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IN THE SUPREME COURT OF INDIA

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

(Civil Appellate Jurisdiction)

SPECIAL LEAVE PETITION (C) **15401** OF 2022

(Under Article 136 of the Constitution of India)

(Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition No. 2347 of 2022)

(WITH PRAYER FOR INTERIM RELEIF)

IN THE MATTER OF:

Fathima Jazeela and Ors. ... Petitioner

Versus

State of Karnataka and Ors. … Respondent

Paper Book

(FOR INDEX, PLEASE SEE INSIDE)

I.A. No. ____ of 2022: Application seeking permission to file lengthy synopsis and list of dates.

I.A. No. ____ of 2022: Application for exemption from filling certified copy of the impugned order.

I.A. No. ____ of 2022: Application for exemption from filing official translation

I.A. No. ____ of 2022: Application for Permission to file SLP

Filed on: 23.03.2022

ADVOCATE FOR PETITIONER: Mr. Satya Mitra

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OFFICE REPORT ON LIMITATION

1. The petition is/are within time.
2. The petition is barred by time and there is delay of ..... days in filing the same against order dated and petition for condonation of ..... days delay has been filed.
3. There is delay of ..... days in refilling the petition and petition for condonation of..... days delay in refilling has been filed.

BRANCH OFFICER

Place: New Delhi

Date: 23.03.2022

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PROFORMA FOR FIRST LISTING

SECTION _____

The case pertains to (Please tick/check the correct box):

☐ Central Act: N.A.

☐ Section:

☐ Central rule: N.A.

☐ Rule no(s): N.A.

☐ State Act: Karnataka Education Act, 1983

☐ Section: Section 7(2)(g)(v), Section 133

☐ State Rule: The Karnataka Educational Institutions (Classification, Regulation And Prescription Of Curricula Etc.,) Rules, 1995

☐ Impugned Interim Order date: N.A.

☐ Impugned Final Order/Decree Date: 15.03.2022

☐ High court name: High Court of Karnataka at Bengaluru.

☐ Name of Judges: Hon'ble Mr. Ritu Raj Awasthi. Chief Justice, Hon'ble Mr. Justice Krishna S. Dixit, Hon'ble Ms. Justice J.M. Khazi

☐ Tribunal/Authority (Name): N.A.

1. Nature of matter: ■ Civil ☐ Criminal
2. (a) Petitioner/Appellant No.1: Fathima Jazeela
   (b) E-mail ID: N.A.
   (c) Mobile Phone Number: N
3. (a) Respondent No.1: State of Karnataka
   (b) E-mail ID: N.A.
   (c) Mobile Phone Number: N.A.
4. (a) Main category classification: 0816
   (b) Sub classification: 0816 and Others
5. Not to be listed before: N.A.
6. Similar/Pending matter: N.A.
   a. Similar disposed of matter with citation, if any, & case details: No similar matter is disposed of.
   b. Similar pending matter with case details: No similar case is pending.

7. Criminal matters:

   a. Whether accused/convict has surrendered: Yes ☐ No ☐

   b. FIR No.: N.A. Date: N.A.

   c. Police Station: N.A.

   d. Sentence Awarded: N.A.

   e. Sentence Undergone: N.A.

8. Land Acquisition Matters:

   a. Date of section 4 notification: N.A.

   b. Date of section 6 notification: N.A.

   c. Date of section 17 notification: N.A.

9. Tax Matters: State the tax effect: N.A.

10. Special Category (first petitioner/appellant only):

☐ Senior citizen > 65 years ☐ SC/ST ☐ Woman/Child

☐ Disabled ☐ Legal Aid case ☐ In custody

11. Vehicle No. (In case of Motor Accident Claim matters): N.A.

Date: 23.03.2022

(Satya Mitra)

AOR for Petitioner

Registration No. 1852

E-mail id: satyamitra2003@yahoo.co.in

Synopsis

1. The points of law of general public importance where the High Court has gone wrong are the following:

HC went on a wrong track: "Essentiality" irrelevant

Voluntary practices based on belief constitutionally protected

International judgments abovementioned argued but ignored

a. The High Court has held that if the practice complained of is not "essential" to the religion then on that ground alone the practice is not capable of constitutional protection under Article 25. This is wrong. Even practices which are not essential to the religion but are based on genuine beliefs by members of the community (though not by all) must be accorded constitutional protection. Hence it was not at all necessary for the High Court to go into the essentiality of the practice. The High Court has spent a large part of the decision in coming to the conclusion that the wearing of hijab was not essential to Islam. Even if this were to be assumed, the main point as to whether voluntary practices based on sincere religious beliefs are constitutionally protected have not been addressed in this decision.

b. There appears to be no Indian decision on this issue. However, there are 3 international judgments that squarely cover this issue on law and facts.

i. In Mohamed Fugicha vs. Methodist Church in Kenya [(2016) SCC OnLine Kenya 3023] the Court of Appeal of Kenya at Nyeri in Civil Appeal 22 of 2015 held as under:

> "In it he asserted the obligatory nature of the hijab confirmed by notable Islamic jurists and ordained in the Quran. He swore that the hijab is not a matter of choice but a religious obligation which should not be hindered. He made the distinction that ***"Indeed the hijab is a concept that seeks to maintain chastity and modesty and not merely a code of dress"*** and proceeded to state that it is the instrument by which women are able to effectively participate in society as supported by Islam. As we have already observed, these averments were unchallenged and we have no hesitation in arriving at the conclusion that barring Fugicha's daughers and other Muslim girls from donning the hijab did place them at a particular disadvantage or detriment because the hijab is genuinely considered to be an item of clothing constituting a practice or

manifestation of religion. It is important to observe at this point that it is not for the courts to judge on the basis of some 'independent or objective' criterion the correctness of the beliefs that give rise to Muslim girls' belief that the particular practice is of utmost or exceptional importance to them. It is enough only to be satisfied that the said beliefs are genuinely held."

ii. In MEC for Education: Kwazulu-Natal vs. Navaneethum Pillay (Case: CCT 51/06) : [2000] ZACC 2 the Constitutional Court of South Africa held as under:

"[62] The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson's choice between observance of their faith and adherence to the law. There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.40 Are voluntary practices any less a part of

a person's identity or do they affect human dignity any less seriously because they are not mandatory?

[63] Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of "human dignity, equality and freedom". These values are not mutually exclusive but enhance and reinforce each other. In *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* Ackermann J wrote that:

> "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity."

[64] A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues." One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of

obligation only enhances the significance of a practice to our autonomy, our identity and our dignity. While the majority in Ferreira v Levin distanced themselves from Ackermann J's broad construction of freedom as a self-standing right, there is nothing to suggest they questioned his link between freedom and dignity.

[65] The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains. As this Court held in Minister of Home Affairs and Another v Fourie and Another; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others:*

> "The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and sociocultural), affirms the right to be different, and celebrates the diversity of the nation." (Footnotes omitted.)

These values are shared with other jurisdictions, such as Canada, to name one, where the Supreme Court has affirmed the necessity of protecting voluntary religious practices.

[66] The protection of voluntary practices applies equally to culture and religion. Indeed, it seems to me that it may even be more vital to protect non-obligatory cultural practices. Cultures, unlike

religions, are not necessarily based on tenets of faith but on a collection of practices, ideas or ways of being. While some cultures may have obligatory rules which act as conditions for membership of the culture, many cultures, unlike many religions, will not have an authoritative body or text that determines the dictates of the culture. Any single member of a culture will seldom observe all those practices that make up the cultural milieu, but will choose those which she or he feels are most important to her or his own relationship to and expression of that culture. To limit cultural protection to cultural obligations would, for many cultures and their members, make the protection largely meaningless.

[67] It follows that whether a religious or cultural practice is voluntary or mandatory is irrelevant at the threshold stage of determining whether it qualifies for protection. However, the centrality of the practice, which may be affected by its voluntary nature, is a relevant question in determining the fairness of the discrimination. That is a point I return to later.

[68] I therefore find that Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act. I proceed now to consider whether or not that discrimination was fair.

iii. In Balvir Singh Multani vs. Commission Scolaire Marguerite-Bourgeoys & Attorney General and World Sikh Organization of Canada (2006) 1 SCR 256, the Supreme Court of Canada held as under:

6. Infringement of Freedom of Religion

32. This Court has on numerous occasions stressed the importance of freedom of religion. For the purposes of this case, it is sufficient to reproduce the following statement from Big M Drug Mart, at pp. 336-37 and 351:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

33. It was explained in Amselem, at para. 46, that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

34. In Amselem, the Court ruled that, in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

35. The fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an

individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice (Amselem, at para. 52). In assessing the sincerity of the belief, a court must take into account, inter alia, the credibility of the testimony of the person asserting the particular belief and the consistency of the belief with his or her other current religious practices (Amselem, at para. 53).

36. In the case at bar, Gurbaj Singh must therefore show that he sincerely believes that his faith requires him at all times to wear a kirpan made of metal. Evidence to this effect was introduced and was not contradicted. No one contests the fact that the orthodox Sikh religion requires its adherents to wear a kirpan at all times. The affidavits of chaplain Manjit Singh and of Gurbaj Singh explain that orthodox Sikhs must comply with a strict dress code requiring them to wear religious symbols commonly known as the Five Ks: (1) the kesh (uncut hair); (2) the kangha (a wooden comb); (3) the kara (a steel bracelet

worn on the wrist); (4) the kaccha (a special undergarment); and (5) the kirpan (a metal dagger or sword). Furthermore, Manjit Singh explains in his affidavit that the Sikh religion teaches pacifism and encourages respect for other religions, that the kirpan must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic kirpan made of a material other than metal is based on a reasonable religiously motivated interpretation.

37. Much of the CSMB's argument is based on its submission that [TRANSLATION] "the kirpan is essentially a dagger, a weapon designed to kill, intimidate or threaten others". With respect, while the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person, this submission disregards the fact that, for orthodox Sikhs, the kirpan is above all a religious symbol. Chaplain Manjit Singh mentions in his affidavit that the word "kirpan" comes from "kirpa", meaning "mercy" and "kindness", and "aan", meaning "honour". There is no denying that this religious object could be used wrongly to wound or even kill

someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan. Since the question of the physical makeup of the kirpan and the risks the kirpan could pose to the school board's students involves the reconciliation of conflicting values, I will return to it when I address justification under s. 1 of the Canadian Charter. In order to demonstrate an infringement of his freedom of religion, Gurbaj Singh does not have to establish that the kirpan is not a weapon. He need only show that his personal and subjective belief in the religious significance of the kirpan is sincere.

38. Gurbaj Singh says that he sincerely believes he must adhere to this practice in order to comply with the requirements of his religion. Grenier J. of the Superior Court declared (at para. 6) — and the Court of Appeal reached the same conclusion (at para. 70) — that Gurbaj Singh's belief was sincere. Gurbaj Singh's affidavit supports this conclusion, and none of the parties have contested the sincerity of his belief.

39. Furthermore, Gurbaj Singh's refusal to wear a replica made of a material other than metal is not capricious. He genuinely believes that he would not be complying with the requirements of his religion were he to wear a plastic or wooden kirpan. The fact that other Sikhs accept such a compromise is not relevant, since as Lemelin J. mentioned at para. 68 of her decision, [TRANSLATION] "[w]e must recognize that people who profess the same religion may adhere to the dogma and practices of that religion to varying degrees of rigour."

40. Finally, the interference with Gurbaj Singh's freedom of religion is neither trivial nor insignificant. Forced to choose between leaving his kirpan at home and leaving the public school system, Gurbaj Singh decided to follow his religious convictions and is now attending a private school. The prohibition against wearing his kirpan to school has therefore deprived him of his right to attend a public school.

41. Thus, there can be no doubt that the council of commissioners' decision prohibiting Gurbaj Singh from wearing his kirpan to Sainte-Catherine-Labouré school infringes his freedom of religion. This limit

must therefore be justified under s. 1 of the Canadian Charter.

2. The discussion on essentiality runs throughout the judgment. The main discussion is to be found in the 34 pages from pages 53 to 87.

3. The observations in the impugned order that make "essentiality" a pre-condition for protection are as under:

> "Thus, a person who seeks refuge under the umbrella of Article 25 of the Constitution has to demonstrate not only essential religious practice… 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." (at Page 57)

High Court negates freedom of conscience

4. The High Court has ignored the arguments on the freedom of conscience. The observations in impugned order entirely negating the freedom of conscience which is guaranteed as a fundamental right are as under:

> "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." (at Page 80)

…

"There is scope for the argument that the freedom of conscience and the right to religion are mutually exclusive... 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." (at Page 81)

5. In Mohamed Fugicha vs. Methodist Church in Kenya [(2016) SCC OnLine Kenya 3023] the Court of Appeal of Kenya at Nyeri in Civil Appeal 22 of 2015 held as under:

"That pitfall might have been avoided had the learned Judge sought to establish in the first place, whether the discrimination said to have been

suffered by the non-Muslim population in the school was direct or indirect, a distinction which the church made no attempt to make beforehand; and also identified the exact basis or ground, falling within any of the protected grounds in **Article 27(4)** of the Constitution, upon which the unfair or disadvantageous treatment comprising the alleged discrimination was founded. The protected grounds, on the basis of which the Constitution expressly prohibits any person to discriminate against another directly or indirectly are listed in **Article 27(4)** as including *sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.* We have anxiously and carefully perused the judgment of the High Court and nowhere have we seen a protected ground in respect of the un-named non-Muslim students were discriminated against. Nor have we been able to glean or identify any from the submissions made by the church both at the High Court and before us. We therefore find and hold that there was no factual or legal basis for the holding by the learned Judge that

allowing Muslim girls to wear hijab favoured Muslim girl students and discriminated against the non-Muslims."

…

We reiterate and adopt the essential and intimate link between freedom of religion and the cherished dream of a truly free society that was captured by Judge Dickson in **BIG DRUG MART LTD** (supra) thus;

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter [Article 27 of the Constitution]. Freedom must surely be founded on respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs

openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter [the Constitution] is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to

manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

To force students to abandon or refrain from a practice or observance dear to them and genuinely held as a manifestation of their religious convictions, as happened herein, violates their conscience, is the antithesis of freedom, is unconstitutional and is therefore null, void and of no force or effect."

High Court misses the point

No objections to uniforms per se

What was asked for was Reasonable Accommodation

6. The High court in the impugned order makes the following erroneous observations with respect to the compulsory nature of uniforms, completely ignoring the plea of the petitioners which did not pertain to doing away with uniform in its entirety and only sought reasonable accommodation:

"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." (at Page 88)

7. In MEC for Education: Kwazulu-Natal vs. Navaneethum Pillay (Case: CCT 51/06); [2000] ZACC 2 the Constitutional Court of South Africa held as under:

"[37] There are two problems with the Code, which operate together. The first is that it does not set out a process or standard according to which exemptions should be granted, for the guidance of learners, parents and the Governing Body. The School has itself developed a tradition of granting exemptions in certain circumstances. The second problem is the fact that the jewellery provision in the Code does not permit learners to wear a nose stud and accordingly required Sunali to seek an exemption in the first place.

[38] It is true, however, that even taking these flaws into account, this dispute would never have arisen if the School had granted an exemption to Sunali. Whether the policy according to which that decision was taken was part of the Code, or existed only as

the Governing Body's tradition, would ultimately have made no difference. Nonetheless, it is still necessary for the Court to address the underlying problems of the Code. A properly drafted code which sets realistic boundaries and provides a procedure to be followed in applying for and the granting of exemptions, is the proper way to foster a spirit of reasonable accommodation in our schools and to avoid acrimonious disputes such as the present one. In sum, the problem is both the decision to refuse Sunali an exemption and the inadequacies of the Code itself.

…

[72] The concept of reasonable accommodation is not new to our law – this Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion. The Employment Equity Act defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment" and recognises making reasonable accommodation

for designated groups as an affirmative action measure. There is also specific mention of the concept in the Equality Act. It recognises that "failing to take steps to reasonably accommodate the needs" of people on the basis of race, gender or disability will amount to unfair discrimination. The Equality Act places a duty on the state to "develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation" and permits courts to order that a group or class of persons be reasonably accommodated. Finally, section 14(3)(i)(ii) lists as a factor for the determination of fairness the question whether the applicant has taken reasonable steps to accommodate diversity.

[73] But what is the content of the principle? At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or

cannot conform to certain social norms. In *Christian Education*, in the context of accommodating religious belief in society, a unanimous Court identified the underlying motivation of the concept as follows:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome

> choices of either being true to their faith or else respectful of the law."

[74] The idea extends beyond religious belief. Its importance is particularly well illustrated by the application of reasonable accommodation to disability law. As I have already mentioned, the Equality Act specifically requires that reasonable accommodation be made for people with disabilities. Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society:

> "Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled

> individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."

[75] While the extent of this exclusion is most powerfully felt by the disabled, the same exclusion is inflicted on all those who are excluded by rules that fail to accommodate those who depart from the norm. Our society which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity. Those steps might be as simple as granting and regulating an exemption from a general rule or they may require that the rules or practices be changed or even that buildings be altered or monetary loss incurred.

[76] The difficult question then is not whether positive steps must be taken, but how far the community must be required to go to enable those outside the "mainstream" to swim freely in its

waters. This is an issue which has been debated both in this Court and abroad and different positions have been taken. For instance, although the term "undue hardship" is employed as the test for reasonable accommodation in both the United States and Canada, the United States Supreme Court has held that employers need only incur "*a de minimis cost*" in order to accommodate an individual's religion, whilst the Canadian Supreme Court has specifically declined to adopt that standard68 and has stressed that "more than mere negligible effort is required to satisfy the duty to accommodate." The latter approach is more in line with the spirit of our constitutional project which affirms diversity. However, the utility of either of these phrases is limited as ultimately the question will always be a contextual one dependant not on its compatibility with a judicially created slogan but with the values and principles underlying the Constitution. Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.

[77] It is now necessary to crystallise the role that reasonable accommodation can play in the Equality Act. As noted earlier, the principle is mentioned on a number of occasions in the Equality Act. What concerns us in this case, however, is section 14(3)(i)(ii) which states that taking reasonable steps to accommodate diversity is a factor for determining the fairness of discrimination. From this it is clear that reasonable accommodation will always be an important factor in the determination of the fairness of discrimination. It would however be wrong to reduce the test for fairness to a test for reasonable accommodation, particularly because the factors relevant to the determination of fairness have been carefully articulated by the legislature and that option has been specifically avoided.

[78] There may be circumstances where fairness requires a reasonable accommodation, while in other circumstances it may require more or less, or something completely different. It will depend on the nature of the case and the nature of the interests involved. Two factors seem particularly relevant. First, reasonable accommodation is most

appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck. Even where fairness requires a reasonable accommodation, the other factors listed in section 14 will always remain relevant.

[79] The present case bears both these characteristics and therefore, in my view, fairness required a reasonable accommodation. Whether that required the School to permit Sunali to wear the nose stud depends on the importance of the practice to Sunali on the one hand, and the hardship that permitting her to wear the stud would cause the School. Before I address that question, there were two points raised about the context within which fairness should be determined. These relate to the

need for deference and the consultation that went into the making of the Code.

…

[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.

[86] The School further argued that the nose stud is not central to Sunali's religion or culture, but is only an optional practice. I agree that the centrality of a practice or a belief must play a role in determining how far another party must go to accommodate that belief. The essence of reasonable accommodation is an exercise of proportionality. Persons who

merely appear to adhere to a religious and/or cultural practice, but who are willing to forego it if necessary, can hardly demand the same adjustment from others as those whose identity will be seriously undermined if they do not follow their belief. The difficult question is how to determine centrality. Should we enquire into the centrality of the practice or belief to the community, or to the individual?

…

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

circumstances in this case and the availability of another school is therefore not a relevant consideration.

…

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

…

[117] In addition, I deem it appropriate to make an order rectifying the procedural defect in the Code. I have held that the lack of a procedure for exemption is one of the primary reasons this dispute has arisen. As noted earlier, section 21(2)(i) of the Equality Act specifically allows for an order that reasonable accommodation be made for a group or class of persons. Section 8(1) of the South African Schools

Act97 gives the power to the School's Governing Body to adopt a code of conduct in consultation with learners, parents and educators. The power to adopt must necessarily include the power to amend. Although the Governing Body itself is not before us, it is properly represented by its chairperson. In this case it is therefore appropriate to order the School's Governing Body to amend the Code to provide for reasonable accommodation for deviations from the Code on religious and cultural grounds and a procedure for the application and granting of those exemptions.

…

[119] The following order is made:

…

3. The order of the High Court is set aside and replaced with the following:

…

> b. The Governing Body of Durban Girls' High School is ordered, in consultation with the learners, parents and educators of the School and within a reasonable time, to effect amendments to the School's Code of Conduct

> to provide for the reasonable accommodation of deviations from the Code on religious or cultural grounds and a procedure according to which such exemptions from the Code can be sought and granted.

…

[165] This is the correct comparator in my view because the challenge really relates to a failure by the school to afford the learner an exemption. The challenge is thus based on a failure to provide reasonable accommodation to the learner in respect of a neutral rule. In this I differ from the position taken by the Chief Justice who sees the complaint both in the text of the Code and in the failure to grant an exemption. In my view, the Code is entitled to establish neutral rules to govern the school uniform. Indeed, uniforms by definition require such rules. The only cogent complaint to be directed at the Code is its failure to provide expressly for a fair exemption procedure, a matter to which I return later.

[166] I conclude that the applicant has established that in failing to grant her an exemption to wear the

nose-stud in circumstances where other learners are afforded exemptions to pursue their cultural practices, the school did discriminate against her."

8. In Mohamed Fugicha vs. Methodist Church in Kenya [(2016) SCC OnLine Kenya 3023] the Court of Appeal of Kenya at Nyeri in Civil Appeal 22 of 2015 held as under:

> "Counsel next addressed the distinction between *accommodation* and special treatment which she blamed the learned Judge for conflating and confusing. She submitted that accommodation, which involves the granting of exception to the common rule, so as to give effect to a request considered to be of exceptional importance to the seeker's religion, is key to non-discrimination. She cited Langa CJ's observation, that the principle of accommodation demands that ***"…the State, an employer or a school must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally".*** In the instant case, the school did not even stand to suffer any additional hardship or expense since Fugicha's daughters and other Muslim

girls were seeking to wear hijab and trouser, not in lieu of, but in addition to the school uniform, and had in fact offered that the school itself do choose the colour of the hijab. The failure to accommodate Fugicha's daughters' request indirectly discriminated against them in their enjoyment of the right to education on the basis of both religion and dress.

This discrimination was the more serious considering that the school, though sponsored by the church, is a Public school and is so registered. The Church was under an obligation as a sponsor to ensure respect for the religious beliefs of those of other faiths by dint of Section 27 of the Basic Education Act. That obligation required that the church and the school ensure that Muslim girls, who made up 68% of the female population, be allowed to wear the hijab.

…

We now turn to the doctrine of **accommodation** which we believe will not only lead to development of the law on non-discrimination and freedom of religion in the country but should also, if properly understood, appreciated and applied, contribute to

good governance of our schools thus entrenching constitutional and democratic principles.

…

Accommodation

In contrast to the hardline and fixed position advanced for and on behalf of the Church that Muslim female students should under no circumstances be allowed to wear the hijab in obedience to what they honestly and genuinely believe to be their religious duty, a more pragmatic approach is that of accommodation which ought to uphold school uniform while at the same time permitting exceptions and exemptions where merited. Even though the principle of accommodation has not been pronounced on or affirmed by courts in this country as far as we are able to discern, it is not new in comparative jurisprudence. The South African Constitutional Court and High Court have expressed themselves on it on many occasions in matters religion, especially in the context of education and employment.

…

The Canadian Court of Appeal in R –vs- VIDEOFLICKS [1984] 48 O.R. (2d) 395 held, which would hold true of Kenya, that;

"[The Constitution] determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where religious practices are recognized as permissible exceptions to otherwise justifiable homogenous requirements."

The perils of peripherization, which essentially shuts out persons whose religious convictions cannot allow them to do certain things or require them to do things and behave in certain ways that are different from the dominant views conduct or practice of the majority, was poignantly captured by the South African Constitutional Court which proposed a balancing act in **CHRISTIAN EDUCATION SOUTH AFRICA V MINISTER OF EDUCATION [2000] ZACC II; 2004(4) SA 757 (CC)** as follows;

"The underlying problem in any open and democratic society based on human dignity,

equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such society can cohere only if all its participants accept that certain basic norms and standards are binding. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."

Even though the degree to which the mainstream is required to be inconvenienced or put to expense so as to accommodate the minority religious believers has differed from jurisdiction to jurisdiction with the United Supreme Court stating **in TRANS WORLD AIRLINES –vs- HARDISON 432 US 63 (1977) at 84** that an employer should incur only a "de minimis" cost while its Canadian counterpart has been emphatic that the duty to accommodate

demands the putting of more than negligible effort in **CENTRAL OKANAGAN SCHOOL DISTRICT NO. 23 –vs- RENAUD 1992 CAN LII 81 (SCC.) [1992] 2 SCR 970**, there is consensus that there is a definite duty to accommodate. We think, as did the South African Constitutional court in **PILLAY** (supra), that the effort required to accommodate has to be more rather than less if the end of diversity is to be meaningful. We are justified in this view by the phraseology employed in **Article 32** of the Constitution. The text goes beyond stating a persons right to *"manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship"* to also state at **sub-article (4)** that *"a person shall not be compelled to act, or engage in any act; that is contrary to the persons' belief or religion."* Taken together, the two subarticles create a double duty to accommodate in the form of allowance or accommodation of practice, manifestation or observance that may be different from the majoritarian norm and an exemption from any act

which may impinge on and violate the person's belief or religion.

Asserting the indispensability of accommodation in **PILLAY**, (supra) the Chief Justice stated, and we are inclined to agree with his reasoning, thus; (at para 78);

"Two factors seem particularly relevant. First, a reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalizing effect on certain portions of society.

Second, the principle is particularly appropriate in specific localized contexts such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck."

We are of the same view with regard to the donning of the hijab in the case at hand. We find and hold that the school ought to have worked out a reasonable accommodation to enable the Muslim

girls to wear the hijab considering, especially, that there was a willingness to agree on the colour of such hijab so as to rhyme and not overly clash with the school uniform. This thinking also accords with that of the Canadian Supreme Court in **MULTANI – vs- COMMISSION SOLAIRE MARGUERITE BOURGEOYS [2006] 1SCR 256.**

It matters not that Fugicha, in common with the parents of all students did sign the letter of admission together with their daughters when they joined the school binding them to abide by school rules and the stipulated school uniform. We think it to be plainly notorious that with secondary education being so competitive, and from the nature of things, it is impractical and fanciful to expect that a parent and/or a new student joining a school in Form One will have a meaningful opportunity to engage in a negotiation, pre-admission, of whatever exemptions be it in uniform or other activities, that they may need for religious reasons.

We are not prepared to hold that, by merely signing the admission letter or the school rules, a student and/or her parent or guardian is thereby estopped

from raising a complaint or seeking exemptions ex post facto. Where, as here, the exemptions or accommodation sought are on clear constitutional grounds, it would be escapist even surreal, for a court to point at the signed letter of admission as a bar to assertion of fundamental rights and freedoms. We do not accept that schools are enclaves that are outside the reach of the sunshine of liberty and freedom that the Constitution sheds. Students do not abandon their constitutional rights when they enter the school gate to regain them when they leave. Nor can fundamental rights and freedoms be contracted away in the name and at the altar of education.

Schools cannot raise an estoppel against the Constitution. No one can. We are firm in our assessment that students in Kenya are bearers and exercisers of the full panoply guarantees in our Bill of Rights and they are no less entitled to those rights by reason only of being within school gates.

…

…In the hierarchy of norms and the relative weight to be attached thereto, school rules rank way below

the Constitution and it is incumbent upon those who formulate and enforce them to ensure that they align and accord with the letter and spirit of it, failing which they would be null, void and of no effect whatsoever. It must be remembered that such rules are not in consonance with the very clear principles for permissible limitations to the fundamental rights and freedoms as stipulated in Article 24 of the Constitution. Where they conflict with the Constitution it is an altruism that it rules, and they are voided to the extent of the conflict or inconsistency.

This is the proper doctrinal and normative approach with which the High Court ought to have approached the issue of religion in schools in the matter before us. In so far as the KENYA HIGH, and the ALLIANCE HIGH (supra) cases cited before us by the church did not give full effect to the principles we have engaged with and in particular paid no or insufficient attention to the proscribed indirect discrimination and the principle of accommodation as the answer to the problem of discrimination, we are unable to accept them as a persuasive guide on how the

matter before us should be decided. It is quite clear that the said decisions suffer from a deficit of wider, deeper analysis and turn a full blind eye or are silent on indirect discrimination. They give scant attention to the principle of accommodation with the effect that their conclusions are materially flawed. They therefore cannot aid the Church herein. They also contain some dicta that seem to take too far the notion of secularism in a manner suggestive of hostility to religion that is discordant with the letter and spirit of the Constitution and the most progressive jurisprudence on the subject. They thereby lose their persuasive quotient and must with justification be characterized as being *per in curriam* and therefore no longer good law."

9. In Balvir Singh Multani vs. Commission Scolaire Marguerite-Bourgeoys & Attorney General and World Sikh Organization of Canada 2006) 1 SCR 256, the Supreme Court of Canada held as under:

> "53. In my view, this correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for

individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar. In my view, Professor José Woehrling correctly explained the relationship between the duty to accommodate or adapt and the Oakes analysis in the following passage:

> [TRANSLATION] Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant. More specifically, in the context of s. 1 of the Canadian Charter, it is necessary, in applying the test from R. v. Oakes, to show, in succession, that applying the standard in its

entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure's salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation. This is clear from the Supreme Court's judgment in Edwards Books, in which the application of the minimal impairment test led the Court to ask whether the Ontario legislature, in prohibiting stores from opening on Sundays and allowing certain exceptions for stores that were closed on Saturdays, had done enough to accommodate merchants who, for religious reasons, had to observe a day of rest on a day other than Sunday. (J. Woehrling, "L'obligation

> d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998), 43 McGill L.J. 325, at p. 360

…

2.3.1 Reasonable Accommodation

129. The apparent overlap between the concepts of minimal impairment and reasonable accommodation is another striking example of the need to preserve the distinctiveness of the administrative law approach. Charron J. is of the opinion that there is a correspondence between the concepts of accommodation and minimal impairment (para. 53). We agree that these concepts have a number of similarities, but in our view they belong to two different analytical categories.

…

131. The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs.

…

132. The approach is different, however, in the case of minimal impairment when it is considered in the context of the broad impact of the result of the constitutional justification analysis. The justification of the infringement is based on societal interests, not on the needs of the individual parties. An administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macrocosmic. The values involved may be different. We believe that there is an advantage to keeping these approaches separate.

133. Furthermore, although the minimal impairment test under s. 1 of the Canadian Charter is similar to the undue hardship test in human rights law, the perspectives in the two cases are different, as is the evidence that can support the analysis. Assessing the scope of a law sometimes requires that social facts or the potential consequences of applying the law be taken into account, whereas determining whether there is undue hardship requires evidence of hardship in a particular case.

134. These separate streams — public versus individual — should be kept distinct. A lack of coherence in the analysis can only be detrimental to the exercise of human rights. Reasonable accommodation and undue hardship belong to the sphere of administrative law and human rights legislation, whereas the assessment of minimal impairment is part of a constitutional analysis with wider societal implications.

135. The scope of the Canadian Charter is broad. Section 52 of the Constitution Act, 1982 guarantees the supremacy of the Constitution of Canada. This incomparable tool can be used to invalidate laws that infringe fundamental rights and are not justified by societal goals of fundamental importance. However, where the concepts specific to administrative law are sufficient to resolve a dispute, it is unnecessary to resort to the Canadian Charter.

136. Constitutional values have breathed new life into the Civil Code of Québec, S.Q. 1991, c. 64, the common law and legislation in general. Courts and administrative tribunals must uphold them, as must Parliament and the legislatures. However, the same

rules should not apply to the review of legislative action as to the review of the exercise of adjudicative authority.

3. Conclusion

137. Administrative law review has been designed to scrutinize administrative boards' decisions. Administrative law review has become a full-fledged branch of the law. Its integrity should be preserved.

138. If the Code de vie itself or one of its provisions had been challenged on the ground that it did not meet the minimal impairment standard, a s. 1 analysis would have been appropriate. But the appellant did not challenge it. When the validity of a rule of general application is not in question, the mechanisms of administrative law are called for. This approach makes it possible to avoid the blurring of concepts or roles and enhances the proper application of both administrative and human rights law.

139. For these reasons, we would allow the appeal and set aside the decision of the Court of Appeal."

High Court wrongly equates Secularism with Homogeneity

Negates Diversity and Pluralism

10. The High Court in its impugned order observes as under on citing secularism to be enhanced by encouraging homogeneity:

> "The school regulations prescribing dress code for all the students as one homogenous class, serve constitutional secularism. (at Page 96)
>
> …
>
> 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." (at Page 97)

11. In Mohamed Fugicha vs. Methodist Church in Kenya [(2016) SCC OnLine Kenya 3023] the Court of Appeal of Kenya in Civil Appeal 22 of 2015 held as under:

> Silber J then made reference to the case of **SERIF –VS- GREECE [2001]31 EHRR 20** where the European Court of Human Rights domiciled at Strasbourg had stated emphatically the duty of educational institutions to educate their

communities of the values of pluralism and the indispensability of toleration as the cure for the feared tensions;

"53. Although the Court recognizes that it is possible that tension is created in situations where a religious or the communities becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities on such circumstances is not to remove the cause of the tension by eliminating pluralism but to ensure that competing groups tolerate each other."

We do not better them to echo Judge Silber's own words on the subject;

"84.Therefore, there is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and religious and second to respect other people's religious wishes. Without those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multicultural

society can be built in this country. In any event, in so far as the intention of the uniform policy is to eliminate bullying, there is no rational connection between the objective and eliminating signs of difference."

Judging from the Petition, the motion, the supporting affidavits and the submissions made before the High Court and before us, the Church does not seem to have internalized the intrinsic value of heterogeneity and heterodoxy. It has not seen difference or diversity as a good to be embraced, celebrated and encouraged. Rather, it has a approached the matter from the rather narrow stricture, prism or blinkers of the need for discipline and uniformity and seems to consider its position as Sponsor of the school as a sufficient reason to sift out and eliminate difference or plurality in religious expression or manifestation. And this is notwithstanding that it consciously admitted into the school, which is a public school, students of faiths and religions other than its own. It is no answer to say that religion has no room in schools or that those who find difficulty abiding by the restrictions of the

school uniform code may well leave and join schools of their own religious persuasion. Such an attitude evinces an intolerable deficit of constitutionalism and, moreover, flies in the face of the guiding principles that govern the provision of basic education in this country.

…

For the school to not only entertain and condone, but actually propound those arguments also speaks to a signal failure to appreciate and to effectuate part of its statutory duties.

…

To our mind this is a duty requiring a sponsor to rise above and go beyond the narrow parochialism and insularity of its own religion or denomination and respect the equal right of others to be different in religious or denominational persuasion. It is a call to broadmindedness and respect for others including those whose creeds and the manner of their manifestation may be unappealing or baffling. It is a duty to uphold the autonomy and dignity of those whose choices are discordant with ours and acknowledgment of heterodoxy in the school setting

as opposed to a forced and unlawful artificial and superficial homogeneity that attempts to suppress difference and diversity. The people of Kenya in the Preamble to the Constitution proclaim that we are *"Proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation."* That is an ethos that it is incumbent upon all schools to teach to students from an early age. The determination to live in peace and undivided in spite of diversity at the macro national level must be translated and lived at the micro level of school communities.

Diversity is further amplified in **Article 10(4)** the Constitution which declares that among the national values and principles of governance, which are binding on *"all persons whenever any of them makes or implements public policy decisions"* is *"(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."*

All of these provisions and pronouncements in the Constitution are not mere platitudes. They are not words devoid of significance. Rather, they are firm commitments made by the people of Kenya as part of their vision of the society they wish to live in. They are mutual and reciprocal promises made by and to all Kenyans and they have binding force of law. It is the duty of courts in interpreting the Constitution to ensure that the values which find even further explicit expression on the Bill of Rights are given the broadest meaning and vivified as living, active essentials and not lifeless forms on parchment. Courts must breathe life into the constitutional text and must avoid stifling and constrictive constructions that lead to atrophy and the sapping of its life and vibrancy.

In obedience to that explicit direction, we are clear in our minds that the view we have taken that the Muslim girls ought to have been allowed to wear the hijab promotes the values and principles of dignity, diversity and non-discrimination. We also advance the law by making a definite finding that what the school did to Fugicha's daughters amounts to

indirect discrimination, a concept on which there appears not to have been any judicial engagement from the jurisprudence that has so far flowed from the High Court. We affirm, endorse and uphold the rights of equality and freedom of religion as set out in **Articles 27 and 32** of the Constitution."

12. In MEC for Education: Kwazulu-Natal vs. Navaneethum Pillay (Case: CCT 51/06) : [2000] ZACC 2 the Constitutional Court of South Africa held as under:

> "[65] The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains. As this Court held in Minister of Home Affairs and Another v Fourie and Another;

Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others:

> "The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and sociocultural), affirms the right to be different, and celebrates the diversity of the nation."(Footnotes omitted.)

These values are shared with other jurisdictions, such as Canada, to name one, where the Supreme Court has affirmed the necessity of protecting voluntary religious practices.

…

[104] This reasoning can and should be explained to all the girls in the School. Teaching the constitutional values of equality and diversity forms an important part of education. This approach not only teaches and promotes the rights and values enshrined in the Constitution, it also treats the learners as sensitive and autonomous people who can understand the impact the ban has on Sunali.

…

[107] …Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution.

…

[126] At one level, this is a case about a school learner ("the learner") who, after having had her nose pierced, sought an exemption from the school rule which prohibited adornment of this sort. At

another level, it is about how schools and other educational institutions establish rules and processes to accommodate diversity in a manner which makes all learners in the school feel that they are equally worthy and respected.

…

[155] Secondly, I am anxious that an approach to cultural rights which is based predominantly on subjective perceptions of cultural practices may undervalue the need for solidarity between different communities in our society. After all, the Preamble of our Constitution proclaims that, "South Africa belongs to all who live in it, united in our diversity." It does not envisage a society of atomised communities circling in the shared space that is our country, but a society that is unified in its diversity. That unity requires a "pluralistic solidarity" between our different racial, cultural, religious and linguistic communities. That solidarity, of course, must not be based on domination by a majority culture or group, but on a shared understanding of the human dignity of all citizens and the recognition of our need for solidarity with one another in our common land.

…

[173] The unfairness I have identified in this case lies in the school's failure to be consistent with regard to the grant of exemptions. It is clear that the school has established no clear rules for determining when exemptions should be granted from the Code of Conduct and when not. Nor is any clear procedure established for processing applications for exemption. Schools are excellent institutions for creating the dialogue about culture that will best foster cultural rights in the overall framework of our Constitution. Schools that have diverse learner populations need to create spaces within the curriculum for diversity to be discussed and understood, but also they need to build processes to deal with disputes regarding cultural and religious rights that arise.

…

[185] …In this way, schools will model for learners the way in which disputes in our broader society should be resolved, and they will play an important role in realising the vision of the Preamble of our Constitution: a country that is united in its diversity

in which all citizens are recognised as being worthy of equal respect."

13. In Balvir Singh Multani vs. Commission Scolaire Marguerite-Bourgeoys & Attorney General and World Sikh Organization of Canada (2006) 1 SCR 256, the Supreme Court of Canada held as under:

> "78. Since we have found that the council of commissioners' decision is not a reasonable limit on religious freedom, it is not strictly necessary to weigh the deleterious effects of this measure against its salutary effects. I do believe, however, like the intervener Canadian Civil Liberties Association, that it is important to consider some effects that could result from an absolute prohibition. An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. This Court has on numerous occasions reiterated the importance of these values. For example, in Ross, the Court stated the following, at para. 42: A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend

society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. In R. v. M. (M.R.), [1998] 3 S.C.R. 393, at para. 3, the Court made the following observation: [S]chools … have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined if the students' rights are ignored by those in authority. Then, in Trinity Western University, the Court stated the following, at para. 13: Our Court [has] accepted … that teachers are a medium for the transmission of values…. Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance."

High Court wrongly concludes

Even the uniform modified to Accommodate the Hijab;

Destructive of discipline

14. The High Court in its impugned order incorrectly concluded as under, deducing that it is in the interest of discipline that curtailment on wearing of hijab is justified:

> "Such 'qualified spaces' by their very nature repel the assertion of individual rights to the detriment of their general discipline & decorum. (at page 100)
>
> …
>
> 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." (at Page 101).
>
> …
>
> 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. (at Page 104)

…

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… (at Page 105)

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. (at Page 105-106)

…

…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. (at Page 106)

…

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. (at Page 107)

…

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. (at Page 120)"

15. In Mohamed Fugicha vs. Methodist Church in Kenya [(2016) SCC OnLine Kenya 3023] the Court of Appeal of Kenya in Civil Appeal 22 of 2015 held as under:

We think, with respect, that the justification cited by the school and accepted by the learned Judge, who followed in the footsteps of Githua, J in the **KENYA**

HIGH case (supra) for the rejection of the plea for hijab was hollow and unconvincing. We cannot accept that perfect uniformity of dress, pleasing to the eye and picture-perfect though it be, can be a fair, proportionate or rational basis for discrimination. There does exist a perfect and comprehensive rejoinder to the fear repeated by our Judges that permitting Muslim girls to wear hijab would lead to a flood gate of similar demands by other religious groups leading to students *"arriving in a mosaic of colours"* and bringing "equality and harmonization" to *"an abrupt end"* and be a harbinger of *"disorder, indiscipline, social distegration and disharmony in our learning institutions"*.

We do not conceive of a system of exemptions consistent with the principle of accommodation as a nullification of rules or an invitation to a-free-for-all when it comes to school uniform or the observance of discipline and the other dictates of the school routines. It is not every fanciful, capricious or whimsical request for exemption that will be countenanced or granted. Rules clearly do have

their place but they cannot be allowed to infringe or intrude upon the space occupied by religion and belief or make of no effect the express protection granted by the Constitution to the manifestation of the same through ***"worship, practice, teaching or observance, including observance of a day of worship"*** as expressly stated in Article 32(2).

16. In MEC for Education: Kwazulu-Natal vs. Navaneethum Pillay (Case: CCT 51/06) : [2000] ZACC 2 the Constitutional Court of South Africa held as under:

> "[101] But this case is not about the constitutionality of school uniforms. It is about granting religious and cultural exemptions to an existing uniform. The admirable purposes that uniforms serve do not seem to be undermined by granting religious and cultural exemptions. There is no reason to believe, nor has the School presented any evidence to show, that a learner who is granted an exemption from the provisions of the Code will be any less disciplined or that she will negatively affect the discipline of others.
>
> [102] I am therefore not persuaded that refusing Sunali an exemption achieves the intended purpose.

> Indeed, the evidence shows that Sunali wore the stud for more than two years without any demonstrable effect on school discipline or the standard of education. Granting exemptions will also have the added benefit of inducting the learners into a multi-cultural South Africa where vastly different cultures exist sideby-side.
>
> …
>
> [114] … The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not."

17. *Petitioner submits that hijab has been allowed since independence all across the country and there is no evidence at all that this practice has led to indiscipline. The following states allow the hijab today:*

    1. *Uttar Pradesh*
    2. *Bihar*
    3. *Jharkhand*

4. *Odisha*
5. *Assam*
6. *Himachal*
7. *Gujarat*
8. *Maharashtra*
9. *Madhya Pradesh*
10. *Tamil Nadu*
11. *Kerala*
12. *Chhattisgarh*

Hijab nothing to do with religion

Hurtful statement

13. The High Court in the impugned order makes a hurtful statement to the effect that hijab has nothing to do with religion and observes as under:

> "At the most the practice of wearing this apparel may have something to do with culture but certainly not with religion." (at Page 70)

Undertaking given does not obviate judicial review

14. The High Court referring to the undertaking signed by parents at the time of admission observes as under, in its impugned order:

> "No explanation is offered for giving an undertaking at the time of admission to the course that they would abide by school discipline." (at Page 86)

15. In Mohamed Fugicha vs. Methodist Church in Kenya [(2016) SCC OnLine Kenya 3023] the Court of Appeal of Kenya in Civil Appeal 22 of 2015 held as under:

> "It matters not that Fugicha, in common with the parents of all students did sign the letter of admission together with their daughters when they joined the school binding them to abide by school rules and the stipulated school uniform. We think it to be plainly notorious that with secondary education being so competitive, and from the nature of things, it is impractical and fanciful to expect that a parent and/or a new student joining a school in Form One will have a meaningful opportunity to engage in a negotiation, pre-admission, of whatever exemptions be it in uniform or other activities, that they may need for religious reasons.
>
> We are not prepared to hold that, by merely signing the admission letter or the school rules, a student and/or her parent or guardian is thereby estopped from raising a complaint or seeking exemptions ex

> post facto. Where, as here, the exemptions or accommodation sought are on clear constitutional grounds, it would be escapist even surreal, for a court to point at the signed letter of admission as a bar to assertion of fundamental rights and freedoms. We do not accept that schools are enclaves that are outside the reach of the sunshine of liberty and freedom that the Constitution sheds. Students do not abandon their constitutional rights when they enter the school gate to regain them when they leave. Nor can fundamental rights and freedoms be contracted away in the name and at the altar of education. Schools cannot raise an estoppel against the Constitution. No one can. We are firm in our assessment that students in Kenya are bearers and exercisers of the full panoply guarantees in our Bill of Rights and they are no less entitled to those rights by reason only of being within school gates."

