

Note of submissions

I. Preliminary Submission

The present case ought to be referred to a larger bench in view of the judgment of this Hon'ble Court in the Sabrimala Temple case reported in (2020) 2 SCC 1 (16). One of the questions referred to in the said case relates to the extent to which the court can inquire into the issue as to whether a particular practice is an integral part of religion or as to whether such determination would be within the exclusive domain of the head of that religious group. (*Supra*, Pg. 16, Para 5.4(iv)).

Since, one of the questions involved in the present case is with regard to the determination of the question as to whether the practice of wearing a hijab/headscarf is part of essential religious practice in the Islamic faith (Pg. 39), this question should also be referred for determination to the Constitution Bench along with other matters referred to in paragraph 5 of the judgment with regard to entry of Muslim women in dargah/mosque or marriage of a Parsi women to a non Parsi in the agiyari etc. (*Supra*, Pg 15, Pa. 5)

That apart, the present case involves a substantial question of law relating to the interpretation of the Constitution under Article 145(3) of the Constitution and therefore ought to be referred to a Constitution Bench.

The Petitioners in the present case seek to ventilate a breach of their Fundamental Right under Article 25 of the Constitution of India. **Given the present reference to the Constitution Bench, it is unclear as to which of the following tests will apply for the purposes of infringement of the said articles:**

a) Test of an essential religious practice, which has to be determined by the court on basis of evidence;

- b) Test of any religious practice recognized by a particular sect, or its head, as being essential religious practice;
- c) No requirement for the test of ‘essential religious practice’, but rather every practice that is found to be a ‘religious practice’ would be protected by Article 25.

The state of the law as it stands today is therefore unclear as to which test would apply amongst the above for establishing a right under Article 25. Therefore, the petitioners are unaware as to whether they should argue on the basis of the test of an essential religious practice to be determined by the court on evidence, or a mere religious practice, or as to whether such practices are recognized by the sect as being essential. It is therefore appropriate that only after determination of the said question by the Constitution Bench that the matter be finally decided.

A. The Impugned Government Order dated 05.02.22 impinges upon the constitutional promise of “Fraternity” under the Preamble, as well as the Fundamental Duties enumerated under Article 51A (e) and (f)

A1. The Preamble to the Constitution, as well as Article 51A(e) and (f) are reproduced below for ease of reference:

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a **SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC** and to secure to all its citizens:

JUSTICE, social, economic and political; **LIBERTY** of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation; [Emphasis Supplied]

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949,
do **HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION**

Article 51A (e) and (f) reads thus:

It shall be the duty of every citizens of India-

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

(f) *to value and preserve the rich heritage of our composite culture*; [Emphasis Supplied]

A2. Seervai's Constitutional Law of India states that the ethic of 'fraternity' is absolute, and cannot be circumscribed. In that sense it is an unfettered right.

"4.13 (a) The words "justice, liberty, equality and **fraternity**" are words of passion and power- the last three were the watchwords of the French Revolution. If they are to retain their power, to move men's hearts and to stir them to action, *the words must be used absolutely – as they are used in the preamble.*" [Emphasis Supplied, Volume 1, Page 280]

A3. Introducing the ethic of "fraternity" into the Preamble to the draft constitution, an extract from Dr. Ambedkar's speech is reproduced below:

"The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. *What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity.* They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. *Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.* Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. **Without fraternity, liberty and equality could not become a natural course of things.**" [Speech to the Constituent Assembly, 25TH November 1949, Constituent Assembly Debates, Volume XI, Page 979].

A4. Thus, it would be clear from reading the extract that:

- i) The purpose of introducing 'fraternity' as a constitutional value is to invoke horizontal or social sensitivity towards inequalities, in addition to the vertical, or top- down political prescriptions towards inequality. **Fraternity is social sensitivity.**
- ii) The objective of fraternity is to recognize the worth of every individual by transcending the accidents of birth. It aims to make society substantively equal, and not facially uniform. 'Uniformity' in fact forces individuals into some form of general conformity, rather than recognizing their individual worth.

A5. In *Subramanian Swamy v. Union of India* [(2016) 7 SCC 221], this Hon'ble Court has endorsed these very points in the following words: [Emphasis Supplied, Paragraphs 153, 154, 156, 157 and 161]

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

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

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

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

II. Similarly, in *Indra Sawhney and Others v. Union of India and Others* [(1992) Supp. 3 SCC 217 at para 412] has read fraternity in the context of elimination of substantive inequality, and not of difference.

“412 **Inequality ill-favours fraternity, and unity remains a dream without fraternity.** The goal enumerated in the preamble of the Constitution, of fraternity assuring the dignity of the individual

and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all.'

