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ELECTION LAW

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I INTRODUCTION

IN OUR current survey, we have identified five problems in the arena of election law, which correspond to the five judgments of the Supreme Court delivered and reported during the calendar year 2022. Each one of the problems in their resolution by the Supreme Court, even if those might not be unprecedented, carries its own distinct flavour.

The first conflicting issue relates to the critical examination, whether suspension of an erring member of Legislative Assembly beyond the period of its current Session is constitutionally justified, given the adoption of the wide ambit of the undefined parliamentary privileges in the common law tradition in India.[1] Quite apart from the resolution of the problem on grounds of constitutionality, the serious reflection of the judicial mind in the context of fact matrix of the case, as to why should the members of the Parliament or Assembly/Council of the State, "spend much of the time in a hostile atmosphere"; "spent (most of the time) in jeering and personal attacks against each other instead of erudite constructive and educative debates consistent with the highest tradition of the august body," "especially when we the people of India, that is Bharat, take credit of being the oldest civilisation on the planet and also being the world's largest democracy (demographically)"?[2] Response to this self-posed pondering is in the form of an "Epilogue", which constitutes, in our view, a unique feature of the Supreme Court judgment.[3]

The second conflicting issue addressed in this survey is, whether prohibition of wearing *hijab* (headscarf) –a religious symbol of Muslims - as a part of mandatory school dress is violative of Article 25 of the Constitution.[4] This issue has emanated

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1 See generally, *infra*, Part II: "Suspension of an erring member of Legislative Assembly beyond the period of its current Session: Whether it is legally and constitutionally sanctioned?"

2 See, *ibid.*

3 See, *infra*, Part VII: "Our Conclusions" *supra* note 405 and the accompanying text.

4 See generally, *infra*, Part III: "Prohibition of wearing hijab (headscarf) as a part of mandatory school dress: Whether violative of Article 25 of the Constitution?"

from a judgment of the Supreme Court, which is, though not come up directly with reference to the provisions of election law, yet for the exposition of the term 'secular' in the context of freedom of religion, it does make reference to the judgment decided under the Representation of the People Act, 1951.[5] Otherwise also, freedom of religion is of fundamental importance in deciphering the character of secular State in all matters relating to impingement of religion in electioneering.[6] Be that as it may, the problem of essentially deciphering the notion of secularism under our Constitution requires a special analytical treatment of the judgment under reference(which is relatively very lengthy judgment running into 280 paragraphs manned by over one hundred pages, with two opposite opinions!) at least for three reasons.[7]One, the issue of right to religion and the freedom of conscience under article 25(1) with respect to right to equality under article 14 is highly contentious, inasmuch as in the instant case, the two justices hold diagonally opposite views. Two, since the same issue is pending for consideration by the nine-Judge Bench of the Supreme Court,[8] it is just possible that the present analysis might yield some useful inputs and thereby assisting the Supreme Court in their eventual decision-making. Three, the inter se relationship between the right to freedom of religion and the right to equality is of generic interest, capable of invoking in the resolution of multiple cognate issues. All these reasons *per se* require the treatment of the Supreme Court judgment in Part III relatively more exhaustive.

The third issue taken up has arisen from the judgment of the Supreme Court which apparently deals with the problem requiring the voiding of an election by the election court on ground of improper reception of the nomination paper of the

5 See, *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra,* MANU/SC/0277/1975: (1976) 2 SCC 17. In this case, a three-Judge Bench of the Supreme Court was considering an appeal against the setting aside of election of the appellant under the Representation of the People Act, 1951 to the Maharashtra State Assembly on the ground of speeches made by him in the course of election campaign. It was held that "the Secular State, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices."[See, *infra*, Part III, dealing with *Aishat Shifa*, para 8.]

6 See generally, Virendra Kumar, "Varying Approaches to Religion under the Electoral Law [A functional comparative perspective of the deeply divided opinion of the Seven-Judge Constitution Bench of the Supreme Court in *Abhiram Singh* case (2017)]" Ch. 5 in *The Indian Year Book of Comparative Law* (Springer's Publishers 2018).

7 See generally, *infra*, Part III.

8 Reference maybe made to the author's *Critique* presented on Aug. 27, 2019 at the 57th Colloquium of Panjab University under the title, "Socio-religious Reform through Judicial Intervention: Its limit and limitation under the Constitution [A critique of the 5-Judge Constitution Bench decision of the Supreme Court in Sabarimala Temple case (2018)].It has been published as such in the form of Monograph by Panjab University, Chandigarh [PU Publication Bureau, 1ST edn. 2020]. The critical issues, which were then raised and responded were subsequently referred by the 5-Judge Bench to 7-judge bench, which in turn, referred to 9-judge Bench of the Supreme Court, which are pending for resolution. Hereinafter cited as author's Monograph.

returned candidate by the returning officer.[9] However, on close and critical judicial scrutiny of the fact matrix of the case, the revelations made are indeed startling! In the first instance, the returning officer's acceptance of the nomination of the returned candidate cannot be faulted, as he proceeded to undertake scrutiny on the basis of basic documents produced before him,[10] and that it was not his function to suspect the public authorities, who issued those basic documents, which included Birth Certificate, Aadhar Card, Electoral Roll, Driving License, and that all those documents were manipulated by persons wielding huge political power[11]to fulfill their political ambitions[12]! It also shows, how the alert press has enabled the election petitioner to initiate proceedings[13] and digging out more information[14] that enabled the election court to uncover the murky affairs of the appellant-returned candidate and declared his election *void ab initio*.

The fourth issue included in this survey relates to settling the question, whether non-disclosure of assets by an election candidate constitutes corrupt practice in the absence of any statutory provision requiring disclosure of assets?[15] Significance in the responding to this issue lies, not just in the fact that the Supreme Court has affirmed the decision of the high court but, in showing *de novo*, how non-disclosure amounts to corrupt practice affecting the 'purity of election at all levels', which indeed is a matter of national concern, and, therefore, 'a hyper-technical view of the omission to incorporate any specific provision' in the State electoral rules should not allowed to be an obstacle to fill in the statutory gap in larger 'public interest.'[16]

The fifth issue that has been included in this survey has emerged from the judgment of the Supreme Court that dealt with the question involving whether amendment of the election petition can be justifiably allowed in the given fact matrix of the case.[17] Though the issue is relatively very simple to resolve, but what needs to be noticed in this instance is, how has the Supreme Court approached the issue of allowing amendment of the election petition in this appeal?[18]

9 See generally, *infra*, Part IV: "Election of the returned candidate: How it was declared null and void by the High Court on ground of improper acceptance of the Nomination and duly affirmed by the Supreme Court?"

10 See, *infra*, Part VII: "Our Conclusions", note 412 and the accompanying text.

11 See, *infra*, Part IV (dealing with *Mohd. Abdullah Azam Khan,* paras31, 32, 36, 37, and 40.]

12 See, infra, Part IV (dealing with *Mohd. Abdullah Azam Khan,* para 30].

13 See, *infra*, Part VII: "Our conclusions", *supra* note 416 and the accompanying text.

14 See, *infra*, Part VII: "Our conclusions", *supra* note 417 and the accompanying text.

15 See generally, *infra*, Part V: "Non-disclosure of assets: whether constitutes corrupt practice in the absence of any statutory provision requiring disclosure of assets?".

16 See, *ibid.*

17 See generally, *infra*. Part VI: "Amendment of the Election Petition: When it can or cannot be allowed?"

18 See, *ibid.*

II. SUSPENSION OF AN ERRING MEMBER OF LEGISLATIVE ASSEMBLY BEYOND THE PERIOD OF ITS CURRENT SESSION: WHETHER IT IS LEGALLY AND CONSTITUTIONALLY SANCTIONED?[19]

This issue has come up for consideration before the three-Judge Bench of the Supreme Court in *Ashish Shelar* v. *The Maharashtra Legislative Assembly*.[20] For its due consideration, we may abstract the fact matrix in the first instance, which is as under.

In the run up of Maharashtra Legislative Assembly elections (2019-2024), although the Bharatiya Janata Party emerged as the largest single party, nevertheless the coalition between the Shiv Sena, the Nationalist Congress Party (NCP) and the Indian National Congress (INC), christened as "Maha Vikas Aghadi", managed to form the government. For fear of losing the majority in the House, the coalition government suspended 12 MLAs of the BJP for having committed contempt of the House through the resolution dated July 5, 2021 passed by the Maharashtra Legislative Assembly by voice vote without any discussion. The suspended members are the petitioners in this case under Article 32 of the Constitution of India, for issuing appropriate writ, order or direction so as to quash and set aside the impugned resolution being unconstitutional and grossly illegal, and for enforcement of their fundamental rights as guaranteed under Articles 14 and 21 of the Constitution of India, 1950. Their plea was strongly resisted by raising various contentions.

For resolving the *lis,* the three-Judge Bench of the Supreme Court considered the following pivotal question: Whether the Supreme Court in the exercise of the power of judicial review can intervene in the matters of exercising legislative privileges, including particularly the power to punish for contempt of the House by suspending a member from the membership of the House for a period which runs beyond the life of the legislative assembly.

As a matter of general constitutional practice, following the common law tradition, any intervention by the courts, in *stricto sensu*, is barred in the domain of exercise of legislative privileges, including power to punish for contempt of the House. This seems to imply that there is complete immunity from judicial review even if there existed, for instance, some lapses or procedural irregularities in the exercise legislative privileges.

However, the adoption of any common law practice principle is subsumed by the most fundamental principle of constitutionalism: any immunity is not beyond the provisions of the Constitution of Independent India. This is what is stated by

19 See also, Virendra Kumar, "The Speaker's power of the State Legislative Assembly: How to balance the conflicting and competing rights in the functioning of democratic-parliamentary-political -party system under the Constitution?" LV *ASIL* at 278-294 (2019).

20 *Per*, A.M. Khanwilkar, J. (for himself and for Dinesh Maheshwari and C.T. Ravikumar, JJ., MANU/SC/0094/2022: AIR2022SC721. Hereinafter, *Ashish Shelar.*

A.M. Khanwilkar J., in the instant case. While speaking for the three-judge bench, he said at the very outset in an articulate manner:[21]

> The Constitution, by itself, does not specify the limitation on the privileges of the Legislature, but, indubitably, those privileges are 'subject to the provisions of the Constitution' (as is predicated in the opening part of Article 194(1) as also in Article 208(1) requiring the House of the Legislature to make Rules for regulating its procedure), which ought to include the rights guaranteed to the citizens under Part III of the Constitution. The moment it is demonstrated that it is a case of infraction of any of the rights under Para III of the Constitution including ascribable to Articles 14 and 21 of the Constitution, the exercise of power by the Legislature would be rendered unconstitutional. For attracting Articles 14 and 21 of the Constitution, it is open to the Petitioner to demonstrate that the action of the Legislature is manifestly arbitrary. The arbitrariness can be attributed to different aspects. Applying that test, it could be a case of irrationality of the resolution/decision of the House. Indeed, in this case, the Court is not called upon to enquire into the proportionality of such a resolution/decision.

The issue for eventual determination boils down to the pointed question: whether the act of suspending a member from the membership of the House for a period which runs beyond the life of the legislative assembly is "manifestly arbitrary", which is other than adjudicating upon the irrationality of the resolution/ decision of the House itself, as that is not the question agitated for decision in the instant case. This implies, we need to focus our attention in examining the manifest *arbitrariness in matters of irregularity of procedure* adopted in suspending a member from the membership of the House for a period which runs beyond the life of the legislative assembly for contempt of the House.

How to construe manifest arbitrariness in matters of irregularity of procedure is the pivotal point for consideration? In the instant case, the Supreme Court after relying upon the analysis of catena of cases has held that ordinarily they would not interfere in the internal functioning of the legislature, "but not on grounds of lack of jurisdiction or it being a nullity for some reason such as gross illegality, irrationality, violation of constitutional mandate, mala fides, non-compliance with Rules of natural justice and perversity."[22] In the light of this premise, the three-Judge Bench by analyzing the grounds of challenge in the fact matrix of the case has held that in suspending a member from the membership of the House, it is obligatory to observe certain basic principles, which may be abstracted as under:

21 See, *Ashish Shelar,* para 27.

22 See the analysis of the relevant parameters articulated by the Constitution five-judge bench judgment in *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha* MANU/SC/0241/2007: (2007) 3 SCC 184, cited in *Ashish Shelar*, para 26.

(1) Constitutionally, "it is imperative for the House to adhere to the procedure prescribed in the Rules framed by the House under Article 208 of the Constitution."[23]

(2) The "powers and the procedure prescribed by the Rules has the sanction of enacted law and an order of committal for contempt of the Assembly", therefore, has to be "according to procedure established by law."[24] Otherwise also, it is the "settled law that even Rules made to exercise the powers and privileges of State Legislature constitute law within the meaning of Article 13."[25]

(3) Both the power and procedure that enable the Speaker to ensure smooth working of the House, without any obstruction or impediment and for keeping the recalcitrant member away from the House is categorically predicated in Rule 53, which indeed is the "benchmark to be observed" by him:[26]it represents the "graded (rational and objective standard) approach" enabling him to keep the disobeying member out of the House in "a graded manner for the remainder of the day and for repeat misconduct in the same Session—for the remainder of the Session."[27]

23 *Id.*, para 29. For this preposition, reliance has been placed on *M.S.M. Sharma* v. *Sri Krishna Sinha* MANU/SC/0021/1958: AIR 1959 SC 395 (five-judge bench) (paras 25, 26, 28 and 29), stipulating that any exercise of power by the House in depriving a member of his fundamental right under art. 21, presupposes that action taken under the Rules framed under Article 208 of the Constitution and in conformity therewith is compliance of the procedure established by law for the purpose of Article 21 of the Constitution", cited in*Ashish Shelar,* para 30*;*

24 See, *Ratilal Bhanji Mithani* v. *Asstt. Collector of Customs, Bombay,* MANU/SC/0077/1967: (1967) 3 SCR 926 at 929 (the Constitution Bench), cited in *Ashish Shelar,* para 31. See also, it is settled law that even Rules made to exercise the powers and privileges of State Legislature constitute law within the meaning of art. 13.

25 *Ashish Shelar*, para 32, citing *Special Reference No. 1 of 1964*, 8 MANU/SC/0048/1964: AIR 1965 SC 745 (seven-judge bench) (paras 31, 32, 35, 36, 39 to 41, 56, 60, 61, 124 and 125), holding that when the State Legislatures purport to exercise rule making power, they will undoubtedly be acting Under Article 246 read with Entry 39 of List II, which implies that the enactment of such a law will, therefore, have to be treated as a law within the meaning of art. 13. *Cf.* The judgments of the High Court of Gujarat (referred to in *id*., para 71) wherein it had been held that "the Rules framed Under Article 208 of the Constitution are neither statutory nor binding on the Legislative Assembly." This position has been repelled by the Supreme Court by observing that those decisions "have not taken note of the efficacy of the observations made by the Constitution Bench of this Court in *M.S.M. Sharma* (*supra*) as back as in 1959—that the Rules framed under Article 208 of the Constitution would have the effect of procedure established by law for the purpose of Article 21 of the Constitution and which dictum has been consistently followed in subsequent decisions including by the Constitution Bench which dealt with the case of *Raja Ram Pal* (supra)," *ibid*.

26 See, *id.*, para 45.

27 See, *id*., para 45 read with para 44.

(4) "If the House takes upon itself to discipline its members, it is expected to adopt the same graded (rational and objective standard) approach on the lines predicated in Rule 53."[28]

(5) Consequentially, "Inflicting suspension for a period 'beyond the period necessary' than to ensure smooth working/functioning of the House during the Session 'by itself'; and also, as per the underlying objective standard specified in Rule 53, indubitably, suffer from the vice of being grossly irrational measure adopted against the erring member and also substantively illegal and unconstitutional."[29]

(6) Suspension for a period 'beyond the period necessary'could be regarded, in terms of procedure, as"grossly irrational" measure(closer to or bordering on perversity), inasmuch as "such an action would be violative of procedure established by law,"[30] that is the direction, which is neither ascribable to the dispensation prescribed in Part XVIII of the Rules or Rule 53 enabling the Speaker to do so.[31]

(7) It also becomes a case of "substantive illegality", and not just of "procedural irregularity" as such, when the period of suspension is in excess of the period essential for ensuring orderly functioning of the House during the ongoing Session, much less in a graded manner including on principle underlying Rule 53.[32] In this wise, it is "also manifestly arbitrary, grossly irrational and illegal and violative of Articles 14 and 21 of the Constitution."[33]

(8) Suspension beyond the period of the life of the House is simply "irrational" even on the plea of the 'implied' or 'inherent' power of the House or the

28 *Id*., para 44: For "That would be a case of rational action taken by the House as per the procedure established by law." *Ibid.*

29 *Id*., para 46.

30 *Id.*, para 47.

31 See, *id*., para 50. Part XVIII of the Rules dealing with Privileges, requires constitution of a Committee of Privileges to enquire into the entire matter by giving opportunity of hearing to the persons concerned. In the instant case, instead of adopting that procedure, the House itself chose to direct withdrawal of the Petitioners from the meetings of the Assembly for a period of one year, see ibid.

32 *Id.,* para 51. Clearly, it *"would be antithesis to rational or objective standard approach," ibid.*

33 *Id*., para 47. See also, *id*., para 49: "It is well-established that fundamental rights are guaranteed by Part III of the Constitution, out of which Articles 14, 19 and 21 are the most frequently invoked to test the validity of the executive as well as legislative actions when these actions are subjected to judicial scrutiny. … The sweep of Article 21 is expansive enough to govern the action of dismembering a member from the House of the Legislative Assembly in the form of expulsion or be it a case of suspension by directing withdrawal from the meeting of the Assembly for the remainder of the Session."

Speaker, on the analogy of the power of British Parliament[34] at least for two cogent reasons: one, "the suspension may be resorted to merely for ensuring orderly conduct of the business of the House during the concerned Session "[35] and therefore, "(a)nything in excess of that would be irrational suspension;"[36] two, "the member represents the constituency from where he has been duly elected and longer suspension would entail in deprivation of the constituency to be represented in the House. … their representative cannot be kept away from the House in the guise of suspension beyond the necessary (rational) period linked to the ongoing Assembly Session, including the timeline referred to in Article 190(4) of the Constitution and Section 151A of the 1951 Act."[37]

(9) Again, suspension, which is essentially a disciplinary measure, for a period of one year, that is beyond the period of the life of the House, would assume the character of "punitive and punishment", is "worse than 'expulsion', 'disqualification' or 'resignation'—insofar as the right of the constituency to be represented before the House/Assembly is concerned,"[38] for it is "bound to affect the rights harsher than expulsion wherein a mid-term election is held within the specified time in terms of Section 151A of the 1951 Act, not later than six months."[39]

In the light of propositions, as abstracted above, it has been conclusively held by the Supreme Court that the impugned resolution of the Maharashtra Legislative Assembly is not "a case of mere procedural irregularity committed by the Legislature within the meaning of Article 212(1) of the Constitution,"[40] but "suffers from the vice of being unconstitutional, grossly illegal and irrational to

34 Recalling the decision of the the Constitution Bench in *Raja Ram Pal*, which examined the Privy Council judgments, the Supreme Court has stated that "in absence of any express provision bestowing power in the Legislature to suspend its member(s) beyond the term of the ongoing Session, the inherent power of the Legislature can be invoked only to the extent necessary and for proper exercise of the functions of the House at the relevant point of time. No more. For that purpose, it could resort to protective and self-defensive powers alone and not punitive at all." See, *id.*, *para* 60 read with *para* 57. This is reinforced again by observing, "Legislature must be reckoned to the extent only to what is required to be done by the House for effective and orderly functioning of its business during the ongoing Session and not beyond," *id*., *para* 61.This seems to be the background of the provision of Rule 53, which "provides for a graded corrective action, namely, on the first occasion, the Speaker may suspend the member for the remainder of the day and if the misbehaviour is repeated in the same Session—for the remainder of the Session," see, *id.*, para 62.

35 *Id*., para 54.

36 *Ibid*.

37 *Ibid*.

38 *Id*., para 56 read with para 55.

39 *Id*., para 56. See also, *id.,* para 63: "Suspension beyond the Session would be bordering on punishing not only the member concerned, but also inevitably impact the legitimate rights of the constituency from where the member had been elected."

40 *Id.*, para 72.

the extent of period of suspension beyond the remainder of the concerned (ongoing) Session."[41] Accordingly, the said resolution has been set aside by a declaration "that suspension beyond the remainder of the ongoing Session in which the resolution was passed, is nullity, unconstitutional and grossly illegal and irrational,"[42] and therefore the same "cannot be given effect to beyond the remainder period of the concerned Session and must be regarded as *nonest* in the eyes of law beyond that period."[43]

III PROHIBITION OF WEARING HIJAB (HEADSCARF) AS A PART OF MANDATORY SCHOOL DRESS: WHETHER VIOLATIVE OF ARTICLE 25 OF THE CONSTITUTION?

The impingement of the fundamental right to freedom of religion and imperatives of the secular State has come to the fore in the Division Bench judgment of the Supreme Court in *Aishat Shifa* v. *The State of Karnataka.*[44] It relates to the denial of wearing *hijab* (headscarf) by a Muslim girl student in the class room while attending the government college,

Fact matrix of the case may be abstracted as under;

The petitioner Aishat Shifa, a Muslim young girl, was the second-year student of Government Pre-University College in the State of Karnataka.[45]Besides, wearing the prescribed school/college dress, she also wore *hijab* (headscarf) inside her classrooms as a mark of her religious faith. This she did ever since she joined the college, more than a year back, and she had never faced any objection from anyone, including the college administration. However, thereafter when she came to attend the college as usual (on February 3, 2022),at the gate of her college she was asked to take off her *hijab* before entering the premises. Since she refused to remove her *hijab*, she was denied entry into the college by the college administration. Subsequently, on February 5, 2022, the college administration came up with a Government Order rooted in Karnataka Education Act, 1983 and the Rules framed therein, justifying their denial of entry to *hijab*-wearing girls. This Order, passed in pursuance of Section 133(2) of the said Act,[46] *inter alia*, mandates the wearing of the prescribed uniform by students in all government and private schools/ colleges.[47] In respect of private schools, however, there is a "caveat", which

41 *Ibid*.

42 *Id.*, para 73.

43 *Ibid.*

44 *Aishat Shifa* v. *The State of Karnataka*, *per* Hemant Gupta and Sudhanshu Dhulia, JJ. MANU/SC/1321/2022: (2023)2 SCC 1 (decided on Oct. 13, 2022). Herein after simply *Aishat Shifa.*

45 See, *Aishat Shifa,* paras 201-

46 Reproduce the full order.

47 The government order stipulates that the government schools must have a school uniform and the colleges which come under the jurisdiction of the Pre-University Education Department the uniform which is prescribed by the College Development Committees (in Government colleges), and Board of Management (in private schools). See para 203 for the abstraction.

stipulates that in the event the Board of Management did not prescribe any uniform, then students should wear clothes that are "in the interest of unity, equality and public order."[48]

Denial of entry, led the petitioner to challenge the constitutionality of the said government order in her writ petition before the High Court of Karnataka [49]The full bench consisting of three judges of the high court heard the matter at length and then eventually passed its orders on March 15, 2022, dismissing the writ petition. Appeal by special leave to appeal against the judgment of the high court, thus, came up before the Division Bench the Supreme Court. The Division Bench of the Supreme Court is deeply divided on the issue whether wearing of *hijab* as a religious symbol in addition to putting on the prescribed dress in a government educational institution is violative of the basic concept of secularism?

In the opinion of Justice Hemant Gupta, in the light of his own exposition the concept of 'secularism', the GO "is applicable to all citizens, [and] therefore, permitting one religious community to wear their religious symbols would be antithesis to secularism."[50]Accordingly, "the Government Order cannot be said to be against the ethic of secularism or to the objective of the Karnataka Education Act, 1983."[51]On the contrary, Justice Sudhanshu Dhulia is of the firm conviction that "[b]y asking the girls to take off their hijab before they enter the school gates, is first an invasion on their privacy, then it is an attack on their dignity, and then ultimately it is a denial to them of secular education."[52]Accordingly, the government order is "clearly violative of Article 19(1)(a), Article 21 and Article 25(1) of the Constitution of India,"[53] and, therefore, in his own judgment, "[t]here shall be no restriction on the wearing of hijab anywhere in schools and colleges in Karnataka."[54]

However, for our critical analysis of the deeply divided opinion in *Aishat Shifa*, we take the leading judgment of Hemant Gupta J., as the basis, primarily because the deviating judgment of Sudhanshu Dhulia J., emanates, in our own respectful reading, as a 'reactive response' to the judgment of Gupta J., which is, otherwise too, very elaborate inasmuch as he (Justice Gupta) "has recorded each

48 *Ibid.*

49 Initially the case came up before a single judge of the high court, who in turn, considering the importance of the issue involved, referred it to the chief justice for constituting a larger bench. A three-judge bench was, thus, constituted by the chief justice.

50 *Aishat Shifa*, para 195*, per* Hemant Gupta, J.

51 *Ibid.*

52 *Aishat Shifa,* para 278*, per* Sudhanshu Dhulia, J.

53 *Ibid*.

54 *Id*., para 279.

argument which was raised at the Bar before us in the long hearing of the case and he has given his findings on each of the issues."[55]

Resolving the conflict problem in the given fact matrix essentially involves the impingement of the two basic constitutional concepts; namely, concepts of the 'freedom of religion' and concept of the 'secular State.' In our comparative critique, we need to assess or evaluate their impingement in the given concrete situation. For this purpose, we need to raise the fundamental issue: Is the fundamental right to freedom of religion an anti-thesis of the imperatives of Secular State under the Indian Constitution? In other words, whether the fundamental right to freedom of religion is destructive or promotive of the requisites of the Secular State? For unfolding the genesis of impingement, we may first bear in mind the exposition of the two opposite conclusions.

