JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 66 OCTOBER-DECEMBER 2023 NUMBER 4

RIGHT TO FREEDOM OF RELIGION: ITS JUXTAPOSITION IN THE COMPLEX OF SECULAR STATE UNDER THE INDIAN CONSTITUTION

[A critique of Supreme Court judgment in *Aishat Shifa* case (2022) in the light of Values of Indian Classical Tradition]

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Abstract

Locating the juxtaposition of the Right to Freedom of Religion in the complex of Secular State is essentially a critical issue of determining the inter se relatedness of religion with Secular State. The proximity of such relationship is indeed inherent in the very notion of Secular State, which itself is defined in terms of either absence or presence of the element of 'religion'. In the Western jurisprudential thought, any idea of religion needs to be kept out from the temporal activities of State, as is evident from drawing the line of demarcation of the respective domains of the Church and the State. The core value of the Secular State in the Western philosophy, thus, consciously excludes any reference to religion. On the contrary, under the Indian classical tradition, invocation of religion is an integral part of life of every Indian, as if from birth to death; nay, even before birth and even after death! In this differential stance, the pivotal point to be explored is to determine, whether the mandate of the Constitution is to remain blind to the value of religion in the life of an iidual in the Indian social milieu! Hitherto, the approach of the Supreme Court in relatively recent cases, in view of their deeply divided opinions in the interpretation of the fundamental right to freedom of religion vis-à-vis the other rights, is rather shaky and ambivalent, and pending before the 9-Judge Bench for an authoritative and resolute opinion. In the meanwhile, our own perusal of the relevant provisions of the Constitution reveals that the founding fathers has clearly recognized that the value of the right to religion cannot be undermined and make subservient to other rights. Such a recognition rather positively assists the Secular State in fulfilling the preambular objective of establishing 'inclusive social order' on the premise of such sound precepts drawn from the Indian classical tradition (Indian Knowledge System) as 'यतोधर्मस्ततोजयः' (Where there is Dharma, there is victory), 'धर्मोरक्षतिरक्षितः' (He who preserves Dharma, himself stands preserved), 'सर्वेभवन्तुसुखिनः' (Let all beings be happy and peaceful in all respects),

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'वसुधैवकुटम्बकम्' (Whole World is One Big Family).All such philosophical precepts in the complex of secular State operate through the time-tested pragmatics principle of 'unity in diversity', instead of made-up forced fanciful principle of 'unity in uniformity'.

I Introduction

BOTH THE right to freedom of religion and the concept of secular State are integral part of our Constitution.In the very preambulatory statement we, the people of India, solemnly resolved to constitute India, called 'Bharat'[1], into a "Secular" State;[2] whereas the "right to freedom of religion" has been enunciated as a fundamental right in Part III of the Constitution.[3]Axiomatically, there cannot be any inherent conflict between the two concepts that are integral parts of one and the same Constitution. If seemingly there is any conflict, the same should be resolved with their conjoint consideration invariably on the principle of harmonious construction, and in case of amendment of the Constitution on the basis of Basic Structure Doctrine.[4]

However, recently a conflict has come to the fore in the most precipitant form in the judgment of the Supreme Court in *Aishat Shifa* case (2022).[5] The apex court in this case was essentially required to respond, whether prohibition of wearing *hijab* (headscarf) – a religious symbol of Muslims –along with the mandatory dress code in a State-run educational institution was violative of fundamental right to freedom of religion under Article 25 of the Constitution.[6]

This issue was addressed at length at the bar. However, in their eventual decision-making, the Division Bench of the Supreme Court is deeply divided. The two Justices hold diagonally opposite views in their perception of the freedom of religion in the Secular State under the Indian Constitution.[7] In fact, this fundamental question of relatedness of the right to freedom of religion in the domain to secular State was raised at the very threshold, and, therefore, a plea was made to make a reference to the Constitution Bench. However, the Division Bench declined this plea by stating that interpretation of Constitution was not required for deciding the case in the given fact matrix; it was to be decided whether wearing hijab was an essential attribute of

1 See, Article 1(1):"India, that is Bharat, shall be a Union of States."

2 For its exposition, see generally, *infra*, Sections IX and XII.

3 See Articles 25-28 of the Constitution. See also, *infra*, Section XII.

4 Virendra Kumar,"Reservation for EWS under 103rd Constitutional Amendment *via* Basic Structure Doctrine of the Constitution: A critique of 5-Judge bench judgment of the Supreme Court in *Janhit Abhiyan* v. *Union of India*,65:4*Journal of the Indian Law Institute* 351-377(2023).

5 *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.*

6 The Constitution of India, art. 25.

7 See generally, *infra*, S.XII.

Islamic faith, which turned out to be a contentious premise in their eventually decision-making. The decision of the court, thus, resulted into making a reference to a larger bench, most likely to a Constitution Bench.[8]

II Critical issue to be addressed: Relatedness between religion and secular state

The basic critical issue to be resolved is: what is the relatedness between the Right to Freedom of Religion and the conception of Secular State under the Indian Constitution? This indeed is the fundamental question, which needs to be answered for the resolution of number of cognate issues that have hitherto come to light in different fact situations.[9] It would be interesting to review, how the exercise of resolution of those issues culminated in making a reference to a nine-Judge Bench of the Supreme Court.[10] Since the response of the nine-Judge Bench is still awaited, and in the meanwhile another judgement of the Division Bench of the Supreme Court in *Aishat Shifa case* (2022) has appeared shedding some light on the relationship of right to freedom of religion within the domain of secular State in the new fact matrix,it is felt that our critique of *Aishat Shifa* case (2022) might yield some more useful inputs and thereby aid and assist the 9-Judge Bench of the Supreme Court in their eventual decision-making on the fundamental question of relatedness on still wider canvass.

III Is religion an anti-thesis of secular state?

The prevailing perception of relatedness of the freedom of religion and the imperatives of the secular state, as manifested by the *Aishat Shifa* case (2022), revolves around the problematic issue (put into provocative form): 'Is the fundamental right to freedom of religion an anti-thesis or even destructive of the imperatives of Secular State under the Indian Constitution?[11] For due appreciation of thisissue, we need to comprehend the genesis of this issue as a background consideration. This is necessitated simply because, although the issue of relatedness between the Right to Freedom of Religion and the Secular State have been hitherto dealt with by the Supreme Court in several judgments, and yet the final authoritative judicial exposition of that relationship under the Indian Constitution is still awaited. Why do I say so?

