IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) No. 5236 OF 2022
&
CONNECTED MATTERS

IN THE MATTER OF:

MISS AISHAT SHIFA & ANR **PETITIONERS**

VERSUS

STATE OF KARNATAKA & ORS **RESPONDENTS**

WRITTEN SUBMISSIONS BY THE STATE OF KARNATAKA

The following issues arise for the kind consideration of this Hon'ble Court in the above Special Leave Petitions-

I. The Validity and Effect of the Government Order dated 05.02.2022 which was Impugned in the Writ Proceedings before the Hon'ble High Court

II. Whether the Petitioners have established that the '*wearing of Hijab*' is an essential Religious Practice under Article 25 of the Constitution of India?

III. Is the practice of wearing '*Hijab*' a facet of privacy and therefore protected under Article 21 of the Constitution of India?

IV. Whether the assertion that '*wearing of Hijab*' is a part of Freedom of Speech and Expression as provided under Article 19(1)(a) of the Constitution of India is correct?

V. Whether the present Special Leave Petitions merit to be referred to a Constitutional Bench under Article 145(3) of the Constitution of India, as contended by the Petitioners herein?

VI. Without prejudice to the above, the State has a wide expanse for exercise of power, including the power to reform

I. THE VALIDITY AND EFFECT OF THE GOVERNMENT ORDER DATED 05.02.2022 WHICH WAS IMPUGNED IN THE WRIT PROCEEDINGS BEFORE THE HON'BLE HIGH COURT?

1. In order to appreciate the true context and purpose of the aforesaid Govt Order, it is necessary to state before this Hon'ble Court the events preceding the Govt. Order. The same is as following-

Sl. No.	DATE	EVENT (Pages referred to are from the compilation filed by the State)
1.	29.03.2013 Pg-1-3	College Development Committee of Pre-university College,(PUC) Udupi in its meeting dated 29.3.2013 passed a resolution that the uniform of girl students studying in the PUC would be prescribed. As such, there were no issues in the said institutions and the students were following the said uniform.
2.	31.1.2014 Pg 4-5	Govt of Karnataka issued a circular directing a formation of a College Development Committee(CDC), comprising of inter alia the local Member of the Legislative Assembly, representatives of parents, student representatives and teachers and Principal of the PUC.
3.	01.02.2014 Pg-6-9	The Circular issued by the State Government regarding the constitution of CDC was intimated to the all the authorities in the State.
4.	23.06.2018 Pg-10-13	A resolution was passed by the CDC of Government P.U College for Girls, Udupi prescribing dress code as blue colour churidar, white and blue colour checks top and blue colour dupatta for the students.
5.	31.12.2019	The CDC's of another PUC being Kundapura Pre-University College, Udupi unanimously resolved that the uniform of the

Sl. No.	DATE	EVENT (Pages referred to are from the compilation filed by the State)
		students for the academic year would continue to be same as one prescribed in the previous years.
6.	August 2020 - December 2021	Petitioners in W.P No. 2347/2022 (Resham); W.P No. 2146/2022 (Ayesha Hajeera); W.P No. 2880/2022 (Aishat Shifa) admitted themselves to the institutions namely i.e Udupi and Kundapura Pre-University College in First year Pre-University Course. At the time of the admission to the pre-university course, Petitioners undertook to comply with all the rules and regulations of the Pre-University College.
7.	December, 2021	An agitation started which culminated with certain students and their parents requesting the Educational Institutions to permit Hijab to be worn in classrooms. The Institutions sought to resolve the same by having discussions with the Students, their parents and other representatives.
8.	25.01.2022 29.1.2022	Certain representations were made to the Government as well in view of the growing agitation. The State Government addressed letters dated 25.1.2022 and 29.1.2022 to the PUC stating that it had decided to form a committee and to look into the issues of raised above and till then status quo ought to be maintained. The respective CDCs, PUC directed the maintenance of status quo.
9.	29.1.2022 Pg-14-32	Even before any final decision was taken by the State Govt., five students of Govt PUC college being one Ayesha Hajeera Almas and 4 others (W.P No. 2146/2022) filed Writ Petitions seeking an interim prayer that they be allowed to continue to attend school wearing head scarfs.

Sl. No.	DATE	EVENT (Pages referred to are from the compilation filed by the State)
10.	31.01.2022 Pg-33-37	CDC of the Udupi Pre-University College met on 31.01.2022 and unanimously resolved that the students must continue to wear uniform as prescribed by the college in the previous academic years. The CDC resolved that students must not wear hijab in classrooms.
11.	02.02.2022	CDC of the Kundapura Pre-University College also unanimously resolved that the uniform of the students for present academic years would continue to be same as one prescribed in the previous years.
12.	05.02.2022 Pg-38-44	The State Government by the Impugned Order directed that it is for the College Development Committee and respective Educational Institutions to prescribe the uniform to the students of Pre-University board.

2. It is humbly submitted that the said Govt order dated 5.2.2022 may need to be construed in the context of three sub-heads;

(a) The events preceding the issuance of the Impugned Govt. Order dated 5.2.2022;

(b) The content of the order;

(c) The purport and effect of the said order

Events preceding the issuance of the Impugned Govt. Order dated 5.2.2022

3. It merits to be reiterated before this Hon'ble Court that the following facts are of seminal importance-

(a) As stated in the foregoing List of dates, the uniforms for the PUC's have been in vogue since 2013 and the same have been prescribed by the

College Development Committees from time to time. As such there were no issues since 2013 and the students were following the same;

(b) In the last week of December, 2021, some girl students started an agitation and came in groups insisting on wearing hijab which led to unrest in the PUC, Udupi. There were applications made to the institutions seeking to wear Hijab within classrooms;

(c) Subsequently, another group of students started a similar agitation in the case of PUC, Kundapura, insisting that they be permitted to wear a hijab in the classroom. Several students also came wearing saffron shawls;

(d) The institutions wrote to the Govt for guidance, in view of the agitations. The State Govt. decided to constitute a Committee and informed the institutions that status quo to be maintained till the decision was taken, vide letters dated 25.1.2022 and 29.1.2022;

(e) However, the agitation continued and there was a charged atmosphere in the educational institutions and there were protests outside the gates in front of media personnel;

(f) The Udupi PUC thereafter called for a meeting on 31.1.2022, with the parents and the students as well. It was stated in the meeting that the insistence on wearing hijab was causing discord in the college environment. Therefore, the students in order to maintain a peaceful academic environment must not insist on the same;

(g) Further, PUC, Kundapura, also called a meeting on 2.2.2022 wherein a decision was taken that to protect the tranquillity of the PUC till the decision is taken by the Govt, no students wearing hijab or saffron shawl would be allowed in the classes. More importantly, it was decided that they would wear uniform as prescribed in the previous years;

(h) Interesting to note that on 29.1.2022, even before the PUC or the State Govt. had taken a decision, a Writ Petition had already been filed before the Hon'ble High Court by five girl students, namely Writ Petition No. 2146 of 2022-Ayesha Hajeera Almas & Ors. v. State of Karnataka seeking the following prayer for interim relief-

> *"Wherefore, Petitioners humbly prays to this Hon'ble Court to direct Respondent 5 and 6 <u>to permit the Petitioners to attend the classes with their head scarf</u> without any bias and discrimination and also provide attendance in all days in which Petitioners forced to leave classes, due to bias approach of teaching staff, in this academic year or till the disposal of this writ petition, in the interest of justice and equity"*

4. It was in this background that the Govt was called upon to take the decision that it took on 5.2.2022. What is clear from the above narration is that-

i. The Students insisted on wearing hijab and caused agitation for the first time around the end of the year 2021 and not in previous years;
ii. The CDC tried to resolve the issue by counselling the students and taking them into confidence;
iii. The situation was volatile and likely to lead to a breach of tranquillity and disorder in the institutions;
iv. Most importantly, the students had filed Writ Petitions even before the Govt order dated 5.2.2022 was passed.

Content of the Impugned Govt. Order dated 5.2.2022

5. The content of the Govt Order can be divided in three parts;

(a) The first part records the statutory power of the Govt. and the constitution of the CDC and its importance;

(b) The 2nd part records the views of the various judgements of the Hon'ble High Court and Supreme Court, including *Asha Renjan v. State of Bihar, (2017) 4 SCC 297* which held that the test of larger public interest would need to be applied in the event of conflict between competing interests. Further, it also cites the judgements of various high courts, including Kerala High Court, Bombay High Court and Madras High Court which have taken a certain view in the matter;

(c) The Third part is the actual decision, the purport and effect of which is explained in the following paragraphs.

Purport and effect of the Impugned Govt. Order dated 5.2.2022

6. It is submitted that the purport of the Government Order is as follows:

i. The students of the Government institution would wear uniform prescribed by the Government;
ii. All private schools shall follow the uniform prescribed by the School Management;
iii. All Government pre-university colleges coming under the jurisdiction of the pre-university board, shall follow the uniform prescribed by the CDC or Supervisory Committee;

iv. In the event, the dress code not being prescribed, the students shall adhere to wear such dress which inspire equality and unity without affecting public order.

Thus, the Government Order *per se* does not interdict/infringe any of the legal rights, much less the alleged fundamental rights of the Petitioners.

7. The Government Order merely reiterates that the position of the Rule 11 of the Karnataka Educational Institution (Classification, Regulation & Prescription of curricula, etc) Rule 1995 (**"1995 Rules"** hereinafter) (Pg No. 45-57), wherein, the prescription of uniform had to be done by the education institutional concerned and the same is extracted hereinafter-

> *"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*"

8. A plain reading of Government Order would show that all that the State Government has directed is that the institutions concerned can prescribe the uniform as mandated under Rule 11 of the 1995 Rules. The necessary corollary of the above is that it is the concerned educational institutions which had to decide on the uniforms which is to be worn by the students when attend the respective schools.

9. It is respectfully submitted that Petitioners have not placed the facts in the proper perspective in as much as the prohibition to wear Hijab by two educational institutes preceded the Government Order dated 05.02.2022 itself. Further, the first writ petition seeking enforcement of right to wear hijab was filed even before the passing of the said Govt order. The same in itself makes it clear that in the matter of administration/prescription of curricula/academic

matters/ disciplinary action/matter of uniform, the institutions are autonomous from the Government.

10. The sequitur of the Government Order dated 05.2.2022 is that the prescription of the uniform has been left to the institute concerned, some of which may have regulated it, some may have permitted it and some who may have left it to the individual student concerned. Therefore, the entire argument that the State has acted in violation of the fundamental rights must fail.

Reasonableness of the action of the Schools/institutions in prescribing uniforms

11. As stated earlier, Rule 11 of the 1995 rules empowers a recognised educational institution to prescribe a uniform. It is pertinent to state that the rule itself is not under any challenge. Therefore, it cannot be questioned that by a reading of the rules in conjunction with the Karnataka Education Act, the concerned educational institutions have a right to prescribe a uniform to the students attending the said school

12. It is humbly submitted that the scope of judicial review of the decisions of the Educational Institution vis a vis its pupil are narrower than a purely administrative action. At this juncture, it is pertinent to refer to the dicta of this Hon'ble Court as laid by 11 Judges in *T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481* **:**

> *"**61.** In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged....."*

13. The general principle is that in matters concerning campus discipline of educational institutions, the court does not substitute its own views in place of the school authority. The exception is a scenario where the court steps in to remedy any manifest injustice or to interfere with a decision which does not pass the muster of *Wednesbury reasonableness*. *(Chairman, J& K State Board of Education v. Feyaz Ahmed Malik* (2000) 3 SCC 59 – Para 20*]*

14. While interpreting Article 30 (which has no limitation as prescribed in Article 25), this Hon'ble Court in the NEET judgement (*Christian Medical College Vellore Association v. Union of India (2020) 8 SCC 705*) has accepted and reiterated the following principles in previous judgements in the following manner:

a. This Hon'ble Court further quoted with approval the judgement passed in *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717 which in turn held that educational institutions being temples of learning, discipline is required between the teacher and taught. Regulations which will serve the interest of students and discipline were read as necessary prescription in Article 30. (Para 23 of the Judgement which relied upon Para 30, 31, 47 & 90 of *Ahmedabad ST. Xavier Society reported in 1974 (1) SCC 717*]

b. This Hon'ble Court further relied upon *Bihar State Madarasa Education Board* v. *Madarasa Hanfia Arabic College*, (1990) 1 SCC 428 which in turn held that even for minority institutions the State had the power to regulate in the interest of educational needs and discipline of the institution. (Para 27 of the Judgement relies upon *Bihar State Madarasa Education Board v. Madarasa Hanifa Arabic College Jamalia) Para 6 of 1990 (1) SCC 428*]

c. This Hon'ble Court further approved of the concept of proportionality laid down in *Modern Dental College & Research Centre* v. *State of M.P.*, (2016) 7 SCC 353 in the following terms-

> *"57. It is well settled that the right under Article 19(1)(g) is not absolute in terms but is subject to reasonable restrictions under clause (6). Reasonableness has to be determined having regard to the nature of right alleged to be infringed, purpose of the restriction, extent of restriction and other relevant factors. In applying these factors, one cannot lose sight of the directive principles of State policy. The Court has to try to strike a just balance between the fundamental rights and the larger interest of the society. The Court interferes with a statute if it clearly violates the fundamental rights. The Court proceeds on the footing that the legislature understands the needs of the people. The Constitution is primarily for the common man. Larger interest and welfare of student community to promote merit, achieve excellence and curb malpractices, fee and admissions can certainly be regulated.* (Para 38.3 of the Judgment relies upon Para 57-59 of *Modern Dental College & Research Centre v. State of Madhya Pradesh. 2016 (7) SCC 353*).

15. Whether the Action of the school authorities is reasonable or excessive or arbitrary must be examined in the light of the facts preceding the said action namely-

(a) There was a sudden spurt in the groups of students coming to school insistent on wearing hijab within the class rooms;
(b) The Hijab was sought to be worn as religious symbol;(Please see the averments made in the very first writ Petition filed by Ayesha Hajeera Almas & Ors.)
(c) There were discordant notes by other students attending the same educational institutions;
(d) As the events were unprecedented, the institutes tried to bring about a reconciliation which was unsuccessful. The agitation was also affecting the educational environment in the campuses.