III. In *Prithvi Raj Chauhan v. Union of India* [(2020) 4 SCC 727, Paragraphs 15, 17 and 21] a **three judge bench** of this Hon'ble Court held that :

“ 15. The Constitution of India is described variously as a charter of governance of the republic, as a delineation of the powers of the state in its various manifestations vis-à-vis inalienable liberties and a document delimiting the rights and responsibilities of the Union and its constituent states. It is more: it is also a pact between people, about the relationships that they guarantee to each other (apart from the guarantee of liberties vis- à-vis the state) in what was a society riven along caste and sectarian divisions. That is why the preambular assurance that the republic would be one which guarantees to its people liberties, dignity, equality of *status and opportunity and fraternity.*”

17. The making of this provision- and others, in my view, is impelled by the trinity of the preambular vision that the Constitution makers gave to this country. Paeans have been sung about the importance of liberty as a constitutional value: its manifest articulation in the (original) seven “lamps” -i.e. freedoms under Article 19 of the Constitution; the other rights to religion, those of religious denominations, etc. Likewise, the centrality of equality as an important constitutional provision has been emphasized, and its many dimensions have been commented upon. **However, the articulation of fraternity as a constitutional value, has lamentably been largely undeveloped. In my opinion, all the three - Liberty, Equality and Fraternity, are intimately linked. The right to equality, sans liberty or fraternity, would be chimerical - as the concept presently known would be reduced to equality among equals, in every manner- a mere husk of the grand vision of the Constitution. Likewise, liberty without equality or fraternity, can well result in the perpetuation of existing inequalities and worse, result in license to indulge in society's basest practices. It is fraternity, poignantly embedded through the provisions of Part III, which assures true equality, where the state treats all alike, assures the benefits of growth and prosperity to all, with equal liberties to all, and what is more, which guarantees that every citizen treats every other citizen alike.**

21. It is important to reiterate and emphasize that unless provisions of the Act are enforced in their true letter and spirit, with utmost earnestness and dispatch, the dream and ideal of a casteless society will remain only a dream, a mirage. The marginalization of scheduled caste and scheduled tribe communities is an enduring exclusion and is based almost solely on caste identities. It is to address problems of a segmented society, that express provisions of the Constitution which give effect to the idea of fraternity, or bandhutva referred to in the Preamble, and statutes like the Act, have been framed. **These underline the social – rather collective resolve – of ensuring that all humans are treated as humans, that their innate genius is allowed outlets through equal opportunities and each of them is fearless in the pursuit of her or his dreams.** The question which each of us has to address, in everyday life, is can the prevailing situation of exclusion based on caste identity be allowed to persist in a democracy which is committed to equality and the rule of law? If so, till when? **And, most importantly, what each one of us can do to foster this feeling of fraternity amongst all sections of the community without reducing the concept (of fraternity) to a ritualistic formality, a tacit acknowledgment, of the “otherness” of each one's identity.** [Emphasis Supplied]

A6. The impugned GO, while emphasizing on fraternal behaviour misunderstands the said concept and confuses the same as being the anti-thesis of diversity. The impugned order endorses this erroneous view. (Pages 96-97).

A7. The relevant extract of the GO, which relies on the ethic of ‘fraternity’ in support of imposing uniformity, is reproduced below for ease of reference:

“As mentioned in the above at reference No. 1, the Karnataka Education Act, 1983 passed by the government of Karnataka (1-1995) Section 7 (2)(5) stipulates that all the school students studying in Karnataka should behave in a fraternal manner, transcend their group identity and develop an orientation towards social justice. Under Section 133 of the above law, the government has the authority to issue directions to schools and colleges in this regard.

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

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

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

A8. The GO intersperses language that is taken verbatim from the Preamble to the Constitution, with phrases that are not mentioned in the Constitution, or the Karnataka Education Act, 1983. [For e.g., ‘behave in a fraternal manner by transcending their group identity’]. Here, the particular placement of ‘transcending group identity’ next to ‘fraternity’ suggests that the ethic of fraternity is best served by complete erasure of all differences.

A9. Similarly paragraphs 3 and 4 of the GO lay down a series of aspirational goals, purportedly derived from the ethic of fraternity, and the objective of good education, but in reality having no rational nexus with these values. For example, the GO states that a ‘standardized learning experience’ for all students is something to be aspired towards, and the same is ostensibly disrupted by wearing of clothing that signifies religious identity. Such clothing also is “an obstacle to unity and uniformity” in the schools and colleges. [NB:

perhaps, the aspiration is towards ‘equitable learning experience’; also the GO erroneously uses the words ‘unity’ and ‘uniformity’ interchangeably.]

NB2: In fact, students’ testimonies show that with the disallowance of hijab, the learning experience has become anything but ‘standardized’ with many schools making hijab wearing students sit in separate classrooms but not allowing them into the general class.]

A10. It also relies on the Government Circular dated 31.01.14, which established local College Development Committees to take decisions about utilization of budgetary allocations, improvement of basic amenities and maintenance of academic standards in a participatory and democratic manner.

A11. The GO therefore confuses ‘fraternity’ with ‘uniformity’ and mandates that students “transcend their group identity” and have a “standardized” learning experience, and that religious manifestations are obstacles to “unity and uniformity” in schools and colleges. All the above criteria, which form the substratum of the impugned circular is expressly opposed to the concept of fraternity as understood by the Hon’ble Supreme Court *infra*.