As an exposition, we may make a synoptic reference to the following fourmajor critiques of four Constitution Bench judgments of the Supreme Court, reflecting how the issue of relatedness arose and that issue was disposed of.[12] These would serve as background consideration of our present critique of *Aishat Shifa case (2022).*

8 See, *infra,* S. VIII.

9 See*, infra*, S. IV-VII.

10 See, *infra,* S.VI.

11 See, *infra*, s. VIII.

12 The four major critiques have been dealt with in the following four succeeding Sections: ss. IV to VII.

IV Seven-Judge Bench in *Abhiram Singh* -non-responsive on the issue of relatedness

First major Critique (2018): It is the critique of 7-Judge Bench judgment of the Supreme Court in *Abhiram Singh* v. *C.D. Commachen (Dead) by Lrs.,*[13] and published under the title, "Varying Approaches to Religion under the Electoral Law [A functional comparative perspective of the deeply divided opinion of the 7-Judge Constitution Bench of the Supreme Court in *Abhiram Singh* case (2017)]."[14] Critical issue to be resolved in this case revolved around the interpretation of Section 123(3) of the Representation of the People Act, 1951,[15] which prohibits an election candidate to appeal to the voter on ground of "his religion." The short question to be decided was, whether the pronoun "his" refers to the 'religion' of the election candidate or does it include the religion of the voter as well.

The Supreme Court by a majority of 4:3 decided that "his" is used in a wider purposive sense, and not in a narrow literal sense, and avoided answering the basic constitutional question of *inter se* relationship between the fundamental right to freedom of religion and the political activity of holding elections in a Secular State. Was this avoidance to answer the basic constitutional question of relatedness by the Constitution Bench of 7-Judges of the Supreme Court justified?

What is the prime purpose of the Supreme Court? Is it merely to decide the *lis* between the disputing contestants before it? Is it not a frustration of the very objective of constituting Constitution Bench of five or more judges under Article 145(3) of the Constitution, which obligates the Supreme Court to decide "a substantial question of law as to the interpretation of this Constitution" if it is so required "for the purpose of deciding any case"? A plain reading of Article 141 of the Constitution, which stipulates that "The law declared by the Supreme Court shall be binding on all courts within the territory of India," reveals that the critical role of the Supreme Court, as a Constitutional Court, is not just to decide the dispute in hand but, to strengthen constitutionalism by declaring "the law" – a law which brings certainty by eschewing all conflicts and confusions through interpretative processes, and thereby reinforcing the rule of law.

In the absence of resolving the basic issue of relatedness, some sequential lingering questions come to the fore. Does it mean that a person aspiring to stand for election under the Representation of the People Act, 1951 is obliged to surrender his or her

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13 (Civil Appeal No. 37 of 1992) ILR 2017 (1) Kerala 89: 2017 (1) SCALE*, per* T.S. Thakur, C.J.I., Madan B. Lokur, L. Nageswara Rao, S.A. Bobde, A.K. Goel, U.U. Lalit and Dr. D.Y. Chandrachud, JJ. Hereinafter simply *Abhiram Singh*.

14 *The Indian Year Book of Comparative Law* 2018, Ch. 5 (Springer's Publishers).Hereinafter simply, *Varying approaches to religion*.

15 The Representation of the People Act, 1951, s. 123(3).

fundamental right of "freely to profess, practice and propagate religion" under Article 25 of the Constitution as a condition precedent? Does it mean, likewise, a person before casting his or her vote under the Representation of the People Act, 1951 [after the decision of the seven Judge Bench in *Abhiram Singh* case (2017)] is obliged to surrender his or her fundamental right of "freely to profess, practice and propagate religion" under Article 25 of the Constitution as a condition precedent?

The other fallouts of non-resolution of basic constitutional issues like the issue of relatedness of two concepts include the far-reaching pernicious consequences, which are invisibly gradual and subtle! These affect the whole gamut of rule of law in general, and the qualitative efficacy of the constitutional court itself as manifested in the continuing piling of cases![16] While participating in the International Conference on Ambedkar in Massachusetts, United States, on October 24, 2023, for instance, DY Chandrachud, CJI, had deeply reflected on the critical role of the highest judiciary, when he said, *inter alia*, that judges are the voice of "something" which must subsist beyond "the vicissitudes of time;" they have a "stabilising influence" in the evolution of societies which are rapidly changing with technology, "particularly in the context of a plural society, such as India;" and they become the "focal points of engagement between civil society and the quest for social transformation."[17]

Besides, there is duality of operation in the right to freedom of religion vis-a-vis the Secular State, which is reflected in two perspectives: *de-ju*re and *de-facto. De jure* operational perspective of the right to freedom of religion is reflected, as stated earlier, under the provision of Representation of the People Act, 1951, which provides that no citizen is permitted to make an appeal to the electorates on ground of his religion.[18]On the other hand, *defacto* operation of the right to freedom of religion refers to the practice, which 'in reality' 'exists', even though it is legally prohibitive or not legally recognized. In other words, despite the prohibition of seeking vote on ground of religion, the continuing critical role of religion in the electoral battle can neither be denied nor downgraded.[19]

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16 During 2023, the Supreme Court disposed of 52191 cases from Jan. 1, 2023 to 15 Dec. 2023. Against this, the number of cases disposed by the US Supreme Court does not exceed a few hundred only (said to be around 1500 cases! Where is the time left for our overburdened Supreme Court to devote themselves to deeper analysis and resolve basic issues of constitutional import.

17 See, *The Tribune*, : "Judges, though unelected, play vital role in social evolution, stresses CJI" Oct. 25, 2023.

18 See, *supra,* note 16, in part IV. For the reinforcement of this provision, see, *The Tribune*, March 27, 2024: "Don't Seek Votes on Basis of Religion, Azad Tells Workers" DPAP chairman Ghulam Nabi Azad in Kathua on Mar. 26, 2024.

19 See, *The Tribune*, May 15, 2024: "Constituency Watch — Jalandhar: Deras, churches may play decisive role in elections." For the post-election scenario, see *The Tribune*, "Dera factor worked for Cong, but not for BJB" June 5, 2024.