16. In this background, the PUCs decided to impose a status quo-meaning thereby whatever uniform was being followed in preceding years was directed to be followed. The same was as per the direction of the CDC's which was again comprised of representatives of the parents, students and the other members of the community. Even after the Govt order dated 2.2.2022, the same has been left to the concerned PUCs to take an appropriate decision. It is humbly submitted that the actions of the school is clearly a decision vis a vis its own students and doesn't even rise to the level of an administrative decision. In any event, the decision by school authorities to impose a uniform within school campuses is not a restriction to be judged under Article 19 or Article 25 of the Constitution of India.

Actions of the State is in consonance with the Rules and Provisions of the Karnataka Education Act

17. It is pertinent to state that one of the main objects of the Karnataka Education Act is provide for harmonious development of the mental and physical faculties of the students and cultivating a scientific and secular outlook through education and the preamble of Act reads as follows:

> *"An Act to provide for better organisation, development, discipline and control of the educational institutions in the State. WHEREAS it is considered necessary to provide for the planned development of educational institutions inculcation of healthy educational practice, maintenance and improvement in the standards of education and better organisation, discipline and control over educational institutions in the State with a view to fostering the harmonious development of the mental*

and physical faculties of students and cultivating a scientific and secular outlook through education;"

18. Section 1 (3) of the Act prescribes the applicability of the Act and the Act applies to all educational institutions and tutorial institutions except where mentioned in the Act.

19. Section 2 (14) defines educational institution, such definition is inclusive in nature and means any institution imparting education referred to in Section 3 and includes a private educational institution.

20. Section 2 (30) defines recognised educational institution, which means an educational institution recognised under the Act.

21. Section 6 of the Act mandates that no educational institution shall be established than in accordance with the provisions of the Act.

22. It is important to refer to Section 7 of the Act which gives power to the State Government to prescribe curricula and it is pertinent to note that the Section 7 (1) (i) provides a residuary power to the State Government to prescribes rules in such other matters as are considered necessary. For sake of convenience, Section 7 (1) (i) has been culled out

> *"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,-*
>
> *...*
>
> *(i) such other matters as are considered necessary."*

23. Section 36 of Act, which falls under Chapter VI of the Act which deals with recognition of Educational Institutions, state that that State Government may grant recognition to any educational institutions subject to fulfilment of conditions.

24. Section 38 deals with recognition of existing institution and states that the institutions approved by competent authority in accordance with prescribed conditions shall be deemed to educational institutions. Section 38 (a) of the Act provides that educational institutions established and run by the State Government or by any authority sponsored by the Central or State Government or by a local authority and approved by the competent authority in accordance with such conditions as may be prescribed shall be deemed to be educational institutions recognised under this Act; " However, the Act does not mention as to person who would act on behalf of recognised education institution, in so far government education is concerned.

25. Section 133 of the Act gives powers to Government to give directions to educational institutions that are necessary to carry out the purposes of the Act. It is important to refer to Section 133 (2), which reads as follows,

> *"(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"*

26. It is respectfully submitted in absence of management committee under Section 36 and Section 38 of the Act in government institution, the Government have given direction by constituting committee by exercise of powers under Section 133 of the KEA. The said committee, which is inclusive in nature, consist of the local MLA, parents, principal, representatives of students and teachers. The said committee takes collective decisions without veto power to any person.

27. The direction issued by the State Government under Section 133 (2), vesting the prescription of uniform upon the CDC is in consonance with the provisions of the Act read with Rule 11 of 1995 rules.

28. Some of the counsels for the Petitioners have argued that the powers could not have been delegated to the CDC under S. 142 of the Act. The power of the delegation as exercised under Section 142 is to ask an authority to perform a duty vested in some other authority. In the case on hand, it is recognised educational institution which prescribes uniform and CDC is acting on behalf of education institution. Therefore, the provisions of S. 142 have no application.

29. Besides, the CDC is an authority which has been created by an executive order in the year 2014 itself and dehors, challenge to the formation of the CDC's, the Petitioners contention must fail. It is submitted that the restriction of wearing of hijab does not flow from the Government Order but in fact by the Resolution passed by the CDC's. If the Petitioner had any grievances with the resolutions, they ought to have called such resolution in to question.

30. In absence of challenge to Rule 11 of the 1995 Rules, Order dated 31.01.2014 establishing CDC and specific Resolutions issued by the respective CDC's the challenge to GO dated 05.02.2022 itself must fail.

II. WHETHER THE PETITIONERS HAVE ESTABLISHED THAT THE 'WEARING OF HIJAB' IS AN ESSENTIAL RELIGIOUS PRACTICE UNDER ARTICLE 25 OF THE CONSTITUTION OF INDIA?

31. It is humbly submitted that it was the case set up by the Petitioners before the Hon'ble Court that the wearing of Hijab is an essential Religious Practice under Article 25 of the Constitution of India. It was in this background that the Hon'ble High Court took up the said issue and answered the same in the Impugned Judgement. In that view of the matter, it may not be fair for the Petitioners to call into question the Hon'ble High Court for deciding the issue as to whether hijab was an Essential Religious Practice.

32. The same is clear from the averments made and prayers sought in the writ petitions . As an example some of the pleadings are quoted hereunder:

a. In ***W.P No. 2880/2022*** - (*Aishat Shifa v. State of Karnataka*)

> *Para 4: It is submitted that the Petitioners herein conscientiously chose to follow the tenets of Islam, one of which is to observe hijab head scarf. Not only is it a part of their essential religious identity but denuding them from pursuing their education unless they give up on it is also an affront to their right to living with dignity protected under Article 21 of the Constitution. The unreasonable and discriminatory "punishment" imposed on the petitioners by the 5th Respondent for merely practicing their religious tenets, which in no way hinders or obstructs the imparting or acquiring of education within the institute is in blatant violation of the fundamental rights of the petitioners guaranteed under Article 15, 19(1)(a), 25 and 21 of the Constitution of India.*
>
> *Para 5: It is submitted that in a multi-religious, multi-cultural and vibrant democracy such as ours, identity forms an integral part of religious as well as other minorities. The framers of the constitution had the foresight to apprehend the possibility of the right to practice of religion being trampled upon and therefore l zealously sought to protect it by making the right to practice religion a fundamental right, correspondingly casting a duty upon the constitutional courts to enforce it.*

b. In W.P No. 2347/2022 (*Resham & Ors v. State of Karnataka & Ors*) – the following prayers were sought by the Petitioners

> **Prayer:**
>
> *Writ of mandamus direction Respondent No. 2 not to interfere with the Petitioner's fundamental right to practice the essential practices*

of her religion, including wearing of hijab to the 2nd Respondent university while attending classes.
Writ of mandamus directing the Respondents to permit the Petitioner to wear hijab while attending her classes as being a part of essential practice of her religion
Writ of mandamus declaring that the Petitioner's right to wear hijab is a fundamental right guaranteed under Articles 14 and 25 of the Constitution of India and is an essential practice of Islam religion.

In that view of the matter, the Hon'ble High Court was called upon and has answered the issue in the Impugned Judgement.

33. It is submitted that the State is seeking to advance the following propositions with respect to Article 25-

A. Article 25 alongwith Article 26 commence with a non-obstante clause and have limiting factors within the said articles themselves;

B. This Hon'ble Court has interpreted Article 25 to mean that the right to practice, profess and propagate religious practice would mean the right to practice, profess and propagate Essential Religious Practice. In other words, every religious practice does not fall within the ambit of Article 25;

C. Article 25, unlike Article 19, does not require any order to be passed by the Govt. If any person sets up the case that he has a right to a religious practice then the said person has to satisfy that the said practice doesn't come in conflict with Health, Public Order and Morality and other fundamental rights protected under Part III of the Constitution of India;

D. The Rights available under Article 25 must also be harmoniously construed with other Fundamental Rights in Part III and Directive principles under Article 51.

34. The law as to what constitutes an Essential Religious Practice is well settled and in order to establish above said right, the Petitioners has to pass through the tests prescribed by this Hon'ble Court in the following judgements-

35. In the case of ***Durgah Committee, Ajmer and Another v. Syed Hussain Ali and Ors.*** **[AIR 1961 SC 1402]** this Hon'ble Court held as follows:

*"**33.** ..... What the expression "religious denomination" means has been considered by this Court in Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [(1954) SCR 1005] . Mukherjea, J., as he then was, who spoke for the Court, has quoted with approval the dictionary meaning of the word "denomination" which says that a "denomination" is a collection of individuals classed together under the same name, a religious sect or body having a common faith and organisation and designated by a distinctive name. The learned Judge has added that Article 26 contemplates not merely a religious denomination but also a section thereof.* ***Dealing with the questions as to what are the matters of religion, the learned Judge observed that the word "religion" has not been defined in the Constitution, and it is a term which is hardly susceptible of any rigid definition. Religion, according to him, is a matter of faith with individuals or communities and it is not necessarily theistic. It undoubtedly has its basis in a system of pleas or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it is not correct to say that religion is nothing else but a doctrine or 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*** *(pp. 1023, 1024). Dealing with the same topic, though in another context, in Venkataramna Devaru v. State of Mysore [(1958) SCR 895] Venkatarama Aiyar, J. spoke for the Court in the same vein and observed that it was settled that matters of religion in Article 26(b) include even practices which are regarded by the community as part of its religion, and in support of this statement the learned Judge referred to the observations of Mukherjea, J., which we have already cited.* ***Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of***

Article 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other*."*

36. In ***Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another*** **[(2004) 12 SCC 770]** the Hon'ble Apex Court observed as follows:

*"**9.** 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. (See generally the Constitution Bench decisions in Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005] , Sardar Syedna Taher Saifuddin Saheb v. State of Bombay [AIR 1962 SC 853 : 1962 Supp (2) SCR 496] and Seshammal v. State of T.N. [(1972) 2 SCC 11 : AIR 1972 SC 1586] regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not.)* ***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."

37. In the case ***Javed and Others v. State of Haryana and Others*** **[(2003) 8 SCC 369]** this Hon'ble Court observed as follows:

> *"**45.** The meaning of religion — the term as employed in Article 25 and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in M. Ismail Faruqui (Dr) v. Union of India [(1994) 6 SCC 360] . Article 25 merely protects the freedom to practise rituals and ceremonies etc. which are only the integral parts of the religion. Article 25 of the Constitution of India will, therefore, not have any application in the instant case."*

38. Moreover, in the case of ***A.S Narayana Deekshitulu v. State of Andhra Pradesh and Others*** **[(1996) 9 SCC 548]** this Hon'ble Court held as follows:

> *"**86.** A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, cannot be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. **There is nothing which a man can do, whether in the way***

of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice.

87. *In pluralistic society like India, as stated earlier, there are numerous religious groups who practise diverse forms of worship or practise religions, rituals, rites etc.; even among Hindus, different denominants and sects residing within the country or abroad profess different religious faiths, beliefs, practices. They seek to identify religion with what may in substance be mere facets of religion. It would, therefore, be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. To one class of persons a mere dogma or precept or a doctrine may be predominant in the matter of religion; to others, rituals or ceremonies may be predominant facets of religion; and to yet another class of persons a code of conduct or a mode of life may constitute religion. Even to different persons professing the same religious faith some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice. That is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right to profess religion.* ***Therefore, the right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right to propagating religion which is subject to legislation by the State limiting or regulating any activity — economic, financial, political or secular which are associated with religious belief, faith, practice or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. 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."

39. According to the aforesaid judgments, it is clear that a practice to fall under the ken of the essential religious practice, the said threshold must be met:

a) **Practice should be fundamental to religion and must be from the time immemorial.** (*Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another, (2004) 12 SCC 770-Para 9*)

b) **If that practice is not observed or followed, it would result in the change of religion itself** (*Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another, (2004) 12 SCC 770-Para 9*)

c) **The foundation of the practice must precede the religion itself or should be co-founded at the origin of the religion. Such practice must form cornerstone of the religion itself**(*Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another, (2004) 12 SCC 770-Para 9*)

d) **Such practice must be binding nature of the religion itself. Practice must so compelling.** (*Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another, (2004) 12 SCC 770-Para 9*)

e) **Not every activity of associated with the religion which can be characterised as part of religion, instance, like food and dress** *(A.S Narayana Deekshitulu v. State of Andhra Pradesh and Others (1996) 9 SCC 548-Para 86-87)*

40. In so far as freedom of conscience is concerned, it is relevant to refer to the **Constitution Assembly Debates (Vol. VII)**. The relevant portions have been reproduced hereinbelow:

A. The Honourable Shri Ghanshyam, @Pg. 821-822**:**

"Sir, I move:

That in the Explanation to clause (1) of article 19, for the word profession, the word practice be substituted. Article 19. Sir, is very comprehensive. It says "All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion." Now, as to

freedom of conscience: It means that a man is free either to have a religion or no religion. If a man has a religion, then he is free to profess whatever religion he likes, either Islam, or Hinduism, or Buddhism or Sikhism and so on. Then, professing that religion, he is free to practise the dictates of that religion. For instance, if Islam requires that there should be a namaz, a Muslim is free to practise it and also to propagate it. What I would humbly submit is this: The wearing of kirpan may more appropriately be called the practice of religion than the profession of the Sikh religion. This is all I have to say."

B. The Honourable Shri K. Santhanam, @Pg. 834-835**:**

Mr. Vice-President, Sir, I stand here to support this article. This article has to be read with article 13, article 13 has already assured freedom of speech and expression and the right to form association or unions. The above rights include the right of religious speech and expression and the right to form religious association or unions. Therefore, article 19 is really not so much an article on religious freedom, but an article on, what I may call religious toleration. ***It is not so much the words "All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion" that are important. What are important are the governing words with which the article begins, viz., "Subject to public order, morality and health".***

Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. ***But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health. The full implications of this qualification are not easy to discover. Naturally, they will grow with the growing social and moral conscience of the people.*** *For instance, I do not know if for a considerable period of time the people of India will think that purdah is consistent with the health of the people.* ***Similarly, there are many institutions of Hindu religion which the future conscience of the Hindu community will consider as inconsistent with morality.***

Sir, some discussion has taken place on the word 'propagate'. After all, propagation is merely freedom of expression. I would like to point out that the word 'convert' is not there. Mass conversion was a part of the activities of the Christian Missionaries in this country and great objection has been taken by the people to that. Those who drafted this Constitution have taken care to see that no unlimited right of conversion has been given. People have freedom of conscience and, if any man is converted voluntarily owing to freedom of conscience, then well and good. No restrictions can be placed against it. But if any attempt is made

by one religious community or another to have mass conversions through undue influence either by money or by pressure or by other means, the State has every right to regulate such activity. Therefore, I submit to you that this article, as it is, is not so much an article ensuring freedom, but toleration--toleration for all, irrespective of the religious practice or profession. And this toleration is subject to public order, morality and health. Therefore, this article has been very carefully drafted and the exceptions and qualifications are as important as the right it confers. Therefore, I think the article as it stands is entitled to our wholehearted support"

Is the claim of the Petitioners of wearing hijab as a Essential religious practice is based on sufficient evidence

41. It is clear from the judgements the Petitioners failed to discharge their burden that wearing of the hijab pass the muster of the above five thresholds. Further, it has been clearly held in a catena of judgements that whether a particular practice is an Essential Religious Practice or not is essentially a question of fact which has to be established by the Petitioners. Having failed to do so, the Petitions therefore have been rightly dismissed.