A12. The GO completely misconstrues the meaning of ‘Fraternity’ in the constitution, and results in action that is contrary to that meaning. The development of feelings of ‘fraternity’ refers to acceptance, warmth and engagement between diverse people, *in spite* of their differences. It does not mean ‘flattening out of differences’, or forced assimilation. The Constitutional ethic is ‘the salad bowl’ with each ingredient distinct and identifiable and adding value to the whole. The idea of the ‘melting pot’, where distinct characteristics are lost and everything melts into a big cooking pot does not apply to our context. In *Tehseen Poonawalla v. Union of India* [(2018) 9 SCC 501], a **three-judge bench** of this Hon’ble Court has held that “**the aim of our Constitution is unity in diversity and to impede any fissiparous tendencies for enriching the unity amongst Indians by assimilating the diversities.** [Extracted from Paragraph 27]

A13. The GO erroneously uses the words ‘unity’ and ‘uniformity’ interchangeably. It may be stressed that uniformity is not a constitutional or statutory mandate, and has no nexus with unity.

1. In *Tehseen Poonawalla v. Union of India* [(2018) 9 SCC 501] a **three-judge bench** of the Hon’ble Supreme Court has described as “fissiparous” the tendencies that tend to “assimilate diversities” by invoking the ethic of unity. [Para 27, *Supra*]

In the same case, the Hon’ble Court has rejected the tendency towards forced homogeneity: “**A fabricated identity with bigoted approach sans acceptance of plurality and diversity results in provocative sentiments and display of reactionary retributive attitude transforming itself into dehumanization of human beings.** Such an atmosphere is one in which rational debate, logical discussion and sound administration of law eludes thereby manifesting clear danger to various freedoms including freedom of speech and expression. One man’s freedom of thought, action,

speech, expression, belief, conscience and personal choices is not being tolerated by the other and this is due to lack of objective rationalization of acts and situations. [Emphasis Supplied, extracted from Paragraph 20]

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

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

27. In *St. Stephen's College v. University of Delhi* [(1992) 1 SCC 558] while emphasizing on the significance of “**Unity in Diversity**”, the Court has observed that the aim of our Constitution is unity in diversity and to impede any fissiparous tendencies for enriching the unity amongst Indians by assimilating the diversities. The meaning of diversity in its connotative expanse of the term would include geographical, religious, linguistic, racial and cultural differences. It is absolutely necessary to underscore that India represents a social, religious and cultural diversity.

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

29. The Court in *Sri Adi Visheshwara of kashi Vishwanath Temple v. State of UP* [(1997) 4 SCC 606] has highlighted that religious tolerance is an important facet of “**Unity in Diversity**” and observed thus:- “Unity in diversity is the Indian culture and ethos. The tolerance of all religious faiths, respect for each other's religion are our ethos. These pave the way and foundation for integration and national unity and foster respect for each others religion; religious faith and belief. Integration of Bharat is, thus, its arch.”

30. In *State of Karnataka v. Dr. Praveen Togadia* [(2004) 4 SCC 684] stress has been laid on “**Unity in Diversity**” treating it as the ideal way of life considering that our nation is a unification of people coming from diverse cultures, religions and races. The Court further went on to say that our nation

has the world's most heterogeneous society having a rich heritage where the Constitution is committed to the high ideas of socialism, secularism and the integrity of the nation and problems, if any, that arise on the path of the nation's progress are mostly solved on the basis of human approaches and harmonious reconciliation of differences. The following observations made by the Court in the aforesaid case with regard to the need to preserve the unified social fabric are also important.

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

A14. The idea of organic unity is based on heterogeneity and diversity. [*Poonawalla, Supra.*]

A15. If pluralism, tolerance, freedom of choice and decisional autonomy are constitutional values that we hope that children would grow into as adults, the argument that 'schools as qualified public spaces' are somehow exempt from these ethics are counter-intuitive. Arguendo, why would we teach our children forced assimilation, uniformity, non-exposure to any kind of diversity, negation of choice and decisional autonomy, if these values are anathema to our constitutional goals?

A16. 'Qualified public spaces' as used in the Impugned Order at Page 104 is not a legal concept, or even a known idea in public policy. Presumably it implies that all public spaces have certain constraints and limitations (as do private spaces, now, for that matter with the passing of the Domestic violence act for instance). However, it is equally true that not all public spaces are similar in nature. For instance, public roads require a different kind of compliance to rules; the army whose success to a large extent depends on centralized chains of command requires a different public culture. Hospitals, which are also public spaces, require individualized care of each patient according to their needs. Likewise it is increasingly understood – and the National Education Policy, 2020 encapsulates the philosophy – that schools are spaces of diversity and critical thinking. It is fraternal free thinking public places, very different in nature to a police station, a jail, or an army barrack, simply because the needs and expectations are different. The NEP 2020, which is a 66-page comprehensive document on what constitutes good education in contemporary India, does not mention 'uniform' or 'discipline' even once. This document encompasses the present philosophy on education.

B) *Puttuswamy Infra.* at Paragraph 298 transcends the distinction between private and public spaces and states that both must be free to the extent that there should be freedom to think, without any direct or indirect pressures on thought and belief. Thus schools must give students the privacy and the freedom to think about their choices.