Here we may raise a question to ponder: If seeking vote on ground of religion is prohibited under the Representation of the People Act, 1951, and the proposition of surrendering one's own fundamental right to freedom of religion either to be a candidate for election or to be a voter at such election is preposterous is unreal or fanciful, then how to construe the prohibition of making appeal on ground of religion while knowing full well that religion has a critical role to play? Our own answer to this knotty question is sitting cozily in the text of Article 25 of the Constitution itself, which sets the limits, how, when and where the right to freedom of religion cannot be extended by specifically subjecting it to three articulate conditions; namely "public order, morality, and health." Stated positively, a citizen can invoke his right to freedom of religion in electioneering so long as it does not generate religious animosity or an antagonistic attitude, disturbing the peace of society by creating the problem of public order.

Thus, our own take on the issue of relatedness of the freedom of religion and the secular state is that invocation of religion in electoral matter *per se* is not prohibitive. The true test for determining prohibition is, whether on evidence the appeal made by the election candidate on ground of religion is destructive of the 'secular' character of our democratic social order, irrespective of the fact whether it is the religion of the contesting candidate or that of the electorate. From this perspective, both the opinions, in our view, tend to converge rather than deviating.[20]

Our second take is in relation to the very purpose of constituting the larger Constitution Benches. It is to enable the Supreme Court to explore the foundational values of the Constitution that are of futuristic import. Accordingly, we are prompted to state as an axiomatic principle: 'the more you move unto the Constitution Benches of greater strength, the more you enter the rarefied region of foundational values of constitutional law by liberating yourself from the traditional inertia."[21]

V Nine-Judge Bench in *Justice K S Puttaswamy (Retd.)* – open to recognise the sway of right to religion inhering right to privacy

Second major Critique (2019): It is the critique of the nine-Judge Bench judgment of the Supreme Court in *Justice K S Puttaswamy (Retd.)* v. *Union of India,*[22] which stands published under the title, "Dynamics of the 'Right to Privacy': Its characterization under the Indian Constitution [A juridical critique of the 9-Judge Bench judgment of the Supreme Court in *Justice K S Puttaswamy (Retd.)* case (2017)].[23] This Critique, explores the intrinsic nature of 'Right to Privacy' under the Constitution.This exercise has

20 See also, *Varying approaches to religion* (2018).

21 See, *ibid.*

22 AIR 2017 SC 4161.

23 *Journal of the Indian Law Institute*, 61:1 (2019) 68-96.

turned out to be intriguingly interesting at least on two counts. One, prior to this judgement (the judgment was pronounced on August 24, 2017), it was proclaimed that this right had not be defined as such in the Constitution, and yet after the nine-Judge Bench judgment, we have discovered thatright to privacy is pervasive in Part III of the constitution in general and article 21 in particular. Two, though this right is intensely personal in nature, and yet realising that it has no meaningful existence for an individual in isolation; it gets meaning and substance only in the social context, when a person asserts against 'others' and clamours for 'let me be alone'!

The distinct contribution of the nine-Judge Bench of the Supreme Court may be abstracted as under: Perhaps, the most critical question to be addressed was, 'How to convert the common law right to privacy into the constitutional fundamental right?' This has been accomplished by transforming something into 'visible', which was hitherto 'invisible'. That is, the hitherto held view was that right to privacy continued to be a common a right, because it did not find any mention in the complex of fundamental rights in Part III of the Constitution. However, the nine-Judge Bench has shown that right to privacy is all pervasive in Part III of the Constitution generally and article 21 particularly by searchingly stating that right to privacy is inherent in all persons by nature, and by nature it is an integral part of their dignity, liberty, integrity.

There is value advantage of the 'right to privacy as a constitutional fundamental right' over the value advantage of the 'right to privacy as a common law right'. In case of construing the 'right to privacy' as a common law right, the State was in the driving seat for determining the dimensions of its nature and scope; whereas in case of construing the 'right to privacy' as a constitutional fundamental right, it is the fundamental right of the citizen that comes into the driving seat by becoming a limitation on the law-making power of the State. The State is dislodged from the commanding position *vis-à-vis* the 'right of privacy' as a constitutional fundamental right!

This critical transformative-shift was caused by the nine-Judge Bench to overcome the basis of earlier authoritative decisions of eight-Judge Bench (1954) and six-Judge Bench (1963) in view of the new emerging context of Aadhar Card bearing personal data. Earlier, following the 'common law' tradition, the 'Right to privacy' developed on the singular basis of the doctrine of 'informed consent' in regulating professional relationship, say, between the doctor and his patient, lawyer and his client, *et al*, and thereby the operational area of the 'right to privacy' remained relatively limited as if between two private parties or persons. However, in the case of Aadhar Card carrying demographic and biometric data, grounded in digital technology, needed entirely a different approach to protect the right to privacy than hitherto provided in the common law tradition. The emerging digital internet technology enables the State to collect, compile and coagulate data for accomplishing certain disclosed purpose(s), as envisaged under the *Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services)*

Act, 2016. However, the same data could be used through unique manipulation at an unimaginable speed and with promptitude and precision for serving some other undisclosed purpose(s), such as surveillance and profiling, brazenly allowing others to intrude upon the privacy of individuals without their fair consent, with almost irreversible damage and that too with impunity. For instance, 'Uber' knows our whereabouts and the places we frequently visit; 'Facebook', at the least, knows who we are friends with; WhatsApp knows whom we are talking to; 'Alibaba' or 'Amazon' knows our shopping habits; 'Airbnb' knows where we are travelling to. Isn't it all curiously interesting!