The opinion of Gupta J., is that, since the government educational institution, unlike private schools and colleges, are essentially 'secular' in character, wearing of *hijab,* a religious symbol, amounts to distorting the value of secularism, and, therefore, doing so is not permissible in the exercise of fundamental right to freedom of religion. This stance is supported by adducing at least two reasons; one, *hijab* is not an essential attribute of Islam; two, no right under the Constitution is absolute and the State is permitted to regulate that right by imposing reasonable restrictions, and the prohibition of wearing *hijab*, in his view, is indeed a reasonable restriction.[56]

The other opinion, which is just the opposite of the first one, is that of Dhulia J., holding that the government order prohibiting the wearing of *hijab* along with wearing the prescribed dress, is an unreasonable restriction, for it "is, a matter of conscience, belief, and expression," and she should be allowed to continue to wear *hijab* "even inside her class room', as she had been doing earlier for the past one year without any objection, and "as it may be the only way her conservative family will permit her to go to school, and in those cases, her *hijab* is her ticket to education."[57] Since in the constitutional scheme of governance, two

55 See, *Aishat Shifa*, paras198 and 199, per Sudhanshu Dhulia, J. At the very outset of his judgment, Justice Sudhanshu Dhulia revealingly states that he "had the advantage of going through the judgment of Justice Hemant Gupta" in which he "has recorded each argument which was raised at the Bar before us in the long hearing of the case and he has given his findings on each of the issues." However, after the perusal of the otherwise "very well composed judgment" of Justice Gupta, Justice Dhulia candidly observes that he is "unable to agree with the decision of Justice Gupta." Being acutely conscious of the fact that "as far as possible, a Constitutional Court must speak in one voice," for "[s]plit verdicts and discordant notes do not resolve a dispute." Nevertheless, lamentingly he is rendering a "separate opinion" for no other reason than, to use the cryptic phraseology of Lord Akin, "...finality is a good thing, but Justice is better."Cited in *Ras Behari Lal* v. *The King-Emperor*, MANU/PR/0035/1933: AIR 1933 PC 208.

56 See, for instance, *Aishat Shifa,* para 104*, per* Hemant Gupta, J.

57 See, *Aishat Shifa*, para 275, per Sudhanshu Dhulia, J. While articulating his opinion, he, *inter alia*, said: "The question this Court would put before itself is also whether we are making the life of a girl child any better by denying her education merely because she wears a hijab!" *Id.*, para 276.

opposite opinions emanating from one the same set of provisions of the Constitution and in the same fact matrix cannot be countenanced, we may critically examine which one of these is in consonance with the constitutional values hitherto explored through the first principles of constitutional interpretation.

As a prelude to the exploration of the impingement of right to freedom of religion and the secular State, Justice Gupta has explored at the very outset "the ethos and principles of secularism adopted in the Constitution of India."[58] Cumulatively, these 'ethos and principles', which we simply term as 'imperatives of secular State', are of "wide amplitude" and "understood differently in different parts of the world."[59]

Under the Indian Constitution, the concept of secular State, which is inherent in the Constitution, is brought to the fore in the Preamble of the Constitution. By juxtaposing the term "Secular" in the expression "Sovereign Socialist Secular Democratic Republic",[60] the purpose seems to highlight the primacy of the value of secularism in the creation of new India, called Bharat.[61]

For deciphering the value of secularism under the Indian Constitution,[62] we need to construe in the first instance the meaning of the term "Secular". Its corresponding usage in the Hindi version of the Constitution was "dharma nirpeksh", which was later on replaced by "*panth nirpeksh*."[63] The difference between the two has been spelled out by Justice Gupta by stating that the meaning of the word '*Panth'* in the expression '*panth nirpeksh'* "symbolizes devotion towards any specific belief, way of worship or form of God," whereas the term 'Dharma' in the expression 'Dharmanirpeksh' "symbolizes absolute and eternal values which can never change, like the laws of nature."[64] "Dharma is what upholds,

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

59 *Ibid*.

60 Substituted by the Constitution (Forty-second Amendment) Act, 1976, s.2, for "*Sovereign Democratic Republic"* (*w.e.f.* Jan 3, 1977).

61 See Cl. (1) of Art. 1, defining the name and territory of the new India, that is Bharat, which shall be "a Union of States."

62 See, *Aishat Shifa,* para 3, *per* Hemant Gupta, J.: "The idea of secularism may have been borrowed in the Indian Constitution from the West; however, it has adopted its own unique brand based on its particular history and exigencies which are far distinct in many ways from secularism as defined and followed in European countries, the United States of America and Australia," citing *T.M.A. Pai Foundation* v. *State of Karnataka*, MANU/SC/0905/2002 : (2002) 8 SCC 481 (11 judges Bench).

63 According to the Hindi translation of the Constitution (Updated as of Nov. 9, 2015) available at the website of Ministry of Law and Justice (Legislative Department), the earlier translation of the word 'secular', implying 'dharma nirpeksh' is replaced with '*panth nirpeksh'*. See, www.thehindu.com/news/cities/mumbai/lost-in-translation-the-definition-of-secular/article8545307.e. (last

64 See, *Aishat Shifa,* para 4, per Hemant Gupta, J.

sustains and results in the well-being and upliftment of the *Praja* (citizens) and the society as a whole."[65]

For this elucidation of the concept of 'dharma', as distinct from the concept of 'panth', Justice Gupta drew support from the Division Bench judgment of the Supreme Court in *A.S. Narayana Deekshitulu* v. *State of A.P.*,[66]which quoted with approval the exposition of 'dharma' by Justice M. Rama Jois in his *Legal and Constitutional History of India.* The statement is to the following effect:[67]

> …it is most difficult to define Dharma. Dharma has been explained to be that which helps the upliftment of living beings. Therefore, that which ensures welfare (of living beings) is surely Dharma. The learned rishis have declared that which sustains is Dharma". This Court held that "when dharma is used in the context of duties of the individuals and powers of the King (the State), it means constitutional law (Rajadharma). Likewise, when it is said that Dharmarajya is necessary for the peace and prosperity of the people and for establishing an egalitarian society, the word dharma in the context of the word Rajya only means law, and Dharmarajya means Rule of law and not Rule of religion or a theocratic State". Any action, big or small, that is free from selfishness, is part of dharma. Thus, having love for all human beings is dharma. This Court held as under:
>
> 156. It is because of the above that if one were to ask "What are the signs and symptoms of dharma?", the answer is: that which has no room for narrow-mindedness, sectarianism, blind faith, and dogma. The purity of dharma, therefore, cannot be compromised with sectarianism. *A sectarian religion is open to a limited group of people whereas dharma embraces all and excludes none. This is the core of our dharma, our psyche.*[Emphasis supplied]
>
> 157. *Nothing further is required to bring home the distinction between religion and dharma; and so I say that the word 'religion' in Articles 25 and 26 has to be understood not in a narrow sectarian sense but encompassing our ethos of . Let us strive to achieve this; let us spread the message of our dharma by availing and taking advantage of the freedom guaranteed by Articles 25 and 26 of our Constitution.*[Emphasis supplied]

What light does this extracted extensive quote from the judgment of the Supreme Court in *A.S. Narayana Deekshitulu* throw in illuminating the concept of secular State under our Constitution, which is, in the phraseology of Hindi version of the Constitution, 'panth nirpeksh' and not 'dharm nirpeksh'? And that how the

65 *Ibid*.

66 MANU/SC/0455/1996: (1996) 9 SCC 548, *per* K. Ramaswamy and D.P. Wadhwa, JJ. Hereinafter, simply *A.S. Narayana.*

67 See, *Aishat Shifa,* para 5, *per* Hemant Gupta, J.

term 'religion' in the domain of 'right to freedom of religion' under Articles 25 and 26, needs to be construed 'not in a narrow sectarian sense" but in a wider sense 'encompassing' welfare of all? In this backdrop, we may review the concept of Secular State as hitherto developed under the Indian Constitution.

Generally speaking, the term 'secular' is considered connotative of the idea which is opposite to the "theocratic State" in which "the State either identifies itself with or favours any particular religion or religious sect or denomination."[68] On the contrary, 'the secular State', as under our Constitution, is "enjoined to accord *equal treatment to all religions and religious sects and denominations.*"[69] This statement implies that if the Secular State is promotive of '*all religions and religious sects and denominations',* then surely it cannot be termed as '*dharma-nirpeksh'* or religion-neutral, much less than anti-religion! Rather, it is emphatically stated in the 9-Judge Bench of the Supreme Court in *S.R. Bommai* that under the fundamental right to freedom of religion under Article 25(1) of the Constitution:[70]

> While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. *To it, all are equal and all are entitled to be treated equally*.[71]

How does the Secular State fulfill the objective of promoting 'all religions and religious sects and denomination' or providing "equal treatment" to all citizens irrespective of their different religious persuasions? This indeed is the critical question that was posed by the 9-Judge Bench of the Supreme Court in *S.R. Bommai* by asking*, "*How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes."[72] The answer inherent in the poser is that 'equal treatment' of all religions is not possible in a

68 See, the nine-Judge bench judgment of the Supreme Court in *S.R. Bommai* v. *Union of India*., MANU/SC/0444/1994: (1994) 3 SCC 1 (Para 146], cited in *Aishat Shifa,* para 9, per Hemant Gupta, J.

69 *Ibid.* [Emphasis is supplied].

70 *Id.*, para 304. [Emphasis is supplied]

71 See also *Santosh Kumar* v. *Secretary, Ministry of Human Resources Development* MANU/SC/0060/1995: (1994) 6 SCC 579, para 17: while considering whether the inclusion of Sanskrit in the syllabus of Central Board of Secondary Education as an elective subject would violate the principle of secularism, B.L. Hansaria, J. (for himself and Kuldip Singh, J.),quoted Justice H.R. Khanna by referring to his article 'The Spirit of Secularism' [as printed in *Secularism and India: Dilemmas and Challenges,* edited by MM Sankhdhar] to the effect:"secularism is neither anti-God nor pro-God; it treats alike the devout, the agonistic and the atheist. According to him, secularism is not antithesis of religious devoutness. He would like to dispel the impression that if a person is devout Hindu or devout Muslim he ceases to be secular. This is illustrated by saying that Vivenkanand and Gandhiji were the greatest Hindus yet their entire life and teachings embodied the essence of secularism" (para 17), cited in *Aishat Shifa,* para 10, *per* Hemant Gupta, J.

72 *Ibid.*

secular state if it were to adopt or follow like in a theocratic State preferring any one religion over another.

This led the nine-judge bench to pose the same question of providing "equal treatment" to all citizens irrespective of their different religious persuasions on a wider constitutional canvas: "How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements?"[73]

Seemingly, the emerging response at the first blush is that the secular State, in order to fulfill the "constitutional promises", is obliged to "eschew" the religious persuasions of a person "altogether"! However, with a little deeper consideration, the eventual response tends to be distinctly different: it would not be constitutionally justified to oust the fundamental right to freedom of religion under Article 25(1) of the Constitution so summarily![74] Such a construction is supported by the ultimate response of the nine-judge bench, when it summed up by observing:[75]

> Secularism is thus more than a passive attitude of religious tolerance. *It is a positive concept of equal treatment of all religions*. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality....

The exposition of 'positive concept of equal treatment of all religions' in *S.R. Bommai*, especially in the context of educational institutions in the secular State, is found in the S.B. Chavan Committee Report, 1999, which constituted the basis of The National Curriculum Framework for School Education published by National Council of Educational Research and Training. This report strongly recommended education about religions as an instrument of social cohesion and social and religious harmony. While upholding its constitutional legitimacy of the Report, the Supreme Court has held that "all religions" have to be treated with equal respect (*sarva dharma sambhav*) and that there has to be no discrimination on the ground of any religion (*panthnirapekshata*)."[76] By quoting the S.B. Chavan Committee's Report with approval, it is emphatically stated by the Supreme Court: "All students have to be made aware that the basic concept behind every religion is common, only the practices differ,"[77] and even if "there are differences of opinion in certain areas, people have to learn to coexist and carry no hatred against any

73 *Ibid*.

74 *See, supra,* note 8 and the accompanying text.

75 *S.R. Bommai,* para 304. Emphasis added.

76 See, *Aishat Shifa*, para 11, per Hemant Gupta, J., citing *Aruna Roy* v. *Union of India,* MANU/SC/1519/2002: (2002) 7 SCC 368, dwelling upon S.B. Chavan Committee Report, 1999.

77 *Id.*, *Aruna Roy* (para 29), *citing* S.B. Chavan Committee Report, 1999 (para 13).

religion."[78] Moreover, "if the basic tenets of all religions over the world are learnt, it cannot be said that secularism would not survive."[79]

This exposition of religion, in our view, truly represents the 'positive concept of equal treatment of all religions;'[80] that is, 'equal treatment' not just in terms of 'neutrality' or 'indifference' signifying 'negativity' or 'withdrawal' [bearing in mind Justice HR Khanna's statement, that "secularism is not antithesis of religious devoutness"], but something more by way of adding 'positive values' drawn from various religions. Consistently with this line of thinking, curtailment of the right to profess, practise and propagate religion conferred on the persons under Article 25(1) of the Constitution is a *limited one*: it is restricted under Article 25(2)(a) to "the making of a law in relation to economic, financial, political or other secular activities associated with the religious practice."[81]The limited jurisdiction of curtailment of the right to freedom of religion granted to the State, in effect, amounts to widening, rather than restricting, its ambit.[82]

Thus, evidently there are two distinct approaches to secularism: one is restrictive approach, in which there is a "*completely neutral* approach towards religion;" and the other is non-restrictive, called the "positive approach", wherein "the State believes and respects all religions, but does not favour any."[83] In the light of the foregoing analysis, it is clearly evident that in India, with 'multiple

78 *Ibid.*

79 *Id.,* S.B. Chavan Committee Report, 1999 (para 37).

80 The usage of the term 'positive' in jurisprudence is connotative of 'positive law', as we speak of it in Austin's analytical school of jurisprudence, the law made by State, the law made by man for man. It is in this sense, it has been expounded by the Supreme Court in *Aruna Roy*, when it stated in para 37*: "*Therefore, in our view, the word 'religion' should not be misunderstood nor contention could be raised that as it is used in the National Policy of Education, secularism would be at peril. On the contrary, let us have a secularistic democracy where even a very weak man hopes to prevail over a very strong man (having post, power or property) on the strength of Rule of law by proper understanding of duties towards the society. Value-based education is likely to help the nation to fight against all kinds of prevailing fanaticism, ill will, violence, dishonesty, corruption, exploitation and drug abuse…". Cited in *Aishat Shifa,* para 11 (*per* Hemant Gupta, J.)

81 See, T.M.A. Pai Foundation case, cited in *Aishat Shifa,* para 12 (per Hemant Gupta, J.). See also, Virendra Kumar "Minorities' Rights to Run Educational Institutions: *T.M.A. Pai Foundation* in Perspective," 45(2) *Journal of the Indian Law Institute* 200-238 (2003).

82 See*, supra*, note 8, in which the present author has raised and responded to the critical issue of relationship of art. 25 and art. 26 with respect to art. 14 and art. 15 of the Constitution – an issue which is now pending before the 9-Judge Bench of the Supreme Court.

83 See, *Aishat Shifa*, para 13*, per* Hemant Gupta, J. "Secularism can be practiced by adopting a *completely neutral* approach towards religion or by a *positive approach* wherein though the State believes and respects all religions, but does not favour any." Emphasis added.

religions, regions, faith, languages, food and clothing,' we have opted for *"positive concept of equal treatment of all religions.*"[84]

If granting "equal treatment of all religions" is the positive concept of secular State under the Constitution, then what is implication of the statement that in such a secular State, "religion cannot be mixed with any secular activity of the State," or such a mixing is "strictly prohibited."[85] What does it imply in the present context of *Aishat Shifa* case in which we are considering the proposition propounded by the nine-judge bench judgment of the Supreme Court in *S.R. Bommai* read with *MS Aruna Roy*?

All the State run or State sponsored educational institutions are manifestation of 'secular' activities of the State. All students, irrespective of their religion, race, caste, sex, or place of birth are entitled to take the benefit of secular education. State cannot deny admission to a student simply because he or she is carrying his or her personal religious belief, say, by wearing some symbol as an insignia of his or her belief, provided only if it does not create any ill-will or feeling of disaffection. A very clear statement as to meaning of 'secular State' is found in the Constituent assembly Debates when deliberating the draft of Article 25 it was forcefully stated that "in the affairs of the State the professing of any particular religion will not be taken into consideration at all."[86] Looked from this perspective, we may examine the constitutionality/legality of the Order passed by the Executive Government of the State of Karnataka on February 5, 2022on the subject: "Regarding a dress code for students of all schools and colleges of the state."[87]

Proceedings of the Government of Karnataka relating to the issuance of the Government Order on February 5, 2022, prohibiting the wearing of hijab (headscarf) as a religious symbol, reveals the following critical contours:[88]

(a) This Order has been passed by the Governor in pursuance of the Rule 11 of Karnataka Educational Institutions (Classification, Regulation, and

84 As articulated by nine-judge bench of the Supreme Court in *S.R. Bommai* (para 304) case, see below.

Cf. *Aishat Shifa*, para 13, per Hemant Gupta, J.: "….The positive meaning of secularism would be non-discrimination by the State on the basis of religious faith and practices." This statement seemingly is inconsistent with the preceding statement; namely, "Secularism thus means treating all religions equally, respecting all religions and protecting the practices of all religions."

85 See, the nine-Judge bench judgment of the Supreme Court in *S.R. Bommai.* v. *Union of India* MANU/SC/0444/1994: (1994) 3 SCC 1 (Para 148] [cited in H -9]. [See, *supra*] Similar statement has been made by Justice Hemant Gupta in *Aishat Shifa*, para 13: "Secularism, as adopted under our Constitution, is that religion cannot be intertwined with any of the secular activities of the State. Any encroachment of religion in the secular activities is not permissible."

86 See, the statement of Pandit Lakshmi Kanta Maitra, while considering the draft art. 19, which is now art. 25, Constituent Assembly Debate dated Dec.6, 1948, cited in *Aishat Shifa*, para 13, *per* Hemant Gupta, J.

87 For the translated copy of the Government Order dated 5.2.2022, see, *Aishat Shifa*, para 60, per Hemant Gupta, J.

88 See, *ibid.*

Prescription of Curricula, *etc.*) Rules, 1995, which permits every recognized educational institution of the State to "specify its own set of Uniform."[89]

(b) The avowed objective of such an Order is, *inter alia*, "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."[90]

(c) Wearing of hijab (a religious symbol) militates against "standardized learning experience" and it becomes "an obstacle to unity and uniformity in the schools and colleges."[91]

(d) Prohibition of wearing *hijab* is in "the larger public interest,"[92] and that such a prohibition "was not in violation of Article 25 of the Constitution."[93]

(e) Thus, the Government Order,[94]duly supported by the relevant statutory provisions and the Rules made thereunder and further fortified by the cited judicial precedents,[95] ordains that

89 Such uniform once specified under s. 11(1) of the Act "shall not be changed within the period of next five years." See, *ibid*.

90 Citing the provision of s. 7(2)(g)(v) of the Act of 1983. See, *ibid.* In fact, The Karnataka Education Act, 1983, under which the above Government Order has been issued, was enacted with a view "to foster the harmonious development of the mental and physical faculties of students and cultivate a scientific and secular outlook through education," cited *Aishat Shifa*, para 15, *per* Hemant Gupta, J.

91 See, *ibid:* It is stated in the preambulatory statement, "… 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."

92 Citing the judgment of the High Court of Kerala's ruling in W.P. (C) No. 35293/2018, date: 04-12-2018, which, in turn, in para 9, cites a ruling of the apex court in *Asha Renjan* v. *State of Bihar* [MANU/SC/0159/2017: (2017) 4 SCC 397], which accepted "the balance test when competing rights are involved and has taken a view that individual interest must yield to the larger public interest. Thus, conflict to competing rights can be resolved not by negating individual rights but by upholding larger right to remain, to hold such relationship between institution and students." See, *ibid*.

93 Citing the case of *Fatima Hussain Syed* v. *Bharat Education Society* (MANU/MH/0350/2002: AIR 2003 Bom 75), dealing with a similar incident regarding the dress code, when a controversy occurred at Kartik High School, Mumbai. "The Bombay High Court appraised the matter, and ruled that it was not a violation of Article 25 of the Constitution for the principal to prohibit the wearing of head scarf or head covering in the school." See also: the judgments of High Court of Madras, in *V. Kamalamma* v. *MGR Medical University*, *Tamil Nadu* (which upheld the modified dress code mandated by the university), and a similar issue in *Shri. M Venkatasubbarao Matriculation Higher Secondary School Staff Association* v. *M. Venkatasubbarao Matriculation Higher Secondary School,* MANU/TN/0106/2004: (2004) 2 MLJ 653 case. See, *ibid.*

94 GONo: EP14 SHH 2022 Bengaluru dated, Feb. 5, 2022. See, *ibid.*

95 It is somewhat intriguing that some of the referred judgments to support and sustain the legality of the government order dated Feb. 5, 2022 do not deal with the issue of wearing *hijab*, but still it is concluded that use of headscarf or a garment covering the head is not in violation of art. 25. See the argument raised before the Supreme Court on behalf of the appellants, see *Aishat Shifa*, para 31, *per* Hemant Gupta, J.

(i) "all the government schools in the state are mandated to abide by the official uniform;"[96] whereas "Private schools should mandate a uniform decided upon by their board of management."[97]

(ii) "In colleges that come under the pre-university education department's jurisdiction, the uniforms mandated by the College Development Committee, or the board of management, should be worn,"[98] and that "In the event that the management does mandate a uniform, students should wear clothes that are *in the interests of unity, equality and public order.*"[99](Emphasis supplied)

In view of the underlying reasons of the government order, as abstracted above, we need to examine the issue *de novo* by raising a couple of basic, fundamental, questions that directly and discretely enable us to answer the predicament of the petitioner. The petitioner is a young girl coming from an orthodox Muslim family, but aspiring to be benefitted by receiving secular education from the recognized government educational institution[100] without suppressing her religious identity.[101] Our probing concern, therefore, revolves around the central issue; namely, whether wearing of religious symbol along with the mandatorily prescribed uniform disturbs the secular character of the governmental educational

96 *Ibid.*

97 *Ibid*.

98 *Ibid.*

99 *Ibid*.

100 The recognized educational institution in terms of s. 2(30) of the Act means an educational institution recognized under the Act and includes one deemed to be recognized thereunder. The recognition of educational institutions is contemplated by s. 36 of the Act whereas the educational institutions established and run by the state government or by the authority sponsored by the Central or the state government or by a local authority and approved by the competent authority shall be deemed to be the educational institution recognized under the Act, cited in *Aishat Shifa*, para 53, *per* Hemant Gupta, J.

101 Hemant Gupta, J., instead of confining to the specific grounds on which the challenge to the Circular dated Feb.5, 2022 before the high court remained unsuccessful (see para 21), preferred to go on a wider constitutional canvas by identifying as many as eleven questions for consideration in the present appeals. These questions have been spelled out in para 23 of his judgment. However, a bare perusal of eleven questions cumulatively reveals the following pattern: Questions (i) and (ii) are preliminary in nature, inasmuch as, whether the instant appeals should be referred to Constitution Bench terms of art. 145(3) of the Constitution, and whether the state government could delegate its decision to implement the wearing of uniform to the designated authorities; Questions from (iii) to (xi) broadly reflect the scope and ambit of Article 25(1), and its impingement with or without other Fundamental Rights, Directive Principles of State Policy And Fundamental Duties under Articles 14, 15,19(1)(a), 21, 21A, 39(f), 41, 46 and 51A of the Constitution; and Question (xi) represents the summation of the petitioner's predicament in the form of an interrogative:"Whether the Government Order neither achieves any equitable access to education, nor serves the ethic of secularism, nor is true to the objective of the Karnataka Education Act." On the other hand, Sudhanshu Dhulia, J., in the background of analysis of the given fact matrix of the problematic case, preferred to focus specifically on the four issues emanating from the full bench decision of the high court for their decision-making, as spelled out in para 208 of his judgment.

institution?[102] Or, simply put, what is the placing or juxtaposition of the right to wear religious symbol in the secular set up of the State?

Granting that the right to fundamental right to freedom of religion under Article 25(1) read with fundamental rights under Articles 14, 19(1)(a) and 21 of the Constitution is not absolute, the State is empowered to regulate the exercise of fundamental right to freedom of religion to a limited extent by imposing only 'reasonable' restrictions. The question, therefore, that arises is: 'Is the Secular State in the exercise of *limited regulating power* empowered to eschew, deface or destroy religious diversities in the name of effecting uniformity? This is more so when there is no iota of evidence either of indiscipline, disorder, ill-will or disaffection caused by wearing religious symbol? Do we want to go in for the secular State bearing the complexion of 'unity in uniformity', or 'unity in diversity' in our Nation State, which is distinctly marked by plurality of culture, characterized by different religions, faiths, languages, modes of living, and so on.

Justice Gupta's view is that wearing of hijab along with putting on the prescribed dress is "objectionable," in inasmuch as the "the prescribed uniform" under the government order dated 5.2.2022 "necessarily excludes all religious symbols visible to naked eye."[103]What is the underlying rational for this stance?

The exclusion of a student from entering the portal of educational institution run by the State on ground of showing the "visible" religious identity, in Justice Gupta's view, is in contravention of the Government Order of February 5, 2022, which is held justified by stating:[104]

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

The whole thrust of the reason of exclusion is two-fold, One, permitting a student to wear religious symbol visibly militates against the 'secular environment' of the government school, which the impugned Order seeks to protect by enforcing "parity amongst the students in terms of uniform." Two, the government order is constitutionally justified, because it is "in tune with the right guaranteed Under Article 14 of the Constitution;" that is, the State is constitutionally empowered to debar a *hijab* wearing student from attending the secular school by imposing

102 See also, *Aishat Shifa*, para 28, per Hemant Gupta, J. for the centrality of the issue (though made slightly in the different context): "The issue in the present matter is however as to whether the students can enforce their religious beliefs in a secular institution."

103 However, if the religious symbol, such as Rudraksha or a Cross "worn by the students under his/her shirt cannot be said to be objectionable in terms of the Government Order issued." See, *Aishat Shifa*, para 87, *per* Hemant Gupta, J.

104 *Aishat Shifa*, para 54*, per* Hemant Gupta, J.

restrictions "on the freedom of religion and conscience" under Article 25(1) read with "other provisions of Part III", including particularly Article 14 of the Constitution.