A17. It is the students' case that they seek equal access to public education, where they have the opportunity to fraternize across religious, class, and gender boundaries, an opportunity which would not be available to them if they were to transfer to religious schools. **In this regard, the GO by disallowing the hijab creates an arbitrary barrier to education and to fraternal spaces.**

A detailed report published by Peoples' Union for Civil Liberties (PUCL) Karnataka, compiling the testimonies of students who have been directly affected by the hijab ban at schools states:

“For many Muslim girls, education is a step towards social mobility, employment and empowerment. They are also determined to access values of the Constitution through the educational process (studying and fraternizing with other students in inter-communal and co-educational spaces). In the process, they are also seeking avenues for self-development as well as a social climate that is conducive for studies that is free from fear, conflict and tension. The verdict is closing avenues that modern education has opened up for these young women from the leading minority community” [Page 19, Report]

Thus while the circular is based on fraternal behaviour it has achieved the exact opposite, which renders it arbitrary and therefore vitiates the same.

B. The impugned GO also violates the preambular constitutional postulate of dignity of the individual, which is assured through fraternity and is therefore violative of Article 14 of the Constitution.

B1. Dignity of the individual is given lexical priority in the preamble, indicating that there can be no fraternal feeling unless the individual choices and worth of each individual is recognized.

B2. Individual dignity includes the freedom to choose and to live without fear. In *Navtej Johar v. Union of India* [(2018) 10 SCC 1] a **five-judge bench** of this Hon'ble Court has upheld the **right to recognition of identity with dignity** thus: “the overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, **recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution** forming the concrete substratum of our fundamental rights that has eluded certain sections of our society who are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes, parochial mindset and bigoted perceptions. **Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities** faced by individuals today and it is only when each and every individual is liberated from the shackles of such bondage and is able to work towards full development of his/her personality that we can call ourselves a truly free society.” [Emphasis Supplied, Paragraph 4] It has also held that the **“destruction of individual identity would tantamount to crushing of intrinsic dignity that cumulatively**

encapsulates the values of privacy, choice, freedom of speech and other expressions.

[Emphasis Supplied, Paragraph 5]

B3. In Paragraphs 129 and 130, this Hon'ble Court seeks to describe the facets of dignity thus:

Every individual has many possessions which assume the position of his/her definitive characteristics. There may not be any obsession with them but he/she may abhor to be denuded of them, for they are sacred to him/her and so inseparably associated that he/she may not conceive of any dissolution. He/she would like others to respect the said attributes with a singular acceptable condition that there is mutual respect. Mutual respect abandons outside interference and is averse to any kind of interdiction. It is based on the precept that the individuality of an individual is recognized, accepted and respected. Such respect for the conception of dignity has become a fundamental right under Article 21 of the Constitution and that ushers in the right of liberty of expression. Dignity and liberty as a twin concept in a society that cares for both, apart from painting a grand picture of humanity, also smoothens the atmosphere by promoting peaceful co-existence and thereby makes the administration of justice easy. In such a society, everyone becomes a part of the social engineering process where rights as inviolable and sacrosanct principles are adhered to; individual choice is not an exception and each one gets his/her space. Though no tower is built, yet the tower of individual rights with peaceful co-existence is visible.

In Common Cause (A Regd. Society) (supra), one of us has observed that human dignity is beyond definition and it may, at times, defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism, but what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling.” [Emphasis supplied]

[See also *Francis Corallie Mullin v. Administrator, Union Territory of Delh* [(1981) 1 SCC 608, Para 8]; See also *KS Puttuswamy v. Union of India* [(2017) 10 SCC 1, Para 298, 373, 374]

B4. Indignities accorded to hijab wearing students include direct violence, and mental harassment, and also the untested insinuations that their decisional autonomy is immature and invalid, and that they are causing fissures in uniformity (which in itself is a principle of dubious constitutional value)

- i) The experience of being forced to uncover their head was a humiliating experience for many students. In Raichur, for example, one young woman who spoke to us told us how they found this experience to be humiliating and how it was “equal to being naked”. [Page 29, PUCL Report]
- ii) In Hassan district, students described ways in which hijab-wearing girls in their college were constantly targeted by lecturers, and even harassed by boys who sent

vulgar messages on the phone. Boys even began teasing them in public spaces and they could not walk alone anymore. They began calling in public “O Hijab! O Burkha!” They said that even a teacher called out to students this way. [Page 26, PUCL Report]

- iii) To many of the students, wearing a hijab had become routine long before the judgment. The suddenness caused a shock to them, leaving them disoriented. In Raichur, one student said "After wearing the hijab for so long, it is hard to suddenly stop doing it. We started wearing it from a very young age." At the same time, the students insisted that she was active in making a choice in wearing hijabs. [Para 31, PUCL Report]

B5. The GO breaches individual dignity by negating decisional autonomy and personal choices of women students. It fails in its objective of encouraging fraternity, integrity and Unity.