Scientific temperament not possible with hijab

Several judicial comments of hurtful nature

16. The High Court in the impugned order makes the insinuation that it would become difficult to foster scientific temperament

in students if wearing of religious symbols like bhagwa and hijab were to be permitted and deduces as under:

> "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." (at Page 96)

17. In MEC for Education: Kwazulu-Natal vs. Navaneethum Pillay (Case: CCT 51/06) : : [2000] ZACC 2 the Constitutional Court of South Africa held as under:

> [107] The other argument raised by the School took the form of a "parade of horribles"94 or slippery slope scenario that the necessary consequence of a judgment in 93 Id at paras 71 and 74. 94 This term was employed by O'Connor J in Oregon v Smith to describe the majority's list of extreme examples of possible religious exemptions which they employed to justify their decision that neutral rules would not violate the First Amendment. See Oregon v Smith above n 87 at 902. 54 LANGA CJ favour of Ms Pillay is that many more learners will come to school with

dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a "parade of horribles" but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the School to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the School, it may refuse to permit it

18. In Balvir Singh Multani vs. Commission Scolaire Marguerite-Bourgeoys & Attorney General and World Sikh Organization

of Canada (2006) 1 SCR 256, the Supreme Court of Canada held as under:

> "76. Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is, as I will explain in the next section, at the very foundation of our democracy.
>
> 77. In my opinion, the respondents have failed to demonstrate that it would be reasonable to conclude that an absolute prohibition against wearing a kirpan minimally impairs Gurbaj Singh's rights.
>
> 7.2.3 Effects of the Measure
>
> 78. Since we have found that the council of commissioners' decision is not a reasonable limit on religious freedom, it is not strictly necessary to weigh the deleterious effects of this measure against its salutary effects. I do believe, however, like the intervener Canadian Civil Liberties Association, that it is important to consider some effects that could result from an absolute prohibition. An absolute

prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. This Court has on numerous occasions reiterated the importance of these values. For example, in Ross, the Court stated the following, at para. 42:

A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.

In R. v. M. (M.R.), [1998] 3 S.C.R. 393, at para. 3, the Court made the following observation:

[S]chools … have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined

> if the students' rights are ignored by those in authority.
>
> Then, in Trinity Western University, the Court stated the following, at para. 13:
>
> Our Court [has] accepted … that teachers are a medium for the transmission of values…. Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance."

High Court ignored

Freedom of expression

Right to privacy

Right to dignity

19. 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." (Page 99-100)

20. The Constitutional Court of South Africa in its decision in Mec for Education: Kwazulu-Natal vs. Navaneethum Pillay dated 05.10.2007 has held as under:

> [156] My third difficulty with Langa CJ's conclusion – that a subjective sincerely held belief regarding a cultural practice is the central point of the constitutional enquiry into a complaint of unfair discrimination on the ground of culture – is that it obscures the need to approach diversity with the fundamental value of human dignity firmly in mind. With human dignity as the lodestar, it becomes clear that treating people as worthy of equal respect in relation to their cultural practices requires more than mere tolerance of sincerely held beliefs with regard to cultural practices. As Addis has observed –
>
> > "To treat individuals with 'equal respect' entails, at least partly, respecting their traditions and cultures, the forms of life which give depth and coherence to their identities. And to treat those

> forms of life with respect means to engage them, not simply to tolerate them as strange and alien. . . . [I]nsofar as paternalistic toleration does not provide for . . . the notion of the tolerator taking the tolerated group seriously and engaging it in a dialogue, the polity cannot cultivate an important virtue . . . 'civility (reciprocal empathy and respect).' One can hardly develop empathy for those that one only knows as the alien and strange. To have reciprocal empathy is to first attempt to understand the Other, but there cannot be understanding the Other if one is not prepared to engage the Other in a dialogue." (Footnote omitted.)

[157] My understanding of how our Constitution requires us to approach the rights to culture, therefore, emphasises four things: cultural rights are associative practices, which are protected because of the meaning that shared practices gives to individuals and to succeed in a claim relating to a cultural practice a litigant will need to establish its associative quality; an approach to cultural rights in

our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life; cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society; and solidarity is not best achieved by simple toleration arising from a subjectively asserted practice. It needs to be built through institutionally enabled dialogue. Once again as Addis reasons –

> "A genuine sense of shared identity, social integration, in multicultural and multiethnic societies will develop only through a process where minorities and majorities are linked in institutional dialogue. Shared identity, like justice itself, is defined discursively."

21. In Mohamed Fugicha vs. Methodist Church in Kenya [(2016) SCC OnLine Kenya 3023] the Court of Appeal of Kenya in Civil Appeal 22 of 2015 held as under:

> "It is a duty to uphold the autonomy and dignity of those whose choices are discordant with ours and

acknowledgment of heterodoxy in the school setting as opposed to a forced and unlawful artificial and superficial homogeneity that attempts to suppress difference and diversity.

…

We also think that an education system or any school administration that by word or deed violates the rights of students or condones their violation by others and otherwise diminishes their importance is a danger to the present and future fate of the Bill of Rights, the rule of law and the culture of democracy for true it is that ***"what monkey see, monkey does."*** In violating rights or showing them to be minor irrelevancies, mere inconveniences or optional extras, such schools inculcate a culture of disregard of or contempt for rights and the students graduating from those schools will in their future adult lives be a whole army of rights-abusers steeped in audacious and odious impunity, instead of their defenders. We must set our face firmly against such an eventuality that involves a grave dimunition and dilution of the constitutionally-protected right to have one's inherent dignity

protected (Article 28) and reaffirm the command in Article 21(1) to observe, respect, protect, promote and fulfill the fundamental rights and freedoms in the Bill of Rights."

Ban on hijab to emancipate women

Hurtful insinuation

22. Another hurtful insinuation made by the High Court in its impugned order is that the allowing hijab would hamper the emancipation of women. Developing on the same erroneous premise, the High Court has observed as under:

> "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." (at Page 124)

DDDD

List of Dates

Date	Particular/Event
01.06.1995	The Karnataka Education Act, 1983 was enacted, which allowed the state government to prescribe curricula in respect of inculcation of the sense of duty of citizens enshrined in the Constitution 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. (Section 7(2)(g)(v))
04.10.1996	The Karnataka Educational Institutions (Classification, Regulation And Prescription Of Curricula Etc.,) Rules, 1995 came into force, which allowed every recognised educational institution to specify its own set of Uniform and stipulated that such uniform once specified shall not be changed within the period of next five years. (Rule 11)
02.03.2006	Supreme Court of Canada in its judgement in Balvir Singh Multani vs. Commission Scolaire Marguerite-Bourgeoys & Attorney General and World Sikh Organization of Canada (2006) 1 SCR 256 recognised the right of the Appellant's son to carry and wear a kirpan to school as it was a part of his honest and genuine religious belief.

	True Copy of the judgement of Supreme Court of Canada in Balvir Singh Multani vs. Commission Scolaire Marguerite-Bourgeoys & Attorney General and World Sikh Organization of Canada (2006) 1 SCR 256 is annexed herewith as Annexure P-1 at pages 159 to 189.
05.10.2007	Constitutional Court of South Africa in its judgement in MEC for Education: Kwazulu-Natal vs. Navaneethum Pillay (Case: CCT 51/06) : [2000] ZACC 2 recognised the right to identity and to practice voluntary religious prescriptions thereby allowing a Tamil girl, to wear a nose stud to school as it was a part of her belief. True Copy of the Constitutional Court of South Africa's judgement in MEC for Education: Kwazulu-Natal vs. Navaneethum Pillay (Case: CCT 51/06) : [2000] ZACC 2 is annexed herewith as Annexure P-2 at pages 190 to 288.
07.09.2016	The Court of Appeal of Kenya in its judgement in Mohamed Fugicha vs. Methodist Church in Kenya [(2016) SCC OnLine Kenya 3023] recognised the Appellant's daughter's right to wear hijab to school as part of the school uniform, thereby allowing reasonable accommodation in the school uniform to incorporate a genuine belief held by the Appellant's daughters.

	True copy of the judgement of the Court of Appeal of Kenya at Nyeri in Mohamed Fugicha vs. Methodist Church in Kenya (Civil Appeal No. 22 of 2015) is annexed herewith as Annexure P-3 at pages 289 to 322.
05.02.2022	Government of Karnataka passed a Government Order prescribing "Uniform Dress Code for students of all Government Schools and Colleges". 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. True and translated Copy of the Government Order dated 05.02.022 is annexed herewith as Annexure P-4 at pages 323 to 337.
February 2022	Protests in the State against the Government Order and several students were precluded from attending schools.
08.02.2022	Hon'ble High Court of Karnataka started hearing petitions laying 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.
09.02.2022	Hon'ble Single judge bench of the High Court of Karnataka 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.
10.02.2022	Interim Order passed by the Hon'ble High Court of Karnataka directing the State Government and all other stakeholders to reopen the educational institutions and allow the students to return to the classes at the earliest. It was further directed that pending consideration of all these petitions, all the students regardless of their religion or faith were restrained from wearing saffron shawls (Bhagwa), and connected matters scarfs, hijab, religious flags or the like within the classroom, until further orders.

	This resulted in several girl students from being disallowed to attend schools as they were barred from practicing their religious belief. True Copy of the Interim Order dated 10.02.022 is annexed herewith as Annexure P-5 at pages 328 to 334.
14.02.2022	Arguments in the aforementioned writ petitions commenced.
25.02.2022	Judgement reserved by the Hon'ble High court of Karnataka after hearing the matter at length from both parties for 11 days.
15.03.2022	The Hon'ble High Court of Karnataka passed the impugned order, upholding the government order which disallowed muslim students from wearing hijab as part of their uniform.
	Hence this Special Leave Petition.

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

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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
Email: ishso@nic.in

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
PH NO.01123384205
Email: secylaw-dla@nic.in

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.

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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

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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

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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…"*

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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*

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*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

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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

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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

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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

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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

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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*

[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

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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

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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

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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

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(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

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[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

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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

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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

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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

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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

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'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

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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

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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

[47] (1985) 2 SCC 556

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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

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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*

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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

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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

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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.

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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

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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*

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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

[61] (1975) Supp. SCC 1

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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.*

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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…"

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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*

[62] (1889) 133 US 333

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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

[63] AIR 1954 MAD 385

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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

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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 …*t*hroughout 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.

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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

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

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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)

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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

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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

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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:*

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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

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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

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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*

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> *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***

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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)

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> *"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.

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

(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:

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> *"…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*

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> *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

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

***Sūra xxiv* (*Nūr*):**

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,

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

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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)***

Sūra xxxiii (Ahzāb)

"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

[*] *Id*

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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

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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:

***Sūra xxiv* (*Nūr*)**

> *"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*

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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*:

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> *"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:

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> *"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."*

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(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

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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.*

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> *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

[70] 2004 (1) JKJ 418

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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

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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

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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

[71] (2016) SCC Online Ker 487

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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.

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(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

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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.

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(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

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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

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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*',

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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

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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.

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(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'

[74] (1909) 33 BOM. 122

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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

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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

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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

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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

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

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> *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…*"

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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

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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

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> *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..."*

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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.

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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

[77] (D.C. III) 315 F SUP. 94
[78] (D.C. Okla.) 313 F SUPP. 618

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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)

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> *"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.*

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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

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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

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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.

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(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*

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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

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'*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

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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

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(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

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

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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

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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*,

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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

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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

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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

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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

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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.

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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*

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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

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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*

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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

[87] AIR 1952 SC 16

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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*

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> *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.*

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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*

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

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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.

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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.

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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

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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 …"*

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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

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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

[89] AIR 1965 SC 491

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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

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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

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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

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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

IN THE SUPREME COURT OF INDIA

[S.C.R., Order XXI Rule 3(1) (a)]
(Civil Appellate Jurisdiction)
SPECIAL LEAVE PETITION (C) _____ OF 2022
(Under Article 136 of the Constitution of India)
((Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition 2347 of 2022)
(WITH PRAYER FOR INTERIM RELEIF)

IN THE MATTER OF:

Fathima Jazeela and Ors. ... Petitioner

Versus

State of Karnataka and Ors. … Respondent

IN THE MATTER OF:

SR. No.	Between	Position of parties	
		Before Hon'ble High Court	Before this Hon'ble Court
1.	Fathima Jazeela D/o Ramath BH Aged about 19 years, Behind Belve Masjid #10; Belve Albady; Kundapura Udipi	Not a Party	Petitioner No. 1
2.	Lamia Mol D/o Abdul Muthalib Aged About 17 years, Through her father, Abdul Muthalib S/o M Yusuf Saheb Aged about 47 years, Both residing at Abbiguddi, Mavinakatte, Gulvadi Post, Kudapura-Taluku, Gulvadi, Udupi, Karnataka - 576283	Not a Party	Petitioner No. 2

3.	Irfan Engineer Managing Trustee, Institute of Islamic Studies Office at: 603, New silver Star, Prabhat Colony Road, Santa Cruz East, Mumbai – 400055 R/o 304 Olive Apartment, 4th Road, Golibar, Santa Cruz East, Mumbai – 400055	Not a Party	Petitioner No. 3
4.	Monwar Hussain S/o Md. Tasour Rahman Aged about 43 years R/o Ward No-13, J.K. Kedia Road, Main Road, Hojai, Assam, 782435	Not a Party	Petitioner No. 4
5.	Rumana Begum C/o: Manaf Ali Aged About 30 years R/o Sibpur No-1, Murazar Bazar, Lanka, Nagaon, Assam - 782439	Not a Party	Petitioner No. 5
	VERSUS		
1.	State of Karnataka, Represented by the Principal Secretary, Department of Primary and Secondary Education 2nd Gate, 6th Flour, M.S.Building, Dr.Ambedkar Veedhi, Bengaluru-01	Respondent No.1	Respondent
2.	Government PU College for Girls, Behind Syndicate Bank Near Harsha Store Udupi, Karnataka-576101 Represented by its Principal	Respondent No.2	Respondent
3.	District Commissioner Udupi District Manipal, Agumbe, Udupi Highway Eshwar Nagar, Manipal Karnataka	Respondent No.3	Respondent
4.	The Director	Respondent No.4	Respondent

	Karnataka Pre-University Board Department of Pre-University Education Karnataka, 18th Cross Road Sampige Road, Malleswaram Bengaluru - 560012		
5.	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, Perampalli Road, Santhekatte, Santhosh Nagapa, Manipal Road, Kunjibettu Post, Udupi, Karnataka - 576105	Petitioner	Porforma Respondent

To,
Hon'ble Chief Justice of India, and
His Companion Judges,
Supreme Court of India,
New Delhi.

The Humble Petition of
The Petitioner herein above mentioned

MOST RESPECTFULLY SHOWETH:

1. This Special Leave Petition impugns the final order and judgment dated 15.3.2022 of the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition 2347 of 2022 where in the Hon'ble High Court of Karnataka at Bengaluru erroneously upheld the validity of the discriminatory

Government Order issued by Government of Karnataka under the Karnataka Education Act 1983. The relevant part of the order is under:

> "Vide notification of the Act under reference 1 above, Govt of Karnataka has 1983 (1-1995) implemented Karnataka Education Act 1983, section 7 (2) (5), states that the students of all government schools and colleges should act like one family without feeling the sense of belonging to any one particular community or class and should act in accordance with the ideals of social justice. The present act under section 133 states that the Government of Karnataka will have every right to instruct and direct the managements of schools and colleges in this regard.
>
> …
>
> In all schools and colleges Students, both boys and girls, should be enabled to participate in similar form of learning and in this respect programmes have been

held in all schools and colleges. But few educational institutions it is observed that boys and girl students are practicing their religious practices. This has disturbed the principles of equality and Unity being maintained in those schools and colleges and these incidents have come to the notice of the concerned authorities.

…

As the Supreme Court and various High Courts have held that restricting students from coming to school wearing head scarfs or head covering is not in violation of Article 25 of the Constitution, and after carefully examining the rules under Karnataka Education Act 1983, the government issues the following Order:

In exercise of the powers conferred under Section 133(2) of the Karnataka Education Act, 1983, we direct students of all government schools to wear the uniform prescribed by the state. Students of private schools are instructed to wear

uniforms prescribed by the management committees of the school.

In colleges that fall under the Karnataka Board of Pre-University Education, the dress code prescribed by the College Development Committee or the administrative supervisory committee must be followed. In case no uniforms are mandated or students are expected to wear such dress so that equality and unity should be ensured and measures should be taken to maintaining public peace and tranquillity"

2. QUESTION OF LAW

The Petitioner states that the following questions of law arise for consideration of this Hon'ble Court:

a) Whether the Hon'ble High Court was wrong in affirming the government order dated 05.02.022 passed by the Government of Karnataka?

b) Whether the Hon'ble High Court failed to address the individual right to autonomy, freedom of expression and conscience, identity and privacy of the girl students

studying in various government schools and colleges in Karnataka being protected under the Constitution?

c) Whether the Hon'ble High Court failed to appreciate the fact that the wearing of hijab need not be an essential religious practice for it be voluntarily practiced by believers of the faith?

d) Whether the High Court failed erroneously concluded that non-adherence to uniform would result in disorder, disruption and invasion of rights of others?

e) Whether the Hon'ble High Court has erroneously disallowed reasonable accommodation to the uniform as sought by the Petitioners?

3. DECLARATION IN TERMS OF RULE 3(2)

The Petitioner states that no other petition seeking Special Leave to Appeal has been filed by her against the impugned final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in W.P. 2347 of 2022.

4. DECLARATION IN TERMS OF RULE 5

The Petitioner states that the Annexures P-1 to P-5 produced along with the instant SLP are true copies of the pleading/documents which

formed part of the record of the case in the Hon'ble High Court against whose order the leave to appeal is sought for in this petition.

5. GROUNDS

The Petitioner is seeking intervention of this Hon'ble Court, inter alia, on the following grounds:

1. Because the Hon'ble High Court of Karnataka at Bengaluru has wrongfully dismissed the relief sought by the Petitioners before it in W.P. No. 2347 of 2022 seeking quashing of the government order dated 05.02.2022 passed by Government of Karnataka.
2. Because Hon'ble High Court has held that if the practice complained of is not "essential" to the religion then on that ground alone the practice is not capable of constitutional protection under Article 25. The Hon'ble High Court also overlooked the judgement of this Hon'ble Court in Bijoe Emmanuel v. State of Kerala (1986) 3 SCC 615 where this Court while endorsing the view suggested by Davar, J. in his judgement in Jamshed Ji v. Soonabai (1909) 33 Bom 122 held as under:

"…we also notice that Mukherjee, J. quoted as appropriate Davar, J.'s following observations in Jamshed Ji v. Soonabai:

> 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 judgement 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 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."

3. Because Hon'ble High Court has ignored the arguments on the freedom of conscience and negated it as a right protected under the Constitution of India.
4. Because Hon'ble High Court while considering and harping on the compulsory nature of uniforms, completely ignoring the plea of the petitioners which did not pertain to doing away with uniform in its entirety and only sought reasonable accommodation
5. Because Hon'ble High Court by affirming the government order wrongly equates Secularism with Homogeneity and negates Diversity and Pluralism.
6. Because Hon'ble High Court wrongly concludes that even the uniform modified to Accommodate the Hijab would be Destructive of discipline and cause disorder, disruption and invasion of rights of others. The Hon'ble High Court also overlooked the decision of this Hon'ble Court in Bijoe Emmanuel vs. State of Kerala where this Hon'ble Court has opined as under:

> "21. …Frankfurter, J.'s view, it is seen, was founded entirely upon his conception of judicial restraint. In that very case Justice Stone dissented and said: (L Ed p. 1383)

> "It (the Government) may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order. But it is a long step, and one which I am unable to take, to the position that government may, as a supposed, educational measure and as a means of disciplining young, compel affirmations which violate their religious conscience."

Stone, J. further observed: (L Ed p. 1384)

> "The very essence of the liberty which they guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion."

It was further added: (L Ed p. 1384)

> "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."

"22. …Justice Jackson referred to Lincoln's famous dilemma: "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?" and added:

…It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."

7. Because the Hon'ble High Court wrongfully deduces that practice of wearing of hijab at the most may have something to do with culture but certainly not with religion. The Hon'ble High court has stood in judgement of the religious by practices and not followed the view endorsed in the judgement of Bijoe Emmanuel vs. State of Kerala (1986) 3 SCC 615, which is as under:

24. …After referring to Jackson, J's opinion in *West Virginia State Board of Education* v. *Barnette* [87 Law Ed 1628, 1633 : 319 US 624, 629 (1943)] and some other cases, it was further observed:

"For the court to take to itself the right to say that the exercises here in question had no religious or devotional significance might well

be for the court to deny that very religious freedom which the statute is intended to provide.

It is urged that the refusal of the infant appellants to join in the exercises in question is disturbing and constitutes conduct injurious to the moral tone of the school."

8. Because the Hon'ble High Court obviates the nature of judicial review to be limited by the fact that students and parents signed an undertaking at the time of admission agreeing to adhere to the school uniform.

9. Because the Hon'ble High Court makes the wrongful insinuation that it would become difficult to foster scientific temperament in students if wearing of religious symbols like bhagwa and hijab were to be permitted.

10. Because Hon'ble High Court failed to address the individual right to autonomy, freedom of expression and conscience, identity and privacy of the girl students studying in various government schools and colleges in Karnataka being protected under the Constitution.

11. Because the Hon'ble High Court wrongfully concluded that wearing of hijab 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. It further erroneously deduced that the same 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.

6. GROUNDS FOR INTERIM RELIEF

1. Because the case of the Petitioner pertains to an issue of general public importance and that there is every possibility of succeeding in this case and if during the pendency of the present SLP, suspension of the impugned orders is not granted to the Petitioner, then several Muslim students would be unable get access to education and continue to express their belief.

7. MAIN PRAYER

The Petitioner prays before this Hon'ble Court, inter alia, for the following reliefs:

a) Grant Special Leave Petition to appeal against the Final order and Judgement dated 15.03.2022 passed by the

Hon'ble High Court of Karnataka at Bengaluru in W.P. 2347 of 2022.

b) Pass such order and further orders, as this Hon'ble Court may deem fit and proper in the circumstances of the case.

8. INTERIM PRAYER

The Petitioner prays before this Hon'ble Court, inter alia, for the following reliefs:

a) Pass an order granting an ad-interim ex-parte stay on the impugned final order and judgement dated 15.03.2022 pass by the Hon'ble High court of Karnataka at Bengaluru.

b) Pass an order quashing the impugned final order and judgement dated 15.03.2022 pass by the Hon'ble High court of Karnataka at Bengaluru.

c) Pass such order and further orders, as this Hon'ble Court may deem fit and proper in the circumstances of the case.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BUOND SHALL EVER BE GRATEFUL.

Drawn by: Ms. Mugdha, Advocate

Place: New Delhi

Filed on: 23.03.2022

SATYA MITRA

(ADVOCATE FOR PETITIONER)

IN THE SUPREME COURT OF INDIA

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

(Civil Appellate Jurisdiction)

SPECIAL LEAVE PETITION (C) _____ OF 2021

(Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in W.P. No. 2347 of 2022)

(WITH PRAYER FOR INTERIM RELEIF)

IN THE MATTER OF:

FATHIMA JAZEELA ... Petitioners

Versus

State of Karnataka and Ors. ... Respondents

AFFIDAVIT

I, Fathima Jazeela, D/o Rahamath B H, Aged 19 years, Studying in BSc 1st Year in Bhandarkars Arts and Science College, Kundapura, having Roll No.210901, Residing at behind Belve Masjid, Belve, Abady, Kundapura Taluk, Udupi Distrit, Karnataka State – 576212 today in 'Kundapura' dohereby solemnly affirm and state on oath as under:

That I am the Petitioner No.1 and as such I am well conversant with the facts and circumstances of this case and hence authorized to swear the present affidavit.

NOTARY
M. BHASKARSHETTY
KUNDAPURA
UDUPI DIST
Regn. No. 2363
GOVT. OF INDIA

Jazeela

No. OF CORRECTIONS One

2. That I have read and understood the contents of the accompanying Synopsis & List of Dates from page no. B to HHH Special Leave Petition from page no. 130 to 146 and paragraph no. 1 to 8 , along with the accompanying Applications, and that the same are being filed under my instructions and the contents thereof are true to the best of my belief and no material has been concealed.

3. That the annexures annexed with the Petition/application/affidavit are true and correct copies of the respective originals.

Jazeela

DEPONENT

VERIFICATION

Verified at Kundapura on this 25th Day of March of 2022 that the contents of the above Affidavit are true and correct to my knowledge, that no part of it is false and that no material has been conceived therefrom.

Jazeela

DEPONENT

NOTARY GOVT. OF INDIA
M. BHASKARASHETTY
KUNDAPURA
UDUPI DIST.
Reg. No. 2383

Solemnly affirmed and the contents of this affidavit having been read over to the deponent and admitted by him to be true and Correct and signed before me.

This 25th day of March 2022

NOTARY
KUNDAPURA

NOTARIAL REGISTER
Sl. No. 0577 dt. 25/03/2022

No. OF CONNECTIONS Two 06

IN THE SUPREME COURT OF INDIA

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

(Civil Appellate Jurisdiction)
SPECIAL LEAVE PETITION (C) _____ OF 2021
(Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in W.P. No. 2347 of 2022)
(WITH PRAYER FOR INTERIM RELEIF)

IN THE MATTER OF:

Fathima Jazeela and Ors. ... Petitioner

Versus

State of Karnataka and Ors. … Respondent

CERTIFICATE

Certified that the Special Leave Petition is confined only to the pleadings before the Court whose judgment/order is challenged and the other documents relied upon in those proceedings. No additional facts/documents 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 whose affidavit is filed in support of the Special Leave Petition.

Place: New Delhi Satya Mitra

Date: 23.03.2022 (Advocate for the Petitioner)

Appendix

THE KARNATAKA EDUCATION ACT, 1983

Section 7:

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

(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 arrangments, playground, furniture,

equipment, library, teaching aid, laboratory and workshops;

(i) such other matters as are considered necessary.

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

(a) moral and ethical education;

(b) population education, physical education, health education and sports;

(c) socially useful productive work, work experience and social service;

(d) innovative, creative and research activities;

(e) promotion of national integration;

(f) promotion of civic sense ; and

(g) inculcation of the sense of the following duties of citizens, enshrined in the Constitution namely:-

(i) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(ii) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(iii) to uphold and protect the sovereignty, unity and integrity of India;

(iv) to defend the country and render national service when called upon to do so;

(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;

(vii) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

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

(ix) to safeguard public property and to abjure violence;

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

(3) The prescription under sub-section (1) may be different for the different categories of educational institutions.

(4) (a) The objectives of education at the primary level shall be universalisation of education at the primary level by comprehensive access by both formal and non-formal means and by improving retention and completion rates with carriculum development and teacher education to help children attain the required level of achivement in the following basic purposes:-

(i) development of 'basic skills' in literacy in the mother tongue and Kannada (where mother tongue is not Kannada), numeracy and communication;

(ii) development of 'life skills' for understanding of and meaningful interaction with the physical and social environment, including study of Indian culture and history, science, health and nutrition;

(iii) introduction of 'work experience' or socially useful productive work to provide children with the ability to help themselves, to orient them to the work processes of society and to develop right attitudes to work;

(iv) promotion of values including moral values; and

(v) development of good attitudes towards further learning.

(b) The main objective of education at the secondary level shall be to impart such general eduction as may be prescribed so as to make the pupil fit either for higher academic studies or for job-oriented vocational courses. The general education so imparted shall, among others, include,-

(i) the development of linguistic skills and literary appreciation in the regional language;

(ii) the attainment of prescribed standards of proficiency in any two other selected languages among classical or modern Indian languages including Hindi and English;

(iii) the acquisition of requisite knowledge in mathematics and physical and biological sciences, with special reference to the physical environment of the pupil;

(iv) the study of social sciences with special reference to history, geography and civics so as to acquire the minimum necessary knowledge in regard to the State, country and the world;

(v) the introduction of 'work experience' or 'socially useful productive work' as an integral part of the curriculum; and

(vi) training in sports, games, physical exercises and other arts.

(5) In every recognised educational institution,-

(a) the course of instruction shall conform to the curricula and other conditions under sub-section (1); and

(b) no part of the working hours prescribed shall be utilised for any purpose other than instruction in accordance with the curricula.

Section 133:

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

State Government in due course the result of the enquiry made or the proceeding taken by him.

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

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

THE KARNATAKA EDUCATIONAL INSTITUTIONS (CLASSIFICATION, REGULATION AND PRESCRIPTION OF CURRICULA ETC.,) RULES, 1995

Rule 11:

Provision of Uniform, Clothing, Text Books etc., (1) Every recognised educational institution may specify its

own set of Uniform. Such uniform once specified shall not be changed within the period of next five years.

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

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

CONSTITUTION OF INDIA, 1950

Article 19:

19. Protection of certain rights regarding freedom of speech etc

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the

said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the

interests of the general public or for the protection of the interests of any Scheduled Tribe

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

Article 25:

Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, 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

2006 SCC OnLine Can SC 6 : [2006] 1 SCR 256 : 2006 SCC 6

In the Supreme Court of Canada

(BEFORE MCLACHLIN, C.J. AND MAJOR,[1] BASTARACHE, BINNIE, LEBEL, DESCHAMPS, FISH, ABELLA AND CHARRON, JJ.)

On Appeal from the Court of Appeal for Quebec

Balvir Singh Multani and Balvir Singh Multani, in his capacity as tutor to his minor son Gurbaj Singh Multani ... Appellants;

Versus

Commission scolaire Marguerite-Bourgeoys and Attorney General of Quebec ... Respondents.

and

World Sikh Organization of Canada, Canadian Civil Liberties Association, Canadian Human Rights Commission and Ontario Human Rights Commission Interveners Official English Translation

File No.: 30322

Decided on April 12, 2005 and March 2, 2006

English version of the judgment of McLachlin, C.J. and Bastarache, Binnie, Fish and Charron, JJ. delivered by

CHARRON, J.:—

1. Introduction

1. This appeal requires us to determine whether the decision of a school board's council of commissioners prohibiting one of the students under its jurisdiction from wearing a kirpan to school as required by his religion infringes the student's freedom of religion. If we find that it does, we must determine whether that infringement is a reasonable limit that can be justified by the need to maintain a safe environment at the school.

2. As I will explain below, I am of the view that an absolute prohibition against wearing a kirpan infringes the freedom of religion of the student in question under s. 2 (*a*) of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"). The infringement cannot be justified under s. 1 of the *Canadian Charter*, since it has not been shown that such a prohibition minimally impairs the student's rights. The decision of the council of commissioners must therefore be declared a nullity.

2. Facts

3. The appellant Balvir Singh Multani and his son Gurbaj Singh Multani are orthodox Sikhs. Gurbaj Singh, born in 1989, has been baptized and believes that his religion requires him to wear a kirpan at all times; a kirpan is a religious object that resembles a dagger and must be made of metal. On November 19, 2001, Gurbaj Singh accidentally dropped the kirpan he was wearing under his clothes in the yard of the school he was attending, École Sainte-Catherine-Labouré. On December 21, 2001, the school board, the Commission scolaire Marguerite-Bourgeoys ("CSMB"), through its legal counsel, sent Gurbaj Singh's parents a letter in which, as a [translation] "reasonable accommodation", it authorized their son to wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. Gurbaj Singh and his parents agreed to this arrangement.

4. In a resolution passed on February 12, 2002, the school's governing board refused to ratify the agreement on the basis that wearing a kirpan at the school

violated art. 5 of the school's *Code de vie* (code of conduct), which prohibited the carrying of weapons and dangerous objects. For the purposes of this case, it is not in dispute that the governing board had, pursuant to the authority granted to it under s. 76 of the *Education Act*, R.S.Q., c. I-13.3, approved the *Code de vie*, which imposed certain rules of conduct.

5. On March 19, 2002, based on a unanimous recommendation by a review committee to which a request by the Multanis to reconsider the governing board's decision had been referred, the CSMB's council of commissioners upheld that decision. The council of commissioners also notified the Multanis that a symbolic kirpan in the form of a pendant or one in another form made of a material rendering it harmless would be acceptable in the place of a real kirpan.

6. On March 25, 2002, Balvir Singh Multani, personally and in his capacity as tutor to his son Gurbaj Singh, filed in the Superior Court, under art. 453 of the *Code of Civil Procedure*, R.S.Q., c. C-25, and s. 24(1) of the *Canadian Charter*, a motion for a declaratory judgment together with an application for an interlocutory injunction. In his motion, Mr. Multani asked the court to declare that the council of commissioners' decision was of no force or effect and that Gurbaj Singh had a right to wear his kirpan to school if it was sealed and sewn up inside his clothing. He submitted that this would represent a reasonable accommodation to the freedom of religion and right to equality guaranteed in ss. 3 and 10 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), and ss. 2 and 15 of the *Canadian Charter*.

7. On April 16, 2002, Tellier J. ordered an interlocutory injunction and authorized Gurbaj Singh to wear his kirpan, provided that he complied with the conditions initially proposed by the CSMB, until a final decision was rendered in the case. On May 17, 2002, Grenier J. of the Superior Court granted Mr. Multani's motion for a declaratory judgment, declared the council of commissioners' decision to be null and of no force or effect, and authorized Gurbaj Singh to wear his kirpan under certain conditions. The Quebec Court of Appeal allowed the appeal and dismissed the motion for a declaratory judgment on March 4, 2004. Balvir Singh Multani then appealed to this Court on behalf of himself and his son.

3. Decisions of the Courts Below

3.1 *Superior Court* ([2002] Q.J. No. 1131 (QL))

8. Grenier J. began by discussing the agreement between the CSMB and the Multanis respecting the proposed accommodation measure. Noting that the need to wear a kirpan was based on a sincere religious belief held by Gurbaj Singh and that there was no evidence of any violent incidents involving kirpans in Quebec schools, she granted the motion for a declaratory judgment and authorized Gurbaj Singh to wear his kirpan at Sainte-Catherine-Labouré school on the following conditions (at para. 7):

[TRANSLATION]

– that the kirpan be worn under his clothes;

– that the kirpan be carried in a sheath made of wood, not metal, to prevent it from causing injury;

– that the kirpan be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope, and that this envelope be sewn to the guthra;

– that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with;

– that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; and

– that in the event of a failure to comply with the terms of the judgment, the petitioner would definitively lose the right to wear his kirpan at school.

3.2 *Court of Appeal (Pelletier and Rochon, JJ.A. and Lemelin, J. (ad hoc))* ([2004] Q.J. No. 1904 (QL))

9. Writing on behalf of a unanimous Quebec Court of Appeal, Lemelin J. (*ad hoc*) began by pointing out that the parties had not agreed on an accommodation measure, since the CSMB had consistently opposed the Multanis' motion and argued in favour of a measure similar to the offer made in the council of commissioners' resolution, that is, permission to wear a symbolic kirpan or one made of a material rendering it harmless.

10. Regarding the applicable standard of review, Lemelin J. conducted a pragmatic and functional analysis and concluded that the applicable standard was reasonableness *simpliciter*.

11. Lemelin, J. found that the appellant had proven that his son's need to wear a kirpan was a sincerely held religious belief and was not capricious. She concluded that the council of commissioners' decision infringed Gurbaj Singh's freedom of religion and conscience because it had [TRANSLATION] “the effect of impeding conduct integral to the practice of [his] religion” (para. 71).

12. Lemelin, J. first noted that Gurbaj Singh's freedom of religion could be limited for the purposes of s. 1 of the *Canadian Charter* — in accordance with the test set out in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 — and of s. 9.1 of the *Quebec Charter*. She stated that she could not conceive of a sufficient justification where there is a reasonable accommodation measure. Lemelin J. considered that the council of commissioners' decision was motivated by a pressing and substantial objective, namely to ensure the safety of the school's students and staff. She stated that there was a direct and rational connection between the prohibition against wearing a kirpan to school and the objective of maintaining a safe environment. Lemelin J. explained that the duty to accommodate is a corollary of the minimal impairment criterion. Given that the kirpan is a dangerous object, that the conditions imposed by Grenier J. did not eliminate every risk, but merely delayed access to the object, and that the concerns expressed by the school board were not merely hypothetical, Lemelin J. concluded that allowing the kirpan to be worn, even under certain conditions, would oblige the school board to reduce its safety standards and would result in undue hardship. In her opinion, the school's students and staff would be exposed to the risks associated with the kirpan. She stated that she was unable to convince herself that safety concerns are less serious in schools than in courts of law or in airplanes. She concluded that the council of commissioners' decision was not unreasonable and did not warrant intervention. Given this conclusion, she did not consider it necessary to conduct a separate analysis with regard to a violation of the right to equality, since the same arguments concerning justification would apply. She allowed the appeal and dismissed Mr. Multani's motion for a declaratory judgment.

4. Issues

13. Does the decision of the council of commissioners prohibiting Gurbaj Singh Multani from wearing his kirpan at Sainte-Catherine-Labouré school infringe his freedom of religion under s. 2(*a*) of the *Canadian Charter* or s. 3 of the *Quebec Charter*? Does the decision infringe his right to equality under s. 15 of the *Canadian Charter* or s. 10 of the *Quebec Charter*? If so, can the infringement be justified pursuant to s. 1 of the *Canadian Charter* or s. 9.1 of the *Quebec Charter*?

14. I will begin by discussing the freedom of religion guaranteed by s. 2(*a*) of the *Canadian Charter*. Before proceeding with the analysis, there are a few preliminary issues to address.

5. Preliminary Issues

5.1 *The Administrative Law Standard of Review Is Not Applicable*

15. Although the appropriate standard of review in the case at bar was not argued

at trial, it was in the Court of Appeal. Based on the decisions in *Chamberlain* v. *Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, and *Dr. Q* v. *College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, the Court of Appeal concluded that the standard for reviewing the council of commissioners' decision should be reasonableness *simpliciter*. Having found that the decision infringed Gurbaj Singh's freedom of religion and conscience, the Court of Appeal then incorporated that administrative law standard of review into its analysis of constitutional justification under s. 1 of the *Canadian Charter*. My colleagues Deschamps and Abella JJ. see no reason to depart from the administrative law approach adopted by the Court of Appeal (para. 95). They also believe that it is both sufficient and more appropriate, in the case at bar, to rely solely on the principles of administrative law to decide the substantive issue rather than applying the principles of constitutional justification.

16. With respect for the opinion of Deschamps and Abella JJ., I am of the view that this approach could well reduce the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles or, at the very least, cause confusion between the two. It is not surprising that the values underlying the rights and freedoms guaranteed by the *Canadian Charter* form part — and sometimes even an integral part — of the laws to which we are subject. However, the fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional law standards must be dissolved into the administrative law standards. The rights and freedoms guaranteed by the *Canadian Charter* establish a *minimum* constitutional protection that must be taken into account by the legislature and by every person or body subject to the *Canadian Charter*. The role of constitutional law is therefore to define the scope of the protection of these rights and freedoms. An infringement of a protected right will be found to be constitutional only if it meets the requirements of s. 1 of the *Canadian Charter*. Moreover, as Dickson C.J. noted in *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, the more sophisticated and structured analysis of s. 1 is the proper framework within which to review the values protected by the *Canadian Charter* (see also *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 32). Since, as I will explain below, it is the compliance of the commissioners' decision with the requirements of the *Canadian Charter* that is central to this appeal, it is my opinion that the Court of Appeal's analysis of the standard of review was inadequate and that it leads to an erroneous conclusion.

17. As this Court recognized in *Ross*, judicial review may involve a constitutional law component and an administrative law component (para. 22). In that case, for example, the appeal raised two broad issues. From the point of view of administrative law, the Court first had to determine whether, based on the appropriate administrative law standard of review, namely reasonableness, the human rights board of inquiry had erred in making a finding of discrimination under s. 5(1) of the *Human Rights Act*, R.S.N.B. 1973, c. H-11, and whether that Act gave it jurisdiction to make the order in issue. (It should be noted here that the Court did not confuse the protection against discrimination provided for in s. 5(1) of the Act with the right guaranteed in s. 15 of the *Canadian Charter*.) However, the conclusion that there was discrimination and that the Act granted the board of inquiry a very broad power to make orders did not end the analysis. Since the respondent had also argued that the decision infringed his freedom of expression and religion under the *Canadian Charter*, the Court also had to determine whether the board of inquiry's order that the school board remove the respondent from his teaching position was valid from the point of view of constitutional law. As the Court recognized, “an administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter*” (para. 31; see also *Slaight Communications*). The Court

therefore conducted an analysis under ss. 2(*a*) and (*b*) and 1 of the *Canadian Charter* to decide the constitutional issue. The administrative law standard of review is not applicable to the constitutional component of judicial review.

18. As stated above, it is the compliance of the commissioners' decision with the requirements of the *Canadian Charter* that is central to this appeal, not the decision's validity from the point of view of administrative law. Section 76 of the *Education Act* grants the governing board the power to approve any safety measure proposed by a school principal:

> The governing board is responsible for approving the rules of conduct and the safety measures proposed by the principal.
>
> The rules and measures may include disciplinary sanctions other than expulsion from school or corporal punishment; the rules and measures shall be transmitted to all students at the school and their parents.

The governing board exercised this power to approve, *inter alia*, art. 5 of the *Code de vie*, which prohibits the carrying of weapons and dangerous objects at Sainte-Catherine-Labouré school. The council of commissioners, in turn, upheld the governing board's decision pursuant to the power implicitly conferred on it in s. 12 of the *Education Act*, which reads as follows:

> The council of commissioners may, if it considers that the request is founded, overturn, entirely or in part, the decision contemplated by the request and make the decision which, in its opinion, ought to have been made in the first instance.

19. There is no suggestion that the council of commissioners did not have jurisdiction, from an administrative law standpoint, to approve the *Code de vie*. Nor, it should be noted, is the administrative and constitutional validity of the *rule* against carrying weapons and dangerous objects in issue. It would appear that the *Code de vie* was never even introduced into evidence by the parties. Rather, the appellant argues that it was in applying the rule, that is, in categorically denying Gurbaj Singh the right to wear his kirpan, that the governing board, and subsequently the council of commissioners when it upheld the original decision, infringed Gurbaj Singh's freedom of religion under the *Canadian Charter*.

20. The complaint is based entirely on this constitutional freedom. The Court of Appeal therefore erred in applying the reasonableness standard to its constitutional analysis. The administrative law standard of review was not relevant. Moreover, if this appeal had instead concerned the review of an administrative decision based on the application and interpretation of the *Canadian Charter*, it would, according to the case law of this Court, have been necessary to apply the correctness standard (*Nova Scotia (Workers' Compensation Board)* v. *Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 31).

21. Thus, it is the constitutionality of the *decision* that is in issue in this appeal, which means that a constitutional analysis must be conducted. The reasons of Deschamps and Abella JJ. raise another issue relating to the application of s. 1 of the *Canadian Charter*. My colleagues believe that the Court should address the issue of justification under s. 1 only where a complainant is attempting to overturn a normative rule as opposed to a decision applying that rule. With respect, it is of little importance to Gurbaj Singh — who wants to exercise his freedom of religion — whether the absolute prohibition against wearing a kirpan in his school derives from the actual wording of a normative rule or merely from the application of such a rule. In either case, any limit on his freedom of religion must meet the same requirements if it is to be found to be constitutional. In my opinion, consistency in the law can be maintained only by addressing the issue of justification under s. 1 regardless of whether what is in issue is the wording of the statute itself or its application. I will explain this.

22. There is no question that the *Canadian Charter* applies to the decision of the council of commissioners, despite the decision's individual nature. The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker: see *Slaight Communications*, at pp. 1077-78. As was explained in *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 20, the *Canadian Charter* can apply in two ways:

> First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

Deschamps and Abella JJ. take the view that the Court must apply s. 1 of the *Canadian Charter* only in the first case. I myself believe that the same analysis is necessary in the second case, where the decision maker has acted pursuant to an enabling statute, since any infringement of a guaranteed right that results from the decision maker's actions is also a limit "prescribed by law" within the meaning of s. 1. On the other hand, as illustrated by *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 141, when the delegated power is not exercised in accordance with the enabling legislation, a decision not authorized by statute is not a limit "prescribed by law" and therefore cannot be justified under s. 1.

23. In the case at bar, no one is suggesting that the council of commissioners failed to act in accordance with its enabling legislation. It is thus necessary to determine, as the Court did in *Slaight Communications*, whether the council of commissioners' decision infringes, as alleged, Gurbaj Singh's freedom of religion. As Lamer J. explained (at pp. 1079-80), where the legislation pursuant to which an administrative body has made a contested decision confers a discretion (in the instant case, the choice of means to keep schools safe) and does not confer, either expressly or by implication, the power to limit the rights and freedoms guaranteed by the *Canadian Charter*, the decision should, if there is an infringement, be subjected to the test set out in s. 1 of the *Canadian Charter* to ascertain whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. If it is not justified, the administrative body has exceeded its authority in making the contested decision.

5.2 *Internal Limits of Freedom of Religion, or Justification Within the Meaning of Section 1?*

24. The parties have been unable to agree on the most appropriate analytical approach. The appellant considers it clear that the council of commissioners' decision infringes his son's freedom of religion protected by s. 2(*a*) of the *Canadian Charter*. In response to the respondents' submissions, he maintains that only a limit that meets the test for the application of s. 1 of the *Canadian Charter* can be justified. The Attorney General of Quebec concedes that the prohibition against the appellant's son wearing his kirpan to school infringes the son's freedom of religion, but submits that, regardless of the conditions ordered by the Superior Court, the prohibition is a fair limit on freedom of religion, which is not an absolute right.

25. According to the CSMB, freedom of religion has not been infringed, because it has internal limits. The CSMB considers that, in the instant case, the freedom of religion guaranteed by s. 2(*a*) must be limited by imperatives of public order, safety,

and health, as well as by the rights and freedoms of others. In support of this contention, it relies primarily on *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, in which the Court defined the scope of the rights in issue (freedom of religion and the right to equality) in order to resolve any potential conflict. The CSMB is of the view that, in the case at bar, delineating the rights in issue in this way would preserve Gurbaj Singh's freedom of religion while, as in *Trinity Western University*, circumscribing his freedom to act in accordance with his beliefs. According to this line of reasoning, the outcome of this appeal would be decided at the stage of determining whether freedom of religion has been infringed rather than at the stage of reconciling the rights of the parties under s. 1 of the *Canadian Charter*.