We may examine both the reasons afresh, *de novo*, in the light of first principles of constitutional law, namely, by following the text of the Constitution as nearly as possible, and then see how that text has been construed bearing different hues and complexions in constitutional development that has hitherto taken place.

The first reason relates to the core value of secular State in India. In order to decipher, how and in what manner wearing of hijab distracts us from the 'secular environment', we may focus our attention on the values of secularism, adopted in our Constitution, which is stated to be distinct or different from that of the Western countries.[105] Where does lie the essence of secular State that seeks to unite people with different religions? Does it lie in establishing 'uniformity' by affecting their freedom of religion which is otherwise guaranteed to them under the Constitution? The constitutional strategy that has hitherto developed and come to the fore is to bring about 'unity in diversity', and not 'unity in uniformity'.[106] Freedom of conscience, thus, needs to be protected in deference to maintaining 'unity in diversity', and this value has been clearly recognized.[107] Moreover, for protecting the individual's right to 'freedom of conscience,' it is not at all required, much less than an imperative condition, that wearing of hijab should be proved as

105 See, *Aishat Shifa*, para 3, *per* Hemant Gupta, J.

106 See, *infra,* note dealing with Question VI

107 See the singular statement in *Aishat Shifa*, para 13, per Hemant Gupta, J.: "Secularism thus means treating all religions equally, respecting all religions and protecting the practices of all religions." This centrality is further reinforced by Justice Gupta in para 119: "Justice H.R. Khanna had quoted the statement of K. Santhanam in Kesavananda Bharati in respect of social revolution to get India out of the medievalism based on factors like birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education. I find that religion is not to be understood in a narrow sectarian sense but by encompassing our ethos that all should be treated alike [Sikhs??]. Secular State means rising above all differences of religions, and attempting to secure the good of all its citizens irrespective of their religious beliefs and practices. The faith or belief of a person is immaterial from the point of view of the State. For the State, all are equal and all are entitled to be treated equally. The Constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity cannot be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him. Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. Therefore, the object of the State is to bridge the gap between different Sections of the society and to harmonize the relationship between the citizens to ensure growth of community in all spheres i.e., social, economic and political."

an essential religious practice of Islam.[108] It is quite independent of any such prior-condition or restraints.

108 The formulation of Question Number(vii),'Whether, if the wearing of hijab is considered as an essential religious practice, the student can seek right to wear headscarf to a secular school as a matter of right', read with Question Number (iv), "What is the ambit and scope of essential religious practices Under Article 25 of the Constitution?", seems to give the impression that the right to freedom of conscience can be claimed only if it is proved to be an essential part, and not just a practice principle, of religion of the claimant. This is not required in the scheme of things as envisaged under Article 25(1), read with the provisions of Article 26. However, Justice Gupta has devoted considerable space in his judgment to respond to the two questions in paras 88 to 123. To wit, in para 106, it is *inter alia* stated: "… But I would examine the question that if the believers of the faith hold an opinion that wearing of hijab is an essential religious practice, the question is whether the students can seek to carry their religious beliefs and symbols to a secular school". "It is unnecessary in our view." Continuing in para 109, it is emphasized, *"Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection Under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."*[Emphasis added] On this count, the analogy of the Sikhs carrying kirpan was held to be inapplicable, see para 120, citing the Full Bench judgment of Punjab and Haryana High Court:

"The Appellants have also made a comparison with the rights of the followers of the Sikh faith by arguing that since Kirpan is allowed in terms of Explanation I to Article 25, therefore, the students who want to wear headscarf should be equally protected as in the case of the followers of the Sikh students. The Full Bench of the Punjab & Haryana High Court in *Gurleen Kaur and Ors. v. State of Punjab and Ors*. MANU/PH/0267/2009 held that the essential religious practice of the followers of Sikh faith includes *retaining hair unshorn*, which is one of the most important and fundamental tenets of the Sikh religion. The Full Bench of the high court held as under:

128... A perusal of explanation I Under Article 25 of the Constitution of India reveals, that wearing and carrying a "kirpan" by Sikhs is deemed to be included in the profession of the Sikh religion. During the course of examining historical facts, legislation on the 'Sikh religion', the "Sikh rehatmaryada". the "Sikh ardas" and the views of authors and scholars of the Sikh religion, we arrived at the conclusion *that wearing and carrying of "kirpans" though an important and significant aspect of the Sikh religion, is nowhere close to the importance and significance of maintaining hair unshorn.* If the Constitution of India itself recognizes wearing and carrying of "kirpans" as a part of the profession of the Sikh religion, we have no hesitation, whatsoever, to conclude that wearing hair unshorn must essentially be accepted as a fundamental requirement in the profession of the Sikh religion. For the present controversy, we hereby, accordingly, hold that retaining hair unshorn is one of the most important and fundamental tenets of the Sikh religion. In fact, it is undoubtedly a part of the religious consciousness of the Sikh faith."

A bare reading of this extracted paragraph from the full bench judgment of the high court betrays that "*wearing and carrying of 'kirpans' though an important and significant aspect of the Sikh religion, is nowhere close to the importance and significance of maintaining hair unshorn." It seems to imply that in Sikh religion, 'maintaining* hair unshorn' is an essential attribute, and not 'wearing kirpans'. Kirpan-wearing under the Constitution, thus, does not violate the freedom of conscience, not necessarily being an essential attribute of Sikh religion. And, therefore, wearing hijab cannot be prohibited on the analogy of wearing kirpan.

The second reason relates to the impact or impingement of the right to freedom of religion on the right to equality under Article 14 of the Constitution.[109] How to construe the right to freedom of religion under Article 25(1) with respect to Article 14 of the Constitution? This is born out from the very opening statement of Article 25, which makes this right subject to 'other provisions of Part III of the Constitution' along with 'public order, morality and health.'[110] The provisions of Part III of the Constitution indubitably include the fundamental right to equality under Article 14. What does this inclusion means? Elucidation on this count has been made by Justice Gupta:[111]

> 86. I need to examine the right to freedom of conscience and religion in light of the restrictions provided Under Article 25(1) of the Constitution. Such right is not just subject to public order, morality and health but also 'other provisions of Part III'. *This would also include Article 14 which provides for equality before law.* In T.M.A. Pai Foundation, this Court reiterated that Article 25(1) is not only subject to public order, morality and health, but also to other provisions of Part III of the Constitution. It was observed [in TMA Foundation case inpara 82] as under:
>
> Article 25 gives to all persons the freedom of conscience and the right to freely profess, practise and propagate religion. This right, however, is not absolute. The opening words of Article 25(1) make this right subject to public order, morality and health, and also to the other provisions of Part III of the Constitution. *This would mean that the right given to a person Under Article 25(1) can be curtailed or regulated if the exercise of that right would violate other provisions of Part III of the Constitution*, or if the exercise thereof is not in consonance with public order, morality and health. The general law made by the Government contains provisions relating to public order, morality and health; these would have to be complied with, and cannot be violated by any person in exercise of his freedom of conscience or his freedom to profess, practise and propagate religion. For example, a person cannot propagate his religion in such a manner as to denigrate another religion or bring about dissatisfaction amongst people."(Emphasis added)

109 This exposition is also in response to Question Number (iii), 'What is ambit and scope of the right to freedom of 'conscience' and 'religion' Under Article 25, read with Question Number (iv), 'What is the ambit and scope of essential religious practices Under Article 25 of the Constitution?'

110Article 25(1): "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

111 See, *Aishat Shifa*, para 86*, per* Hemant Gupta, J., citing in turn para 82 of T.M.A. Pai Foundation.

The crucial question in the context of hijab controversy, which still remains to be answered is this: when it is constitutionally stated that the exercise of the 'right to religion and freedom of conscience' under article 25(1) is made subject to the 'right to equality' under Article 14 of the Constitution, is it the same thing when the same 'right to religion and freedom of conscience' is made subject to 'public order, morality and health'? This question was squarely answered by the majority court in *Sabrimala Temple* case (2018)[112] by stating that in the order of 'priorities', the fundamental right to 'freedom of conscience' under article 25(1), permitting exclusion of menstruating women from entering the Sabrimala temple, is 'overridden' by the fundamental right to equality and non-discrimination under Articles 14 and 15.[113] In our respectful submission, this is not so, simply because in the scheme of Part III of the Constitution, there is no hierarchy amongst of Fundamental Rights, which prompts us to say that Fundamental Right to Freedom of Religion is subservient to the Fundamental Right to Equality and non-discrimination. This is what we found in our critique of *Sabrimala Temple case* (2018), presented in a Special Lecture at Panjab University 57th Colloquium held on August 27, 2019.[114] In this respect, we are supported by the following conclusion statement in the dissenting judgment of Justice Indu Malhotra in *Sabrimala Temple Entry case* (2018): "The equality doctrine enshrined Under article 14 does not override the Fundamental Right guaranteed by Article 25 to every individual to freely profess, practice and propagate their faith, in accordance with the tenets of their religion."[115] In our *Critique*, we spelled out the reason and the rationale for taking the view that we abstracted above. In this respect, our train of thoughts was as under:[116]

> If we intend to prefer and pursue the view supported by the minority court over that of the majority view, we are, then obliged to explore and identify, what is the basic flaw in the construction of Article 25(1) by the majority court on basis of the principle of hierarchy, such as 'priorities' and 'overriding', in the scheme of fundamental rights? On this count we decipher the following flaw: The majority court construction of the 'subject to' clause of Article 25(1) on the basis of hierarchy tends to obliterate the independent identity and autonomy of the fundamental right to "freedom of conscience",

112 *Indian Young Lawyers Association* v. *Th e State of Kerala*, [Writ Petition (Civil) No. 373 of 2006, decided on 28.09.2018], per Dipak Misra, C.J.I., A.M. Khanwilkar, Rohinton Fali Nariman, D.Y. Chandrachud and Indu Malhotra, JJ. [popularly known as *Sabarimala Temple* case (2018)]

113 See, for instance, the concurring judgment of Chandrachud, J. in *Sabarimala Temple* case (2018), para 291.

114 See, *supra*, note 8, the author's *Monograph*, presenting a critique of *Sabrimala Temple* case (2018).

115 See, id., *Sabarimala Temple case (2018),* per Indu Malhotra, J. (dissenting) at para 312 (ii).

116 See, author's *Monograph*, presenting a critique of *Sabrimala Temple* case (2018) at 20-22.

etc., which is guaranteed so openly and eloquently under the substantive provisions of the same Article of the Constitution.

How to overcome the basic flaw in the construction of the 'subject to' clause of Article 25(1) remains the crucial question? That is, how to construe or not to construe the 'subject to' clause in Article 25(1) of the Constitution so as to preserve the intrinsic value and autonomy of the fundamental right to 'freedom of religion,' consistently with the fundamental right to equality and non-discrimination in Part III of the Constitution?

In our view, the basic flaw could be remedied by recognizing that the 'subject to' clause of Article 25(1) bear two opposite proximate perspectives, what we may call, Positive and Negative perspectives.

Positive perspective: The 'subject to' clause of Article 25(1) permits that a person, in the exercise of his fundamental right to equality and non-discrimination under Articles 14 and 15, has the equal right to have the 'freedom of conscience' in like manner as pursed by 'others' under Article 25(1) of the Constitution; that is, by conforming to their religious tenets of belief, faith and worship.

Negative perspective: The 'subject to' clause of Article 25(1) does not permit that a person, in the exercise of his fundamental 'right to equality and non-discrimination' under Articles 14 and 15, has the right to deprive other(s) of their right to 'freedom of conscience' under Article 25(1) by violating their religious tenets of belief, faith and worship.

Conjoint consideration of Positive and Negative perspectives of the 'subject to' clause of Article 25(1): It enables us to preserve the independent identity and autonomy of the 'freedom of conscience' consistently with the exercise of fundamental right to 'equality and non-discrimination'. Thus, though seemingly the two perspectives are opposed to each other, as if mutually destructive; and yet, being the two opposite facets of the same coin of 'freedom of religion', they are essentially supportive of each other.

In our submission, it is the missing of this conjoint-consideration-perspective in *Sabrimala temple case* that has led the majority court to permit the petitioners, the young women of menstruating age, in the exercise of their right to equality and non-discrimination under Articles 14 and15 of the Constitution, to enter the Sabrimala temple. This, in turn, has resulted in depriving the devotees of the Sabrimala temple (respondents) of their right to 'freedom of conscience' under Article 25(1) of the Constitution. In short, permitting the petitioners to enter the Sabrimala temple is potentially destructive of the respondents' right to 'freedom of conscience'. It amounts to saying that not only I can have what you have, but I also have the right to

> deprive you of what you have in your own right! This is not simply permissible constitutionally, because, as we have emphasized earlier, there is no hierarchy between fundamental rights themselves, and, therefore, the right to equality and non-discrimination cannot override the right to freedom of religion. In other words, freedom of religion is not subservient to right to equality in this bizarre overriding sense. To emphasize again, if equality principle is understood to mean to say that you cannot have a faith or belief, which is contrary to that of mine, then the fundamental right to freedom of religion of each individual citizen is completely obliterated and lost.

Ambit of the right to 'freedom of religion' under article 25 is very wide. Freedom of conscience is of highest order of freedom. Fundamental right to privacy is its integral part, which is indeed "is the ultimate expression of the sanctity of the individual."[117] "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."[118] Right to freedom of religion, thus, "has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world."[119]

It also inheres within its ambit the fundamental right to freedom of speech and expression under Article 19(1)(a)and right to life and personal liberty under Article 21 of the Constitution. The prime reason for this widened ambit is the development that has taken place in constitutional law in which all the Fundamental Rights under Part III of the Constitution are considered to constitute "a bouquet

117 See Constitution Bench judgment of *K.S. Puttaswamy* case, *cited in Aishat Shifa*, para 144, *per* Hemant Gupta, J., in which privacy has been declared as fundamental right. See also, Virendra Kumar, "Dynamics of the 'Right to Privacy': Its characterization under the Indian Constitution" [A juridical critique of the nine-Judge Bench judgment of the Supreme Court in Justice K S Puttaswamy (Retd.) case (2017)] 61(1) *Journal of the Indian Law Institute* 68-96 (2019).

118 *Ibid.*

119 *Ibid.*

of rights*", and therefore, all* are to be "read together", "as a whole ", "in aid of each other," and not "in isolation."[120]

What is the implication of considering the right to freedom of religion under Article 25(1) in conjunction with the rights under Article 19(1)(a) and Article 21 of the Constitution? The 9-Judge Bench judgment in *I.R. Coelho*, which is cited in support of cumulative reading of all the fundamental rights together is that the protection granted under Article 25(1)(a) is "considerably widened." Logical corollary of the 'widened protection', therefore, is that the State power to curtail the right to freedom of religion stands 'considerably' reduced correspondingly. If that is so, it needs strict scrutiny, whether the Government Order prohibiting the wearing *hijab* infringers either directly or indirectly the right to 'freedom of religion' under Article 19(1)(a) as an expression of 'self-presentation',[121] or under Article 21

120 *Aishat Shifa*, para 143, *per* Hemant Gupta, J., citing in para 142 the unanimous nine-Judge Bench of the Supreme Court in *I.R. Coelho v. State of Tamil Nadu* MANU/SC/0562/1999: (1999) 7 SCC 580 [Para 60], to the effect that it can no longer be stated that protection provided by fundamental rights comes in isolated pools; on the contrary, these rights together provide a comprehensive guarantee against excesses by State authorities. This is so by observing that in post-Maneka Gandhi's case, "it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of state power in any area that occurs as an inevitable consequence." "The protection of fundamental rights has, therefore, been considerably widened." See also *id*., para 129, citing *Maneka Gandhi* v. *Union of India* MANU/SC/0133/1978: (1978) 1 SCC 248, in which it was held by the Supreme Court that even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some Clause of that article, if it is an integral part of a named fundamental right. It was observed that "....be that as it may, the law is now settled, as I apprehend it, that no Article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached."

121 See, *id.*, para 130, *National Legal Services Authority*, para 69, in which the Supreme Court has held that

"Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender." "The self-identified gender can be expressed through dress, words, action or behaviour or any other form." And that "[n]o restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution."

as an expression of 'dignity of the individual'.[122] This means, the government order has to pass the test of "reasonableness" under both the Articles as well.

If "[t]he intent and object of the Government Order is only to maintain uniformity amongst the students by adherence to the prescribed uniform,"[123]we need to examine closely how the denial of wearing hijab brings about 'uniformity,' and whether such a measure of effecting uniformity is promotive of unity and harmony in our multi-religious society?

In the opinion of Gupta. J., "the right of freedom of expression Under Article 19(1)(a) and of privacy Under Article 21 are complementary to each other and not mutually exclusive and *does meet the injunction of reasonableness for the purposes of Article 21 and Article 14*."[124] On this count, as we have concluded earlier, such a holding is contrary to the singular objective of the Constitution, which is unarguably is to maintain 'unity in diversity' and not 'unity in uniformity.'[125] This plea is powerfully reinforced in *St. Stephen's College* v. *University of Delhi,*[126] wherein the Constitution Bench of the Supreme Court has, *inter alia*, observed:[127]

> It may not be conducive to have a relatively homogeneous society. It may lead to religious bigotry which is the bane of mankind. In the nation building with secular character sectarian schools or colleges, segregated faculties or universities for imparting general secular

122 See, *id.*, para 131, citing *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra* MANU/SC/0612/2015 : (2015) 6 SCC 1, wherein the Supreme Court quoted with approval Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : (1978) 1 SCC 248, para 5 to emphasize: "The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction," and that (citing *Rustom Cawasjee Cooper* v. *Union of India*, MANU/SC/0074/1970 : (1970) 2 SCC 298) "it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that Article and Article 19(1)."See also*, id.,* para 132*,* citing *Navtej Singh Johar* v. *Union of India,* MANU/SC/0947/2018: (2018) 10 SCC 1 (para 641.2) holding that 'the right to wear a particular clothing emerges from the right of dignity enshrined Under Article 21 of the Constitution.' In this backdrop, wearing a religious mark is indeed a symbolic expression of one's own identity under Article 19(1)(a), and preservation of self-dignity of a person under Article 21 of the Constitution. Any restraint on these rights must pass the test of "reasonableness."

123 *Aishat Shifa*, para 144*, per* Hemant Gupta, J.[Emphasis added]

124 *Ibid*. Emphasis added.

125 The government order banning wearing of hijab is not a reasonable restriction as it is violative of Article 14, because the very basis of denial, namely the wearing of religious symbol (hijab), even in relation to the prescribed dress, does not have a rational nexus with the object sought to be achieved; it does not create neither disunity, inequality or public disorder, and therefore is not covered under Article 19(2). And there is no evidence on record showing that wearing of hijab has caused, likely to cause, any public disorder or disturbance.

126 MANU/SC/0319/1992: (1992) 1 SCC 558, per M.H. Kania, K.J. Shetty, N.M. Kasliwal, M. Fathima Beevi, Y. Dayal, JJ., cited in *Aishat Shifa*, para 132, *per* Hemant Gupta, J. (Hereinafter, *St. Stephen's College)*

127 *St. Stephen's College*, *id*., para 81. (Emphasis added)

> education are undesirable and they may undermine secular democracy. They would be inconsistent with the central concept of secularism and equality embedded in the Constitution. Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life. The students and teachers are the critical ingredients. It is there they develop respect for, and tolerance of, the cultures and beliefs of others. *It is essential therefore, that there should be proper mix of students of different communities in all educational institutions*.

In this backdrop, exclusion of students by reason of their wearing a religious mark, which is indeed a symbolic expression of one's own identity under Article 19(1)(a), and preservation of self-dignity of a person under Article 21 of the Constitution, is just counter-productive: it militates against the natural mix of students of different communities, and that too in educational institutions that are proclaimed to be secular.

We may also address to the lingering question, whether our constitutional objective is to create 'unity in diversity' or 'unity in uniformity'. The answer to this question is implicit in the very Preamble of the Constitution. The emerging answer is that we wish to create an inclusive society (read for 'fraternity') in the secular State by "assuring the dignity of the individual and unity and integrity of the Nation." Unarguably, it ordains the strategy of establishing fraternity or inclusive society through the unique concept of 'unity in diversity' by assuring the dignity of the individual.

In this backdrop, the legitimacy of the question, whether the GO, banning the wearing hijab, is promotive of 'fraternity' and 'dignity' of the individual as envisaged in the Preamble of our Constitution. Gupta J., has examined this question even on a larger canvass by including within the ambit of his enquiry, whether the said GO also offends the fundamental duties enumerated Under Article 51-A Sub-clauses (e) and (f) of the Constitution?[128]

Justice Gupta's steadfast view is that wearing of *hijab*, as an addition to the prescribed code of dress, nullifies its very objective of bringing uniformity.[129] It would breed indiscipline.[130] In his view, "The freedom of expression guaranteed Under Article 19(1)(a) does not extend to the wearing of headscarf."[131] "Once the uniform is prescribed, all students are bound to follow the uniform so prescribed."[132]

128 See Question Number (vi) in *Aishat Shifa*, para 23, per Hemant Gupta, J.: "Whether the Government Order impinges upon Constitutional promise of fraternity and dignity under the Preamble as well as fundamental duties enumerated Under Article 51-A Sub-clauses (e) and (f)?"

129 See, *Aishat Shifa*, para 162, *per* Hemant Gupta, J.: "The uniform prescribed would lose its meaning if the student is permitted to add or subtract any part of uniform."

130 See, *id.*: "If, the norms of the uniform in the school are permitted to be breached, then what kind of discipline is sought to imparted to the students."

131 *Ibid.*

132 *Ibid*.

Uniformity through prescribed dress code is desiderated in his view:"The uniform is to assimilate the students without any distinction of rich or poor, irrespective of caste, creed or faith and for the harmonious development of the mental and physical faculties of the students and to cultivate a secular outlook."[133]Again, the very "objective behind a uniform," is "to bring about uniformity in appearances;"[134] "the students should look alike, feel alike, think alike and study together in a cohesive cordial atmosphere."[135]

However, such a stipulation is limited to the four-walls of the secular State educational institutions: "The wearing of hijab is not permitted only during the school time, therefore, the students can wear it everywhere else except in schools.[136]"The wearing of anything other than the uniform is not expected in schools run by the State as a secular institution,"[137] and that "In a secular school maintained at the cost of the State, the State is competent to not permit anything other than the uniform."[138] "The students are at liberty to carry their religious symbols outside the schools, but in pre-university college the students should look alike, feel alike, think alike and study together in a cohesive cordial atmosphere."[139] "That is the objective behind a uniform, so as to bring about uniformity in appearances."[140]

So far as the issue of 'dignity' of the individual, as presaged in the Preamble, is concerned, Justice Gupta meets this challenge by simply stating: "The argument that the wearing of a headscarf provides dignity to the girl students is also not tenable,"[141] inasmuch as the students (petitioners) in the given fact matrix of the case "are attending an all-girls' college."[142]

Moreover, we also need to notice, how another issue, whether *hijab* prohibition government orderalso offends the fundamental duties enumerated Under Article 51-A Sub-clauses (e) and (f)of the Constitution[143] has been dealt with?

Sub-clauses (e) and (f) of Article 51-A, providing for fundamental duties, may be extracted as under for their due evaluation in terms of government order:

133 *Ibid*

134 *Aishat Shifa,* para 163.

135 *Ibid*.

136 *Aishat Shifa*, para 162.

137 *Ibid.*

138 *Ibid.*

139 *Id.*, para 163.

140 *Ibid*.

141 *Ibid*.

142 *Ibid.*

143 See, Question Number (vi) in *Aishat Shifa*, para 23, *per* Hemant Gupta, J.: "Whether the Government Order impinges upon Constitutional promise of fraternity and dignity under the Preamble as well as fundamental duties enumerated Under Article 51-A Sub-clauses (e) and (f)?"?

> 51A. Fundamental duties.- It shall be the duty of every citizen 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.

The issue, whether hijab prohibition government order also offends the fundamental duties as enumerated above can be pursued notwithstanding the said prohibition order. Gupta J., has dismissed this issue by simply stating: "The freedom of expression guaranteed Under Article 19(1)(a) does not extend to the wearing of headscarf."[144]

In the light of the above, the thrust of whole reasoning is that uniformity through the wearing of the prescribed uniform without any deviations whatsoever results in establishing 'fraternity', as it would make students "look alike, feel alike, think alike" while staying within the premises of the State supported or State run secular educational institutions, and that there is at all no issue of 'dignity' of the girls studying in 'an all-girls' college. Nor the students are allowed to carry with them the "freedom of expression" guaranteed to them under Article 19(1)(a), as the same is not allowed to them in the matter of "wearing of headscarf." In sum, the essence of the secular State lies in establishing 'fraternity' by vigorously pursuing 'uniformity' through prescribed uniform, and not through 'diversity' by deviating from the same dress code.

However, if the stance that the objective of the Government Order is to promote 'uniformity' even at the cast of sacrificing 'diversity' is legitimate, then it clearly runs counter to the tenets hitherto established, through the catena of judicial precedents.[145] Stated principally, 'Fraternity' is proclaimed as a "Preambulatory promise;" "it is a constitutional duty to promote fraternity assuring the dignity of the individual;" it is recognized as "a constitutional norm and a precept;" and that "it must be understood in the breed of homogeneity in a positive sense and not to trample dissent and diversity."[146]

We may now engage ourselves in responding to the basic question, whether wearing hijab distracts from 'unity, equality and public order', which indeed is the singular objective of prescribing the dress code?[147] We consider this question 'basic' or 'fundamental' as it arises from the government order itself, which was

144 *Aishat Shifa*, para 162, *per* Hemant Gupta, J.

145 See, *supra,* constitution bench judgments, such as *St. Stephen's College* v. *University of Delhi*.

146 *Subramanian Swamy* v. *Union of India, Ministry of Law* MANU/SC/0621/2016: (2016) 7 SCC 221 (Paras 153, 156), cited in *Aishat Shifa*, para 147*, per* Hemant Gupta, J.