B6. Furthermore, assuming arguendo, that the right to wear a hijab does not constitute an ‘essential religious practice’ under Articles 25 and 26 of the Constitution, because it fails the essentiality test, even then wearing of an apparel or dressing in a manner which discloses a religious identity, even if not essential to a particular religion would qualify as a religious practice and also inherent to individual dignity and therefore a right to privacy. **To stop a person from dressing in a particular manner, there must be some rationale.** It is respectfully submitted that the impugned GO is bereft of any rationale and therefore the right to wear an apparel (**or not wear one, for that matter**) would be protected by the students’ Fundamental Right to privacy, which would be protected under Article 21 of the Constitution of India and can be curtailed only for a rational reason. In this context, reliance is put on the following observations in *Puttuswamy, supra.*, which hold as follows:

“The choice of appearance and apparel are also aspects of the right of privacy. The freedom of certain groups of subjects to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right of privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling under Article 25”. It is submitted that even if it is found that hijab is not an essential religious practice, it would certainly be a cultural right protected by Article 29 (1). [Emphasis Supplied, Paragraph 373]

C The GO does not serve any proper purpose: it does not achieve any equitable access to education, nor serves the ethic of secularism, nor is it true to the objective of the Karnataka Education Act, 1983.

C1. The GO is not aligned with the purpose of the Act, but rather is in direct conflict with it.

- i) The objects and reasons state that

“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 organization, **discipline and control over educational institutions** in the State with a view to **fostering the harmonious development of the mental and physical faculties of students** and cultivating a scientific and secular outlook through education”. [Emphasis Supplied]

C2. It is important to note that the reference to better organization, **discipline and control is with regard to educational institutions, and not with regard to students** and their decisional autonomy and other freedoms. On the contrary, the Act seeks to ‘foster the harmonious development of the mental faculties of students’. This is also borne out by the fact that the Act contains specific provisions for regulation of educational institutions with respect to their registration, grant of aid, regulation of number of persons admitted, establishment of hostels, etc. [Sections 3, 4 and 7].

With respect to students, the prescriptions are present in Sections 5 and 7

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

Section 7(1) gives the power to the government to prescribe curricula, syllabi, medium of instruction, scheme of examination, the number of working days, tuition fees, and number of teaching staff. However, it does not mention uniforms *per se*. Section 7(2) states: “The curricula under sub-section (1) may also include schemes in respect of-

- (a) Moral and ethical education;
- (b) Population education, physical education, health education and sports;
- (c) Socially useful productive work, work experience and social service;
- (d) Innovative, creative and research activities;

(e) **Promotion of national integration;**

(f) Promotion of civic sense; and

(g) **Inculcation of the sense of the following duties of citizens, enshrined in the Constitution under Article 51 A** [Emphasis Supplied]

C3. The GO relies on Section 7 (2)(e) and (g) of the Act and erroneously interprets it to read into it the power to disallow the hijab at school. Such an interpretation is contrary to all rulings of this Hon'ble court on what constitutes national integration, and secularism [*Tehseen Poonawalla, Supra.*]

[See on Indian Secularism, which must show equal respect and equal accommodation for all religions in public spaces: *SR Bommai v Union of India* [(1994) 3 SCC 1, **seven judge bench**; Para 25, 28-30 Ahmadi, J. concurring]

C4. In *Subramanian Swamy, Supra.* this Hon'ble Court has read into Article 51A, not an aspiration to impose homogeneity, or standardization, but rather an acceptance and a comfort with diversity, and equal access to education.

162. In the context of constitutional fraternity, fundamental duties engrafted under Article 51A of the Constitution gain significance. Sub-articles (e) and (j) of Article 51A the Constitution read as follows:-

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

X x x x x

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

163. The prismatic perception of sub-article (e) would reflect that it is the duty of every citizen of India to promote harmony and the concept of common brotherhood amongst all the people **despite many diversities**. It is also the duty of every citizen to strive towards excellence in all spheres of individual and collective activity.

164. In *P.A Inamdar and Others v. State of Maharashtra* and others it has been observed that:-

“Fundamental duties recognized by Article 51A include, amongst others, (i) to develop the scientific temper, humanism and the spirit of inquiry and reform; and (ii) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. **None can be achieved or ensured except by means of education. It is well accepted by the thinkers, philosophers and academicians that if JUSTICE, LIBERTY, EQUALITY and FRATERNITY, including social, economic and political justice, the golden goals set out in the Preamble to the Constitution of India are to be achieved, the Indian polity has to be educated and educated with excellence. Education is a national wealth which must be distributed equally and widely, as far as possible, in the interest of creating an egalitarian society, to enable the country to rise high and face global competition**”. [Emphasis Supplied]

C5. The Act itself does not conceptualize schools free of manifestations of diversity of students. In fact, certain sections indicate that the Act aims for educational spaces to be sensitive, welcoming, tolerant and inclusive of diverse religious practices and views.

- i) Section 15(b) makes accommodations for non-attendance by a child, when religious instruction not approved by his parents is given at school. [NB: it does not ban such religious instruction, but reasonably accommodates those who do not wish to attend].
- ii) Section 39 (1)(b) and (c) speak of withdrawal of recognition to such schools that deny admission to any citizen on grounds of religion, race, caste, language; and (c) where there is direct or indirect encouragement in the educational institution of any propaganda or practice wounding the religious feelings of any class of citizens of India, or insulting their religion or religious belief

C6. The Act does not provide for disallowing hijab. In fact, it makes space for reasonable accommodation of religious beliefs and practices.

C7. The GO is incompetent since the power to prescribe uniforms, and more specifically, to disallow the hijab, is not derived from the Act.