26. This Court has clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others (see *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 337, and *Syndicat Northcrest* v. *Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, at para. 62). However, the Court has on numerous occasions stressed the advantages of reconciling competing rights by means of a s. 1 analysis. For example, in *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, the claimants, who were Jehovah's Witnesses, contested an order that authorized the administration of a blood transfusion to their daughter. While acknowledging that freedom of religion could be limited in the best interests of the child, La Forest J., writing for the majority of the Court, stated the following, at paras. 109-10:

> This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter* ....
>
> In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(*a*)....

27. *Ross* provides another example of this. In that case, the Court recognized a teacher's right to act on the basis of antisemitic views that compromised the right of students to a school environment free of discrimination, but opted to limit the teacher's freedom of religion pursuant to s. 1 of the *Canadian Charter* (at paras. 74-75):

> This mode of approach is analytically preferable because it gives the broadest possible scope to judicial review under the *Charter* ..., and provides a more comprehensive method of assessing the relevant conflicting values....
>
> ... That approach seems to me compelling in the present case where the respondent's claim is to a serious infringement of his rights of expression and of religion in a context requiring a detailed contextual analysis. In these circumstances, there can be no doubt that the detailed s. 1 analytical approach developed by this Court provides a more practical and comprehensive mechanism, involving review of a whole range of factors for the assessment of competing interests and the imposition of restrictions upon individual rights and freedoms.

28. It is important to distinguish these decisions from the ones in which the Court did not conduct a s. 1 analysis because there was no conflict of fundamental rights. For example, in *Trinity Western University*, the Court, asked to resolve a potential conflict between religious freedoms and equality rights, concluded that a proper delineation of the rights involved would make it possible to avoid any conflict in that case. Likewise, in *Amselem*, a case concerning the *Quebec Charter*, the Court refused

to pit freedom of religion against the right to peaceful enjoyment and free disposition of property, because the impact on the latter was considered "at best, minimal" (para. 64). Logically, where there is not an apparent infringement of more than one fundamental right, no reconciliation is necessary at the initial stage.

29. In the case at bar, the Court does not at the outset have to reconcile two constitutional rights, as only freedom of religion is in issue here. Furthermore, since the decision genuinely affects both parties and was made by an administrative body exercising statutory powers, a contextual analysis under s. 1 will enable us to balance the relevant competing values in a more comprehensive manner.

30. This Court has frequently stated, and rightly so, that freedom of religion is not absolute and that it can conflict with other constitutional rights. However, since the test governing limits on rights was developed in *Oakes*, the Court has never called into question the principle that rights are reconciled through the constitutional justification required by s. 1 of the *Canadian Charter*. In this regard, the significance of *Big M Drug Mart*, which predated *Oakes*, was considered in *B. (R.)*, at paras. 110-11; see also *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, at pp. 733-34. In *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, the Court, in formulating the common law test applicable to publication bans, was concerned with the need to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution" (p. 878). For this purpose, since the media's freedom of expression had to be reconciled with the accused's right to a fair trial, the Court held that a common law standard that "clearly reflects the substance of the *Oakes* test" was the most appropriate one (p. 878).

31. Thus, the central issue in the instant case is best suited to a s. 1 analysis. But before proceeding with this analysis, I will explain why the contested decision clearly infringes freedom of religion.

6. Infringement of Freedom of Religion

32. This Court has on numerous occasions stressed the importance of freedom of religion. For the purposes of this case, it is sufficient to reproduce the following statement from *Big M Drug Mart*, at pp. 336-37 and 351:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> ... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> ...
>
> ... With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise.

33. It was explained in *Amselem*, at para. 46, that freedom of religion consists

> of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. [Emphasis added.]

34. In *Amselem*, the Court ruled that, in order to establish that his or her freedom

of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

35. The fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice (*Amselem*, at para. 52). In assessing the sincerity of the belief, a court must take into account, *inter alia*, the credibility of the testimony of the person asserting the particular belief and the consistency of the belief with his or her other current religious practices (*Amselem*, at para. 53).

36. In the case at bar, Gurbaj Singh must therefore show that he sincerely believes that his faith requires him at all times to wear a kirpan made of metal. Evidence to this effect was introduced and was not contradicted. No one contests the fact that the orthodox Sikh religion requires its adherents to wear a kirpan at all times. The affidavits of chaplain Manjit Singh and of Gurbaj Singh explain that orthodox Sikhs must comply with a strict dress code requiring them to wear religious symbols commonly known as the Five Ks: (1) the kesh (uncut hair); (2) the kangha (a wooden comb); (3) the kara (a steel bracelet worn on the wrist); (4) the kaccha (a special undergarment); and (5) the kirpan (a metal dagger or sword). Furthermore, Manjit Singh explains in his affidavit that the Sikh religion teaches pacifism and encourages respect for other religions, that the kirpan must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic kirpan made of a material other than metal is based on a reasonable religiously motivated interpretation.

37. Much of the CSMB's argument is based on its submission that [TRANSLATION] “the kirpan is essentially a dagger, a weapon designed to kill, intimidate or threaten others”. With respect, while the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person, this submission disregards the fact that, for orthodox Sikhs, the kirpan is above all a religious symbol. Chaplain Manjit Singh mentions in his affidavit that the word “kirpan” comes from “kirpa”, meaning “mercy” and “kindness”, and “aan”, meaning “honour”. There is no denying that this religious object could be used wrongly to wound or even kill someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan. Since the question of the physical makeup of the kirpan and the risks the kirpan could pose to the school board's students involves the reconciliation of conflicting values, I will return to it when I address justification under s. 1 of the *Canadian Charter*. In order to demonstrate an infringement of his freedom of religion, Gurbaj Singh does not have to establish that the kirpan is not a weapon. He need only show that his personal and subjective belief in the religious significance of the kirpan is sincere.

38. Gurbaj Singh says that he sincerely believes he must adhere to this practice in order to comply with the requirements of his religion. Grenier J. of the Superior Court declared (at para. 6) — and the Court of Appeal reached the same conclusion (at para. 70) — that Gurbaj Singh's belief was sincere. Gurbaj Singh's affidavit supports this conclusion, and none of the parties have contested the sincerity of his belief.

39. Furthermore, Gurbaj Singh's refusal to wear a replica made of a material other than metal is not capricious. He genuinely believes that he would not be complying with the requirements of his religion were he to wear a plastic or wooden kirpan. The fact that other Sikhs accept such a compromise is not relevant, since as Lemelin J.

mentioned at para. 68 of her decision, [TRANSLATION] "[w]e must recognize that people who profess the same religion may adhere to the dogma and practices of that religion to varying degrees of rigour."

40. Finally, the interference with Gurbaj Singh's freedom of religion is neither trivial nor insignificant. Forced to choose between leaving his kirpan at home and leaving the public school system, Gurbaj Singh decided to follow his religious convictions and is now attending a private school. The prohibition against wearing his kirpan to school has therefore deprived him of his right to attend a public school.

41. Thus, there can be no doubt that the council of commissioners' decision prohibiting Gurbaj Singh from wearing his kirpan to Sainte-Catherine-Labouré school infringes his freedom of religion. This limit must therefore be justified under s. 1 of the *Canadian Charter*.

7. Section 1 of the *Canadian Charter*

42. As I mentioned above, the council of commissioners made its decision pursuant to its discretion under s. 12 of the *Education Act*. The decision prohibiting the wearing of a kirpan at the school thus constitutes a limit prescribed by a rule of law within the meaning of s. 1 of the *Canadian Charter* and must accordingly be justified in accordance with that section:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

43. The onus is on the respondents to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question: *Oakes*; *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

7.1 *Importance of the Objective*

44. As stated by the Court of Appeal, the council of commissioners' decision [TRANSLATION] "was motivated by [a pressing and substantial] objective, namely, to ensure an environment conducive to the development and learning of the students. This requires [the CSMB] to ensure the safety of the students and the staff. This duty is at the core of the mandate entrusted to educational institutions" (para. 77). The appellant concedes that this objective is laudable and that it passes the first stage of the test. The respondents also submitted fairly detailed evidence consisting of affidavits from various stakeholders in the educational community explaining the importance of safety in schools and the upsurge in problems relating to weapons and violence in schools.

45. Clearly, the objective of ensuring safety in schools is sufficiently important to warrant overriding a constitutionally protected right or freedom. It remains to be determined what level of safety the governing board was seeking to achieve by prohibiting the carrying of weapons and dangerous objects, and what degree of risk would accordingly be tolerated. As in *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at para. 25, the possibilities range from a desire to ensure absolute safety to a total lack of concern for safety. Between these two extremes lies a concern to ensure a reasonable level of safety.

46. Although the parties did not present argument on the level of safety sought by the governing board, the issue was addressed by the intervener Canadian Human Rights Commission, which correctly stated that the standard that seems to be applied in schools is reasonable safety, not absolute safety. The application of a standard of absolute safety could result in the installation of metal detectors in schools, the

prohibition of all potentially dangerous objects (such as scissors, compasses, baseball bats and table knives in the cafeteria) and permanent expulsion from the public school system of any student exhibiting violent behaviour. Apart from the fact that such a standard would be impossible to attain, it would compromise the objective of providing universal access to the public school system.

47. On the other hand, when the governing board approved the article in question of the *Code de vie*, it was not seeking to establish a minimum standard of safety. As can be seen from the affidavits of certain stakeholders from the educational community, violence and weapons are not tolerated in schools, and students exhibiting violent or dangerous behaviour are punished. Such measures show that the objective is to attain a certain level of safety beyond a minimum threshold.

48. I therefore conclude that the level of safety chosen by the governing council and confirmed by the council of commissioners was reasonable safety. The objective of ensuring a reasonable level of safety in schools is without question a pressing and substantial one.

7.2 *Proportionality*

7.2.1 Rational Connection

49. The first stage of the proportionality analysis consists in determining whether the council of commissioners' decision was rendered in furtherance of the objective. The decision must have a rational connection with the objective. In the instant case, prohibiting Gurbaj Singh from wearing his kirpan to school was intended to further this objective. Despite the profound religious significance of the kirpan for Gurbaj Singh, it also has the characteristics of a bladed weapon and could therefore cause injury. The council of commissioners' decision therefore has a rational connection with the objective of ensuring a reasonable level of safety in schools. Moreover, it is relevant that the appellant has never contested the rationality of the *Code de vie's* rule prohibiting weapons in school.

7.2.2 Minimal Impairment

50. The second stage of the proportionality analysis is often central to the debate as to whether the infringement of a right protected by the *Canadian Charter* can be justified. The limit, which must minimally impair the right or freedom that has been infringed, need not necessarily be the least intrusive solution. In *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, this Court defined the test as follows:

> The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ….

51. The approach to the question must be the same where what is in issue is not legislation, but a decision rendered pursuant to a statutory discretion. Thus, it must be determined whether the decision to establish an absolute prohibition against wearing a kirpan “falls within a range of reasonable alternatives”.

52. In considering this aspect of the proportionality analysis, Lemelin J. expressed the view that [TRANSLATION] “[t]he duty to accommodate this student is a corollary of the minimal impairment [test]” (para. 92). In other words, she could not conceive of the possibility of a justification being sufficient for the purposes of s. 1 if reasonable accommodation is possible (para. 75). This correspondence of the concept of reasonable accommodation with the proportionality analysis is not without precedent. In *Eldridge*, at para. 79, this Court stated that, in cases concerning s. 15(1) of the *Canadian Charter*, “reasonable accommodation” was equivalent to the concept of

"reasonable limits" provided for in s. 1 of the *Canadian Charter*.

53. In my view, this correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar. In my view, Professor José Woehrling correctly explained the relationship between the duty to accommodate or adapt and the *Oakes* analysis in the following passage:

> [TRANSLATION] Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant. More specifically, in the context of s. 1 of the *Canadian Charter*, it is necessary, in applying the test from *R.* v. *Oakes*, to show, in succession, that applying the standard in its entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure's salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation. This is clear from the Supreme Court's judgment in *Edwards Books*, in which the application of the minimal impairment test led the Court to ask whether the Ontario legislature, in prohibiting stores from opening on Sundays and allowing certain exceptions for stores that were closed on Saturdays, had done enough to accommodate merchants who, for religious reasons, had to observe a day of rest on a day other than Sunday.
>
> (J. Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998), 43 McGill L.J. 325, at p. 360)

54. The council of commissioners' decision establishes an absolute prohibition against Gurbaj Singh wearing his kirpan to school. The respondents contend that this prohibition is necessary, because the presence of the kirpan at the school poses numerous risks for the school's pupils and staff. It is important to note that Gurbaj Singh has never claimed a right to wear his kirpan to school without restrictions. Rather, he says that he is prepared to wear his kirpan under the above-mentioned conditions imposed by Grenier J. of the Superior Court. Thus, the issue is whether the respondents have succeeded in demonstrating that an absolute prohibition is justified.

55. According to the CSMB, to allow the kirpan to be worn to school entails the risks that it could be used for violent purposes by the person wearing it or by another student who takes it away from him, that it could lead to a proliferation of weapons at the school, and that its presence could have a negative impact on the school environment. In support of this last point, the CSMB submits that the kirpan is a symbol of violence and that it sends the message that the use of force is the way to assert rights and resolve conflicts, in addition to undermining the perception of safety and compromising the spirit of fairness that should prevail in schools, in that its presence suggests the existence of a double standard. Let us look at those arguments.

7.2.2.1 *Safety in Schools*

56. According to the respondents, the presence of kirpans in schools, even under certain conditions, creates a risk that they will be used for violent purposes, either by those who wear them or by other students who might take hold of them by force.

57. The evidence shows that Gurbaj Singh does not have behavioural problems and

has never resorted to violence at school. The risk that this particular student would use his kirpan for violent purposes seems highly unlikely to me. In fact, the CSMB has never argued that there was a risk of his doing so.

58. As for the risk of another student taking his kirpan away from him, it also seems to me to be quite low, especially if the kirpan is worn under conditions such as were imposed by Grenier J. of the Superior Court. In the instant case, if the kirpan were worn in accordance with those conditions, any student wanting to take it away from Gurbaj Singh would first have to physically restrain him, then search through his clothes, remove the sheath from his guthra, and try to unstitch or tear open the cloth enclosing the sheath in order to get to the kirpan. There is no question that a student who wanted to commit an act of violence could find another way to obtain a weapon, such as bringing one in from outside the school. Furthermore, there are many objects in schools that could be used to commit violent acts and that are much more easily obtained by students, such as scissors, pencils and baseball bats.

59. In her brief reasons, Grenier J. explained that her decision was based in part on the fact that [TRANSLATION] "the evidence revealed no instances of violent incidents involving kirpans in schools in Quebec" and on "the state of Canadian and American law on this matter" (para. 6). In fact, the evidence in the record suggests that, over the 100 years since Sikhs have been attending schools in Canada, not a single violent incident related to the presence of kirpans in schools has been reported. In the reasons for his interim order, Tellier J. stated the following:

> [TRANSLATION] [T]he Court is of the view that the school board would not suffer any major inconvenience if an order were made under conditions required to ensure a safe environment. The Court does not believe that the safety of the environment would be compromised. In argument, it was stated that in the last 100 years, not a single case of kirpan-related violence has been reported. Moreover, in a school setting, there are usually all sorts of instruments that could be used as weapons during a violent incident, including compasses, drawing implements and sports equipment, such as baseball bats.
>
> (*Multani (Tuteur de)* v. *Commission scolaire Marguerite-Bourgeois*, [2002] Q.J. No. 619 (QL) (Sup. Ct.), at para. 28)

60. The lack of evidence of risks related to the wearing of kirpans was also noted in 1990 by a board of inquiry of the Ontario Human Rights Commission, which considered the presence of kirpans in schools in great depth in *Pandori* v. *Peel Bd. of Education* (1990), 12 C.H.R.R. D/364; its decision was affirmed by the Ontario Divisional Court in *Peel Board of Education* v. *Ontario Human Rights Commission* (1991), 3 O.R. (3d) 531, and leave to appeal was refused by the Ontario Court of Appeal. The board of inquiry allowed kirpans to be worn in Ontario schools under conditions similar to the ones imposed by Grenier J. of the Quebec Superior Court. The board noted that there had been no incidents involving kirpans in Canadian schools (at para. 176):

> Respondent has underscored that a kirpan could have the function of a weapon, but did not establish that a student had in fact so used it. In fact, there is not a single incident to which the respondent could point when the kirpan was used on school property or its environs — either in Peel or anywhere in Ontario or even all of Canada. Since Sikhs, and Khalsa among others, have been in this country for nearly a hundred years, this is a record worth considering.

The decision was affirmed by the Ontario Divisional Court, which stated the following (at p. 535):

> We can see no error in principle in the way it applied its judgment to the facts of this case, particularly in light of the lack of any incident of kirpan-related violence in any school system.

While noting the lack of kirpan-related incidents in schools, the Divisional Court summarized the evidence submitted to it regarding the violent use of kirpans in locations other than schools as follows (at pp. 532-33):

> There have been, in the Metropolitan Toronto area, three reported incidents of violent kirpan use. One involved a plea of guilty to attempted murder after a stabbing with a kirpan. In one street fight, a man was stabbed in the back with a kirpan. In one case, a kirpan was drawn for defensive purposes.
>
> None of these incidents was associated with any school. The only incident associated with a school was when a 10-year-old Sikh boy, walking home from school, was assaulted by two older boys. He put his hand on the handle of his kirpan before stepping back and running away, without drawing the kirpan from its sheath.
>
> There is no evidence that a kirpan has ever been drawn or used as a weapon in any school under the board's jurisdiction.
>
> ...
>
> Sikhs may wear kirpans in schools in Surrey, British Columbia. Although no other Ontario school board has expressly addressed the issue with the same depth as the Peel board, students may wear kirpans in the North York Board of Education and the Etobicoke Board of Education (which has a limit of six inches in size). No school boards in the Metropolitan Toronto area have a policy prohibiting or restricting kirpans. There is no evidence that kirpans have sparked a violent incident in any school, no evidence that any other school board in Canada bans kirpans, and no evidence of a student anywhere in Canada using a kirpan as a weapon.

61. The parties introduced into evidence several newspaper articles confirming the lack of incidents involving kirpans. An article published in the March 23, 2002 edition of *The Globe and Mail* refers to the 1990 Ontario decision and mentions that there is no evidence of a growing danger since that time. In an article appearing in *The Gazette* on May 16, 2002, Surrey School District spokeswoman Muriel Wilson is quoted as saying, “We have a strict zero-tolerance policy on weapons or something that could be used as a weapon or taken to be a weapon, like a fake gun.” But according to her, the kirpan is considered to be a religious symbol, not a weapon: “The key is how things are used. A pen could be used as a weapon, but we're not saying, ‘No pens in schools’.” The same article mentions that the Peel District School Board now says that the wearing of kirpans “[is] truly not an issue” and that there “has never been an issue or incident, never a complaint or problem” related to wearing kirpans in school since the ban was lifted: “It can work and work really well.” An article published in the May 13, 2002 edition of *La Presse* notes that there have been no problems related to the wearing of kirpans in the schools of the Vancouver and Surrey school boards, which have large numbers of Sikh students. Finally, according to an article published in *The Gazette* on February 21, 2002, “Whether a Sikh pupil should be allowed to wear a kirpan to school might be a new issue in Quebec, but it is not in the rest of the country.”

62. The respondents maintain that freedom of religion can be limited even in the absence of evidence of a real risk of significant harm, since it is not necessary to wait for the harm to occur before correcting the situation. They submit that the same line of reasoning that was followed in *Hothi* v. *R.*, [1985] 3 W.W.R. 256 (Man. Q.B.) (aff'd [1986] 3 W.W.R. 671 (Man. C.A.)), and *Nijjar* v. *Canada 3000 Airlines Ltd.* (1999), 36 C.H.R.R. D/76 (Can. Trib.), in which the wearing of kirpans was prohibited in courts and on airplanes, should apply in this case. As was mentioned above, Lemelin J. of the Court of Appeal pointed out that safety concerns are no less serious in schools.

63. There can be no doubt that safety is just as important in schools as it is on airplanes and in courts. However, it is important to remember that the specific context

must always be borne in mind in resolving the issue. In *Nijjar*, Mr. Nijjar's complaint that he had been denied the right to wear his kirpan aboard a Canada 3000 Airlines aircraft was dismissed because, *inter alia*, he had failed to demonstrate that wearing a kirpan in a manner consistent with Canada 3000's policies would be contrary to his religious beliefs. It was apparent from Mr. Nijjar's testimony that wearing one particular type of kirpan rather than another was a matter of personal preference, not of religious belief. While it concluded that Mr. Nijjar had not been discriminated against on the basis of his religion, the Canadian Human Rights Tribunal did nevertheless consider the issue of reasonable accommodation. It made the following comment at para. 123 of its decision:

> In assessing whether or not the respondent's weapons policy can be modified so as to accommodate Sikhs detrimentally affected, consideration must be given to the environment in which the rule must be applied. In this regard, we are satisfied that aircraft present a unique environment. Groups of strangers are brought together and are required to stay together, in confined spaces, for prolonged periods of time. Emergency medical and police assistance are not readily accessible.

Then, at para. 125, the Tribunal distinguished the case before it from *Pandori*:

> Unlike the school environment in issue in the *Pandori case*, where there is an ongoing relationship between the student and the school and with that a meaningful opportunity to assess the circumstances of the individual seeking the accommodation, air travel involves a transitory population. Significant numbers of people are processed each day, with minimal opportunity for assessment. It will be recalled that Mr. Kinnear testified that Canada 3000 check-in personnel have between forty-five and ninety seconds of contact with each passenger.

64.*Hothi* also involved special circumstances. The judge who prohibited the wearing of a kirpan in the courtroom was hearing the case of an accused charged with assault under s. 245 of the *Criminal Code*, R.S.C. 1970, c. C-34. Dewar C.J. of the Manitoba Court of Queen's Bench considered (at p. 259) the special nature of courts and stated the following about the prohibition against wearing kirpans in courtrooms:

> [It] serves a transcending public interest that justice be administered in an environment free from any influence which may tend to thwart the process. Possession in the courtroom of weapons, or articles capable of use as such, by parties or others is one such influence.

65. The facts in the case at bar are more similar to the facts in *Pandori* than to those in *Nijjar* and *Hothi*. The school environment is a unique one that permits relationships to develop among students and staff. These relationships make it possible to better control the different types of situations that arise in schools. The Ontario board of inquiry commented on the special nature of the school environment in *Pandori*, at para. 197:

> Courts and schools are not comparable institutions. One is a tightly circumscribed environment in which contending elements, adversarially aligned, strive to obtain justice as they see it, with judge and/or jury determining the final outcome. Schools on the other hand are living communities which, while subject to some controls, engage in the enterprise of education in which both teachers and students are partners. Also, a court appearance is temporary (a Khalsa Sikh could conceivably deal with the prohibition of the kirpan as he/she would on an airplane ride) and is therefore not comparable to the years a student spends in the school system.

66. Although there is no need in the instant case for this Court to compare the desirable level of safety in a given environment with the desirable level in a school environment, these decisions show that each environment is a special case with its own unique characteristics that justify a different level of safety, depending on the

circumstances.

67. Returning to the respondents' argument, I agree that it is not necessary to wait for harm to be done before acting, but the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified. Given the evidence in the record, it is my opinion that the respondents' argument in support of an absolute prohibition — namely that kirpans are inherently dangerous — must fail.

7.2.2.2 *Proliferation of Weapons in Schools*

68. The respondents also contend that allowing Gurbaj Singh to wear his kirpan to school could have a ripple effect. They submit that other students who learn that orthodox Sikhs may wear their kirpans will feel the need to arm themselves so that they can defend themselves if attacked by a student wearing a kirpan.

69. This argument is essentially based on the one discussed above, namely that kirpans in school pose a safety risk to other students, forcing them to arm themselves in turn in order to defend themselves. For the reasons given above, I am of the view that the evidence does not support this argument. It is purely speculative and cannot be accepted in the instant case: see *Eldridge*, at para. 89. Moreover, this argument merges with the next one, which relates more specifically to the risk of poisoning the school environment. I will therefore continue with the analysis.

7.2.2.3 *Negative Impact on the School Environment*

70. The respondents submit that the presence of kirpans in schools will contribute to a poisoning of the school environment. They maintain that the kirpan is a symbol of violence and that it sends the message that using force is the way to assert rights and resolve conflict, compromises the perception of safety in schools and establishes a double standard.

71. The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.

72. As for the submissions based on the other students' perception regarding safety and on feelings of unfairness that they might experience, these appear to stem from the affidavit of psychoeducator Denis Leclerc, who gave his opinion concerning a study in which he took part that involved, *inter alia*, questioning students and staff from 14 high schools belonging to the CSMB about the socio-educational environment in schools. The results of the study seem to show that there is a mixed or negative perception regarding safety in schools. It should be noted that this study did not directly address kirpans, but was instead a general examination of the situation in schools in terms of safety. Mr. Leclerc is of the opinion that the presence of kirpans in schools would heighten this impression that the schools are unsafe. He also believes that allowing Gurbaj Singh to wear a kirpan would engender a feeling of unfairness among the students, who would perceive this permission as special treatment. He mentions, for example, that some students still consider the right of Muslim women to wear the chador to be unfair, because they themselves are not allowed to wear caps or scarves.

73. It should be noted that, in a letter submitted to counsel for the appellants, psychologist Mathieu Gattuso indicated that, in light of the generally accepted principles concerning expert evidence, Denis Leclerc's affidavit does not constitute an expert opinion. It is clear from the examination of Mr. Leclerc that he did not study the situation in schools that authorize the wearing of kirpans and that, in his affidavit, he was merely giving a personal opinion.

74. With respect for the view of the Court of Appeal, I cannot accept Denis Leclerc's position. Among other concerns, the example he presents concerning the chador is particularly revealing. To equate a religious obligation such as wearing the chador with the desire of certain students to wear caps is indicative of a simplistic view of freedom of religion that is incompatible with the *Canadian Charter*. Moreover, his opinion seems to be based on the firm belief that the kirpan is, by its true nature, a weapon. The CSMB itself vigorously defends this same position. For example, it states the following in its factum (at paras. 37-38):

> [TRANSLATION] Although kirpans were presented to the trial judge at the hearing, she failed to rule on the true nature of the kirpan. On the contrary, she seemed, in light of her comments, to accept the appellants' argument that in today's world, the kirpan has only symbolic value for Sikhs.
>
> Yet whatever it may symbolize, the kirpan is still essentially a dagger, a weapon designed to kill, intimidate or threaten others. [Emphasis added.]

These assertions strip the kirpan of any religious significance and leave no room for accommodation. The CSMB also makes the following statement (at para. 51):

> [TRANSLATION] It is thus a paralogism ... to liken a weapon to all objects whose purpose is not to kill or wound but that could potentially be used as weapons, such as compasses, paper cutters, baseball bats, sporting equipment, or cars. Does this mean that we should stop studying geometry or playing baseball?

75. The appellants are perhaps right to state that the only possible explanation for the acceptance of these other potentially dangerous objects in schools is that the respondents consider the activities in which those objects are used to be important, while accommodating the religious beliefs of the appellant's son is not.

76. Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is, as I will explain in the next section, at the very foundation of our democracy.

77. In my opinion, the respondents have failed to demonstrate that it would be reasonable to conclude that an absolute prohibition against wearing a kirpan minimally impairs Gurbaj Singh's rights.

7.2.3 Effects of the Measure

78. Since we have found that the council of commissioners' decision is not a reasonable limit on religious freedom, it is not strictly necessary to weigh the deleterious effects of this measure against its salutary effects. I do believe, however, like the intervener Canadian Civil Liberties Association, that it is important to consider some effects that could result from an absolute prohibition. An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. This Court has on numerous occasions reiterated the importance of these values. For example, in *Ross*, the Court stated the following, at para. 42:

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.

In *R.* v. *M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 3, the Court made the following observation:

> [S]chools ... have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values

are best taught by example and may be undermined if the students' rights are ignored by those in authority.

Then, in *Trinity Western University*, the Court stated the following, at para. 13:

> Our Court [has] accepted ... that teachers are a medium for the transmission of values.... Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance.

79. A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.

8. Section 15(1) of the *Canadian Charter* and the *Quebec Charter*

80. Having found that the commissioners' decision infringes Gurbaj Singh's freedom of religion and that this infringement cannot be justified in a free and democratic society, I believe it is unnecessary to consider the alleged violation of s. 15 of the *Canadian Charter*. I am also of the view that a separate analysis with respect to the *Quebec Charter* is not necessary in the circumstances of the case.

9. Remedy

81. Section 24(1) of the *Canadian Charter* reads as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

82. Given that Gurbaj Singh no longer attends Sainte-Catherine-Labouré school, it would not be appropriate to restore the judgment of the Superior Court, as requested by the appellants. The Court accordingly considers that the appropriate and just remedy is to declare the decision prohibiting Gurbaj Singh from wearing his kirpan to be null.

10. Disposition

83. I would allow the appeal, set aside the decision of the Court of Appeal, and declare the decision of the council of commissioners to be null, with costs throughout.

English version of the reasons delivered by

84. DESCHAMPS AND ABELLA, JJ. — This case raises two issues. The first relates to the right of a Sikh student to wear his kirpan to school; the second concerns the relationship between administrative law and constitutional law in the context of human rights litigation.

85. We have come to the same conclusion as Charron J. but do not agree with her approach. In our view, the case is more appropriately decided by recourse to an administrative law review than to a constitutional law justification. Two main reasons dictate that an administrative law review be conducted. First, the purpose of constitutional justification is to assess a norm of general application, such as a statute or regulation. The analytical approach developed uniquely for that purpose is not easily transportable where what must be assessed is the validity of an administrative body's decision, even on a human rights question. In such a case, an administrative law analysis is called for. Second, basing the analysis on the principles of administrative law averts the problems that result from blurring the distinction between the principles of constitutional justification and the principles of administrative law, and prevents the impairment of the analytical tools developed specifically for each of these fields.

86. In *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R.

817, at para. 56, the Court recognized that an administrative law analysis does not exclude, but incorporates, arguments relating to the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"):

> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

Simply put, it is difficult to conceive of an administrative decision being permitted to stand if it violates the *Canadian Charter*. The administrative body's decisions can, indeed must, be judicially reviewed in accordance with the principles of administrative law where they do not have the normative import usually associated with a law. For the reasons that follow, we accordingly believe that it is preferable to adhere to an administrative law analysis where resorting to constitutional justification is neither necessary nor appropriate.

1. Administrative Law Analysis

1.1 *Facts and Judgments Below*

87. A brief review of the facts provides the necessary background. The *Code de vie* (code of conduct) of the school attended by the appellant's son prohibits the carrying of weapons and dangerous objects. The validity of this code is not in issue. Relying on it, the school board — the Commission scolaire Marguerite-Bourgeoys — prohibited the appellant's son, a Sikh student, from wearing his kirpan — a 20-cm knife with a metal blade — to school. At the time the school board first became involved in this matter, the student claimed the right to wear his kirpan under his clothes. The father and the student offered to wrap the kirpan in cloth. The school board accepted this as a reasonable accommodation. When the father and the student met with school officials, these officials expressed concerns about safety at the school. The governing board of the school refused to ratify the proposed accommodation measure and instead proposed that the student wear a harmless symbolic kirpan. On review, the council of commissioners of the school board endorsed the governing board's position.

88. The father contested the decision on behalf of himself and his son, filing a motion for a declaratory judgment. He initially asked the Superior Court to declare, based on ss. 3 and 10 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), and ss. 2 and 15 of the *Canadian Charter*, that his son had the right to wear his kirpan. He also asked the court — in what was in fact an offer of accommodation — to declare that the kirpan had to be worn under the student's clothes. Finally, he asked for a declaration that the school board was not entitled to prohibit the kirpan and that its decision was of no force or effect. In the Superior Court, the debate involved further conditions that would permit the concerns about safety at the school to be more effectively taken into account, while preserving the right to freedom of religion. The Superior Court judge stated that, in her view, wearing a symbolic kirpan was not acceptable, and the father and the student agreed to secure the kirpan in a wooden sheath and wrap it in cloth sewn to a shoulder strap ([2002] Q.J. No. 1131 (QL)). The Superior Court included in an order the following accommodation measures:

– the kirpan was to be worn under the student's clothes;

– the kirpan was to be placed in a wooden sheath and wrapped and sewn securely in a sturdy cloth envelope, which was to be sewn to a shoulder strap (guthra);

– the student was required to keep the kirpan in his possession at all times, and its

disappearance was to be reported to school authorities immediately;

– school personnel were authorized to verify, in a reasonable fashion, that the conditions for wearing the kirpan were being complied with; and

– if these conditions were not complied with, the student would definitively lose the right to wear a kirpan.

The Superior Court declared the school board's decision prohibiting the wearing of a kirpan to be null.

89. The school board and the Attorney General of Quebec appealed to the Court of Appeal. While the father and the student were still willing to accept the conditions set by the Superior Court, the Attorney General of Quebec and the school board again submitted that the kirpan was a weapon that could legitimately be prohibited in a school setting, that the decision did not infringe freedom of religion, and that the offer to allow the student to wear a symbolic kirpan represented a reasonable accommodation. They added that if the decision did infringe freedom of religion, it was nonetheless justified under s. 9.1 of the *Quebec Charter* and s. 1 of the *Canadian Charter*.

90. The Court of Appeal first addressed the issue of the applicable standard of review ([2004] Q.J. No. 1904 (QL)). Taking into consideration the four factors of the pragmatic and functional approach, it concluded that the standard of reasonableness should apply. The court then turned to the substantive issue, concluding that the kirpan is a weapon and that although the decision to prohibit a weapon did impair the full exercise of freedom of religion, it was not unreasonable given the school board's obligation to preserve the physical safety of the school community.

91. In this Court, the parties are relying on the same arguments as in the Court of Appeal.

1.2 *Analysis*

1.2.1 Standard of Review

92. In his motion for a declaratory judgment, the student's father contested the validity of the school board's decision. In this Court, the father and the student say that they are still prepared to accept the conditions imposed by the Superior Court. What must be examined in this case, therefore, is the validity of the school board's decision in light of the offer of accommodation made by the father and the student, not the validity of the school's *Code de vie*.

93. Our colleague Charron J. (at para. 20), relying on *Nova Scotia (Workers' Compensation Board)* v. *Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 31, finds that since the dispute concerns the compliance of the school board's decision with the requirements of the *Canadian Charter*, an analysis of the standard of review is unnecessary and that this analysis led the Court of Appeal to an erroneous decision. With respect, we do not believe that *Martin* established a rule that simply raising an argument based on human rights makes administrative law inapplicable, or that all decisions contested under the *Canadian Charter* or provincial human rights legislation are subject to the correctness standard. In *Martin*, the correctness standard applied because the decision concerned the Workers' Compensation Board's authority to determine the validity of a provision of its enabling statute under the *Canadian Charter*.

94. Moreover, it should be noted that an administrative law approach was adopted in reviewing decisions made by, respectively, university and school authorities in *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 (“*T.W.U.*”), and *Chamberlain* v. *Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86. In those cases, the Court had to determine what standard applied to decisions on issues that unquestionably concerned values protected by the *Canadian Charter*.

95. In the case at bar, the Court must determine the standard of deference to be applied to the school board's decision, which had an impact on freedom of religion, the right to equality and the right to physical inviolability. We see no reason to depart from the approach taken in *T.W.U.* and *Chamberlain*.

96. The *Education Act*, R.S.Q., c. I-13.3, contains no privative clause limiting intervention by the courts. However, the authority to establish rules of conduct in educational institutions is clearly conferred on the governing board by s. 76, while s. 12 authorizes the council of commissioners to reconsider a decision of the governing board. The establishment of an internal appeal mechanism suggests that the legislature intended to leave the power to make decisions to local stakeholders. Furthermore, the issue in the case at bar is not limited to interpreting the scope of the protection of the student's right to freedom of religion under ss. 2(*a*) and 15 of the *Canadian Charter* and ss. 3 and 10 of the *Quebec Charter*. The school board also had to consider the right of all students to physical inviolability, and the specific circumstances of its schools. The situation in one school board's schools can be very different from that in another board's schools. The assessment of the facts is therefore of considerable importance. Where safety in the schools under its responsibility is concerned, the respondent school board unquestionably has greater expertise than does a court of law reviewing its decision. If the reasonableness standard applied in *Chamberlain*, there is even more reason to conclude that it applies in the instant case because of the factual element associated with determinations of safety requirements.

1.2.2 Reasonableness of the Decision

97. The Court of Appeal focused on the kirpan's inherent dangerousness. This approach fails to take account of the other facts that were presented. It is true that the kirpan, considered objectively and without the protective measures imposed by the Superior Court, is an object that fits the definition of a weapon. According to the evidence of psychoeducator Denis Leclerc, the kirpan would contribute to a perception that schools are unsafe because a student might [TRANSLATION] “think it necessary to have a knife at school … [in case of] an altercation with another student, since he or she knows that certain students have the right to carry knives and that other students have as a result also assumed the right to carry one without telling anyone about it”. Such a categorical approach to the kirpan and to safety in the schools disregards the risks inherent in the use of other objects that are part of the everyday school environment, such as compasses. Risks can — and should — be limited in the school environment, but they cannot realistically ever be completely eliminated.

98. The Court of Appeal's approach also disregards the strict conditions imposed by the Superior Court. No student is allowed to carry a “knife”. The young Sikh is authorized to wear his kirpan, which, while a kind of “knife”, is above all a religious object whose dangerous nature is neutralized by the many coverings required by the Superior Court. The kirpan must be enclosed in a wooden sheath and the sheath must be sewn inside a cloth envelope, which must itself be attached to a shoulder strap worn under the student's clothing. Secured in this way, the kirpan is almost totally stripped of its objectively dangerous characteristics. Access to the kirpan is not merely delayed, as was the case with the first offer made by the father and the student, it is now fully impeded by the cloth envelope sewn around the wooden sheath. In these circumstances, the argument relating to safety can no longer reasonably succeed.

99. In making its determinations, the school board must take all fundamental values into consideration, including not only security, but also freedom of religion and the right to equality. The prohibition on the wearing of a kirpan cannot be imposed without considering conditions that would interfere less with freedom of religion. In the case at bar, the school board did not sufficiently consider either the right to freedom of religion or the accommodation measure proposed by the father and the

student. It merely applied the *Code de vie* literally. By disregarding the right to freedom of religion, and by invoking the safety of the school community without considering the possibility of a solution that posed little or no risk, the school board made an unreasonable decision.

2. Inappropriateness of Constitutional Law Justification

2.1 *The Court's Prior Decisions*

100. The courts, and particularly this Court, have devoted a great deal of energy to determining the jurisdiction conferred on administrative bodies and developing the standard of review.

101. From *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, [1990] 3 S.C.R. 570, through to *Parry Sound (District) Social Services Administration Board* v. *O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, the Court has made it clear that administrative tribunals and arbitrators can decide claims or grievances based on provisions that are implicitly or explicitly incorporated into their mandates. The jurisdiction of decision makers expanded at the same time as the scrutiny of their decisions, through the standards of review, was evolving. These changes in the standards of review were meant to acknowledge the expertise and the specific nature of the work of administrative boards and should not be disregarded simply because a party argues that a constitutional justification analysis is instead appropriate. The fact that a party chooses to characterize an issue as one requiring a s. 1 analysis does not make it so. The changes in the standard of review cannot be disregarded just because the decision maker also has to deal with an argument based on human rights.

102. Decisions by administrative bodies were originally reviewed using two standards, jurisdictional error and patent unreasonableness (*Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Syndicat des employés de production du Québec et de l'Acadie* v. *Canada Labour Relations Board*, [1984] 2 S.C.R. 412; and G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 51). The Court was still confined in that straitjacket when it decided *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038. The emphasis is now on the deference owed to administrative bodies. Over the past few years, the Court has even insisted that a single analytical approach be used for all administrative decision makers: *Dr. Q* v. *College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19. Once again, this change would have little impact if administrative decisions had in addition to be assessed under s. 1 of the *Canadian Charter*. We doubt that this is what the Court had in mind in *Slaight, Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, and, later, *Dr. Q.*

103. Charron J. considers that the analysis must be based on the rules of constitutional justification because of comments made by Lamer J. in *Slaight* and by La Forest J. in *Ross*, at para. 32. In *Slaight*, Lamer J. expressed the view that an order can be analysed using the same rules as are used to analyse a law in the context of a constitutional challenge, and can thus be justified under s. 1 of the *Canadian Charter*. We do not think that the analytical approach proposed by Lamer J. is the most appropriate one, nor do we believe that this question has been settled. In our opinion, the administrative law approach must be retained for reviewing *decisions* and *orders* made by administrative bodies. A constitutional justification analysis must, on the other hand, be carried out when reviewing the validity or enforceability of a *norm* such as a law, regulation, or other similar rule of general application. We also note the words of Dickson C.J. who, writing for the majority in *Slaight*, refused to accept the approach proposed by Lamer J. as the definitive one, stating (at p. 1049):

> The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review

will be worked out in future cases.

104. We take this comment to mean that Dickson C.J. did not consider that case to be an appropriate occasion to distinguish cases in which a constitutional analysis is necessary from those in which an analysis based on the principles of administrative law should be preferred. However, in anticipation of the confusion we are now facing, he stressed that the chosen approach should not impose a more onerous burden on the government (at p. 1049):

> A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review.

105. In *Ross*, La Forest J. briefly addressed the question, and in his view this comment meant that Dickson C.J. favoured a constitutional analysis whenever constitutional values are in issue, even where a decision of an administrative body is being reviewed. However, such an approach is not imperative, as is clearly illustrated by *T.W.U.* and *Chamberlain*, both of which were decided after *Ross*.

106. Moreover, in *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 84, La Forest J. expressly declined to decide whether the Medical Services Commission's decision not to fund medical interpreter services was a law within the meaning of s. 1: he assumed this to be the case but did not rule on the issue. Such reserve would have been unnecessary had the required approach been clear.

107. While administrative bodies do have the power and the duty to take the values protected by the *Canadian Charter* into account, it does not follow that their decisions must be subjected to the justification process under s. 1 of the *Canadian Charter*.

108. More than 15 years have passed since Dickson C.J. stated that the relationship between the administrative law standard of review and the constitutional law standard would be worked out in future cases. The contrast between the approach taken by the Court in *T.W.U.* and *Chamberlain* and the one adopted by the majority in the instant case, as well as the ambiguity of the parties' arguments in the case at bar, are clear signs of the uncertainty resulting from the unified analytical approach proposed by Lamer J. We therefore consider it necessary to review Lamer J.'s approach to determine whether it is useful and appropriate.

109. The idea that norms of general application should be dealt with in the same way as decisions or orders of administrative bodies, as suggested by Lamer J. in *Slaight*, may be attractive from a theoretical standpoint. However, apart from the aesthetic appeal of this unified approach, we are not convinced that there is any advantage to adopting it. The question is not whether an administrative body can disregard constitutional values. The answer to that question is clear: it cannot do so absent an express indication that the legislature intended to allow it to do so. The question is rather how to assess an administrative body's alleged breach — in a decision — of its constitutional obligations: by means of the analytical approach under s. 1 of the *Canadian Charter* or under an administrative law standard of review? As the instant case shows, and as we stated previously, it is difficult to imagine a decision that would be considered reasonable or correct even though it conflicted with constitutional values. Given the demanding nature of the standard of judicial review to be met where an administrative body fails to consider constitutional values, the result can be no different, as Dickson C.J. noted in *Slaight*, at p. 1049; see also *Ross*, at para. 32.

110. In short, not only do we think that this Court's past decisions do not rule out the applicability of an administrative law approach where an infringement of the

Canadian Charter is argued, we also disagree with an approach that involves *starting* with a constitutional review in such a case.

111. In addition to the fact that we believe the question was not settled definitively by *Slaight* and *Ross*, there are several incongruities that prompt us to reflect upon the approach proposed in those cases. First, there is the bifurcated obligation imposed on an administrative body to justify certain aspects of its decision pursuant to an administrative law analysis while other aspects are subject to s. 1 of the *Canadian Charter*. There are also problems related to the attribution of the burden of proof and to the nature of the evidence that an administrative body with quasi-judicial functions would have to adduce to justify its decision under s. 1 in light of the fact that it is supposed to be independent of the government. However, these practical problems obscure more important legal problems, which we will now discuss. The first is the equating of a decision with a law within the meaning of s. 1 of the *Canadian Charter*, and the second is the undermining of the integrity of the tools of administrative law and the resulting further confusion in the principles of judicial review.

2.2 Meaning of the Expression "Law" in Section 1 of the Canadian Charter

112. An administrative body determines an individual's rights in relation to a particular issue. A decision or order made by such a body is not a law or regulation, but is instead the result of a process provided for by statute and by the principles of administrative law in a given case. A law or regulation, on the other hand, is enacted or made by the legislature or by a body to which powers are delegated. The norm so established is not limited to a specific case. It is general in scope. Establishing a norm and resolving a dispute are not usually considered equivalent processes. At first glance, therefore, equating a decision or order with a law, as Lamer J. does in *Slaight*, seems anomalous.

113. A law (*loi*), in the broad sense, is [TRANSLATION] "any legal or moral norm or set of norms" (H. Reid, *Dictionnaire de droit québécois et canadien* (2nd ed. 2001), at p. 344). A rule (*règle*) is a [TRANSLATION] "[p]rinciple of a general and impersonal nature that determines a line of conduct" (Reid, at p. 475). Thus, the expression "law" (*règle de droit*) used in s. 1 of the *Canadian Charter* naturally refers to a norm or rule of general application:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits <u>prescribed by law</u> as can be demonstrably justified in a free and democratic society.

114. The general nature of the expression "law" seems to emerge from the earliest judicial definitions of the expression. In *R.* v. *Therens*, [1985] 1 S.C.R. 613, at p. 645, Le Dain J. wrote the following:

> The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by <u>statute</u> or <u>regulation</u>, or results by necessary implication from the terms of a statute or regulation or from its <u>operating requirements</u>. [Emphasis added.]

115. This definition is also consistent with the meaning conveyed by the equivalent expression (*règle de droit*) used in the French version of s. 1 of the *Canadian Charter*, and by the same expression as used in both versions of s. 52(1) of the *Constitution Act, 1982*:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> 52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Professors Brun and Tremblay define "law" as follows (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at p. 944):

> [TRANSLATION] A law, within the meaning of s. 1, is an "intelligible legal standard". The notion of a legal standard relates to the unilaterally coercive and legally enforceable character of the act in question.