The extent of intrusion is now almost total! A cyber intelligence specialist[24] has put across this digital world phenomenon of encroachment in America, where the sway of digital technology is at the top, in the most cryptic manner: "There are two kinds of companies left in America: those that have been hacked and know it; and those that have been hacked and do not know it."[25]In this predicament, the arena of protection of the right to privacy has vastly expanded. It is no more just the right 'to be let alone', but includes within its ambit a large number of privacy interests, such as rights of same sex couples, including the right to marry; rights as to procreation, contraception, general family relationships, child rearing, education; right to protection of all sorts of personal private data – thoughts, emotions, tastes, preferences, and so on. In this scenario, the strategy of the nine-Judge Bench of the Supreme Court, entailing the reading of the right to privacy into the provisions of Article 21 of the Constitution, and thereby transforming the common law right into the constitutional Fundamental Right is indeed admirable. It instantly reminds the State of its first and foremost constitutional responsibility to protect the right to privacy, bearing in mind that it shall not make any law, even through the construct of Aadhar Act of 2016, which takes away or abridges the fundamental rights conferred by Part III of the Constitution, and if "any law made in contravention of this clause shall, to the extent of the contravention, be void."[26] The functional exposition, albeit stated somewhat philosophically, has been put across by the nine-Judge Bench through Chelameswar, J.: "In my opinion, provisions purportedly conferring power on the State are in fact limitations on the State power to infringe on the liberty of SUBJECTS. In the context of interpretation of the Constitution, the intensity of analysis to ascertain the purpose is required to be more profound."[27]

Following this line of progressive judicial evolution, the bare reading of the provisions of the fundamental right to freedom of religion reveals that the very concept of the

24 A Cyber counter-measures firm CrowdStrike.

25 See, "Digital privacy is a Faustian bargain," *The Tribune*, Aug. 2, 2018.

26 Cl. (2) of Art. 13 of the Constitution.

27 AIR 2017 SC 4161, at 4320 (para 201).

right to privacy and its protection are inherent in Article 25 of the Constitution. This is perhaps true and legitimate as much, if not more, as they have been held and located by the nine-Judge Bench in the provision of Article 21 of the Constitution. Thus, any violation of the right to freedom of religion by the State shall be held violative of the right to privacy as well.

VI Five-Judge Bench in *Sabrimala Temple* culminating into Nine-Judge bench referenceon the ambit of right to religion within the campus of secular state

Third major Critique (2020): It relates to the Five-Judge Constitution Bench judgment of the Supreme Court in *Indian Young Lawyers Association* v. *The State of Kerala*,[28]popularly known as the *Sabrimala Temple* case (2018).By a majority of 4:1,[29]it decided that the right to freedom of religion is not absolute and is subject to the right to equality and non-discrimination under Article 14 and Article 15 of the Constitution, and thereby allowing the petitioners, the young girls of menstruating age to visit the temple against the established customary norms. This had evoked protests pan India by the Hindus devotees, both men and women.

In view of this scenario, we undertook the full-length critique of the *Sabrimala Temple* case (2018) and presented the same as "57th Panjab University Colloquium" on August 27, 2019 under the title, "Socio-religious Reform through Judicial Intervention: Its limit and limitation under the Constitution: A critique of 5-Judge Constitution Bench in *Sabrimala Temple* case (2018)." This critique, as presented on August 27, 2019, was instantly published by Panjab University, Chandigarh in the form of a monograph for wider dissemination.[30]

The Five-Judge Constitution Bench of the Supreme Court in *Sabrimala Temple* case (2018) had delivered an unprecedented judgment in the annals of Constitutional history of India. By a majority of 4:1, the Supreme Court, as if with a deep sense of satisfaction, triumphantly declared: "Sixty-eight years after the advent of the Constitution, we have held that in providing equality in matters of faith and worship, the Constitution does not allow the exclusion of women." Both principally and functionally, in our view, it amounts to saying: 'Not only I can have what you have in the exercise of my fundamental right to *equality and non-discrimination*, but by virtue of this very right I can also legally and constitutionally deprive you of what you have in

28 *Sabarimala Temple* case (2018).

29 *Per* Dipak Misra, C.J.I. (for himself and A.M. Khanwilkar, J.), Rohinton Fali Nariman, J. (concurring); Dr. D.Y. Chandrachud, J. (concurring); and Indu Malhotra, J. (dissenting).

30 Virendra Kumar, *Socio-religious Reform through Judicial Intervention: Its limit and limitation under the Constitution*. A Monograph published by Panjab University, Chandigarh (PU Publication Bureau, First Edition 2020) – [Delivered as Special Lecture at "57th Panjab University Colloquium" on Aug. 27, 2019] Hereinafter, simply *Monograph*.

the exercise of your fundamental right to *freedom of conscience*.' It is this proposition that has been examined *de novo* on the basis of first principle of constitutionalism by raising three critical questions. First, what is the juxtaposition of the fundamental right to 'freedom of conscience,' *etc*. under article 25 *vis-à-vis* the other Fundamental Rights enunciated in Part III of the Constitution, particularly the 'right to equality and non-discrimination' under Articles 14 and 15? Second, what is the intrinsic value of the fundamental right to 'freedom to manage religious affairs' under Article 26 that gives it an independent identity and autonomy in relation to other Fundamental Rights in Part III of the Constitution? Third, how to protect 'the freedom of religion' in the wake of socio-religious reforms by the State, and what are the limit and limitations of this protection under the Constitution? In the light of our critical analysis of these three pivotal questions, it is concluded: Our salvation, in a democratic secular polity, lies, not in *forcing* 'unity in uniformity' *from without* but, in *promoting* 'unity in diversity' *from within*. 'Diversity' is neither discriminatory nor destructive or nor even divisive - it is the essence of innate unity that makes India truly Incredible, as it leaves the people free to evolve and unfold themselves and their own potentials in response to the call of 'space and time' (*desh* and *kal)*! *In the present constitutional discourse under Articles 25 and 26 read with Articles 14 and 15, what we are essentially seeking for is 'freedom* of *religion', and not 'freedom* from *religion'*.

However, post-delivery of Panjab University Colloquium on August 27, 2019, there sprang up some surprising twists and turns in the judicial decision-making in *Sabrimala Temple* case (2018)![31] The Constitution Bench of the Supreme Court, which heard the review petitions in an open court and reserved their judgment on February 6, 2019 against their judgment delivered earlier by the majority of 4:1 on September 28, 2018,[32] pronounced their perhaps the most surprising verdict, albeit without deciding the review petitions, on November 14, 2019. This was completely an unexpected, unprecedented, judicial decision that instantly transformed, as if by quirk of judicial feat, the initial minority judgment of 1:4 into the majority judgment of 3:2![33] This new majority court judgment of 3:2 (minority becoming majority), referred the case

31 For the post-delivery of Panjab University Colloquium on Aug. 27, 2019 development, see the appended Post-script(PS) and Post Post-script(PPS) to *Monograph* at 46-54.