C8. The GO tries to invoke ‘uniformity’ and ‘homogeneity’, which have been repeatedly held to be anathema to secularism, fraternity, individual dignity, equality and liberty.

C9. The objectives of the GO serve no proper purpose and thus display arbitrariness in terms of unreasonableness, irrationality and lack of principled justification. See *Shayara Bano v. Union of India* [2017(9) SCC 1] Paragraphs 95, 101, Nariman, J

C10. The GO is arbitrary also for its whimsical nature and timing, in the middle of an academic year and barely a month before the annual exams.

The GO also relies on Rule 11 of the *Karnataka Educational Institutions Rules 1995*, which empowers recognized educational institutions to specify its own uniforms.

“Rule 11. Provision of Uniform, Clothing, Text Books etc.

1. Every recognized 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** [Emphasis Supplied]

The specifications regarding disallowance of Hijab were applied abruptly, at the end of the

academic section and shortly before exams, leading to much chaos. They were also sought to be applied retrospectively [while the GO was notified on 5.02.22, girls had been stopped from entering school as early as 31.12.21].

The GO is thus ‘capricious’ and acting ‘at pleasure’, which again makes it arbitrary and falls foul of Article 14. [Shayara Bano, *Supra.*]

D. The GO is contrary to legitimate state interest of promoting literacy and education as mandated under Articles 21 and 21A, 39(f), 41, 46 and 51A, and rather has the effect of restricting education for women. It is therefore contrary to public interest.

D1. The main purpose of schools and colleges is to provide ‘good education’ and not to inculcate homogeneity.

D2. The constitutional emphasis on access to education includes the 86th Amendment and the insertion of Article 21A, a fundamental right to primary education. Article 39(f) enjoins the state to provide children with opportunities to develop in a healthy manner, in conditions of freedom and dignity. Article 41 enjoins the state to secure the right to access education.

D3. Constitutional morality lies in providing opportunities for access to education, and in circumstances where such access comes into conflict with values like discipline, etc. the focus must be on access to education. Inculcation of discipline in schools is not a constitutional ethic.

D4. The traditions of education must encapsulate the development of scientific temper, critical study and self-enquiry, and autonomy rather than authoritarian cultures. This is reflected in the National Education Policy of India, which focuses on critical thought, self-reflection and diversity in education, rather than standardization and uncritical learning. **It outlines the fundamental principles that will guide the Indian Education System as well individual institutions within it: [Page 5, NEP]**

“1. **full equity and inclusion as the cornerstone of all educational decisions** to ensure that all students are able to thrive in the education system;”

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

D5. At Paragraph 6.12, the NEP states as one of the fundamental directives thus: [**Page 28**]

“Students will be sensitized through this new school culture, brought in by teachers, trained social workers and counsellors as well as through corresponding changes to bring in an **inclusive school curriculum**. The school curriculum will include, early on, material on human values such as respect for all persons, empathy, tolerance,

human rights, gender equality, non-violence, global citizenship, inclusion, and equity. **It would also include more detailed knowledge of various cultures, religions, languages, gender identities, etc. to sensitize and develop respect for diversity. Any biases and stereotypes in school curriculum will be removed, and more material will be included that is relevant and relatable to all communities.**

[Emphasis Supplied]

D6. NEP also recognizes the importance of curtailing dropout rates and states: [Pages 10-11]

“3.2 There are two overall initiatives that will be undertaken to bring children who have dropped out back to school and to prevent further children from dropping out. The first is to provide effective and sufficient infrastructure so that **all students have access to safe and engaging school education at all levels from pre-primary school to Grade 12.** Besides providing regular trained teachers at each stage, special care shall be taken to ensure that no school remains deficient on infrastructure support.

3.3. **The second is to achieve universal participation in school by carefully tracking students, as well as their learning levels,** in order to ensure that they (a) are enrolled in and attending school, and (b) have suitable opportunities to catch up and re-enter school in case they have fallen behind or dropped out. **For providing equitable and quality education from the Foundational Stage through Grade 12 to all children up to the age of 18, suitable facilitating systems shall be put in place. Counsellors or welltrained social workers connected to schools/school complexes and teachers will continuously work with students and their parents and will travel through and engage with communities to ensure that all school-age children are attending and learning in school. Trained and qualified social workers from civil society organizations/departments of Social Justice and Empowerment and government functionaries dealing with empowerment of Persons with Disabilities at the State and district level, could be connected to schools, through various innovative mechanisms adopted by State/UT Governments, to help in carrying out this important work.**

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

[Emphasis Supplied]

D7. The kneejerk decision in barring the hijab is completely counter to the comprehensive education policy, and the attempt to curtail drop out rates for girls, and in fact has no rational basis, or any rational nexus to ‘ good education’. It takes away autonomy, engagement with diversity, a sense of comfort and any form of critical thought.

D8. Therefore, legitimate state interest lies in not proscribing the hijab as it will have a deliterious effect on education of a protected group. [Articles 21A, 39(f), 41, 46, 51A(e), (f) and (h). It will have the effect of dropouts amongst hijab wearing students who will be forced to opt out of secular education and opt for madrasas instead.