These authors express surprise at the unified approach suggested in *Slaight* (at p. 945):

> [TRANSLATION] It would appear that an order of a court or tribunal is also a law within the meaning of s. 1. The Supreme Court has applied the reasonableness test under s. 1 to such orders on several occasions. This means that limits on rights can arise out of individualized legal standards, which is surprising. Such orders are of course law, but to have s. 1 apply to them without reservation means that litigants may often be unable to determine the status of their fundamental rights in advance, as in the case of limits resulting from general norms, such as statutes and regulations. We would have thought that limits on rights could not result from individualized orders unless the legislation conferring authority for those orders envisaged such a possibility. [Citations omitted.]

116. Professor D. Pinard also criticizes the inconsistency of the approach proposed in *Slaight*, noting that equating a decision with a law does violence to the traditional and usual meaning of this concept: D. Pinard, "Les seules règles de droit qui peuvent poser des limites aux droits et libertés constitutionnellement protégés et l'arrêt *Slaight Communications*" (1992), 1 N.J.C.L. 79, at p. 119 (see also P. Garant, *Droit administratif* (3rd ed. 1992), vol. 3, *Les chartes*, at p. XXXV).

117. E. Mendes, "The Crucible of the Charter: Judicial *Principles* v. *Judicial Deference* in the Context of Section 1", in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (4th ed. 2005), 165, attempts to reconcile the various approaches the Court has taken in dealing with the expression "law" (at pp. 172-73):

> An analysis that could reconcile the various cases in this area is one which argues that the courts have distinguished between arbitrary action that is exercised without legal authority and discretion that is constrained by intelligible legal standards and they have held that the latter will meet the "prescribed by law" requirement. However, in *Irwin Toy*, the Supreme Court held that it would not find that a law provided an intelligible standard if it was vague. The "void for vagueness" doctrine comes from the rule of law principle that a law must provide sufficient guidance for others to determine its meaning….
>
> Put another way, the phrase "prescribed by law" requires that "the legislature [provide] an intelligible standard according to which the judiciary must do its work."

118. To include administrative decisions in the concept of "law" therefore implies that it is necessary in every case to begin by assessing the validity of the statutory or regulatory provision on which the decision is based. This indicates that the expression "law" is used first and foremost in its normative sense. Professor Mendes does not seem totally convinced that it is helpful to apply s. 1 of the *Canadian Charter* to assess a decision (at p. 173):

> One could argue that this is a form of double deference: first, to the legislature to allow them to enact provisions which, although vague, are not beyond the ability of the judiciary to interpret. Second, there is a form of self-deference that the judiciary can turn such legislated vagueness into sufficient precision and certainty to satisfy the requirements of section 1. Depending how consistent the courts are in interpreting the vastly open-textured terms of section 1, this form of self-deference may or may not be justified.

119. The fact that justification is based on the collective interest also suggests that the expression "law" should be limited to rules of general application. In *R.* v. *Oakes*,

[1986] 1 S.C.R. 103, Dickson C.J. wrote the following (at p. 136):

> The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. [Emphasis added.]

120. To suggest that the decisions of administrative bodies must be justifiable under the *Oakes* test implies that the decision makers in question must incorporate this analysis into their decision-making process. This requirement makes the decision-making process formalistic and distracts the reviewing court from the objective of the analysis, which relates instead to the substance of the decision and consists of determining whether it is correct (*T.W.U.*) or reasonable (*Chamberlain*).

121. An administrative decision maker should not have to justify its decision under the *Oakes* test, which is based on an analysis of societal interests and is better suited, conceptually and literally, to the concept of "prescribed by law". That test is based on the duty of the executive and legislative branches of government to account to the courts for any rules they establish that infringe protected rights. The *Oakes* test was developed to assess legislative policies. The duty to account imposed — conceptually and in practice — on the legislative and executive branches is not easily applied to administrative tribunals.

122. In commenting on the application of the *Canadian Charter* to the common law, McIntyre J., writing for the majority in *RWDSU* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 600, wrote the following:

> The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute.

123. The same reasoning applies in the context of administrative law. Like the courts, administrative tribunals are bound by the *Canadian Charter*, their enabling legislation and the statutes they are specifically responsible for applying. Like the courts, they cannot be treated as parties with an interest in a dispute. A tribunal's decision should not be subject to a justification process as if it were a party to a dispute.

124. Although our colleague LeBel J. does not agree with the norm-decision dichotomy (at para. 151), his reformulation of the s. 1 test as stated in *Oakes* reveals the inherent shortcomings of that test when it is applied to administrative decisions (para. 155).

125. We accordingly believe that the expression "law" should not include the decisions of administrative bodies. Such decisions should be reviewed in accordance with the principles of administrative law, which will both allow claimants and administrative bodies to know in advance which rules govern disputes and help prevent any blurring of roles.

2.3 *Analytical Consistency*

126. The mechanisms of administrative law are flexible enough to make it unnecessary to resort to the justification process under s. 1 of the *Canadian Charter* when a complainant is not attempting to strike down a rule or law of general application. The use of two different processes can even be a source of confusion for the parties.

127. To illustrate this risk of confusion, it is enough to mention that the parties in the case at bar have raised all possible arguments, that is, both those relating to constitutional justification and those based on administrative law. Given the state of the case law, no one can blame them for doing so. In Quebec, an application for judicial review of an administrative body's decision must be made to the Superior

Court, as can an application based on the *Canadian Charter* or the *Quebec Charter*. However, this is not the case in all provinces. If, as in *Ross*, the decision were bifurcated with the administrative law review on the discrimination issue being conducted separately from the analysis of the validity of the order, litigants — and reviewing courts — would very likely lose their way. It is therefore in this Court's interest to suggest consistent approaches.

128. Our comments do not mean that we believe the Court must always exclude the s. 1 approach. That approach remains the only one available to demonstrate that an infringement of a right resulting from a law, in the normative sense of that expression, is consistent with the values of a free and democratic society. However, where the issue concerns the validity or merits of an administrative body's decision, resorting to this justification process is unnecessary because of the specific tools that have been developed in administrative law. The standard of review is one of those tools. If an administrative body makes a decision or order that is said to conflict with fundamental values, the mechanisms of administrative law are readily available to meet the needs of individuals whose rights have been violated. Such individuals can have the decision quashed by obtaining a declaration that it is unreasonable or incorrect.

2.3.1 Reasonable Accommodation

129. The apparent overlap between the concepts of minimal impairment and reasonable accommodation is another striking example of the need to preserve the distinctiveness of the administrative law approach. Charron J. is of the opinion that there is a correspondence between the concepts of accommodation and minimal impairment (para. 53). We agree that these concepts have a number of similarities, but in our view they belong to two different analytical categories.

130. The case law on reasonable accommodation developed mainly in the context of the application of human rights legislation to private disputes: *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, and *Bhinder* v. *Canadian National Railway Co.*, [1985] 2 S.C.R. 561. In *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), and *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), the Court developed a mechanism that permits a balance to be struck between the requirements of the enforcement of a right or freedom and the constraints imposed by a given environment. This duty, which is more than a mere *bona fide* occupational requirement, was extended in *Meiorin* to all cases of direct or indirect discrimination, and in *Grismer* (at para. 19), to all persons governed by human rights legislation.

131. The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs.

132. The approach is different, however, in the case of minimal impairment when it is considered in the context of the broad impact of the result of the constitutional justification analysis. The justification of the infringement is based on societal interests, not on the needs of the individual parties. An administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macrocosmic. The values involved may be different. We believe that there is an advantage to keeping these approaches separate.

133. Furthermore, although the minimal impairment test under s. 1 of the *Canadian Charter* is similar to the undue hardship test in human rights law, the perspectives in the two cases are different, as is the evidence that can support the analysis. Assessing the scope of a law sometimes requires that social facts or the

potential consequences of applying the law be taken into account, whereas determining whether there is undue hardship requires evidence of hardship in a particular case.

134. These separate streams — public versus individual — should be kept distinct. A lack of coherence in the analysis can only be detrimental to the exercise of human rights. Reasonable accommodation and undue hardship belong to the sphere of administrative law and human rights legislation, whereas the assessment of minimal impairment is part of a constitutional analysis with wider societal implications.

135. The scope of the *Canadian Charter* is broad. Section 52 of the *Constitution Act, 1982* guarantees the supremacy of the Constitution of Canada. This incomparable tool can be used to invalidate laws that infringe fundamental rights and are not justified by societal goals of fundamental importance. However, where the concepts specific to administrative law are sufficient to resolve a dispute, it is unnecessary to resort to the *Canadian Charter*.

136. Constitutional values have breathed new life into the *Civil Code of Québec*, S.Q. 1991, c. 64, the common law and legislation in general. Courts and administrative tribunals must uphold them, as must Parliament and the legislatures. However, the same rules should not apply to the review of legislative action as to the review of the exercise of adjudicative authority.

3. Conclusion

137. Administrative law review has been designed to scrutinize administrative boards' decisions. Administrative law review has become a full-fledged branch of the law. Its integrity should be preserved.

138. If the *Code de vie* itself or one of its provisions had been challenged on the ground that it did not meet the minimal impairment standard, a s. 1 analysis would have been appropriate. But the appellant did not challenge it. When the validity of a rule of general application is not in question, the mechanisms of administrative law are called for. This approach makes it possible to avoid the blurring of concepts or roles and enhances the proper application of both administrative and human rights law.

139. For these reasons, we would allow the appeal and set aside the decision of the Court of Appeal.

English version of the reasons delivered by

LEBEL J. —

I. Introduction

140. As can be seen from the reasons of my colleagues Deschamps, Abella and Charron JJ., the approach to applying s. 1 of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") continues to be problematic and to raise new questions even after it has been followed for more than 20 years. The analytical framework established in *R.* v. *Oakes*, [1986] 1 S.C.R. 103, for applying the *Canadian Charter* has not settled every question or averted every problem. Thus, the case at bar once again raises the issue of how the constitutional law of civil liberties relates to quasi-constitutional legislation on fundamental rights, such as the *Charter of human rights and freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), and, in an even more subtle way, to administrative law in general. The need to find an appropriate solution therefore makes it necessary to consider how the operation of the *Canadian Charter* itself is structured, that is, what relationship exists between the guaranteed rights and the approach to limiting those rights under s. 1.

141. Although I agree with the disposition proposed by my colleagues, I remain concerned about some aspects of the problems of legal methodology raised by this case. As can be seen, the case involves diverse legal concepts that, although belonging to fields of law that are in principle separate, are still part of a single legal

system the coherence of which must be adequately ensured.

A. *Nature of the Legal Issue*

142. The fact that education legislation obliges the school board to ensure the safety of its students is not in issue in this appeal. Nor is it disputed, as regards the performance of this obligation, that the *Code de vie* (code of conduct) prohibiting the carrying or use of any type of weapon is a valid exercise of the administrative powers delegated to the board for the purpose of ensuring safety. The board's specific decision to prohibit the appellant's son from wearing a kirpan on the basis that the kirpan is a weapon is not being contested on administrative law grounds, such as abuse or excess of power.

143. Rather, the appellant contests the decision by arguing that the respondent school board's exercise of the delegated power is vitiated by the violation of one of his son's fundamental rights. He submits that the school board's refusal to agree to a reasonable accommodation measure violates his son's freedom of religion. Although the board's decision was formally authorized by a delegation of powers under the *Education Act*, R.S.Q., c. I-13.3, it was null because it was an unjustified infringement of the constitutional guarantee of freedom of religion set out in s. 2(*a*) of the *Canadian Charter* as well as of similar rights protected by the *Quebec Charter*.

144. The case as it stands before this Court therefore appears to involve an issue of constitutional law. I readily acknowledge that it is better, where problems arise in such circumstances, to begin by attempting to solve them by means of administrative law principles. I do not think that it is always necessary to resort to the *Canadian Charter* or, in the case of Quebec, the *Quebec Charter* when a decision can be reached by applying general administrative law principles or the specific rules governing the exercise of a delegated power. I had occasion to point this out in my reasons in *Blencoe* v. *British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 138. However, the context of a dispute sometimes makes a constitutional analysis unavoidable. If the reasoning proposed by my colleagues Deschamps and Abella JJ. were accepted, an administrative decision would, of course, be quashed. In this sense, the case can be said to come under administrative law. However, if the decision is quashed because of the violation of a constitutional standard, it then becomes necessary to consider the fundamental rights in issue and how they have been applied. Only in this way can it be determined whether the infringement of the constitutional standard is unjustified. In such a case, the outcome of the case depends on how the constitutional issue is resolved.

145. The proceedings before this Court bring into play, at least in theory, the constitutional guarantee of freedom of religion and the right of children and other persons at educational institutions to security, which is protected by s. 7 of the *Canadian Charter*. What relationship can be found between these sometimes competing rights when it is alleged that freedom of religion has been violated because of the failure to make reasonable accommodation? How can these rights be analysed?

146. In such circumstances, it becomes very tempting to go directly to the stage of s. 1 justification, which provides courts, tribunals and litigants with the advantage of a familiar, well-established framework. However, in applying the *Canadian Charter*, not everything can be resolved under s. 1. To begin with, it is still necessary to analyse the right in issue, define its content and, where relevant, consider the scope of competing rights. The definition of the content of a right does not correspond systematically to a limit that must be justified by means of the approach developed in the cases on s. 1.

B. *Delimitation and Reconciliation of Guaranteed Rights*

147. A question that arises in the initial stages of the review of an alleged violation of a constitutional right is that of the nature and scope of the right. What the right is

must be determined, and its boundaries must be established. Establishing these boundaries requires consideration of the guaranteed right's relationship with competing rights and sometimes leads to the necessary finding that rights come with corresponding obligations. We not only have rights, we also have obligations. How the *Canadian Charter* is applied, and the flexibility with which it is applied, are an acknowledgment of this reality. The application of the *Canadian Charter* does not always involve solely the relationship between the guaranteed rights of individuals and government action limiting those rights. The relationship is often more complex, as it could have been in the instant case. The school board's decision could have affected the competing right of all the students to security of the person under s. 7. It is therefore necessary to find approaches to applying the *Canadian Charter* that reflect the need to harmonize values and reconcile rights and obligations.

148. With respect for those who disagree, while this Court has indeed favoured resorting to the s. 1 justification process with respect to freedom of religion, its decisions have never definitively established that this approach is the only way to reconcile competing or conflicting fundamental rights. This is not what emerges from the Court's decisions. Nor would it be desirable. The complexity of the situations to which the *Canadian Charter* applies is unsuited to simplistic formulas, as it is to rigid classifications.

149. Case law developed over 20 years or more can no doubt be used to support any opinion or position. A variety of quotations can be taken from this Court's successive decisions. Attempts can be made to distinguish those decisions or to reconcile them. Doing this would probably not lead to the conclusion that the Court intended to create a straitjacket in which it would be confined when trying to resolve issues relating to the application of the *Canadian Charter* fairly and efficiently. The Court has not ruled out the possibility of reconciling or delimiting rights before applying s. 1. This is shown by two cases decided more than 10 years apart, *Young* v. *Young*, [1993] 4 S.C.R. 3, and a very recent decision, *Montréal (City)* v. *2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, at paras. 56-57 and 60-61, the first of which deals with freedom of religion and the second with freedom of expression.

150. Moreover, this Court has never definitively concluded that the s. 1 justification analysis must be carried out mechanically or that all its steps are relevant to every situation. *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, is one case that recognizes the flexibility of the *Oakes* analysis and the usefulness of that flexibility. In *Dagenais*, the Court reviewed common law rules that affected two protected rights, the right to a fair trial and freedom of expression, and used a simplified approach that was based on the balancing of rights and dispensed with certain steps of the now classical approach.

151. This flexibility also makes it possible to apply the *Canadian Charter* and its values to a wide range of administrative acts without necessarily being confined by the norm-decision duality. Although appealing from the standpoint of legal theory, this dualism underestimates the problems that arise in applying the classifications it invites. It also entails a risk of narrowing the scope of constitutional review of compliance with the *Canadian Charter* and its underlying values. In this regard, I share the concerns expressed by my colleague Charron J. in her reasons.

152. The approaches followed to apply the *Canadian Charter* must be especially flexible when it comes to working out the relationship between administrative law and constitutional law. In verifying whether an administrative act is consistent with the fundamental normative order, recourse to administrative law principles remains initially appropriate for the purpose of determining whether the adopted measure is in conformity with the powers delegated by legislation to school authorities. If it is authorized by that delegation, the exercise of the discretion to adopt safety measures

to protect the public and students must then be assessed in light of constitutional guarantees and the values they reflect.

153. Where the exercise of such a discretion has an impact on the relationship between competing constitutional rights, those rights can be reconciled in two ways. The first approach involves defining the rights and how they relate to each other, and the second consists of the justification process developed in the cases on s. 1. In the case at bar, the first approach can be dispensed with. The evidence does not show a *prima facie* infringement of the right to security of the person. Wrapped as it would be, the kirpan does not seem to be a threat to anyone. It is therefore necessary to turn to the second approach.

154. In attempting to justify the infringement under s. 1 of the *Canadian Charter*, as we know, the school board bears the burden of proving that prohibiting the kirpan is a reasonable limit on the constitutional right of the appellant's son to protection of his freedom of religion. In such an analysis, it is certainly necessary to bear in mind the importance of the obligations of safety and protection that school authorities have, under the law of civil liability and education legislation, to their students and also to third persons in respect of acts committed by students (P. Garant, *Droit scolaire* (1992), at pp. 319-45; *Civil Code of Québec*, S.Q. 1991, c. 64, art. 1460). It is possible that a justification could be found in the need to fulfil such obligations.

155. Moving on now to the application of s. 1, it must be asked whether the analytical approach established in *Oakes* need be followed in its entirety. In the case of an individualized decision made pursuant to statutory authority, it may be possible to dispense with certain steps of the analysis. The existence of a statutory authority that is not itself challenged makes it pointless to review the objectives of the act. The issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed. Reasonable accommodation that would meet the requirements of the constitutional standard must be considered at this stage and in this context. In the case at bar, I must conclude that the respondent school board has not shown that its prohibition was justified and met the constitutional standard. I therefore agree with the conclusion proposed by my colleagues.

Appeal allowed with costs.

Solicitors for the appellants: Grey, Casgrain, Montréal.

Solicitor for the respondent Commission scolaire Marguerite-Bourgeoys: François Aquin, Montréal.

Solicitors for the respondent the Attorney General of Quebec: Bernard, Roy & Associés, Montréal.

Solicitors for the intervener the World Sikh Organization of Canada: Peterson, Stark, Scott, Surrey, British Columbia.

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Ontario Human Rights Commission: Ontario Human Rights Commission, Toronto.

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[1] Major J. took no part in the judgment.

Annexure P-2

CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE: CCT 51/06

MEC FOR EDUCATION: KWAZULU-NATAL	First Applicant
THULANI CELE: SCHOOL LIAISON OFFICER	Second Applicant
ANNE MARTIN: PRINCIPAL OF DURBAN GIRLS' HIGH SCHOOL	Third Applicant
FIONA KNIGHT: CHAIRPERSON OF THE GOVERNING BODY OF DURBAN GIRLS' HIGH SCHOOL	Fourth Applicant
versus	
NAVANEETHUM PILLAY	Respondent
with	
GOVERNING BODY FOUNDATION	First Amicus Curiae
NATAL TAMIL VEDIC SOCIETY TRUST	Second Amicus Curiae
FREEDOM OF EXPRESSION INSTITUTE	Third Amicus Curiae

Heard on : 20 February 2007
Decided on : 5 October 2007

JUDGMENT

LANGA CJ:

Introduction

[1] What is the place of religious and cultural expression in public schools? This case raises vital questions about the nature of discrimination under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) as well as the extent of protection afforded to cultural and religious rights in the public school setting and possibly beyond. At the centre of the storm is a tiny gold nose stud.

The Parties

[2] The first and second applicants are the Member of the Executive Council for Education in KwaZulu-Natal and the School Liaison Officer for the KwaZulu-Natal Education Department. I will refer to them collectively as "the Department". The third and fourth applicants are the headmistress of Durban Girls' High School, Mrs Martin, and Mrs Knight, the Chairperson of the Governing Body of that School. I will refer to the two collectively and the Durban Girls' High School itself interchangeably as either "the School" or "DGHS". Any reference to "the applicants" is to all four applicants.

[3] The respondent is Ms Navaneethum Pillay who appears on behalf of her minor daughter, Sunali Pillay (Sunali) who was, until the end of last year, a learner at DGHS. Ms Pillay runs a holistic centre known as Yabba Dabba Do! Centre of Creativity.

Factual Background

[4] Sunali applied for admission to DGHS for the 2002 school year. Her mother signed a declaration in which she undertook to ensure that Sunali complied with the Code of Conduct of the School (the Code). Sunali was admitted to the School.

[5] During the school holidays in September 2004 Ms Pillay gave Sunali permission to pierce her nose and insert a small gold stud. When she returned to School after the holidays on 4 October 2004, Ms Pillay was informed that her daughter was not allowed to wear the nose stud as it was in contravention of the Code. The relevant part of the Code reads:

> "Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wrist watch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn."

[6] Mrs Martin told Ms Pillay that Sunali had received a laminated card to indicate that she had been permitted to wear the nose stud only until the end of October 2004. This was in order to allow the piercing to heal so that the nose stud would be capable of being inserted and removed on a daily basis. October came and went and Sunali did not remove the nose stud. When the new academic year of 2005 commenced, Sunali returned to school with the nose stud still in place.

[7] The School then requested Ms Pillay to write a letter motivating why Sunali should be allowed to continue to wear the stud. In a letter dated 1 February 2005, Ms Pillay apologised for not having discussed the issue of Sunali's nose stud with Mrs Martin beforehand. She explained that she and Sunali came from a South Indian family that intends to maintain cultural identity by upholding the traditions of the women before them. The insertion of the nose stud was part of a time-honoured family tradition. It entailed that a young woman's nose was pierced and a stud inserted when she reached physical maturity as an indication that she had become eligible for marriage. The practice today is meant to honour daughters as responsible young adults. When Sunali turned sixteen, her grandmother would replace the gold stud with a diamond stud. She claimed that this was to be done as part of a religious ritual to honour and bless Sunali. Ms Pillay made it clear that the wearing of the nose stud was not for fashion purposes but as part of a long-standing family tradition and for cultural reasons.

[8] Following a meeting with the Governing Body on 2 February 2005, Mrs Martin consulted with recognised experts in the field of human rights and Hindu tradition in order to determine the School's position. She was advised that the School was not obliged to allow Sunali to wear the nose stud. The Governing Body accepted this advice and, on 3 March 2005, Mrs Martin informed Ms Pillay of the decision not to permit Sunali to wear the nose stud.

[9] Ms Pillay was aggrieved by the Governing Body's decision. A stream of increasingly acrimonious correspondence ensued between her and Mrs Martin relating to the reasons for the decision and the steps that would be taken as a result. On 8 March 2005 Ms Pillay wrote to the Department of Education seeking clarity about its position, since she believed that the Governing Body's decision violated her daughter's constitutional right to practice her religious and cultural traditions. In May 2005, however, Ms Pillay was informed that the MEC supported the School's approach. The School decided that if Sunali did not remove the nose stud by 23 May 2005 she would face a disciplinary tribunal. Sunali did not remove the nose stud and a hearing by the disciplinary tribunal was then re-scheduled for 18 July.

[10] The disciplinary hearing in fact never took place as Ms Pillay took the matter to the Equality Court on 14 July and obtained an interim order restraining the school from interfering, intimidating, harassing, demeaning, humiliating or discriminating against Sunali. The Equality Court hearing for confirmation of the interim order was set down for 29 September 2005.

The Equality Court hearing

[11] The issue before the Equality Court was whether the School's refusal to permit Sunali to wear the nose stud at school was an act of unfair discrimination in terms of the Equality Act. The evidence presented by Ms Pillay amounted to the following: the practice of wearing the nose stud is a tradition that is some 4000 to 5000 years old, hailing predominantly from the south of India. When a girl comes of age, a stage

marked by the onset of her menstrual cycle, the family honours the fact of her becoming a young woman. As part of the ritual, a prayer is performed and her nose is pierced on the left side for the insertion of the nose stud. The ritual also serves the purpose of endowing daughters with jewellery since a woman's dowry in patriarchal society went to her husband and all she could claim as her own was her jewellery. Further, according to Ayurvedic medicine, the medicinal branch of the Vedas, the left side of the nose is directly related to fertility and childbearing. Ms Pillay stressed that the practice of wearing the nose stud or ring plays an important part in many religions and is not limited to Hinduism. On the other hand, Hinduism has a variety of sects that observe different practices.

[12] Mrs Martin, on behalf of the School, made the point that the Code had been drawn up in consultation with the learners' representative council, parents and the governing body. It is the practice of the School that exemptions, based on religious considerations, are made from the provisions of the Code. Asked why an exemption was not granted to Sunali on the basis of the religious reasons given by Ms Pillay, she stated that Ms Pillay had made it clear in her letter that the nose stud was worn as a personal choice and tradition and not for religious reasons.

[13] Dr Vishram Rambilass, called by the School as an expert in Hindu religion, told the Court that the practice in question is an expression of Hindu culture. It was not obligatory, nor was it a religious rite. Under cross-examination, however, he conceded that it was difficult to distinguish between Hindu culture and Hindu religion

and described the situation as a "universal dilemma of all cultures and religions". He stated further that it is difficult to pinpoint what constitutes Hinduism, since there are various schools that have developed very differently.

[14] The Equality Court held that although a prima facie case of discrimination had been made out, the discrimination was not unfair. It characterised the purpose of the Code as being "to promote uniformity and acceptable convention amongst the learners" and accepted Mrs Martin's evidence that undue permissiveness could result in a conflict with the Code, "thereby creating a disorderly environment." In reaching its conclusion the Court took into account several factors namely: Ms Pillay had agreed to the Code when she took Sunali to the School; the Code was devised by the School in consultation with the students, parents and educators; and also that Ms Pillay had failed to consult with the School before sending Sunali to it with the nose stud. The Court held that no impairment to Sunali's dignity or of another interest of a comparably serious nature had occurred and concluded that DGHS had acted reasonably and fairly. In addition, the Court held that any harm that may have been caused "was as a result of [Sunali's] and her mother's own doing." This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court.

The High Court

[15] In its judgment, the High Court[1] (Kondile J with Tshabalala JP concurring) held that the conduct of the School was discriminatory against Sunali and was unfair in terms of the Equality Act. It held that our society prohibits both direct and indirect discrimination and aims to eliminate entrenched inequalities. It held further that the Equality Court had failed to consider properly the impact of the Constitution and the Equality Act on the Code and that both religion and culture are equally protected under the Equality Act and the Constitution. Because the nose stud had religious and/or cultural significance to Sunali, the failure to treat her differently from her peers amounted to withholding from her "the benefit, opportunity and advantage of enjoying fully [her] culture and/or of practising [her] religion" and therefore constituted indirect discrimination.

[16] The High Court rejected arguments by the applicants that Sunali had waived her right to insist on wearing the nose stud; that she could not complain about the prohibition because the Code had been the product of extensive consultations; and that because Sunali had failed to testify on her own behalf her religious or cultural belief in relation to the nose stud had not been established. The High Court held that Sunali's failure to testify was irrelevant as her mother had acted on her behalf, in her role as a parent and as a representative of the "Hindu/Indian" community.

[17] In reaching the conclusion that the conduct of the School amounted to unfair discrimination, the High Court noted that Sunali was part of a group that had been

[1] *Pillay v MEC for Education, KwaZulu-Natal, and Others* 2006 (6) SA 363 (EqC); 2006 (10) BCLR 1237 (N).

historically discriminated against and that the School's contention that its rule prohibiting the wearing of jewellery was a general one applicable to every learner served only to prolong that discrimination. It highlighted the vulnerable and marginalised status of Hindus and Indians in South Africa's past and present, the demeaning effect of denying Sunali's religion — and hence her identity — and the systemic nature of the discrimination. It held that the insistence by the School on uniformity or similar treatment was inappropriate as it failed to dismantle structures of discrimination. The Court held further that the desire to maintain discipline in the School was not an acceptable reason for the prohibition as there was no evidence that wearing the nose stud had a disruptive effect on the smooth-running of the School. The High Court found that, in any event, there were less restrictive means to achieve the laudable objectives of the School as it could simply explain to its learners that Sunali's religion or culture entitles her to wear the nose stud.

[18] The High Court accordingly set aside the decision and order of the Equality Court and replaced it with an order declaring "null and void" the School's "decision, prohibiting the wearing of a nose stud, in school, by Hindu/Indian learners". The School now applies for leave to appeal to this Court against the decision of the Pietermaritzburg High Court.

Proceedings in this Court

[19] The application for leave to appeal against the decisions of the Pietermaritzburg High Court was set down for hearing in this Court on 2 November 2006. The hearing

was however postponed at the request of Ms Pillay because Sunali was about to write her examinations. The hearing eventually took place on 20 and 21 February 2007.

[20] The Department then lodged a notice purporting to withdraw from the case on the basis that the matter had become moot on two grounds. Firstly, Sunali would no longer be at school by the time the case was decided and, secondly, new guidelines[2] on school uniforms had been issued by the National Department of Education after the institution of the case. The Department contended that any future case on the issue would have to be brought in terms of the new guidelines and any decision in the present case would no longer be relevant.

[21] New directions specifically required the parties to address the issue of mootness as well as the merits. The Department was directed to file written submissions notwithstanding their purported withdrawal.

[22] Three institutions were admitted as amici curiae. These were: the Governing Body Foundation (GBF); the Natal Tamil Vedic Society Trust (NTVS); and the Freedom of Expression Institute (FXI). The GBF, a voluntary association of 500 public school governing bodies with a total population of over 300 000 learners, generally supported the appeal. It stated that it interacts with government on issues relating to education and believes that the High Court judgment will have significant consequences for all schools, including its members and accordingly it has a keen

[2] The National Guidelines on School Uniforms were issued in terms of the South African Schools Act 84 of 1996 and published in Government Gazette 28538 GN 173, 23 February 2006.

interest in the case. It has conducted a survey of its member schools to determine their opinion on the nose stud issue and the responses indicate that the majority of schools do not allow nose studs to be worn. In the view of the member schools, the wearing of a nose stud pursuant to the High Court's decision would impact negatively on discipline in their schools.

[23] The NTVS had been admitted as amicus curiae in the High Court and applied for that status again in this Court. It is a religious and cultural organisation with origins as far back as 1957. Its members are Tamil speakers and its aims are to "foster the Tamil language and culture and the religious practices of Tamil South Africans." The NTVS also has a more general interest in the promotion of cultural and religious diversity. The NTVS supported Sunali's right to wear the nose stud as part of her Tamil heritage.

[24] Finally, the FXI, a non-profit organisation with the stated objective of promoting freedom of expression in South Africa averred that it is particularly concerned with the development of South African law relating to freedom of expression. Its interest in the matter involved highlighting freedom of expression issues raised by the case in addition to the equality issues already raised by the parties.

Submissions before this Court

[25] The Department contended that the High Court erred in characterising the matter as an equality claim within the contemplation of the Equality Act. It argued

that there can be no case for discrimination where it cannot be said that there is a "dominant group" that is treated better than Sunali. The complaint should rather have been brought as a freedom of religion claim and recourse to the Equality Court was, according to the applicants, entirely misplaced. The applicants submitted that in any event, the Code cannot be said to be discriminatory as it affected all religions equally. The School further criticised the failure to lead Sunali's evidence as, in their view, this makes it impossible to determine if discrimination had occurred.

[26] It was further contended that in the event of it being found that there was discrimination against Sunali, such discrimination was not unfair. In that context the applicants pointed to a number of factors, namely: that the Code was compiled on the basis of prior consultations with all relevant parties; the fact that Ms Pillay had agreed to the Code; the popularity of nose studs outside of Sunali's culture; the importance of uniforms in maintaining discipline; the need to give deference to school authorities; and the fact that the ban on the wearing of a nose stud could only have a limited effect on Sunali's culture since she was at liberty to wear the nose stud when she was not at school.

[27] These contentions were substantially supported by the GBF. The Department did not persist with its contention that the issue before the Court was moot; on the other hand, the School and the GBF argued that the matter was not moot because of its impact on all other schools. It also disputed the claim that Sunali formed part of an identifiable culture.

[28] For her part, Ms Pillay took the view that the issue is moot because Sunali was no longer a learner at DGHS and, according to her, the new guidelines have changed the legal landscape. She also submitted that under the Equality Act it was unnecessary to show a comparator or a dominant group. As long as a rule imposes disadvantage, it can be discriminatory. She contended further that Sunali's failure to testify was irrelevant as it was not raised when Ms Pillay was cross-examined in the Equality Court. Ms Pillay downplayed the need to accord deference to the school authorities as well as the role of consultation. She argued that there was no evidence that refusing Sunali an exemption improved discipline at the School. While her primary case was based on equality, she also sought to assert the rights to freedom of expression and freedom of religion as independent claims.

[29] The NTVS and the FXI submitted argument together. They emphasised the importance of culture. While accepting that culture and religion differ, they argued that once a cultural practice is established, it should be treated exactly the same as a religious practice. They also took issue with the reliance placed by the School and the GBF on the perception of the nose stud as a desirable fashion accessory. They further argued that freedom of expression could be considered as a separate right but that even if it could not, it was still relevant in interpreting the Equality Act. They contended that Sunali's right to freedom of expression had been unjustifiably limited because Sunali's nose stud posed no risk of substantial disruption to school activities.

Leave to Appeal

[30] The parties were agreed that the case raises a constitutional issue; it was also not disputed that the applicants have reasonable prospects of success on appeal. There are, however, two issues that must be examined in order to determine whether leave to appeal should be granted. The first is the fact that the Supreme Court of Appeal has been bypassed and the second is the issue of mootness. The central enquiry is whether it is in the interests of justice for leave to appeal to be granted.

[31] It is clear that the issues in this case involve matters that must eventually be decided by this Court. The parties themselves have made this patently clear. These issues have been fully canvassed in two courts. We have also had the benefit of comprehensive argument, presented by the parties and the three amici curiae. In my view, it is not in the interests of justice in this case to require the parties to incur the additional expense of going to the Supreme Court of Appeal before the matter is decided by this Court.

[32] With regard to mootness, this Court has held that:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."[3]

[3] *National Coalition for Gay and Lesbian Equality and Others v Minister for Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18. See also *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15.

Sunali is no longer at DGHS and the issue is therefore moot. This Court has however held that it may be in the interests of justice to hear a matter even if it is moot if "any order which [it] may make will have some practical effect either on the parties or on others."[4] The following factors have been held to be potentially relevant:

- the nature and extent of the practical effect that any possible order might have;[5]
- the importance of the issue;[6]
- the complexity of the issue;[7]
- the fullness or otherwise of the argument advanced;[8] and
- resolving disputes between different courts.[9]

[33] I do not agree with Ms Pillay's contention that the new guidelines that have been issued by the Department have altered the "legal landscape" in which these questions must be considered. The implication of this submission is that any decision this Court may make will have no relevance as it will have been decided under a legal regime that is no longer applicable.

[4] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11. See also *AAA Investments Pty (Ltd) v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27.

[5] *Langeberg* above n 4 at para 11.

[6] Id.

[7] Id.

[8] Id.

[9] *AAA Investments* above n 4 at para 27.

[34] The guidelines are not mandatory but are exactly what they purport to be – a guide. The following features all demonstrate the non-binding nature of the guidelines: section 8(3) of the South African Schools Act[10] which empowers the Minister to make the guidelines states that they are for the "consideration" of schools; while some of the regulations are couched in mandatory language,[11] the vast majority – including those relating to religious and cultural diversity – use the suggestive word "should"; the section on religious and cultural diversity is solely to "assist" schools in determining their uniform policy;[12] when a governing body adopts a new code, the only requirement is that it "should make [its] decision in terms of these guidelines";[13] and the strongest obligation that exists on governing bodies is that they must "consider" the guidelines.[14] That hardly alters the "legal landscape" as schools, including DGHS, might consider the guidelines and lawfully decide to adopt exactly the same provision that is currently before us. Any aggrieved party would be entitled to bring exactly the same challenge. That Ms Pillay might have an additional challenge based on a failure to consider the guidelines does not seem relevant.

[35] As already noted, this matter raises vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond. The issues are both important and complex, as is evidenced by the varying

[10] Act 84 of 1996.

[11] For example: "The uniform *must* allow learners to participate in school activities with comfort, safety and decorum" (regulation 11); "*No* child may be refused admission to a school because of an inability to obtain or wear the school uniform" (regulation 14). (Emphasis added.)

[12] Regulation 29.

[13] Regulation 23.

[14] Preamble to guidelines.

approaches of the courts below as well as courts in foreign jurisdictions. Extensive argument has been presented, not only from the parties but from three amici curiae. There is accordingly no doubt that the order, if the matter is heard, will have a significant practical effect on the School and all other schools in the country, although it will have no direct impact on Sunali. It is therefore in the interests of justice to grant leave to appeal.

What is at issue?

[36] The first question is whether the discrimination complained of by Ms Pillay flows from the Code or from the decision of the School to refuse an exemption. Ms Pillay specifically identifies the decision of the School as the problem, but the major part of the arguments addressed to the Court by all the other parties focused on the discriminatory nature of the Code. To my mind, it is the combination of the Code and the refusal to grant an exemption that resulted in the alleged discrimination, not the one or the other in isolation.

[37] There are two problems with the Code, which operate together. The first is that it does not set out a process or standard according to which exemptions should be granted, for the guidance of learners, parents and the Governing Body. The School has itself developed a tradition of granting exemptions in certain circumstances. The second problem is the fact that the jewellery provision in the Code does not permit learners to wear a nose stud and accordingly required Sunali to seek an exemption in the first place.

[38] It is true, however, that even taking these flaws into account, this dispute would never have arisen if the School had granted an exemption to Sunali. Whether the policy according to which that decision was taken was part of the Code, or existed only as the Governing Body's tradition, would ultimately have made no difference. Nonetheless, it is still necessary for the Court to address the underlying problems of the Code. A properly drafted code which sets realistic boundaries and provides a procedure to be followed in applying for and the granting of exemptions, is the proper way to foster a spirit of reasonable accommodation in our schools and to avoid acrimonious disputes such as the present one. In sum, the problem is both the decision to refuse Sunali an exemption and the inadequacies of the Code itself.

The correct approach to "discrimination" under the Equality Act

[39] Unfair discrimination, by both the State and private parties, including on the grounds of both religion and culture, is specifically prohibited by sections 9(3) and (4) of the Constitution, which read:

> "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

The Equality Act is clearly the legislation contemplated in section 9(4) and gives further content to the prohibition on unfair discrimination.[15] Section 6 of the Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the State and private parties on the same grounds including, of course, religion and culture.[16] Although this Court has regularly considered unfair discrimination under section 9 of the Constitution, it has not yet considered discrimination as prohibited by the Equality Act. Two preliminary issues about the nature of discrimination under the Act therefore arise.

[40] The first is that claims brought under the Equality Act must be considered within the four corners of that Act. This Court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right.[17] To do so would be to "fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights."[18] The same principle applies to the Equality Act. Absent a direct

[15] See the long title of the Equality Act which reads:

> "To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith."

[16] Section 6 reads: "Neither the State nor any person may unfairly discriminate against any person." The "prohibited grounds" on which discrimination is barred, are defined in section 1 which repeats the list in section 9(3) of the Constitution.

[17] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 96 (Chaskalson CJ) and 434-437 (Ngcobo J); *South African National Defence Union v Minister of Defence and Others* CCT 65/06, 30 May 2007, as yet unreported at para 51. See also *NAPTOSA and Others v Minister of Education, Western Cape, and Others* 2001 (2) SA 112 (C) at 123I-J; 2001 (4) BCLR 388 (C) at 396I-J.

[18] *SANDU* above n 17 at para 52. See also *New Clicks* above n 17 at para 96. Section 7(2) of the Constitution reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.

[41] The second issue is how the definition of "discrimination" in the Equality Act should be interpreted. Section 1 of the Equality Act defines "discrimination" as:

> "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—
>
> (a) imposes burdens, obligations or disadvantage on; or
>
> (b) withholds benefits, opportunities or advantages from,
>
> any person on one or more of the prohibited grounds".

[42] The School, the GBF and, to a lesser extent, the Department argued that in this case, there was no comparator in the form of a group that was treated better than Sunali. They contended that although a comparator is not specifically mentioned in the definition in the Equality Act, it should be implied as a requirement. Absent a comparator therefore, no discrimination could be established. Ms Pillay's response to this line of reasoning spawned a deeper debate about the extent to which the Act must be informed by section 9 of the Constitution and this Court's interpretation of that section.

[43] I deal with that deeper problem first and then turn to the specific question of the need for a comparator. Section 39(2) of the Constitution makes it clear that the Act must be interpreted in light of the "spirit, purport and objects of the Bill of Rights" which includes section 9. That does not mean that the Act must be interpreted to restate the precise terms of section 9. The legislature, when enacting national

legislation to give effect to the right to equality, may extend protection beyond what is conferred by section 9. As long as the Act does not decrease the protection afforded by section 9 or infringe another right, a difference between the Act and section 9 does not violate the Constitution. It would therefore not be a problem if the definition of discrimination in the Act included forms of conduct not covered by section 9 as long as the prohibition of those forms of conduct conformed to the Bill of Rights.

[44] Fortunately, on the approach I adopt below, the final determination of the more direct question of whether the Equality Act always requires a comparator can be left for another day. I hold that there is an appropriate comparator available in this case. It is those learners whose sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised. The ground of discrimination is still religion or culture as the Code has a disparate impact on certain religions and cultures. The norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them. In my view, the comparator is not learners who were granted an exemption compared with those who were not.[19] That approach identifies only the direct effect flowing from the School's decisions and fails to address the underlying indirect impact inherent in the Code itself.

[19] This is the conclusion reached by O'Regan J at para 164 below.

[45] It follows, therefore that the Code coupled with the decision to refuse Sunali an exemption will be discriminatory if they imposed a burden on her or withheld a benefit from her. In the circumstances of this case that will require a showing that Sunali's religious or cultural beliefs or practices have been impaired. It is to that question that I now turn.

Discrimination

[46] The prohibition of discrimination on the basis of religion or culture in terms of the Equality Act and section 9 of the Constitution is distinct from the protection of religion and culture provided for by sections 15[20] and 30[21] of the Constitution. The two rights may overlap, however, where the discrimination in question flows from an interference with a person's religious or cultural practices.[22] Therefore, in order to

[20] Section 15 reads:

> "**Freedom of religion, belief and opinion.—**
> (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
> (2) Religious observances may be conducted at state or state-aided institutions, provided that—
> (a) those observances follow rules made by the appropriate public authorities;
> (b) they are conducted on an equitable basis; and
> (c) attendance at them is free and voluntary.
> (3) (a) This section does not prevent legislation recognising—
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

[21] Section 30 reads:

> "**Language and Culture.—**
> Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[22] Discrimination on religious or cultural grounds might also be present where one religion or culture is treated in an inferior manner, even though the treatment does not interfere with their religious or cultural beliefs or practices.

establish discrimination in this case, Ms Pillay must show that the School in some way interfered with Sunali's participation in or practice or expression of her religion or culture. This inquiry is similar to an inquiry under sections 15 or 30, but it is not identical because the Court must go on to consider whether the discrimination, if any, was unfair.

[47] The alleged grounds of discrimination are religion and/or culture. It is important to keep these two grounds distinct. Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.

[48] With that brief introduction in mind, I now address the facts of this specific case. The first question is whether Sunali is part of an identifiable religion or culture. It was not contended that Hinduism is not a religion or that Sunali is not a Hindu. The GBF argued however that Sunali did not show that she was part of an identifiable culture. While I do not propose to provide a comprehensive definition of culture, it is necessary to consider the matter briefly. The GBF supported Lord Fraser's

understanding of "ethnic group" in the United Kingdom's Race Relations Act 1976[23] as being an appropriate starting point to define "culture". Lord Fraser held that for a group to constitute an "ethnic group" it must at least have a long shared history and a cultural tradition of its own, including family and social customs and manners. Other relevant factors would include a common geographical origin; a common language; a common literature peculiar to the group; and a common religion different from that of neighbouring groups or from the general community surrounding it.[24]

[49] While foreign jurisprudence is useful, the context in which a particular pronouncement was made needs to be carefully examined.[25] Lord Fraser's remarks were crafted in the specific context of the English Race Relations Act and concerned legislation specifically directed at race and ethnicity, not at the concept of culture, broadly understood. They are accordingly, in my view, not a reliable guide in interpreting the Equality Act. In addition, discrimination on the basis of race, ethnic or social origin, religion and language is already prohibited by the Constitution and the Equality Act. Our understanding of "culture" must therefore extend beyond the limits of those terms which seem to have been the focus of Lord Fraser's definition. At the same time, if too wide a meaning is given to culture, "the category becomes so

[23] *Mandla and another v Dowell Lee and another* [1983] 1 All ER 1062 (HL) at 1066j-1067d.

[24] Id.

[25] See, for example, *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 133 (Kriegler J); *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 33.

broad as to be rather useless for understanding differences among identity groups."[26] (Footnote omitted.)

[50] The outer limits of culture fortunately do not concern us in this case. Even on the most restrictive understanding of culture, Sunali is part of the South Indian, Tamil and Hindu groups which are defined by a combination of religion, language, geographical origin, ethnicity and artistic tradition. Whether those groups operate together or separately matters not; combined or separate, they are an identifiable culture of which Sunali is a part.

[51] Next, we need to consider the religious and cultural significance of the nose stud. There were two interrelated areas of contention. The first was whether a claim that a practice has religious or cultural significance should be determined subjectively or objectively. The second concerned the absence of any evidence from Sunali herself.

[52] It is accepted both in South Africa[27] and abroad[28] that, in order to determine if a practice or belief qualifies as religious a court should ask only whether the claimant professes a sincere belief. There is however no such consensus concerning cultural

[26] Gutmann *Identity in Democracy* (Princeton University Press, Princeton 2003) at 38.