32 The Review petitions were heard in *Kantaru Rajeevaru* v. *Indian Young Lawyers Association through its General Secretary,* Review petition (civil) no. 3358/2018 in writ petition (civil) no. 373/ 2006. Hereinafter simply *Review Petition*.

33 The majority judgment has been delivered by Ranjan Gogoi, CJI (for himself and A.M. Khanwilkar and Indu Malhotra, JJ.) and the minority dissenting decision has been handed over by R.F. Nariman, J. (for himself and D.Y. Chandrachud, J.).

on seven-point reference to be heard by the larger seven-Judge Bench[34] along with similar other cases pending for consideration.[35] When the newly constituted seven-Judge Bench met on January 6, 2020, it, in turn, referred the case to be heard by a nine-Judge Bench. Still again, when the nine-Judge Bench met on January 13, 2020, announced that they confine itself to seven-point reference without deciding the review petitions.[36] This is how the matter stands for final decision!

The seven-issue reference development has come to us as the most pleasant surprise as we hear in it the clear resonance of our own Critique that we presented in the Panjab University Colloquium on August 27, 2019!A bare perusal of the serialized seven issues would reveal that the issues listed from serial number (ii) to (vii) are mere expositions of the various facets of the issue at serial number (i), which, indeed, is the basic, fundamental, question of constitutional interpretation; namely, 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? This central constitutional question has hitherto remained un-answered authoritatively. As argued earlier that such an opportunity arose before the seven-Judge Bench in *Abhiram Singh* (2017) while deciding

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34 'Seven issues-reference' for seven-Judge Constitutional Bench included:

(i) Regarding the interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III, particularly Article 14.

(ii) What is the sweep of expression 'public order, morality and health' occurring in Article 25(1) of the Constitution.

(iii) The expression 'morality' or 'constitutional morality' has not been defined in the Constitution. Is it over arching morality in reference to preamble or limited to religious beliefs or faith. There is need to delineate the contours of that expression, lest it becomes subjective.

(iv) The extent to which the court can enquire into the issue of a particular practice is an integral part of the religion or religious practice of a particular religious denomination or should that be left exclusively to be determined by the head of the section of the religious group.

(v) What is the meaning of the expression 'sections of Hindus' appearing in Article 25(2)(b) of the Constitution.

(vi) Whether the "essential religious practices" of a religious denomination, or even a section thereof are afforded constitutional protection under Article 26.

(vii) What would be the permissible extent of judicial recognition to PILs in matters calling into question religious practices of a denomination or a section thereof at the instance of persons who do not belong to such religious denomination?

35 The pending cases are "regarding entry of Muslim Women in Durgah/Mosque(being 7 Writ Petition (Civil) No.472 of 2019); of Parsi Women married to a non-Parsi in the Agyari (being Special Leave Petition (Civil) No. 18889/2012); and including the practice of female genital mutilation in Dawoodi Bohra community (being Writ Petition (Civil) No.286 of 2017)." See also, the appended Post-script (PS) and Post Post-script (PPS) to *Monograph* at 46-54.

36 See, Post Post-script (PPS) to *Monograph* at 54.

the issue in an election case, whether the appeal made by the election candidate on ground of religion to the electorates is *ipso facto* destructive of the 'secular' character of our democratic polity.[37] However, such an opportunity of constitutional construct was *missed*, as the Bench by a close majority of 4:3 held that the larger issue of constitutional interpretation did not arise for consideration before them.[38]

The singular opportunity for constitutional reconstruction directly arose in *Sabrimala Temple* case (2018), but the same was *lost*, as argued in our critique that the majority court judgment in their reformative zeal have failed to recognize and realize the essence of that *inter se* relationship between the fundamental 'right to equality and non-discrimination' and the fundamental 'right to freedom of religion' as envisaged by the founding fathers of our Constitution.[39]

However, surprisingly, the lost opportunity for constitutional reconstruct was *regained* in *Sabrimala* when the same five-Judge Constitution Bench while delivering the reserved judgment on Review Petitions on November 14, 2019 made seven-Issue Reference to seven-Judge Constitution Bench, which, in turn, passed on the reference to nine-Judge Bench,[40] whose authoritative response is eagerly awaited.

In retrospect, one can venture to state, even though it might sound somewhat presumptive, that our academic critique on *Sabrimala Temple* case (2018) caries a distinctive functional value. In this endeavour, it has not only anticipated the centrality of seven-Issue Reference by specifically raising three critical questions for exploring the interplay between the constitutional right to 'freedom of religion' (articles 25 and 26) and the right to 'equality and non-discrimination' (articles 14 and 15), but have also responded them in full measure.[41] Since these very questions are yet to be answered principally by the nine-Judge Bench in response to the seven-Issue Reference, their response is keenly awaited as that would give us another opportunity of re-visiting our critique and to see for ourselves in retrospect once again, how far we are justified in comprehending the constitutional jurisprudence and say with a certain degree of certitude that in the realm of 'freedom of religion' read with the 'right to equality', 'freedom of religion' should not be mistaken for 'freedom from religion'.

VII Five-Judge Bench in *Ram Janmabhumi-Babri Masjid case* – an exemplary instance of balancing religious susceptibilities in a secular state

Fourth major Critique (2021): It concerns the uniquely unanimous five-Judge Bench Judgment of the Supreme Court in *M. Siddiq* v. *Mahant Suresh Das* (decided on

37 See generally, *supra*, s. IV.

38 See, *supra*, note 15, author's art., "Varying Approaches to Religion under the Electoral Law."

39 See, *supra*, note 31, author's *Monograph*.

40 See, *supra*, note 32, author's *Monograph*.

41 *Ibid*.

November 9, 2019)[42] – popularly known as *Ayodhya* case (2019).It was published under the title, "Ayodhya Ram Janmabhumi-Babri Masjid Lingering Conflict: A critique of its resolution by the Constitution Bench of the Supreme Court in *M. Siddiq* v. *Mahant Suresh Das*."[43]

The prime purpose of our critiquing *Ayodhya* case (2019) is two-fold. The first one is to present a rounded view of the Supreme Court's singular strategy that has led it to resolve a highly complex conflict problem seemingly revolving around the title of a disputed property. The conflict was essentially lying loaded with religious susceptibilities, involving violation of the Rule of Law, resulting into the acute problem of 'law and order' at some critical junctures (to wit, episodes of 1857,[44] 1934,[45] 1949[46] and 1992[47]) and with sparse and scattered corroborative evidence drawn from diverse resources – archaeology, history, philosophy, religion, law and legal principles. In this respect, we have perceived and read the Supreme Court decision-making as an 'intriguingly interesting Judgment', which is characterised by antiquity, showing how to resolve the conflict problem skilfully and with ingenuity that has hitherto defied solution for centuries past, and that too within a relatively short span of 41 days of hearing!