147 This main question emerges from the crystallization of fact matrix by Justice Sudhanshu Dhulia: *Aishat Shifa*, para 204, *per* Sudhanshu Dhulia, J.

passed under the relevant Rule. The statement to this effect may be extracted as under:

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

A bare perusal of this statement cumulatively reveals that the prescribed dress code under the government order is principally defined in terms of the three related 'objectives'; namely, "unity, equality and public order," which are sought to be achieved through the prescription Order. Dhulia J., aptly describes this order as "an innocuous order, which is religion neutral,"[148] because it "only directs the school authorities of respective schools to prescribe a school uniform."[149] The connotative critical question that arises for consideration, therefore, is: wearing of hijab, which is admittedly not a part of the prescribed dress code, if supposedly worn along with prescribed code of dress, does that distract from the pronounced objectives of "unity, equality and public order"?

On perusal of the fact matrix of *Aishat Shifa,* we heard no murmur of any public disorder hitherto caused by wearing of hijab in the school. This leaves us to examine, if the objectives of 'unity and equality' are distorted in any manner by allowing hijab wearing. To answer this question, we need to bear in mind Dr. Ambedkar's classical exposition of 'Liberty, Equality, Fraternity' in the Constituent Assembly Debates, wherein he emphasized the inherent integrity of these three concepts, which go to make 'social democracy'. His argumentation may be extracted as under:[150]

> … 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

148 *Aishat Shifa*, para 207, *per* Sudhanshu Dhulia, J.

149 See, *Aishat Shifa*, para 207, *per* Sudhanshu Dhulia, J.

150 For Ambedkar's speech in the Constituent Assembly on Nov. 25, 1949, see *Constituent Assembly Debates*, Volume XI, 979 (1949), cited in *Aishat Shifa*, para 57, *per* Hemant Gupta, J.

> liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things.

In the exposition of the objectives of 'unity and equality' in the light of Dr Ambedkar's elucidation, the very objective of 'unity' (to be read as 'fraternity' or inclusive society – the prime objective of the constitutional system of governance) in a multi-religious social order cannot be attained without at the same time granting 'liberty' and 'equality' together [freedom of conscience and religion to all, by assuring the dignity of each individual). Pursuant to this logical progression of thought, prohibition of hijab by the GO militates its own set objectives. The GO, therefore, needs to be rescinded at least to the extent to which it prohibits the wearing of hijab. That would lead us to establish a social order premised on the principle of 'unity in diversity' instead of 'unity in uniformity'. That would meaningfully fulfil the constitutional mandate of protecting the right "to conserve cultural and educational rights" under Article 29.Clause (1) of Article 29, dealing specifically with the protection of interests of minorities, empowers "any section of the citizens" of India to conserve their "distinct language, script or culture"[151], and further stipulates in Clause (2)that no citizen "shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

In view of the express constitutional stipulation that in no educational institution "maintained by the State or receiving aid out of State funds", a student shall be denied to conserve his cultural identity, it would not be right to say that "[t]hereligious belief cannot be carried to a secular school maintained out of State funds,"[152] and that "[i]t is open to the students to carry their faith in a school which permits them to wear Hijab or any other mark, may be tilak, which can be identified to a person holding a particular religious belief but the State is within its jurisdiction to direct that the apparent symbols of religious beliefs cannot be carried to school maintained by the State from the State funds."[153] The constitutionality of such a plea becomes instantly suspect.

Our summations:

The main purpose of prescribing uniform in educational institutions, as spelled out in in the fact matrix of the instant case, is to promote 'unity, equality, and public order'. However, in a multi-cultural democratic society, this three-fold objective can be attained only by preserving, and not destroying, diversity. This is most resolutely reflected in Dr Ambedkar's exposition on inter-se relationship of Liberty, Equality. Fraternity. It very eloquently reveals, how the cherished objective of unity, described in 'Preambulatory promise' as 'Fraternity', is required to be

151 Art. 29 cl. (1) dealing specifically with the protection of interests of minorities provides: "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same."

152 *Aishat Shifa*, para 123, *per* Hemant Gupta, J.

153 On the basis of this reasoning, Gupta J has concluded: "Thus, the practice of wearing hijab could be restricted by the State in terms of the Government Order." *Ibid.*

fulfilled. Assuredly, it cannot be achieved by destroying diversity in the name of uniformity, which is the hallmark of Indian culture.

In the constitutional scheme of things, the strategies to bring about 'unity in diversity' are well laid down in the frame of Fundamental Rights in Part III read with Directive Principles of State Policy in Part IV and Fundamental Duties in Part IVA of the Constitution. In the instant case, the essence of the conflict problem is, how to interpret the 'freedom of religion' under Article 25(1) of the Constitution that guarantees to "all persons" "equally" "freedom of conscience and the right freely to profess, practice, and propagate religion", and that what is its juxtaposition with respect to "other" Fundamental Rights enunciated in Part III of the Constitution. For the authoritative pronouncement on this knotty issue, the matter is presently pending before the 9-Judge Bench of the Supreme Court. The reference on this count arose somewhat in a piqued situation in *Sabrimala Temple* case in 2018, in which, while considering review petitions, the five-Judge Constitution Bench, in a split opinion, referred the matter to seven-judge bench, which, in turn, unanimously referred the same to nine-Judge Bench of the Supreme Court. May be quite incidentally, fortunately for me perhaps, I have not only raised (as if in anticipation of the Supreme Court Constitution Bench reference!), but also responded in adequate measure, this very baffling issue earlier than the reference by the five-Judge Constitution Bench to seven-judge bench, and then eventually to nine-judge bench. Since the nine-judge bench decision on this issue is still awaited, it would be in order, nay imperative, to show, how did we explore the relationship of right to freedom of religion with respect to other fundamental rights, including particularly the right to equality and non-discrimination under Articles 14 and 15 of the Constitution. Sharing our analysis on this count, as we have done briefly,[154] would enable us to resolve the riddle in the fact matrix of the present case.

In *Aishat Shifa* case, the government order, prohibiting the wearing of *hijab* by Muslim Girls in the State sponsored secular college in the State of Karnataka, has been held constitutional by Hemant Gupta J., on the ground that allowing the private and personal religious practice in the public secular educational institution would amount to violation of the principle of equality under Article 14 of the Constitution, and thereby distorting the whole concept of secularism. Here in this context it needs emphasis to state that it is not the objective of prescribing the wearing the uniform in educational institutions (in terms of 'unity, equality and public order), both in public and private, which is bad; it is the superimposed condition of banning *hijab* (a symbol of preserving personal identity and freedom of religion) along with wearing the prescribed uniform, which is seriously suspected and becomes the point of real contention.

Almost a very similar case of identity crises in terms of religious belief came up before the Supreme Court Division Bench in *Bijoe Emmanuel* v. *State of*

154 See, *supra*, note 8 (author's *Monograph*, presenting a critique of *Sabrimala Temple* case (2018).

Kerala[155] in 1986.On facts*, in* that case three Christian children, including the petitioner Bijoe, studying in a school in the State of Kerala were expelled from school after they refused to sing the National Anthem of India, although they respectfully stood in the assembly when the National Anthem was being sung. This they did because their parents advised them to do so, as it was against their religious beliefs in Jehovah's Witnesses.[156] Their expulsion was challenged before the High Court of Kerala, which was dismissed on the ground that no word or thought in the national anthem could offend any religious beliefs.[157]On special leave to appeal under Article 136, the high court judgment was reversed by the Supreme Court by holding that expelling the children based on their "conscientiously held religious faith" violated their constitutional rights to freedom of expression and freedom of religion, and thus ordered the school authorities to readmit the children.

The intent and import of freedom of religion, as spelled out by the Supreme Court through the Bench of Justice O. Chinnappa Reddy in *Bijoe Emmanuel,* is that "Article 25 is an Article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution,"[158] and that "This has to be borne in mind in interpreting Article 25."[159] The reactive response of Justice Gupta to this extracted intent and import of Article 25 of the Constitution in relation to the fact matrix of *Aishat Shifa* case is:[160]

> In the said case (of *Bijoe Emmanuel)*, the circular of the State Government dated 18.2.1970 was in question mandating that *all schools in the State* shall have morning assembly and that the whole school shall sing National Anthem in the assembly. *The circular was not restricted to secular schools only but to all schools.* The said judgment is of no help to the arguments raised *as it does not deal with secular schools only.*[Emphasis added]

With a view to apply the principle enunciated by Chennappa J in Bijoe Emmanuel to the fact matrix of Aishat Shifa, Gupta J., has drawn the distinction between the circular of the State Government of Kerala, dated February 18, 1970, expelling students from the school for their refusal to sing the National Anthem with the circular of the State Government of Karnataka, dated February 5, 2022, banning entry of *hiajb* wearing girl students in secular schools. The point of

155 MANU/SC/0061/1986: (1986) 3 SCC 615, per O. Chinnappa Reddy and M.M. Dutt, JJ. Cited in *Aishat Shifa*, para 114*, per* Hemant Gupta, J.

156 Most of the people who belong to Jehovah's Witnesses do not sing any other Anthem, as doing so is considered by them an act of unfaithfulness to their only God, Jehovah, and they worship only Jehovah-the Creator - and none other.

157 First by a single judge and then a Division Bench of the High Court of Karnataka rejected the prayer of the appellants.

158 As extracted in *Aishat Shifa*, para 114, *per* Hemant Gupta, J.

159 *Ibid*.

160 *Ibid*.

distinction is that Kerala Circular applies to "all schools"; whereas Karnataka Circular applies only to secular (public) schools. Such a distinction, in our view, seems to be invidious and inequitable at least for the following three reasons:

> (i) The Kerala circular covering 'all schools' is of wider import, and, thus, covers the secular schools as well.
>
> (ii) The Kerala circular is annulled, because it violated the rights to freedom of expression and freedom of religion so clearly expressed in Articles 19(1)(a) and 25(1)(a), of the Constitution, and, therefore, not applying the emanating principle to the state sponsored Schools is by itself constitutionally anomalous.
>
> (iii) The Karnataka Circular, if construed in terms of the principle emerging from the annulment of the of Kerala Circular, tends to promote religious intolerance, which is in contradiction of the summation so succinctly made by Justice Chennappa Reddy: "Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance; allow us to not dilute it."

Thus, in multi-cultural societies, students should be taught to acknowledge, accept and respect diversities by cultivating the spirit of tolerance, else freedom of conscience and right to religion as constitutional values have little meaning. In *Aishat Shifa* case, there is neither any breach of school discipline, nor violation of the principle of equality, because the girl students have not refused to wear the prescribed school dress while wearing hijab as well exactly in the same manner as in *Bijoe Emmanuel* the students haven't refused to stand up as a mark of respect to the National Anthem along with other students while refusing to sing the same as mark of one's own religion. Thus, the wearing hijab did not amount "to subjugate their freedom of choice of dress to be regulated by religion than by the State while they are in fact students of a state school."[161]Nor did it constitute any 'breach' of the principle of equality by the State in permitting the Muslim girl students to wear hijab.[162]

In our conclusions, we may also turn to the core value objective underlying the prescription of dress code through the government order. It is firmly is stated to be the promotion of 'unity, equality and public order.' The cumulative purpose of all the three attributes is to create an inclusive social order, which is termed 'fraternity' in the Preambulatory statement. This objective is comprehensive in character: It is studiously informed by Justice, Liberty, and Equality; it is to be achieved by assuring the dignity of the individual and unity and integrity of the

161 *Aishat Shifa*, para 116, *per* Hemant Gupta, J. While examining whether wearing hijab constituted an essential practice in Islam, it was stated in conclusion: "The claim of the Appellants is not to perform a religious activity in a religious institution but to wear headscarf in public place as a matter of social conduct expected from the believers of the faith."

162 *Cf.* the statement: "The equality before law is to treat all citizens equally, irrespective of caste, creed, sex or place of birth. Such equality cannot be breached by the State on the basis of religious faith." *Ibid*.

Nation. Bearing this preambulatory objective in mind, we would like to create unity of minds, in which, using the language of statutory provision, "all the school students studying in Karnataka should behave in a fraternal manner, transcend their group identity and develop an orientation towards social justice."[163] The route to create unity through 'uniform', in the scheme of Nature, is neither possible nor even desirable. We apply the principle of equality only through the strategy of classification, which accommodates diversities of all sorts, and at the same time guarantying the dignity of each individual. Prohibition of hijab tends to nullify this very objective, both substantively and procedurally. Though it may seem ironic, isn't the State of Karnataka through government order of February 5, 2022 in denying admission to hijab wearing students 'mixing secular activity with religion', which is 'strictly prohibited'!

The right to religion and freedom of conscience instantly impinges upon other rights, and proximity of this right could be traced and located into the arena of Culture (Articles 29 and 51-A(f)), Identity (Articles 19), Autonomy, Dignity, and Choice (Articles 21). The students in *Aishat Shifa,* therefore, have been wrongly denied admission to an educational institution on the basis of religion. The contention of the students is that by denying the right to wear headscarf, they have also been denied to attend the classes which stand foul with the mandate of clause (2) of article 29.

Approach of Dhulia J., is distinctly different, and, in our view, this is as it should be while dealing with an issue of constitutional import. This we say, as the prime function of the Constitutional Court is not just to decide the *lis,* but to expound and explore the principle underlying the Constitution, which are not only relevant to the resolution of the conflict problem in hand, but, more importantly, are of futuristic import, what Chandrachud J., said, "beyond the vicissitude of time"[164] In this respect, the distinctive feature is to identify the central issue that calls for determination in the given fact matrix of the case. This is imperative because then alone, in the tradition of common law, the apex court would be able move ahead of the existing position as manned or reflected in the past precedents. This, of course, is relatively a difficult exercise: as it imposes a burden on the highest court to undertake differential analysis in the first instance, showing how and in what manner the present case is different, and that why and how the ratio of those precedents are to be applied. This is how the constitutional development takes place through interpretative processes. This is what Dhulia J., has demonstrated in *Aishat Shifa* case.

Centrality of the issue to be decided by the constitutional court is, whether the government order, prohibiting the wearing of hijab while attending the secular educational institution passes the constitutional muster; that is, whether government order had violated the fundamental rights of the petitioner as provided

163 Citing specifically the provision of s. 7(2)(g)(v) of the Act of 1983.
164 See, *infra*, note 410 and the accompanying text.

under Article the19 and 25 of the Constitution?[165] However, may be owing to the wrong pleadings, the centrality of the issue shifted to the question, whether "wearing of hijab forms a core belief in the religion of Islam."[166] This question, indeed, became the central issue of "crucial" concern before the Full Bench of the High Court Karnataka, which formulated four questions for their consideration,[167] This is so, because "[e]verything depended on the determination on this question."[168] This was "a very tall order for the Petitioners to prove,"[169] and since they couldn't prove, the matter ended there and that prompted the high court to hold:[170]

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

The impact of this holding is far reaching in the development of constitutional law. We see it at least in two ways. One, that there cannot be an infraction of the fundamental right to freedom of conscience and the right to profess, practice, and propagate religion, unless the petitioner proves that "wearing hijab is an inviolable religious practice in Islam and much less a part of 'essential religious practice'..." In other words, such a requisite, *ipso facto*, becomes a condition precedent in claims of protection of fundamental rights. Two, such a holding also forecloses the opportunity for further exploration of constitutional values in all such cases of infraction of fundamental freedom, as is evident from the observation of the Full Bench of the high court: "It hardly needs to be stated that if Essential Religious Practice [ERP] as a threshold requirement is not satisfied then the case would by extension not travel to the merits surrounding the domain of those Constitutional

165 See, *Aishat Shifa*, para 210*, per* Sudhanshu Dhulia, J.: Although the G.O has the force of law, as it draws its source from the statue and the statutory rules, nevertheless, "the fact remains that it still has to pass muster the provisions of Articles 19 and 25 of the Constitution."

166 *Id.*, para 211.

167 See, *id.*, para 208 (*per* Sudhanshu Dhulia, J).

168 *Ibid*. Out of the four questions formulated by the High Court of Karnataka, this question "is in fact the crucial one."

169 *Ibid.*

170 *Ibid,* extracting the holding of the high court.

Values."[171] This very stand has been affirmed by Gupta J., in his judgment in *Aishat Shifa*.[172]

Justice Dhulia, on the other hand, makes a distinct departure from giving primacy to Essential Religious Practices [ERP]-approach. Instead, it seems, realizing that he himself is an integral part of the constitutional court, he feels constitutionally duty-bound to explore the conflict problem in *Aishat Shifa* from a different constitutional perspective.[173]From this perspective, he begins by examining the contours of the right to freedom of conscience *et al* under Article 25(1), on which the claim of the petitioner(s) is constitutionally founded. To quote Justice Dhulia:[174]

> In my opinion, the question of Essential Religious Practices, which we have also referred in this judgment as ERP, was not at all relevant in the determination of the dispute before the Court. I say this because when protection is sought Under Article 25(1) of the Constitution of India, as is being done in the present case, it is not required for an individual to establish that what he or she asserts is an ERP. It may simply be any religious practice, a matter of faith or conscience! Yes, what is asserted as a Right should not go against 'public order, morality and health' and of course, it is subject to other provisions of Part III of the Constitution.

If ERP-issue was not relevant for the resolution of the problem in *Aishat Shifa*, why then did it become the central concern first of the Full Bench of the High Court and then continued to be so before the Supreme Court in the instant case?[175]Justice Dhulia's prognosis reveals two reasons. Before the full bench of the high court, it was the petitioner(s) who specifically had raised this question, and the Bench had no option but to respond to that question. To quote Dhulia J., on this count:[176]

> *Partly,* the Petitioners had to be blamed for the course taken by the Court as it was indeed the Petitioners or some of the Petitioners who had claimed that wearing of hijab is an essential practice in Islam. ... the Petitioners before the Karnataka High Court had no choice as they were, inter alia, attacking the Government Order dated 5 February 2022, which clearly stated that prohibiting hijab in schools will not

171 *Ibid*.

172 See, *supra*, in the judgment of Hemant Gupta, J.

173 See also, supra, Part I: "Introductory", the very objective of the apex court is not just to decide the list between the parties before it, but to enunciate basic constitutional principles with a futuristic perspective.

174 *Aishat Shifa*, para 213, *per* Sudhanshu Dhulia, J.

175 See the two questions out of 11, as formulated by Justice Gupta Question for the determination of the dispute. Question Number (iv): "What is the ambit and scope of essential religious practices Under Article 25 of the Constitution?" and Question Number (vii): "Whether, if the wearing of hijab is considered as an essential religious practice, the student can seek right to wear headscarf to a secular school as a matter of right?

176 See *Aishat Shifa*, para 214, *per* Sudhanshu Dhulia, J. (emphasis supplied).

> be violative of Article 25 of the Constitution of India. Be that as it may, the fact remains that the point was raised. It was made the core issue by the Court, and it went against the Petitioners.

This, indeed, is the first reason, betraying how the issue of ERP came to occupy the central stage in the decision-making. However, such a reason was only "Partly"! If so, what then is the other remaining 'partly' reason for taking the ERP route, as a threshold requirement in the instant case, specially more when during the course of arguments at the Bar, it became admittedly clear that "ERP was not the core issue in the matter."[177]

In somber reflections of Justice Dhulia, I venture to think, the other 'partly' reason to pursue ERP-issue as a preferential course of action, was that the high court was seemingly oblivious of its own critical role of the constitutional court, which was no other than to zealously protect the fundamental rights of all citizens! In support of this critical function of the constitutional court, he recalls what the Supreme Court said through Justice O. Chennappa Reddy in *Bijoe Emmanuel*[178]

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

If the priority and supremacy of 'duty and function' of the constitutional court would have dawned upon, "[t]he approach of the High Court could have been different."[179] "Instead of straightaway taking the ERP route, as a threshold requirement, the Court could have first examined whether the restriction imposed by the school or the government order on wearing a hijab, were valid restrictions? Or whether these restrictions are hit by the Doctrine of Proportionality."[180]

Bearing this prescription in mind, Justice Dhulia visited the issue of ERP in the instant case entirely from a different perspective. In his view, what is needed to resolve the issue is, not whether wearing hijab was an essential requisite of Islamic religion but, whether the GO prohibiting wearing of hijab violated her 'freedom of

177 *Ibid.*

178 *Bijoe Emmanuel* v. *State of Kerala*, MANU/SC/0061/1986 : 1986 3 SCC 615 (Para 19), cited in *Aishat Shifa*, para 215, *per* Sudhanshu Dhulia, J.(Emphasis mine)

179 *Ibid*

180 *Ibid.*

expression' under Article 19(1)(a) read with Article 25(1) of the Constitution.[181] Hitherto, the question of ERP arose in those cases "where the rituals and practices of a denomination or a sect of a particular religion sought protection against State intervention"[182] under Article 26, though read with the provisions of Article 25, and yet has its own independent domain different from that of article 25.[183] Herein also, in defining the operational domain of ERP, the primacy of the individual's right to freedom of conscience and profess, practice and propagate religion was not lost; it was rather protected and promoted through the elaboration "on the meaning of religion and how it has to be understood in the context of the Constitution."[184]

In this context the exposition of the Seven Judge Constitutional Bench of the Supreme Court in the case popularly known as *Shirur Mutt* case[185]is instructive. While construing the meaning of religion, it was stated that a religion is a system of beliefs or doctrines, which are regarded by those who profess that religion as conducive to their spiritual well-being, and also considered the practices or rituals associated with religion as an integral part of it, including even such matters as food and dress.[186]In resolving the pivotal issue, whether the State, in the exercise of the power under article 25(2), permitting it to regulate or restrict "any economic, financial, political or other secular activity which may be associated with religious practice;" could also regulate"the secular activities which are associated with a religion which do not constitute the essential part of it."[187] This is how the concept

181 *Aishat Shifa*, para 217, *per* Sudhanshu Dhulia, J. "…In the case at hand, the question is not merely of religious practice or identity but also of 'freedom of expression,' given to a citizen Under Article 19(1)(a) of the Constitution of India, and this makes this case different."

182 *Ibid*. See also, *Aishat Shifa*, para 222, *per* Sudhanshu Dhulia, J., citing *Durgah Committee, Ajmer* v. *Syed Hussain Ali* MANU/SC/0063/1961: (1962) 1 SCR 383, holding the rights of a Sect or a denomination against State intervention in the light of an interplay of Article 25 and Article 26 of the Constitution.

183 See, *supra*, note 8, author's *Monograph*.

184 See, *Aishat Shifa*, para 219, *per* Sudhanshu Dhulia, J.

185 *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* MANU/SC/0136/1954 : (1954) SCR 1005, cited in *Aishat Shifa*, para 219, *per* Sudhanshu Dhulia, J.

186 See *Aishat Shifa*, para 219, per Sudhanshu Dhulia, J., citing the concurring opinion of Justice B.K. Mukherjea on behalf of the Seven Judge Constitutional Bench of the Supreme Court in Shirur Mutt case.This case dealt with the question, whether the action of the Commissioner under the provisions of the Madras Hindu Religious Endowments Act (Act 2 of 1927), which empowered him to exercise control over the affairs of Shirur Muttt, was an invasion on the exercise of Fundamental Rights of the Mathadhipati and the Management of the Temple given to them Under Article 25 and 26 of the Constitution. While doing so, the Bench also expounded the nature of the belief and practices, which may be theistic (belief in God) or non-theistic (not believing in God or in any Intelligent First Cause, as in the case of Buddhism and Jainism).

187 See *Aishat Shifa*, para 220, *per* Sudhanshu Dhulia, J., explaining how this knotty question arose before the 7-Judge Bench in *Shirur Mutt* case, and how the Bench responded?

of ERP came to the fore in defining the contours of freedom of religion. Its exposition by the seven-judge bench of the Supreme Court is illuminating:[188]

> In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and *mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b).*[189]

A bare reading of the extracted paragraph reveals the widened constitutional ambit of the freedom of conscience and free profession, practice and propagation of religion under Article 25 at least in three respects. One, what constitutes 'the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself,' we may add, without any outside intervention.[190] Two, by excluding from the purview of State power under Article 25(2)[191]all such '*secular activities partaking of a commercial or economic character'* though seemingly secular, but essentially religious in nature; that is, the 'outward acts in pursuance of religious belief.' Three, by approximating all such 'seemingly secular, but essentially religious activities' to the domain of "Freedom to manage religious affairs" under Article 26, which grants to "every religious denomination or any section thereof" the right, inter alia, "to manage its own affairs in matters of religion."[192]

188 *Ibid*., citing paras 19 and 20 of *Shirur Mutt* case.

189 Following the logic of *Shirur Mutt* case, the Supreme Court held in *Ratilal Panachand Gandhi* v. *State of Bombay* MANU/SC/0138/1954 : 1954 SCR 1055, para 10: "… What Sub-clause (a) of Clause 2 of Article 25 contemplates is not State Regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices," cited in *Aishat Shifa*, para 221, *per* Sudhanshu Dhulia, J.

190 See, *supra,* note 8, author's *Monograph*.

191 of the Constitution of India, 1950, Art. 25(2) (a): permits the State to make any law "regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice."

192 *Id.*, art. 26, grants every religious denomination or any section there of Freedom to manage religious affairs, subject only to public order, morality and health[and not to other provisions of Part III as is stipulated under Article 25(1)] the right: (a)to establish and maintain institutions for religious and charitable purposes; (b)to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

What is the most distinctive feature of Justice Shubhanshu Dhulia's approach in *Aishat Shifa* case in the development of constitutional law? In our respectful submission, his approach truly represents the common law tradition, in which basic foundational principles evolve and develop from a concrete fact situational matrix. The advantage is that such principles are not hypothetical. These emanate from real life situations, and then get tested from case to case, and eventually evolve as fundamental principles of futuristic import.