42. It is respectfully submitted that the Petitioners have laid down scant evidence to establish that the wearing of hijab constituted an essential religious practice of Islamic faith. For sake of convivence, the chart depicts the averments made by the Petitioners to establish that the Hijab forms part of essential religious practice

SL.No.	Writ Petition No.	Relevant Averments.
1.	W.P. No. 2146/22 *Ayesha Hajeera & Anr. v. Chief Secretary, State of Karnataka & Anr.*	In P**ara 22** it is averred that "wearing head scarf by the young girls is a part and parcel of their cultural and religious practices …" In **Para 26:** Reliance is placed on the (2016) 2 KLT 601 (Amnah Bint Basheer v. Central Secondary Education Board)
2.	W.P. No. 2880/22 Ms. Aishat Shifav. State of	In P**ara 4** it is averred that: "…Petitioners herein conscientiously choose to follow the tenets of Islam, one of which is to observe

SL.No.	Writ Petition No.	Relevant Averments.
	Karnataka & Ors.	hijab/headscarf. Not only is it a part of their essential religious identity but denuding them from pursuing their education unless they give up on it is also an affront to their right to living with dignity protected under Article 21 of the constitution." In **Para 24** – "Petitioner's practice of wearing hijab, which according to her is an essential part of her religious practice, in no way interferes with the imparting of education…..' **Para 25:** Reference to verse 24.31 of the Qur'an. **Para 26:** "**…..** injunction to wear a headscarf or hijab is an essential feature of Islamic practice being ordained by Qur'an itself. **Para 28:** They being followers of the Islamic faith since birth and is practicing the essential religious practice of wearing a hijab/head scarf. **Para 36:** Petitioner believe that it an essential part of their faith and conscience that they must wear a hijab. **Para 38:** Reliance is placed on the (2016) 2 KLT 601 (Amnah Bint Basheer v. Central Secondary Education Board) **Para 41:** Verses of Holy Quran and the narrations of Hadiths (the Prophet's way of life) contain the essential religious practices to be followed by persons of Islamic faith. Ground G: Refers to Verse 31 of Chapter 34 of the Holy Quran

SL.No.	Writ Petition No.	Relevant Averments.
3.	W.P. No. 2347/22 Resham v. State of Karnataka & Ors.	**Para 5: ....**religious practice of wearing the Hijab is neither entangled in public law nor is there any conflict between the Petitioner's right to religious freedom..... **Para 11: .....** Thus by not keeping a check on such unfettered action on the state to deny the Petitioner her guaranteed right to education merely on the ground of wearing the hijab, which is essential religious practice would tantamount to reducing the rule of law..... **Para 15:** Reliance is placed on the 2016) 2 KLT 601 (Amnah Bint Basheer v. Central Secondary Education Board) **Para 16:** The discussion in the aforesaid case would show that covering the head and wearing a long sleeve dress by women have been treated as an essential part of the Islamic religion.
4.	W.P. No. 3424/22 (PIL) Vinod Kulkarni v. Union of India & Ors.	No averments in the Petition that wearing of Hijab forms part of the essential religious practice.
5.	W.P. No. 3821/22 (PIL) All India Democratic Women's Association v. State of Karnataka & Ors.	No averments in the Petition that wearing of Hijab forms part of the essential religious practice except for reliance on the judgements in of Hon'ble High Court of Kerala in Amnah Bint Basheer v. Central Board of Secondary Education reported in AIR 2016 Ker 115 and Nadha Raheem v. Central Board of Secondary Education reported in 2015 SCC OnLine Ker 21660 in ***Para 19 and 20***

SL.No.	Writ Petition No.	Relevant Averments.
6.	W.P. No. 3853/22 Karnataka State Minorities Educational Institutions Management Federations v. State of Karnataka & Ors.	In this petition nothing is averred stating hijab is an essential religious practice under Islam.
7.	W.P. No. 3044/22 Fatima Jazeela v. State of Karnataka & Ors.	**Para 37**: It is stated that "covering the head and wearing a long sleeve dress by women have been treated as an essential part of Islamic religion"
8.	W.P. No. 3038/22 Ms. Shahena v. State of Karnataka & Ors.	Para 4: Petitioners conscientiously believe that the hijab/head scarfs part of their religious identity and essential in Islamic faith. Para 18: Petitioner believe that it is an essential part of their faith and conscience that they must wear a hijab. Para 20: Reliance placed on Hon'ble High Court of Kerala in ***Amnah Bint Basheer v. Central Board of Secondary Education*** reported in ***AIR 2016 Ker 115.*** Para 23: Reliance placed on verse 26 Chapter 7; verse 31 Chapter 24; Verse 59 Chapter 33 of Holy Quran

43. This Hon'ble Court in the following cases has held that the religious practice though pleaded was not an Essential Religious Practice-

44. In the case of ***Mohd. Hanif Quareshi and Others v. State of Bihar*** **[AIR 1958 SC 731]** this Hon'ble Court held as follows:

> *"**13.** Coming now to the arguments as to the violation of the petitioners' fundamental rights, it will be convenient to take up first the complaint founded on Article 25(1).....*
>
> *What then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? The materials before us are extremely meagre and it is surprising that on a matter of this description the allegations in the petition should be so vague. In the Bihar Petition No. 58 of 1956 are set out the following bald allegations: "....."*
> *The allegations in the other petitions are similar. These are met by an equally bald denial in paragraph 21 of the affidavit in opposition.* ***No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. All that was placed before us during the argument were Surah XXII, Verses 28 and 33, and Surah CVIII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We have no affidavit before us by any Maulana explaining the implications of those verses or throwing any light on this problem. We, however, find it laid down in Hamilton's translation of Hedaya Book XLIII at p. 592 that it is the duty of every free Mussulman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice, provided he be then possessed of Nisab and be not a traveller. The sacrifice established for one person is a goat and that for seven a cow or a camel. It is therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty. It is, however, pointed out that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats. ..... We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day***

is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners."

45. In ***Mohd. Ahmed Khan v. Shah Bano Begum and Others*** **[(1985) 2 SCC 556]** this Hon'ble Court *inter-alia* held as under:

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

46. Further, in the case of ***Dr. M. Ismail Faruqui and Others v. Union of India and Others*** **[(1994) 6 SCC 360],** this Hon'ble Court *inter-alia* stated that a practice may be a religious practice but not an essential and integral part of practice of that religion and held as follows:

> *"**77.** It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include*

the right to acquire or own or possess property. Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.

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

82. *The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession (See Mulla's Principles of Mahomedan Law, 19th Edn., by M. Hidayatullah — Section 217; and Shahid Ganj v. Shiromani Gurdwara [AIR 1940 PC 116, 121 : 44 CWN 957 : 67 IA 251]). If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. A mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practise the religion, if the significance of that place be such. Subject to this*

condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right."

47. Moreover, in ***Javed and Others v. State of Haryana and Others*** **[(2003) 8 SCC 369],** this Hon'ble Court held as follows:

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

48. It is submitted that Respondent states from the reference to the tests mentioned above, the Petitioners have failed to establish that the right to wear hijab is an Essential Religious Practice as follows-

I. **Practice should be fundamental to religion and must be from the time immemorial.** **(***Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another, (2004) 12 SCC 770-Para 9***)**

Petitioners have to failed to establish that the wearing of hijab is fundamental to religion and no sources is relied upon or pleaded by the Petitioners .

I. **If that practice is not observed or followed, it would result in the change of religion itself(***Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another, (2004) 12 SCC 770-Para 9***)**

The fact that non wearing of hijab is not even pleaded and no sources are relied to demonstrate that such nonpractice would result in change of the colour of religion. For instance, several of the women belonging to the Islamic faith do not wear hijab. Similarly, several countries as matter of faith have prohibited wearing of hijab for example,

France and Turkey. It cannot be said Islamic faith has changed by non-wearing of hijab. On the contra, Islamic faith continues to be followed in same manner as prevalent in other parts of the world.

III. The foundation of the practice must precede the religion itself or should be co-founded at the origin of the religion. Such practice must form cornerstone of the religion itself(*Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another, (2004) 12 SCC 770-Para 9*)

The Petitioners have not shown or pleaded in this regard and it is not the case of the Petitioners that the practice of wearing hijab preceded or formed the cornerstone of religion of Islam.

IV. Such practice must be binding nature of the religion itself. Practice must so compelling. (*Commissioner of Police and Others v. Acharaya Jagadishwarananda Avadhuta and Another, (2004) 12 SCC 770-Para 9*)

It is submitted that Petitioner have failed to state that it is binding in nature and its compelling. While construing the sacrifice of animal in the matter of ***Mohd Hanif Quareshi v. State of Bihar AIR 1958 SC 731*** (para 13) , this Hon'ble court held that it is not obligatory. Petitioner has Failed to show from any source of Islam that wearing is mandatory and it is compulsory and there is no option not to wear hijab.

V. Not every activity associated with the religion which can be characterised as part of religion, instance, like food and dress.

This Hon'ble Court in ***A.S Narayana Deekshitulu v. State of Andhra Pradesh and Others*** **(1996) 9 SCC 548-Para 86-87** has held that not every activity of the dress can be associated with the practice of religion.

49. It is humbly submitted that the Petitioners have failed to establish that the right to wear hijab is an Essential Religious Practice under Article 25 of the Constitution of India.

III. IS THE PRACTICE OF WEARING 'HIJAB' A FACET OF PRIVACY AND THEREFORE PROTECTED UNDER ARTICLE 21 OF THE CONSTITUTION OF INDIA?

50. It is humbly submitted that the Petitioners have failed to establish their right to wear Hijab is traceable to Article 21 of the Constitution of India.

51. It is submitted that right to privacy is crystallized in the constitution bench ***(9-Judges)*** judgement of ***Justice K.S Puttuswamy (Retd) v. Union of India & Ors* (2017) 10 SCC 1**. The Petitioners rely, *interalia,* on Paragraph 298 of the judgment to contend that the freedom to dress forms part of privacy. The said paragraphs is as under

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

52. However, the same has to be read in the context of the other portions of the judgement Court in paragraphs 299 lays downs the restriction on the right to privacy in the following manner:

> *"299. Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal. Yet, it is necessary to acknowledge that individuals live in communities and work in communities. Their personalities affect and, in turn are*

shaped by their social environment. The individual is not a hermit. The lives of individuals are as much a social phenomenon. In their interactions with others, individuals are constantly engaged in behavioural patterns and in relationships impacting on the rest of society. Equally, the life of the individual is being consistently shaped by cultural and social values imbibed from living in the community. This state of flux which represents a constant evolution of individual personhood in the relationship with the rest of society provides the rationale for reserving to the individual a zone of repose. The lives which individuals lead as members of society engender a reasonable expectation of privacy. The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desire to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone. The notion that there must exist a reasonable expectation of privacy ensures that while on the one hand, the individual has a protected zone of privacy, yet on the other, the exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning regulations. If the building bye laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by regulations designed to protect the interests of the community in planned spaces. Hence while the individual is entitled to a zone of privacy, its extent is based not only on the subjective expectation of the individual but on an objective principle which defines a reasonable expectation.

Further the judgement states that

377. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right to privacy, it is

necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

426. There is no doubt that privacy is integral to the several fundamental rights recognised by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right to privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since privacy is always integrated with personal liberty, the constitutionality of the law which is alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty under Article 21 is liable to be tested. Under Article 21, the standard test at present is the rationality review expressed in Maneka Gandhi case . This requires that any procedure by which the State interferes with an Article 21 right to be "fair, just and reasonable, not fanciful, oppressive or arbitrary"

427. Once it is established that privacy imbues every constitutional freedom with its efficacy and that it can be located in each of them, it must follow that interference with it by the State must be tested against whichever one or more Part III guarantees whose enjoyment is curtailed. As a result, privacy violations will usually have to answer to tests in addition to the one applicable to Article 21. Such a view would be wholly consistent with Rustom Cavasjee Cooper v. Union of India

526. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1)(a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in

order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

567. In view of the foregoing discussion, my answer to Question 2 is that "right to privacy" is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but is subject to certain reasonable restrictions, which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law.

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

53. Hence, based on the reading of the above said paragraphs, it is clear that the right to privacy is not an absolute right and holds that the limitations are to identified on case-to-case basis depending upon the nature of privacy interest claimed.

IV. WHETHER THE ASSERTION THAT 'WEARING OF HIJAB' IS A PART OF FREEDOM OF SPEECH AND EXPRESSION AS PROVIDED UNDER ARTICLE 19(1)(A) OF THE CONSTITUTION OF INDIA IS CORRECT?

54. It is submitted that the Article 19(1)(a) confers freedom of speech and expression. The said freedom of expression is a right to express oneself to another person or persons.

55. It is submitted that it has been held in ***Maneka Gandhi v. Union of India*****, (1978) 1 SCC 248,** as under :

"29....It would thus be seen that even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that article, if it is an integral part of a named fundamental right or partakes of the same basic nature and

character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right.

56. In the present case, it has not been established that the right to wear hijab inside a classroom is a fundamental right of expression;

A. It was incumbent upon the Petitioners to explain what is the expression that they seek to convey by wearing a hijab. In the absence of establishing the nature of the expression and how the same would partake the character of the right of expression under Article 19(1)(a), even the present contention must fail;

B. In the present case, the rights of the students(Petitioners) are regulated by the provisions of Karnataka Education Act and Rules made thereunder. It is submitted that the said provisions are a complete code in itself and the right to prescribe a uniform for students is governed by provisions thereunder;

C. Test of invasion of Article 19(1)(a) right is required to be examined by the test of Pith and Substance of the impugned Legislation. (see ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684***-Para 45-60*)*

57. Taken on the aforesaid parameters, the Petitioners have failed to establish that the right to wear Hijab forms part of Freedom of Speech and Expression as provided under Article 19(1)(a) of the Constitution of India.