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42 *M. Siddiq (D) thr. L.Rs.* v. *Mahant Suresh Das and Ors.* MANU/SC/1538/2019 (Decided on Nov. 9, 2019), per Ranjan Gogoi, C.J.I., S.A. Bobde, D.Y. Chandrachud, Ashok Bhushan and S. Abdul Nazeer, JJ. Hereinafter, simply *Ayodhya case* (2019)

43 It was delivered as, "Professor (Dr) Anil Kumar Thakur First Memorial Lecture," at the Department of Laws, Panjab University, Chandigarh and published in 61(2) *Panjab University Law Review*, 2 (2022), 1- 42. Anil Kumar Thakur was one of the author's former students (Dec. 12, 1976 - Dec. 19, 2021). Unfortunately, he became victim of coronavirus. This Critique bears the imprints of his distinct contribution that he passionately made (along with his bosom friend and colleague Sheetal Setia, Faculty of Law, Mumbai University, Mumbai) by raising and responding numerous critical questions while it was still in progress.

44 The communal riots in 1857 led the British to bifurcate the disputed land, known as Ram Janmabhomi-Babri masjid complex, where the three-domed structure stood, into 'inner' and 'outer' courtyards, for facilitating the offering of namaz exclusively by the Muslims in the 'inner' courtyard, leaving the 'outer' court yard to the Hindus.

45 The communal riots of 1934, resulting into damage to the domes of the mosque, which was renovated by the British administration at their own expense, and that facilitated the offering of regular Nawaz by Muslims.

46 To quell and subdue the communal riots of 1949, in which the Hindu idols were surreptitiously placed inside the central dome by desecrating the Mosque, the 'inner courtyard' was 'attached' and a 'receiver' appointed till the pendency of suits, and the Hindus in the meanwhile permitted to continue with their worship of the newly placed idols for maintaining peace and order.

47 On Dec. 6, 1992 the Mosque was raised down by the Hindus "in breach of the order of status quo" passed in 1949 and that clearly "constituted a serious violation of the Rule of law."

The second purpose is to examine critically some of the interrogatives of public concern that tend to make the validity of the Supreme Court judgment somewhat suspect in the perception of public at large. In this wise, we have particularly examined the popular perception; namely, whether the Supreme Court judgement is 'majoritarian in character', representing 'the victory of faith over facts,' and unduly favouring the Hindus over the Muslims despite the secular credentials of the Indian State, even to the extent of rewarding them for their violation of the rule of law with impunity. A critical review on this count reveals that such public concerns stood completely negotiated by the Supreme Court in their judgment in the light of our critique as presented in this paper.

All this has prompted us to conclude that the Supreme Court, in its endeavour of 'doing complete justice' by acting judiciously on the principle of 'justice, equity and good conscience,' has eventually produced a uniquely unanimous[48] equitable, well-balanced and, therefore, acceptable historic judgment. This has ushered in an era with new beginnings on the strong foundation of secular State, showing how religious susceptibilities need to be negotiated!

VIII *Aishat Shifa* case *(2022)* – Two opposite opinions on the relatedness of Religion and Secular State

Bearing in mind the outcome of four major critiques, reflecting how the issues of relatedness of the freedom of religion and the secular State arose and that how those were disposed of,[49] we may now turn to our critique of *Aishat Shifa* case (2022).[50] For better appreciation of the adducing rationales of evolving principles, the fact matrix of the case may be abstracted in the first instance.

The petitioner Aishat Shifa, a Muslim young girl, was the second-year student of Government Pre-University College in the State of Karnataka.[51] Besides, wearing the

48 In *Ayodhya* case (2019), there is one single judgment, authored by all the judges on the bench, as if each of the paragraph of the 806-para judgment had been penned down by each one of the Justices on the Bench individually, but incognito! And this is what makes the judgment, what we describe as, 'unanimity in anonymity,' and, thereby, reflecting the collective wisdom by completely concealing the identity of the contributing judges. See also, *The Tribune*, January 22, 2024: "CJI: Ayodhya case judges unanimously decided to keep verdict anonymous." Chief Justice of India DY Chandrachud said: "The case has a long history of conflict and diverse viewpoints based on the history of the nation, and all those who were part of the Bench decided that this will be a judgment of the court. The court will speak through one voice and the idea of doing so was to send a clear message that all of us stand together not only in the ultimate outcome but in the reasons indicated in the judgment,"

49 See, *supra*, part IV to VII.

50 For this Critique, the author has substantially relied upon his Survey of Election Law for the year 2022,which included this *Aishat Shifa* case, and published in the *Annual Survey of Indian Law,* Vol. 58 (2022).

51 See, *Aishat Shifa,* paras 201 onwards.

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, *inter alia*, mandates the wearing of the prescribed uniform by students in all government and private schools/colleges.[52] In respect of private schools, however, there is a "caveat", which 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."[53]

Denial of entry, led the petitioner to challenge the constitutionality of the said GO in her writ petition before the High Court of Karnataka.[54] 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 symbolin addition to putting on the prescribed dress in a government educational institution is violative of the basic conceptof secularism?

In the opinion of Hemant Gupta J., in the light of his ownexpositionthe 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."[55] Accordingly, "the Government Order cannot be said to be against the ethic of secularism or to the objective of the Karnataka Education Act, 1983."[56] On the contrary, Justice Sudhanshu Dhulia is of the firm conviction that "[b]y asking the

52 The GO 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.

53 *Ibid.*

54 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.

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

56 *Ibid.*

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."[57] Accordingly, the government order is "clearly violative of Article 19(1)(a), Article 21 and Article 25(1) of the Constitution of India,"[58] and, therefore, in his own judgment, "[t]here shall be no restriction on the wearing of hijab anywhere in schools and colleges in Karnataka."[59]

However, for our critical analysis of the deeply divided opinion in *Aishat Shifa*, we take the leading judgment of Justice Hemant Gupta as the basis, primarily because the deviating judgment of Justice Sudhanshu Dhulia emanates, in our own respectful reading, as a 'reactive response' to the judgment of Justice Gupta, which is, otherwise too, very elaborate inasmuch as he (Justice Gupta) "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."[60]

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 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 Justice Gupta 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 distortingthe value of secularism, and, therefore, doing so is not permissible in the exercise of fundamental right to freedom of religion.