[27] *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) (*Prince II*) at para 42. The majority in *Prince II* did not express any disagreement with this part of Ngcobo J's judgment.

[28] See, for example, *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (SCC) at para 43; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 at paras 70-71; BVerfGE 33, 23 at 29; *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981) at 715-716; *United States v Ballard* 322 US 78 (1944) at 86-87; and *In re Chikweche* 1995 (4) SA 284 (ZSC) at 289J.

practices and beliefs. There was much argument in this Court that because culture is inherently an associative practice, a more objective approach should be adopted when dealing with cultural beliefs or practices. It is unnecessary in this case to engage too deeply in that debate as both the subjective and objective evidence lead to the same conclusion. It is however necessary to make two points.

[53] Firstly, cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are to those more inclined to find meaning in a higher power than in a community of people. The notion that "we are not islands unto ourselves"[29] is central to the understanding of the individual in African thought.[30] It is often expressed in the phrase *umuntu ngumuntu ngabantu*[31] which emphasises "communality and the inter-dependence of the members of a community"[32] and that every individual is an extension of others. According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons".[33] This thinking emphasises the importance of community to individual identity and

[29] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 37.

[30] A recognition of the importance of the community to the individual is by no means unique to African thought. See, for example, Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Claredon Press, Oxford 1995) at 89-90 quoting and discussing Margalit and Raz "National Self Determination" (1990) *Journal of Philosophy* 439 at 447-449; Donders *Towards a Right to Cultural Identity?* (Intersentia, Antwerpen 2002) especially at 30-31 and Almqvist *Human Rights, Culture and the Rule of Law* (Hart Publishing, Oxford and Portland 2005) especially at 40-42.

[31] This translates literally as "a person is a person through other people".

[32] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 163 (Ngcobo J).

[33] Gyekye *Person and Community: Ghanaian Philosophical Studies* (1992) reprinted as "Person and Community in African Thought" in Coetzee and Roux (eds) *Philosophy from Africa: A Text with Readings* (Oxford University Press, Cape Town 1998) at 321.

hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity.[34] Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.

[54] Secondly, while cultures are associative, they are not monolithic. The practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture: one may express their culture through participation in initiation rites, another through traditional dress or song and another through keeping a traditional home. While people find their cultural identity in different places, the importance of that identity to their being in the world remains the same. There is a danger of falling into an antiquated mode of understanding culture as a single unified entity that can be studied and defined from outside. As Martin Chanock warns us:

> "The idea of culture derived from anthropology, a discipline which studied the encapsulated exotic, is no longer appropriate. There are no longer (if there ever were) single cultures in any country, polity or legal system, but many. Cultures are complex conversations within any social formation. These conversations have many voices."[35]

[34] See, for example, *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 59 and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 26.

[35] Chanock "Human Rights and Cultural Branding: Who Speaks and How" in An-Na'im *Cultural Transformation and Human Rights in Africa* (Zed Books, London 2002) at 41. See also Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, Princeton 2002) especially at 3-9.

Cultures are living and contested formations. The protection of the Constitution extends to all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation.

[55] The second debate I mentioned earlier related to the absence of any evidence from Sunali. The School argued that Sunali's failure to testify in the Equality Court or to provide any affidavit renders it impossible for a court to determine what her beliefs are and this Court is accordingly precluded from making a finding of discrimination.

[56] It is always desirable, and may sometimes be vital, to hear from the person whose religion or culture is at issue. That is often no less true when the belief in question is that of a child. Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In *Christian Education South Africa v Minister of Education*[36] this Court held, in the context of a case concerning children, that their

> "actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure."[37]

That is true for this case as well. The need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age who should be increasingly taking responsibility for their own actions and beliefs.

[36] 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

[37] Id at para 53.

[57] However, as an analysis of the evidence shows, Sunali's failure to testify is not fatal to Ms Pillay's case. It is important to note that the School does not directly challenge the veracity of Ms Pillay's testimony; it simply argues that we should have heard Sunali as well. I agree with Ms Pillay that any difficulties they had with her testimony should have been raised in the Equality Court during cross-examination, and not for the first time on appeal. It is possible that if Ms Pillay had been challenged on whether she correctly represented Sunali's belief, she would have called Sunali, who was present in court, as a witness.

[58] In any event, we have the specific admission of Mrs Martin that the nose stud has cultural significance to Sunali although she denies it has independent religious significance. And we know how Sunali acted. Although when Mrs Martin first confronted her about the nose stud she agreed to remove it, she consistently thereafter defied the will of the School in order to adhere to her belief. The initial failure can easily be explained as a young woman uncertain about the consequences of standing up against the imposing authority of the School's headmistress. Sunali also endured a large measure of insensitive treatment from her peers, including the prefects of the School, and media exposure, yet continued to stand by her belief. All this points to the conclusion that Sunali held a sincere belief that the nose stud was part of her religion and culture.

[59] The expert evidence of Dr Rambilass, the School's own expert witness, confirms the impression that Sunali's own conduct created. The Doctor accepted that the nose stud is a cultural practice that clearly has "significance and value" and testified that according to Hindu tradition, nose piercing is part of the Shringaar which is concerned with love, beauty and adornment, not from the religious texts. While Dr Rambilass disputed that the nose stud had independent religious significance, he accepted under cross-examination that it is difficult to separate Hindu culture and Hindu religion and that there are many different sects of Hinduism with different beliefs and practices. His evidence on religion was also self-consciously focused on defining Hindu religion according to the specific wording of the Vedic texts rather than on a broader view of religion as being informed and even defined by culture, tradition and practice.

[60] In conclusion, the evidence shows that the nose stud is not a mandatory tenet of Sunali's religion or culture; Ms Pillay has admitted as much. But the evidence does confirm that the nose stud is a voluntary expression of South Indian Tamil Hindu culture, a culture that is intimately intertwined with Hindu religion, and that Sunali regards it as such. The question arises whether the nose stud should be classified as a religious or cultural practice, or both. This Court has noted that "the temptation to force [grounds of discrimination] into neatly self-contained categories should be resisted."[38] That is particularly so in this case where the evidence suggests that the borders between culture and religion are malleable and that religious belief informs

[38] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 50; 1997 (11) BCLR 1489 (CC) at para 49.

cultural practice and cultural practice attains religious significance. As noted above, that will not always be the case: culture and religion remain very different forms of human association and individual identity, and often inform peoples' lives in very different ways. But in this matter, culture and religion sing with the same voice and it is necessary to understand the nose stud in that light – as an expression of both religion and culture.

[61] The final question is whether the Equality Act and the Constitution apply to voluntary religious and cultural practices. This question has not yet arisen before South African courts. The School and the GBF have argued that voluntary practices should not be protected or should be accorded less protection while Ms Pillay has taken the opposite stance.

[62] The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson's choice between observance of their faith and adherence to the law.[39] There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.[40] Are voluntary practices any less a part of a person's identity or do they affect human dignity any less seriously because they are not mandatory?

[39] See, for example, *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (*Prince I*) at para 26; *Prince II* above n 27 at paras 145-147 (Sachs J); *Christian Education* above n 36 at para 35.

[40] See above n 34.

[63] Freedom is one of the underlying values of our Bill of Rights[41] and courts must interpret all rights to promote the underlying values of "human dignity, equality and freedom".[42] These values are not mutually exclusive but enhance and reinforce each other. In *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others*[43] Ackermann J wrote that:

> "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity."[44]

[64] A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues."[45] One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.

[41] Section 7(1) reads: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and *freedom*." (Emphasis added.)

[42] Section 39(1)(a) reads: "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and *freedom*". (Emphasis added.)

[43] 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

[44] Id at para 49. While the majority in *Ferreira v Levin* distanced themselves from Ackermann J's broad construction of freedom as a self-standing right, there is nothing to suggest they questioned his link between freedom and dignity.

[45] See Woolman "Dignity" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta, Cape Town 2006) at 36-11.

[65] The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains. As this Court held in *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*:[46]

> "The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation."[47] (Footnotes omitted.)

These values are shared with other jurisdictions, such as Canada, to name one, where the Supreme Court has affirmed the necessity of protecting voluntary religious practices.[48]

[46] 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

[47] Id at para 60.

[48] See *Syndicat* above n 28 at paras 67-68.

[66] The protection of voluntary practices applies equally to culture and religion. Indeed, it seems to me that it may even be more vital to protect non-obligatory cultural practices. Cultures, unlike religions, are not necessarily based on tenets of faith but on a collection of practices, ideas or ways of being. While some cultures may have obligatory rules which act as conditions for membership of the culture, many cultures, unlike many religions, will not have an authoritative body or text that determines the dictates of the culture. Any single member of a culture will seldom observe all those practices that make up the cultural milieu, but will choose those which she or he feels are most important to her or his own relationship to and expression of that culture. To limit cultural protection to cultural obligations would, for many cultures and their members, make the protection largely meaningless.

[67] It follows that whether a religious or cultural practice is voluntary or mandatory is irrelevant at the threshold stage of determining whether it qualifies for protection. However, the centrality of the practice, which may be affected by its voluntary nature, is a relevant question in determining the fairness of the discrimination. That is a point I return to later.

[68] I therefore find that Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act. I proceed now to consider whether or not that discrimination was fair.

Unfairness

[69] Section 13(2)(a) of the Equality Act[49] tracks section 9(5) of the Constitution[50] in placing the onus on the applicants to prove that discrimination on a listed ground is fair. Section 14 of the Equality Act deals with the determination of unfairness. It reads:

> "(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
> (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
>
> (a) The context;
> (b) the factors referred to in subsection (3);
> (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
>
> (3) The factors referred to in subsection (2)(b) include the following:
>
> (a) Whether the discrimination impairs or is likely to impair human dignity;
> (b) the impact or likely impact of the discrimination on the complainant;
> (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
> (d) the nature and extent of the discrimination;
> (e) whether the discrimination is systemic in nature;
> (f) whether the discrimination has a legitimate purpose;
> (g) whether and to what extent the discrimination achieves its purpose;
> (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

[49] Section 13(2)(a) reads:

> "If the discrimination did take place—
> (a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair".

[50] Section 9(5) reads: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

[70] The list of factors in section 14(3) includes issues that traditionally fall under a fairness analysis ((a), (b), (c) and (e))[51] and questions normally relevant to a limitation analysis under section 36(1) of the Constitution[52] ((d), (f), (g) and (h)). Accordingly, the fairness test under the Equality Act as it stands may involve a wider range of factors than are relevant to the test of fairness in terms of section 9 of the Constitution. Whether that approach is consistent with the Constitution is not before us, and we address the question on the legislation as it stands.

[71] Before considering the fairness of the discrimination in this case, it will be convenient to make a few comments about the form of the unfairness inquiry under the Equality Act in circumstances such as the present. Much was said by both parties in argument about the principle of "reasonable accommodation". Ms Pillay specifically argued that Sunali's case should be decided on that principle. It is

[51] See, for example, *Harksen v Lane* above n 38 at para 51 and para 50 respectively.

[52] Section 36(1) reads:

"**Limitation of Rights.—**
The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

therefore necessary to consider both the content of the idea of reasonable accommodation and its place in the Equality Act.

[72] The concept of reasonable accommodation is not new to our law – this Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion.[53] The Employment Equity Act[54] defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment"[55] and recognises making reasonable accommodation for designated groups as an affirmative action measure.[56] There is also specific mention of the concept in the Equality Act. It recognises that "failing to take steps to reasonably accommodate the needs" of people on the basis of race,[57] gender[58] or disability[59] will amount to unfair discrimination. The Equality Act places a duty on the state to "develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation"[60] and permits courts to order that a group or class of persons be reasonably

[53] *Prince I* above n 39 at para 17; *Prince II* above n 27 at para 76 (Ngcobo J) and paras 146-148 and 170-172 (Sachs J); *Fourie* above n 46 at para 159. The High Court has also mentioned the principle on at least two occasions relating to employment. See *McLean v Sasol Mine (Pty) Ltd Secunda Collieries; McLean v Sasol Pension Fund* 2003 (6) SA 254 (W) at para 45; *Public Servants Association of South Africa and Others v Minister of Justice and Others* 1997 (3) SA 925 (T) at 976G.

[54] Act 55 of 1998.

[55] Section 1.

[56] Section 15(2)(c).

[57] Section 7(e).

[58] Section 8(h).

[59] Section 9(c).

[60] Section 25(1)(c)(iii).

accommodated.[61] Finally, section 14(3)(i)(ii) lists as a factor for the determination of fairness the question whether the applicant has taken reasonable steps to accommodate diversity.

[73] But what is the content of the principle? At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms. In *Christian Education*,[62] in the context of accommodating religious belief in society, a unanimous Court identified the underlying motivation of the concept as follows:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."[63]

[61] Section 21(2)(i).

[62] Above n 36.

[63] Id at para 35.

[74] The idea extends beyond religious belief. Its importance is particularly well illustrated by the application of reasonable accommodation to disability law. As I have already mentioned, the Equality Act specifically requires that reasonable accommodation be made for people with disabilities. Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society:

> "Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."[64]

[75] While the extent of this exclusion is most powerfully felt by the disabled, the same exclusion is inflicted on all those who are excluded by rules that fail to accommodate those who depart from the norm. Our society which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity. Those steps might be as simple as granting and regulating an exemption from a general rule or they may require that the rules or practices be changed or even that buildings be altered or monetary loss incurred.

[64] *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at para 67.

[76] The difficult question then is not whether positive steps must be taken, but how far the community must be required to go to enable those outside the "mainstream" to swim freely in its waters. This is an issue which has been debated both in this Court[65] and abroad[66] and different positions have been taken. For instance, although the term "undue hardship" is employed as the test for reasonable accommodation in both the United States and Canada, the United States Supreme Court has held that employers need only incur "a *de minimis* cost" in order to accommodate an individual's religion,[67] whilst the Canadian Supreme Court has specifically declined to adopt that standard[68] and has stressed that "more than mere negligible effort is required to satisfy the duty to accommodate."[69] The latter approach is more in line with the spirit of our constitutional project which affirms diversity. However, the utility of either of these phrases is limited as ultimately the question will always be a contextual one dependant not on its compatibility with a judicially created slogan but with the values and principles underlying the Constitution.[70] Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.

[77] It is now necessary to crystallise the role that reasonable accommodation can play in the Equality Act. As noted earlier, the principle is mentioned on a number of occasions in the Equality Act. What concerns us in this case, however, is section

[65] See *Prince II* above n 27.

[66] For a useful summary of the various positions see Pretorius et al *Employment Equity Law* (LexisNexis Butterworths, Durban 2001) at 7-6–7-18.

[67] *Trans World Airlines Inc v Hardison* 432 US 63 (1977) at 84.

[68] *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970 at 983g-985a.

[69] Id at 984a.

[70] See *Prince II* above n 27 at para 155 (Sachs J).

14(3)(i)(ii) which states that taking reasonable steps to accommodate diversity is a factor for determining the fairness of discrimination.[71] From this it is clear that reasonable accommodation will always be an important factor in the determination of the fairness of discrimination. It would however be wrong to reduce the test for fairness to a test for reasonable accommodation, particularly because the factors relevant to the determination of fairness have been carefully articulated by the legislature and that option has been specifically avoided.

[78] There may be circumstances where fairness requires a reasonable accommodation, while in other circumstances it may require more or less, or something completely different. It will depend on the nature of the case and the nature of the interests involved. Two factors seem particularly relevant. First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck.[72] Even where fairness requires a reasonable accommodation, the other factors listed in section 14 will always remain relevant.

[71] Section 14 is quoted in para 69 above.

[72] See the concurring judgment of Deschamps and Abella JJ in *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 at paras 129-134.

[79] The present case bears both these characteristics and therefore, in my view, fairness required a reasonable accommodation. Whether that required the School to permit Sunali to wear the nose stud depends on the importance of the practice to Sunali on the one hand, and the hardship that permitting her to wear the stud would cause the School. Before I address that question, there were two points raised about the context within which fairness should be determined. These relate to the need for deference and the consultation that went into the making of the Code.

Deference

[80] The School and the GBF argued that courts should show a measure of deference to governing bodies that are statutorily required to run schools and have the necessary expertise to do so. They relied for this proposition on decisions of the European Court of Human Rights[73] and the House of Lords[74] which invoke the doctrine of the "margin of appreciation". The doctrine has been described as

> "a recognition by the [European Court] that the domestic authorities of any given Member State are generally in a better position than an international court of supervisory jurisdiction to reach a decision on an individual case or to determine the extent to which a measure was 'necessary' to deal with a particular issue."[75]

[73] *Sahin v Turkey* (2005) 41 EHRR 8 at paras 100-102.

[74] *R (on the application of Begum) v Head Teacher and Governors of Denbigh High School* [2006] 2 All ER 487 (HL) at para 64.

[75] Gordon et al *The Strasbourg Case Law: Leading Cases from the European Human Rights Reports* (Sweet and Maxwell, London 2001) at 4.

This Court has held that the doctrine is not a useful guide when deciding either whether a right has been limited[76] or whether such a limitation is justified.[77]

[81] This Court has recognised the need for judicial deference in reviewing administrative decisions where the decision-maker is, by virtue of his or her expertise, especially well-qualified to decide.[78] It is true that the Court must give due weight to the opinion of experts, including school authorities, who are particularly knowledgeable in their area, depending on the cogency of their opinions. The question before this Court, however, is whether the fundamental right to equality has been violated, which in turn requires the Court to determine what obligations the School bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This Court cannot abdicate its duty by deferring to the School's view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the School to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.

Consultation

[82] In urging that the Code should be respected, the School stressed the fact that it was devised after extensive consultation with parents, educators, staff, and learners,

[76] *NCGLE v Minster of Justice* above n 34 at para 41.

[77] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 109 (Chaskalson P).

[78] The reasons both for deference in administrative review, and for limiting it, were well expressed in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 48.

and accordingly represented the combined wisdom of all who participated in its construction and should therefore be respected. There is no doubt that consultation and public participation in local decision-making are good and deserve to be applauded. They promote and deepen democracy. In the context of the Code, it means that the School community is involved in the running of the School and acquires a sense of ownership over the Code. In *Doctors for Life v Speaker of the National Assembly and Others*[79] Ngcobo J held, in the context of public participation in crafting national legislation, that:

> "participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people."[80]

[83] This, however, does not immunise the resultant decisions, in effect the opinion of the school community, from constitutional scrutiny and review.[81] The reality is that many individual communities still retain historically unequal power relations or historically skewed population groups which may make it more likely that local decisions will infringe on the rights of disfavoured groups. In sum, while local democratic processes and consultation are important constitutional values in their own

[79] 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[80] Id at para 115 and at 1442B-D respectively.

[81] *Makwanyane* above n 77 at para 88 (Chaskalson P).

right, their role in the evaluation of the substance of decisions, if any, should not be overstated.

[84] I turn now to the question of the importance of the nose stud to Sunali and its effect on the School.

The severity of the infringement

[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.

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

do not follow their belief. The difficult question is how to determine centrality. Should we enquire into the centrality of the practice or belief to the community, or to the individual?

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

[88] Centrality must be judged with reference only to how important the belief or practice is to the claimant's religious or cultural identity.[82] In reaching that decision the Court can properly look at a range of evidence including evidence of the objective centrality of the practice to the community at large. That evidence however is only relevant in so far as it helps to answer the primary inquiry of subjective centrality. The fact that a practice is voluntary may also be relevant as many people will not feel that voluntary practices are central to their religious or cultural identity. But there will also be those who, although they do not feel obliged to observe a certain practice, feel

[82] See the debate between the majority and minority in *Lyng, Secretary of Agriculture, et al v Northwest Indian Cemetery Protective Association et al* 485 US 439 (1988) at 457-458 and 474-475. Despite their disagreement, both the majority and minority seem to support a purely subjective approach to determining centrality.

that it is central to their identity that they do so. They too deserve protection. In sum, the School and this Court must consider all the relevant evidence, but the ultimate question they must answer is: "How central is the nose stud to Sunali's religious and cultural identity?" However, the need for a subjective investigation takes us back to the complaint that Sunali did not give evidence regarding that importance.

[89] Ms Pillay's case would no doubt have been assisted by Sunali's evidence. However, the Court must evaluate such evidence as there is. Ms Pillay stated that the nose stud was not imposed on Sunali; she had wanted her nose pierced since the age of four. The nose stud was not worn for fashion reasons but was inserted as part of a traditional ritual and an expression of her religious and cultural identity. In her first letter to the School, Ms Pillay wrote that the stud "serves not only to indicate that we value our daughters, but in keeping with Indian tradition, that our daughters are the Luxmi (Goddess of Prosperity) and Light of the house." In her testimony Ms Pillay stated that by inserting the stud:

> "we acknowledge our daughters, the women in our family, as a very vital part of family life. We honour them and we honour the divine within them. And that's important. It's important for every child to know that she garners respect."

[90] The wearing of the nose stud was also not without consequences to Sunali. She was obviously under a great deal of stress and her grades dropped because of the School's reaction to the nose stud and the related publicity. She was regularly required to explain herself to staff members and prefects at the school and was threatened with disciplinary action. In spite of these difficulties, Sunali did not alter

her conduct or belief. None of this evidence was disputed and it all points to a very strong belief on Sunali's part that the nose stud was important for her identity. I am accordingly convinced that the practice was a peculiar and particularly significant manifestation of her South Indian, Tamil and Hindu identity. It was her way of expressing her roots and her faith. While others may have expressed the same faith, traditions and beliefs differently or not at all, the evidence shows that it was important for Sunali to express her religion and culture through wearing the nose stud.

[91] The next string of the School's centrality bow was that the infringement of Sunali's right to equality is less severe because the nose stud is a cultural rather than a religious adornment. This was also the basis originally relied upon by the School for refusing the exemption and why it could recognise the stud's cultural significance without granting Sunali an exemption. To my mind the argument is flawed. As stated above,[83] religious and cultural practices can be equally important to a person's identity. What is relevant is not whether a practice is characterised as religious or cultural but its meaning to the person involved. Pre-determining that importance based on what will often be an imperfect or artificial categorisation reinforces ideas about the respective roles and importance of religion and culture in peoples' lives and fails to accommodate those who do not conform to that stereotype.

[92] The School also argued that if Sunali did not like the Code, she could simply go to another school that would allow her to wear the nose stud. I cannot agree. In my

[83] At para 53.

view the effect of this would be to marginalise religions and cultures, something that is completely inconsistent with the values of our Constitution. As already noted, our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation.[84] There may, however, be occasions where the specific factual circumstances make the availability of another school a relevant consideration in searching for a reasonable accommodation. However, there are no such circumstances in this case and the availability of another school is therefore not a relevant consideration.

The Code limits freedom of expression

[93] While considering the centrality of the practice to Sunali or the effect that its prohibition would have on her dignity, it bears mentioning that the ban affects other constitutional rights as well. The dual purpose of the NTVS and FXI's submission was to stress the relevance of the right to freedom of expression to the case and to show that it had been infringed. They argued that freedom of expression was relevant both as a self-standing right and as a relevant factor in determining unfair discrimination. This was disputed by the applicants and the GBF on the basis that the case had been brought under the Equality Act which does not make provision for non-equality claims.

[94] It is unnecessary in this case to decide whether it is possible to rely directly on the right to freedom of expression under the Equality Act, or whether the ban on the

[84] See *Fourie* above n 46 at para 60.

nose stud is an unjustifiable limit on that right. It suffices to say that the extent to which discrimination impacts on other rights will be a relevant consideration in the determination of whether the discrimination is fair and that the ban on the nose stud limited Sunali's right to express her religion and culture which is central to the right to freedom of expression.

The effect on the School

[95] It is no doubt true that even the most vital practice of a religion or culture can be limited for the greater good.[85] No belief is absolute, but those that are closer to the core of an individual's identity require a greater justification to limit. The question is whether, considering the importance of the stud to Sunali, allowing her to wear the stud would impose too great a burden on the School.

[96] The primary argument of both the School and the GBF was that allowing Sunali to wear the nose stud or allowing others like her similar exemptions would impact negatively on the discipline in schools and, as a result, on the quality of the education they provide.

[97] This evaluation is correctly characterised by Ms Pillay as relating to the factors in section 14(3)(f), (g) and (h) of the Equality Act that are also part of the traditional section 36 analysis. It is also part of determining whether allowing the stud imposes an undue burden. If allowing the stud would cause indiscipline and a drop in

[85] See *Prince II* above n 27 at paras 128-139 and *Christian Education* above n 36 at paras 29-31.

academic standards, that might indeed be an undue burden to impose on the School.[86] It is helpful to separate the inquiry into its constitutive parts: Is there a legitimate purpose? Does the limitation achieve the purpose? Are less restrictive means available to achieve the purpose?

[98] Both discipline and education are legitimate goals. However, care must be taken not to state the School's interest too broadly. Sunali's interest in wearing her nose stud could never outweigh the general importance of ensuring discipline in schools. The interest of the School must be confined to refusing Sunali an exemption, not to the wearing of uniforms in general because this case is not about uniforms, but about exemptions to existing uniforms.[87]

[99] This is important because Mrs Martin presented evidence about the importance of uniforms in promoting a culture of discipline and respect for authority. According to her, children, especially teenagers, need boundaries and the school environment should be a place where the influences of modern commercial life are moderated to create a better learning environment. The pressures of modern fashion are particularly intense as girls try to imitate and out-do each other. Uniforms help to limit the impact of that competition on the learning experience. There is no reason to question this

[86] See, for example, *Canady v Bossier Parish School Board* 240 F 3d 437 (5th Cir 2001) at para 8.

[87] See *Prince II* above n 27 at para 47 citing the dissenting judgment of Blackmun J in *Employment Division, Department of Human Resources of Oregon, et al v Smith, et al* 494 US 872 (1990) at 911.

evidence and Ms Pillay does not do so. The guidelines too recognise the importance of uniforms in the school environment.[88]

[100] Rules are important to education. Not only do they promote an important sense of discipline in children, they prepare them for the real world which contains even more rules than the schoolyard. Schools belong to the communities they serve and that ownership implies a responsibility not only to make rules that fit the community, but also to abide by those rules. Nothing in this judgment should be interpreted as encouraging or condoning the breaking of school rules.

[101] But this case is not about the constitutionality of school uniforms. It is about granting religious and cultural exemptions to an existing uniform. The admirable purposes that uniforms serve do not seem to be undermined by granting religious and cultural exemptions. There is no reason to believe, nor has the School presented any evidence to show, that a learner who is granted an exemption from the provisions of the Code will be any less disciplined or that she will negatively affect the discipline of others.

[102] I am therefore not persuaded that refusing Sunali an exemption achieves the intended purpose. Indeed, the evidence shows that Sunali wore the stud for more than two years without any demonstrable effect on school discipline or the standard of education. Granting exemptions will also have the added benefit of inducting the

[88] Regulation 6.

learners into a multi-cultural South Africa where vastly different cultures exist side-by-side.

[103] The only confirmed effect of granting Sunali an exemption is that some of the girls might feel it is unfair. While that is unfortunate, neither the Equality Act nor the Constitution require identical treatment. They require equal concern and equal respect.[89] They specifically recognise that sometimes it is fair to treat people differently. In *Christian Education*[90] this Court held:

> "It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views."[91]

[104] This reasoning can and should be explained to all the girls in the School.[92] Teaching the constitutional values of equality and diversity forms an important part of education. This approach not only teaches and promotes the rights and values enshrined in the Constitution, it also treats the learners as sensitive and autonomous people who can understand the impact the ban has on Sunali.

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[89] *Fourie* above n 46 at paras 60, 95 and 112; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at paras 81 (Langa DP) and 130 (Sachs J); *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 32.

[90] Above n 36.

[91] Id at para 42.

[92] This matter was pertinently dealt with in *Multani* above n 72 at para 76.

[105] The School and the GBF made two more specific arguments about the effect of the nose stud on the School. First, they argued that the nose stud should be treated differently because it is also a popular fashion item. Second, they contended that even if the nose stud was acceptable, allowing it would necessitate that many undesirable adornments be permitted. I address each in turn.

[106] Asserting that the nose stud should not be allowed because it is also a fashion symbol fails to understand its religious and cultural significance and is disrespectful of those for whom it is an important expression of their religion and culture.[93] In addition, to uphold the School's reasoning would entail greater protection for religions or cultures whose symbols are well known; those are in fact often the ones least in need of protection. It would also have the absurd result that if a turban, yarmulke or headscarf became part of popular fashion they would no longer be constitutionally protected, while they have constitutional protection as long as they remain on the fringes of society. I accept that the popularity of the nose stud may make it more difficult to determine if a learner is practicing her religion or culture or trying to impress her friends. But once the former is established, as it has been in this case, the mainstream popularity of a religious or cultural practice can never be relevant.

[107] The other argument raised by the School took the form of a "parade of horribles"[94] or slippery slope scenario that the necessary consequence of a judgment in

[93] Id at paras 71 and 74.

[94] This term was employed by O'Connor J in *Oregon v Smith* to describe the majority's list of extreme examples of possible religious exemptions which they employed to justify their decision that neutral rules would not violate the First Amendment. See *Oregon v Smith* above n 87 at 902.

favour of Ms Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a "parade of horribles" but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the School to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the School, it may refuse to permit it.

The manner in which the matter was raised

[108] One final issue needs attention. It is common cause that the way in which Ms Pillay dealt with the problem left much to be desired and the School has quite rightly complained about it. The School argued that this should count against Ms Pillay in the determination of whether the conduct of the School was unfair. Ms Pillay has accepted that it would have been preferable to approach the School before the nose stud was inserted, rather than to confront the School with the nose stud and demand that it should be accommodated. Ms Pillay has apologised for her conduct.

[109] It is obviously preferable for these matters to be dealt with by approaching the relevant authority before the issue arises. It indicates an important degree of respect and a desire to resolve the matter amicably rather than through confrontation. In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*[95] Sachs J pointed out, in the context of television broadcasting of court proceedings, that

> "it is not in the interests of justice for matters such as these to be resolved under a sword of Damocles. All the questions concerning [these difficult issues] should be worked out through an appropriate process of negotiation. This not only establishes clear points of reference. It gives sufficient time for all those involved to accustom themselves to the major changes involved."[96]

While it is uncertain whether there would have been a different result, the process of negotiation is inherently valuable. It is part of a search for a reasonable accommodation that will suit both parties.

[110] It would be perfectly correct for a school, through its code of conduct to set strict procedural requirements for exemption. It would also be appropriate for the parents and, depending on their age, the learners, to be required to explain in writing beforehand why they require an exemption. That would ensure that these difficult matters are resolved responsibly, fairly and amicably. It seems that the absence of such a procedure in the Code is largely to blame, not only for the manner in which the complaint was raised, but for the way in which it was resolved. It is a serious obstacle

[95] 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

[96] Id at para 152. See also *Central Okanagan* above n 68 at 995f-996f.

to a search for reasonable accommodation that an appropriate procedure was not in place.

[111] That said, the manner in which the matter was raised can have only minimal relevance to the question of fairness. Sunali should not be adversely affected because of the confrontational manner in which the complaint was raised. However the complaint was originally made, the School made a decision on the exemption with input and co-operation from Ms Pillay. I therefore find that the conduct of Ms Pillay in this case is not a weighty consideration in the determination of fairness.

Conclusion

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

[113] It is necessary, however, to add the following: everything on the record indicates that DGHS maintains high academic standards and that it has taken meaningful steps to accommodate diversity in its community. It regularly allows religious exemptions and promotes the expression of culture at various events on the school calendar. It is, in other words, an excellent school. This judgment is not an

indictment on DGHS but an indication of the complexities that have to be overcome in order to achieve a fully religiously and culturally sensitive society, not least of all in the schools of our land.

[114] It is worthwhile to explain at this stage, for the benefit of all schools, what the effect of this judgment is, and what it is not. It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture. There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not.

The order

[115] I have found that the Code coupled with the decision to refuse an exemption is discriminatory. This is not a review of administrative action but a claim based on the Equality Act. If the matter were not moot, it would therefore not be appropriate simply to set the decision aside and send it back to the School for reconsideration. It would instead be just and equitable to set aside the School's decision and grant Sunali

the exemption. However, as Sunali is no longer at the School, that is not appropriate. But Ms Pillay and Sunali are still entitled to a declarator that she was unfairly discriminated against. That the matter is moot does not alter that position. The declarator is simply a reflection of this Court's findings. A failure to grant a declarator would, to my mind, fail to vindicate Sunali's right and would therefore not qualify as effective relief.

[116] There was a dispute amongst the parties as to whether this Court should confirm the High Court's order, or fashion a new order. I find it unnecessary to determine the precise meaning of the order. At best, it is ambiguous and I prefer to replace it with an order specifically limited to Sunali.

[117] In addition, I deem it appropriate to make an order rectifying the procedural defect in the Code. I have held that the lack of a procedure for exemption is one of the primary reasons this dispute has arisen. As noted earlier, section 21(2)(i) of the Equality Act specifically allows for an order that reasonable accommodation be made for a group or class of persons. Section 8(1) of the South African Schools Act[97] gives the power to the School's Governing Body to adopt a code of conduct in consultation with learners, parents and educators.[98] The power to adopt must necessarily include the power to amend. Although the Governing Body itself is not before us, it is properly represented by its chairperson. In this case it is therefore appropriate to order

[97] Above n 10.

[98] Section 8(1) reads: "Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school."

the School's Governing Body to amend the Code to provide for reasonable accommodation for deviations from the Code on religious and cultural grounds and a procedure for the application and granting of those exemptions.

[118] Neither the High Court nor the Equality Court made any order as to costs. Ms Pillay has raised an important constitutional issue and has been successful. She should not have to bear her costs. The School has been at the centre of a difficult constitutional issue. If it is required to pay costs the funds must come from what would otherwise be spent on the learners. While it has been ultimately unsuccessful, it has played an important role in ventilating a difficult constitutional issue. It will accordingly be appropriate in my view for Ms Pillay's costs to be paid solely by the Department.

[119] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The order of the High Court is set aside and replaced with the following:
    a. It is declared that the decision of the Governing Body of Durban Girls' High School to refuse Sunali Pillay an exemption from its Code of Conduct to allow her to wear a nose stud, discriminated unfairly against her.
    b. The Governing Body of Durban Girls' High School is ordered, in consultation with the learners, parents and educators of the

School and within a reasonable time, to effect amendments to the School's Code of Conduct to provide for the reasonable accommodation of deviations from the Code on religious or cultural grounds and a procedure according to which such exemptions from the Code can be sought and granted.

4. The first and second applicants are ordered to pay the respondent's costs.

Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Langa CJ.

O'REGAN J:

[120] I have had the pleasure of reading the judgment prepared by the Chief Justice in this matter. Although there is much in his judgment with which I agree, I dissent in part from the order he proposes. It is necessary therefore for me to set out my approach to the matter which leads to this different conclusion.

[121] Education is the engine of equal opportunity. Education in South Africa under apartheid was both separate and deeply unequal. Notoriously, HF Verwoerd proclaimed in 1953 that –

> "Native education should be controlled in such a way that it should be in accord with the policy of the state . . . If the native in South Africa today in any kind of school in existence is being taught to expect that he will live his adult life under a policy of equal rights, he is making a big mistake . . . There is no place for him in the European community above the level of certain forms of labour. . . ."[1]

And the apartheid state implemented this vision. Spending on Black school children in 1976 was a fraction of spending on White school children. It is not surprising then that education was the trigger for the Soweto revolt by Black school children. Throughout the 1970s and 1980s, the issue of unequal education mobilised thousands of South Africans of all ages to oppose the apartheid state.

[122] When democracy dawned in 1994, the picture was bleak. By and large South African children of different colours were educated separately in institutions which bore the scars of the appalling policy of apartheid. Excellence in the matriculation examination at the end of twelve years of formal schooling reflected this unequal past. A tremendous challenge faced the new government.

[123] Things have improved somewhat but the pattern of disadvantage engraved onto our education system by apartheid has not been erased. In 2003 there were 440 396 candidates for matriculation, of whom 77,4% were Black, 7,2% were Coloured, 3,8% were Indian and 10,5% were White. Only 73% of these candidates passed and a tiny 19% obtained a university entrance pass. While more than 50% of all white

[1] Quoted in Omond *The Apartheid Handbook: A Guide to South Africa's Everyday Racial Policies* (Penguin Books, Great Britain 1985) at 80.

candidates who wrote obtained a university entrance pass, only just over 10% of Black candidates who wrote did so.[2] There is much to be done to achieve educational equality of opportunity.

[124] As importantly, although the law no longer compels racially separate institutions, social realities by and large still do. Most Black learners are educated in township schools where there are generally no White learners at all. Many White learners are educated in schools where there is only a sprinkling of Black learners. The absence of racial integration in our schools remains a problem for us all. It deprives young South Africans of the ability to meet, and to learn and play together.

[125] Durban Girls' High School, the school at issue in this case, is one of the exceptions. Although historically it was a school for White girls under apartheid law, that has changed dramatically in the last fifteen years. Now, we were told from the bar, of its approximately 1300 learners, approximately 350 are Black, 350 are Indian, 470 are White and 90 are Coloured. Moreover, it is an educationally excellent school which produces fine matriculation results. It is at the cutting edge of non-racial education, facing the challenges of moving away from its racial past to a non-racial future where young girls, regardless of their colour or background, can be educated. This context is crucial to how we approach this case.

[2] Kane-Berman (ed) *South Africa Survey 2004/2005* (South African Institute of Race Relations, Johannesburg 2006) at 293-296.

[126] At one level, this is a case about a school learner ("the learner") who, after having had her nose pierced, sought an exemption from the school rule which prohibited adornment of this sort. At another level, it is about how schools and other educational institutions establish rules and processes to accommodate diversity in a manner which makes all learners in the school feel that they are equally worthy and respected.

[127] The school, like most South African schools, requires its learners to wear a uniform. The requirements of the uniform are set out in the school's Code of Conduct which provides as follows –

> "SCHOOL UNIFORM
>
> - Only the official school uniform may be worn to school. This includes regulation shoes, shirts, skirts and bags.
> - Jerseys may only be worn under a blazer. Learners may wear a jersey without the blazer in the school grounds but not to assembly. Jerseys must be regulation school jerseys with no logos.
> - Girls must leave the grounds after sport in full correct sports kit or the official track suit, with appropriate footwear otherwise they must be in full school uniform.
> - All items of school uniform must be clearly marked with your name.
> - Hair must be worn in a style that is acceptable to the school. Once the hair is long, it must be tied up using navy-blue or black clips, ribbons or bands. Hair may not be dyed or tinted. Appropriate braids are permitted. Braids may only be from colours 0 – 6. Any other braid colour is unacceptable. Braid colouring must match the natural hair colour.
> - Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wrist watch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn.

- Nails must be kept short and must NOT be varnished.
- Name badges are compulsory during school times. Each learner must wear her own badge.
- Only official school badges are permitted.
- Learners are not permitted to wear any other adornment even of a sentimental nature.

. . . .

Learners are obliged to abide by the regulations which have been adopted by the school, regarding the wearing of school or sports uniform. Failure to do so will lead to Community Service or Detention."

[128] Section 8 of the South African Schools Act, 84 of 1996 ("the Schools Act"), requires governing bodies[3] of schools to "adopt a code of conduct for learners after consultation with learners, parents and educators of the school."[4] The purpose of a code of conduct is to establish a "disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process."[5] According to Mrs Martin, the principal of the school ("the principal"), the

[3] According to section 16 of the Schools Act, the governance of every public school is vested in its governing body. Section 18 of the Schools Act provides that governing bodies must function in terms of a written constitution which must comply with minimum requirements determined by provincial MECs for Education in the Provincial Gazettes.

[4] Section 8 of the Schools Act provides in pertinent part that –

"(1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

(2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

(3) The Minister may, after consultation with the Council of Education Ministers, determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners.

(4) Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner.

(5) A code of conduct must contain provisions of due process safe-guarding the interests of the learner and any other party involved in disciplinary proceedings."

[5] See section 8(2) of the Schools Act.

Code of Conduct was drawn up by the school's Governing Body in consultation with parents and the Learners' Representative Council.

[129] When parents apply for the admission of their daughters to the school, they are required to sign a form declaring that they will ensure that their daughters comply with the Code of Conduct and regulations of the school. This the learner's mother[6] did.

[130] The Code of Conduct does not contain any express procedure for exemption from its terms. However, in her evidence, the principal made clear that from time to time exemptions are granted by the school. For example, at certain times during the year, some learners of the Hindu faith apply to wear "Lakshmi strings" in honour of the Goddess Lakshmi, the deity of prosperity and well-being in the home. Similarly, requests from learners to wear hide bracelets as a mark of respect on the death of a close relative are granted. When exemptions of this sort are granted, the learner is given a card noting the permission, should any teacher query her non-compliance with the Code of Conduct.

[131] It is also clear from the principal's evidence that the basis upon which exemptions are granted is not clearly established. An important consideration is whether the exemption is sought on religious grounds, but this is not a pre-requisite for the exemption to be granted. In this case, the learner sought an exemption after

[6] She shall also be referred to as the applicant.

having had her nose pierced. The principal then asked for an account as to why the exemption was sought. That account was provided by the learner's mother as follows:

> "I also regret that Sunali and I did not discuss the piercing of her nose and seek your endorsement prior to acting on her decision. Simultaneously, I reiterate my need, indeed my duty as a parent, to support Sunali's choices for herself.
>
> As you know shortly after her 15th birthday, Sunali decide to pierce her nose with a small gold stud. She has been requesting permission to do this since the age of 4. As per our traditions, her ears were pierced at age 1.
>
> I allowed the piercing for several reasons:
> (a) It is a time-honoured family tradition. Sunali and I come from a South Indian family that has sought to maintain a cultural identity by respecting and implementing the traditions of the women before us. Usually, a young woman would get her nose pierced upon her physical maturity (the onset of her menstrual cycle) as an indication that she is now eligible for marriage. While this physically oriented reasoning no longer applies, we do still use the tradition to honour our daughters as responsible young adults. After her 16th birthday, Sunali's grandmother will replace the current gold stud with a diamond. This will be done as part of a religious ritual to honour and bless Sunali. It is also a way in which the elders of the household bestow worldly goods, including other pieces of jewellery, upon the young women. This serves not only to indicate that we value our daughters, but in keeping with Indian tradition, that our daughters are the Luxmi (Goddess of Prosperity) and Light of the house.
> (b) Sunali has demonstrated both at school and at home that she is a responsible and emotionally mature young woman capable of making independent choices.
> (c) I promised Sunali over the years, each time she requested permission to pierce her nose, that I would allow her to do so when she was old enough and sufficiently aware of her own identity to make this choice. I consciously choose to keep my word to my daughter.
> (d) I myself have adhered to this tradition and wear a nose ring. From this perspective, I cannot and will not impose a double standard on my child.
> (e) Sunali and I live in a spiritually aware holistic centre based on the values of integrity, respect and compassion. This is the system by which we relate to each other and to the rest of the world. Our independent choices are not intended to impact

> negatively on any person or institution, but rather to reflect who we truly are. I respect Sunali's choices for herself. It is not a choice that will damage her in any way. Instead, it has given her and will continue to give her a sense of belonging, a heritage . . . something missing from most children's lives as they struggle with a series of identity crises."

[132] The school read this primarily as seeking an exemption based on family tradition, though they did recognise that there was a cultural and religious aspect to the question. Accordingly, the Governing Body sought some advice from experts in Hinduism who advised them that it was not necessary to make an exemption for the learner on the basis that she sought. The school refused the request for an exemption and instructed the learner to stop wearing the nose-stud. When she failed to desist, they initiated disciplinary proceedings against her.

[133] The learner's mother then instituted proceedings in the Equality Court to prevent the disciplinary proceedings going ahead on the ground that the school was discriminating against her daughter on the grounds of culture and religion. The Equality Court dismissed the claim, but the Equality Appeal Court upheld it. The school and the educational authorities now seek leave to appeal to this court.

[134] I agree with Chief Justice Langa that this case falls to be determined under the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("the Act" or "Equality Act"), not directly on the basis of section 9 of the Constitution[7] although I also accept that the Act should, where reasonably possible, be interpreted

[7] See Langa CJ's judgment at para 40 above.

consistently with section 9 of the Constitution.[8] I turn now to a brief consideration of that Act.

[135] Section 6 of the Act prohibits unfair discrimination in the following terms –

> "Neither the State nor any person may unfairly discriminate against any person."

Discrimination is defined in the Act as –

> "any act or omission . . . which directly or indirectly—
> (1) imposes burdens, obligations or disadvantage on; or
> (2) withholds benefits, opportunities or advantages from,
> any person on one or more of the prohibited grounds."[9]

The prohibited grounds provided in the definitions section are "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[10] This is not a closed list and it includes additional criteria for identifying further grounds,[11] though this has no relevance in the present case.

[136] The Act also provides guidance for the determination of unfairness. Section 14 of the Act provides that –

[8] Id at para 43.

[9] Subsection 1(1)(viii).

[10] Subsection 1(1)(xxii)(a).

[11] Subsection 1(1)(xxii)(b).

"(1)It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

(a) The context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

[137] This provision is not a model of legislative clarity, as some observers have commented.[12] Section 14(2) is the key provision and provides that in determining unfairness, a court will have regard to the context, the list of criteria in section 14(3)

[12] See Albertyn et al (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (Witwatersrand University Press, Johannesburg 2001) at 41 - 48.

and whether the discrimination is reasonably and justifiably based on objective criteria intrinsic to the activity concerned. The criteria in section 14(3) are suggestive of a proportionality analysis: in particular, it seems as if the criteria identified in section 14(3)(a)-(e) should be weighed against the criteria in section 14(3)(f)-(i). How this analysis should chime with section 14(2)(c) is not clear. Section 14(2)(c) seems similar to the exception of genuine occupational requirement in English labour law,[13] or the bona fide occupational qualification analysis of the Civil Rights Act in the United States of America.[14] Section 14(2)(c) is not in issue in this case so it is not necessary to consider how it interrelates with the criteria identified in section 14(3). I shall return to a discussion of the application of section 14 later in this judgment.[15]

[13] Regulation 7(2) of the Race Relations Act 1976 (Amendment) Regulations 2003 introduced the following exception to the prohibition in the Race Relations Act 1976 against discrimination in the employment sphere –

> "This subsection applies where, having regard to the nature of the employment or the context in which it is carried out –
>
> (a) being of a particular race or of particular ethnic or national origins is a genuine and determining occupational requirement;
>
> (b) it is proportionate to apply that requirement in the particular case; and
>
> (c) either –
>
> (i) the person to whom that requirement is applied does not meet it, or
>
> (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

[14] Section 703e(1) of Title VII of the Civil Rights Act of 1964 provides that –

> ". . . it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise".