58. The petitioners have relied upon *NALSA v. Union of India (2014) 5 SCC 438* judgement to contend that the right to wear hijab is also a right of freedom of

expression. At the outset it is submitted that the contention that right to wear dress of choice *per se* form an unrestricted right is not correct. The NALSA judgment must be read in the context of right of transgender to express themselves, which forms intrinsic part of their identity itself. Hence, the ratio of NALSA is inapplicable to the present factual matrix.

59. It is further submitted that in case of an overlap between an economic or religious / political or religious / secular or religious activity, the only manner in which the Hon'ble Court can separate the *wheat from the chaff*, would be to apply the doctrine of *pith and substance*. It is submitted that the set doctrine has been used by this Hon'ble Court on numerous occasions in order to answer such vexed questions. The claim for protection of hijab under Article 19(1)(a) is in pith an substance a claim under Article 25 and not under Article 19 and therefore must be tested by this Hon'ble Court as a religious claim rather than a free speech/expression claim.

60. It is submitted that the doctrine of pith and substance means that if the substance of legislation falls within the legitimate power of a legislature, the legislation does not become invalid merely because it incidentally affects a matter outside its authorized sphere. The phrase **"pith and substance" means "true nature and character".** The doctrine relates to the violation of Constitutional delimitation of legislative power in a Federal State. It is submitted that **Pith means 'true nature' or 'essence of something' and Substance means 'the most important or essential part of something'.** Further, it is submitted that the "Doctrine of Pith and Substance" says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. Subsequently, if the substance falls within the Union List, then the incidental encroachment by the law on the State List does not make it invalid.

61. It is submitted that it is respectfully submitted that while the said doctrine has been utilised in order to adjudicate dispute between Union and the states in ascertaining and interpreting the Seventh Schedule, the principle laid down therein, would be useful in the present case. It is submitted that "*pith and substance*" means the *true subject matter of the legislation*. Therefore, if the legislation has substantial and not merely a remote connection with the powers mentioned in Article 25(2)(a), the exercise of such power would be valid. While the law on the subject is settled, the following are a few instances to aid the Hon'ble Court :

A. ***A.S. Krishna*** **v.** ***State of Madras*****, AIR 1957 SC 297**

"8. … But then, it must be remembered that we are construing a federal Constitution. It is of the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces. The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate some overlapping of the fields of legislation is inevitable. The British North America Act, 1867, which established a federal Constitution for Canada, enumerated in Sections 91 and 92 the topics on which the Dominion and the Provinces could respectively legislate. Notwithstanding that the list were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two sections overlapped, and the Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial Legislatures. ***It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was intra vires, regard must be had to its pith and substance. That is to say, if a statute is found in substance to relate to a topic within the competence of the legislature it should be held to be intra vires, even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within it competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment****."*

B. ***Kartar Singh*** **v.** ***State of Punjab*****, (1994) 3 SCC 569**

"60. This ***doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list.*** *In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that* ***the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole***

must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature*. To say differently, incidental encroachment is not altogether forbidden."*

43. *It is common ground that the State Legislature does not have power to legislate upon any of the matters enumerated in the Union List. However, if it could be shown that the core area and the subject-matter of the legislation is covered by an entry in the State List, then any incidental encroachment upon an entry in the Union List would not be enough so as to render the State law invalid, and such an incidental encroachment will not make the legislation ultra vires the Constitution.*

C. *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra and Ors.* (2010) 5 SCC 246

*"**40.** One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by the application of the doctrine of pith and substance. This doctrine is applied* ***when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question****. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is an established principle of law in India recognised not only by this Court, but also by various High Courts.* ***Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List."***

Reasonable Restriction under Article 19(2)

62. It is submitted that assuming for the sake of argument that right to wear hijab is a right conferred under Article 19 (1) (a), the same is subject to the reasonable restriction under Article 19(2). In the present case Rule 11 empowers the educational institute to impose a uniform which is a reasonable restriction.

63. It is submitted that the test of reasonable restriction stands settled in catena of judgements beginning with the judgement of the ***Chintaman Rao v. State of Madhya Pradesh,*** **AIR 1951 SC 118,** wherein the court held that :

> *"The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates……"*

64. Further, this Hon'ble Court held that in ***State of Madras v. V.G. Row,*** **AIR 1952 SC 196**-

> *"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard. or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case. it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable"*

The said dicta of the Supreme Court is further followed in ***Mohd. Faruk v. State of Madhya Pradesh*** **AIR 1970 SC 93** and subsequent judgements.

65. It is submitted that this Court in ***Shreya Singhal v. Union of India*** **(2015) 5 SCC 1**, based on the previous precedents has analysed the concept of the "public

order" vis-à-vis Section 66A of the Information Technology Act. This Hon'ble Court held that

"Public Order

30. In Article 19(2) (as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made Under Section 7 of the Punjab Maintenance of Public Order Act and to an order made Under Section 9(1)(a) of the Madras Maintenance of Public Order Act were allowed in two early judgments by this Court. Thus in Romesh Thappar v. State of Madras (1950) S.C.R. 594, this Court held that an order made Under Section 9(1)(a) of the Madras Maintenance of Public Order Act (XXIII of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal Regulations enforced by the Government which they have established.

31. Similarly, in Brij Bhushan and Anr. v. State of Delhi (1950) S.C.R. 605, an order made Under Section 7 of the East Punjab Public Safety Act, 1949, was held to be unconstitutional and void for the self-same reason.

32. As an aftermath of these judgments, the Constitution First Amendment added the words "public order" to Article 19(2).

33. In Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia (1960) 2 S.C.R. 821, this Court held that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. This definition was further refined in Dr. Ram Manohar Lohia v. State of Bihar and Ors (1966) 1 S.C.R. 709, where this Court held:

It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle

representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. (at page 746)

34. In Arun Ghosh v. State of West Bengal (1970) 3 S.C.R. 288, Ram Manohar Lohia's case was referred to with approval in the following terms:

"In Dr. Ram Manohar Lohia's case this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished, from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. ....."

66. Further, the Supreme Court has also recognised the inherent limitations under Article 19 (1) and the classic example of such limitation is recognized in the dicta of ***Jumuna Prasad Mukhariya & Ors v. Lachhi Ram*** **AIR 1954 SC 686**, wherein, the Appellant challenged provisions of Section 123 (5) and Section 124 (5) of Representation of People Act, 1951 on the ground that it violated Article 19 (1) (a) of the constitution of India. However, the Supreme Court held that the Appellants therein have no fundamental right to be elected members of Parliament. The Court stated that rules of the institution must be observed, if they prefer to exercise their right under Article 19(1)(a). Based on such finding, the contention were repelled. Juxtaposing the set of facts of the case to the present factual matrix, the students must abide by the institutional rules which prescribe uniform.

67. In the present case the restriction cannot be held to be unreasonable in the following circumstances-

A. It is submitted that there is no restriction on wearing hijab in society at large or on the way to school or in any public transport. However,

the restriction is confined to class premises only. Therefore, it does not even fall foul of the least restrictive test;

B. The circumstances in which the same was done is the charged atmosphere created by the Petitioners and some other students insisting on wearing hijab even within the class precincts;

C. The avowed object of Rule 11 read with the Act is to prescribe the unform to the students to promote secular outlook and maintaining uniformity in schools.

D. The students study in the PUC only for a period of 2 years.

68. The Petitioner/students can only raise a grievance, if any, only against the Educational Institutions which was exercising its statutory powers under the Karnataka Education Act and Rules by prescribing a uniform. In any event, the restriction cannot be considered as unreasonable.

69. Further, it is pertinent to note Rule 11 is not under challenge and as such, the present petition merits to be dismissed on this ground alone.

V. WHETHER THE PRESENT SPECIAL LEAVE PETITIONS MERIT TO BE REFERRED TO A CONSTITUTIONAL BENCH UNDER ARTICLE 145(3) OF THE CONSTITUTION OF INDIA, AS CONTENDED BY THE PETITIONERS HEREIN?

70. It is a settled position of law that a substantial question of law in the context of Article 145 of the Constitution of India would mean a question of law with regard to the interpretation of the Constitution which is yet to be declared/decided by this Hon'ble Court. (See ***Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.*, 1962 Supp (3) SCR 549-Para 6)**

71. For the purpose of Article 145 and the reference to the Constitution Bench, it is submitted that the law, as to the parameters to be born in mind for accepting / refusing a particular practice as "essential religious practice", is well settled. This Hon'ble Court may come across various fact situations whereby one party claims a particular practice to be "essential religious practice" and other party disputes it. The only thing which needs to be done by this Hon'ble Court is to apply the settled principles to the facts of each case. All questions where a claim of essential religious practice is raised, need not be referred to a Constitution Bench / larger bench since the parameters for such a decision are already settled by this Hon'ble Court.

72. It is a settled position by Constitutional Courts that the Court has never determined whether a particular practice/Essential Religious Practice was free or proper. Instead, the Courts have asked the persons contending the same to be an Essential Religious Practice to plead and prove the same with evidence including the source of the practice in question from religious texts. In the present case, whether the practice of hijab is an Essential Religious Practice or not is purely a question of fact. It is pertinent to mention that this issue was averred by the Petitioners and duly dealt with by the Hon'ble High Court in the impugned judgment holding that the basic pleading has not been raised in the Impugned Order. **(Pg 84-87 of the Impugned Judgement)**

73. In the present case, there is no need for the issue to be decided by a Constitution Bench as the characteristics of an Essential Religious Practice and the law with respect to Article 25 is well established in a line of judgments-

A. **Mohd. Hanif Quareshi and Ors v. State of Bihar, AIR 1958 SC 731** at para 13 *(sacrifice of cow not an obligatory act for a Muslim)*

B. ***Durgah Committee, Ajmer and Anr. v. Syed Hussain Ali and Ors.,* AIR 1961 SC 1402** at para 33 *(protection must only be afforded to practices that are essential and integral to the religion)*

C. **Mohd**. **Ahmed Khan v. Shah Bano Begum and Ors., (1985) 2 SCC 556** at para 14 *(statements in the text books are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself)*

D. **Dr. M. Ismail Faruqui and Ors v. Union of India and Ors., (1994) 6 SCC 360** at paras 77, 78, 82 *(A mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open)*

E. ***A.S.Narayana Deekshitulu v. State of Andhra Pradesh and Ors.,* (1996) 9 SCC 548** at para 86, 87 *(every mundane or human activity cannot be protected under the guise of religion, Articles 25 and 26 not absolute and is subject to legislations by the State to limit or regulate any activity, what are essential parts of a religion is essentially a question of fact)*,

F. ***Javed and Ors. v. State of Haryana and Ors.,* (2003) 8 SCC 369** at paras 44, 45 *(Muslim law permits four marriages, but four marriages is not an obligation. Article 25 of the Constitution only protects the freedom to practice rituals/ceremonies etc. that are integral to the religion)*,

G. ***Commissioner of Police and Ors. v. Acharya Jagadishwarananda Avadhuta and Anr.*, (2004) 12 SCC 770** at para 9

(test to determine if a practice is essential would be to consider if nature of the religion would be changed without that part or practice),

H. **Shayara Bano v. Union of India and Ors., (2017) 9 SCC 1** at paras 55, 220 (*triple talaq is not an essential religious practice).*

74. It is humbly submitted that every question does not merit a reference to a CB under Art 145(3) when the substantial question of law stands decided-

(i) ***Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly,*** **(2020) 2 SCC 595** at paras 119 to 122, 155 to 167

(ii) ***Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra***, **(1964) 2 SCR 378** at para 11,

(iii) ***PUCL v. Union of India,*** **(2003) 4 SCC 399** at paras 28 to 32)

VI. WITHOUT PREJUDICE TO THE ABOVE, THE STATE HAS A WIDE EXPANSE FOR EXERCISE OF POWER INCLUDING POWER TO REFORM

75. It is submitted that the State, as per Article 25 and Article 26, holds the mandate for reform. It is submitted that the very fact that the Constitution has negatively couched Article 25[2], makes it extremely clear. Article 25(2)(a) gives primacy to laws made by competent legislature for regulation of secular aspects and Article 25[2][b] gives primacy to "social welfare" and "reform". In other words, if the State seeks to regulate the economic, political, financial or other secular aspects connected with religion, the State law is to have primacy over the proposed right. Similarly, if a particular practice / belief / part of any religion is in existence and is found to be subjected to either "social welfare" and "reform", such right will have to give way to "social welfare" and "reform".

76. It is submitted that for the present purpose, the power of the State for reform is also to be appreciated in order to merely appreciate the width of the power in general. It is reiterated that Article 25(2) being negatively couched is clearly an enabling provision which provides the power to the State in the matters mentioned therein. The said provision does not curtail or restrict the otherwise positive right under article 25(1) in the absence of any intervention by the state in the nature of executive or legislative power. It is submitted that one of the principles of law with regards to the effects of an enabling act is that if the legislature enables something to be done, it gives power at the same time, by necessary implications, to do everything which is indispensable for the purposes of carrying out the purposes in view. The nature of enabling provision has been discussed by the Hon'ble Supreme Court in the judgments in ***Reserve Bank of***

India and Ors. V. Peerless General Finance and Investment Company Ltd. And Anr., **[(1996) 1 SCC 642];** ***Sub-Committee on Judicial Accountability v. Union of India,*** **[(1991) 4 SCC 699];** ***Indian Council of Legal Aid & Advice v. Bar Council of India*****, [(1995) 1 SCC 732];** ***Bidi Leaves and Tobacco Merchants' Association v. State of Bombay*****, [1962 Supp (1) SCR 381]**

77. It is submitted that subsection 2 (a) concerns the enabling power of the state to regulate and restrict, not to prohibit, any "economic", "financial", "political" or "*other secular activity*" which may be associated with religious practice. It is submitted that the phrases empowering the State ought to be understood in there *cognate sense* especially due to the use of the words "*other secular activity*". The judgments of the Hon'ble Supreme Court, while discussing the mandate for reform of the State, has consistently interpreted the said mandate to wide and plenary in charter in order to achieve larger social goals of equality and egalitarianism.

78. With regard to sub-article 2(b) of Article 25, it is submitted that the said provision contains the mandate of reform and a *constitutional aspiration* on part of the State. It is submitted that the said mandate for reform exists solely with the State and not with any other constitutional organ as a matter of constitutional propriety and keeping the very nature of the right in mind. It is submitted that the power for reform, on sensitive issue concerning the society at large, is designedly entrusted to the democratically elected constitutional organ of the State.