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

58 *Ibid.*

59 *Id.*, para 279.

60 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.

This stance is supported by adducing atleast 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.[61]

The other opinion, which is just the opposite of the first one, is that of Justice Dhulia, 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."[62]

Since in the constitutional scheme of governance, two 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.

IX Two opposite opinions in *Aishat Shifa* case (2022) – their relative evaluation

As a prelude to the exploration of the impingement of right to freedom of religion and the secular State, Gupta J., has explored at the very outset "the ethos and principles of secularism adopted in the Constitution of India."[63] 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."[64] Under the Indian Constitution, the concept of secular State, which is inherent in the Constitution, is brough to the *fore* in the Preamble of the Constitution. By juxtaposing the term "Secular" in the expression "Sovereign Socialist Secular Democratic

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

62 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.

63 *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."

64 *Ibid.*

Republic",[65] the purpose seems to highlight the primacy of the value of secularismin the creation of new India, called Bharat.[66]

For deciphering the value of secularism under the Indian Constitution,[67] it is vital 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*."[68] The difference between the two has been spelled out 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."[69] "D*harma* is what upholds, sustains and results in the well-being and upliftment of the *Praja* (citizens) and the society as a whole."[70]

For this elucidation of the concept of 'dharma', as distinct from the concept of 'panth', support has been drawn from the Division Bench judgment of the Supreme Court in *A.S. Narayana Deekshitulu* v. *State of A.P.*,[71] which quoted with approval theexpositionof '*dharma*' by Justice M. Rama Jois in his *Legal and Constitutional History of India.*The statement is to the following effect:[72]

> "…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

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65 Substituted by the Constitution (Forty-second Amendment) Act, 1976, s.2, for "Sovereign Democratic Republic" (w.e.f. 3-1-1977).

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

67 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).

68 According to the Hindi translation of the Constitution (Updated as of November 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.

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

70 *Ibid.*

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

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

> 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:
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> 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* 'सर्वेभवन्तुसुखिनः'. *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, 'panthnirpeksh'and not 'dharmnirpeksh'? And that how the 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, the concept of Secular State as hitherto developed under the Indian Constitution can be reveiewed.

Generally speaking, the term 'secular' is considered connotative of the idea which is opposite to the "theocratic State" in which "the State either identifies itselfwith or favours any particular religion or religious sect or denomination."[73] On the contrary, 'the secular State', as under our Constitution, is "enjoined to accord *equal treatment to all religions and religious sects and denominations.*"[74] This statement implies that if the Secular

73 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.

74 *Ibid.* [Emphasis is supplied]

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 nine-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,[75]

> 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.*[76]

X Nine-Judge Bench in *S.R. Bommai* - Secularism imaging the concept of 'equal treatment of all religions'

How does the Secular State fulfil 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 nine-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."[77]The answer inherent in the poser is that 'equal treatment' of all religions is not possible in a 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?"[78]

Seemingly, the emerging response at the first blush is that the secular State, in order to fulfil 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

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

76 See also *Santosh Kumar* v. *Secretary, Ministry of Human Resources Development* MANU/SC/0060/1995: (1994) 6 SCC 579.

77 *Ibid.*

78 *Ibid.*

Constitution so summarily![79] Such a construction is supported by the ultimate response of the nine-Judge Bench, when it summed up by observing:[80]

> "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...."(Emphasis added)

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 exposition of religion, in our view, truly represents the 'positive concept of equal treatment of all religions;'[81] 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."[82]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.[83]

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79 See also*, supra,* note 31. Author's *Monograph.*

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

81 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 *Ms 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.)

82 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).

83 See*, supra*, note 31, *Monograph* 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 nine-Judge Bench of the Supreme Court.

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."[84] In the light of the foregoing analysis, it is clearly evident that in India, with 'multiple religions, regions, faith, languages, food and clothing,' we have opted for *"positive concept of equal treatment of all religions.*"[85]

XI Secular state's obligation of 'equal treatment of all religions' – how to reconcile it with the concept of 'separation of religion from secular activities'?

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."[86] 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 onlyifit 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."[87] Looked from this perspective, the constitutionality/legality of the Order passed by the Executive Government of the State of Karnataka on February 5, 2022 on the subject may be examined, "Regarding a dress code for students of all schools and colleges of the state."[88]

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84 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.

85 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.

86 See, *supra*, note 74.

87 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.

88 For the translated copy of the Government Order dated Feb. 5, 2022, see, *Aishat Shifa*, para 60, per Hemant Gupta, J.

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:[89]

(i) This Order has been passed by the Governor in pursuance of the Rule 11 of Karnataka Educational Institutions (Classification, Regulation, and Prescription of Curricula, etc.) Rules, 1995, whichpermitsevery recognized educational institution of the Stateto"specify its own set of Uniform."[90]

(ii) 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."[91]

(iii) Wearing of hijab (a religious symbol) militates against "standardized learning experience" and itbecomes"an obstacle to unity and uniformity in the schools and colleges."[92]

(iv) Prohibition of wearing hijabis in "the larger public interest,"[93] and that such a prohibition"was not in violation of Article 25 of the Constitution."[94]

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89 See, *ibid.*

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

91 Citing the provision of Section 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.

92 See, *ibid.*

93 Citing the judgment of the High Court of Kerala's ruling in W.P. (C) No. 35293/2018, date: Dec 4, 2018, which, in turn,in para 9, cites a ruling of the Apex Court in *Asha Renjan* v. *State of Bihar and Ors.* [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.*

94 Citing the case of *Fatima Hussain Syed* v. *Bharat Education Society* (MANU/MH/0350/2002: AIR 2003 Bom 75).See also: the judgments of Madras High Court, in *V. Kamalamma* v. *MGR Medical University*, *Tamil Nadu* (which upheld the modified dress code mandated by the university), and a similar issue in *M Venkatasubbarao Matriculation Higher Secondary School Staff Association* v. *Shri M. Venkatasubbarao Matriculation Higher Secondary School,* MANU/TN/0106/2004: (2004) 2 MLJ 653 case. See, *ibid.*

(e) Thus, the Government Order,[95]duly supported by the relevant statutory provisions and the Rules made thereunder and further fortified by the cited judicial precedents,[96] ordains that

(i) "all the government schools in the state are mandated to abide by the official uniform;"[97] whereas "Private schools should mandate a uniform decided upon by their board of management."[98]

(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,"[99] and that "In the event that the management does not mandate a uniform, students should wear clothes that are *in the interests of unity, equality and public order.*"[100] (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[101] without suppressing her religious identity.[102] 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 institution?[103] Or, simply put, what is the placing or juxtaposition of the right to wear religious symbol in the secular set up of the State?