In *Aishat Shifa case*, for the resolution of the problem in hand, the facts are recapitulated and abstracted from the concrete situation so that, in order to follow the Rule of Law, those become of common concern and could be brought easily within the ambit of applicable principles of law. To wit, Dhulia J., states: "We have before us two children, two girl students, asserting their identity by wearing hijab, and claim protection Under Article 19 and Article 25 of the Constitution of India."[193]In the fact matrix of the case, the clearly identifiable applicable law is:

> We must deal with only Article 25(1), and not with Article 25(2), or even with Article 26 of the Constitution of India. Article 25(1) deals with the Rights of an individual, whereas Article 25(2), and Article 26 deal with the Rights of communities or religious denominations, as referred above. Additionally, we must deal with the Fundamental Rights given to an individual Under Article 19(1)(a) and its interplay with Article 25(1) of the Constitution."[194]
>
> "Article 25 gives a citizen the 'freedom of conscience and free profession, practice and propagation of religion'. It does not speak of Essential Religious Practice. This concept comes in only when we are dealing with Article 25(2) or Article 26, and where there is an inter-play of these two Articles."[195]

In this logical progression of thoughts, since in the application of the constitutional right guaranteed under article 25(1) *vis-à-vis* wearing hijab by a Muslim girl student in the classroom, there is neither a mention of the requisite of ERP under Article 25(1), nor it is required to establish, whether "wearing hijab is an ERP in Islam or not is not essential for the determination of this dispute."[196]What is required to find out is: "If the belief is sincere, and it harms no one else, there can be no justifiable reasons for banning hijab in a classroom."[197]

However, on the contrary, the high court, whose judgment is under challenge, adopted an approach, which is not judicially warranted,[198] notwithstanding the pleadings of the petitioners:[199]

193 *Aishat Shifa*, para 230, per Sudhanshu Dhulia, J.

194 *Id.*, para 229.

195 *Id*., para 230.

196 *Ibid.*

197 *Ibid.*

198 The function of the constitutional court is not just to decide the *lis* between the parties before it, but to go beyond it in the exposition of constitutional law.

199 *Id.*, para 231.

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

The whole exercise of finding ERP for the determination of the dispute has turned out to be an exercise in futility. It is at least for three reasons. One, it is not required in the exploration of the right under Article 25(1) of the Constitution.[200] Two, whatever exploration is done on the strength of judicial precedents, that related to Article 26 read with Article 25(2), dealing with community rights, and not individual rights under Article 25(1).[201] Three, the courts are not the appropriate forums for determining as to what is an ERP, except "when the boundaries set by the Constitution are broken, or where unjustified restrictions are imposed" by the State.[202] In the light of such cogent reasons, in Justice Dhulia's opinion "the entire exercise done by the High Court of Karnataka in evaluating the rights of the Petitioners only on the touchstone of ERP, was incorrect."[203]

We may now turn again to the seminal judgment of O. Chinnappa Reddy J., in *Bijoe Emmanuel* case.[204] In the opinion of Justice Dhulia, "this case is the guiding star which will show us the path laid down by the well-established principles of our Constitutional values, the path of understanding and tolerance, which we may also call as 'reasonable accommodation.'"[205] Negating the view of the Full

200 *Id.*, para 232: "…ERP was not essential to the determination of the dispute."

201 See, *id*., para 229: "This concept [of ERP] comes in only when we are dealing with Article 25(2) or Article 26, and where there is an inter-play of these two Articles." See also, *id.*, para 224, to the same effect.

202 *Id.*, para 232. The Ccurts should not only be slow in determining as to what is an ERP, but in Justice Dhulia's "humble opinion Courts are not the forums to solve theological questions," as they are not "well equipped" to choose one viewpoint over other view points on a particular religious matter, and there is nothing that gives the authority to the Court to pick one over the other, see, *ibid*. See also, *id.*, para 233, citing *M. Siddiq (Dead) Through LR's* v. *Mahant Suresh Das* MANU/SC/1538/2019 : (2020) 1 SCC 1; Para 90 and 91 (popularly known as the Ram Janmabhoomi -Babri Masjid Case) to the effect: The Supreme Court, "as a secular institution, set up under a constitutional regime must steer clear from choosing one among many possible interpretations of theological doctrine and must defer to the safer course of accepting the faith and belief of the worshipper," and the Court must desist "to interpret religious doctrine in an absolute and extreme form and question the faith of worshippers," as that would be "destructive of the values underlying Article 25 of the Constitution.

203 *Ibid*.

204 See, *supra* note 178.

205 *Aishat Shifa*, para 235, per Sudhanshu Dhulia, J.

Bench of the High Court of Karnataka,[206] he considers this case of the Supreme Court as the "most relevant in the present case, both on the facts as well as on law."[207]

On facts, in *Bijoe Emmanuel,* the three girl students, belonging to a faith called Jehovah's Witnesses, were expelled from the government school, because they did not sing the National Anthem, like other children in the school, though they used to respectfully stand up for the National Anthem. They did so as their faith forbid them to sing for anyone else but Jehovah. The Supreme Court "rejected the approach" of the High Court of Kerala for upholding the order of expulsion as constitutional as it "did not find any word or thought in the Indian National Anthem which could offend anyone's religious susceptibilities."[208] In doing so, the High Court had "actually misdirected itself," and "went off at a tangent," inasmuch as the objection of the petitioners was "not to the language of the National Anthem, but they simply refused to sing any National Anthem, irrespective of any country as they sincerely believe that this is what their religion prescribes them to do."[209]

And our Constitution permits them to do so in two ways: one, under Article 19(1)(a) the right to freedom of speech and expression also includes the freedom to sing, which impliedly "also mean freedom to remain silent;"[210] two, under article 25, which has been described as "an Article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's

206 Karnataka High Court chose not to rely on Bijoe Emmanuel case by making cryptic statement that "Bijoe Emmanuel is not the best vehicle for drawing a proposition essentially founded on the freedom of conscience," which is "not correct" in the opinion of Justice Dhulia, see, *Aishat Shifa*, para 235.

207 *Ibid.*

208 See, *id*., para 237.

209 *Ibid*. In his decision-making, Justice Chennappa Reddy J., drew inspiration from the two judgments of the United States Supreme Court, both relating to schools and the 'discipline' imposed by the schools: *Minersville School District* v. *Gobitis* MANU/USSC/0138/1940 : 310 US 586 (1940) dealt with the question, whether compulsory saluting of the National Flag infringed upon the liberties guaranteed by the Fourteenth Amendment of the Constitution of the United States of America; majority court responded to this question in the negative. However, this view was reversed by the Supreme Court in *West Virginia State Board of Education* v. *Barnette* MANU/USSC/0148/1943 : 319 US 624 (1943) by observing: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." Cited in*Aishat Shifa*, paras 238-241, *per* Sudhanshu Dhulia, J.

210 *Aishat Shifa*, para 243, *per* Sudhanshu Dhulia, J. "The Government Circular which directed that the entire school should sing National Anthem was not 'law' as given in Clause 2 of Article 19 of the Constitution. The law i.e., the statutory law was 'The Prevention of Insults to National Honour Act, 1971'. A person who respectfully stands when the National Anthem is sung but does not participate in the singing does not commit an offence under the Act. Offence is only committed when a person prevents another from singing National Anthem."

Constitution," permits all persons to pursue their respective persuasions irrespective of their, so-called, 'insignificant minority' status.[211]

In the light of the above, Dhulia J., has found that the narrative of *Bijoe Emmanuel* runs exactly parallel to that of *Aishat Shifa.* The girls in *Aishat Shifa* "face the same predicament as the Jehovah's Witnesses in *Bijoe Emmanuel*. The petitioners in *Aishat Shifa*too wear hijab as an article of their faith, for they firmly believe that it is a part of their religion and social practice. So did the petitioners in *Bijoe Emmanuel while* refusing to sing the National Anthem. This led Dhulia J., to say: "In my considered opinion therefore, this case is squarely covered by the case of Bijoe Emmanuel (supra) and the ratio laid down therein."[212]

Although the ratio of *Bijoe Emmanuel* is enough for determining the legitimacy of the GO in *Aishat Shifa* case, nevertheless there has come to the fore another problem. The problem is, how to apply the well-established principle in the given new fact situation. Even where there is close similarity in two cases, yet the application of the principle emanating from one case, called the *ratio decidendi*, to the other case with a similar fact matrix, is not just a mechanical, but highly creative, exercise. It needs to be applied judiciously in such a manner so that its outcome results in doing justice. This is how the development takes place in the realm of constitutional law by following the common law tradition.

A similar predicament arose in *Aishat Shifa case* in the determination of the question whether banning the wearing of hijab through a GO in the school is justified. The High Court of Karnataka held the banning justified on the principle, known as the principle of "qualified public places" and "derivative rights."[213] This principle stated by the high court axiomatically isas under:[214]

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

Reflecting upon the principle-statement as extracted above, Justice Dhulia has disputed its application in the fact matrix of the instant case. He has done so by saying that "[a]s a general principle, one can have no quarrel with this proposition,"[215] so far it provides that "all public places have a certain degree of

211 See, *id.*, para 244, citing *Bijoe Emmanuel case*, para 18*, per* O. Chennappa Reddy, J., exhorting that such an exposition "has to be borne in mind in interpreting Article 25."

212 *Id.*, para 245.

213 See, *Aishat Shifa*, para 246, per Sudhanshu Dhulia, J.

214 For the extracted statement, see, ibid. Reference to footnote has been omitted.

215 *Id.*, para 247.

discipline and limitations and the degree of enjoyment of a Right by an individual inside his house or anywhere outside a public space is different to what he or she would enjoy once they are inside a public space."However, disputation of Justice Dhulia lies in his diagnostic statement: "Laying down a principle is one thing, justifying that to the facts of a case is quite another."[216]In his opinion, though it is true that all such places "like schools, courts, war rooms, defense camp, etc." are public places, but there is absolutely "no justification" in "drawing a parallel between a school and a jail or a military camp" with a view to maintaining discipline.[217]His summation of this count is:[218]

> But discipline not at the cost of freedom, not at the cost of dignity. Asking a pre university schoolgirl to take of her hijab at her school gate, is an invasion on her privacy and dignity. It is clearly violative of the Fundamental Right given to her Under Article 19(1)(a) and 21 of the Constitution of India. This right to her dignity and her privacy she carries in her person, even inside her school gate or when she is in her classroom. It is still her Fundamental Right, not a 'derivative right' as has been described by the High Court.

The values of the constitutional right to the freedom of religion under Article 25 has been emphasized and reinforced by stating that it "has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world" cannot be violated simply in the name of discipline.[219]

Once again, in the name of enforcing discipline through dress code in schools, including in Pre-University classes, the State tried to justify the government order on the basis of the rule of "pith and substance of the law."[220]Impliedly it means that the primary objective of G.O. was to maintain discipline, and the violation of fundamental right under Article 25 to wear hijab was only incidental, and, therefore, "the anvil of Article 19 will not be available for judging its validity."[221] Justice Dhulia has cogently countered this plea on two counts: one, the G.O. "specifically seeks to address the question of hijab, which is evident from the preamble of the G.O."[222] and, therefore, the 'pith and substance' rule is simply inapplicable "in the facts of the controversy before this Court;"[223] two, the basic premise, on which the plea of excluding Article 19 as the basis of testing the validity of government order was anchored, has been abandoned in view of extensive review of catena of cases

216 *Ibid.*

217 See, *id.,* paras 247 and 248.

218 *Id.,* para 248. Reference to footnotes has been omitted.

219 See, *id*., para 249, citing the elaborative statement of D.Y. Chandrachud J., in para 298 of his judgment. In the *Puttaswamy* case.

220 *Aishat Shifa*, *id*., para 250.

221 See, *ibid*, citing *Bachan Singh* v. *State of Punjab,* MANU/SC/0055/1982: (1980) 2 SCC 684 (para 60) in support of this plea.

222 *Ibid.*

223 *Ibid.*

undertaken in *Puttaswamy judgment*.[224]The old position has given way to "what is now a settled position in constitutional law," which is as under:[225]

> Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights Under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of State action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that State action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III.

All the three principles representing the "settled position in constitutional law" of India, cumulatively connote and communicate that freedom of conscience and the right to profess, practice and propagate religion is the manifestation of the fundamental right of highest order. All State actions are to be tested not in terms of the objective of State actions but on the touchstone of guaranteed freedom so eloquently pronounced in Article 25, presaging that 'all persons are equally entitled to freedom conscience…" subject only to the stipulations as stated therein itself.

The distinctive feature of Justice Dhulia's judgment in the instant case is that, it admirably shows how the settled position is strengthened, not by just citing precedents that deserve to be quoted but, by showing how and in what manner, they need to be comprehended and applied. His dissection of both facts and the applicable principle of constitutional law in judgments of foreign courts, which have a Constitutional Democracy, are specially instructive. They instantly enable us to appreciate the assertion of religious and cultural rights in our school set-up in India. The two cases are taken up for elucidation, one decided by the Constitutional Court of South Africa and the other by the House of Lords in England.[226]

The South African case revolves around toa school going 10th class girl student by the name of Somali, who was asked by the school administration to remove her nose-stud, which she wore as a part of Tamil-Hindu culture along with the prescribed dress code. Her parents perceived this denial as an affront to the dignity of their daughter. They approached the Equality Court, established in South Africa to hear disputes relating to cases of discrimination under the Constitution of South Africa.[227] The equality court held that though a prima facie case for discrimination had been made out, yet it could not be termed as 'unfair', thus dismissing her case.[228] Thereafter, the matter was taken in appeal before the high court, which allowed her appeal and held that asking Sunali to remove her

224 See*, ibid.*
225 *Ibid*.
226 See, *id*., para 251.
227 See, *id*., para 252.
228 See, *id.,* para 253.

nose stud amounts to discrimination which is wrong.[229] Both the school and the administration went to the Constitutional Court, the Highest Court of South Africa, which heard the matter and again decided in favour of Sunali.[230]

The central issue to be decided was, whether wearing of nose-stud constituted the centrality of Sunali's religious faith and culture?[231] If so, how to determine that centrality? Reflecting upon this piqued question, the constitutional court, in return, raised a counter question: "Should we enquire into centrality of the practice or belief to the community, or to the individual?"[232] The Highest Court of South Africa resolutely responded:[233]

> While it is tempting to consider the objective importance or centrality of a belief to a particular religion or culture in determining whether the discrimination is fair, that approach raises many difficulties. In my view, courts should not involve themselves in determining the objective centrality of practices, as this would require them to substitute their judgment of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes. This is true both for religious and cultural practices. If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way. [Para 87]
>
> Again, "…As stated above, religious and cultural practices can be equally important to a persons' identity. What is relevant is not whether a practice is characterised as religious or cultural but its meaning to the person involved." [Para 91]

The constitutional court also resolutely refused to accept the logic of the school administration that if Sunali did not like to abide by the dress code of school, "she could simply go to another school that would allow her to wear the nose stud."[234] Refusal response of the presiding Judge of the Highest Court is notable at least in two respects. Firstly, the effect of such a plea simply "would be to *marginalise religions and cultures*, something that is completely inconsistent

229 *Ibid.*

230 *Ibid.*

231 The plea of the school before the court was that nose stud was not central to Sunali's religion or culture and it is only an optional practice and, therefore, the same could be curtailed without much discomfort to Sunali, see, *id.*, para 254. citing para 86 of the judgment of the Constitutional Court of South Africa. See also*, id.,* para 255, citing para 91 of the judgment of the Constitutional Court of South Africa for the exposition of the same plea: "What was also pleaded on behalf of the school was that the nose stud after all is a cultural and not a religious issue and therefore the infringement of any right, if at all, is much less."

232 See, *ibid.*

233 *Id.,* para 254, citing paras 87 and 91 of the judgment of the Constitutional Court of South Africa.

234 *Id.*, para 255, citing para 92 of the judgment of the Constitutional Court of South Africa.

with the values of our Constitution."[235] Secondly, it was noticed with equal vehemence, "*our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation*."[236]

Bearing in mind the underlying values of the Constitution of South Africa, it was eventually held:[237]

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

Thus, on the basis of the doctrine of 'reasonable accommodation', which is essentially premised on 'the principle of proportionality', since the court did not find any such "circumstances" in Sunali's case that would make "the availability of another school a relevant consideration in searching for a reasonable accommodation," she was held entitled to carry on with nose stud in the school by reversing the decision of the school administration.

However, the plea of 'availability of another school' argument on the principle of 'reasonable accommodation' is found to have succeeded in the case of House of Lords judgment, which was relied upon by the High Court of Karnataka in *Aishat Shifa* case.[238] Justice Dhulia closely considered that judgment, which is referred here simply as the *Hijab-Jilbab (burqua) case,* and through the extraction of relevant passages from that judgment, showed how the same is inapplicable in the fact matrix of *Aishat Shifa* case.

On the fact matrix in the *Hijab-Jilbab (burqua)* case,[239] primarily the controversy was that the school, which is co-educational institution, allowed the petitioner wearing of hijab, but what was further insisted by her was wearing of jilbab (which is more or less a burqa) as well. Jilbab was denied and this led to the litigation where the restriction of the school on jilbab was upheld by the House of Lords. How the invocation of the principle of 'reasonable accommodation' premised on 'the principle of proportionality was found to be applicable in that case? The thrust of the extracted passages may be abstracted as follows:

235 *Ibid*.

236 *Ibid*. Emphasis added

237 *Id.*, para 256, citing para 112 of the judgment of the Constitutional Court of South Africa. *Emphasis added*.

238 *Regina (SB)* v. *Governors of Denbigh High School,* MANU/UKWA/0356/2005 : [2007] 1 AC 100, cited in *Aishat Shifa*, para 257, *per* Sudhanshu Dhulia, J. Hereinafter, cited as *Hijab-Jilbab (burqua*) *Shabina Begum* case.

239 For the abstracted facts, see, *ibid*.

i. One of the critical functions of the schools is to fostering "a sense of community and cohesion within the school,"[240] and for this purpose a "uniform dress code can play its role in smoothing over ethnic, religious and social divisions."[241]

ii. With the dress code prescription, it is also to be borne in mind that we are living in a society, which is "committed, in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law."[242]

iii. "Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture,"[243] and that a "good school will enable and support them" as far as possible.[244]

iv. In the instant case, cited as *Hijab-Jilbab (burqua*) *Shabina Begum* case, the predicament of Shabina Begum was that she came from an orthodox Muslim family, but nevertheless she wanted to take the benefit of the good public school that provided modern liberal education equally to both boys and girls, which, however, permitted her to wear *hijab* but not *jilbab*.

v. A mandatory policy that rejects veiling (wearing of *jilbab*) in state educational institutions is intended to provide "a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families."[245]

vi. But, "a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students"[246]on the one hand, and may also "result in traditionalist families not sending their children to the state educational institutions" on the other, giving rise to two ponderable questions: one, how farShabina Begum and her parents'to adopt or to distance' themselves from the dominant culture, expressed as the mandatory public policy of prohibiting jilbab; two, how far the State could still balance the "two conflicting policy priorities in a specific social environment"[247]–the policy of prohibiting the wearing of jilbab as a symbol of modern education, and the policy of respecting individual autonomy and cultural diversity.

On the principle of 'reasonable accommodation', thus, it was held by the House of Lords that jilbab (and not hijab, which was not an issue at all) that

240 *Ibid.*
241 *Ibid*.
242 *Ibid.*
243 *Ibid.*
244 *Ibid.*
245 *Aishat Shifa,* para 258.
246 *Ibid*.
247 *Ibid.*

militated most apparently against the dress code discipline, and shifting to another school meant exclusively for girls was considered a relevant consideration in balancing the two policy priorities, as indicated above.

In *Aishat Shifa* case, since there were no such significant circumstances compelling the petitioner to shift to another school and thereby depriving her of the benefits of education in a State public school. In this context, Justice Dhulia has posed a few searching questions that must be taken into account while enforcing the dress code principle. To wit:

(1(a) What should be more important to the State/Public School Administration: Education of a girl child or Enforcement of a Dress Code![248]

(b) In their decision-making, involving particularly the issue of educating girls, the apex court itself should ask: "whether we are making the life of a girl child any better by denying her education, merely because she wears a hijab!"[249]

(c) How is wearing hijab "against public order, morality or health? or even decency or against any other provision of Part III of the Constitution."[250]

Justice Sudhanshu Dhulia has answered all these questions in his own unique way, *albeit* constitutionally. As a part of constitutional court, he felt duty bound to do so. For this he drew inspiration from what Justice Oliver Wendell Holmes Jr.,

248 See*, id*., para 261: During the course of arguments, the Supreme Court was informed at the Bar "by many of the Senior counsels appearing for the Petitioners, that the unfortunate fallout of the enforcement of hijab ban in schools in Karnataka has been that some of the girl students have not been able to appear in their Board examinations, and many others were forced to seek transfer to other schools, most likely madrasas, where they may not get the same standard of education. This is for a girl child, for whom it was never easy, in the first place, to reach her school gate."

249 See, id., para 262: Such a poser is of immense relevance and needs to be seen "in the perspective of the challenges already faced by a girl child in reaching her school." Dhulia J., has pointed out ratherpicturesquely, portraying that "that it is much more difficult for a girl child to get education, as compared to her brother. In villages and semi urban areas in India, it is commonplace for a girl child to help her mother in her daily chores of cleaning and washing, before she can grab her school bag. The hurdles and hardships a girl child undergoes in gaining education are many times more than a male child."

250 *Id*., para 263: Justice Dhulia J., has reflectively noted that "these questions have not been sufficiently answered in the High Court of Karnataka judgment. The State has not given any plausible reasons either in the Government Order dated 5 February 2022, or in the counter affidavit before the High Court. It does not appeal to my logic or reason as to how a girl child who is wearing a hijab in a classroom is a public order problem or even a law-and-order problem. To the contrary reasonable accommodation in this case would be a sign of a mature society which has learnt to live and adjust with its differences."

said in his famous dissent delivered in *United States* v. *Schwimmer:*[251] "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought-not free thought for those who agree with us but freedom for the thought that we hate."

Justice Dhulia's judgment is indeed an essay on towards the building up a tolerant social order based on assimilation of constitutional values of Justice, Liberty, Equality, Fraternity, 'assuring the dignity of the individual and the and unity and integrity of the Nation.' As an elucidation, the following paragraphs may be abstracted from his judgment:

As if, by way of an introduction, the problematic account is opened by stating straightaway: [252]

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

Under the Constitution, any resolution of conflict involving rights of minorities is eventually based on the principle of mutuality of trust: [253]

> We live in a Democracy and under the Rule of Law, and the Laws which govern us must pass muster the Constitution of India. Amongst many facets of our Constitution, one is Trust. Our Constitution is also a document of Trust. It is the trust the minorities have reposed upon the majority….

251 MANU/USSC/0083/1929: 279 US 644 (1929), para 22, cited in *Aishat Shifa*, para 262, *per* Sudhanshu Dhulia, J. In this case, the Supreme Court ruled that a pacifist who said she would not bear arms to defend the United States could be denied naturalization as a citizen. In his dissent, Justice Oliver Wendell Holmes Jr. disagreed. He pointed out that Schwimmer "would not be allowed to bear arms if she wanted to" and rejected the idea that pacifism disqualified her for citizenship. Since then, this case featured a historic dissent by Justice Holmes, which emphasized the importance of toleration for dissident political speech. Holmes's statement since then, it is often claimed, has become 'a central principle for much First Amendment thought.'

252 *Aishat Shifa*, para 263, *per* Sudhanshu Dhulia.

253 *Id.*, para 264.An elaborative statement is added: "Commenting on the report of the Advisory committee on minorities, Sardar Vallabh Bhai Patel made a statement before the Constitute Assembly on May 24, 1949, which should be referred here. He said, ".... it is not our intention to commit the minorities to a particular position in a hurry. If they really have to come honestly to the conclusion that in the changed conditions of this country, it is in the interest of all to lay down real and genuine foundations of a secular State, then nothing is better for the minorities than to trust the good-sense and sense of fairness of the majority, and to place confidence in them. So also, it is for us who happened to be in a majority to think about what the minorities feel, and how we in their position would feel if we were treated in the manner in which they are treated." [May 25, 1949: Constituent Assembly Debates, Vol.VIII 32].

> The value of diversity is forcefully expressed to bring out the innate strength of 'our rich plural culture' by stating pithily 'unity in diversity' [in contra distinction of 'unity in uniformity']. Such an expression needs to be borne in mind in judicial decision-making processes, and not to be dismissed merely as a "hollow rhetoric" or an "often quoted platitude":[254]

The question of diversity and our rich plural culture is, however, important in the context of our present case. Our schools, in particular our Pre-University colleges are the perfect institutions where our children, who are now at an impressionable age, and are just waking up to the rich diversity of this nation, need to be counselled and guided, so that they imbibe our constitutional values of tolerance and accommodation, towards those who may speak a different language, eat different food, or even wear different clothes or apparels! This is the time to foster in them sensitivity, empathy and understanding towards different religions, languages and cultures. This is the time when they should learn not to be alarmed by our diversity but to rejoice and celebrate this diversity. This is the time when they must realise that in diversity is our strength.[255]

The realization of the principle of diversity is the core concern of our new National Education Policy:

> The National Education Policy 2020, of the Government of India underlines the need for inculcating the values of tolerance and understanding in education and making the children aware of the rich diversity of this country. The Principles of the Policy state that 'It aims at producing engaged, productive, and contributing citizens for building an equitable, inclusive, and plural society as envisaged by our Constitution'.[256]
>
> Likewise, the need for constitutional values of "religious tolerance and diversity of culture" "in our education system" has been the recurring theme in judicial discourse:[257]

… These need to be inculcated at appropriate stages in education right from the primary years. Students have to be given the awareness that the essence of every religion is common, only the practices differ...[258]

254 See, *id*., para 265, citing the mode and manner in which the petitioners' plea was viewed by the High Court: "The question of diversity, raised by the Petitioners before the Karnataka High Court, was not considered by the Court since it was thought to be a 'hollow rhetoric,' and the submissions made by the lawyers on 'unity and diversity,' were dismissed as an 'oft quoted platitude.' This is what was said, "Petitioners' contention that a class room should be a place for recognition and reflection of diversity of society, a mirror image of the society (socially and ethically) in its deeper analysis is only a hollow rhetoric, 'unity in diversity' being the oft quoted platitude..." (Para XIV(v) at Page 101 of impugned judgment)

255 *Id.*, para 266.

256 *Id.*, para 267.