79. Further, it is submitted that the aforesaid Constitutional intent becomes meaningful only if the word "or" used in Article 25[2][b] is read disjunctively. In other words, the phrase "providing for social welfare and reform" would apply across all religions and the later part of Article 25[2][b] is mere reiteration and reinforcement of the first part by way of abundant caution and in tune with Article 17 of the Constitution. If this interpretation is not given, Article 25[2][b] would be directly hit by Article 14 of the Constitution of India. It would be arbitrary and discriminatory without any rationale or reasonable basis.

80. It is submitted that B.R. Ambedkar, in the Constituent Assembly, during debates, with regard to the wide expanse of religion in India and the role of the state to regulate, stated as under:

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

*with ceremonials which are essentially religious (emphasis added). (*Constituent Assembly Debates VII, p. 781)

81. It is made clear from the statement that it is clear the role of State for reform cannot be underestimated.

82. It is submitted that the second part of article 25(2)(b), is merely a reiteration of the rights of reserved communities as mentioned in the Constitution. It is merely an extension of the first part which provides the State the scope for reform as the rights to the reserved communities to enter into Hindu Temples of "public character" which is also a mode of reform itself. In other words, the phrase "providing for social welfare and reform" would apply across all religions and the later part of Article 25[2][b] is a mere reiteration and reinforcement of the first part by way of abundant caution and in tune with Article 17 of the Constitution. If this interpretation is not given, Article 25[2][b] would be directly hit by Article 14 of the Constitution of India. It would be arbitrary and discriminatory without any rationale or reasonable basis.

83. The following case law of the Hon'ble Supreme Court on the issue of reform, when examined in the factual context, would make the above assertions evident. The Hon'ble Supreme Court, thereafter pronouncement a judgment in ***Sri Venkataramana Devaru And Others V. State Of Mysore And Others*** **[1958 SCR 895]** [now famously known as the ***Devaru*** case]. The Hon'ble Supreme Court, after relying upon ***Shirur Mutt (Supra)*** and ***Agamashatras*** held that under the ceremonial law pertaining to temples with respect to who is entitled to enter a temple and to worship and how the worship is to be conducted are "matters of religion". Critically this Hon'ble Court held that if the rights of the temple authorities in the said case were to be decided solely with reference to Article 26 then the impugned statute mandating the entry of *dalits* in temples would have been held to be bad as infringing Article 26. Thereafter, this Hon'ble Court analysed the applicability of Article 25(2)(b), the charter for welfare reform and the opening up of Hindu temples, with respect to religious institutions and their rights under Article 26. This Hon'ble Court held that Article 25(2)(b) applies to all the religious institutions of public character unimpeded by the right under Article 26. In final analyses, the Hon'ble Court held that there must be harmonious construction of the enabling provision under Article 25(2)(b) and Article 26. Therefore, in effect the Hon'ble Supreme Court upheld the impugned enactment as one enacted by the State in its enabling power despite the purported breach of Article 26. The following is the relevant passage of the said case:

*"17. **It being thus settled that matters of religion in Article 26(b) include even practices which are regarded by the community as part of its religion, we have now to consider whether exclusion of a person from entering into a temple for worship is a matter of religion according to Hindu Ceremonial Law.** There has been difference of opinion among the writers as to whether image worship had a place in the religion of the Hindus, as revealed in the Vedas. On the one hand, we have hymns in praise of Gods, and on the other, we have highly philosophical passages in the Upanishads describing the Supreme Being as omnipotent, omniscient and omnipresent and transcending all names and forms. When we come to the Puranas, we find a marked change. The conception had become established of Trinity of Gods, Brahma, Vishnu and Siva as manifestations of the three aspects of creation, preservation and destruction attributed to the Supreme Being in the Upanishads, as, for example, in the following passage in the Taittiriya Upanishad, Brigu Valli, First Anuvaka:*
"That from which all beings are born, by which they live and into which they enter and merge."
The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation. These injunctions have had such a powerful hold over the minds of the people that daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu. It was during this period that temples were constructed all over the country dedicated to Vishnu, Rudra, Devi, Skanda, Ganesha and so forth, and worship in the temple can be said to have become the practical religion of all sections of the Hindus ever since. With the growth in importance of temples and of worship therein, more and more attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of worship of the deity, and numerous are the treatises that came to be written for its exposition. These are known as Agamas, and there are as many as 28 of them relating to the Saiva temples, the most important of them being the Kamikagama, the Karanagama and the Suprabhedagama, while the Vikhanasa and the Pancharatra are the chief Agamas of the Vaishnavas. These Agamas, contain elaborate rules as to how the temple is to be constructed, where the principal deity is to be consecrated, and where the other Devatas are to be installed and where the several classes of worshippers are to stand and worship. The

following passage from the judgment of Sadasiva Aiyar, J., in Gopala Muppanar v. Subramania Aiyar [(1914) 27 MLJ 253] gives a summary of the prescription contained in one of the Agamas:

"In the Nirvachanapaddhathi it is said that Sivadwijas should worship in the Garbhagriham, Brahmins from the ante chamber or Sabah Mantabam, Kshatriyas, Vysias and Sudras from the Mahamantabham, the dancer and the musician from the Nrithamantabham east of the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram."

The other Agamas also contain similar rules.

18. *According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as Samprokshana) have to be performed for restoring the sanctity of the shrine. Vide judgment of Sadasiva Aiyar, J., in Gopala Muppanar v. Subramania Aiyar [(1914) 27 MLJ 253] . In Sankaralinga Nadan v. Raja Rajeswara Dorai [(1908) LR 35 IA 176] it was held by the Privy Council affirming the judgment of the Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the Agamas and the custom of the temple was guilty of breach of trust.* ***Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion.*** *The conclusion is also implicit in Article 25 which after declaring that all persons are entitled freely to profess, practise and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor-General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenets of Hinduism.* ***We must, accordingly hold that if the rights of the appellants have to be determined solely with reference to Article 26(b), then Section 3 of Act 5 of 1947, should be held to be bad as infringing it.***

20. We have held that matters of religion in Article 26(b) include the right to exclude persons who are not entitled

to participate in the worship according to the tenets of the institution. *Under this Article, therefore, the appellants would be entitled to exclude all persons other than Gowda Saraswath Brahmins from entering into the temple for worship. Article 25(2)(b) enacts that a law throwing open public temples to all classes of Hindus is valid. The word "public" includes, in its ordinary acceptation, any section of the public, and the suit temple would be a public institution within Article 25(2)(b), and Section 3 of the Act would therefore be within its protection. Thus, the two Articles appear to be apparently in conflict.* ***Mr M.K. Nambiar contends that this conflict could be avoided if the expression "religious institutions of a public character" is understood as meaning institutions dedicated to the Hindu community in general, though some sections thereof might be excluded by custom from entering into them, and that, in that view, denominational institutions founded for the benefit of a section of Hindus would fall outside the purview of Article 25(2)(b) as not being dedicated for the Hindu community in general. He sought support for this contention in the law relating to the entry of excluded classes into Hindu temples and in the history of legislation with reference thereto, in Madras.***

21. *According to the Agamas, a public temple ensures, where it is not proved to have been founded for the benefit of any particular community, for the benefit of all Hindus including the excluded classes. But the extent to which a person might participate in the worship therein would vary with the community in which he was born. In Venkatachalapathi v. Subbarayadu [(1890) ILR 13 Mad 293] the following statement of the law was quoted by the learned Judges with apparent approval:*

"Temple, of course, is intended for all castes, but there are restrictions of entry. Pariahs cannot go into the court of the temple even. Sudras and Baniyas can go into the hall of the temple. Brahmins can go into the holy of the holies."

In Gopala Muppanar v. Subramania Aiyar [(1914) 27 MLJ 253] Sadasiva Aiyar, J., observed as follows at p. 258:

> *"It is clear from the above that temples were intended for the worship of people belonging to all the four castes without exception. Even outcastes were not wholly left out of the benefits of temple worship, their mode of worship being however made subject to severe restrictions as they could not pass beyond the Dwajastambam (and some times not beyond the temple outer gate) and they could not have a sight of the*

images other than the procession images brought out at the times of festivals."

22. *The true position, therefore, is that the excluded classes were all entitled to the benefit of the dedication, though their actual participation in the worship was insignificant. It was to remove this anomaly that legislation in Madras was directed for near a decade. First came the Malabar Temple Entry Act (Madras 20 of 1938). Its object was stated to be "to remove the disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into, and offering worship in, Hindu temples". Section 2(4) defined "temple" as "a place which is used as a place of public worship by the Hindu community generally except excluded classes...." Sections 4 and 5 of the Act authorised the trustees to throw such temples open to persons belonging to the excluded classes under certain conditions. This Act extended only to the District of Malabar. Next came the Madras Temple Entry Authorisation and Indemnity Act (Madras Act 22 of 1939). The preamble to the Act states that "there has been a growing volume of public opinion demanding the removal of disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into and offering worship in Hindu temples", and that "it is just and desirable to authorise the trustees in charge of such temples to throw them open to ... the said classes". Section 3 of the Act authorised the trustees to throw open the temples to them. This Act extended to the whole of the Province of Madras.* ***Then we come to the Act, which has given rise to this litigation, Act 5 of 1947. It has been already mentioned that, as originally passed, its object was to lift the ban on the entry into temples of communities which are excluded by custom from entering into them, and "temple" was also defined as a place dedicated to the Hindus generally.***

23. *Now, the contention of Mr Nambiar is that Article 25(2)(b) must be interpreted in the background of the law as laid down in Gopala Muppanar v. Subramania Aiyar [(1914) 27 MLJ 253] and the definition of "temple" given in the statutes mentioned above, and that the expression "religious institutions of a public character" must be interpreted as meaning institutions which are dedicated for worship to the Hindu community in general, though certain sections thereof were prohibited by custom from entering into them, and that, in that view, denominational temples will fall outside Article 25(2)(b).* ***There is considerable force in this argument. One of the problems which had***

been exercising the minds of the Hindu social reformers during the period preceding the Constitution was the existence in their midst of communities which were classed as untouchables. A custom which denied to large sections of Hindus the right to use public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth could not be considered reasonable and defended on any sound democratic principle, and efforts were being made to secure its abolition by legislation*. This culminated in the enactment of Article 17, which is as follows:*

> *"'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."*

24. *Construing Article 25(2)(b) in the light of Article 17, it is arguable that its object was only to permit entry of the excluded classes into temples which were open to all other classes of Hindus, and that that would exclude its application to denominational temples. Now, denominational temples are founded, ex hypothesi, for the benefit of particular sections of Hindus, and so long as the law recognises them as valid — and Article 26 clearly does that — what reason can there be for permitting entry into them of persons other than those for whose benefit they were founded? If a trustee diverts trust funds for the benefit of persons who are not beneficiaries under the endowment, he would be committing a breach of trust, and though a provision of the Constitution is not open to attack on the ground that it authorises such an act, is it to be lightly inferred that Article 25(2)(b) validates what would, but for it, be a breach of trust and for no obvious reasons of policy, as in the case of Article 17?* ***There is, it should be noted, a fundamental distinction between excluding persons from temples open for purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation.*** *The former will be hit by Article 17 and the latter protected by Article 26, and it is the contention of the appellants that Article 25(2)(b) should not be interpreted as applicable to both these categories and that it should be limited to the former. The argument was also advanced as further supporting this view, that while Article 26 protects*

denominational institutions of not merely Hindus but of all communities such as Muslims and Christians, Article 25(2)(b) is limited in its operation to Hindu temples, and that it could not have been intended that there should be imported into Article 26(b), a limitation which would apply to institutions of one community and not of others. Article 26, it was contended, should therefore be construed as falling wholly outside Article 25(2)(b) which should be limited to institutions other than denominational ones.

25. The answer to this contention is that it is impossible to read any such limitation into the language of Article 25(2)(b). It applies in terms to all religious institutions of a public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on a priori reasoning as to the probable intention of the legislature. Such intention can be gathered only from the words actually used in the statute; and in a court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Article 25(2)(b).

26. *It is then said that if the expression "religious institutions of a public character" in Article 25(2)(b) is to be interpreted as including denominational institutions, it would clearly be in conflict with Article 26(b), and it is argued that in that situation, Article 26(b) must, on its true construction, be held to override Article 25(2)(b). Three grounds were urged in support of this contention, and they must now be examined. It was firstly argued that while Article 25 was stated to be "subject to the other provisions of this Part" (Part III), there was no such limitation on the operation of Article 26, and that, therefore, Article 26(b) must be held to prevail over Article 25(2)(b). But it has to be noticed that the limitation "subject to the other provisions of this Part" occurs only in Clause (1) of Article 25 and not in clause (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practise and propagate religion.* ***It is this right that is subject to the other provisions in the Fundamental Rights Chapter. One of the provisions to which the right declared in Article 25(1) is***

subject is Article 25(2). A law, therefore, which falls within Article 25(2)(b) will control the right conferred by Article 25(1), and the limitation in Article 25(1) does not apply to that law.

28. *And lastly, it is argued that whereas Article 25 deals with the rights of individuals, Article 26 protects the rights of denominations, and that as what the appellants claim is the right of the Gowda Saraswath Brahmins to exclude those who do not belong to that denomination, that would remain unaffected by Article 25(2)(b). This contention ignores the true nature of the right conferred by Article 25(2)(b). That is a right conferred on "all classes and sections of Hindus" to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Art 25(1) or against a denomination under Article 26(b). The fact is that though Article 25(1) deals with rights of individuals, Article 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Article 25(1) and Article 26(b).*

29. The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Article 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Article 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Article 25(2)(b) will prevail. While, in the former case, Article 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 26(b). We must accordingly hold that Article 26(b) must be read subject to Article 25(2)(b).