D9. The impugned GO sanctifies uniform instead of sanctifying education

D10 It forms arbitrary barriers to access to education and employment

D11 The GO is also blithely unaware of Section 2(9) of the *Juvenile Justice (Care and Protection of Children) Act, 2015*, wherein the “best interest of the child” specifically include the child’s **identity**, social well-being and physical, emotional and intellectual development. Thus, an erasure of the child’s religious, social and cultural contexts is not in the child’s best interests. [Also see Paragraph **B6** *Supra.* and *Puttuswamy* which recognizes dress as manifestation of identity as a fundamental right].

E. The GO and the Impugned Order also endorse the unexamined view of the state that barring the hijab furthers freedom and dignity

E1. The GO has also uncritically given strength to certain stereotypes about hijab wearing women. It endorses the unexamined view that it is a regressive practice and displays lack of freedom and dignity. [NB: The impugned order records on Page 35 and 36 the state’s contentions that ‘hijab offends human dignity’; ‘robs individual choices of Muslim women’. These are at best presumptions and at worst stereotypes]

E2. There is nothing to support this contention in the face of students who are putting forth their informed reasons for wearing the hijab which range from legitimate belief that it is an essential religious practice, to others who wear it for reasons of culture, or conscience.

E3. The view that the women who wear hijab do it out of compulsion, or due to false consciousness is both untested and presumptuous.

E4. The Report records that the controversy has led to a general hostility to hijab wearing women, and in one case they were categorized as extremists and terrorists. [Page 32, Report]

- ii) In Raichur, one student, who was doing her B.Ed. said that as part of her course, she was expected to teach classes to tenth grade students enrolled in Government schools. Her internal marks were based on practice teaching. Her college had told her that she could go ahead and give these classes and that a lecturer from the college would accompany her to evaluate her performance. However, after the judgment, her lecturers said that a headscarf was not allowed as it affects the student in the class. As a result, she could not teach the classes. Her internal marks were left in the air. The student continued that because she lost her marks in internals, she would not get any experience in her B.Ed. She said she does not understand the priorities of those who have pushed for the ban. The B.Ed. student said that she was asked to take leave and promised that her attendance would not be harmed. Regardless, she lost on valuable experience and proper evaluation [Page 22]
- iii) When speaking to law students in Dakshina Kannada, students said that during their Practical Court Visits, they were not allowed into the court premises with their hijab on. The security of the court asked them to come back with a written permission from their university, even though other students from the university were allowed into the courts. When the students asked the professor about this, they were told to go back to the university. The next week when they returned, they were only allowed into the court premises because of a lawyer who helped them. [Page 22]
- iv) *Another student explained the toll this has taken on her sense of independence in public spaces. "I don't feel confident to go to the college, and I take my brothers along. Outside the college, I face harassment from other boys, who are not from our college. Earlier, I was the class representative, and I would go to the principal about issues facing the students. Nowadays, I've fallen silent, and don't interact with other students. I want to change this college where I don't feel free.* [Page 27]
- v) The news anchors have often portrayed the hijab-wearing students as backward and stubborn, and have framed the issue as Muslim women choosing the hijab over education. This has made it a demeaning stereotype about Muslim women which incites the ostracisation, dehumanization and the isolation of the Muslim community. [Page 13]

- vi) There have also been incidents during which a Muslim student's hijab was forcibly removed by the college teaching staff as well as by the police, under the glare of the media. [Page 13]
- vii) In Mangalore city, students described the hostile environment at the university following the judgment, they stated that students looked at them in a different way and would stare at them. As a result, they are made more conscious of their attire in that environment. They also have to confront stereotypes surrounding students who wear headscarves and emphasized the indignity in being forced to choose between their religious expression and their education. [Page 28]
- viii) In Udupi district, students explained how the hostility follows them even to their neighborhoods. While their neighbors were friendly earlier, after the judgment their attitudes changed completely. Neighbors have told the students that because of them, others girls are feeling the effect, and suffering. The constant hostility has been overwhelming for them. As one student told the team, "We want a comfortable life, we want to be treated as normal people. I don't want to be stared at. "The hostility has made many women look into the community for support. In rural Udupi district, one student said that she now only travels in buses which are owned by Muslims for safety. In other buses and public spaces, she experiences harassment. [Page 28]

E6. Article 19 of the UN Convention on the Rights of Child 1989 (UNCRC) declares that any form of discipline involving violence is unacceptable. It lays down that children have the right to be protected from being hurt and mistreated, physically or mentally. Article 28(2) of the same convention requires the state parties to "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."

E7. Section 17 of the Right to Education Act, 2009, imposes an absolute bar on corporal punishment. **It prohibits physical punishment and mental harassment to children** and prescribes disciplinary action to be taken against the guilty person in accordance with the service rules applicable to such person.