Again: " ...The complete neutrality towards religion and apathy for all kinds of religious teachings in institutions of the State have not helped in removing mutual misunderstandings and intolerance inter se between Sections of the people of different religions, faiths and belief. 'Secularism', therefore, is susceptible to a positive meaning, that is developing and understanding and respect towards different religion."[259]

While dilating upon the values of 'diversity, dissent, liberty and accommodation,' observations of the undernoted Constitution Bench of the Supreme Court has been cited to the following effect:[260]

The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets; in the beliefs, ideas and ways of living of her citizens. Democratic as it is, out Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. *It nurtures dissent as the safety valve for societal conflict.* Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril[261]

A judicious mix of "students of different communities" in all educational institutions is desiderated for promoting the constitutional values of "secularism and equality;"[262] to this effect has been quoted Justice K Jagannatha Shetty, who delivered the majority opinion on behalf of the bench in *St. Stephen's College* v. *University of Delhi:*[263]

> … In the nation building with secular character sectarian schools or colleges segregated faculties or universities for imparting general secular education are undesirable and they may undermine secular democracy. They would be inconsistent with the central concept of secularism and equality embedded in the Constitution. Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life. The students and teachers are the critical ingredients. It is there they develop respect for, and tolerance of, the cultures and beliefs of others. It is essential therefore, that there should be proper mix of students of different communities in all educational institutions."[264]

257 See, *id*., para 268.

258 See, *ibid*, citing the concurring opinion of Justice Dharmadhikari in *Aruna Roy* v. *Union of India*, MANU/SC/1519/2002: (2002) 7 SCC 368 (Para 25).

259 See, *id*, citing Aruna Roy, para 86.

260 See, *id*., para 269, citing *Navtej Singh Johar* v. *Union of India, Ministry of Law and Justice,* MANU/SC/0947/2018: (2018) 10 SCC 1.

261 Concurring opinion by D.Y. Chandrachud J., in *Navtej Singh Johar (*para 375) Emphasis added.

262 See, *Aishat Shifa*, para 270, *per* Sudhanshu Dhulia J.

263 MANU/SC/0319/1992: (1992) 1 SCC 558.

264 *Id.,* para 81.

> Besides, as if to complete the narrative of 'unity in diversity', one more set of constitutional values is added[265] under Fundamental Duties in Part IV-A of the Constitution, which inter alia provides that it is also Duty of every citizen, to "value and preserve the rich heritage of our composite culture."[266]

The comprehensive perspective of constitutional values, as abstracted above, prompted Justice to conclude:

"Under our Constitutional scheme, wearing a hijab should be simply a matter of Choice. It may or may not be a matter of essential religious practice, but it still is, a matter of conscience, belief, and expression. If she wants to wear hijab, even inside her class room, she cannot be stopped, if it is worn as a matter of her choice, as it may be the only way her conservative family will permit her to go to school, and in those cases, her hijab is her ticket to education."[267] And "by denying her education merely because she wears a hijab," we would be ruining chances for a young girl to make her life any better.[268]

Bearing in mind the preambular promise to secure Justice to every citizen,[269]which is juxtaposed with the values of Liberty, Equality, Fraternity, "by assuring the dignity of the individual and unity and integrity of the Nation,"[270] the government order dated February 5, 2022, putting restrictions on the wearing of hijab amounts to:[271]

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

This is how Justice Sudhanshu Dhulia has ordered that "[t]here shall be no restriction on the wearing of hijab anywhere in schools and colleges in Karnataka."[272]

265 See, *Aishat Shifa*, para 271, *per* Sudhanshu Dhulia J.

266 The Constitution of India, 1950 art. 51A(f).

267 *Aishat Shifa*, para 275, *per* Sudhanshu Dhulia,

268 *Id*., para 276.

269 To emphasize the primacy of the value of Justice in our Constitution, Rawls' Theory of Justice' is cited:

"... Justice is the first virtue of social institutions, as truth is of system of thoughts..." "...Therefore in a just society the liberties of equal citizenship are taken as settled, the rights secured by justice are not subject to political bargaining or to the calculus of social interest..." Rawls, John (1921): A Theory of Social Justice, Rev. Ed.; The Belknap Press of the Harvard University Press, Cambridge, Massachusetts. See, *Aishat Shifa*, para 277, *pe*r Sudhanshu Dhulia.

270 See, *Aishat Shifa*, para 273, per Sudhanshu Dhulia., quoting speech of Ambedkar on Nov. 25, 1949: Constituent Assembly Debates, Vol. XI (1949).

271 *Id*., para 278.

272 *Id.*, para 279. This was doneby allowing the appeals as well as the Writ Petitions, setting aside the order of the High Court of Karnataka dated March 15, 2022, and quashing the government order dated February 5, 2022.

> In view of the divergent views expressed by the Division Bench of Justice Hemant Gupta and Justice Sudhanshu Dhulia, the Order of the Supreme Court states that "the matter be placed before Hon'ble The Chief Justice of India for constitution of an appropriate Bench."

IV ELECTION OF THE RETURNED CANDIDATE: HOW IT WAS DECLARED NULL AND VOID BY THE HIGH COURT ON GROUND OF IMPROPER ACCEPTANCE OF THE NOMINATION AND DULY AFFIRMED BY THE SUPREME COURT?[273]

The issue of declaring the election of the returned candidate as null and void by the election tribunal on ground of improper acceptance of the nomination by the returning officer has come up before the Supreme Court in *Mohd. Abdullah Azam Khan* v. *Nawab Kazim Ali Khan*.[274] In this case, elections to the Uttar Pradesh State Legislative Assembly elections were held in 2017 under the Representation of the People Act, 1951.[275]The appellant and the respondent along with others filed their nomination papers. After scrutiny and withdrawal of nomination papers, the appellant and six others including the respondent were the candidates who remained in the field for election.

Soon thereafter, the respondent filed an objection before the returning officer against the appellant alleging that he was less than 25 years of age and, therefore, is not qualified to contest the election in view of Article 173(b) of the Constitution of India.[276]This he could do instantly "on the basis of a newspaper Article published in a local daily, Dainik Jagran Amar Ujala on January 28, 2017."[277] The objection was, however, overruled by the Returning Officer (RO) by observing:[278]

> that the successful candidate herein had stated in Column B of Section 3 of the nomination form, as also in Form 26, that his age was twenty-six years. That in support of such claim, the successful candidate had attached his Birth Certificate (No. 229428) which was issued to him by the Nagar Nigam, Lucknow, on 21.05.2015 and in the said document, the date of birth of the successful candidate was recorded as 30.09.1990. It was further noted that as per the successful candidate's Aadhar card and the electoral roll, his age at the relevant

273 See also, Virenndra Kumar, "Whether furnishing of the information by the election candidate of his criminal antecedents under Section 33-A(1) of the Representation of the People Act, 1951 also includes within its ambit the disclosure of criminal cases where cognizance had been taken by the court?" *ASIL* Vol. LV at 272-278 (2019).

274 MANU/SC/1454/2022 (Decided on: Nov.7, 2022), per Ajay Rastogi and B.V. Nagarathna, JJ. (Hereinafter, simply *Mohd. Abdullah Azam Khan*).

275 Hereinafter simply the Act of 1951.

276 The Constitution of India, 1950, art. 173(b) dealing with the qualification for membership of the State Legislature, provides that a person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he "is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age."

277 See, *Mohd. Abdullah Azam Khan,* para 55.2, *per*v. B.V. Nagarathna, J.

278 For the abstraction of the RO's order dated 30.01.2017, see *Mohd. Abdullah Azam Khan,* para 55.3, *per* B.V. Nagarathna, J.

> time was twenty-six years. Consequent to the rejection of the objections raised by the election Petitioner and on the basis of the documents submitted and details furnished by the successful candidate in the nomination form, his nomination was accepted by the Returning Officer.

Accordingly, the election took place as per the schedule, in which the Appellant securing the highest number of votes was, thus, declared elected.

The election of the appellant (hereinafter the returned candidate - RC) was challenged by the respondent (hereinafter the election petitioner-EC), although he himself securing the third place,[279] on the solitary ground that RC's nomination papers were improperly accepted by the RO. *Inter alia*, the EP specifically contended: [280]

> that objection as regards the age of the Appellant was raised by him in the first instance before the Returning Officer, but the same was rejected without appreciating the bare documentary evidence on record and despite the date of birth of the Appellant being 1st January, 1993, which was recorded throughout in his academic records, including his Secondary School Examination Certificate in 2007 from the Central Board of Secondary Education and Intermediate Examination in 2009 from St. Paul's School, Rampur affiliated to Central Board of Secondary Education, Delhi, the Returning Officer failed to consider the same and arbitrarily overruled the objection raised by him.

In this fact matrix, there were two sets of documents, one produced by the election petitioner, showing the date of birth of the RC as January1, 1993, which was recorded throughout in his academic records, revealing that he was under 25 years of age at the relevant time, and, therefore, not eligible to stand for election; and the other set produced by the Returned Candidate, showing his date of birth as September 30, 1990, based on the birth certificate issued to him by the Nagar Nigam, Lucknow, on May 21, 2015, which was carried forward in his Aadhar card and the electoral roll, and thereby clearly showing that his age at the relevant time was 26 years. In the election petition, the high court as the election tribunal was called upon to decide, which version was to be relied upon.

The High Court of Allahabad, after due appreciation of the documentary as well as oral evidence on record and taking note of the submissions made by the parties "returned the finding that on the date of filing of nomination papers, January 25, 2017, on the date of scrutiny of nomination papers *i.e.,* January 28, 2017 and on the date of declaration of result of 34, Suar Assembly Constituency of District Rampur *i.e.,* March 11, 2017, the Appellant was less than 25 years of age and thus, was not qualified to contest the election in terms of Article 173(b) of the Constitution

279 See, *id*., para 55.4, mentioning that the election petitioner stood third in the said assembly election

280 For the abstracted facts, see, *Mohd. Abdullah Azam Khan,* para 5, *per* Ajay Rastogi, J.

and declared the election of the Appellant to be void and consequently it came to be set aside by the impugned judgment dated 16th December, 2019."[281]

The high court adverse judgment prompted the returned candidate to come to the Supreme Court by filing an appeal under Section 116A of the Representation of People Act, 1951, assailing the judgment that held the election of the returned candidate (appellant) as void and consequently came to be set aside.

Admittedly, there were two sets of documents relating to one and the same person, namely the returned candidate, *albeit* both were procured by him at two different occasions. One set of documents is based on the birth certificate issued by Nagar Palika, Rampur on June 28, 2012, clearly indicating the recorded date of birth as January 1, 1993. It is this birth date, which is subsequently reflected in his academic record commencing from Class X Secondary School Examination Certificate [Matriculation], to Class XII Secondary School Examination Certificate and onwards to Master's Degree,[282] at all stages that had been generated only under the appellant's own signatures or under the authority of the appellant. The same birthdate is carried forward in Driving Liscence, Pan Card, Passport (August 28, 2006), Aadhar Card.[283]

The other set of documents is founded on the birth certificate issued to the Returned Candidate (Appellant) by the Nagar Nigam, Lucknow, on May 21,2015, mentioning the date of birth as September 30, 1990, which is reflected subsequently in all such new duplicate documents as Driving License, Pan Card, Passport,

281 See, *Mohd. Abdullah Azam Khan,* para 11, *per* Ajay Rastogi, J. See also, id., para 56, per B.V. Nagarathna, J., stating that the prayer of the election petitioner, seeking a declaration that the election of the successful candidate to the Uttar Pradesh Legislative Assembly be declared as null and void, for non-compliance of the requirements of Article 173(b) of the Constitution of India, was allowed by the high court and the election of the successful candidate was set aside.

282 For Master's degree, the appellant (returned candidate) had passed out from Galgotias University, Greater Noida, indicating the he was born on Jan. 1, 1993. See, *Mohd. Abdullah Azam Khan,* para 7*, per* Ajay Rastogi, J.

283 All the documents in this set placed as documentary evidence by the election petitioner on record to substantiate that the date of birth of the appellant is Jan. 1, 1993 fall in "public documents issued by the public authorities and are admissible in evidence in terms of s. 35 of the Indian Evidence Act." For the details of the documentary evidence, see, *id*., para 25. See also, *id.,* para 26, showing that when the various Court Witnesses (including PW. 2 Mohd. Naseem, the Passport Officer, Bareilly, PW. 3 Mohd. Ateer Ansari, Junior Passport Assistant, Bareilly and PW. 4 Tej Pal Singh Verma, Chief Sanitation and Food Inspector/Deputy Registrar Birth and Death, Nagar Palika, Rampur) were examined, they supported the public documents placed on record by the election petitioner, establishing that the appellant's date of birth is Jan. 1,1993.

Aadhar Card. excepting in the certificate of Class X (which could not be changed despite initiating the process of change).[284]

In this background, in the ultimate analysis the Supreme Court Bench is to examine in the light of already judicially well-settled principles, "whether the date of birth of the Appellant, as claimed by him, is September 30, 1990 or it is January 1, 1993."[285]

On behalf of the returned candidate (appellant), it was seriously contended before the Supreme Court Bench that "the impugned judgment of the High Court had been rendered based on an erroneous appreciation of law and facts relating to the controversy at hand, and also on an incorrect understanding of the fact in issue."[286] In this respect, elaboration made on behalf of the Appellant needs to be noticed at least on two counts: 'facts in issue' and 'burden of proof.'

Facts in issue:

> "[T]he *fact in issue in the present case is not whether the successful candidate entered his date of birth as 01.01.1993 in his official documents, but whether the successful candidate was actually born on 01.01.1993;* or *whether despite the fact that certain documents had recorded the successful candidate's date of birth to be 01.01.1993, he was actually born on another date, i.e., 30.09.1990.*"[287]
>
> And, under the law of evidence, it was vehemently stated, "the actual date of birth" must be proved by "the direct and primary evidence, if available," because "such evidence would be the best evidence of such fact,"[288] and that in the instant case, "the evidence of the successful candidate's mother and the delivering doctor is direct oral evidence of the fact of birth of the successful candidate on a given date."[289]

Stated negatively, "[t]he school records are not the direct evidence of the fact of birth and on a balance of probabilities, it cannot be given pre-eminence

284 All the documents in this second set were attached as documentary evidence by the appellant, the returned candidate, with his nomination paper. Regarding these documents, the election petitioner made a specific averment in his examination-in-chief that all these documents placed by the Appellant/returned candidate on record, "are all fake and forged documents which are manufactured to create false evidence regarding the age and date of birth of the Appellant," and that "the official documents issued prior to the year 2015 consistently indicate his date of birth as Jan. 1, 1993 and that is also elicited from his cross-examination." See, *id*., para 26.

285 See, *Mohd. Abdullah Azam Khan,* para 16, *per* Ajay Rastogi, J.

286 This was contended by the Senior Counsel, Shri Kapil Sibal, appearing on behalf of the successful candidate, see, *Mohd. Abdullah Azam Khan,* para 60.1, *pe*r B.V. Nagarathna, J.

287 See, *id.,* para 60.2, *per* B.V. Nagarathna, J. (Emphasis supplied]

288 *Id*., para 60.3: This foundational Rule is reflected, *inter-alia*, in ss. 59 to 65 and s. 91 of the Indian Evidence Act, 1872.

289 *Ibid.*

over direct evidence of the mother, delivering doctor and contemporaneously maintained hospital records."[290]

Burden of proof

> [T]here is a statutory presumption of validity of the nomination papers as reflected under para 6 of Chapter VI of the Handbook of Returning Officers,"[291] and that "the school/academic records on which reliance was placed by the election Petitioner/Respondent and of which cognizance has been taken by the High Court under the impugned judgment was not disputed by the Appellant, but the Appellant disputed the contents of the document relied upon by the Respondent throughout and that can be reflected from the written statement filed by the Appellant to the election petition and it was the specific case of the Appellant that the date of birth as recorded in his school records i.e. 1st January, 1993 is incorrect and wrongly recorded, in fact, he was born on 30th September, 1990 and to support his date of birth, sufficient primary documentary evidence was placed on record which pertains to the authenticated record of Queen Mary's Hospital, Lucknow, which is a Government hospital and followed with the birth certificate issued by the competent authority i.e. Nagar Nigam, Lucknow dated 21st January, 2015."[292]

Following this logic, it is pleaded that "once the contents of the document pertaining to the Appellant were disputed specifically in his written statement, the burden was on the election Petitioner to prove that the date of birth of the Appellant was 1st January, 1993 to which no efforts were made and the premise on which the High Court has proceeded to shift the burden of proof on the Appellant is in disregard to the principles of the Evidence Act and the fact as alleged is to be proved by the person who pleads under the Evidence Act."[293]

The Supreme Court, has countered both the related concerns of 'facts in issue' and 'burden of proof', by fully exploring them on principle in terms of the very "Purpose of the Evidence Act" as well as contextually in the light of judicial precedents. To wit:

Exposition on 'facts in issue':

> The purpose of the Evidence Act, 1872 is to prove and disprove the existence of facts in issue and to find out the truth of the facts which are asserted by the parties as the decision of the case lies upon/depends upon the truthfulness of those facts….. Ultimately,

290 See, *Mohd. Abdullah Azam Khan,* para 13(xiii), *per* Ajay Rastogi, J.

291 See, *Mohd. Abdullah Azam Khan,* para 12, per Ajay Rastogi, J., citing a Three-Judge Bench of the Supreme Court in *Rakesh Kumar* v. *Sunil Kumar,* MANU/SC/0084/1999: (1999) 2 SCC 489 (para 18) and later considered in *Uttamrao Shivdas Jankar* v. *Ranjitsinh Vijaysinh Mohite Patil*, MANU/SC/1015/2009: (2009) 13 SCC 131 (paras 35, 40 and 44).

292 *Ibid.*

293 *Id*., para 13.

> the Indian Evidence Act, 1872 is about the quest towards truthfulness. 'Procedure is the handmade of justice and not its mistress' i.e. procedure is not to control justice but procedure is the helping hand of justice and it helps to facilitate justice. [294]

"It is a well-established dictum of the Evidence Act that misplacing the burden of proof vitiates the judgment. At the same time, the Rule relating to the burden of proof is based upon certain practical considerations of convenience and reasonableness and also of policy, but where there is a rebuttable presumption of law in favour of one party, the burden of rebutting it lies upon the later."[295]

"*At the same time, when any fact is especially within the knowledge of a party, the burden of proving it lies upon that party*. The term 'especially' means facts which are preeminently or exceptionally within the knowledge of a person. It is true that it cannot apply when the fact is such as to be capable of being known also by persons other than the party. This Rule is an exception to the Rule of burden of proof. *Thus, when a person acts with some intention other than that which the character and circumstances of the act suggest, the burden of proving the intention is upon him.* The bottom line of the purpose of the Indian Evidence Act is to adopt a procedure that helps to facilitate justice and ultimately what is required is to unearth the truth, to prevail."[296]

Exposition on 'burden of proof':

The legal scheme governing various aspects of 'burden of proof' in the Indian context, is contained in Sections 101 to 106 of the Indian Evidence Act,[297]and the same has been meaningfully expounded by Justice B.V. Nagarathna as under:

(a) As per Section 101 of the Indian Evidence Act, "[t]he burden of proving a fact always lies upon the person who asserts and until such burden is discharged, the other party is not required to be called upon to prove his case."[298] However, this Rule is "subject to the general principle that things admitted need not be proved."[299]

(b) "If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a Court to arrive at a definite conclusion, *it is idle to contend that the party on whom the burden of proof lies would still be liable to produce direct evidence"*[300]

294 *Id.*, para 17.

295 *Id.*, para 15.

296 *Id.*, para 19. [emphasis supplied].

297 The legal scheme governing various aspects of 'burden of proof' in the Indian context, is contained in s. 101 to 106 of the Indian Evidence Act. See, *id*., para 64.1, *per* B.V. Nagarathna, J.

298 See, *ibid.*, para 64.2.

299 *Ibid.*

300 *Id.*, para 64.3, citing *National Insurance Co. Ltd.* v. *Rattani*, MANU/SC/8484/2008: (2009) 2 SCC 75: AIR 2009 SC 1499. [emphasis added].

(c) "Burden to prove documents lie on Plaintiff alone as onus is always on the person asserting a proposition or fact which is not self-evident. This position is summarised in the observation to the effect that, an assertion that a man who is alive was born requires no proof; the onus, is not on the person making the assertion, because it is self-evident that he had been born. But to assert that he had been born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion."[301]

(d) "[T]here is an essential distinction between burden of proof and onus of proof. Burden of proof lies upon a person who has to prove the fact and it never shifts, onus of proof on the other hand, shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. For instance, In a suit for possession based on title, once the Plaintiff has been able to create a high degree of probability so as to shift the onus on the Defendant, it is for the Defendant to discharge his onus and in the absence thereof, *the burden of proof lying on the Plaintiff shall be held to have been discharged so as to amount to proof of the Plaintiffs title.*"[302]

(e) "In terms of Section 102 of the Evidence Act, the initial burden to prove its claim is always on the Plaintiff and if he discharges that burden and makes out a case which entitles him to a relief, the onus shifts to the Defendant to prove those circumstances, if any, which would disentitle the Plaintiff of the same."[303]

(f) "Where, however, evidence has been led by the contesting parties, abstract considerations of onus are out of place and truth or otherwise must always be adjudged on the evidence led by the parties."[304]

(g) "As per Section 103, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. This Section amplifies the general Rule in Section 101 that the burden of proof lies on the person who asserts the affirmative of the issue."[305] It lays down that if a person wishes the court to believe in the existence of a particular fact, the onus of proving that fact, is on him, unless the burden of proving it is cast by any law on any particular person.

(h) "Section 105 is an application of the Rule in Section 103. When parties to a dispute adduce evidence to substantiate their claim, *onus becomes*

301 *Id*., para 64.4, citing *Robins* v. *National Trust and Co. Ltd*. MANU/PR/0100/1927: 1927 AC 515: 101 IC 903.

302 *Id.*, para 64.5, citing *RVE Venkatachala Gounder* v. *Arulmigu Viswesaraswami and V.P. Temple*, MANU/SC/0798/2003: AIR 2003 SC 4548 (4558-59): (2003) 8 SCC 752. [emphasis added]

303 *Id*., para 64.6.

304 *Id.*, para 64.7, citing *Kalwa Devadattam* v. *Union*, MANU/SC/0106/1963: AIR1964 SC 880.

305 *Id.*, para 64.8.

academic and divided, entailing each party to prove their respective plea."[306]

(i) "Section 106 is an exception to the general Rule laid down in Section 101, that the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue. Section 106 is not intended to relieve any person of that duty or burden but states that when a fact to be proved is peculiarly within the knowledge of a party, it is for him to prove it. It applies to cases where the fact is especially within a party's knowledge and to none else. The expression 'especially' used in Section 106 means facts that are eminently or exceptionally within one's knowledge. This means a party having personal knowledge of certain facts has a duty to appear as a witness and if he does not go to the witness box, there is a strong presumption against him. In an Election Petition, the initial burden to prove determination of age of returned candidate lies on the Petitioner, however, burden lies on the Respondent to prove facts within his special knowledge."[307]

(j) "The provisions of Section 106 are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. If he does so, he must be held to have discharged his burden but if he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106."[308]

Ajay Rastogi J., in respect of burden of proof, cited[309] the principles "succinctly" stated by the Supreme Court in *Sushil Kumar*[310] in their paras 28 to 32, which are as under:

> 28. It is no doubt true that the burden of proof to show that a candidate who was disqualified as on the date of the nomination would be on the election Petitioner.
>
> 29. It is also true that the initial burden of proof that nomination paper of an elected candidate has wrongly been accepted is on the election Petitioner.
>
> 30. In terms of Section 103 of the Indian Evidence Act, however, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

306 *Id*., para 64.9. [Emphasis added].

307 *Id.*, para 64.10, citing *Sushil Kumar* v. *Rakesh Kumar*, MANU/SC/0826/2003: (2003) 8 SCC 673.

308 *Id.*, para 64.11.

309 See, *id*., para 20.

310 *Sushil Kumar* v. *Rakesh Kumar*, MANU/SC/0826/2003: (2003) 8 SCC 673. For the facts of *Sushil Kumar* case, and how are these *pari matria* with the instant case, see, *id*., para 64.12, *per* B.V. Nagarathna, J.

> 31. Furthermore, in relation to certain matters, the fact being within the special knowledge of the Respondent, the burden to prove the same would be on him in terms of Section 106 of the Indian Evidence Act. However, the question as to whether the burden to prove a particular matter is on the Plaintiff or the Defendant would depend upon the nature of the dispute. (See Orissa Mining Corporation v. Ananda Chandra Prusty [MANU/SC/0571/1997 : (1996) 11 SCC 600]
>
> 32. *The age of a person in an election petition has to be determined not only on the basis of the materials placed on record but also upon taking into consideration the circumstances attending thereto*. The initial burden to prove the allegations made in the election petition although was upon the election petitioner but for proving the facts which were within the special knowledge of the respondent, the burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence, the question of the onus of proof becomes academic [see *Union of India* v. *Sugauli Sugar Works (P) Ltd*. [MANU/SC/0056/1976 : (1976) 3 SCC 32] and *Cox and Kings* (Agents) *Ltd*. v. *Workmen* [MANU/SC/0224/1977 : (1977) 2 SCC 705]. Furthermore, an admission on the part of a party to the lis shall be binding on him and in any event a presumption must be made that the same is taken to be established."[311]

Bearing in mind the mandate of Section 35 of the Evidence Act, 1872 which stipulates that 'a register of record maintained in terms of the statute or by statutory authority in the regular course of business would be a relevant fact,' the evidence brought on record is required to be considered by the court trying the election petition.[312] The parties in the instant case before the high court "have led their documentary as well as oral evidence and have marked exhibits in reference to relevant documents placed by the election Petitioner and the Appellant in support of their respective claims to justify with regard to the date of birth of the Appellant."[313]For their perusal and consideration, both the oral and documentary evidence relied upon by the parties, which has been noticed in paras 8 and 9 of the judgment of the high court, have been reproduced.[314]

In this backdrop, the Supreme Court has analyzed the entire evidence threadbare in the light of totality of "circumstances appearing in the case" right from the very beginning of filing of nomination till the declaration of result, along

311 The Supreme Court in *Sushil Kumar* followed, inter alia, *Birad Mal Singhvi* [1988 Supp SCC 604] and several other decisions, see, *Mohd. Abdullah Azam Khan,* para 46, *per* Ajay Rastogi, J.,

312 See, *id.*, para 21.

313 *Ibid*.