[15] See paras 167-168 below.

[138] The court tasked with the determination of whether unfair discrimination has taken place in the first place is the Equality Court. The scheme contemplated by the Act is for the Equality Court to determine whether a complainant has shown that there has been an act or omission that caused harm by imposing a burden or withholding a benefit on a prohibited ground. Once the complainant establishes this, discrimination has been established. Then it is for the respondent to show that the discrimination was not unfair.

[139] Section 21 of the Act[16] provides that a court may make a range of orders including a declaratory order,[17] an order requiring the payment of damages,[18] an

[16] Section 21(2) of the Act provides that –

> "After holding an inquiry, the court may make an appropriate order in the circumstances, including –
> (a) an interim order;
> (b) a declaratory order;
> (c) an order making a settlement between the parties to the proceedings an order of court;
> (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
> (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
> (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
> (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
> (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
> (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
> (j) an order that an unconditional apology be made;
> (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
> (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
> (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;
> (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation;
> (o) an appropriate order of costs against any party to the proceedings;

interdict restraining unfair discrimination,[19] a mandatory order including an order directing the reasonable accommodation of a group or class of people,[20] an order that an apology be made[21] and an order requiring progress reports to be made.[22]

[140] In this case, the applicant argues that the conduct of the school constituted unfair discrimination on the grounds of culture and religion. Argument was also presented by the applicant and the Freedom of Expression Institute concerning freedom of expression. I am in complete agreement with the Chief Justice's consideration of these arguments and have nothing to add.[23] Before turning to the question of unfair discrimination, I consider it necessary to consider briefly the constitutional approach to culture and religion.

Culture and religion

[141] Both "culture" and "religion" are terms that resist definition. And it is not desirable in this case to seek to identify a determinative definition of either. However our Constitution does treat them differently. And that different treatment gives us some understanding of where the difference between the two concepts lies. Section 9 of the Constitution prohibits discrimination on the grounds of both culture and

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(p) an order to comply with any provision of the Act."

[17] Subsection 21(2)(b).

[18] Subsections 21(2)(d) and (e).

[19] Subsection 21(2)(f).

[20] Subsection 21(2)(i).

[21] Subsection 21(2)(j).

[22] Subsection 21(2)(m).

[23] At paras 93-94 above.

religion,[24] but section 15 entrenches the right to freedom of "conscience, religion, thought, belief and opinion" and does not mention culture or cultural identity.[25] Here the different constitutional treatment of the two concepts arises.

[142] Section 30 entrenches the rights to language and culture, without mention of religion, in the following terms –

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

Section 31 provides for certain rights to members of cultural and religious communities in the following manner –

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

[24] Section 9(3) of the Constitution provides – "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . religion, conscience, belief, culture, language and birth."

[25] Section 15 of the Constitution provides –

> "(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
>
> (2) Religious observances may be conducted at state or state-aided institutions, provided that –
>
> (a) those observances follow rules made by the appropriate public authorities;
>
> (b) they are conducted on an equitable basis; and
>
> (c) attendance at them is free and voluntary.
>
> (3) (a) This section does not prevent legislation recognising –
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[143] Although it is not easy to divine a sharp dividing line between the two, it does seem to me that our Constitution recognises that culture is not the same as religion, and should not always be treated as if it is. Religion is dealt with without mention of culture in section 15, which entrenches the right to freedom of belief and conscience. By associating religion with belief and conscience, which involve an individual's state of mind, religion is understood in an individualist sense: a set of beliefs that an individual may hold regardless of the beliefs of others. The exclusion of culture from section 15 suggests that culture is different.

[144] The inclusion of culture in section 30 and section 31 makes it clear that by and large culture as conceived in our Constitution, involves associative practices and not individual beliefs. So, section 31 speaks of the right of persons who are members of religious, linguistic or cultural communities "with other members of that community" to enjoy their culture. This formulation is drawn almost directly from Article 27 of the United Nations International Covenant on Civil and Political Rights, which provides that people who belong to a particular "minority" shall not be denied "in community with other members of their group" the right to enjoy their own culture.[26]

[26] Article 27 of the International Covenant on Civil and Political Rights provides –

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

See also Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights which recognises the right of everyone to take part in cultural life.

In this sense, it is understood that individuals draw meaning and their sense of cultural identity from a group with whom they share cultural identity and with whom they associate. As Currie and De Waal reason –

> "The right of a member of a cultural or linguistic community cannot meaningfully be exercised alone. Enjoyment of culture and use of language presupposes the existence of a community of individuals with similar rights. . . . Therefore an individual right of enjoyment of culture assumes the existence of a community that sustains a particular culture."[27] (Footnote omitted.)

[145] By including religion in section 31, the Constitution makes plain that when a group of people share a religious belief, that group may also share associative practices that have meaning for the individuals within that religious group. Where one is dealing with associative practices, therefore, it seems that religion and culture should be treated similarly. In the case of an associative practice, an individual is drawing meaning and identity from the shared or common practices of a group. The basis for these practices may be a shared religion, a shared language or a shared history. Associative practices, which might well be related to shared religious beliefs, are treated differently by the Constitution because of their associative, not personal character.

[146] Religion however need not be associative at all. A religious belief can be entirely personal. The importance of a personal religious belief is more often than not

[27] See Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta & Co, Lansdowne 2005) at 623-624. Currie and De Waal, at 623 at fn 3, also rely on the General Comment adopted by the Human Rights Committee under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights, No 23(50) (art 27) (26 April 1994) at para 5.2.

based on a particular relationship with a deity or deities that may have little bearing on community or associative practices. Where one is dealing with personal and individualised belief, religion is to be considered differently to culture, as the Constitution makes clear. In such circumstances, it is appropriate for a court to ask whether the belief is sincerely held in order to decide whether a litigant has established that it falls within the scope of section 15. If a sincere religious belief is established, it seems correct that a court will not investigate the belief further as the cases cited by the Chief Justice in his judgment make plain.[28] A religious belief is personal, and need not be rational, nor need it be shared by others. A court must simply be persuaded that it is a profound and sincerely held belief.

[147] A cultural practice on the other hand is not about a personal belief but about a practice pursued by individuals as part of a community. The question will not be whether the practice forms part of the sincerely held personal beliefs of an individual, but whether the practice is a practice pursued by a particular cultural community. This distinction needs to inform how we deal with discrimination on the grounds of religion and culture. Where one is dealing with an associative religious practice such as protected by section 31, religion and culture will be treated very similarly. In this regard it is worth noting that some religions are far more associative in character than others. Many African religions and traditions are profoundly associative in character. Our Constitution recognises this and does not privilege one form of religion over another, although associative practices are treated differently to what can loosely be

[28] See, for example, *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 42; *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (SCC); *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981), cited in the judgment of Langa CJ at para 52 above.

described as personal beliefs. Where one is dealing with religious belief that is personal, as contemplated by section 15, it will be treated differently to culture. At times, this line may be difficult to draw but that is not the case here and nothing further need be said at this stage.

[148] I set out the difference between the constitutional protection of religion, on the one hand, and associative religious and cultural practices, on the other, because I am uneasy with the approach taken by Langa CJ on two issues. The first is whether religious and cultural practices are to be dealt with on the basis of the sincerely held beliefs of a particular complainant;[29] and the second relates to the implications for the principles of unfair discrimination as to whether a particular practice is mandatory or not.[30] I shall return to these issues in a moment. First, I wish to consider briefly the constitutional approach to culture.

The constitutional approach to culture

[149] Culture is a difficult concept to define. As O'Keefe has highlighted, it has at least three senses in modern usage: the first is the concept of culture as involving the arts; the second concept is culture in a more plural form including handicraft, popular television, film and radio; and the third is anthropological conception of culture which refers to the way of life of a particular community.[31] There can be no doubt that it is the third concept of culture to which our Constitution refers in sections 30 and 31,

[29] Langa CJ's judgment at para 87 above.

[30] Id at para 67.

[31] O'Keefe "The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR" (1998) 47 *International and Comparative Law Quarterly* 904 at 905.

although the expression of the right to culture in international law may embrace the first two conceptions, as O'Keefe argues.

[150] In the anthropological sense, all human beings have a culture. Human beings live in communities and ordinarily share practices that make life meaningful to that community. Sections 30 and 31 of the Constitution protect the rights of individuals within communities to pursue cultural practices. There can be no doubt that these are important rights which protect diversity within our country. The rights, like all others in our Constitution, must be interpreted in light of the founding value of human dignity which asserts the equal moral worth of human beings and the right of each and every person to choose to live the life that is meaningful to them. Understanding the right to cultural life against the background of human dignity emphasises that the rights in sections 30 and 31 are associative rights exercised by individual human beings and are not rights that attach to groups. They foster association and bolster the existence of cultural, religious and linguistic groups so long as individuals remain committed to living their lives in that form of association.

[151] These rights are important in protecting members of cultural, religious and linguistic communities who feel threatened by the dominance or hegemony of larger or more powerful groups. They are an express affirmation of those members of cultural or other groups as human beings of equal worth in our society whose community practices and associations must be treated with respect. However, there is

a constitutional limit on the protection of associative practices. The rights may not be exercised in a manner inconsistent with other provisions of the Bill of Rights.

[152] It is also important to remember that cultural, religious and linguistic communities are not static communities that can be captured in constitutional amber and preserved from change. Our constitutional understanding of culture needs to recognise that these communities, like all human communities, are dynamic. It is tempting as an observer to seek to impose coherence and unity on communities that are not, in the lived experience of those who are members of those communities, entirely unified. As Benhabib observes –

> "In my view, all analyses of cultures, whether empirical or normative, must begin by distinguishing the standpoint of the social observer from that of the social agent. The social observer – whether an eighteenth-century narrator or chronicler; a nineteenth-century general, linguist, or educational reformer; or a twentieth-century anthropologist, secret agent, or development worker – is the one who imposes, together with local elites, unity and coherence on cultures as observed entities. Any view of cultures as clearly delineable wholes is a view from the outside that generates coherence for the purposes of understanding and control. Participants in the culture, by contrast, experience their traditions, stories, rituals and symbols, tools, and material living conditions through shared, albeit contested and contestable, narrative accounts. From within, a culture need not appear as a whole; rather, it forms a horizon that recedes each time one approaches it."[32] (Footnote omitted.)

[153] Benhabib's distinction between the observer of a community and the member of a community must remind South Africans of the colonial approach to customary law which sought to impose coherence and unity on a set of customary rules and

[32] Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, Princeton 2002) at 5.

practices. The result of this, as this Court has recently observed, was to fossilise customary law and to produce a distinction between customary law in the courts and textbooks.[33] This is counter to what has been called "living customary law"[34] – the evolving nature of customary law as practised and experienced by members of communities. Our history must warn us that when approaching culture in our new constitutional order, courts, as outsiders, must seek to avoid imposing a false internal coherence and unity on a particular cultural community.

[154] How then should we approach culture? The Chief Justice's answer to this question is that courts should urge respect for the sincerely held beliefs of those who assert cultural rights. My difficulty with that approach is threefold. First, it does not acknowledge sufficiently that cultural practices are associative and that the right to cultural life is a right to be practiced as a member of a community and not primarily a question of a sincere, but personal belief. If the right to cultural life "cannot be meaningfully exercised alone"[35] then an individualised and subjective approach to what constitutes culture is faulty. In probing whether a particular practice is a cultural practice, some understanding of what the cultural community considers to be a cultural practice, is important. Of course, we must approach this task with an acknowledgement of the caution sounded by Benhabib. Cultures are not generally unified and coherent but are dynamic and often contested. Nevertheless, the need to

[33] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 90.

[34] Id at para 87.

[35] Currie and De Waal above n 27.

investigate whether a particular asserted practice is shared within the broader community, or portion of it, and therefore properly understood as a cultural practice rather than a personal habit or preference, is central to determining whether a cultural claim has been established.

[155] Secondly, I am anxious that an approach to cultural rights which is based predominantly on subjective perceptions of cultural practices may undervalue the need for solidarity between different communities in our society. After all, the Preamble of our Constitution proclaims that, "South Africa belongs to all who live in it, united in our diversity."[36] It does not envisage a society of atomised communities circling in the shared space that is our country, but a society that is unified in its diversity. That unity requires a "pluralistic solidarity"[37] between our different racial, cultural, religious and linguistic communities. That solidarity, of course, must not be based on domination by a majority culture or group, but on a shared understanding of the human dignity of all citizens and the recognition of our need for solidarity with one another in our common land.

[156] My third difficulty with Langa CJ's conclusion – that a subjective sincerely held belief regarding a cultural practice is the central point of the constitutional enquiry into a complaint of unfair discrimination on the ground of culture – is that it obscures the need to approach diversity with the fundamental value of human dignity

[36] Preamble to the Constitution.

[37] See Addis "On Human Diversity and the Limits of Toleration" in Shapiro and Kymlicka (eds) *Nomos XXXIX: Ethnicity and Group Rights* (New York Press, New York 1997) 112 at 126.

firmly in mind. With human dignity as the lodestar, it becomes clear that treating people as worthy of equal respect in relation to their cultural practices requires more than mere tolerance of sincerely held beliefs with regard to cultural practices. As Addis has observed –

> "To treat individuals with 'equal respect' entails, at least partly, respecting their traditions and cultures, the forms of life which give depth and coherence to their identities. And to treat those forms of life with respect means to engage them, not simply to tolerate them as strange and alien. . . . [I]nsofar as paternalistic toleration does not provide for . . . the notion of the tolerator taking the tolerated group seriously and engaging it in a dialogue, the polity cannot cultivate an important virtue . . . 'civility (reciprocal empathy and respect).' One can hardly develop empathy for those that one only knows as the alien and strange. To have reciprocal empathy is to first attempt to understand the Other, but there cannot be understanding the Other if one is not prepared to engage the Other in a dialogue."[38] (Footnote omitted.)

[157] My understanding of how our Constitution requires us to approach the rights to culture, therefore, emphasises four things: cultural rights are associative practices, which are protected because of the meaning that shared practices gives to individuals and to succeed in a claim relating to a cultural practice a litigant will need to establish its associative quality; an approach to cultural rights in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life; cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society; and solidarity is not best achieved by simple toleration arising from a subjectively asserted

[38] Id at 121.

practice. It needs to be built through institutionally enabled dialogue. Once again as Addis reasons –

> "A genuine sense of shared identity, social integration, in multicultural and multiethnic societies will develop only through a process where minorities and majorities are linked in institutional dialogue. Shared identity, like justice itself, is defined discursively."[39]

[158] It is necessary now to return to the Equality Act to consider how this understanding of culture and cultural rights in our Constitution affects the interpretation and application of that Act in the light of the facts of this case.

Was there discrimination in this case?

[159] As set out above, the Equality Act prohibits unfair discrimination on the ground of culture. In determining whether an applicant has established discrimination on the ground of culture, a court will need to bear in mind that the Constitution protects culture as an associative right. It will not ordinarily be sufficient for a person who needs to establish that he or she has been discriminated against on the grounds of culture to establish that it is his or her sincerely held belief that it is a cultural practice, or that his or her family has a tradition of pursuing this practice. The person will need to show that the practice that has been affected relates to a practice that is shared in a broader community of which he or she is a member and from which he or she draws meaning.

[39] Id at 128.

[160] It is clear on the facts of this case that there are many women within the southern Indian community who consider that wearing a nose-stud or nose-ring identifies them as members of that community. Wearing the nose-stud connects them with their community and establishes continuity with former generations. In his affidavit placed before the Equality Court, Dr Rambilass, the principal of the Westville Hindu School and an expert in Hinduism, averred that although ear-piercing is one of the religious sacraments prescribed by the *Sanskaras*, nose-piercing is not. He accepted, however, that nose-piercing is a form of cultural expression common amongst Hindu women. His oral evidence in the Equality Court was to the same effect. During it, he acknowledged that although wearing a nose-stud is not a religious practice, it is a cultural practice of significance and value.

[161] Although the applicant disputed whether Dr Rambilass's account of Hindu scriptures was correct, in describing the reason that the learner wished to wear the nose-stud, she emphasised the cultural aspects of wearing the nose-stud. Her evidence was as follows –

> "The nose ring is not jewellery, nor is it simply a body piercing. I don't regard it as such, my heritage and culture do not regard it as such. If it were jewellery it would be something that I'd be taking off my nose and wearing to match my outfit. It's not merely an accessory, it is an expression of my cultural identity. It proclaims to the world who I am and where I come from. It gives us a sense of belonging."

[162] Although the applicant argues that the nose-stud was part of religious practice, it is clear that its primary significance to her family arises from its associative meaning as part of their cultural identity, rather than from personal religious beliefs.

This is consistent with Dr Rambilass's evidence which made plain that wearing a nose-stud is not a part of Hindu religion. Indeed, it is also clear that within the applicant's family, the wearing of the nose-stud is a matter of choice. Two of the applicant's sisters, for example, do not wear nose-studs and the applicant's mother made plain that it was the learner herself who chose to wear the stud. In light of all the above, I conclude that the applicant has established that the wearing of the nose-stud is a matter of associative cultural significance, which was a matter of personal choice at least for the learner in this case, but that it is not part of a religious or personal belief of the applicant that it is necessary to wear the stud as part of her religious beliefs.

[163] Having established that wearing the nose-stud is a cultural practice with associative significance, the question arises whether the applicant has shown that the failure to afford the learner an exemption to wear the nose-stud imposed a burden on the learner's exercise of her cultural practice that has caused her harm. In formulating the question in this way, it should be emphasised that this case does not concern a challenge to the general prohibition on the wearing of jewellery set out in the school's Code of Conduct itself. It concerns a challenge to the failure by the school to provide an exemption to the learner.

[164] In answering this question, one of the issues that arises is whether the Equality Act, properly construed, requires a complainant to show that he or she has been treated differently to some comparably-situated person. I agree with the Chief Justice,

that it is not necessary in this case to determine whether it is always necessary for a complainant to point to a comparator in order to establish discrimination in terms of the Equality Act, as there is a comparator in this case.[40] Langa CJ finds the comparator to be those learners whose sincere religious or cultural beliefs are not compromised by the Code. In my view, the correct comparator is those learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied exemption, like the learner in this case. Those learners who are not afforded an exemption suffer a burden in that they are not permitted to pursue their cultural or religious practice, while those who are afforded an exemption may do so.

[165] This is the correct comparator in my view because the challenge really relates to a failure by the school to afford the learner an exemption. The challenge is thus based on a failure to provide reasonable accommodation to the learner in respect of a neutral rule. In this I differ from the position taken by the Chief Justice who sees the complaint both in the text of the Code and in the failure to grant an exemption.[41] In my view, the Code is entitled to establish neutral rules to govern the school uniform. Indeed, uniforms by definition require such rules. The only cogent complaint to be directed at the Code is its failure to provide expressly for a fair exemption procedure, a matter to which I return later.

[40] Langa CJ's judgment at para 44 above.

[41] Id at para 36. Further, in para 37 the Chief Justice states that "[t]he second problem is the fact that the jewellery provision in the Code does not permit learners to wear a nose stud and accordingly required Sunali to seek an exemption in the first place."

[166] I conclude that the applicant has established that in failing to grant her an exemption to wear the nose-stud in circumstances where other learners are afforded exemptions to pursue their cultural practices, the school did discriminate against her.

Was the discrimination unfair?

[167] Where discrimination on the basis of a cultural or religious practice is established by an applicant, the next question will be whether that discrimination is unfair. It is clear from section 13 of the Act that once the applicant has established a prima facie case of discrimination, the respondent will have to prove that the discrimination is not unfair in terms of section 14(2).[42] The following criteria are relevant: the context;[43] the question whether the discrimination impairs or is likely to impair human dignity;[44] the impact or likely impact of the discrimination on the complainant;[45] the position of the complainant in society and whether he or she belongs to a group which suffers from patterns of disadvantage;[46] the nature and extent of the discrimination;[47] whether it is systemic in nature;[48] whether it has a legitimate purpose;[49] whether and to what extent it achieves its purpose;[50] whether there are less restrictive and less disadvantageous means to achieve the purpose;[51] and

[42] The provisions of section 14 are set out in para 136 above.

[43] Subsection 14(2)(a).

[44] Subsection 14(3)(a).

[45] Subsection 14(3)(b).

[46] Subsection 14(3)(c).

[47] Subsection 14(3)(d).

[48] Subsection 14(3)(e).

[49] Subsection 14(3)(f).

[50] Subsection 14(3)(g).

[51] Subsection 14(3)(h).

whether and to what extent the respondent has taken steps that are reasonable to address the disadvantage or to accommodate diversity.[52]

[168] As stated above,[53] section 14 is not a model of clarity, nor is it particularly helpful to a court faced with the determination of what constitutes fairness. As the Chief Justice has noted, there is not a challenge to section 14 in this case[54] and it must be applied consistently with the Constitution as best possible.

[169] In assessing whether the discrimination in this case is unfair, it is necessary to recognise that it arises from the school's refusal to grant an exemption to the learner to wear a nose-stud. There is no clear statement on the record as to why the school refused to grant an exemption. In her letter communicating the School Governing Body's decision to the applicant, the principal stated the following –

> "Thank you for your email detailing and explaining Sunali's wearing of a small gold stud in her nose.
>
> The information was presented at the Governing Body meeting on 02 February 2005. The Governing Body supports the Code of Conduct of the school and are unanimous in upholding the regulation which does not allow the wearing of a stud in a learner's nose.
>
> Sunali may not wear this stud at school. . . .

[52] Subsection 14(3)(i) of the Act.

[53] See para 137 above, especially the comment concerning section 14(2)(c).

[54] Langa CJ's judgment at para 70 above.

> The school has not taken this decision lightly and has consulted more widely than our own area of expertise. The school's uniform rule takes precedence over Sunali's desire to continue in the traditional pattern of her previous generations."

[170] In her evidence before the Equality Court, the principal stated that the consultations she had undertaken had involved discussions with leading members of the Hindu community who informed her that wearing a nose-stud was not a requirement of the Hindu religion. It appears from this that the school took the view that if the practice was a mandatory form of religious adherence it would qualify for an exemption, but if it were not mandatory, it would not. This appears inconsistent with the school's practice in relation to other exemptions. Two examples were given of when an exemption had been granted previously: the wearing of red "Lakshmi strings" at certain times of the year; and the wearing of hide bracelets to mark respect after a funeral. It is not clear in either case that these are mandatory requirements of religious adherence. Indeed, it seems likely that both these practices are not mandatory but are associative cultural or religious practices. It is not clear then why exemptions were granted in these circumstances but not in the present case.

[171] Given that the school had in the past granted exemptions from rules for cultural practices, it has not established that it acted fairly in refusing an exemption in this case on the ground that the applicant had not established that the practice constituted a mandatory requirement of her religion. Exemptions had in the past been afforded to others for cultural practices, so the justification afforded by the school does not establish the fairness of the refusal in this case.

[172] An issue that was raised on the papers that might have been relevant to the decision to refuse the exemption was the fact that the wearing of nose-studs is now considered to be fashionable by many teenagers. This consideration may have been taken into account by the school in its decision to refuse to permit the wearing of the nose-stud. Although this factor may be a relevant factor, it cannot be a determinative one. Once it is established that the desire to wear a nose-stud is genuinely based on a cultural practice that is important to a learner, the fact that it may coincide with current fashions, cannot without more justify a refusal to permit the learner to wear the nose-stud. A school is an ideal place to educate other learners about the difference between fashion and cultural practices and should an exemption for nose-studs be granted, a school would be obliged to furnish such education to its learners.

[173] The unfairness I have identified in this case lies in the school's failure to be consistent with regard to the grant of exemptions. It is clear that the school has established no clear rules for determining when exemptions should be granted from the Code of Conduct and when not. Nor is any clear procedure established for processing applications for exemption. Schools are excellent institutions for creating the dialogue about culture that will best foster cultural rights in the overall framework of our Constitution. Schools that have diverse learner populations need to create spaces within the curriculum for diversity to be discussed and understood, but also they need to build processes to deal with disputes regarding cultural and religious rights that arise.

[174] In this case, as required by the Schools Act, the school established a consultation process to draft a code of conduct which contained the rules regulating the uniform. I pause here to emphasise the importance of this consultative process. The first step in accommodating a plurality of traditions within one institution is the need to consult widely and carefully on common rules. The process is likely not only to improve the content of the rules, but also to foster their legitimacy. On the other hand, one of the great difficulties for schools and other educational institutions is the relevant transience of the learner population. This transience makes it desirable, especially in schools with changing demographic profiles, to repeat the process of consultation at regular intervals.

[175] The Code of Conduct once adopted did not contain any express provision for exemptions, either to regulate in what circumstances they would be granted or to establish a procedure whereby an exemption could be obtained. In my view, it is this absence which was a significant factor in giving rise to the unfairness in this case. An exemption procedure was established in an ad hoc fashion which allowed certain exemptions to be made but which did not establish the principles for the granting of an exemption, nor the process that had to be followed to obtain one.

[176] In this regard, I conclude that the school failed in its obligations to the learner. Where a school establishes a code of conduct which may have the effect of discriminating against learners on the grounds of culture or religion, it is obliged to

establish a fair process for the determination of exemptions. This principle requires schools to establish an exemption procedure that permits learners, assisted by parents, to explain clearly why it is that they think their desire to follow a cultural practice warrants the grant of an exemption. Such a process would promote respect for those who are seeking an exemption as well as afford appropriate respect to school rules. An exemption process would require learners to show that the practice for which they seek exemption is a cultural practice of importance to them, that it is part of the practices of a community of which they form part and which in a significant way constructs their identity. The school's authorities would in this way gain greater understanding of and empathy for the cultural practices of learners at the school.

[177] In this case, the learner has never set out either orally or in writing her view as to why she thinks the school should afford her an exemption. This failure is unexplained on the record. Only the learner's mother's voice has been heard. This is unfortunate. A fifteen-year old learner who is seeking an exemption from school rules should as part of a fair exemption process be required to set out in writing or orally her reasons for seeking an exemption. As citizens of a diverse society we need to be able to explain to the other members of society why it is that our cultural practices require protection. An exemption process in a school environment, particularly where one is dealing with learners in their teens, should require learners to take responsibility for the exemption they are seeking by setting out their reasons for requiring the exemption. Such a process contributes to an enhancement of human dignity and autonomy.

[178] Once those reasons have been provided, the school decision-making body would need to take into account the following considerations: the cultural or religious practice on which the application for an exemption is based; the importance of that practice to the learner concerned; whether the cultural or religious practice is mandatory or voluntary; whether the relevant cultural or religious community considers it to be a practice which ordinarily warrants exemption from school rules; the extent of the exemption required (in other words how great the departure from the ordinary school rule); and the effect of granting the exemption on the achievement of a "disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process."[55]

[179] There can be no doubt that a key factor in considering an application for exemption will be the beneficial function of a school uniform in the school environment and the effect of the grant of any exemption on the wearing of uniforms. The principal, both in her affidavit and her oral evidence before the Equality Court pointed to that function. In her supplementary affidavit in the Equality Court, the principal stressed the value of a school uniform as follows:

> "Broadly speaking the aim was to adopt a policy in regard to school uniform and appearance that would ensure that the learners would not be distracted by issues of fashion from focussing on the task of getting a good education and deriving the maximum benefit from school activities. The aim is to provide an environment where the girls are less subject to peer pressure in regard to lifestyle issues than is

[55] As provided for in section 8(2) of the Schools Act.

> generally the case outside the school and to avoid both distractions and manifest distinctions between girls, particularly distinctions based on financial differences, that are easily created by different forms of dress and appearance."

[180] The benefit of school uniforms is also affirmed in the National Guidelines on School Uniforms issued by the Minister of Education.[56] These guidelines state that school uniforms serve important "social and educational purposes".[57] Paragraph 6 of the guidelines provides as follows:

> "The adoption of a school uniform can promote school safety, improve discipline, and enhance the learning environment. In addition, a school uniform is also useful in:
>
> (1) assisting school officials in the early recognition of persons not authorised to enter a school;
> (2) helping parents and learners resist peer pressure that leads children to make unnecessary demands for particular and often expensive clothing;
> (3) decreasing theft, particularly of designer clothing, jewellery and expensive footwear;
> (4) minimising gang violence and activity;
> (5) instilling discipline in learners; and
> (6) helping learners concentrate on their schoolwork."

[181] The approach to the granting of exemptions will thus require an exercise in proportionality. The importance of the cultural practice to the learner, including the question of whether it needs to be pursued during school hours, will need to be weighed against the effect that the grant of the exemption may have on the important and legitimate principles that support the wearing of a school uniform. In performing

[56] The National Guidelines on School Uniforms were issued in terms of the Schools Act and published in Government Gazette 28538 GN 173, 23 February 2006.

[57] Id at para 1.

this exercise, a school needs to be fully apprised of the cultural importance of the practice.

[182] In this case, if the learner had still been attending the school, it would have been appropriate to refer the matter back to the school to determine the exemption in the light of the considerations set out above. This would have promoted dialogue about culture within the school and would have required the learner to set out why she seeks an exemption from the Code of Conduct. She would have had to persuade the school of the importance of the practice to her. There is no longer any purpose in pursuing this course as the learner has left school. In the circumstances, it seems to me that no order should be made in this regard.

[183] I do not agree with Langa CJ that it is appropriate to make a declaratory order that the learner's rights have been infringed.[58] The learner has left the school and the matter is accordingly moot as between the learner and the school as Langa CJ accepts in his judgment.[59] I do not think an order in such circumstances is just and equitable.

[184] On the other hand, I agree with Langa CJ that the Court should make an order calling upon the school to effect amendments to its Code of Conduct to provide for the granting of exemptions from the Code of Conduct in the case of religious and cultural practices.[60] The amendments to the Code of Conduct should only be adopted after a

[58] Langa CJ's judgment at para 115 above.

[59] Id.

[60] Id at para 117.

proper process of consultation in terms of section 8 of the Schools Act has taken place. Once they have been adopted, the school should provide a place in its curriculum for the Code of Conduct to be discussed with all learners in the classroom. That discussion should include a discussion of the principles on which exemptions from the rules are granted and the process whereby that happens. In particular, it seems important to stress that parents and learners need to accept that school rules should ordinarily be observed. Where processes are established for exemptions to be granted, they must be followed. Encouraging the observance of rules is the first step towards establishing civility in an institution.

[185] Finally, I should add that this has been an important case concerning the ground rules that should apply in schools that have a diverse student body. As stated at the outset, sadly there are still too few schools in South Africa whose learner population is genuinely diverse. There can be no doubt of the good faith of the applicant, the learner and the school involved in this case. It is inevitable given the extraordinary transformation that the school in this case has undergone that conflict about the school and its rules should arise from time to time. It needs to be emphasised however, that the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success. Where possible processes should be available in schools for the resolution of disputes, and all engaged in such conflict should do so with civility and courtesy. By and large school rules should be observed until an exemption has been granted. In this way, schools will model for learners the way in

which disputes in our broader society should be resolved, and they will play an important role in realising the vision of the Preamble of our Constitution: a country that is united in its diversity in which all citizens are recognised as being worthy of equal respect.

For the first and second applicants:	V Soni SC instructed by the State Attorney, KwaZulu-Natal.
For the third and fourth applicants:	M Wallis SC, M du Plessis and L Naidoo instructed by RF Sobey.
For the respondent:	GJ Marcus SC, S Govender SC and P Naidu instructed by Lawyers for Human Rights.
For the first amicus curiae:	AM Stewart SC instructed by Diane Gammie Attorneys.
For the second and third amici curiae:	S Budlender instructed by SR Sivi Pather Attorneys and the Freedom of Expression Institute respectively.

Annexure P-3

IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE JJ.A)

CIVIL APPEAL NO. 22 OF 2015

BETWEEN

MOHAMED FUGICHA……APPELLANT

AND

METHODIST CHURCH IN KENYA (SUING THROUGH ITS REGISTERED TRUSTEES)....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

COUNTY DIRECTOR OF EDUCATION ISIOLO COUNTY.....3RD RESPONDENT

DISTRICT EDUCATION OFFICER ISIOLO SUB-COUNTY.....4TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Meru (Makau, J.) dated 5th March 2015) in **PETITION NO. 30 OF 2014)**

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JUDGMENT OF THE COURT

By this appeal, this Court is being asked, to pronounce authoritatively for the very first time as far as we can tell, on the very live and often vexed issue of free exercise of religion in Public Schools in Kenya.

1. BACKGROUND AND PROCEDURAL HISTORY

By a Petition filed before the High Court's Constitutional and Human Rights Division at Nairobi, which was later transferred to the High Court at Meru, the Methodist Church in Kenya, suing through its Registered Trustees (The Church), impleaded as respondents the Teachers Service Commission (TSC), the County Director of Education Isiolo County (CDE) and the District Education Officer Isiolo Sub-County (DEO).

On the facts supporting the Petition, the Church averred that it was the Sponsor of St. Paul's Kiwanjani Day Mixed Secondary School (The School) for which, it provided a five-acre piece of land. The School, founded in the year 2006, had "***a population of 412 students from diverse religious backgrounds***"

and was the best performing school in Isiolo County. It had a school uniform policy prescribed in the admission letter which each student signed upon admission. The respective parents also signed it.

Controversy over the issue of uniform, it was averred, only arose on 22nd June 2014 when, during an Annual General Meeting cum Prize Giving Day, the Deputy Governor of Isiolo County ***"made an informal request that all Muslim girls in the school be allowed to wear* hijab *and white trousers in addition to the prescribed uniform"***. A week later, some ***"unknown people/persons"*** brought the said items into the school and thereafter Muslim girls turned up donning the said items of apparel and open shoes in addition to the school uniform. This led to disharmony and tension.

When asked to revert to the prescribed uniform, the Muslim girls, joined by the boys of their faith "***went on the rampage".*** It was alleged that they "***broke window panes and threatened teachers and Christian students"*** before they walked out of the school and marched to the DEO's office. A month later, the DEO, together with officials from the Ministry of Education and Members of an Interfaith Group, visited the school. After discussion it was "***unanimously agreed***" that the school uniform remain as prescribed in the dress code, but the DEO ***"categorically stated that unless* hijab *and trousers were allowed in the school there would be bloodshed".*** On 30th July 2014, a meeting of the school's Board of Management, (BOM), Parents Teachers Association (PTA) and the Church met and agreed on a return to school formula pursuant to which 214 students reported back to school just before it was closed for the August holidays.

On 27th August 2014, the CDE held a meeting with the Principal, Members of the BOM and the PTA who, however, felt that they were being '*hijacked'*, which the Principal complained about in a letter objecting to directions issued by the CDE on the issue. The CDE proceeded to hold a meeting with parents at the school without the BOM and the PTA at which certain resolutions were arrived at, which, the CDE communicated to the BOM and the Church and directed them to meet before 11th September 2014 "***to decide with finality whether* hijab *and white trousers would be acceptable as part of the school uniform".***

The said meeting was duly held at the school and by a vote of 18 out of 22 present, overwhelmingly voted to maintain the *status quo*. The very next day the CDE held a meeting with a few of her officers and directed that Muslim girls should wear trousers and *hijab* and that the principal of the school be transferred.

The Church considered the transfer of the principal, one GEORGE M. MBIJIWE, who had been the best performer in the County for the previous five consecutive years, to have been "***malicious, irrational, punitive***" for his stand in maintaining school uniform. And it complained to the respondents and the relevant authorities requesting that school rules and regulations be adhered to, the Principal retained, the Church be respected as sponsor of the school and that there be non-interference with its running of the school.

It was further averred that,

"3. The Christian students at the school have felt that the school has accorded Muslim students special or preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya…..

4.The Respondents have erred in failing to play a key role in standardization of school uniforms thus creating economic disparities on religious backgrounds (sic). The respondents' actions have given an impression that the Muslim students have been accorded special and preferential

treatment, a fact that is tantamount to discrimination and the rules of natural justice and the rule of law (sic)"

The Church therefore sought a declaration that the decision to allow Muslim girls to wear *hijab* and trousers was discriminatory, unlawful, unconstitutional and contrary to the school's rules and regulations; and various injunctions to remedy the situation or to provide relief against the said decision.

The Petition was supported by the verifying affidavit of KIMAITA JOHN MACHUGUMA, the Church's Development Co-ordinator of the Isiolo Circuit sworn on 18th September 2014 in which he reiterated and provided documentary proofs for the allegations in the Petition.

In answer to the Petition, the TSC filed a replying affidavit sworn on 3rd November 2014 by its Senior Deputy Director in charge of Teachers Management of Post Primary Teachers, MARY ROTICH. The gist of the affidavit was that the transfer of the school's head teacher was done by the TSC in exercise of its constitutional and statutory functions and was done after a rational consideration of relevant factors without loss, prejudice or injustice to the said teacher. The TSC attacked the Petition against itself as being incompetent for imprecision and an attempt by the Church to usurp the TSC's constitutional, statutory and administrative mandate "***which shall uproot the philosophical concept behind Chapter fifteen Commissions".*** It prayed that the Petition be dismissed with costs.

On behalf of herself and the DEO, MRS. MURERWA SK, the CDE Isiolo County swore a replying affidavit on 17th October 2014 in response to both the Petition and an interlocutory application for injunction filed by the Church. She stated that she did convene a meeting of Senior Education Officers on 10th September 2014 with a view to responding to the issue of wearing hijab and trousers which had caused a lot of unrest at the school. She averred as follows at paragraphs 5 and 6;

"5. THAT in deliberating the issue the meeting was informed by among other issues-

(b) Students of the school had transitioned from Kiwanjani Primary School equally sponsored by the Petitioners where they had been allowed to wear* hijab *headscarf/trousers [and] by being required to cease from adorning (sic) the same, great dissatisfaction arose.

***(c) The neighbouring schools for instance Garbatulla High School also sponsored by the Petitioners, adorned (sic) the* hijab.**

***6. THAT in light of the foregoing, the meeting resolved that itwould be fair and just that the Muslim students be allowed to adorn (sic) the* hijab.**

7. THAT the issue of recommending the transfer of the Principal was resolved after it had become apparent that he would be adamant in effecting the resolutions of the aforementioned meeting. His conduct only served to fun(sic) animosity as opposed to mitigating the situation and was reflected in his contemptuous attitude towards his superiors".

She dismissed as outrageous the allegation that she and her office intended to dissolve the school's BOM and PTA. She urged the dismissal of the Petition and Motion.

The appellant's entry into the fray was by an application filed under Certificate of Urgency on 8th October 2014. In the Motion dated 6th October 2014, the appellant **Mohammed Fugicha** (Fugicha) sought to be enjoined in the proceedings as an Interested Party and/or Respondent to the Petition. He also sought leave to respond to the Church's application for injunction dated 18th September 2014. He prayed that

the conservatory orders granted by the Court on 23rd September 2014 pending the hearing and determination of the Petition be set aside or discharged. He prayed, in the alternative, for an interim order limited to the remainder of that school term allowing the Muslim students at the school to wear the *hijab*; "a scarf and trouser" only.

In his grounds and affidavit in support, Fugicha averred that he was a father to KALO MOHAMMED FUGICHA, AISHA MOHAMMED FUGICHA and SUKU MOHAMMED FUGICHA – all students at the school who were Muslims – and that;

"(e) …wearing of hijab is part and parcel of freedom of conscience, religion, thought and belief as enshrined in Article 32 of the Constitution of Kenya and the same is being restricted and limited and being derogated from its core essential content by the Petitioner contrary to Article 24(2) (e) of the Constitution of Kenya.

Fugicha also raised the following grounds;

(g) THAT Kenya as a member of the United Nations Organization and as a democracy is bound by the United Nations Charter and also bound by the decisions of the United Nations Human Rights Committee the monitoring body created by the 1966 International Covenant on Civil and Political Rights and specifically its General Comment No. 31 in the case of Hudoyberaganova against the state of Uzbekistan [CCPR/82/d/931/2000] which upholds the freedom of Muslim students to dorn (sic) on hijab.

(h) THAT it is the applicant's case that the decision in Republic vs Headteacher, Kenya High School & Anor Ex-parte SMY (a minor suing through her mother and next friend AB [2012] eKLR (THE KENYA HIGH case) against wearing of hijab in school was determined per in curiam and as a consequence it is paramount that after disposal of interlocutory applications, directions do issue referring the matter to the Hon. Chief Justice to appoint a bench of more than one judge to hear the main petition as the Court would be bound by this decision.

(i)THAT the administration at St. Paul's Kiwanjani Mixed Day Secondary School are indirectly forcing Muslim students therein to involuntarily sign a commitment not to wear hijab but to abide by the school uniform and if not, refused entry into the school compound an act which is discriminatory and trampling on the Muslim students rights.

He also swore an affidavit in the same terms and added that his three daughters had been denied entry at the school for wearing the *hijab*, which the school administration felt emboldened to do on account of the conservatory orders issued by the High Court. He asserted the children's legitimate expectation to be allowed to exercise their freedom of conscience, religion, thought and belief by wearing the *hijab*.

By its order made on 15th October 2014, the High Court allowed Fugicha's joinder as an Interested Party in the proceedings. He then swore a replying affidavit on 16th October 2014 in response to the School's application for conservatory orders and injunction dated 18th September 2014. In his said Affidavit, Fugicha averred, *inter alia*, as follows;

"8. THAT the word hijab is an Arabic word literally meaning to cover or a curtain . In Islamic jurisprudence it refers to dress code for women and with respect to school-going children beside the school uniform, customarily the girl students have been a headscarf and a trouser normally plain white in colour covering the legs and the head but leaving the face.

9. THAT I do aver that hijab is religious obligation to all Muslim females who have reached the age of puberty primarily to guard on modesty and decency and being a religious command and a core Islamic faith, belief and practice, it is a sin not to adhere to such a religious command and which to Islamic faith has important religious significance.

10. THAT the forcing of Muslim students not to wear hijab as aforesaid is a painful choice to a steadfast Muslim student to practice and express her religion and Islamic culture and exposes them to suffering in silence and detriment and as such it is exceptionally important and justifiable in the circumstance to be allowed to wear hijab.

….

12. THAT I do aver that wearing of hijab by my daughters and by any Muslim girl students is a manifestation, practice and observance of the Muslim faith and/or religion by those who are steadfast and conscious of their faith (my children included as they are steadfast and are always concerned by not being allowed to wear hijab to which they attach exceptional importance) and as such pursuant to the said constitutional provision a person should not be compelled and/or forced to remove the hijab as it would be forcing the students to engage in an act contrary to the Muslim religion and belief which freedom is protected under our progressive bill of rights.

He further swore as follows;

18. THAT I do aver that it is against the spirit of Article 259 of the Constitution the refusal by the petitioner for Muslim students to wear hijab who are concerned about their modesty and decency as demanded in the Muslim faith, does not promote their dignity or fundamental belief in our religion of Islam, it also does not promote equity by equitably appreciating other persons around us and their religious persuasions and giving them room to practice and manifest their religion. It is an antithesis of inclusiveness by not appreciating the multi cultural aspects of our society and an affront to equality and freedom from discrimination as provided under article 27(1), (4) and (5) of the Constitution of Kenya and which is contrary to the expected interpretation (Article 259 (1) (d)) – a contribution of good governance.

19. THAT I am alive to the fact that the freedom of conscience religion, belief and opinion is subject to limitations but I am advised by my advocates on record Mr. Ali Advocate that Article 24(2) (c) of the Constitution provides that such limitations shall not limit the right or fundamental freedom so far as to derogate from its core or essential content which the actions of the petitioners manifestly are doing and intended to do which will only leave the freedom of conscience, religion, belief and opinion as a paper freedom not protected or given effect.

20. THAT for record purposes, the allegation that a Muslim girl student will look different from those of other faiths if allowed to wear on hijab has no basis as the main school uniform is not affected with the exception of the Muslim head scarf and trouser which are all uniform and plain white in colour. It has not been shown or proved that if such an exemption if granted learning process would be disrupted.

21. THAT I aver that pluralism and diversity can cause tension in any community but authorities cannot purport to remove a cause of tension by eliminating pluralism but they ought to ensure that the diverse groups tolerate and accommodate each other."

The church responded to all those affidavits through a further affidavit sworn by Kimaita John

Machuguma on 21st November 2014. In specific answer to Fugicha's affidavit, the said Machuguma asserted that the *hijab* was a purely uniform issue governed by school rules and not a religious issue as had been made to appear. He also averred that when Fugicha's children reported to the school, they each, with their mother, had signed and agreed to comply with the school rules and regulations.

The court having granted an interim stay of its earlier orders thereby allowing Muslim students at the school "***to wear an* hijab *(a scarf/trouser only)",*** and Fugicha having been enjoined as an Interested Party, the parties recorded a consent order on 21st October 2014 for the *status quo* then prevailing to be maintained until hearing and determination of the Petition. The court granted liberal leave to all parties to file and serve further affidavits within fourteen days and directed that the Petition be determined by way of written submissions to be filed and served in accordance with a time-table it gave. The submissions were thereafter highlighted orally by the parties before the honourable Judge who then considered them and delivered the judgment impugned herein on 5th March 2015.

By that judgment the learned Judge dismissed the school's prayers against the TSC on the question of the transfer of the Principal to another school but on the issue of the *hijab* granted the following orders, as against all the respondents before him;

"***4. An order that the respondents decision to allow Muslim students to wear* hijab*/trousers is discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations at St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby issued.***

5. An order of injunction preventing the respondents from allowing Muslims students from wearing* hijab *contrary to the school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary be and is hereby issued.

6. An order of injunction restraining the respondents from interfering with the petitioner in executing its rightful role as a sponsor in respect of the affairs of St. Paul's Kiwanjani Mixed Secondary School be and is hereby issued.