E8. It is submitted that the actions of the state government has directly, or indirectly caused immense mental harassment, fear and trauma to the girl students. The GO thus falls foul of the test laid down in Charan Lal Sahu v. Union of India that the rule has to be judged on the 'ambit of its operations'. [See 1989 SCR Supl. (2) 597]

F. Nitisha Gorwade, facial neutrality and disproportionate effects on a protected group.

F1. In *Nitisha Gorwade v. Union of India* [(2021) SCC Online SC 261] the Hon'ble Supreme Court reiterated the distinction between formal and substantive equality. [Paragraphs 54- 64]: “under the formal and symmetric conception of antidiscrimination law, all that the law requires is that likes be treated alike. Equality, under this conception, has no substantive underpinnings. It is premised on the notion that fairness demands consistency in treatment. Under this analysis, the fact that some protected groups are disproportionately and adversely impacted by the operation of the concerned law or its practice makes no difference.” [Para 55]

F2. This Hon'ble court further holds that “under a substantive approach, the antidiscrimination guarantee pursues more ambitious objectives. The model of substantive equality developed by Professor Sandra Fredman views the aim of antidiscrimination law as being to pursue 4 overlapping objectives”. She states as follows:

“First, it aims to break the cycle of disadvantage associated with status or out-groups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension”. [Emphasis Supplied, Para 56]

F3. Indirect discrimination is caused by **facially neutral criteria** by not taking into consideration the underlying effects of a provision, ‘practice or a criterion’. [Para 61] The Hon'ble Supreme Court emphasized that the enquiry regarding whether there was any indirect discrimination in a given case would look not at the form of the impugned conduct, but at its consequences. ‘In direct discrimination, the focus is abstracted from its social setting, whereas in indirect discrimination, the subject matter is the institutional or societal framework’ [Para 66]

F4. With regard to the enquiry, ‘first, the Court has to enquire whether the impugned Rule disproportionately affects a particular group. Second, the Court has to look at whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Such disadvantage could be in the shape of: “economic exclusion or disadvantage, social exclusion, psychological harms, physical harms, or political exclusion”, and must be

viewed in light of any systemic or historical disadvantages faced by the claimant group.’[Para 82]

What other ways exist to prove indirect discrimination? The Court cited the following paragraph from *Fraser* as relevant to the question of the nature of evidence required to establish indirect discrimination: “as [statistical] evidence might be hard to come by, **reliance can be placed on evidence generated by the claimant group itself**. Equally, recognizing **the importance of applying a robust judicial common sense**. [Para 82, 85]

F6. The evidence generated by way of testimonies by the effected group shows the disproportionate impact in terms of barring of access to education, but also stigmatizing and hostility.

F7. Muslim women around the state from Dakshina Kannada, Udupi, Mandya, Bagalkot, Bidar, Mysuru, and Shimoga have been prevented from accessing their right to education. [Page 6, Report]

F8. Media reportage about Muslim students during the hijab controversy was riddled with gender stereotypes. [Page 13]

F9. The media has invaded college campuses, even classrooms, and has been intimidating school and college managements into enforcing a ban on the hijab; worse still, it has proactively and aggressively carried out targeting of the hijab-wearing girls, pursuing them inside the college campuses, and even in private, domestic spaces, thereby endangering their safety, and in the process, inhibiting Muslim students and their parents from accessing educational institutions. [Page 13]

F10 In one notorious video, a Dighvijaya TV reporter with camera is seen chasing a young hijab-wearing child in the school campus, even as the teacher vainly implores the reporter not to harass the child. [Page 13]

F11. *Nitisha, supra.* also holds that indirect discrimination is a function_not of conscious design or malicious intent, but of implicit biases or an inability to recognize how existing structures have certain consequences of freezing an unjust status quo. In that sense, the GO may have had unforeseen consequences, which have caused a disproportionate disadvantage to a protected group.

F12. Thus the indirect discrimination test asks the question whether the impugned rule or policy is necessary for academic excellence? It is submitted that while wearing or not wearing the hijab has no bearing on receiving good education, but fraternizing with diverse classmates indeed has a bearing on ‘good education’. [Para 87]

F13. Viewed in the aforementioned context, the impugned circular while purporting to be facially neutral, targets “headscarf or a garment covering the head”. Only Muslims wear the headscarf or a garment covering the head. Therefore, the effect of the circular only impacts Muslim girls wanting to wear the headscarf, which while being facially neutral is indirectly discriminatory and thus violates Article 14.

G. The following errors of fact are *inter alia* apparent in the judgment of the High Court:

1. The High Court holds that there was no pleading of proof shown by the petitioner that wearing of a hijab is a religious requirement and an essential religious practice [Pages 85-86] This is factually incorrect; in Writ Petition no. 2880 of 2022, this aspect was specifically pleaded. [Pages 165-167 of SLP No. 5236/ 2022
2. The GO refers to three judgments and states that the said decisions consider the question regarding a uniform dress code and its overriding effects over individual dressing choices. It further states that the said ruling suggests that prohibition regarding a headscarf or a garment covering the head is not a violation of Article 25 of the Constitution. The High Court agrees that all the judgments referred to in the GO are not relevant [Pages 75-77], but is in error in not appreciating that but for the judgments there is no other independent material stated in the GO to justify the above conclusions.
3. The High Court frames question no. 2 regarding the power to prescribe school uniforms and whether such prescription would violate Fundamental Rights [Page 39, question no. 2]. However this issue is a non-issue as none of the parties have questioned the constitutional validity of the prescription of uniform by the authorities.