32. *We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple,*

though comprised in Article 26(b), must yield to the overriding right declared by Article 25(2)(b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, then the question is not whether Article 25(2)(b) overrides that right so as extinguish it, but whether it is possible — so to regulate the rights of the persons protected by Article 25(2)(b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Article 25(2)(b), then of course, on our conclusion that Article 25(2)(b) prevails as against Article 26(b), the denominational rights must vanish. ***But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Article 25(2)(b) as to give effect to Article 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected."***

84. In the case of ***Sastri Yagnapurushadji And Others V. Muldas Bhudardas Vaishya And Another***, [**(1966) 3 SCR 242**] (***Shastri Yagnapurushadji*** case) the Hon'ble Supreme Court was examining the question as to whether the temple belonging to the Swami Narayan Sect would come within the ambit of the Bombay Hindu Places of Worship [Entry Authorization] Act, 1956 on behalf of the petitioners it was alleged that the Swami Narayan Sect is not a part of the definition of Hindu religion, thereby excluded from the ambit of section 2 of the Act applying to Hindu temples. This Hon'ble Court repelled the arguments after discussing in some detail as to what constituted the expanse of Hindu religion. The following is the relevant passage of the said judgment:

*"**40. Tilak faced this complex and difficult problem of defining or at least describing adequately Hindu religion and he evolved a working formula which may be regarded as fairly adequate and satisfactory. Said Tilak: "Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing***

feature of Hindu religion. *This definition brings out succinctly the broad distinctive features of Hindu religion. It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee: "When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions and ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are complementary" [The Present-Day Experiment in Western Civilisation by Toynbee, pp 48-49] .*

41. The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Article 25 has made it clear that in sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

42. Consistently with this constitutional provision, the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956; and the Hindu Adoptions and Maintenance Act, 1956 have extended the application of these Acts to all persons who can be regarded as Hindus in this broad and comprehensive sense. Section 2 of the Hindu Marriage Act, for instance, provides that this Act applies—

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.

(b) to any person who is a Buddhist, Jaina, or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any

of the matters dealt with herein if this Act had not been passed.

The same provision is made in the other three Acts to which we have just referred.

43. *It is in the light of this position that we must now proceed to consider whether the philosophy and theology of Swaminarayan show that the school of Swaminarayan constitutes a distinct and separate religion which is not a part of Hindu religion. Do the followers of the said sect fall outside the Hindu brotherhood, that is the crux of the problem which we have to face in the present appeal. In deciding this question, it is necessary to consider broadly the philosophic and theological tenets of Swaminarayan and the characteristics which marked the followers of Swaminarayan who are otherwise known as Satsangis.*

xxx

51. *It is, however, urged that there are certain features of the Satsangi followers of Swaminarayan which indicate that the sect is a different community by itself and its religion is not a part of Hindu religion. It is argued that no person becomes a Satsangi by birth and it is only by initiation that the status of Satsangi is conferred on a person. Persons of other religions and Harijans can join the Satsangi sect by initiation. Swaminarayan himself is treated as a God and in the main temple, worship is offered to Swaminarayan pre-eminently; and that, it is argued, is not consistent with the accepted notions of Hindu religion. Women can take diksha and become followers of Swaminarayan though diksha to women is given by the wife of the Acharya. Five vows have to be taken by the followers of the Satsang, such as abstinence from drinking, from non-vegetarian diet, from illegal sexual relationship, from theft and from inter-pollution. Separate arrangements are made for Darshan for women, special scriptures are honoured and special teachers are appointed to worship in the temples. Mr Desai contends that having regard to all these distinctive features of the Swaminarayan sect, it would be difficult to hold that they are members of the Hindu community and their temples are places of public worship within the meaning of Section 2 of the Act.*

52. We are not impressed by this argument. Even a cursory study of the growth and development of Hindu religion through the ages shows that whenever a saint or a religious reformer attempted the task of reforming Hindu religion and fighting irrational or corrupt practices which had crept into it, a sect was born which was governed by

its own tenets, but which basically subscribed to the fundamental notions of Hindu religion and Hindu philosophy. It has never been suggested that these sects are outside the Hindu brotherhood and the temples which they honour are not Hindu temples, such as are contemplated by Section 3 of the Act*. The fact that Swaminarayan himself is worshipped in these temples is not inconsistent with the belief which the teachings of Bhagvad Gita have traditionally created in all Hindu minds. According to the Bhagvad Gita, whenever religion is on the decline and irreligion is in the ascendance, God is born to restore the balance of religion and guide the destiny of the human race towards salvation. The birth of every saint and religious reformer is taken as an illustration of the principle thus enunciated by Bhagvad Gita; and so, in course of time, these saints themselves are honoured, because the presence of divinity in their lives inevitably places them on the high pedestal of divinity itself. Therefore, we are satisfied that none of the reasons on which Mr Desai relies, justifies his contention that the view taken by the High Court is not right.*

53. *It is true that the Swaminarayan sect gives diksha to the followers of other religions and as a result of such initiation, they become Satsangis without losing their character as the followers of their own individual religions. This fact, however, merely shows that the Satsang philosophy preached by Swaminarayan allows followers of other religions to receive the blessings of his teachings without insisting upon their forsaking their own religions. The fact that outsiders are willing to accept diksha or initiation is taken as an indication of their sincere desire to absorb and practice the philosophy of Swaminarayan and that alone is held to be enough to confer on them the benefit of Swaminarayan's teachings. The fact that the sect does not insist upon the actual process of proselytising on such occasions has really no relevance in deciding the question as to whether the sect itself is a Hindu sect or not. In a sense, this attitude of the Satsang sect is consistent with the basic Hindu religious and philosophic theory that many roads lead to God. Didn't the Bhagavad Gita say: "even those who profess other religions and worship their gods in the manner prescribed by their religion, ultimately worship me and reach me".* ***Therefore, we have no hesitation in holding that the High Court was right in coming to the conclusion that the Swaminarayan sect to which the appellants belong is not a religion distinct and***

separate from Hindu religion, and consequently, the temples belonging to the said sect do fall within the ambit of Section 2 of the Act."

85. Thereafter the Hon'ble Supreme Court in ***Seshammal And Others Etc. V. State Of Tamil Nadu*, [(1972) 2 SCC 11] (*Seshammal*** case), for the first time, examined an Act which ended the hereditary right of succession to the office of Archakas even if the Archakas are otherwise qualified. An amendment to the Tamil Nadu Religious and Charitable Endowments Act, 1959, which abolished the entitlement of a person to the Archaka post based on hereditary succession was challenged before the Court. The Hon'ble Court, after examination of the Agama Shastras and the importance of the mode, manner and place of worship noted that State actions which permit defilement or pollution of the deity against the Agama Shastras would violently interfere with the religious faith and right under Article 25. The question that squarely fell before the Hon'ble Court was whether the hereditary succession amongst Archakas was secular usage or religious usage. The Hon'ble Supreme Court held that the act of his appointment would be essentially secular and merely because the said archakas perform a religious function it cannot be said that the appointment is a part of a religious practice or a matter of religion. The following is the relevant passage of the said case:

> *"**10.** It is clear from a perusal of the above provisions that the Amendment Act does away with the hereditary right of succession to the office of Archaka even if the Archaka was qualified under Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964. It is claimed on behalf of the petitioners that as a result of the Amendment Act, their fundamental rights under Article 25(1) and Article 26(b) are violated since the effect of the amendment is as follows—*
>
> > *"(a) The freedom of hereditary succession to the office of Archaka is abolished although succession to it is an essential and integral part of the faith of the Saivite and Vaishnavite worshippers.*
> >
> > *(b) It is left to the Government in power to prescribe or not to prescribe such qualifications as they may choose to adopt for applicants to this religious office while the Act itself gives no indication whatever of the principles on which the qualifications should be based. The statement of objects and reasons which is adopted in the counter-affidavit on behalf of the State makes it clear that not only the scope but the object*

of the Amendment Act is to override the exclusive right of the denomination to manage their own affairs in the matter of religion by appointing Archakas belonging to a specific denomination for the purpose of worship.

(c) The Amendment Act gives the right of appointment for the first time to the trustee who is under the control of the Government under the provisions of the principal Act and this is the very negation of freedom of religion and the principle of non-interference by the State as regards the practice of religion and the right of a denomination to manage its own affairs in the matter of religion."

11. *Before we turn to these questions, it will be necessary to refer to certain concepts of Hindu religious faith and practices to understand and appreciate the position in law. The temples with which we are concerned are public religious institutions established in olden times. Some of them are Saivite temples and the others are Vaishnavite temples, which means, that in these temples God Shiva and Vishnu in their several manifestations are worshipped. The image of Shiva is worshipped by his worshippers who are called Saivites and the image of Vishnu is worshipped by his worshippers who are known as Vaishnavites. The institution of temple worship has an ancient history and according to Dr Kane, temples of deities had existed even in the 4th or 5th century B.C. (See History of Dharmasastra Vol. II, Part II, p. 710). With the construction of temples the institution of Archakas also came into existence, the Archakas being professional men who made their livelihood by attending on the images. Just when the cult of worship of Siva and Vishnu started and developed into two distinct cults is very difficult to say, but there can be no doubt that in the times of the Mahabharata these cults were separately developed and there was keen rivalry between them to such an extent that the Mahabharata and some of the Puranas endeavoured to inculcate a spirit of synthesis by impressing that there was no difference between the two deities. (See p. 725 supra.) With the establishment of temples and the institution of Archakas, treatises on rituals were compiled and they are known as "Agamas". The authority of these Agamas is recognised in several decided cases and by this Court in Sri Venkataramana Devaru v. State of Mysore [1958 SCR 895] Agamas are described in the last case as treatises of ceremonial law dealing with such matters as the construction of temples, installation of idols therein and conduct of the worship of the deity. There are 28 Agamas relating to the Saiva temples, the most important of*

them being the Kamikagama, the Karanagama and the Suprabedagama. The Vaishnavas also had their own Agamas. Their principal Agamas were the Vikhanasa and the Pancharatra. ***The Agamas contain elaborate rules as to how the temple is to be constructed, where the principal deity is to be consecrated, and where the other Devatas are to be installed and where the several classes of worshippers are to stand and worship. Where the temple was constructed as per directions of the Agamas the idol had to be consecrated in accordance with an elaborate and complicated ritual accompanied by chanting of mantras and devotional songs appropriate to the deity. On the consecration of the image in the temple the Hindu worshippers believe that the Divine Spirit has descended into the image and from then on the image of the deity is fit to be worshipped. Rules with regard to daily and periodical worship have been laid down for securing the continuance of the Divine Spirit. The rituals have a two-fold object. One is to attract the lay worshipper to participate in the worship carried on by the priest or Archaka. It is believed that when a congregation of worshippers participates in the worship a particular attitude of aspiration and devotion is developed and confers great spiritual benefit. The second object is to preserve the image from pollution, defilement or desecration. It is part of the religious belief of a Hindu worshipper that when the image is polluted or defiled the Divine Spirit in the image diminishes or even vanishes. That is a situation which every devotee or worshipper looks upon with horror. Pollution or defilement may take place in a variety of ways. According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship. In fact, purificatory ceremonies have to be performed for restoring the sanctity of the shrine [1958 SCR 895 (910)]. Worshippers lay great store by the rituals and whatever other people, not of the faith, may think about these rituals and ceremonies, they are a part of the Hindu religious faith and cannot be dismissed as either irrational or superstitious.*** *An illustration of the importance attached to minor details of ritual is found in the case of His Holiness Peria Kovil Kelvi Appan Thiruvenkata Ramanuja Pedda Jiyyangarlu Varlu v. Prathivathi Bhavankaram Venkatacharlu [73 IA 156]*

which went up to the Privy Council. The contest was between two denominations of Vaishnava worshippers of South India, the Vadagalais and Tengalais. The temple was a Vaishnava temple and the controversy between them involved the question as to how the invocation was to begin at the time of worship and which should be the concluding benedictory verses. This gives the measure of the importance attached by the worshippers to certain modes of worship. The idea most prominent in the mind of the worshipper is that a departure from the traditional rules would result in the pollution or defilement of the image which must be avoided at all costs. That is also the rationale for preserving the sanctity of the Garbhagriha or the sanctum sanctorum. In all these temples in which the images are consecrated, the Agamas insist that only the qualified Archaka or Pujari shall step inside the sanctum sanctorum and that too after observing the daily disciplines which are imposed upon him by the Agamas. As an Archaka he has to touch the image in the course of the worship and it is his sole right and duty to touch it. The touch of anybody else would defile it. Thus under the ceremonial law pertaining to temples even the question as to who is to enter the Garbhagriha or the sanctum sanctorum and who is not entitled to enter it and who can worship and from which place in the temple are all matters of religion as shown in the above decision of this Court.

12. *The Agamas have also rules with regard to the Archakas. In Saivite temples only a devotee of Siva, and there too, one belonging to a particular denomination or group or sub-group is entitled to be the Archaka. If he is a Saivite, he cannot possibly be an Archaka in a Vaishnavite Agama temple to whatever caste he may belong and however learned he may be. Similarly, a Vaishnavite Archaka has no place as an Archaka in a Saivite temple. Indeed there is no bar to a Saivite worshipping in a Vaishnavite temple as a lay worshipper or vice versa. What the Agamas prohibit is his appointment as an Archaka in a temple of a different denomination. Dr Kane has quoted the Brahmapurana on the topic of Punah-pratistha (Re-consecration of images in temples) at p. 904 of his History of Dharmasastra referred to above. The Brahmapurana says that "when an image is broken into two or is reduced to particles, is burnt, is removed from its pedestal, is insulted, has ceased to be worshipped, is touched by beasts like donkeys or falls on impure ground or is worshipped with mantras of other deities or is rendered impure by the touch of outcastes and the like — in these*

ten contingencies, God ceases to indwell therein". The Agamas appear to be more severe in this respect. Shri R. Parthasarathy Bhattacharya, whose authority on Agama literature is unquestioned, has filed his affidavit in Writ Petition No. 442 of 1971 and stated in his affidavit, with special reference to the Vaikhanasa Sutra to which he belongs, that according to the texts of the Vaikhanasa Shastra (Agama), persons who are the followers of the four Rishi traditions of Bhrigu, Atri, Marichi and Kasyapa and born of Vaikhanasa parents are alone competent to do puja in Vaikhanasa temples of Vaishnavites. They only can touch the idols and perform the ceremonies and rituals. None others, however, high placed in society as pontiffs or Acharyas, or even other Brahmins could touch the idol, do puja or even enter the Garbha Griha. Not even a person belonging to another Agama is competent to do puja in Vaikhanasa temples. That is the general rule with regard to all these sectarian denominational temples. ***It is, therefore, manifest that the Archaka of such a temple besides being proficient in the rituals appropriate to the worship of the particular deity, must also belong, according to the Agamas, to a particular denomination. An Archaka of a different denomination is supposed to defile the image by his touch and since it is of the essence of the religious faith of all worshippers that there should be no pollution or defilement of the image under any circumstance, the Archaka undoubtedly occupies an important place in the matter of temple worship. Any State action which permits the defilement or pollution of the image by the touch of an Archaka not authorised by the Agamas would violently interfere with the religious faith and practices of the Hindu worshipper in a vital respect, and would, therefore, be prima facie invalid under Article 25(1) of the Constitution.***

xxx

20. Mr Palkhivala *on behalf of the petitioners insisted that the appointment of a person to a religious office in accordance with the hereditary principle is itself a religious usage and amounted to a vital religious practice and hence falls within Articles 25 and 26. In his submission, priests, who are to perform religious ceremonies may be chosen by a temple on such basis as the temple chooses to adopt.* ***It may be election, selection, competition, nomination, or hereditary succession.*** *He, therefore, contended that any law which interferes with the aforesaid basis of appointment would violate religious freedom*

guaranteed by Articles 25 and 26 of the Constitution. In his submission the right to select a priest has an immediate bearing on religious practice and the right of a denomination to manage its own affairs in matters of religion. ***The priest is more important than the ritual and nothing could be more vital than chosing the priest.*** *Under the pretext of social reform, he contended, the State cannot reform a religion out of existence and if any denomination has accepted the hereditary principle for chosing its priest that would be a religious practice vital to the religious faith and cannot be changed on the ground that it leads to social reform.* ***Mere substitution of one method of appointment of the priest by another was, in his submission, no social reform.***