7. A mandatory injunction compelling the respondents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of Kiwanjani Day Mixed Secondary School be and is hereby issued.

8. An order of injunction preventing the respondents from dissolving or purporting to dissolve the current Board of Management and parents Teachers Association of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby granted until their term of office expires.

9. General damages – Nil

10. An order that school uniform policy do (sic) not indirectly discriminate against interested party's daughters and other Muslim female students.

11. The interested party's cross petition is defective and is struck out.

12. Costs of the petition to the petitioner".

2. THE APPEAL

Aggrieved by that decision, Fugicha filed a Notice of Appeal and then a Memorandum of Appeal raising some eighteen (18) grounds. They can be summarized that the learned Judge erred by;

- Failing to appreciate the principle of direct and indirect discrimination.
- Misapplying the concept of accommodation in discrimination law inherent in **Article 27(4)** and **(5)** of the Constitution and equating the wearing of *hijab* to a conferment special status.
- Failing to appreciate and uphold the importance of *hijab* as a manifestation of religion protected under **Article 32** of the Constitution.

- Holding that allowing *hijab* amounts to elevating Islam over other religions and contrary to Kenya's secular character and the equality principle.

- Dismissing the cross-petition for non-compliance with the **Mutunga Rules** yet it surpassed the informality test therein.

- Misapprehending the law on the rights and role of a sponsor under **Section 27 of the Basic Education Act, 2013.**

- Ignoring evidence on record that school uniform was contentious.

- Failing to uphold the submission that absent a statute expressly limiting the right to manifest religion any limitation thereon through school rules was illegal.

- Holding that the wearing of *hijab* by Muslim female students was discriminative of Christian and other students.

- Holding that the school is a Christian institution yet it is public.

- Being biased in time allocation for highlighting of submissions and prompting the petitioner on costs.

Arguing the appeal before us, **Ms Moza Jadeed,** learned Counsel appearing with **Mr. Ali Mahmud Mohammed** for the appellant, argued those grounds under six distinct themes corresponding with the written submissions previously filed. On the import of the donning of the *hijab* on the part of female Muslim students, learned Counsel submitted that the learned Judge was in error to hold that it amounted to according special treatment to Muslim girls and concomitantly discriminating against non-Christian girls. In doing so, she contended, the learned Judge wholly misdirected himself on the doctrine of discrimination.

Citing **Article 24 (4)** and **(5)** of the Constitution, **Ms. Jadeed** posited that discrimination can be either direct or indirect and both forms are proscribed by the said provision, whether by the State or by an individual. The said provision is in the following terms;

"27 (4) The state not discriminate <u>directly</u> or <u>indirectly</u> against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate <u>directly</u> or <u>indirectly</u> against another on any of the grounds specified or contemplated in clause (4)".

(Our emphasis)

Counsel argued that it was wrong for the learned Judge to assume that any different treatment is discriminatory since it is trite, in her view, that not all different treatment amounts to discrimination, in the same way as not all similar treatment amounts to equality. She referred to the classic statement on **non-discrimination** that was made by Judge Tanaka in the **SOUTH WEST AFRICA CASE**; [1966] ICJ REP that equality does not mean;

"…absolute equality, namely the equal treatment of men without regard to individual concrete circumstances, but it means – relative equality, namely the principle to treat equally what are equal and unequally what are unequal …. To treat unequal matters differently according to the inequality is not only permitted but required"

(her emphasis)

She also cited the case of **FEDERATION OF WOMEN LAWYERS KENYA (FIDA K) & 5 OTHERS –vs- ATTORNEY GENERAL & ANOR** [2011] eKLR where the High Court held that mere differentiation or inequality of treatment does not *per se* amount to discrimination within the prohibition of the equal protection clause of the Constitution; running afoul it only if it is shown that the differentiation is arbitrary or unreasonable, adding that it was not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

Faulting the learned Judge for merely deploying the term **discrimination** without stating whether it was **direct** or **indirect**, Counsel drew a distinction between the two forms. Direct discrimination occurs, in Counsel's submission, when a policy, law or rule intentionally seeks to treat another person or persons less favourably compared to others because of that person's protected ground or particular characteristic as enumerated in Article 27 of the Constitution. Indirect discrimination on the other hand occurs when a person, policy, measure, or criteria though neutral, nevertheless places another person at a disadvantage compared to others because of their characteristic or protected ground.

Learned Counsel pointed out that the school uniform rule at the school was indirectly discriminatory against Fugicha's daughters as well as other Muslim girls because, even though on the face of it neutral, the rule nevertheless disadvantaged them on account of their religion, which is a protected ground or characteristic. The learned Judge was also wrong, it was contended, to hold that allowing Muslim students to don the *hijab* discriminated against the non-Muslin students without showing how it did and without a prayer having been made, and no protected ground having been disclosed by those others. The learned Judge was faulted for presuming that there was discrimination against the non-Muslim girls without such evidence of the same having been tendered yet the burden of persuading the court remains on the Plaintiff or Petitioner, which the church never discharged. The US Supreme Court decision of **TEXAS DEPT OF COMMUNITY AFFAIRS –vs- BURDINE** 450 US 248 (1981) was cited.

Returning to the theme of indirect discrimination, learned Counsel submitted that a claimant succeeds on it upon proof that a perfect decision or policy nevertheless has negative impacts or consequences on him because of his protected ground. Then only would the defendant or violator be required to show that the decision was actuated by a legitimate aim. Reliance was placed on the proof pattern for indirect discrimination which the learned Judge ought to have followed, but erroneously failed to do so.

This was said to have been set out in the English case of **THE QUEEN** on the application of **SARIKA ANGEL WATKINS SINGH (A child acting by SANITA KIMARI SINGH her mother and litigation friend) –VS- THE GOVERNING BODY OF ABERDARE GIRLS' HIGH SCHOOL AND ANOR** [2008]

EWHC 1865 (Admin) where Justice Silber stated that in considering the claimant's case on grounds of indirect discrimination, it is necessary to go through the following steps, which are;

(a) to identify the relevant 'provision criterion or purpose' which is applicable;

(b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;

(c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally; and

(d) whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving a legitimate aim."

Relying on that proof pattern, **Miss Jadeed** submitted that on the present case where the school was claiming that allowing the *hijab* would disadvantage the Christian students, the comparator pool would be the Muslim female students said to enjoy the special treatment. This was in line with the thinking of the South African Constitutional Court in **MEC FOR KWAZULU NATAL, SCHOOL LIAISON OFFICER & OTHERS –VS- PILLAY** CCT51/06 [2007] ZACC 21 in determining whether a rule preventing a Tamil-Hindu girl from wearing a nose stud central to her religious identity was discriminatory on religious and cultural grounds. The Chief Justice, Langa identified the comparator group which was treated better than the claimant as those pupils;

"…whose sincere religious or cultural beliefs or practices beliefs or practices are not compromised by the [uniform] code, as compared to those whose beliefs or practices are compromised".

Counsel submitted that it behoved the learned Judge to determine the particular disadvantage suffered by the Christian students *because they were Christian* before he could permissibly hold that they had been discriminated against by allowing the Muslim girls to wear *hijab*. To demonstrate the application of the approach as part of the proof pattern, she referred to the **SARIKA** case (Supra) where a school policy refused a Sikh girl to wear a Kara, a plain steel bangle of 50mm width and great significance to Sikhs. Justice Silber observed thus at par 56B;

"I believe that there would be 'a particular disadvantage' or 'detriment' if a pupil is forbidden from wearing an item when (a) that person genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to his or her racial identity or his or her religious belief and (b) the wearing of this item can be shown objectively to be of exceptional importance to his or her religion or race, even if the wearing of the article is not an actual requirement of that person's religion or race". (emphasis added)

Whereas the school was wholly unable to prove, indeed appears to have made no effort to establish these proof patterns, counsel argued, there was ample proof that Fugicha's daughters were indirectly discriminated against by the uniform policy rules on account of their religion.

Counsel next addressed the distinction between ***accommodation*** and special treatment which she blamed the learned Judge for conflating and confusing. She submitted that accommodation, which involves the granting of exception to the common rule, so as to give effect to a request considered to be of exceptional importance to the seeker's religion, is key to non-discrimination. She cited Langa CJ's observation, that the principle of accommodation demands that ***"…the State, an employer or a school***

must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally". In the instant case, the school did not even stand to suffer any additional hardship or expense since Fugicha's daughters and other Muslim girls were seeking to wear *hijab* and trouser, not in lieu of, but in addition to the school uniform, and had in fact offered that the school itself do choose the colour of the *hijab*. The failure to accommodate Fugicha's daughters' request indirectly discriminated against them in their enjoyment of the right to education on the basis of both religion and dress.

This discrimination was the more serious considering that the school, though sponsored by the church, is a **Public** school and is so registered. The Church was under an obligation as a sponsor to ensure respect for the religious beliefs of those of other faiths by dint of **Section 27** of the **Basic Education Act**. That obligation required that the church and the school ensure that Muslim girls, who made up 68% of the female population, be allowed to wear the *hijab*.

Counsel criticized the learned Judge for erroneously holding that allowing the wearing of the *hijab* amounted to elevating the Muslim religion. She first contended that whereas Kenya is a secular State, it is not founded on hostility to religion. Rather, the Constitution itself in the preamble acknowledges the ***Supremacy of Almighty God*** and contains in its 2nd Schedule the ***National Anthem*** which is a prayer invoking God's Lordship over the nation. The Judge therefore misapprehended the principle of separation of Church and State. She expounded that in principle what is constitutionally forbidden is governmental establishment of religion as well as governmental interference with religion but there is ***"room for play on the joints productive of benevolent neutrality which will permit sponsorship without interference".*** She cited the Canadian case of **ZYLBERBEG vs- SADBURY BOARD OF EDUCATION** 1988 CAN L11 189; the US Supreme Court decision of **ABINGTON SCHOOL DISTRICT –vs- SCHEMP** 374 US 203 and referred to Thomas Jefferson's January 1, 1802 letter to the Danberry Baptist Association of the State of Connecticut in which he posited that **"*while secularism seeks not to elevate one religion over the others, it nonetheless does not proscribe its free exercise."***

Thus, in Counsel's view, what secularism and freedom of religion entails is not a strict wall of separation between State and religion, as there must necessarily be a bridge and a conduit between the two. This is in consonance with reading of all of the constitutional provisions harmoniously, which is a cardinal, principle of constitutional interpretation.

Turning to Fugicha's cross-petition, Counsel termed the learned Judge's dismissal of it as erroneous since it did contain material that met and surpassed the informality test under Rule 10(3) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** ("the Mutunga Rules"). That informality, argued Counsel, is firmly founded on **Article 22 (3)** of the Constitution which obligates the Chief Justice to ensure the Rules he promulgates keep formalities to the minimum and allow proceedings to be entertained on the basis of informal documentation. The learned Judge was criticized for adopting a strict and erroneous interpretation of Article 22 (3) and rejecting the cross-petition on the basis of failing to state precisely the provision being infringed in law when, in fact, the provision was disclosed and the nature of violation, namely discrimination on the basis of religion was "alive in the entire Replying Affidavit". The learned Judge was characterized as having misapplied himself by wholesale adoption of the **ANARITA KARIMI NJERU –vs- REPUBLIC NO. 1** [1976-80] 1KLR 1272, (**ANARITA**) jurisprudence yet the context is now different, admitting to and encouraging informality for the advancement of access to justice.

Ms. Jadeed rested by faulting the learned Judge for following the decision of Githua J in the **KENYA HIGH** case (supra) and thereby erroneously accepting that attainment of a "***common or uniform"*** identity was a legitimate aim of the school uniform policy. This was incorrect, submitted Counsel,

because objectively the alleged justification was untenable because there was no relationship between the wearing of a limited form of *hijab* and the achievement of academic excellence. It was neither agreed nor empirically proved by the school, it was contended, that the hijab in any imaginable way disrupted teaching by teachers or comprehension by students or the communication between them during the learning process. The **KENYA HIGH** case (supra) was therefore patently bad law, in Counsel's opinion, because it flagrantly failed to consider or wholly misunderstood the doctrine of indirect discrimination and saw allowing the *hijab* as a prelude to instigation for a deluge of demands for different religious attire by other students which might result in students turning up dressed in a mosaic of colours and, according to Justice Githua, this scenario ***"would invite disorder, indiscipline, social disintegration and disharmony in our learning institutions".***

It was suggested that the proper approach is an appreciation that cohesiveness, while evidently a useful value, does not entail or demand elimination of pluralism. Rather, it is about being, as was held in **SARIKA**, (supra***) "first tolerant as to the religious rites and beliefs of others and second to respect other people's religious wishes."*** Indeed, contrary to what **KENYA HIGH** held, it was urged that the Constitution "***rumbles on the values of pluralism, diversity and cohesiveness".*** Thus, far from being a threat to be discouraged, difference ought to be celebrated. In the words of Langa, CJ in **PILLAY** (supra), "***The display of religion and culture in public is not a parade of horribles but a pageant of diversity which will enrich our schools and in turn our country".***

On behalf of the TSC, **Mr. Anyuor,** learned counsel submitted that as the appellants are not raising any ground touching on the transfer of the schools' Head Teacher which the learned Judge held to have been lawful and there is no challenge to that finding by way of cross-appeal, the TSC considered itself improperly enjoined in this appeal. This is not entirely correct, in our view, and there was no error in naming the TSC as a respondent as our Rules require a party in the Court below to be named and served in an appeal unless the court grants excusive dispensation on application.

Speaking as an officer of the Court, and with our leave, **Mr. Anyuor** opined that whereas the wearing of school uniform is an expression of equality, there is a compelling basis for a small section of the community to be allowed to express their religion by wearing religious symbols or attire, in this case the *hijab*, the wearing which the rest of the respondents herein have no problem with. Indeed, he urged this Court to come up with relevant rules on this issue after an inclusive, consultative process involving all stakeholders. He was categorical that the protection of the rights of the minority through appropriate accommodation should be upheld.

(a) The Church's Case

Opposing the appeal, **Mr. Kurauka**, learned Counsel for the Church first reiterated the factual basis of the dispute which we have already set out herein. He submitted that every institution has rules and they are binding on all who join that institution. In the present case both Fugicha and his daughters signed that they would abide by the school rules which include the uniform rules. Counsel was categorical that **"if you don't agree with the Rule you cannot be allowed into the school"**, which, he proceeded to state rather curiously, was "***not dissimilar to other areas of life such as the military***". He conceded that the school was a public institution but sponsored by the Church, which is a Christian denomination.

Counsel proceeded to urge that the issue of the *hijab* has been litigated upon in 'many cases' and nowhere was it, or other religious attire such as the ***Akorinos'*** headscarf, allowed. He defended that exclusionary jurisprudence as being based on a sound policy of uniformity without any indication of preferential treatment for those seeking to appear different. He denied that a refusal of the *hijab* amounted to discrimination and contended that Fugicha's daughters should have raised the issue at the

very point of admission to the school and it was not open for them to raise it later. When we asked him whether the uniform rules or regulations were cast in stone, **Mr. Kurauka** conceded that they were not, but that they can only be amended by the School's Board of Management.

Counsel submitted further that ***"to allow this appeal and permit the wearing of the* hijab *would lead to chaos in the school as students would go on the rampage".*** He did not say which section of the students would do so. He insisted hotly that Fugicha's daughters were free to go to a Muslim School but "***they cannot be allowed to come and evangelize in schools built by other religions***". He added that "***it would not be appropriate to allow religious beliefs to enter into schools"***. He extolled standardization of school uniforms as "***very critical"*** as children ought to grow up knowing that there can be no preferential treatment, but conceded that schools can legitimately make exceptions in certain areas such as diet.

Mr. Kurauka contended that it was not possible to accommodate every person's conscience or else there would be anarchy. To him, uniformity is a key value and there can be no discrimination in equality. He rooted for maintenance of the *status quo* as established by various decisions of the High Court as ***"to disturb it would lead to many suits."***

Surprisingly, Counsel's only comment on the weight of comparative jurisprudence relied on by the appellant was simply that the cases are distinguishable and that the ones from our HIGH COURT that he cited are applicable to the Kenya situation.

Counsel concluded his submissions by asserting that the learned Judge was right to dismiss the appellant's purported cross-petition which had been "sneaked in" via paragraph 34 of the Replying Affidavit instead of Filing a proper cross-petition. This failed to follow the **ANARITA** (supra) test, it was submitted, was fatally defective and therefore properly rejected.

Mr. Kurauka therefore besought us to uphold the various decisions of the High Court on the subject of religious expression in schools and dismiss the appeal with costs.

(b) Appellant's Reply

In her reply, **Ms Jadeed** reiterated that the appellant's cross-petition was competent having passed the informality test. As to the High Court decisions, she urged us to declare them bad law. She repeated her earlier criticism of the **KENYA HIGH** case (supra) decided by Githua J, and extended it to Lenaola J's decision in the **SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LIMITED --vs- MINISTER FOR EDUCATION & 3 OTHERS** [2014] e KLR (**THE ALLIANCE HIGH** case) which, in her view, was erroneous in that it failed to interrogate the doctrine of indirect discrimination. She emphasized the importance of the values of diversity and cohesiveness which, in her submission, extend to all spheres of life including schools, which are enriched thereby. This has found statutory recognition in **Section 4 (2)** of the **Basic Education Act** which upholds the principles of cohesiveness and diversity and **Section 27 (4)** of the same which obligates sponsors to respect the religious diversity of others.

Responding specifically to the **J.K. (SUING ON BEHALF OF CK) –vs- BOARD OF DIECTORS OF R. SCHOOL & ANOTHER [2014]**e KLR **(THE RUSINGA SCHOOL**) case relied on by the School and the Church, **Ms Jadeed** submitted that in that case, Mumbi Ngugi, J. did acknowledge the need for protection and accommodation of attire donned for religious or cultural purposes as opposed to fashion which had been the basis for the sought exception, and which she could not grant.

Returning to this appeal Counsel contended that the School Rules, upon which the church placed so

much umbrage, stand in conflict with the Constitution and cannot be sustained. Their apparent neutrality is of no moment, she contended, as they do run afoul the Constitution on account of indirect discrimination. She asserted that the scope of the protected right of freedom of religion under **Article 32** of the Constitution goes beyond merely holding or professing a religion and includes also being able to manifest it. Any limitation on the right is permissible only if it complies with **Article 24** which requires the limitation to be by law, which is statutory law, and to the extent that it is reasonable and justifiable in a free and democratic society. The controlling statute, namely the Basic Education Act contains no such limitation to the right. Accordingly, asserted Counsel, the school rules which are of a stature inferior to a statute, cannot limit or negate Fugicha's daughters' rights under both **Articles 32** and **27 (4)** and **(5).**

The sponsor of a public school, argued learned Counsel, had no higher status and its interests could not override the freedom of religion of the students attending at the school. In the instant case the Muslim students had made a polite request to don the hijab even before the Deputy-Governor raised the issue, but the request was improperly rejected by the school.

3. ANALYSIS

As this is a first appeal, we have gone through the entire record, carefully considered the submissions of learned Counsel and given due attention to the authorities, both local and foreign, cited. We have done so cognizant that we proceed by way of a re-hearing, at the end of which we make our own independent conclusions of law and fact. We accord respect to the findings of the first instance Judge but will not hesitate to depart from those findings if the same are based on no evidence, are arrived at by way of a misapprehension of the evidence or the Judge misdirected himself in some material respect which renders the decision erroneous. Our latitude to depart is greater where, as here, the matter in the court below proceeded not on the basis of oral evidence, which would have given the learned Judge the clear advantage of hearing and observing witnesses as they testified, but by way of affidavits and submissions which are on record. This is the more so where the decision turns on, not so much the peculiarity of highly contested facts, but rather the interpretation of certain provisions of the Constitution. See **Rule 29** of the **Court of Appeal** Rules; **SELLE –vs- ASSOCIATED MOTOR BOAT CO. LTD.** [1968] EA 123; **ABDUL HAMEED SAIF –vs- ALI MOHAMMED SHOLAN** [1955] 22 EACA 270.

Even though the Memorandum of Appeal boasts eighteen grounds of appeal, Fugicha's counsel in written submissions as well as in argument before us has merged and crystallized them into six issues. We on our part will address and determine the first four which we think properly and comprehensively capture the points of contention herein, namely;

"a) whether or not documents relating to the proceedings seeking to enforce the Bill of Rights must be formal.

b) whether or not allowing Muslim female students at the school to wear a limited form of* hijab *(scarf and a pair of trousers) discriminates against the other students (read non-Muslim students)

c) whether or not allowing Muslim female students to wear a limited form of* hijab *elevates Islam against other religions and accords its adherents special status contrary to Article 8 of the Constitution

d) whether a school uniform policy can limit the fundamental freedom of religion contained in Article 32 of the Constitution.

a) ***Formality of Documentation in Human Rights Litigation***

It is common ground that the appellant who was enjoined as an interested party at the High Court upon his application did not file a pleading titled a cross-petition. Rather, his claim as against the church, found expression in the Replying Affidavit to the petition. At paragraph 34 he averred in relevant portion as follows;

"…I am also cross-petitioning that the Muslim students be allowed to wear a limited form of hijab (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and their right to equal protection and equal benefit of the law under Article 27(5) of the Constitution."

Both at the High Court and before us, the church took issue with this mode of pleading alleged violation of rights terming it, essentially, a non-pleading or one introduced through the back door. This view resonated with the learned Judge who, dealing with it as the last of the six issues he framed, concluded that ***"the … cross petition do not (sic) constitute a cross-petition in any shape or substance to be infringed and has not stated the manner in which the alleged rights they are (sic) alleged to be infringed"***. The rather tortured phraseology aside, the learned Judge took the view that the cross-petition was defective because it did not comply with the ***Mutunga Rules*** promulgated pursuant to **Article 22(3)** of the Constitution. He found it to run afoul **Rule 10(2)** in particular which set out the contents of a petition for the protection or enforcement of rights and fundamental freedoms namely;

- ***The petitioner's name and address***
- ***The facts relied upon***
- ***Constitutional provisions violated, the nature of the injury caused or likely to be caused to the petitioner or person in whose name the petitioner has instituted the suit or in a public interest case to the public, class of persons or community***
- ***Defaults regarding any civil or criminal case involving petitioner or any petitioners which is related to the matters in issue in the petition***
- ***Petition to be signed by the petitioner or his advocate***
- ***The relief sought in the petition."***

Fugicha faults the learned Judge's approach to this issue, and not idly in our view, principally for failing to take congnizance of the Mutunga Rules' progenitor, which is the constitution itself, and which expressly required the Hon. the Chief Justice in formulating rules under **Article 22(3)** to ensure that they met certain specified criteria including;

"(b) formalities relating to the proceedings, including commencement of proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation".

With respect to the learned Judge, we are unable to find, in the judgment impugned, any indication that this constitutional command for a minimum of formalities was held in view. We are quite clear in our minds that whereas the Hon. the Chief Justice in making the Rules did set out what a petition ought to contain, it cannot have been his intention, and nor could it be, in the face of express constitutional pronouncement, to invest those rules with a stone cast rigidity they cannot possibly possess. It seems to us unacceptable in principle that a creeping formalism should be allowed to claw back and constrict the door to access to justice flung open by the Constitution when it removed the strictures of standing and formality that formerly held sway. We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings

before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer . Within that general rubric of notification to court and respondent, the Constitution, if it says anything at all on this subject, clearly does not lionize form over substance.

Thus, while **ANARITA** and other cases decided prior to the Constitution of 2010 were decided correctly in their context with their insistence on specificity, the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. We are satisfied that there was no doubt at all as to what Fugicha's complaints were, against whom they were, and the provision of the Constitution he alleged had been violated or contravened. A proper reading of his entire affidavit did not warrant the draconian striking out of the 'cross-petition', however presented. We respectfully think that the learned Judge erred by non-directing himself to the express provision of **Article 22(3) (b)** and failing to enquire into whether paragraph 34 of the appellant's replying affidavit passed the ***informality test*** envisioned in the constitutional text.

We think that in the circumstances of this case where the appellant was not a petitioner or a respondent joined into the proceedings as an interested party, his position on the litigation and specific complaints were sufficiently captured in **paragraph 34** of his replying affidavit. The entire affidavit fully addresses the specific grievance of violation of free exercise of religion and discrimination and it is evident from the submissions made by the parties that the matter was fully canvassed unimpeded by the apparent want of form. We note that the learned Judge did, in fact, deal with the merits of the appellant's complaints and we shall proceed to do so as well.

(b) Does allowing Muslim Girls to Don the* Hijab *Discriminate Against the Rest"

The church in its petition averred that;

"32. The Christian students have felt that the school has accorded Muslim students special preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya 2010".

On that basis, it prayed for a declaration that the decision by the respondents at the High Court to permit the wearing of *hijab*/trousers was discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations.

That there is a standard school uniform for girls at St. Paul's Kiwanjani Mixed Day Secondary School is not in dispute. The uniform, communicated to each new student via the admission letter, comprises ***"checked green skirt, a cream blouse, a pair of white socks and stripes and a green long-sleeved pull-over (with the option of a short-sleeved one) a pair of black leather shoes and a dark green tie".*** The request made by or on behalf of Muslim girls was for them to wear, in addition to the standard uniform, a head covering (*hijab*) and a pair of white trousers underneath the uniform skirts. There is no indication nor was it urged that the Christian or other non-Muslim girls at the school made any requests of their own for any exemption or exceptions from the standard uniform based on their religious persuasions, which were then denied.

That notwithstanding, the learned Judge expressed himself as follows, which is worth reproducing *in extenso*;

"162. That even if it is assumed that the 2nd and the 3rd respondents had powers to prescribe the dress code with the St. Paul's Kiwanjani Day Mixed Secondary School, Isiolo County, urging the rights of only Muslim girl students, it would be in my view discriminatory for them to argue the

rights for girls of Muslims alone. The students in the same school who say for example are Akorinos, and others who are not Muslims, would be discriminated by the respondents actions which would be agitating for Muslim girls to adorn (sic) their religious attire and deny other students from other religions to do so. In my view the respondents as public officials would be discriminating students from other religious background by picking one religious group and support it. The respondents actions offends Article 27(1), (2), (4) and (5) of the Constitution, 2010. I find that the respondents cannot be permitted to impose Islam dress code for Muslim girl students in a manner that is not only contrary to the laid down school rules and regulations and also in discriminatory manner against students who are non-Muslims. There is no suggestion nor evidence that was tendered to the effect that the existing rules and regulations are discriminatory against Muslim girl students or any student.

164. That the respondents in their resolution favoured Muslim girl students and did not consider other religions. In doing so, I am of the view that the officials were discriminatory against non-Muslim students by supporting one religion, that is Islamic Religion.

With the greatest respect to the learned Judge, he appears to have framed and decided a question that was not pleaded or urged before him. We do not understand the case before the High Court to have been one of the school arguing that it was being discriminated against. Less still was it a case of non-Muslim students, whether Christian, Akorino or whatever, contending discrimination. Indeed, none of those non-Muslim students or their parents or guardians sought to be or were enjoined in the litigation. To that extent, the learned Judge patently made speculative and gratuitous pronouncements on behalf of imaginary grievants who had neither presented nor made a case before him.

We think the Judge went too far in making pronouncements that discrimination had occurred against Christian and other non-Muslim students. Those pronouncements were not preceeded by allegations made and proof of them established. As with every matter brought for judicial adjudication, the axiomatic position is that he who alleges must prove. In the case of alleged discrimination, it is absolutely essential that its components be clearly identified and interrogated. The process of arriving at a determination of whether or not there has been discrimination follows a clearly discernible proof pattern. It is a logical exercise not left to mere inclination or hunch.

Permitting the concerned Muslim girls to wear the limited *hijab* certainly did entail treating them differently from the rest of the school population and in a manner which entailed a departure or exemption from the applicable school uniform rules. Did the fact that the Muslim girls were thereby treated differently mean that the other students were thereby discriminated against" Were those other students placed at a disadvantage" We think not.

It is not in doubt that equality is a fundamental right recognized in our Constitution as in those of other modern States. Indeed, as far back as 1945, Sir Hersch Lauterpacht in his ***An International Bill of the Rights of Man*** had boldly asserted thus;

"The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties."

In his oft-cited dissent in the **SOUTH WEST AFRICA CASES** (supra) decided half a century ago, Judge Tanaka opined, and we cannot but agree, that the principle of equally before the law is philosophically related to the concepts of freedom and justice and that the content of it is that what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual

difference indicated by the Greek Philosopher Aristotle as ***"justicia commutativa*** and ***justitia distributive."*** So understood;

"[it] does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal …. To treat unequal matters differently according to their inequality is not only permitted but required".

It therefore becomes a desideratum of both justice and logic that equal should be equally treated and unequal unequally treated as called for by the inequality. This immediately and necessarily calls for a level of analysis that is deeper and more nuanced than a mere conclusion of injustice or discrimination on the basis only of different treatment. This is in recognition that justice, fairness or reasonableness may not only permit but actually require different treatment.

This was fully appreciated by a three-Judge bench of the High Court (Mwera, Warsame and Mwilu JJ., as they then were, before they were all elevated to this Court shortly afterwards) in **FEDERATION OF WOMEN LAWYERS FIDA KENYA & 5 OTHERS vs. ATTORNEY GENERAL & ANOR** 2011 eKLR;

"In our view, mere differentiation or unequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".

This view also resonates with the views of Justice Albie Sachs in the South African Constitutional Court case of **NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY –vs- MINISTER FOR JUSTICE** [1998] ZAAC 15, which we find persuasive;

"The present case shows well that equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of differences. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment – At best, it celebrates the validity that difference brings to any society".

Given that understanding, it was plainly erroneous for the learned Judge to conclude that the differential treatment of Muslim girls in allowing them to wear the *hijab* contrary to the general school uniform policy applicable to all students was *ipso facto*, and without more, discriminatory of and against the non-Muslim students. Different it was but not discriminatory and unlawful, leading us to the conclusion that the term 'discriminatory' as used conveyed only the loose meaning of different as opposed to the technical legal meaning which we shall advert to later in this judgment.

That pitfall might have been avoided had the learned Judge sought to establish in the first place, whether the discrimination said to have been suffered by the non-Muslim population in the school was direct or indirect, a distinction which the church made no attempt to make beforehand; and also identified the

exact basis or ground, falling within any of the protected grounds in **Article 27(4)** of the Constitution, upon which the unfair or disadvantageous treatment comprising the alleged discrimination was founded. The protected grounds, on the basis of which the Constitution expressly prohibits any person to discriminate against another directly or indirectly are listed in **Article 27(4)** as including ***sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*** We have anxiously and carefully perused the judgment of the High Court and nowhere have we seen a protected ground in respect of the un-named non-Muslim students were discriminated against. Nor have we been able to glean or identify any from the submissions made by the church both at the High Court and before us. We therefore find and hold that there was no factual or legal basis for the holding by the learned Judge that allowing Muslim girls to wear *hijab* favoured Muslim girl students and discriminated against the non-Muslims.

c) ***Whether Limited* Hijab*, Elevates Islam, According it Special Status Contrary to Article 8***

The question of the legality, propriety and constitutional permissibility of allowing Muslim girls to wear the *hijab* to the school lies at the heart of this appeal. Around it have swirled competing narratives with Fugicha arguing that it is a necessary accommodation to avoid indirect discrimination against Muslim girls, while the church argues that to permit the same would be tantamount to elevating, indeed imposing, the Muslim religion and dress code contrary to the neutrality not only of the school rules, but also of **Article 8** of the Constitution which states in peremptly terms that there shall be no state religion thus capturing the secular character of our democracy.

In dealing with this issue, the learned Judge delivered himself in these terms;

"166. The subject school in this petition I find has not imposed any religious conditions to its students nor preferred one religion over another. The subject school has students from diverse religious beliefs and has not infringed the freedom of worship by restricting school uniform, in fact, the school action is non-discriminatory against any religion".

He then proceeded to cite with approval and state to be good law the decision of Githua J in the **KENYA HIGH CASE** (supra) and in particular a long passage therefrom which he quoted as follows;

"The significant and critical role played by standardized dress codes and observance of rules in controlled environments which one would expect to find in any national secondary school in Kenya or say for example in the Armed Forces cannot be overemphasized. It is not disputed that school uniforms assist in the identification of students and gives them a sense of belonging to one community of students. It promotes discipline, unity and harmonious co-existence among students. It instills a sense of inclusivity and unity of purpose. In my view, the most important role played by a standardized school uniform is that it creates uniformity and visual equality that obscures the economic disparities and religious backgrounds of students who hail from all walks of life.

If the court were to allow the applicant's quest to wear hijab in school, the 48 Muslim girls in the school would look different from the others and this might give the impression that the applicants were being accorded special or preferential treatment. This may in all probability lead to agitation by students who profess different faiths to demand the right to adorn (sic) their different and perhaps multi-coloured religious attires of all shapes and sizes which the school administrators will not be in position to resist if the Muslim students are allowed to wear a hijab. The result of this turn of events would be that students will be turning up in school dressed in a mosaic of colours and consequently, the concept of equality and harmonization brought about

by the school uniform would come to an abrupt end. It goes without saying that this kind of scenario would invite disorder, indispline, social disintegration and disharmony in our learning institutions. Such an eventuality should be avoided at all costs since it is the public interest to have order and harmonious co-existence in school. It is also in the public interest to have well managed and disciplined schools in a democratic society.

It is important to bear in mind that the Republic of Kenya is a secular state. This has been pronounced boldly and in no uncertain terms by Article 8 of the Constitution. This in effect means that no religion is more superior than the other in the eyes of the law. Considering that the Kenya High School, just like any other national school is a secular public school admitting students of all faiths and religious inclinations, allowing the applicant's prayer in this motion would in my opinion be tantamount to elevating the applicant and their religion to a different category from the other students who belong to other religions.. This would in fact amount to discrimination of the other students who would be required to continue wearing the prescribed school uniform."

The learned Judge then went on to categorically hold that there should be no exemption of Muslim girls from wearing school uniform so as to avoid the appearance that they were being given preferential treatment and to also forestall a situation wherein students of other faiths would also make their own demands to be allowed to don different religious attires thereby, in effect making of no effect the school uniform policy.

Other than the minor misdirection in the Judge's misapprehending the request to wear the *hijab* as an "exception from school uniform" when in fact it was a supplementation of the school uniform, his appreciation of the facts and the law was essentially correct but only if tested against direct discrimination. Indeed, the school uniform policy was neutral and applied to all students equally so there was nothing facially discriminatory or offensive of any given religion.

The issue in the litigation before the Judge and indeed on a proper engagement with discrimination jurisprudence could not be fully and satisfactorily determined on the test of direct discrimination alone. Full justice to a complaint of discrimination cannot be attained unless the court goes further to enquire whether a rule, policy or action that appears neutral and inoffensive on the face of it does nonetheless become discriminatory in effect or operation. The classic and earliest formulation of this was United States Chief Justice Burger's, in the celebrated anti-discrimination case of **DUKE –vs- POWER CO**. 401 US 424 1970 at p432 that ***"the starting point of any analysis of a civil rights violation is the consequences of discrimination not merely the motive."*** The framers of the 2010 Constitution and the people in promulgating it were alive to this all-important distinction between direct and indirect discrimination and were careful to proscribe both forms in express terms in **Article 27(4).** For a court to fail to enquire into that aspect, especially where, as here, the indirect character of the discrimination is cited and submitted on, is a serious non-direction and amounts to a reversible error of law. This is especially so considering that, as was opined by Canadian Judge Dickson (later CJ) in **R –vs- BIG M. DRUG MART LTD** [1985] 1 S.C.R. 295 (**BIG M DRUG MART)** case, ***"both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation [or any policy]."***

Referring to a similar provision in the South African Constitution, Langa D.P (later CJ) in the case of **CITY COUNCIL OF PRETORIA V WALKER** [1989] ZACC 1 made this perceptive comment with which we respectfully agree;

"The inclusion of both direct and indirect discrimination, within the ambit of the prohibition

imposed by section 8(2) [our Article 27(4)] of the Constitution, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) [our Article 27(4)] of the Constitution."

Now, in order for one to establish that one has been the victim of indirect discrimination, it behoves him to go about a four-step process or proof pattern as was stated by Silber, J. of the English High Court of Justice in **SARIKA**. Even though he gleaned the pattern while considering the Race Relations Act and the Equality Act of England, at its heart the pattern is all about how to prove indirect discrimination and we would adopt and accept it as applicable here. The steps are:

"(a) to identify the relevant 'provision, criterion or practice' which is applicable;

(b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;

(c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally;

(d) Whether this policy is objectively justified by a legitimate aim; and to consider, if the above requirements are satisfied, whether this is a proportionate means of achieving a legitimate aim."

As in **SAKIRA** (supra), where it was contended that a school uniform policy that forbade the claimant, a 14 year-old school girl from wearing a *Kara* which is a plain steel bangle about a fifth of an inch wide with great significance for Sikhs was discriminatory of her, it is common ground that ***"the relevant provision criterion and policy"*** under consideration is the school uniform policy. Its prescription as to what girls should wear has already been set out earlier in the judgment.

As for the ***"pool"*** that should be used to compare the disadvantage suffered by Fugicha's daughters by the fact that the school uniform rules did not allow the wearing of *hijab,* otherwise referred to as the ***"comparator group"***, even the learned Judge of the High Court, while not conducting a deliberate pursuit of the proof pattern we espouse, appears to have treated the appellants as the comparator group receiving favourable treatment at the expense of all other students who are non-Muslim. We are of the view that the reverse is the case in that the wider non-Muslim student body is in fact the comparator. It is they that were treated better than the appellants because their compliance with the school rules did not subject them to any disadvantage or burden violative of their religious beliefs or practices. This conclusion is in tandem with the conclusion reached by the English Court of Appeal in **BMA VS CHAUDHARY [2007] IRLR 800**; the House of Lords in **SHAMOON VS CHIEF CONSTABLE OF THE RUC [2003] 2 ALL ER 26** and the Constitutional Court of South Africa in **PILLAY** (supra). In the last case Langa, C.J. stated that the comparator group treated better or more favourably than the claimant was those learners,

"44… whose sincere religious cultural beliefs or practices, or religious beliefs or practices are not compromised by the Uniform Code, as compared to those whose beliefs or practices are compromised."

In the instant case, it was never asserted by the Church that any of the non-Muslim students had complained that the school uniform rules curtailed their religious beliefs or practices.

The third element in the proof of indirect discrimination requires the claimant to prove that the ***"provision, criterion or practice",*** in this case the school uniform policy, puts the claimant at a

particular disadvantage or detriment personal to the claimant. It was Fugicha's contention herein, and we do not see any attempt by the church to deny or controvert it, that the wearing of *hijab* is a matter of great importance and significance to Muslim girls so that denying them the right to wear the same places them in an unfavourable and difficult spot where they genuinely consider that their right to manifest their religion by their mode of dress, which they hold to be of exceptional importance, is curtailed and compromised.

In his replying affidavit sworn on 3rd November, 2014, Fugicha averred thus;

*"**7. THAT I do aver that hijab is an Arabic word literally meaning to cover or a curtain. In Islamic jurisprudence it refers inter alia to a mandatory dress code for females of the age of puberty and above when they are outside the homes or in the company of male strangers. This covering (hijab) covers the whole body save for hands, feet, face.***

8. THAT the purpose of hijab is to identify Muslim females and to allow them to guard their modesty and decency. Modesty is a fundamental tenet within Islam. It is thus sinful for Muslim to flout on their hijab.

9. THAT because of these reasons, hijab is a matter of extreme importance to every practicing Muslim female including my daughters and the female students at Kiwanjani Mixed Day Secondary School.

....

*17. **THAT I do aver that wearing of hijab by my daughter and by any Muslim girl students is a manifestation, practice and observance of the Muslim faith and/or religion by those who are steadfast to their faith (my children included) as they are of exceptional importance and as such pursuant to the said constitutional provision [Article 32] a person should not be compelled and/or forced to remove the hijab as it would be forcing the students to engage in an act contrary to the Muslim religion and belief which freedom is supported under our progressive bill of rights."***

By way of emphasis and reiteration of the exceptional significance of the *hijab* to Fugicha's daughters, there was filed in addition a supporting affidavit by Hammad Mohammed Kassim Mazrui, the Chief Kadhi of Kenya. In it he asserted the obligatory nature of the *hijab* confirmed by notable Islamic jurists and ordained in the Quran. He swore that the *hijab* is not a matter of choice but a religious obligation which should not be hindered. He made the distinction that ***"Indeed the* hijab *is a concept that seeks to maintain chastity and modesty and not merely a code of dress"*** and proceeded to state that it is the instrument by which women are able to effectively participate in society as supported by Islam.

As we have already observed, these averments were unchallenged and we have no hesitation in arriving at the conclusion that barring Fugicha's daughers and other Muslim girls from donning the *hijab* did place them at a particular disadvantage or detriment because the *hijab* is genuinely considered to be an item of clothing constituting a practice or manifestation of religion. It is important to observe at this point that it is not for the courts to judge on the basis of some 'independent or objective' criterion the correctness of the beliefs that give rise to Muslim girls' belief that the particular practice is of utmost or exceptional importance to them. It is enough only to be satisfied that the said beliefs are genuinely held.

In **REGINA WILLIAMSON & OTHERS VS. SECRETARY OF STATE FOR EDUCATION AND EMPLOYMENT [2005]2 AC 246** a case involving the clash between parents' religious beliefs that

children should be subjected to corporal punishment and those children's rights to dignity and personal integrity, Lord Nicholls of Birkenhead of the House of Lords stated the role of the courts thus;

"When the genuineness of a claimants' preferred belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited enquiry. The Court is concerned to ensure an assertion of religious belief is made in good faith 'neither fictitious nor capricious, and that it is not an artifice' to adopt the felicitous phrase of Iacobucci, J. in the decision of the Supreme Court of Canada in Syndicat Northcrest vs Anselem (2004) 241 DLR (44)1,27 para 52. But emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of the individual. As Iacobucci, J. also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising."

Later on in his Judgment the law Lord put his finger on the nature of religious belief which unfits it for others' judgment or certification as follows;

"Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the [European] Convention…[our Constitution]."

It is thus clear to us that all persons, those in authority more so, must approach the issue of religious belief with a measure of deliberate caution and circumspection. A person's religious convictions need not make sense to us in order for us to accord them the necessary respect and space for them to flourish. An issue that may appear trifling to one may be of monumental value to another in the realm of religious beliefs. Their validity and the right of their holders to hold religious beliefs are not dependent on general acceptance or majority vote. They are personal to the individual in accordance with their own inner light and must be respected because they are clear, not to the observer, but to the believer. This idea was well-captured by US Supreme Court Justice Jackson for the Court in **WEST VIRGINIA BOARD OF EDUCATION V BARNATTE**, 319 US 624, 319 U.S. 638 (1943);

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to … freedom of worship … and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

That view, with which we agree, resonates with Judge Dickson's seminal idea in **BIG M. DRUG MART** (supra) that ***"the Charter [the Constitution] safeguards religious minorities from the 'tyranny of the majority.'"***

We are satisfied on the uncontested evidence on record that the wearing of the *hijab* was genuinely and deeply considered to be a matter of great, indeed exceptional, religious significance to Fugisha's

daughters and the other Muslim girls. Their desire to wear the same to school was not borne of a skin-deep and artificial or passing fashion fad but rather a serious and conscientious attempt to obey a religious requirement and therefore deserving of both respect and protection.

We therefore do not think that the wearing of the *hijab* can be equated to the donning of dreadlocks for a purely cosmetic or fashion purpose as was the case in the **RUSINGA SCHOOL** case. There, Mumbi Ngugi, J rejected a claim by the mother of a 6 year-old kindergarten pupil that a school's refusal to allow him to sport dreadlocks contrary to the school's Code of Conduct was discriminatory. The Judge concluded, and we would agree with the critical distinction she drew in the process, as follows;

"49. I must observe, as submitted by the respondents' counsel, that the petitioner has not asserted that the minor practices the Rastafaria religion, and that therefore there is violation of his freedom of religion and belief guaranteed under Article 32 of the Constitution.

50. Had she so argued and presented evidence in support, then there would have been a basis, on the persuasive authority of decisions such as DZVOVA vs. MINISTER OF EDUCATION, SPORTS AND CULTURE AND OTHERS AHRLR 189 (2wSC 2007), to find that there was violation of the minors' rights under Article 32. In that case, the Supreme Court of Zimbabwe declared that expulsion of a Rastafarian child from the school in the basis of his expression of his religious belief through his hairstyle is a contravention of Sections 19 and 23 of the Constitution of Zimbabwe. A similar finding was made in relation to dismissal from employment of Rastafaria correctional officers who refused to shave their dreadlocks in Department of Correctional Services and Another vs. Police and Provision Civil Rights Union (PPCRU) and Others [[ZALAC 21; 2011) 32 KJ 2629 (LAC)].

51. What appears to be the case in the matter before us is that the petitioner has made a choice of hairstyle for fashion rather than religious or cultural reasons. She has the right to make this choice. However, while wearing dreadlocks for cultural or religious reasons is, in any view, entitled to protection under the Constitution and should be accorded reasonable accommodation; the sporting of dreadlocks for fashion or cosmetic purpose is not, and an institution such as the respondent is entitled to prohibit it in its grooming code."

(our emphasis)

Proportionality and Justification

Turning now to the twin questions of whether first, the school uniform policy is justified by a legitimate aim and, second, whether the ban of the *hijab* is a proportionate means of meeting that aim, we think that the first does not present much difficulty while the second will inevitably lead to a discussion of the principle or doctrine of accommodation for completeness.