314 See, *ibid.*

with oral and documentary evidence brough on record.[315]Summation of the Supreme Court in the instant case may abstracted as under:

> *(a)Re date of birth of the appellant: Positive inference*:
>
> [T]he documents issued by Nagar Palika, Rampur in the year 2012, clearly indicate the recorded date of birth as 1st January, 1993 and which is duly supported by his academic record from Class X onwards at all stages which had been generated only under the Appellant's own signatures or under the authority of the Appellant and this in no manner could be disputed.[316]*Merely because the same has been later on cancelled by the Appellant, it may not lose its evidentiary value."*[317]

This is further supported by GIS Nomination Form of appellant's mother, and appellant's own class XII Secondary School Examination Certificate, and also the Passport made at "undisputed point of time."[318]

G.I.S. Nomination Form, which is part of appellant's mother service book and adduced as evidence at the behest of the Appellant, carries an entry about Appellant's age, which is consistent with the date of birth mentioned Class X Secondary School Examination Certificate and Class XII Secondary School Examination Certificate as 01.01.1993, and, thus, goes against the case of the Appellant.[319]The same is the position in respect of appellant's "earlier passports and visa documents" in which he "had relied upon the educational certificates indicating his date of birth as 01.01.1993 and his place of birth as Rampur for the purpose of securing his earlier passports and visa."[320]

> *(b)Re date of birth of the appellant: Negative inference:*
>
> The stand taken by the appellant that "all documents pertaining to the Birth Certificate dated 28.06.2012 issued by the office of Nagar Palika Parishad, Rampur, were burnt due to a short circuit on 08.05.2015 would suggest that the said birth certificate, wherein the date of birth of the successful candidate was recorded as 01.01.1993 came to be destroyed and later cancelled were under suspicious circumstances."[321] In fact, the new Certificate of Birth dated January 21, 2015, issued by the Nagar Nigam, Lucknow, was procured in complete violations of Section 13(3) of the Registration of Birth and

315 See, *id.*, paras 22onwards till we reach the cited seminal judgment of the Supreme Court in Sushil Kumar in para 45, which provided the lead for the decision in the instant case.

316 See, *id*., para 28: It is inter alia stated: "The Respondent has established on record that the date of birth of the Appellant is 1st January, 1993 and this fact was not disputed by the Appellant that the documents placed and relied upon by the Respondent on record are public documents issued by the competent authorities.

317 *Id.*, para 47. [Emphasis added]

318 See, *id.*, para 71.3 ('Summary of Conclusions' at (a), *per* B.V. Nagarathna, J.

319 *Ibid.*

320 *Ibid.*

321 See, *id*., para 71.3 ('Summary of Conclusions' at (b), per B.V. Nagarathna, J.

Death Act, 1969, which "clearly postulates that delayed registration of birth and death are permissible provided a procedure prescribed has been followed after taking orders from the Magistrate and proving the correctness of the date of birth."[322]"Although the defence of the Appellant is that since his name was already registered in the records of Nagar Nigam, Lucknow, Section 13(3) of the Registration of Birth and Death Act, 1969 may not apply, but this submission appears to be misplaced for the reason that on the basis of the birth record maintained by the Nagar Palika, Rampur, the birth certificate was issued to him under the orders of the competent authority on 28th June, 2012, and *there cannot be two separate records of birth available in two different municipalities (Rampur/Lucknow) of the same person*[323] and in the given situation, no credibility can be attached on the records maintained by the Nagar Nigam, Lucknow, and in our considered view, the procedure as prescribed Under Section 13(3) of the Act, 1969, in the ordinary course of business, was supposed to be adopted by the authorities while a fresh certificate of date of birth was issued to him on 21st January, 2015, which indeed has not been followed by the competent authority by Nagar Nigam, Lucknow."[324]

(c) The very foundation of procuring the fresh Birth Certificate is forged

The birth certificate dated 21.01.2015, issued by the Nagar Nigam, Lucknow, which is stated to be issued on the strength of an entry made in the birth register maintained by the Queen Mary's Hospital, Lucknow "is not authentic," inasmuch that very record of the hospital, indicating the birth of the Appellant on 30.09.1990,which constituted the foundation for the issuance of the birth certificate by Nagar Nigam, Lucknow, "is created by manipulation and interpolation in the hospital records,"[325] and, therefore, "no weight can be placed on the birth certificate dated 21.01.2015."[326]In cross-examination of the Appellant's mother, it came to be revealed that the sole reason for changing the date of birth from 1st January 1993 to 30th September 1990 was to gain entry 'into active politics' by becoming eligible to stand for election, and for this a documentary evidence was created by faking the record of the Queen Mary's

322 *Id.*, para 33, *per* Ajay Rastogi, J.

323 *Ibid.* It is stated, *inter alia*, that "admittedly it is not possible that at two different places (Rampur/Lucknow) his birth has taken place or record is maintained and the document obtained from Nagar Palika, Rampur, on June 28, 2012 was completely concealed and the documents were later generated/obtained from Queen Mary's Hospital, Lucknow, which were for the first time placed on record in the course of the election petition."*Ibid*.

324 *Id.*, para 48. (Emphasis added)

325 See*, id*., para 71.3 ('Summary of Conclusions' at (c), *per* B.V. Nagarathna, J.

Hospital, Lucknow,which constituted as the foundation on which the birth certificate has been issued by the Nagar Nigam, Lucknow.[327]In such a scenario, in the "considered view" of the Supreme Court, "no probative value could have been attached to it."[328]

(d) No weightage could be placed "on the result of the ossification test as other documents such as the matriculation certificate, date of birth certificate issued by the Nagar Palika Parishad, Rampur and passports prove that the age and the date of birth recorded in such documents is contrary to the result of the ossification test."[329]

(e) Since the Aadhar card, driver's licence and voter ID of the Appellant (Returned Candide), issued on the strength of birth certificate prepared by the Nagar Nigam, Lucknow, on 21.01.2015, which was premised on the fabricated certificate issued by the Queen Mary's Hospital, Lucknow, on 21.04.2015, could not be regarded as "proof of the successful candidate's date of birth as 30.09.1990."[330]

(f) Bearing in mind the mandate of Article 173(b) of the Constitution, which provides that a person cannot be permitted to occupy an office for which he is disqualified under the Constitution, and since in the instant case, "after taking into consideration all the material on record," it is found that Nomination of the Appellant, the Returned Candidate, was improperly accepted."The findings of the High Court in this regard do not require any interference," and, therefore,his election to the Legislative Assembly is set aside by Justice B.V. Nagarathna.[331] Likewise, in the "considered view" of Justice Ajay Rastogi, "no manifest error was committed by the High Court in passing the impugned judgment, which may call for our interference."[332]

326 *Ibid.*

327 See, *id.*, paras 31 and 32, revealing how the new birth certificate was obtained by the appellant's mother on simple application without any supporting document addressed to the Chief Health Officer, Nagar Nigam, Lucknow, enclosing an affidavit that the appellant was born on 30th September, 1990 in Queen Mary's Hospital, Lucknow, and the requisite birth certificate was issued just within three days.

328 *Id*., para 49, *per* Ajay Rastogi, J.

329 See, *id.*, para 71.3 ('Summary of Conclusions' at (d), *per* B.V. Nagarathna, J.

330 *Id*.

331 *Ibid.*

332 *Id*., para 50.

V NON-DISCLOSURE OF ASSETS: WHETHER CONSTITUTES CORRUPT PRACTICE IN THE ABSENCE OF ANY STATUTORY PROVISION REQUIRING DISCLOSURE OF ASSETS?[333]

This issue has squarely come before the three-judge bench of the Supreme Court in *S.Rukmini Madegowda* v. *The State Election Commission.*[334] In this case, *S. Rukmini Madegowda is the* appellant before the Supreme Court, who had filed her nomination for election to the Mysore Municipal Corporation, as Councilor from Ward No. 36-Yeraganahalli in Karnataka, which was reserved for Backward Class-B (Women), along with a declaration by way of an affidavit, furnishing details of the movable and immovable properties held by her as well as her spouse and dependents. She was declared elected and was serving as the Mayor, Mysore City Corporation after election. Her election was challenged by one of the defeated candidates, through Election petition, alleging that she had in her Affidavit of Assets, falsely declared that her husband did not possess any immovable property, and that by giving such false declaration, the appellant had indulged in corrupt practices to get the benefit of reservation under the Category of Backward Class-B (Women). Her election was eventually set aside by the Principal District and

333 See also, Virendra Kumar, "Election Petition: Whether it can be dismissed at the very threshold on account of non-filing of an affidavit in Form 25 (prescribed under Rule 94A of Conduct of Election Rules, 1961) as provided under Section 83(1) of the Representation of People Act 1951?"*ASIL* Vol. LVII (2021);Virendra Kumar, "Dismissal of Election petition *in limine*: How to determine the non-disclosure of cause of action, one of the pivotal grounds of dismissal?" *ASIL* Vol. LIV at 253-268 (2018), Virendra Kumar, "Whether election petition discloses any 'cause of action': ambit of court's enquiry," *ASIL* Vol. LIII at 349-353 (2017); Virendra Kumar, "corrupt practices under the representation of the people act, 1951: when does an election petition is held to disclose triable issues?" *ASIL* Vol. LII at 482-488 (2016); Virendra Kumar, "Nob-disclosure of criminal antecedents: Whether tantamount to 'undue influence' as a facet of corrupt practice under Section 123(2) of the 1951 Act", *ASIL* Vol. LI at 509-518 (2015); Virendra Kumar, "Election Petition: When could it be said to disclose 'no cause of action'" *ASIL* Vol. LI at524-530 (2015); Virendra Kumar, "Nomination paper: when does it amount to its proper or improper rejection by the returning officer?" *ASIL*. Vol. L at 545-550 (2014); Virendra Kumar, "Cause of action: when it is said to be disclosed in an election petition," *ASIL*. Vol. XLVIII at 414-418 (2012); Virendra Kumar, "An election petition lacking material facts as required to be stated in terms of Section 83(1): whether could be dismissed summarily without trial," *ASIL*. Vol. XLVI at 358-363 (2010); Virendra Kumar, "Material facts and particulars," *ASIL*. Vol. XXXVI at 245-248 (2001); Virendra Kumar, "Dismissal of election petition *in limine*," *ASIL*. Vol. XXXV at 282-284 (1999); Virendra Kumar, "Modus operandi for determining cause of action," *ASIL* Vol. XXIII (1987) at 412-415; and Virendra Kumar, "Rejection of nomination paper," *ASIL* Vol. XXI (1985) at 409-418.

334 NU/SC/1161/2022: AIR 2022 SC4347 (Civil Appeal No. 6576 of 2022 (Arising out of S.L.P. (C) No. 7414 of 2021) Decided On: 14.09.2022, per U.U. Lalit, C.J.I., Indira Banerjee and Ajay Rastogi, JJ. (Hereinafter *S. Rukmini Madegowda*)

Sessions Judge, Mysuru (trial court).[335] The high court dismissed the appeal against that judgment. By way of special leave to appeal, she has come to the Supreme Court.

The main issue to be determined before the Supreme Court is, "Whether non-disclosure of assets would constitute corrupt practice, in the absence of any statutory provision requiring disclosure of assets?"[336] This issue got crystalized when the Appellant, the returned candidate admittedly stated in her averments that "she had no knowledge about her husband having the properties mentioned in the said paragraph at the time of swearing to that affidavit and hence she has not mentioned the same in her said affidavits,"[337] and, thus, "non-mentioning of the said properties in the said affidavit is unintentional and for the said bona fide reason."[338] This clear admission by the appellant, has led to the straight exercise to examining the adverse consequence of such a non-disclosure of husband's assets under the election law. Does it amount to 'corrupt practices', resulting into declaring the election null and void?

The trial court had held that such a suppression of fact by the appellant amounted to violation of the Karnataka Municipal Corporations Act, 1976 as well as Section 123 of the Representation of the Peoples Act, 1951, and, therefore, set aside the election of the appellant. High Court of Karnataka affirmed the decision. What is the response of the three-Judge Bench of the Supreme Court to the impugned judgment?

335 Initially, the Principal District and Sessions Judge, Mysuru (Trial Court), by a judgment and order dated April 16, 2019, rejected the said election petition no. 4 of 2018 filed by the respondent no. 4. However, when an appeal was filed by aggrieved respondent no. 4, the appeal being Miscellaneous First Appeal No. 4023 of 2019 in the High Court of Karnataka, challenging the said judgment and order dated April 16, 2019 passed by the trial court. By an order dated April, 28 2020, the high court remanded election petition no. 4 of 2018 back to the Trial Court, for reconsideration, in the light of the judgments of this Court in Union of India v. Association for Democratic Reforms MANU/SC/0394/2002: (2002) 5 SCC 294 and in *Lok Prahari* v. *Union of India* MANU/SC/0134/2018 : (2018) 4 SCC 699. The high court observed:

"...This Court is of the considered opinion that for complete adjudication of the lis the trial court should have considered such question with reference to the relevant provisions of the KMC Act and the decisions of the Hon'ble Supreme Court in Union of India v. Association for Democratic Reforms, People's Union for Civil Liberties (PUCL) and Anr. v. Union of India and in *Lok Prahari* v. *Union of India*.

Thereafter, by a judgment and order dated December 14, 2020, the trial court allowed the election petition no. 4 of 2018 and set aside the election of the appellant. (See, *S. Rukmini Madegowda,* paras 7-10)

336 See, *S. Rukmini Madegowda*, para 15(ii). The other question raised on behalf of the appellant is somewhat secondary: "(i) Whether a duly elected candidate, serving as the Mayor, Mysore City Corporation after election, could be unseated, in the absence of any statutory provision requiring disclosure of assets in the affidavit filed with the nomination form?"

337 See*, id.*, para 51, wherein the Appellant made this averment to the election petition in para 5 of the petition.

338 *Ibid*.

Appellant's election has been set aside, as she was found to be disqualified to hold the office on ground of corrupt practices under the Karnataka Municipal Corporations Act, 1976. This implied that non-disclosure of assets amounted to corrupt practice. Is it so? If so, then how?

Section 27 of the Karnataka Municipal Corporations Act, 1976 (KMC) deals with "Corrupt practices entailing disqualification". It provides: "The Corrupt practices specified in Section 39 shall entail disqualification for being a councilor for a period of six years counting from the date on which the finding of the court as to such practice takes effect under this Act."[339]

Under Section 39 of the KMC Act, corrupt practices include undue influence.[340] The definition of undue influence in Clause 2 of Section 123 of the Representation of the People Act 1951,[341] has been incorporated in Section 39(2) of the KMC Act.[342]

Section 123(2) of the 1951 RP Act came up for interpretation by the Supreme Court in *Lok Prahari* v. *Union of India.*[343] where it was held that 'the non-disclosure of assets' would amount to 'undue influence' as defined under the Representation of People Act.[344] And the definition of 'undue influence' as used in Section 123(2) of 1951 Representation of the People Act is also adopted by Section 39(2) of the

339 Cited in, *id*., para 44.

340 Under Section of 39 of KM C. "The following shall be deemed to be corrupt practices for the purposes of this Act, namely:(1) 'bribery' as defined in Clause (1) of Section 123 of the Representation of the People Act, 1951 (Central Act 43 of 1951) for the time being in force;(2) 'undue influence' as defined in Clause (2) of the said Section for the time being in force; …."

341 Clause (2) of Section 123 of the 1951 RP Act dealing with 'corrupt practices' provides, inter alia, "The following shall be deemed to be corrupt practices for the purposes of this Act:(1)...(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right: Provided that—

(a) without prejudice to the generality of the provisions of this Clause any such person as is referred to therein who—

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and excommunication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.

342 See, *id*., para 45.

343 MANU/SC/0134/2018: (2018) 4 SCC 699.

344 See, *S. Rukmini Madegowda*, para 55.

KMC Act.[345] Logically, therefore, it has been observed by the Supreme Court in the instant case that "the nondisclosure of assets in the municipal elections would also amount to 'undue influence' and consequently to 'corrupt practice.'"[346] Moreover, this slant KMC Act is further reinforced by "the tenor of Section 39(3) of the KMC Act,"[347] which stipulates that "any false statement relating to a candidate would be corrupt practice."[348]

Once non-disclosure of assets has been found to be a 'corrupt practice' within the statutory scheme of election law as laid down under the KMC Act, there is no difficulty to proceed further under the provisions of section 35 the said Act, which enjoins upon the trial court to declare the election of the returned candidate void on ground of 'corrupt practice', as specifically stipulated under section 35(1)(b).[349]

In the light of cumulative reading of the provisions KMC Act, as stated above, the question, whether or not the State Election Commission (through Notifications dated July 14 2003 and in particular June 19, 2018) had power to issue directions to the candidates to file affidavits disclosing the assets of their spouses mandatorily?[350]

To answer the question, as crystalized above, in the negative seems to be misplaced. This is at least for two reasons. Firstly, in our own view, the notifications issued by the election commission are in consonance with the burden of the provisions of KMC Act, which clearly empower the trial court, trying the election petition, to declare the election of the returned candidate on ground of corrupt practice, which includes the non-disclosure of assets within its ambit.[351] This clearly implies that the State Election Commission has the requisite power to issue the said Notifications. Secondly, such a question "is no longer res Integra."[352] It is

345 *Ibid*.

346 *Ibid*.

347 See, *id*., para 61.

348 *Ibid.*

349 See, *id*., para 60.

350 See, *id*., para 56: The argument raised on behalf of the Appellant that the State Election Commission did not have the power to issue the Notifications dated July 14, 2003 and June 19, 2018, making it mandatory for candidates to file affidavits disclosing the assets of their spouses, since there was no such requirement in the KMC Act.

351 See, *Krishnamoorthy v. Sivakumar* MANU/SC/0108/2015 : (2015) 3 SCC 467, cited in favour of electioneer petitioner, in which the Supreme Court upheld a notification of the Tamil Nadu State Election Commission requiring that every candidate contesting elections to a local body, should disclose whether there was any criminal case pending against him. In the aforesaid case, the election of the Appellant as the President of the Panchayat had been declared null and void for not disclosing the information required in terms of the notification issued by the Tamil Nadu State Election Commission. Cited in, *id*., para 57. See also*, id.,* para 64, in which argument was raised on behalf of the appellant that the Election Commission was required to act "within the four corners of law made by the Parliament and/or the concerned State legislature, as the case may be." In our view, this is what the State Election Commission did in fact.

352 See*, id.,* para 63.

"squarely covered by the law laid down by this Court in *Union of India* v. *Association for Democratic Reforms* (supra), where this Court had directed the Election Commission to secure to voters, inter alia, information pertaining to assets not only of the candidates but also of their spouse and dependents."[353]

The Supreme Court exposition of the "comprehensive provision" under Article 324 of the Constitution in *Association for Democratic Reforms* case, does empower the Election Commission of India "to take care of surprise situations" in the conduct of elections.[354] The width of its power "operates in areas left unoccupied by legislation,"[355] and that such an interpretation given by the Supreme Court of Article 324 is "binding on all courts."[356]Since this wide ranging power of the Election Commission, as expounded by the Supreme Court in *Association for Democratic Reforms* case is meant for ensuring 'free and fair elections', whether the same should be equally available to the State Election Commission for the conduct of elections to the local bodies under Article 243-ZA(1) of the Constitution.[357] The singular reason for such an extension is, as pointed out by the three-Judge Bench of the Supreme Cout in instant case, that "the language and tenor of Article 243-ZA(1) is in *pari materia* with Article 324(1) of the Constitution."[358] To wit,

> Article 324 while dealing with the "Superintendence, direction and control of elections to be vested in an Election Commission", *inter alia*, provides: "(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)."[359]

Likewise, Article 243-ZA, while dealing with "Elections to the Municipalities," *inter alia*, provides. "(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in Article 243-K."[360]

353 See, *id.*, para 63 read with para 56.
354 See, *id*., para 65.
355 *Ibid.*
356 *Ibid.*
357 See, *id*., para
358 *Id.,* para 66.
359 *Ibid*.
360 *Ibid*.

On the basis of this analogy, it is held:[361]

> This Court has interpreted Article 324(1) to confer wide powers on the Election Commission relating to superintendence, direction and control of preparation of electoral roles and/or the conduct of elections to Parliament and to the legislature of every State provided, of course, that the directions are not contrary to law. The interpretation of Article 324(1) to confer wide powers on the Election Commission to issue directions in respect of elections to Parliament and State legislatures would apply to Article 243-ZA(1). *Article 243-ZA(1) has to be construed to confer powers on the State Election Commission to issue directions related to superintendence, direction and control of the preparation of electoral roles or for conduct of elections to municipalities*.

By virtue of similarity between textual and tenor of the provisions of Article 324(1) and Article 243-ZA(1) of the Constitution, the ambit of the power of State Election Commission, corresponding to the power of Election Commission of India as expounded by the Supreme Court in *Association for Democratic Reforms case,* stands extended: "The State Election Commission has the same powers Under Article 243-K and 243-ZA(1) as the Election Commission of India has Under Article 324(1) of the Constitution of India."[362] This clearly implies that the State Election Commission under Article 243-ZA(1) has the power to issue Notifications and directions whereby "for effective exercise of his fundamental right Under Article 19(1)((a), the voter is entitled to have all relevant information about candidates at an election which would include criminal antecedents, if any, of the candidate, his/her assets and liabilities, educational qualifications, etc."[363]

Though, it is true that the decision of the Supreme Court in Association for Democratic Reforms necessitated to amend the Act of 1951, which is within the exclusive domain of the Union Parliament, and no such corresponding amendment has been formally carried into the provisions of the KMC Act, which is exclusively within the domain of the Karnataka State Legislature,[364] but that should be of no consequence to carry forward the directive of ensuring free and fair elections into the domain of KMC Act. On this count, the Supreme Court has rightly observed:[365]

> However, in light of the law declared by this Court in Association for Democratic Reforms (supra), we do not see any legal or normative impediment for the State Election Commission to issue directions requiring disclosure of assets of the candidate, his/her spouse and dependent associates by way of affidavit. In issuing the notification dated 14th July 2003, the Election Commission has not encroached

361 See, *id.*, para 67. [Emphasis added]
362 See, *id.*, para 68
363 *Id*., para 69.
364 See*, ibid.*
365 See, *id.*, para 70.

> into the legislative domain of the Karnataka State Legislature. The direction, as contained in the notification dated 14th July 2003 had been accepted by the Appellant. Having affirmed a false affidavit, it does not lie in the mouth of the Appellant to contend that her election should not be set aside on the ground of corrupt practice Under Section 35(1) of the KMC Act.

Besides justifying the widened power of the State Election Commission on the analogy of the power of Election Commission of India as well as such power falling within the four corners of the KMC Act,[366]the extension of the power of the State Election Commission so as to include within its ambit to make disclosure of assets mandatory, fits into the character of our polity. Under our Constitution, this feature is often described as 'quasi-federal'; that is "Union of States" with a strong Center.[367]For realizing this model, our Constitution, which is "the supreme law for the Union and for the States," envisages "an independent judiciary which acts as the guardian of the Constitution."[368] Furthermore, a perusal of the distribution of powers between the Union and the States under the Constitution instantly reveals that "in matters of national importance in which a uniform policy is desirable in the interest of the units, authority is entrusted to the Union, and matters of local concern remain with the State."[369]

In this situational context, the three-Judge Bench has conclusively summed up:[370]

(a) "Purity of election at all levels, be it election to the Union Parliament or a State Legislature or a Municipal Corporation or a Panchayat is a matter of national importance in which a uniform policy is desirable in the interest of all the States."

(b) "A hyper-technical view of the omission to incorporate any specific provision in the KMC Election Rules, similar to the 1961 Rules, expressly requiring disclosure of assets, to condone dishonesty and corrupt practice would be against the spirit of the Constitution and public interest."

Accordingly, the Supreme has eventually dismissed the appeal by holding that "there are no grounds to interfere with or set aside the impugned judgment

366 See, *id.*, para 72: In the "considered opinion" of the Supreme Court, " the Election Commission has issued the notification dated 14th July 2003 within the contours of law."

367 See, *id.*, para 71: "… The Indian polity combines the features of a federal Government with certain features of a unitary Constitution. While the division of powers between the Union Government and the State Governments is an essential feature of federalism, in matters of national importance, a uniform policy is essential in the interest of all the states, without disturbing the clear division of powers, so that the Union and the States legislate within their respective spheres."

368 *Ibid.*

369 See, *id.*, para 73, citing *State Bank of India v. Santosh Gupta,* MANU/SC/1612/2016 : (2017) 2 SCC 538 (para 10), in which Rohinton Fali Nariman, J. speaking for the Bench relied upon decision of the Supreme Court in *State of West Bengal v. Union of India* MANU/SC/0086/1962 : AIR 1963 SC 1963 made these observations.

and order of the High Court, affirming the judgment and order of the Principal District and Sessions Judge, Mysuru, allowing election petition no. 4 of 2018 and setting aside the election of the Appellant."[371]

VI AMENDMENT OF THE ELECTION PETITION: WHEN IT CAN OR CANNOT BE ALLOWED?[372]

This short issue has been dealt with by the Supreme Court in *Yendapalli Srinivasulu Reddy* v. *Vemireddy Pattabhirami Reddy*.[373]In this case, the appellant is the returned candidate in the Legislative Assembly elections, whose result was declared on March 21, 2017.[374] It was challenged by the respondent through an election petition filed on April 27, 2017.[375] On March 27, 2018, the election petitioner (respondent no. 1) moved an application, being interlocutory application no. 2 of 2018, seeking permission to amend the election petition, so as to incorporate some additional information, which was contested by the appellant.[376]

After consideration of the rival contentions, the high court by the order dated December 6, 2019 allowed the application of the election petitioner for amendment of the petition.[377] This led the Appellant to come to the Supreme Court by way of SLP. Pursuant to this move, notice was issued by the Supreme Court on February 14, 2020 and "operation of the impugned order was stayed."[378]Since "further proceedings in the election petition having not been stayed, the same have progressed further in recording of evidence."[379]

In this situational context, even without waiting for the outcome of the continuing proceedings in the high court, the Supreme Court, "having regard to the nature of proceedings,""considered it appropriate to hear the matter finally at this stage itself,"[380] and to decide *de novo*, 'whether the approach of the High Court in allowing the amendment as prayed for was justified.' What needs to be noticed here is how has the Supreme Court approached the issue of allowing amendment of the election petition in this appeal?