21. *It is true that a priest or an Archaka when appointed has to perform some religious functions but the question is whether the appointment of a priest is by itself a secular function or a religious practice. Mr Palkhivala gave the illustration of the spiritual head of a math belonging to a denomination of a Hindu sect like the Shankaracharya and expressed horror at the idea that such a spiritual head could be chosen by a method recommended by the State though in conflict with the usage and the traditions of the particular institution. Where, for example, a successor of a Mathadhipati is chosen by the Mathadhipati by giving him mantra-deeksha or where the Mathadhipati is chosen by his immediate disciples, it would be, he contended, extraordinary for the State to interfere and direct that some other mode of appointment should be followed on the ground of social reform. Indeed this may strike one as an intrusion in the matter of religion. But we are afraid such an illustration is inapt when we are considering the appointment of an Archaka of a temple. The Archaka has never been regarded as a spiritual head of any institution. He may be an accomplished person, well versed in the Agamas and rituals necessary to be performed in a temple but he does not have the status of a spiritual head. Then again the assumption made that the Archaka may be chosen in a variety of ways is not correct. The Dharam-karta or the Shebait makes the appointment and the Archaka is a servant of the temple. It has been held in K. Seshadri Aiyangar v. Ranga Bhattar [ILR 35 Mad 631] that even the position of the hereditary Archaka of a temple is that of a servant subject to the disciplinary power of the trustee. The trustee can enquire into the conduct of such a servant and dismiss him for misconduct. As a servant he is subject to the discipline and control of the trustee*

*as recognised by the unamended Section 56 of the principal Act which provides "all office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite therefrom shall, whether the office or service is hereditary or not, be controlled by the trustee and the trustee may, after following the prescribed procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause". **That being the position of an Archaka, the act of his appointment by the trustee is essentially secular. He owes his appointment to a secular authority. Any lay founder of a temple may appoint the Archaka. The Shebaits and Managers of temples exercise essentially a secular function in choosing and appointing the Archaka. That the son of an Archaka or the son's son has been continued in the office from generation to generation does not make any difference to the principle of appointment and no such hereditary Archaka can claim any right to the office.** See Kali Krishan Ray v. Makhan Lal Mookerjee [ILR 50 Cal 233] , Nanabhai Narotamdas v. Trimbak Balwant Bhandare [(1878-80) Vol. 4, Unreported printed Judgments of the Bombay High Court, p. 169] and Maharanee Indurjeet Kooer v. Chundemun Misser [16 WR 99] . **Thus the appointment of an Archaka is a secular act and the fact that in some temples the hereditary principle was followed in making the appointment would not make the successive appointments anything but secular. It would only mean that in making the appointment the trustee is limited in respect of the sources of recruitment. Instead of casting his net wide for selecting a proper candidate, he appoints the next heir of the last holder of the office. That after his appointment the Archaka performs worship is no ground for holding that the appointment is either a religious practice or a matter of religion**."*

86. The Honble Supreme Court in the ***Rev. Stainislaus V. State Of Madhya Pradesh And Others*, [(1977) 1 SCC 677]** examined the scope of the words 'propagate' and 'public order'. In this case, the constitutionality of M.P. Dharma Swatantraya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967 was challenged on the grounds that:

i. They violate the right to propagate one's religion under Article 25(1)

ii. State legislatures lacked the legislative competence to enact such provisions, relate as they do to matters of religion falling within the residuary Entry 97 of List I. Herein, the M.P. High Court held the M.P. Act constitutional while the Orissa High Court held otherwise.

This Hon'ble Court held that the word 'propagate' does not envisage the right to convert a person rather is in the nature of the positive right to spread once religion by exposition of its tenets. This Hon'ble Court further held that fraudulent or induced conversion impinges upon the right to freedom of conscience of an individual apart from hampering public order and, therefore, the State was well within its power to regulate / restrict the same. The following is the relevant passage of the said case:

> *"**16.** Counsel for the appellant has argued that the right to "propagate" one's religion means the right to convert a person to one's own religion. On that basis, counsel has argued further that the right to convert a person to one's own religion is a fundamental right guaranteed by Article 25(1) of the Constitution.*
>
> ***17.** The expression "propagate" has a number of meanings, including "to multiply specimens of (a plant, animal, disease, etc.) by any process of natural reproduction from the parent stock", but that cannot, for obvious reasons be the meaning for purposes of Article 25(1) of the Constitution. The article guarantees a right to freedom of religion, and the expression 'propagate' cannot therefore be said to have been used in a biological sense.*
>
> ***18.** The expression 'propagate' has been defined in the Shorter Oxford Dictionary to mean "to spread from person to person, or from place to place, to disseminate, diffuse (a statement, belief, practice, etc.)".*
>
> ***19.** According to the Century Dictionary (which is an Encyclopaedic Lexicon of the English Language) Vol. VI, "propagate" means as follows:*
>
> *"To transmit or spread from person to person or from place to place; carry forward or onward; diffuse; extend; as to propagate a report; to propagate the Christian religion."*
>
> ***20. We have no doubt that it is in this sense that the word 'propagate' has been used in Article 25(1), for what the article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular***

religion, and that, in turn postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike.

21. *The meaning of guarantee under Article 25 of the Constitution came up for consideration in this Court in Ratilal Panachand Gandhi v. State of Bombay [AIR 1954 SC 388 : 1954 SCR 1055, 1062-63] and it was Held as follows:*

"Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others." (emphasis added)

This Court has given the correct meaning of the article, and we find no justification for the view that it grants a fundamental right to convert persons to one's own religion. It has to be appreciated that the freedom of religion enshrined in the article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions. What is freedom for one, is freedom for the other, in equal measure, and there can therefore be no such thing as a fundamental right to convert any person to one's own religion.

24. The expression "public order" is of wide connotation. It must have the connotation which it is meant to provide as the very first Entry in List II. It has been Held by this Court in Ramesh Thappar v. State of Madras [AIR 1950 SC 124 : 1950 SCR 594 : 51 Cri LJ 1514] that "public order" is an expression of wide connotation and signifies state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established.

25. *Reference may also be made to the decision in Ramjilal Modi v. State of U.P. [AIR 1957 SC 620 : 1957 SCR 860, 866 : 1957 Cri LJ 1006] where this Court has Held that the right of freedom of religion guaranteed by Articles 25 and 26 of the Constitution*

is expressly made subject to public order, morality and health, and that

it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order."

It has been Held that these two articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order. Reference may as well be made to the decision in Arun Ghoshe v. State of West Bengal [(1970) 1 SCC 98 : 1970 SCC (Cri) 67] where it has been Held that if a thing disturbs the current of the life of the community, and does not merely affect an individual, it would amount to disturbance of the public order. ***Thus if an attempt is made to raise communal passions, e.g. on the ground that some one has been "forcibly" converted to another religion, it would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large. The impugned Acts therefore fall within the purview of Entry 1 of List II of the Seventh Schedule as they are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community.*** *The two Acts do not provide for the regulation of religion and we do not find any justification for the argument that they fall under Entry 97 of List I of the Seventh Schedule."*

87. Thereafter the Hon'ble Supreme Court in ***Acharya Jagdishwaranand Avadhuta And Others V. Commissioner Of Police, Calcutta And Another*****, (1983) 4 SCC 522** [**First Anand Margis** case] examined the issue concerning the procession carried out by Anand Margis. The affected party, a monk of the Ananda Marga and currently General Secretary, Public Relations Department of the Ananda Marga Pracharak Sangh, has filed this petition under Article 32 of the Constitution The petition sought for a direction to the Commissioner of Police, Calcutta and the State of West Bengal to allow processions to be carried in the public streets and meetings to be held in public places by the followers of the Ananda Marga cult accompanied by the performance of Tandava dance within the State of West Bengal. In the said case, the Hon'ble Supreme Court missed an opportunity to examine the scope of what constitute 'public order' and 'morality' in the context of religious freedoms. This Hon'ble Court held that Anand Margi's

were not an institutionalised religion but a religious denomination. It is respectfully submitted that this Hon'ble Court, however, erroneously held that merely because the Anand Margi's do not constitute a separate religion, the application of Article 25 is not attracted. This Hon'ble Court further examined whether the Tandava Dance was an essential tenet of the religious faith of Anand Margi's and concluded that the performance of Tandav Dance in a procession or a public place is not an essential religious right to be performed by every Anand Margi and, therefore, it is not protected under Article 25 and 26. In view of the same, this Hon'ble Court held that it was not necessary to examine whether the repeated and regular prohibitory orders against the Tandava Dance were justified in the interest of public order or not. The following is the relevant passage of the said case:

> *"**9.** We have already indicated that the claim that Ananda Marga is a separate religion is not acceptable in view of the clear assertion that it was not an institutionalised religion but was a religious denomination. The principle indicated by Gajendragadkar, C.J., while speaking for the Court in Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya [AIR 1966 SC 1119 : (1966) 3 SCR 242 : (1966) 2 SCJ 502] also supports the conclusion that Ananda Marga cannot be a separate religion by itself. In that case the question for consideration was whether the followers of Swaminarayan belonged to a religion different from that of Hinduism. The learned Chief Justice observed:*
> *"Even a cursory study of the growth and development of Hindu religion through the ages shows that whenever a saint or a religious reformer attempted the task of reforming Hindu religion and fighting irrational or corrupt practices which had crept into it, a sect was born which was governed by its own tenets, but which basically subscribed to the fundamental notions of Hindu religion and Hindu philosophy."*
> *The averments in the writ petition would seem to indicate a situation of this type. We have also taken into consideration the writings of Shri Ananda Murti in books like Carya-Carya, Namah Shivaya Shantaya, A Guide to Human Conduct, and Ananda Vachanamritam. These writings by Sri Ananda Murti are essentially founded upon the essence of Hindu philosophy. The test indicated by the learned ChiefJustice in the case referred to above and the admission in para 17 of the writ petition that Ananda Margis belong to the Shaivite order lead to the clear conclusion that Ananda Margis belong to the Hindu religion.* ***Mr Tarkunde for the petitioner had claimed protection of Article 25 of the Constitution but in view of***

our finding that Ananda Marga is not a separate religion, application of Article 25 is not attracted.

10. *The next aspect for consideration is whether Ananda Marga can be accepted to be a religious denomination. In Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005, 1021-22 : 1954 SCJ 335] Mukherjea, J. (as the learned Judge then was), spoke for the Court thus:*

"As regards Article 26, the first question is, what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name"."

This test has been followed in Durgah Committee, Ajmer v. Syed Hussain Ali [AIR 1961 SC 1402 : (1962) 1 SCR 383] . In the majority judgment in S.P. Mittal v. Union of India [(1983) 1 SCC 51, 85 : (1983) 1 SCR 729, 774] reference to this aspect has also been made and it has been stated: (SCC p. 85, para 80)

"The words 'religious denomination' in Article 26 of the Constitution must take their colour from the word 'religion' and if this be so, the expression 'religious denomination' must also satisfy three conditions:

(1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;

(2) common organisation; and

(3) designation by a distinctive name."

11. Ananda Marga appears to satisfy all the three conditions viz. it is a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well-being; they have a common organisation and the collection of these individuals has a distinctive name. Ananda Marga, therefore, can be appropriately treated as a religious denomination, within the Hindu religion.

xxx

14. *The question for consideration now, therefore, is whether performance of Tandava dance is a religious rite or practice essential to the tenets of the religious faith of the Ananda Margis. We have already indicated that Tandava dance was not*

accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced Tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and Tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances Tandava dance can be taken as an essential religious rite of the Ananda Margis. Even conceding that it is so, it is difficult to accept Mr Tarkunde's argument that taking out religious processions with Tandava dance is an essential religious rite of Ananda Margis. In para 17 of the writ petition the petitioner pleaded that "Tandava dance lasts for a few minutes where two or three-persons dance by lifting one leg to the level of the chest, bringing it down and lifting the other". In para 18 it has been pleaded that "when the Ananda Margis greet their spiritual preceptor at the airport, etc., they arrange for a brief welcome dance of Tandava wherein one or two persons use the skull and symbolic knife and dance for two or three minutes". In para 26 it has been pleaded that "Tandava is a custom among the sect members and it is a customary performance and its origin is over four thousand years old, hence it is not a new invention of Ananda Margis". On the basis of the literature of the Ananda Marga denomination it has been contended that there is prescription of the performance of Tandava dance by every follower of Ananda Marga. Even conceding that Tandava dance has been prescribed as a religious rite for every follower of the Ananda Marga it does not follow as a necessary corollary that Tandava dance to be performed in the public is a matter of religious rite. In fact, there is no justification in any of the writings of Sri Ananda Murti that Tandava dance must be performed in public. At least none could be shown to us by Mr Tarkunde despite an enquiry by us in that behalf. ***We are, therefore, not in a position to accept the contention of Mr Tarkunde that performance of Tandava dance in a procession or at public places is an essential religious rite to be performed by every Ananda Margi.***

15. Once we reach this conclusion, the claim that the petitioner has a fundamental right within the meaning of Article 25 or 26 to perform Tandava dance in public streets and public places has to be rejected. In view of this finding it is no more necessary to consider whether the

prohibitory order was justified in the interest of public order as provided in Article 25."