In the **KENYA HIGH** case (supra) Githua, J did capture the utility of school uniforms in the passage we quoted and we would have no difficulty agreeing with it save for the unfortunate use of the military as an example. We think that given the constitutionally recognized limitations of rights that apply to persons serving in the Kenya Defence Forces and the National Police Service **(Art. 24(5))** the analogy was not particularly germane or felicitous. The uses of school uniforms cannot be gainsaid, however Nyamu, J. (as he then was) in **NDANU MUTAMBUKI & 119 OTHERS vs. MINISTER FOR EDUCATION & 12 OTHERS** [2007]e KLR spoke of them, thus, though he may have overstated;

"School uniforms and discipline do constitute and have been generally required as part and

parcel of the management of schools and further constitute basic norms and standards in any democratic society. No doubt the hallmark of a democratic society is respect for human rights, tolerance and broadmindedness. In the case of schools, nothing represents the concept of equality more than school uniforms. Unless it is an essential part of faith it cannot be right for a pupil to wake up one morning and decide to put on headscarf as this derogates from the hallmarks of a democratic society and violates the principles of equality…."

Mr. Kurauka argues essentially that the aims of the standardized school uniform are salutary and self-evident. To him, the uniform applicable to all students signifies equality without preferential treatment. In this he joins many who ***"believe that school uniform plays an integral part in securing high and improving standards, serving the needs of diverse community promoting a positive sense of communal identity and avoiding manifest disparities of wealth and style."*** See **BEGUM, R.** (on the Application of) -**vs- DENBIGH HIGH SCHOOL [2006]2 ALL ER 487; [2007] AC 100**.

Fugisha does not dispute or deny the propriety or utility of a school uniform policy. Indeed, this case is not about whether or not the church should have in place a uniform policy for the school. If anything, the record shows that Fugicha's daughters and other female Muslim students did make attempts to and were always willing to comply with the school uniform policy seeking only to add a limited form of hijab and of colours and design that would not be outlandishly at clash with the prescribed school uniform.

What is on contest in this case is the school's refusal to either relax or enforce the uniform policy in respect of the Muslim students in a manner as would allow them to have the *hijab* ***in addition to*** the uniform. To our mind, the justification that the respondent church and the school are required in law to prove is not the need for school uniforms or a policy on the same, which is uncontested, but rather the failure to grant necessary exemptions therefrom. The burden to prove that justification rests with the person who is alleged to have discriminated, in this case the church and its school. In **JFS** (supra) Murby J stated the alleged discriminator's burden as one to show;

"164. … that the measure in question corresponds to a 'real need' and that the means adopted must be 'appropriate' and 'necessary' to achieving that objective. There must be a 'real match' between the end and the means. The court 'must 'weigh the justification against its discriminatory effect' with a view to determining whether the seriousness of the alleged need is outweighed by the seriousness of the disadvantage of those prejudiced by the measure always bearing in mind that the more serious the disparate impact the more cogent must be the objective justification."

It is upon the court to embark on a careful examination of the reason offered for any discrimination, a duty that reposes on them ***'as guardians of the right of the individual to equal respect'*** in the words of Land Hoffman in **R (CARSON) -vs- SECRETARY OF STATE FOR WORK AND PENSIONS [2006] 1 AC 173 at 182-183.**

Looking at the reasons proferred by the Church as to why the school would not allow the wearing of the *hijab*, they include those set out on the face of its Notice of Motion dated 18th September, 2014, and the supporting affidavit of KIMANA JOHN MACHUGUMA as;

a) ***the need for the Sponsor to be respected and allowed to execute its rightful role in the school affair***

b) the Christian students at the school have felt that the school has accorded Muslims special or preferential treatment and discriminated against them

c) the respondents' actions are unreasonable and tantamount to disrupting school programmes

d) the wearing of hijab by Muslims while non-Muslim students were the prescribed school uniform was causing tension and disharmony in the school.

e) the issue was put to the vote in a meeting of the school's BOM, PTA and the Sponsor on 9th September attended by 22 members and 18 voted for the status quo (no hijab) 3 voted for the hijab and 1 recommended longer skirts for girls.

Those reasons were reiterated by Mr. Kurauka in his submissions before us in which he painted a rather ominous picture of potential breakdown of harmony and an end to tranquility should the Muslim girls be allowed to wear the *hijab*. ***"If you allow this appeal, it will be chaotic as students will go on the rampage"*** he warned. He went on to assert that ***"the Muslim students can go to Muslim schools if they wish and wear the* hijab *but cannot be allowed to come and evangelize in schools built by other religions"*** and that ***"it would not be appropriate to allow religious beliefs to enter into schools"*** and also that ***"it is not possible to accommodate every persons" conscience or else there would be anarchy."***

With great respect to Counsel, we are far from persuaded by the reasons given by the Church and which the learned Judge accepted wholesale as is plain from his adoption of the finding and reasoning of Githua J in the **KENYA HIGH CASE** (supra). Similar arguments were advanced by the respondents in the **SAKIRA** case (supra) and we think that Silber J's answer in rejecting them provides a more coherent and persuasive perspective;

"80. I cannot understand why a decision to prevent the claimant from wearing the Kara would prevent bullying or would be difficult to explain [to the other students who must adhere to the school uniform policy]. The only reason might be ignorance on the part of the school first about the importance of a Kara to Sikhs and second in understanding why a decision by the claimant to wear it should be treated with respect."

Silber J then made reference to the case of **SERIF –VS- GREECE [2001]31 EHRR 20** where the European Court of Human Rights domiciled at Strasbourg had stated emphatically the duty of educational institutions to educate their communities of the values of pluralism and the indispensability of toleration as the cure for the feared tensions;

"53. Although the Court recognizes that it is possible that tension is created in situations where a religious or the communities becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities on such circumstances is not to remove the cause of the tension by eliminating pluralism but to ensure that competing groups tolerate each other."

We do not better them to echo Judge Silber's own words on the subject;

"84.Therefore, there is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and religious and second to respect other people's religious wishes. Without those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multicultural society can be built in this country. In any event, in so far as the intention of the uniform policy is to eliminate bullying, there is no rational connection between the objective and eliminating signs of difference."

Judging from the Petition, the motion, the supporting affidavits and the submissions made before the High Court and before us, the Church does not seem to have internalized the intrinsic value of heterogeneity and heterodoxy. It has not seen difference or diversity as a good to be embraced, celebrated and encouraged. Rather, it has approached the matter from the rather narrow stricture, prism or blinkers of the need for discipline and uniformity and seems to consider its position as Sponsor of the school as a sufficient reason to sift out and eliminate difference or plurality in religious expression or manifestation. And this is notwithstanding that it consciously admitted into the school, which is a public school, students of faiths and religions other than its own. It is no answer to say that religion has no room in schools or that those who find difficulty abiding by the restrictions of the school uniform code may well leave and join schools of their own religious persuasion. Such an attitude evinces an intolerable deficit of constitutionalism and, moreover, flies in the face of the guiding principles that govern the provision of basic education in this country. Those principles as set out in **Section 4** of the Basic Education Act, **No. 14 of 2013** include –

"(e) Protection of every child against discrimination within or by an education department or education (sic) or institution on any ground whatsoever

....

(i) promotion of peace, integration, cohesion, tolerance,and inclusion as an objective in the provision of basic education

(j) ***elimination of hate speech and tribalism through instructions that promote the proper appreciation of ethnic diversity and culture in society***

(k) imparting relevant knowledge, skills, attitudes and values to learners to foster the spirit and sense of patriotism, nationhood, unity of purpose, togetherness, and respect

...."

For the school to not only entertain and condone, but actually propound those arguments also speaks to a signal failure to appreciate and to effectuate part of its statutory duties. The same statute; in **Section 59** enumerates the functions of the Board of Management as including to;

"(i) provide for the welfare and observe the human rights and ensure the safety of pupils, teachers and non-teaching staff at the institution;

(k) promote the spirit of cohesion, interpretation, peace, tolerance, inclusion, elimination of hate speech, and elimination of tribalism at the institution ...."

Some of the arguments made by the Church as Sponsor in the matter before us are cause for no little concern as they seem to be entirely at variance with the specific role and duty of a sponsor in relation to students or pupils who adhere to a religion, faith or denomination different from that of the Sponsor. **Section 27** imposes on a Sponsor the obligation of;

"(d) maintenance of spiritual development while safeguarding the denominations or religious adherence of others."

To our mind this is a duty requiring a sponsor to rise above and go beyond the narrow parochialism and insularity of its own religion or denomination and respect the equal right of others to be different in

religious or denominational persuasion. It is a call to broadmindedness and respect for others including those whose creeds and the manner of their manifestation may be unappealing or baffling. It is a duty to uphold the autonomy and dignity of those whose choices are discordant with ours and acknowledgment of heterodoxy in the school setting as opposed to a forced and unlawful artificial and superficial homogeneity that attempts to suppress difference and diversity. The people of Kenya in the Preamble to the Constitution proclaim that we are ***"Proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation."*** That is an ethos that it is incumbent upon all schools to teach to students from an early age. The determination to live in peace and undivided in spite of diversity at the macro national level must be translated and lived at the micro level of school communities.

Diversity is further amplified in **Article 10(4)** the Constitution which declares that among the national values and principles of governance, which are binding on ***"all persons whenever any of them makes or implements public policy decisions"*** is ***"(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."***

All of these provisions and pronouncements in the Constitution are not mere platitudes. They are not words devoid of significance. Rather, they are firm commitments made by the people of Kenya as part of their vision of the society they wish to live in. They are mutual and reciprocal promises made by and to all Kenyans and they have binding force of law. It is the duty of courts in interpreting the Constitution to ensure that the values which find even further explicit expression on the Bill of Rights are given the broadest meaning and vivified as living, active essentials and not lifeless forms on parchment. Courts must breathe life into the constitutional text and must avoid stifling and constrictive constructions that lead to atrophy and the sapping of its life and vibrancy.

Indeed, the Constitution itself gives an explicit interpretative command in **Article 259(1)**; it shall be construed or interpreted in a manner that –

"(a) promotes its purposes, values and principles

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights

(c) permits the development of the law

(d) contributes to good governance."

In obedience to that explicit direction, we are clear in our minds that the view we have taken that the Muslim girls ought to have been allowed to wear the *hijab* promotes the values and principles of dignity, diversity and non-discrimination. We also advance the law by making a definite finding that what the school did to Fugicha's daughters amounts to indirect discrimination, a concept on which there appears not to have been any judicial engagement from the jurisprudence that has so far flowed from the High Court. We affirm, endorse and uphold the rights of equality and freedom of religion as set out in **Articles 27** and **32** of the Constitution.

We now turn to the doctrine of **accommodation** which we believe will not only lead to development of the law on non-discrimination and freedom of religion in the country but should also, if properly understood, appreciated and applied, contribute to good governance of our schools thus entrenching constitutional and democratic principles.

Accommodation

In contrast to the hardline and fixed position advanced for and on behalf of the Church that Muslim female students should under no circumstances be allowed to wear the *hijab* in obedience to what they honestly and genuinely believe to be their religious duty, a more pragmatic approach is that of accommodation which ought to uphold school uniform while at the same time permitting exceptions and exemptions where merited. Even though the principle of accommodation has not been pronounced on or affirmed by courts in this country as far as we are able to discern, it is not new in comparative jurisprudence. The South African Constitutional Court and High Court have expressed themselves on it on many occasions in matters religion, especially in the context of education and employment. See for instance, **PRINCE –VS- PRESIDENT, CAPE LAW SOCIETY AND OTHERS [2002] 2ACC 1; MINE (PTY) LTD SECUNDA COLLIERIES 2003 (6) SA 254(W); PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA AND OTHERS –VS- MINISTER OF JUSTICE AND OTHERS 1997 (3) SA 925(T).** Chief Justice Langa in **PILLAY** attempts to delineate the content of the principle of accommodation thus (at para 73);

"At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms."

The Canadian Court of Appeal in ***R –vs- VIDEOFLICKS*** [1984] 48 O.R. (2d) 395 held, which would hold true of Kenya, that;

"[The Constitution] determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where religious practices are recognized as permissible exceptions to otherwise justifiable homogenous requirements."

The perils of peripherization, which essentially shuts out persons whose religious convictions cannot allow them to do certain things or require them to do things and behave in certain ways that are different from the dominant views conduct or practice of the majority, was poignantly captured by the South African Constitutional Court which proposed a balancing act in **CHRISTIAN EDUCATION SOUTH AFRICA V MINISTER OF EDUCATION** [2000] ZACC II; 2004(4) SA 757 (CC) as follows;

"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such society can cohere only if all its participants accept that certain basic norms and standards are binding. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."

Even though the degree to which the mainstream is required to be inconvenienced or put to expense so as to accommodate the minority religious believers has differed from jurisdiction to jurisdiction with the United Supreme Court stating in **TRANS WORLD AIRLINES –vs- HARDISON 432 US 63 (1977) at 84** that an employer should incur only a *"de minimis"* cost while its Canadian counterpart has been emphatic that the duty to accommodate demands the putting of more than negligible effort in **CENTRAL OKANAGAN SCHOOL DISTRICT NO. 23 –vs- RENAUD 1992 CAN LII 81 (SCC.) [1992] 2 SCR 970**,

there is consensus that there is a definite duty to accommodate. We think, as did the South African Constitutional court in **PILLAY** (supra), that the effort required to accommodate has to be more rather than less if the end of diversity is to be meaningful. We are justified in this view by the phraseology employed in **Article 32** of the Constitution. The text goes beyond stating a persons right to ***"manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship"*** to also state at **sub-article (4)** that ***"a person shall not be compelled to act, or engage in any act; that is contrary to the persons' belief or religion."*** Taken together, the two sub-articles create a double duty to accommodate in the form of allowance or accommodation of practice, manifestation or observance that may be different from the majoritarian norm and an exemption from any act which may impinge on and violate the person's belief or religion.

Asserting the indispensability of accommodation in **PILLAY**, (supra) the Chief Justice stated, and we are inclined to agree with his reasoning, thus; (at par 78);

"Two factors seem particularly relevant. First, a reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose , but which nevertheless has a marginalizing effect on certain portions of society.

Second, the principle is particularly appropriate in specific localized contexts such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck."

We are of the same view with regard to the donning of the *hijab* in the case at hand. We find and hold that the school ought to have worked out a reasonable accommodation to enable the Muslim girls to wear the *hijab* considering, especially, that there was a willingness to agree on the colour of such *hijab* so as to rhyme and not overly clash with the school uniform. This thinking also accords with that of the Canadian Supreme Court in **MULTANI –vs- COMMISSION SOLAIRE MARGUERITE BOURGEOYS** [2006] 1SCR 256.

It matters not that Fugicha, in common with the parents of all students did sign the letter of admission together with their daughters when they joined the school binding them to abide by school rules and the stipulated school uniform. We think it to be plainly notorious that with secondary education being so competitive, and from the nature of things, it is impractical and fanciful to expect that a parent and/or a new student joining a school in Form One will have a meaningful opportunity to engage in a negotiation, pre-admission, of whatever exemptions be it in uniform or other activities, that they may need for religious reasons.

We are not prepared to hold that, by merely signing the admission letter or the school rules, a student and/or her parent or guardian is thereby estopped from raising a complaint or seeking exemptions *ex post facto*. Where, as here, the exemptions or accommodation sought are on clear constitutional grounds, it would be escapist even surreal, for a court to point at the signed letter of admission as a bar to assertion of fundamental rights and freedoms. We do not accept that schools are enclaves that are outside the reach of the sunshine of liberty and freedom that the Constitution sheds. Students do not abandon their constitutional rights when they enter the school gate to regain them when they leave. Nor can fundamental rights and freedoms be contracted away in the name and at the altar of education. Schools cannot raise an estoppel against the Constitution. No one can. We are firm in our assessment that students in Kenya are bearers and exercisers of the full panoply guarantees in our Bill of Rights and they are no less entitled to those rights by reason only of being within school gates.

We also think that an education system or any school administration that by word or deed violates the rights of students or condones their violation by others and otherwise diminishes their importance is a danger to the present and future fate of the Bill of Rights, the rule of law and the culture of democracy for true it is that ***"what monkey see, monkey does."*** In violating rights or showing them to be minor irrelevancies, mere inconveniences or optional extras, such schools inculcate a culture of disregard of or contempt for rights and the students graduating from those schools will in their future adult lives be a whole army of rights-abusers steeped in audacious and odious impunity, instead of their defenders. We must set our face firmly against such an eventuality that involves a grave dimunition and dilution of the constitutionally-protected right to have one's inherent dignity protected **(Article 28)** and reaffirm the command in **Article 21(1)** to observe, respect, protect, promote and fulfill the fundamental rights and freedoms in the Bill of Rights.

We think, with respect, that the justification cited by the school and accepted by the learned Judge, who followed in the footsteps of Githua, J in the **KENYA HIGH** case (supra) for the rejection of the plea for *hijab* was hollow and unconvincing. We cannot accept that perfect uniformity of dress, pleasing to the eye and picture-perfect though it be, can be a fair, proportionate or rational basis for discrimination. There does exist a perfect and comprehensive rejoinder to the fear repeated by our Judges that permitting Muslim girls to wear *hijab* would lead to a flood gate of similar demands by other religious groups leading to students ***"arriving in a mosaic of colours"*** and bringing ***"equality and harmonization"*** to ***"an abrupt end"*** and be a harbinger of ***"disorder, indiscipline, social distegration and disharmony in our learning institutions".*** That answer was famously given in pellucid fashion by Chief Justice Langa in **PILLAY** (supra), with which we fully concur and so adopt;

"107. The other argument raised by the school took the form of a 'parade of horribles' or slippery slope scenario that the necessary consequence of a judgment in favour of Ms. Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a 'parade of horrible' but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the school to permit all practices. If accommodating a particular practice would impose an unreasonable burden to the school, it may refuse to permit it."

(d) *School Rules*

It is clear from what we have said so far that in a free and democratic society, it is woefully insufficient for school administrators to adopt an absurd inflexibility when it comes to enforcement of school rules to govern various aspects of life. The absurdity springs from an imposition and execution a policy of uniformity that fails to have in contemplation, and take into account individual difference and circumstances that may present a compelling case for exemption. This is the more so, as we have stated repeatedly, when the exemptions are sought on the foundations of freedom of religion and the right to non-discrimination, be it direct or indirect.

Speaking as an officer of the Court learned counsel, **Mr. Anyuor** very candidly and helpfully submitted before us that whereas school uniforms are important as expressions of equality, there will always be a

small section of the school community that should be allowed to express their religion by wearing distinct dress such as the *hijab* in this case. He indicated that the 2nd and 3rd respondents, (the TSC and the Education Directors) are "quite happy to have the *hijab* worn" in schools. We think he is right in that submission. He went on to urge us to direct the Ministry of Education to come up with rules to guide schools countrywide in dealing with this issue ensuring that it engages and secures participation of all the relevant stakeholders so that the concept of accommodation can be clarified and entrenched. Indeed, the Ministry should do so in exercise of its regulatory and oversight powers as set out in the Basic Education Act. However, what rules or regulations the Ministry may come up with can only be necessarily general and probably deal with the policy aspect and may take a while to complete.

Furthermore the formulation of case-specific and school sensitive rules or regulations can only be effectively done at the individual school level where the peculiar circumstances and specific diversities of its population and its dynamiccs may be captured and addressed. Participatory democracy, so essential in creating rational communities, is critical and schools should therefore embrace and actuate the same.

In the **PILLAY** case, Justice O'Regan criticized the subject school, and the same criticism may fairly be leveled against the church and school in this case, as well as a vast majority of schools in Kenya who have not formulated clear or any rules for exemptions from the school Code of Conduct, Rules, Regulations or Regimes. Said the Judge, which we find persuasive;

"173. The unfairness I have identified in this case lies in the school's failure to be consistent with regard to the grant of exemptions. It is clear that the school has established no clear rules for determining when exemptions should be granted from the Code of Conduct and when not. Nor is any clear procedure established for processing applications for exemption. Schools are excellent institutions for creating the dialogue about culture that will best foster cultural rights in the overall framework of our Constitution. Schools that have diverse learner populations need to create spaces within the curriculum for diversity to be discussed and understood, but also they need to build processes to deal with disputes regarding cultural and religious rights that arise.

….

176. In this regard I conclude that the school failed in its obligations to the learner. Where a school establishes a code of conduct which may have the effect of discriminating against learners on the grounds of culture or religion, it is obliged to establish a fair process for the determination of exemptions. This principle requires schools to establish an exemption procedure that permits learners, assisted by parents, to explain clearly why it is they think their desire to follow a cultural practice warrants the grant of an exemption. Such a process would promote respect for those who are seeking an exemption as well as afford appropriate respect to school rules. An exemption process would require learners to show that the practice for which they seek exemption is a cultural practice of importance to them, that it is part of the practices of a community of which they form part and which is in a significant way constructs their identity. The school's authorities would in this way gain greater understanding of and empathy for the cultural practices of learners at the school."

O'Regan, J proceeded to agree with her Chief Justice that the court do make an order calling upon the school to effect amendments to its Code of Conduct to provide for granting of exemption from it in the case of religious and cultural practices. She also added, which we find practical and worthy of adoption, that;

"Once they have been adopted, the school should provide a place in its curriculum for the Code

of Conduct to be discussed with all learners in the classroom. That discussion should include a discussion of the principles on which exemptions from the rules are granted and the process whereby it happens. In particular, it seems important to stress that school rules should ordinarily be observed. Where processes are established for exemptions to be granted, they must be followed. Encouraging observance of rules is the first step towards establishing civility in an institution."

We do not conceive of a system of exemptions consistent with the principle of accommodation as a nullification of rules or an invitation to a-free-for-all when it comes to school uniform or the observance of discipline and the other dictates of the school routines. It is not every fanciful, capricious or whimsical request for exemption that will be countenanced or granted. Rules clearly do have their place but they cannot be allowed to infringe or intrude upon the space occupied by religion and belief or make of no effect the express protection granted by the Constitution to the manifestation of the same through "***worship, practice, teaching or observance, including observance of a day of worship"*** as expressly stated in **Article 32(2).** In the hierarchy of norms and the relative weight to be attached thereto, school rules rank way below the Constitution and it is incumbent upon those who formulate and enforce them to ensure that they align and accord with the letter and spirit of it, failing which they would be null, void and of no effect whatsoever. It must be remembered that such rules are not in consonance with the very clear principles for permissible limitations to the fundamental rights and freedoms as stipulated in **Article 24** of the Constitution. Where they conflict with the Constitution it is an altruism that it rules, and they are voided to the extent of the conflict or inconsistency.

This is the proper doctrinal and normative approach with which the High Court ought to have approached the issue of religion in schools in the matter before us. In so far as the **KENYA HIGH**, and the **ALLIANCE HIGH** (supra) cases cited before us by the church did not give full effect to the principles we have engaged with and in particular paid no or insufficient attention to the proscribed **indirect discrimination** and the principle of **accommodation** as the answer to the problem of discrimination, we are unable to accept them as a persuasive guide on how the matter before us should be decided. It is quite clear that the said decisions suffer from a deficit of wider, deeper analysis and turn a full blind eye or are silent on indirect discrimination. They give scant attention to the principle of accommodation with the effect that their conclusions are materially flawed. They therefore cannot aid the Church herein. They also contain some dicta that seem to take too far the notion of secularism in a manner suggestive of hostility to religion that is discordant with the letter and spirit of the Constitution and the most progressive jurisprudence on the subject. They thereby lose their persuasive quotient and must with justification be characterized as being *per in curriam* and therefore no longer good law.

We reiterate and adopt the essential and intimate link between freedom of religion and the cherished dream of a truly free society that was captured by Judge Dickson in **BIG DRUG MART LTD** (supra) thus;

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter [Article 27 of the Constitution]. Freedom must surely be founded on respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is

compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter [the Constitution] is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

To force students to abandon or refrain from a practice or observance dear to them and genuinely held as a manifestation of their religious convictions, as happened herein, violates their conscience, is the antithesis of freedom, is unconstitutional and is therefore null, void and of no force or effect.

4. DISPOSITION

Given our finding and holding herein, this appeal succeeds to the extent that;

(a) the High Court's order that the decision to allow Muslim students to wear *hijab*/trousers is discriminatory, unlawful and unconstitutional is set aside.

(b) the order of injunction preventing the respondents from allowing Muslim students to wear *hijab* contrary to school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby quashed and set aside.

(c) The mandatory injunction compelling the respondents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of St. Paul's Kiwanjani Day Mixed Secondary School is set aside to the extent that it prohibits Muslim female students from wearing the *hijab*/trousers in addition to the school uniform.

(d) The order that the school uniform policy does not indirectly discriminate against the interested parties Fugicha's daughters or other Muslim female students is set aside and substituted with an order that the said uniform policy indirectly discriminates against the interested partys' daughters and other Muslim female students in so far as it prohibits and prevents them from manifesting their religion through the practice and observance of wearing the *hijab*.

(e) the order striking out the interested party's cross-petition as defective is set aside and substituted with an order allowing the said cross petition.

(f) The order granting the costs of the petition to the petitioner is set aside and substituted with a order that each party do bear its own costs

We in addition direct as follows;

(1) That the Board of Management of St. Paul's Kiwanjani Day Mixed Secondary School do immediately initiate, after due consultation with its stakeholders in particular the parents and students a process of amendment of the relevant school rules touching on the school uniform so as to provide for exemptions to be granted to accommodate those students whose religious beliefs require them to wear particular

items of clothing **in addition to the school uniform**.

(2) This judgment be immediately served upon the Cabinet Secretary for Education for his perusal and consideration with a view to formulating and putting in place rules, regulations and/or directions after due consultations for the better protection of the fundamental right to freedom of religion and belief under **Article 32** of the Constitution and equality and freedom from discrimination under **Article 27** of the Constitution for all pupils and students in Kenya's educational system.

(3) Each party shall bear its own costs of this appeal.

We conclude this judgment with an explanation that it is delivered later than the date on which it was first reserved and outside of the period set by the Rules of this Court due to pressure of work and the voluminous amount of case law and other material with which we had to engage in what is clearly a case of great public importance raising fundamental questions of first impression. We are most grateful to counsel appearing before us for their industry in assembling jurisprudence from within the jurisdiction and further afield and for their cogent and incisive submissions which were of great assistance. If there is any authority we have not referred to, it is not for our non-consideration of it, but out of satisfaction that the point is otherwise already amply made.

Dated and delivered at Nyeri this 7th day of September, 2016.

P. N. WAKI

……

JUDGE OF APPEAL

R. N. NAMBUYE

……

JUDGE OF APPEAL

P. O. KIAGE

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

Annexure P-4

Government of Karnataka Circular

Subject: Uniform dress code for students of all Government schools and colleges

Ref: 1. Karnataka Education Act 1983

2. Govt cicular No 509-SHH/2013/31-01-2014

Foreword:

Vide notification of the Act under reference 1 above, Government of Karnataka has 1983 (1-1995) implemented Karnataka Education Act 1983, section 7 (2) (5), states that the students of all government schools and colleges should act like one family without feeling the sense of belonging to any one particular community or class and should act in accordance with the ideals of social justice. The present act under Section 133 states that the Government of Karnataka will have every right to instruct and direct the managements of schools and colleges in this regard.

In the above referred (ref 2) notification issued by the government, it has been clearly stated that Pre university education is an important and vital stage in the life of students. As such, as guided by the state from time to time, the grants given to these colleges should be utilised to the optimum level

and basic infrastructure of the colleges are to be maintained properly. It has also been emphasised to improve and maintain the standard of coaching in all colleges and in this connections all schools and colleges should have development committees and the schools and colleges should be managed as per directions given by School/College development committees.

The Supervisory committees of any school or college (School Development committees in case of government schools and Parents and Teachers committees and school management committee in case of private schools) should, as directed in the above notifications, should ensure a fair learning atmosphere in the school premises and thus enable the students to get quality education. These committees are empowered to take adequate measures and form code of conduct for the smooth functioning of the institution. The decisions taken by these committees will be applicable and confined to the particular schools or colleges.

In all schools and colleges Students, both boys and girls, should be enabled to participate in similar form of learning and in this respect programmes have been held in all schools and colleges. But few educational institutions it is observed that boys and girl students are practicing their religious practices. This has

disturbed the principles of equality and Unity being maintained in those schools and colleges and these incidents have come to the notice of the concerned authorities.

The Supreme court of India and High courts of different states, have over a period of time, in various cases, given the following decisions regarding Uniform dress codes to be followed by student community.

1. On 4.12.2018, the Kerala High Court in W.P(C) No. 35293/2018 paragraph 9 explained the decision of the Supreme Court as stated below:

   "9. The Apex Court in *Asha Ranjan & Ors v State of Bihar & Ors* [(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 over competing rights can be resolved not by negating individual rights, but by upholding larger rights to remain, to hold such relationships between institution and students."

2. In *Fathima Hussain Sayed v Bharat Education Society & Ors* (AIR 2003 BOM 75) a similar issue pertaining to dress codes arose in Karthik English School, Mumbai. After investigating the issue, the Bombay High Court held that the petitioner's (school Principal's) restriction on wearing

a headscarf or covering one's head is not violative of Article 25 of the Constitution.

3. In accordance with the Supreme Court decision in Asha Ranjan, the Madras High Court in Kamalam v Dr. M.G.R Medical University, Tamilnadu & Ors upheld the dress code issued by the university. In Sir M.Venkata Subba Rao Matriculation Higher Secondary School Staff Association v Sir M.Venkata Subba Rao Matriculation Higher Secondary School (2004) 2 MLJ 653 the Madras High Court decided on a similar matter, allowing the restriction.

As per the above referred decisions of Supreme court and High courts of different states, and as per the orders issued therein, Instruction the students not to cover their heads through a cloth or not to wear head scarf will not violate Article 25 of the constitution and considering the above and also in consideration of the Karnataka State Education Act 1983 and its provisions, the Government of Karnataka has issued directions as under:

As the Supreme Court and various High Courts have held that restricting students from coming to school wearing head scarfs or head covering is not in violation of Article 25 of the Constitution, and after carefully examining the rules under

Karnataka Education Act 1983, the government issues directions as under:

Government Notification No EP 14 SHH 2022 Bangalore dated 05-02-2022

In exercise of the powers conferred under Section 133(2) of the Karnataka Education Act, 1983, we direct students of all government schools to wear the uniform prescribed by the state. Students of private schools are instructed to wear uniforms prescribed by the management committees of the school.

In colleges that fall under the Karnataka Board of Pre-University Education, the dress code prescribed by the College Development Committee or the administrative supervisory committee must be followed. In case no uniforms are mandated or students are expected to wear such dress so that equality and unity should be ensured and measures should be taken to maintaining public peace and tranquillity

As per the instructions and on behalf of the Governor of Karnataka,

Under Secretary to the Government

Department of Education (Pre-university)

WP NO. 2347/2022 Connected Cases: WP NO. 2146/2022, WP NO. 2880/2022, WP NO.3038/2022 AND WP NO.3044/2022

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

[SMT RESHAM AND ANOTHER VS. STATE OF KARNATAKA AND OTHERS]

CJ & KSDJ & JMKJ:
10.02.2022
(VIDEO CONFERENCING)

ORDER

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.

Sd/-
CHIEF JUSTICE

Sd/-
JUDGE

Sd/-
JUDGE

AHB
List No.: 1 Sl Nos.: 1, 2, 3

IN THE SUPREME COURT OF INDIA

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

(Civil Appellate Jurisdiction)

I.A. No. ____ of 2022

In

SPECIAL LEAVE PETITION (C) _____ OF 2022

(Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition No. 2347 of 2022)

(With Prayer for Interim Relief)

In the matter of:

Fathima Jazeela and Ors. ...Petitioner

Versus

State of Karnataka and Ors. ...Respondents

Application Seeking Permission to File Lengthy Synopsis and List Of Dates

To,

THE HON'BLE CHIEF JUSTICE OF INDIA, AND

HIS LORDSHIPS COMPANION JUSTICES

OF THE HON'BLE SUPREME COURT

HUMBLE PETITION OF

THE PETITIONERS HEREIN

MOST RESPECTFULLY SHOWETH:

1. The instant petition is being filed against the impugned final order and judgment dated 15.032022 of the

Hon’ble High Court of Karnataka at Bangalore in W.P. No. 2347 of 2022.

2. The facts of the petition are not being repeated here for the sake of brevity but the same may be read as part and parcel of this application.

3. It is most humbly submitted that the issued involved in the petition are complicated and facts a plenty, a detailed description whereof is necessary, and, hence, the lengthy synopsis.

4. This application is moved bonafide and prejudices none.

PRAYER

Hence, in view of the facts and circumstances explained above, it is prayed before this Hon'ble Court as under:

i. Permit the petitioner to file the lengthy synopsis and list of dates with the Writ Petition.

ii. For any other order or direction that this Hon'ble Court may deem fit and appropriate in the interest of Justice.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BOUND SHALL EVER BE GRATEFUL

Place: New Delhi

Filed on: 23.03.2022 Satya Mitra

(Advocate for the Petitioner)

IN THE SUPREME COURT OF INDIA

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

(Civil Appellate Jurisdiction)

I.A. No. ____ of 2022

In

SPECIAL LEAVE PETITION (C) _____ OF 2022

(Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition No. 2347 of 2022)

(With Prayer for Interim Relief)

In the matter of:

Fathima Jazeela and Ors. ...Petitioner

Versus

State of Karnataka and Ors. ...Respondents

Application Seeking Exemption from Filing Certified Copy of the impugned Final Order and Judgment

To,

THE HON'BLE CHIEF JUSTICE OF INDIA, AND

HIS LORDSHIPS COMPANION JUSTICES

OF THE HON'BLE SUPREME COURT

HUMBLE PETITION OF

THE PETITIONERS HEREIN

MOST RESPECTFULLY SHOWETH:

1. The instant petition is being filed against the impugned final order and judgment dated 15.03.2022 passed by the Hon’ble High Court of Karnataka at Bengaluru in W.P. No. 2347 of 2022.
2. The fact and contents of the Petition are not being repeated here for the sake of brevity and repetition and the same may be read as part and parcel pf the Application.
3. The copy of the impugned order has been obtained through the official website of the High Court of Karnataka and the Petitioner has no reason to believe that the same is different from the certified copy of the final order and judgment.
4. The Petitioner undertakes to obtain and file the certified copy of the impugned order/judgment as and when the same is supplied to the Petitioner.
5. This application is made in the interest of justice.

Prayer

Hence, in view of the facts and circumstances explained above, it is prayed before this Hon'ble Court as under:

i. Pass an order exempting the Petitioner from filing the certified copy of the impugned order;

ii. Pass any other order or direction that this Hon'ble Court may deem fit and appropriate in the interest of Justice

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BOUND SHALL EVER BE GRATEFUL

Place: New Delhi

Filed on: 23.03.2022 Satya Mitra

(Advocate for the Petitioner)

IN THE SUPREME COURT OF INDIA

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

(Civil Appellate Jurisdiction)

I.A. No. ____ of 2022

in

SPECIAL LEAVE PETITION (C) _____ OF 2022

(Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition No. 2347 of 2022)

(With Prayer for Interim Relief)

In the matter of:

Fathima Jazeela and Ors. ...Petitioner

Versus

State of Karnataka and Ors. ...Respondents

Application Seeking Exemption from Filing

Certified Translation

To,

THE HON'BLE CHIEF JUSTICE OF INDIA, AND

HIS LORDSHIPS COMPANION JUSTICES

OF THE HON'BLE SUPREME COURT

HUMBLE PETITION OF

THE PETITIONERS HEREIN

1. The instant petition is being filed against the impugned final order and judgment dated 15.03.2022 passed by

the Hon’ble High Court of Karnataka at Bengaluru in W.P. No. 2347 of 2022.

6. The facts and contents of the Petition are not being repeated here for the sake of brevity and repetition and the same may be read as part and parcel of the Application.
7. The copy of the Government Order issued by the State of Karnataka at Annexure P-4 is a copy of the translation of the original and the Petitioner has no reason to believe that the same are different from the respective certified copies.
8. The Petitioner undertakes to obtain and file certified copy of translation Annexure P-4 as and when the same is supplied to the Petitioner.
9. This application is made in the interest of justice.

Prayer

Hence, in view of the facts and circumstances explained above, it is prayed before this Hon'ble Court as under:

a. Pass an order granting exemption to the Petitioner from filing certified translated copies of the Annexures P-4.

b. Pass any other order or direction that this Hon'ble Court may deem fit and appropriate in the interest of Justice

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BOUND SHALL EVER BE GRATEFUL

Place: New Delhi

Filed on: 23.03.2022 Satya Mitra

(Advocate for the Petitioner)

IN THE SUPREME COURT OF INDIA

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

(Civil Appellate Jurisdiction)

I.A. No. ____ of 2022

in

SPECIAL LEAVE PETITION (C) _____ OF 2022

(Arising out of final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in Writ Petition No. 2347 of 2022)

(With Prayer for Interim Relief)

In the matter of:

Fathima Jazeela and Ors. ...Petitioner

Versus

State of Karnataka and Ors. ...Respondents

Application Seeking Permission to File SLP

To,

THE HON'BLE CHIEF JUSTICE OF INDIA, AND

HIS LORDSHIPS COMPANION JUSTICES

OF THE HON'BLE SUPREME COURT

HUMBLE PETITION OF

THE PETITIONERS HEREIN

1. The instant petition is being filed against the impugned final order and judgment dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in W.P. No. 2347 of 2022.

2. The facts and contents of the Petition are not being repeated here for the sake of brevity and repetition and the same may be read as part and parcel of the Application.

3. That the Petitioners in the instant SLP were not parties as Petitioners or respondents before the High Court at Karnataka in Writ Petition No. 2347 of 2022, however Petitioner No. 1 who is a student of Bhandakars' Arts and Science College, Kundapura, Udupi District and Petitioner No. 2 who is a student of St. Marys PU College, Kundapura are directly and adversely affected by the impugned final order and judgement of the Hon'ble High Court of Karnataka. Petitioner Nos. 3, 4 an 5 are concerned public citizens (Petitioner No. 4 being a child rights activist and Petitioner No. 5 a student in Assam who believes in the practice) who are aggrieved by the arbitrariness of the order, the effects that it will have, and thus seek to file this SLP.

4. This application is bonafide and made in the interest of justice.

Prayer

1. Prayed, therefore, most humbly, that Your Lordships be pleased to:

i. Allow the Petitioners to file this instant SLP.

ii. And pass such other order or orders as this Hon'ble Court may deem fit in light of the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BOUND SHALL EVER BE GRATEFUL

Place: New Delhi

Filed on: 23.03.2022 Satya Mitra

(Advocate for the Petitioner)

IN THE SUPREME COURT OF INDIA

Special Leave Petition (Civil) No._____ of 2022

Civil/Criminal Appeal/Transfer/Writ Petition No. _____ of 2022

IN THE MATTER OF:

Fathima Jazeela and Ors. ... Petitioner

Versus

State of Karnataka and Ors. … Respondent

INDEX OF FILING

S.No.	Particulars	Copies	Court Fees
1.	Listing Proforma		
2.	Synopsis and List of Dates		
3.	SLP with Affidavit		
4.	Annexure P- 1to P- 5		
5.	I.A for exemptions from filing certified copy of the impugned order		
6.	I.A for exemptions from filing notarized affidavit		
7.	Vakalatnama		

Filed on:
23.03.2022
Code No. 1852
I.C. No. 4853

Satya Mitra
(Advocate for the Petitioner)
576, Masjid Road, Jangpura
New Delhi-110014
Mobile No. 09911769905

VAKALATNAMA

IN THE SUPREME COURT OF INDIA

(SCR Order IV Rule 18)

CIVIL / CRIMINAL / ORIGINAL / APPELATE JURISDICTION

W.P./T.P./S.L.P./CIVIL APPEAL (CIVIL/CRIMINAL) NO OF 201

Fathima Jazeela and Ors.

...PETITIONER (S)

VERSUS

State of Karnataka and Ors.

...RESPONDENT (S)

I / We Fathima Jazeela and Lamia Mol(Through her father) ..... the appellant(s) / petitioner(s) / Respondent(s) in the above Suit / Appeal / Petition / Reference do hereby appoint and retain **Mr.SATYA MITRA** Advocate Supreme Court Of India, to act and appear for me / us in the above Appeal / Petition / Reference and on my / our behalf to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein including proceedings in taxation and application for REVIEW to file and obtain return of documents and to deposit and receive money on my / our behalf in the said Appeal / Petition / Reference and application of review and to represent me / us and to take all necessary steps on my/ our behalf in the above matter. I / We agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the 23rd Day of March 2022

Accepted and Identified/ Satisfied.

Jazeela

Petitioner(s)/Appellant(s)/Respondent(s)/Caveat

(SATYA MITRA)
ADVOCATE-ON-RECORED

Fathima Jazeela,
Petitioner 1

Abdul Muthalib,
Father of Petitioner 2

MEMO OF APPEARANCE

To,
The Registrar
Supreme Court of India
New Delhi-110001

Sir, please enter my appearance for the above named Petitioner(s)/ appellant(s)/ Respondent(s) / Intervener(s) in the above Petition /Appeal / Reference.

Thanking you. Yours sincerely.

Dated 23.03.2022

(SATYA MITRA)
ADVOCATE-ON-RECORED
Advocate for Petitioner(S)
Appellant/ Respondent(S)/ Caveator

VAKALATNAMA

IN THE SUPREME COURT OF INDIA

(SCR Order IV Rule 18)

CIVIL / CRIMINAL / ORIGINAL / APPELATE JURISDICTION

W.P./T.P./S.L .P./CIVIL APPEAL (CIVIL/CRIMINAL) NO OF 201

Fathima Jazeela and Ors. ...PETITIONER (S)

VERSUS

State of Karnataka and Ors. ...RESPONDENT (S)

I / We IRFAN ENGINER ..... the appellant(s) / petitioner(s) / Respondent(s) in the above Suit / Appeal / Petition / Reference do hereby appoint and retain **Mr.SATYA MITRA** Advocate Supreme Court Of India, to act and appear for me / us in the above Appeal / Petition / Reference and on my / our behalf to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein including proceedings in taxation and application for REVIEW to file and obtain return of documents and to deposit and receive money on my / our behalf in the said Appeal / Petition / Reference and application of review and to represent me / us and to take all necessary steps on my/ our behalf in the above matter. I / We agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the 23rd Day of March 2022

Accepted and Identified/ Satisfied.

Petitioner(s)/Appellant(s)/Respondent (s)/Caveat

(SATYA MITRA)
ADVOCATE-ON-RECORED

Irfan Engineer, Petitioner No. 3

MEMO OF APPEARANCE

To,
The Registrar
Supreme Court of India
New Delhi-110001

Sir, please enter my appearance for the above named Petitioner(s)/ appellant(s)/ Respondent(s) / Intervener(s) in the above Petition /Appeal / Reference.

Thanking you. Yours sincerely.

Dated 23.03.2022

(SATYA MITRA)
ADVOCATE-ON-RECORED
Advocate for Petitioner(S)
Appellant/ Respondent(S)/ Caveator

VAKALATNAMA

IN THE SUPREME COURT OF INDIA

(SCR Order IV Rule 18)

CIVIL / CRIMINAL / ORIGINAL / APPELATE JURISDICTION

W.P./T.P./S.L .P./CIVIL APPEAL (CIVIL/CRIMINAL) NO OF 201

Fathima Jazeela and Ors.

...PETITIONER (S)

VERSUS

State of Karnataka and Ors.

...RESPONDENT (S)

I / We MONWAR HUSSAIN .....the appellant(s) / petitioner(s) / Respondent(s) in the above Suit / Appeal / Petition / Reference do hereby appoint and retain **Mr.SATYA MITRA** Advocate Supreme Court Of India, to act and appear for me / us in the above Appeal / Petition / Reference and on my / our behalf to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein including proceedings in taxation and application for REVIEW to file and obtain return of documents and to deposit and receive money on my / our behalf in the said Appeal / Petition / Reference and application of review and to represent me / us and to take all necessary steps on my/ our behalf in the above matter. I / We agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the 23rd Day of March 2022

Accepted and Identified/ Satisfied.

Monwar Hussain

Petitioner(s)/Appellant(s)/Respondent (s)/Caveat

(SATYA MITRA)
ADVOCATE-ON-RECORED

Monwar Hussain, Petitioner No. 4

MEMO OF APPEARANCE

To,
The Registrar
Supreme Court of India
New Delhi-110001

Sir, please enter my appearance for the above named Petitioner(s)/ appellant(s)/ Respondent(s) / Intervener(s) in the above Petition /Appeal / Reference.

Thanking you. Yours sincerely.

Dated 23.03.2022

(SATYA MITRA)
ADVOCATE-ON-RECORED
Advocate for Petitioner(S)
Appellant/ Respondent(S)/ Caveator

VAKALATNAMA

IN THE SUPREME COURT OF INDIA

(SCR Order IV Rule 18)

CIVIL / CRIMINAL / ORIGINAL / APPELATE JURISDICTION

W.P./T.P./S.L .P./CIVIL APPEAL (CIVIL/CRIMINAL) NO OF 201

Fathima Jazeela and Ors. ...PETITIONER (S)

VERSUS

State of Karnataka and Ors. ...RESPONDENT (S)

I / We .....RUMANA BEGUM.....the appellant(s) / petitioner(s) / Respondent(s) in the above Suit / Appeal / Petition / Reference do hereby appoint and retain **Mr.SATYA MITRA** Advocate Supreme Court Of India, to act and appear for me / us in the above Appeal / Petition / Reference and on my / our behalf to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein including proceedings in taxation and application for REVIEW to file and obtain return of documents and to deposit and receive money on my / our behalf in the said Appeal / Petition / Reference and application of review and to represent me / us and to take all necessary steps on my/ our behalf in the above matter. I / We agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the 23rd Day of March 2022

Accepted and Identified/ Satisfied.

(SATYA MITRA)
ADVOCATE-ON-RECORED

Rumana Begum

Petitioner(s)/Appellant(s)/Respondent (s)/Caveat

Rumana Begum, Petitioner No. 5

MEMO OF APPEARANCE

To,
The Registrar
Supreme Court of India
New Delhi-110001

Sir, please enter my appearance for the above named Petitioner(s)/ appellant(s)/ Respondent(s) / Intervener(s) in the above Petition /Appeal / Reference.

Thanking you. Yours sincerely.

Dated. 23.03.2022

(SATYA MITRA)
ADVOCATE-ON-RECORED
Advocate for Petitioner(S)
Appellant/ Respondent(S)/ Caveator

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