370 *Id.*, para 74.

371 *Id*., para 76 read with para 75.

372 See also, Virendra Kumar, "Amendment of original election petition and alternative plea of being declared duly elected under Section 101 of Representation of the People Act,1951: when it can be denied?"*ASI*LVol. LVI at 669-673 (2020); Virendra Kumar, "Election Petition: Whether It Can Be Dismissed *In Limine* on Ground of Defective Verification," *ASIL*LVI at 829-689 (2020); Virendra Kumar, "Election Petition: When allowed or not allowed to be amended to make it reasonably tiriable," *ASIL* LI at 830-539 (2015).

373 MANU/SC/1380/2022: AIR2022SC5467 (Civil Appeal No. 7951 of 2022 (Arising out of SLP (C) No. 3267 of 2020), Decided on: 19.10.2022, per Dinesh Maheshwari, J. (for himself and J.K. Maheshwari, J.). Hereinafter, *Yendapalli Srinivasulu Reddy.*

374 See, *Yendapalli Srinivasulu Reddy,* para 7.

375 See*, ibid.*

376 *Ibid.*

377 See, *id.*, para 3.

378 See*, id*., para 10.

379 *Ibid.*

380 *Ibid.*

Right in the first instance, the Supreme Court, for the purpose of this appeal,identified the main grounds on which the election petition was filed. In their view, there were "essentially two broad grounds" [381] "One being of improper acceptance of the nomination of the returned candidate, *i.e.,* the appellant herein, and the second being of improper receipt of invalid votes and improper rejection of valid votes."[382] Since the second ground is not relevant for the disposal of the present appeal in hand, it has focused only on the first ground, and sought Appellant's response to it.[383] On this specific count, "the Appellant has, *inter alia*, prayed for the following relief:[384]

> B. Declare the acceptance of the nomination paper filed by the 1st Respondent/the Returned candidate with substantial defects in the affidavit as illegal, improper and consequently set aside/reject the same.

In relation to appellant's aforementioned relief, the election Petitioner (Respondent No. 1) has stated "that the nomination paper of the Appellant ought to have been rejected for being not accompanied by a proper affidavit, particularly when the verification part was not carrying the signature of the Appellant."[385] The other submissions of the Election Petitioner's, as abstracted by the Supreme Court, are "that the affidavit was drawn up on certain stamp papers but, one of them was not purchased in the name of the Appellant and was purchased by some other person and then, the name of the Appellant was inserted by erasing the name of the original purchaser."[386] "It had also been submitted" by the Election Petitioner, "that there had been certain blank spaces for which, the affidavit was rendered nugatory and these being the defects of substantial nature, the nomination was required to be rejected."[387]

It is in this background, the Supreme Court has critically examined afresh the interlocutory application no. 2 of 2018, seeking permission to amend the election petition. This has been done by first reproducing averments in extenso presented as such by the Election Petitioner in the following terms:[388]

> 8a. It is submitted that as per Section 33(A)(i) of the Representation of the People Act, 1951, a candidate shall furnish the information as to whether he is Accused of any offence punishable with imprisonment for two years or more in a pending case in which charge has been framed by the court of competent Jurisdiction. It is further submitted that the returned candidate/1st Respondent herein

381 See, *id.*, para 4.
382 *Ibid.*
383 *Id*., para 5.
384 *Ibid.*
385 *Id.,* para 6.
386 *Ibid.*
387 *Ibid.*
388 See, *id*., para 7. Emphasis added.

filed a false in Form-26 by not disclosing the criminal case pending against him in which he is Accused of an offence punishable with imprisonment for two years or more and a charge has already been framed by the court of competent Jurisdiction as on the date filing his nomination. I respectfully submit that the Petitioner has deliberately filed as a false affidavit in Form-26 by not disclosing the criminal case pending against him as the FIR in the said criminal case was filed on 3.10.2011 and the same has been registered as Crime No. 188/2011 on the file of the Gudur Rural Police Station, Nellore District. The Petitioner has been arrayed as A3. The Court has taken cognizance of the same as C.C. No. 370/2012 and the charges were also framed as on the day of filing nomination. Later the returned candidate/1st Respondent herein has been convicted for the offences Under Section 143, 147, 148, 447, 290 and 332 read with 149 Indian Penal Code and the details of the sentence and fine imposed on the returned candidate/the first Respondent herein on 12.01.2018 by the Additional Judicial Magistrate of First Class, Gudur, Nellore District are as follows:

Sl. No.	Provision of Law	Sentence	Fine (Rs)
1	Section 143 IPC	6 Months	1000/-
2	Section 147 IPC	One Year	1000/-
3	Section 148 IPC	Two Years	1000/-
4	Section 447 IPC	3 Months	500/-
5	Section 332 IPC	Two Years	1000/-
6	Section 290 IPC	————	200/-

The returned candidate/1st Respondent herein did not disclose the criminal case pending against him in the election affidavit filed in Form-26 and the non-disclosure of such an important fact has rendered the affidavit defective and invalid in law as per the law laid down by the Hon'ble Apex Court in the case of Kisan Shankar Kathore v. Arun Dattatray Sawant and Ors. reported in MANU/SC/0462/2014 : (2014) 14 SCC 162.

8b. It is submitted that as per the Section 33 of the Representation of the People Act, 1951, a nomination paper complete in the prescribed Form, signed by a candidate and by an elector of the constituency as proposer should be delivered to the returning officer within the prescribed period. A candidate has to file an affidavit along with his nomination paper as prescribed in Form 26. The Petitioner has deliberately filed a false affidavit in Form-26 by not disclosing the criminal case pending against him as the FIR in the said criminal case was filed on 3.10.2011 and the same has been registered as Crime No. 188/2011 on the file of the Gudur Rural Police Station, Nellore District. The Petitioner has been arrayed as A3. The Court has taken cognizance of the same as C.C. No. 370/2012 and the charges were also framed as on the day of filing nomination. As per Section 33(A) of The

Representation of the People Act, 1951 it was incumbent upon every candidate, who is contesting election, to give information about his assets, criminal antecedents and other affairs, which requirement is not only essential part of fair and free elections, inasmuch as, every voter has a right to know about these details of the candidates, such a requirement is also covered by freedom of speech granted Under Article 19(1)(a) of the Constitution of India. The right to get information in democracy is recognized all throughout and it is a natural right flowing from the concept of democracy. Under our Constitution Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. *Voter's right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. Voter may think over before making his choice of electing law breakers as law-makers.*

8c. It is submitted that the solemnity of the affidavit has been ridiculed by suppressing the material information resulting in disinformation and misinformation to the voters. The sanctity of true disclosure to be made by the candidate has failed to comply with said obligation in its letter and spirit. *The result of the election in so far as it concerned the returned candidate/1st Respondent herein has therefore been materially affected by improper acceptance of his information and the election result of the returned candidate therefore is required to be declared void under Under Section 100(1)(d)(i) of the Representation of the People Act, 1951.*

8d. It is further submitted that the Respondents herein who is the returned candidate has failed and neglected to disclose the information of pending criminal case against him in which the charges have already been framed in the affidavit in Form-26. The non-disclosure is a material lapse on the part of the returned candidate/ 1st Respondent herein. *The non-disclosure to the voters is fatal and amount to suppression of vital and material information rendering the affidavit defective and the election of the returned candidate/1st Respondent herein is liable to be set aside."*

In view of these added averments made in the interlocutory application, the Supreme Court recalled the relevant law, both statutory law[389] as well as the law resulting from judicial precedents. We may abstract the following principles as expounded by the Supreme Court particularly in two undernoted cases,[390] that

389 See, *id.,* para 15. The relevant provisions that have been specially and specifically taken note of are those of Representation of the People Act, 1951: S. 33A, dealing with 'Right to information'; Sub-s. (5) of s. 86 dealing with 'Trial of election petitions'; S. 100 dealing with 'Grounds for declaring election to be void'; and S. 125A dealing with' Penalty for filing false affidavit, *etc*.'

390 See*, id*., para 16 and 17: *Krishnamoorthy* v. *Sivakumar* MANU/SC/0108/2015 : (2015) 3 SCC 467 (Hereinafter, simply *Krishnamoorthy)*, and *Sethi Roop Lal* v. *Malti Thapar (Mrs.)* MANU/SC/0662/1994 : (1994) 2 SCC 579. (Hereinafter, simply *Sethi Roop Lal).*

enabled the Supreme Court in the instant case to decide, whether or not amendment of the election petition should be allowed.

Sethi Roop Lal case:

The Supreme Court has articulated the critical distinction between "material fact" and 'material particulars' of 'corrupt practice' as determinant of amendment of the Election Petition. This is done by observing as follows:

A. "(i) Our election law is statutory in character as distinguished from common law and it must be

(ii) There is a clear and vital distinction between 'material facts' referred to in Section 83(1)(a) and 'particulars' in relation to corrupt practice referred to in Section 83(1)(b) of the Act.

(iii) Section 86(5) of the Act empowers the High Court to allow particulars of any corrupt practice which has already been alleged in the petitions to be amended or amplified provided the amendment does not seek to introduce a corrupt practice which is not previously pleaded.

(iv) By implication amendment cannot be permitted so as to introduce 'material facts.'"[391]

B. The procedure for trial of election petitions has been provided in Chapter III of Part VI of the Representation of the People Act, 1951."Sub-section (1) of Section 87 thereof provides that subject to the provisions of this Act and of any Rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure ('Code' for short). That necessarily means that Order VI Rule 17 of the Code which relates to amendment of pleadings will a fortiori apply to election petitions subject, however, to the provisions of the Act and of any Rules made thereunder. *Under Order VI Rule 17 of the Code the Court has the power to allow parties to the proceedings to alter or amend their pleadings in such manner and on such terms as may be just and it provides that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.But exercise of such general powers stands curtailed by Section 86(5) of the Act, when amendment is sought for in respect of any election petition based on corrupt practice.* Since Section 87 of the Act—and, for that matter, Order VI Rule 17 of the Code—is subject to the provisions of the Act, which necessarily includes Section 86(5), the general power of amendment under the former must yield to the restrictions imposed by the latter."[392]

391 See*, id*., para 17, citing *Sethi Roop Lal* (supra), para 9, in which the Supreme Court drew sustenance from the observations made by the Supreme Court in the case of *F.A. Sapa* v. *Singora* MANU/SC/0362/1991 : (1991) 3 SCC 375:

392 See*, id*., para 17, citing *Sethi Roop Lal* (supra), para 10

C. "Indubitably, therefore, if the amendment sought for … related to corrupt practice," said the Supreme Cout, "we might have to consider the same in conformity with Section 86(5) of the Act as interpreted by this Court in the case of F.A. Sapa …[If] the Appellant intends to bring in his election petition, [that] do not relate to any corrupt practice …[then] it has to be considered in the light of Section 87, and de hors Section 86(5) of the Act…."[393]

Krishnamoorthy case sums up the law in relation to non-disclosure of the particulars concerning offence, whichis referable to corrupt practice within the meaning of Section 100(1)(b) of the Act of 1951:

(a) "Disclosure of criminal antecedents of a candidate, especially, pertaining to heinous or serious offence or offences relating to corruption or moral turpitude at the time of filing of nomination paper as mandated by law is a categorical imperative."[394]

(b) "When there is non-disclosure of the offences pertaining to the areas mentioned in the preceding clause, it creates an impediment in the free exercise of electoral right."[395]

(c) "Concealment or suppression of this nature deprives the voters to make an informed and advised choice as a consequence of which it would come within the compartment of direct or indirect interference or attempt to interfere with the free exercise of the right to vote by the electorate, on the part of the candidate."[396]

(d) "As the candidate has the special knowledge of the pending cases where cognizance has been taken or charges have been framed and there is a non-disclosure on his part, it would amount to undue influence and, therefore, the election is to be declared null and void by the Election Tribunal Under Section 100(1)(b) of the 1951 Act."[397]

(e) "The question whether it materially affects the election or not will not arise in a case of this nature."[398]

A perusal of the pleadings already taken by the election petitioner reveals that he had never taken "corrupt practice" as a ground to challenge the election of the appellant.[399] His grounds have "precisely been of improper acceptance of the nomination form of the returned candidate and improper acceptance of invalid votes as also improper rejection of valid votes."[400] "That being the position," the Supreme has conclusively held, "the pleadings sought to be taken by way of

393 See. *Id*., para 17, citing *Sethi Roop Lal* (supra), para 11.
394 See, *id*., para 16, citing *Krishnamoorthy (supra),* para 94.1.
395 See, *id.*, para 16, citing *Krishnamoorthy (supra),* para 94.2.
396 See*, id*., para 16, citing *Krishnamoorthy (supra),* para 94.3.
397 See*, id*., para 16, citing *Krishnamoorthy (supra),* para 94.4.
398 See, *id*., para 16, citing *Krishnamoorthy (supra),* para 94.5.
399 See*, id*., para 18.
400 *Ibid.*

amendment so as to indicate that the nomination form was not to be accepted for yet another reason, that is, for non-compliance of the statutory requirements, cannot be said to be of introduction of any new cause of action or new ground of challenge."[401] Nor it can be said that "the ground as sought to be pleaded does not have any foundation whatsoever in the petition as filed; or that pleading of such particulars would change the character of the election petition."[402] In their eventual conclusion, said the Supreme, "we are at one with the High Court that the amendment as prayed for was required to be allowed."[403]

VII OUR CONCLUSIONS

It has been indicated in the introductory part of this survey for the year 2022 that we have identified five problems, which correspond to the five judgments of the Supreme Court. Critical analysis of those judgements has been taken up individually in five successive Parts - from Part II to Part VI. In this Part, titled as, "Our conclusions", attempt has been made to bring out the functional value of each one of the five judgments that come to the fore in the light of their respective critical analysis.

Ashish Shelar is the first case of the Supreme Court that has been taken up for analysis in our survey.[404] It betrays, albeit sadly, a mirror-reflection of the fast-declining values in the democratic functioning of our legislative bodies. The decision-making in this judgment has prompted the Supreme Court to ponder over the critical question, how to arrest and salvage the murky situation, before it becomes too late. The veritable response of the Supreme Court to this knotty question is found in the "Epilogue," appended at the end of the judgment, portraying the pondering of the judicial mind, which needs to be reproduced as such in full, for any annotation of it, we are afraid, might dilute its intrinsic value and completeness:[405]

> It is unnecessary to underscore that Parliament as well as the State Legislative Assembly are regarded as sacred places, just as the Judicature as temple of justice. As a matter of fact, the first place where justice is dispensed to the common man is Parliament/ Legislative Assembly albeit by a democratic process. It is a place where policies and laws are propounded for governing the citizenry. It is here that the entire range of activities concerning the masses until the last mile, are discussed and their destinies are shaped. That, in itself, is the process of dispensing justice to the citizens of this country. These are places where robust and dispassionate debates and discussion inspired by the highest traditions of truth

401 *Ibid*.

402 *Ibid.*

403 *Ibid*.

404 See, *supra*, Part II.

405 *Ashish Shelar,* para 74 (Epilogue), *per* A.M. Khanwilkar, J. (for himself and for Dinesh Maheshwari and C.T. Ravikumar, JJ.) in Part II.

and righteousness ought to take place for resolving the burning issues confronting the nation/State and for dispensing justice—political, social and economic. The happenings in the House is reflection of the contemporary societal fabric. The behavioural pattern of the society is manifested or mirrored in the thought process and actions of the members of the House during the debates. It is in public domain (through print, electronic and social media) that the members of the Parliament or Assembly/Council of the State, spend much of the time in a hostile atmosphere. The Parliament/Legislative Assembly are becoming more and more intransigent place. The philosophical tenet, one must agree to disagree is becoming a seldom scene or a rarity during the debates. It has become common to hear that the House could not complete its usual scheduled business and most of the time had been spent in jeering and personal attacks against each other instead of erudite constructive and educative debates consistent with the highest tradition of the august body. This is the popular sentiment gaining ground amongst the common man. It is disheartening for the observers. They earnestly feel that it is high time that corrective steps are taken by all concerned and the elected representatives would do enough to restore the glory and the standard of intellectual debates of the highest order, as have been chronicled of their predecessors. That legacy should become more prominent than the rumpus caused very often. Aggression during the debates has no place in the setting of country governed by the Rule of Law. Even a complex issue needs to be resolved in a congenial atmosphere by observing collegiality and showing full respect and deference towards each other. They ought to ensure optimum utilisation of quality time of the House, which is very precious, and is the need of the hour especially when we the people of India that is Bharat, take credit of being the oldest civilisation on the planet and also being the world's largest democracy (demographically). For becoming world leaders and self-dependant/reliant, quality of debates in the House ought to be of the highest order and directed towards intrinsic constitutional and native issues confronting the common man of the nation/States, who are at the crossroad of semi-sesquicentennial or may we say platinum or diamond jubilee year on completion of 75 years post-independence. Being House of respected and honourable members, who are emulated by their ardent followers and elected from their respective constituency, they are expected to show statesmanship and not brinkmanship. In the House, their goal is and must be one—so as to ensure the welfare and happiness of we the people of this nation. In any case, there can be no place for disorderly conduct in the House much less "grossly disorderly". Such conduct must be dealt with

> sternly for ensuring orderly functioning of the House. But, that action must be constitutional, legal, rational and as per the procedure established by law. This case has thrown up an occasion for all concerned to ponder over the need to evolve and adhere to good practices befitting the august body; and appropriately denounce and discourage proponents of undemocratic activities in the House, by democratically elected representatives. We say no more.

Aishat Shifa is the second case, which is relatively very lengthy and in its exhaustive analysis we have dealt with the critical issue, although referentially, how to construe the interplay between the fundamental right to 'equality and non-discrimination' on the one hand, and the fundamental right to 'freedom of religion' on the other in our constitutional scheme of things?[406] In view of the deeply divided opinion in the case under reference, and in other cognates cases, particularly like the *Sabrimala Temple* case (2018),[407] this significant critical question in the arena of election law has hitherto remained un-answered through an authoritative judgment of the apex court.[408]However, the objective of detailed critical analysis of the judgment of the Supreme Court is not just limited to show, how the *lis* between two parties before the Court was resolved. In our submission, it is something much more: it presents an opportunity through the instance of one concrete case to evolve law on the larger constitutional canvass. And this has been done in the instant case by vigorously devoting to the theme of Secularism revolving around the interplay of freedom of religion and its juxtaposition in the conspectus of Fundamental Rights in Part III of the Constitution.[409] The detailed critical analysis in the instant case would enable us to respond to such a provocative question as: 'Is the right to freedom of religion destructive or promotive of values of the Secular State?'; or, 'Is the fundamental right to freedom of religion an anti-thesis of the imperatives of the Secular State under the Indian Constitution? This indeed is the beauty of common law tradition, leading the Supreme Court in propounding principles through the interpretation and exploitation of the text of the Constitution and its underlying values, which sustain beyond the 'vicissitude of time.'[410]

The third case taken up is that of in *Mohd. Abdullah Azam Khan,* which has seemingly dealt with the issue of improper acceptance of the nomination of the returned candidate by the returning officer, and the high court as election tribunal had declared that election null and void, and that decision was duly affirmed by

406 See generally, *supra*, Part III.

407 See*, supra*, note 8,author's *Monograph*in Part I.

408 See, *supra,* note 6 and the accompanying text in Part I.

409 This is what has been demonstrated in the *Sabrimala Temple Case* (2018), see, ibid.

410 See, *The Tribune*, October 25, 2023: Chief Justice of India DY Chandrachud during at an 'International conference on Dr BR Ambedkar' in Massachusetts, USA. on October 24, 2023, while stressing that Judges, though unelected, play vital role in social evolution, observed that Judges are the voice of "something" which must subsist beyond "the vicissitudes of time."

the supreme on appeal.[411] However, the close and critical judicial scrutiny of the fact matrix of the case, revealed somewhat a startling story! To be fair to the returning officer, his acceptance of the nomination of the returned candidate can hardly be termed as 'improper', because he proceeded to undertake scrutiny on the basis of basic documents produced before him,[412] and certainly it was not his function to suspect the public authorities, issuing those basic documents, which included Birth Certificate, Aadhar Card, Electoral Roll, Driving Liscence.[413] It was only on close scrutiny of those documents by the Courts it came to light that all those documents were manipulated by the public authorities at the instance of persons wielding huge political power[414]to fulfil their political ambitions![415] It also shows, how the alert press has enabled the election petitioner to initiate proceedings[416] and digging out more information[417] that enabled the election court

411 See generally, *supra*, Part IV.

412 See, *Mohd. Abdullah Azam Khan,* para 55.3: By order dated 30.01.2017, the Returning Officer rejected the objection filed by the election Petitioner herein by observing that the successful candidate herein had stated in Column B of Section 3 of the nomination form, as also in Form 26, that his age was twenty-six years. That in support of such claim, the successful candidate had attached his Birth Certificate (No. 229428) which was issued to him by the Nagar Nigam, Lucknow, on 21.05.2015 and in the said document, the date of birth of the successful candidate was recorded as 30.09.1990. It was further noted that as per the successful candidate's Aadhar card and the electoral roll, his age at the relevant time was twenty-six years. Consequent to the rejection of the objections raised by the election Petitioner and on the basis of the documents submitted and details furnished by the successful candidate in the nomination form, his nomination was accepted by the Returning Officer,"

413 See also, Virendra Kumar, "Role of Returning Officer", *AISL* Vol. XX (1984) at 231-244.

414 See, *Mohd. Abdullah Azam Khan*, paras 31, 32, 36, 37, and 40.

415 See, *id*., para 30.

416 See, *id.*,para 55.2 : " … The election Petitioner had filed on the basis of a newspaper Article published in a local daily, Dainik Jagran Amar Ujala on 28.01.2017."

417 See, *id*., para 58.1. The election Petitioner filed his replication to the written statement which is summarised as under:

(A) While denying the contents of the written statement to be true and the documents attached to the written statement being fabricated, forged and misleading, the election Petitioner reiterated the contents of his election petition.

(B) The election Petitioner has taken an additional plea to the effect that on 14.08.2017, the Election Officer Rampur, had forwarded a representation which was moved by one, Mr. Akash Kumar Saxena, Chairman of the Indian Industries Association, to the Chief Election Officer, disclosing discrepancies with respect to the Pan Card of the successful candidate. That the successful candidate had clandestinely procured a new Pan Card bearing No. DWAPK7513R which was issued to him on 24.03.2015, showing his date of birth as 30.09.1990 by deliberately concealing the fact that he had already been issued Pan Card No. DFOPK6164K on 30.08.2013 in which his date of birth was recorded as 01.01.1993. As per the original pan card, the successful candidate was less than twenty-five years of age, whereas, according to his new pan card he was twenty-six years of age.

(C) Further, the successful candidate had opened a bank account No. 34341386006 in State Bank of India with Pan Card No. DFOPK6164K wherein his date of birth in the bank account was recorded as 01.01.1993. That the successful candidate had two pan cards and had not disclosed his correct income while contesting the legislative assembly elections.

to uncover the murky affairs of the appellant-returned candidate and declared his election void ab initio. One thing more that needs to be reflected in the fact matrix of this case: What has prompted the two Justices to write two separate concurring judgments? Of course, a bare perusal of the two judgments gives two distinct flavours by bringing in new nuances while reacting to the same situational context. Besides, we may state the functional value of the two concurrent judgments by making a cryptic statement: both the judgments are supplementary in some respects, and complementary in others.[418]

S. Rukmini Madegowda is the fourth case of the Supreme Court, the analysis of which has revealed, how non-disclosure of assets constituted, not just improper acceptance of the nomination paper of the returned candidate by the RC *Simpliciter* but, a corrupt practice.[419] However, the merit of this judgment is manifested in two respects. Firstly, this case brings to light in the first instance, how in the absence of incorporation of the judge-made law into the statutory rules, the trial courts at the lowest rug of the ladder are likely to commit the basic error in their decision making, and in such an eventuality, the higher court has to resort to the process of remand.[420] The second point of significant focus of this judgment is that it shows, how the technicalities of the law even in the arena of election law, which is axiomatically considered as 'a self-contained statutory law' requiring strict adherence, needs to be eschewed in order to bring purity in election at all levels in the larger public interest.[421]

The fifth case of the Supreme Court included in this survey is that of *Yendapalli Srinivasulu Reddy,* which dealt with the issue, whether under the given fact matrix of the case high court was justified in allowing the amendment of the Election Petition.[422] Merit of this case lies in the approach of the Supreme Court, which tends to frustrate the design of the returned candidate to avoid the close scrutiny of his election by opposing the addition of new information by the election petitioner through. This has been done, however, without curtailing returned candidate's rights that are otherwise to him under the election law. In this case, while granting special leave to appeal against the judgment of the high court allowing the interlocutory application for adducing additional evidence, only the operation of the impugned order was stayed, and not the ongoing impending

418 Both the judgments are supplementary when the same fact is supported in two different ways, and complementary when some facts left in one, but addressed in the other. See, *Mohd. Abdullah Azam Khan, paras* 66.3, 66.4, per B.V. Nagarathna, J., showing discrepancy in the testimony of the family friend who accompanied the child to admit him in the nursery class – who signed the date of birth – one himself and another by the master himself .See also, id., para 66.5, per B.V. Nagarathna, J., showing discrepancy in relation to the ages re nursery class (2and half years to 5 years and also matriculation from 15 and a half years to 17 and a half years..

419 See generally, *supra*, Part V. Special reference may be made to notes 338-345, and the accompanying text.

420 See, *supra,* note 332 and the accompanying text (in Part V).

421 See, *supra,* note, 367 and the accompanying text (in Part V).

422 See generally, *supra*, Part VI

proceedings in the election petition, by stating that ", having regard to the nature of proceedings, we have considered it appropriate to hear the matter finally at this stage itself."[423] The avowed objective seems to be to clear the mist about the proposition that in the interest of justice, amendment of the election petition should be denied only when it is strictly statutorily prohibited in the cases of 'corrupt practice.'

423 See, *ibid*.