88. In case of ***Commissioner of Police and Others Vs. Acharya Jagadishwarananda Avadhuta and Another*****, [(2004) 12 SCC 770]** (the Second Anand Margis case), the Hon'ble Supreme Court again by way of a fractured verdict held that it is the permanent essential parts which are protected by the constitution and alterable parts or practices which are definitely not the core of the religion are not protected. The following is the relevant passage of the said case:

"***9.*** *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. (See generally the Constitution Bench decisions in Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005] , Sardar Syedna Taher Saifuddin Saheb v. State of Bombay [AIR 1962 SC 853 : 1962 Supp (2) SCR 496] and Seshammal v. State of T.N. [(1972) 2 SCC 11 : AIR 1972 SC 1586] regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not.) 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.

12. *In the result, we respectfully adopt the finding of this Court in the first Ananda Margi case [(1983) 4 SCC 522 : 1984 SCC (Cri) 1] and allow the instant appeal. Since we find that practice of Tandava dance in public is not an essential part of Ananda Margi faith, there is no need to look into any other arguments advanced before us. The order in the writ petition as affirmed by the Division Bench is set aside and the writ petition is dismissed."*

89. It is submitted that therefore, it is clear that the consistent trend of the Hon'ble Supreme Court on the issue of reform has been to allow the State a wide latitude considering the fact that the State is empowered under the Constitution for the same.

90. On the touchstone of the above said principle, this Hon'ble Court must examine the present case of the Petitioner purportedly claiming wearing of Hijab as Essential Religious Practice in such dimensions as elucidated in the judgements above. In the context of the constitution ideology as expounded in judgment above, it would be impermissible for Petitioner to contend and seek a declaration that wearing of hijab by way of religious sanction to all women following Islamic faith would result in violation of dignity and morality.

Profess and Practice - Defined

91. It is submitted that the meaning of the words "profess" and "practice" has been discussed in numerous judicial pronouncements and does not require any review. However, in order to aid the Court, the following table of dictionary meanings is provided :

MEANING OF PRACTICE
A. General meaning of "Practice" is perform (an activity) or exercise (a skill) ***repeatedly or regularly*** in order to acquire, improve or maintain proficiency in it.
B. Or carry out or perform (a particular activity, method, or custom) ***habitually or regularly*** "we still practise some of these rituals today"

C. According to Cambridge Law Dictionary, the meaning of Practice is to do or play something ***regularly or repeatedly in order to become skilled*** at it: or, to do something regularly, often according to a custom, religion, or set of rules, or as a habit.
D. The meaning of "Practice" (A/c to Oxford Dictionary)- to do an activity or ***train regularly*** so that you can improve your skill or, to do something regularly as part of your normal behaviour.

92. The meaning of "practice" centers around the "repeatedness" or "regularity" of an activity which must be analysed in juxtaposition of the pronouncement of this Hon'ble Court in ***Seshammal*** [supra] wherein the hereditary succession of Archakas, despite being followed repeatedly and regularly, could not qualify as an "essential religious practice".

93. The said approach has restricted the right to "practice" religion as the meaning of practice cannot just be limited to practices which the Hon'ble Court determine to be "essential" or "integral" to the religion.

94. It is submitted that similarly, the word "profess", means as under :

MEANING OF "PROFESS"
A. According to Black Law Dictionary, the "profess" means to ***declare openly*** and freely; to confess.
B. The General meaning of the word "Profess" is that to ***claim that one has (a quality or feeling)*** when this is not the case or,
C. Have or ***claim knowledge*** or skill in or,
D. ***Affirm one's faith*** in or allegiance to (a religion or set of beliefs)
E. The meaning of "Profess" (A/c to Cambridge Law Dictionary): to ***state something, sometimes in a way that is not sincere***. Or,
F. To ***claim something***, sometimes falsely.
G. The meaning of word "Profess" (A/c to Oxford Learner's dictionary) is that- to ***claim that something is true or correct***, especially when it is not or,
H. To ***state openly that you have a particular belief***, feeling etc. or
I. ***To belong to a particluar religion***.

95. From the analysis of the above stated meaning, it is clear that the said meanings sit at odds with the role of the Hon'ble Courts as arbiter in matters concerning religion wherein the Hon'ble Courts have sought to answer the question whether a practice/custom/ritual which is professed by the said group/section of denomination/denomination is "essential practice" or not. It is

submitted that in matters concerning such questions, the approach of the hon'ble Court in ***Shirur Mutt***, is absolutely correct wherein the Hon'ble Court has held that the enquiry on part of the Court is to be limited to ascertain whether a particular belief/ritual/custom is "***sincerely held***" by that particular denomination or not. The said approach colours and animates the right to "profess" religion in the apt constitutional manner.

96. With regard to the words "public order", "health" and "morality" [the question of constitutional morality is dealt with separately, the following table would illustrate the legal position :

CASE LAW	DETAILS
PUBLIC ORDER	
Ram Manohar Lohia (Dr.) v. State of Bihar **AIR 1966 SC 740** also in **Commr. of Police v. Acharya Jagadishwarananda Avadhuta, (2004) 12 SCC 770**	*"public order" has a larger connotation than "law and order". Contravention of law to affect public order must affect the community or the public at large. A mere disturbance of law and order leading to disorder is not one which affects "public order".*
Javed v. State of Haryana **(2003) 8 SCC 369**	*What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.*
HEALTH	
***State of Rajasthan v. G. Chawla*, 1959 Supp (1) SCR 904**	***12.*** *There can be little doubt that the growing nuisance of blaring loudspeakers powered by amplifiers of great output needed control, and the short question is whether this salutary measure*

	can be said to fall within one or more of the entries in the State List. It must be admitted that amplifiers are instruments of broadcasting and even of communication, and in that view of the matter, they fall within Entry 31 of the Union list. The manufacture, or the licensing of amplifiers or the control of their ownership or possession, including the regulating of the trade in such apparatus is one matter, but the control of the 'use' of such apparatus though legitimately owned and possessed, to the detriment of tranquillity, health and comfort of others is quite another. It cannot be said that public health does not demand control of the use of such apparatus by day or by night, or in the vicinity of hospitals or schools, or offices or habited localities. The power to legislate in relation to public health includes the power to regulate the use of amplifiers as producers of loud noises when the right of such user, by the disregard of the comfort of and obligation to others, emerges as a manifest nuisance to them. Nor is it any valid argument to say that the pith and substance of the Act falls within Entry 31 of the Union list, because other loud noises, the result of some other instruments etc., are not equally controlled and prohibited. ***13.*** *The pith and substance of the impugned Act is the control of the use of amplifiers in the interests of health and also tranquillity, and thus falls substantially (if not wholly) within the powers conferred to preserve, regulate and promote them and does not so fall within the entry in the Union list, even though the amplifier, the use of which is regulated and controlled is an apparatus for broadcasting or communication. As Latham, C.J. pointed out in Bank of New South Wales v. The Commonwealth [(1948) 76 CLR I, 186] :* *"A power to make laws 'with respect to' a subject-matter is a power to make laws which in reality and substance are laws upon the subject-matter. It is not enough that a law should refer to the subject-matter or apply to the subject-matter:*

	for example, income tax laws apply to clergymen and to hotel-keepers as members of the public; but no one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or banking."
MORALITY	
State of Bombay Vs. F. N. Balsara, AIR 1951 SC 318	*Section 23(a) of the Bombay Prohibition Act, 1939, which prohibited commending of any intoxication was not a law in the interests of Morality and was not saved by clause (2) of Article 19. In holding so, Chagla, C.J. observed, "**the Morality referred to in Article 19(2) is not the ad hoc morality created by the State Legislature. It is morality which is accepted by all the world or at; east throughout the length and breadth of India. It is absurd to suggest that when drinking is permissible in the majority of states in India, mere commendation of a drink would constitutes an encroachment upon morality. Morality within Article 19 is not one which is accepted by all the world.***
***Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881**	***6.*** *Article 19 of the Constitution which is the main plank to support these arguments reads:* *"19(1) All citizens shall have the right—* *(a) to freedom of speech and expressions;* *(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making anylaw, insofar as such law imposes reasonablerestrictions on the exercise of the right conferred by the said sub-clause in the interests of *** public *** decency or morality.* ***21.*** *The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr Johnson with putting improper words in his Dictionary and was rebuked by him. "Madam, you must have been looking for them".*

	To adopt such an attitude towards Art and Literature would make the Courts a Board of Censors. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book etc. on it must not be overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw attention to one fact. Today our National and Regional Languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true Art finds little popular support. Only an obscurent will deny the need for such caution. This consideration marches with all law and precedent and this subject and so considered we can only say that where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our National standards and considered likely to pander to lascivious prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. ***A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.***

***Brij Gopal Denga v. State of Madhya Pradesh*, AIR 1979 MP 173**	***15.*** *The word "morality" occurs in clauses (2) and (4) of Article 19. By morality, in our opinion, here is meant the ideas about right and wrong which are accepted by the right thinking members of the society as a whole of the Country.* ***Morality is a fluid concept and its content will depend upon the time, place and stage of civilisation. A fluid concept of this nature naturally gives rise to the difficulty in its application. Even so we are not prepared to accept that there is any good reason to limit "morality" in Article 19 to sexual morality.*** *We are conscious that the Supreme Court limited the meaning of the word "immoral" in section 23 of the Contract Act to sexual immorality: Gherulal Parkash v. Mahadeodas [AIR 1959 SC 781, p. 797.] . The main reason why limited meaning is given to the word "immoral" in section 23 is that the word occurs there in juxtaposition with an equally illusive concept, public policy and there would be overlapping if wide meaning is given to the word "immoral" for, in its wide sense, what is immoral may be against public policy. This reasoning is not available for limiting the meaning of the word "morality" in clauses (2) and (4) of Article 19. The Patna High Court in In Re Bharati Press [AIR 1951 Pat. 12, p. 20.] expressed the view that the words "decency or morality" as they occur in clause (2) of Article 19 are limited to offences against decency and morals in Chapter XVI of the Penal Code i.e. sections 292-4. We are respectfully unable to agree with this view. Acceptance of the view of the Patna High Court will unduly restrict the power of the Legislature to deal in future with new evils undermining the moral base of the Indian society. Indeed, Young Persons (Harmful Publications) Act, 1956, enacted by Parliament which prohibits the dissemination of pictorial and other publications containing stories of glorification of crime, violence and vice, illustrates the necessity of not confining the meaning of the word "morality" to sexual morality or to offences against decency and morals contained in the*

	Penal Code. We, however, agree that controversial ideas about a course of conduct being right or wrong cannot be resolved by bringing them within the ambit of morality. A conduct is immoral or against morality only when it is so felt generally by right thinking persons in the Indian society. It was, therefore, rightly held in Fram Nusserwanji v. State of Bombay [AIR 1951 Bom. 210.] [approved on this point in appeal in State of Bombay v. F.N. Balsara [AIR 1951 SC 318.]] that section 23(a) of the Bombay Prohibition Act, 1939, which prohibited commending of any intoxicant was not a law in the interests of morality and was not saved by clause (2) of Article 19. In holding so, Chagla C.J., observed: "the morality referred to in Article 19(2) is not the ad hoc morality created by the State Legislature. It is a morality which is accepted by all the world or at least throughout the length and breadth of India. It is absurd to suggest that when drinking is permissible in the majority of States in India, mere commendation of a drink would constitute an encroachment upon morality." We do not, however, agree that morality within Article 19 is one which is accepted by all the world. It is rightly said by Basu that "owing to ethnic cultural and even physiological differences it is not possible to formulate a universal standard of morality," and that differing pronouncement by Courts of different countries on Lady Chatterley's lover illustrate this point: [Basu, the Constitution of India Vol. 1, p. 635, 5th edition; Kingsley Pictures Corp. v. Regents [(1958) 360 US 684.] and Ranjit D. Udeshi v. State of Maharashtra [AIR 1965 SC 881.]]. As earlier stated by us, ***a conduct is immoral or against morality when it is so felt generally by right thinking members in the Indian society. It is in the light of these principles that it has to be seen whether section 19-C(2) is protected being in the interest of morality within clause (2) of Article 19.***
Ramesh Yeshwant Prabhoo (Dr) v.	***28.*** *The expression "in the interests of" used in clause (2) of Article 19 indicates a wide amplitude*

***Prabhakar Kashinath Kunte*, (1996) 1 SCC 130**	*of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are: decency or morality. Thus any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by clause (2) of Article 19.* ***Shri Jethmalani contended that the words "decency or morality" relate to sexual morality alone. In view of the expression "in the interests of" and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words "decency or morality" do not require a narrow or pedantic meaning to be given to these words. The dictionary meaning of 'decency' is "correct and tasteful standards of behaviour as generally accepted; conformity with current standards of behaviour or propriety; avoidance of obscenity; and the requirements of correct behaviour" (The Oxford Encyclopaedic English Dictionary); "conformity to the prevailing standards of propriety, morality, modesty, etc.: and the quality of being decent"*** *(Collins English Dictionary).*
***Ram Chandra Bhagat v. State of Jharkhand*, (2010) 13 SCC 780**	**10.** *It is true that the appellant has not behaved like a gentleman. He lived with the complainant for nine years and had two children by her, and hence as a decent person he should have married her which he did not do.* ***However, there is a difference between law and morality, as already stated above. There are many things which are regarded by society as immoral but which may not be illegal. If we say something is illegal then we must point to some specific section of the Penal Code or some other statute which has been violated. Merely saying that the person has done something***

	improper will not necessarily make the act illegal. ***14.*** *However, since my learned Sister, Hon'ble Gyan Sudha Misra, J. has a different view, let the papers of this case be placed before the Hon'ble the Chief Justice of India for sending the matter before another Bench.*

97. In light of the above, it is submitted that the words "public order", "heath" and "morality", the only element which may circumscribe the extent of Article 25(1) would be the public element of the same. Therefore, the power of the State to intervene or regulate would exist in cases of "public health" and "public morality". The word "public" would in effect be a suffix to all three conditionalities. The expanse of the State is therefore wide and cannot be curtailed without justifiable reasons.

Filed by-

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISIDICTION
CIVIL APPEAL 5236 OF 2022 & Connected SLP's

IN THE MATTER OF :

MISS AISHAT SHIFA & ANR. ..... **PETITIONERS**

VERSUS

STATE OF KARNATAKA & ORS. ..... **RESPONDENT**

INDEX

ADVOCATE FOR THE RESPONDENT-STATE OF KARNATAKA-

SHUBHRANSHU PADHI