95 GONo: EP14 SHH 2022 Bengaluru Dated: Feb. 5, 2022. See, *ibid.*

96 It is somewhat intriguing that some of the referred judgmentsto 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, in *Aishat Shifa*, para 31, *per* Hemant Gupta, J.

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 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.

102 *Aishat Shifa*, para 208, *per* Hemant Gupta, J.

103 See also, *Aishat Shifa*, para 28, *per* Hemant Gupta, J.

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, defaceor 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.

One 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 February 5, 2022 "necessarily excludes all religious symbols visible to naked eye."[104] 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 Gupta's J.,view, is in contravention of the government order of February 5, 2022, which is held justified in the judgement.

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 protectby enforcing "parity amongst the students in terms of uniform." Two, the Government Order is constitutionally justified,becauseit 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 imposingrestrictions"on the freedom of religionandconscience" 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.

XII Right to religion and how it is related to the core value of Secular State in India

In order to decipher, how and in what mannerwearing of hijab distracts usfrom the 'secular environment', we may focus our attention on the core value of secularism, which has been adopted in our Constitution, and which is stated to be distinct or

104 See, *Aishat Shifa*, para 87, *per* Hemant Gupta, J.

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 as their fundamental right? The constitutional strategy that has hitherto developed and come to the fore is to bring about 'unity in diversity', and not 'unity in uniformity'. Freedom of conscience, thus, needs to be protected in deference to maintaining 'unity in diversity', and this value has been clearly recognized.[106] 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 an essential religious practice of Islam.[107] It is quite independent of any such prior-condition or restraints.

XIII Impingement of the right to freedom of religion under article 25(1) *on* the right to equality as enunciated under article 14 of the Constitution[108]

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

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

106 See the singular statement in *Aishat Shifa*, para 13, *pe*r Hemant Gupta, J.

107 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 claimedonly 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 High Court of Punjab and Haryana:

"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 Expl. I to Art. 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 and Haryana High Court in *Gurleen Kaur* v. *State of Punjab* 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:

Article 25, which makes this right subject to 'other provisions of Part III of the Constitution' along with'public order, morality and health.'[109]The provisions of Part III of the Constitution indubitably include the fundamental right to equality under Article 14. What does this inclusion mean? Elucidation on this count has been made by Justice Gupta:[110]

> "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 caseinpara 82] 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.

108 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 art. 25, read with question number (iv), 'What is the ambit and scope of essential religious practices Under art. 25 of the Constitution?'

109 Art. 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."

110 See, *Aishat Shifa*, para 86*, per* Hemant Gupta, J., citing in turn para 82 of *T.M.A. Pai Foundation.* See also, author's article, "Basic structure of the Indian Constitution: The doctrine of constitutionally controlled governance [From His Holiness Kesavananda Bharati (1973) to I.R. Coelho (2007)] Vol. 49 (3) *Journal of the Indian Law Institute*, 365-398.

> "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)

The crucial question in the context of hijab controversy, which still remains to be answered isthis: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)[111] 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.[112] 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 is found in our Critique of *Sabrimala Temple case* (2018), presented in a Special Lecture at Panjab University 57th Colloquium held on August 27, 2019.[113] In this respect, we are supported by the following conclusion statement in the dissenting judgment of Indu Malhotra J., 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."[114]

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111 See, *supra*, note 29, *Sabarimala Temple* case (2018) in part VII.

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

113 See, *supra*, note 31, the author's *Monograph*, presenting a critique of *Sabrimala Temple* case (2018).

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

In our *Critique*, we spelled out the reason and the rationale for taking the view that we have abstracted above. In this respect, our train of thoughts was as under:[115]

> "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", 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

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

> 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."

XIV Close reading of the right to 'freedom of religion' under article 25 reveals the limited power of the State to curtail that right

Ambit of the right to 'freedom of religion' under article 25 is very wide.Freedom of conscience, it seems, 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."[116] "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."[117] Right to freedom of religion, thus, "has implicit within it the ability

116 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 9-Judge Bench judgment of the Supreme Court in Justice K S Puttaswamy (Retd.) case (2017)], Vol. 61 (1) *Journal of the Indian Law Institute*, 68-96 (2019).

117 *Ibid.*

to choose a faith and the freedom to express or not express those choices to the world."[118]

It also inheres within its ambit the fundamental right to freedom of speech and expression under article 19(1)(a)andright 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 whichall the Fundamental Rights under Part III of the Constitution are considered toconstitute "a bouquet of rights*",* and therefore,allare to be "read together", "as a whole ", "in aid of each other," and not "in isolation."[119]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 nine-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',[120] or under article 21 as an expression of 'dignity of the individual.'[121] This means, the GO 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

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118 *Ibid.*

119 *Aishat Shifa*, para 143, *per* Hemant Gupta, J., citing inpara142 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]. See also *id*., para 129, citing *Maneka Gandhi* v. *Union of India* MANU/SC/0133/1978 : (1978) 1 SCC 248.

120 See, *id*., para 130, *National Legal Services Authority*, para 69.

121 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 (para641.2) 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."

to the prescribed uniform,"[122] we need to examine closely how the denial of wearing hijab brings about 'uniformity,' and whether such a measure of effecting uniformityispromotive of unity and harmonyinour 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*."[123] 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'.[124] This plea is powerfully reinforced in *St. Stephen's College* v. *University of Delhi,*[125] wherein the Constitution Bench of the Supreme Courthas, *inter alia*, observed:[126]

> 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 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.

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

123 *Ibid.* Emphasis added.

124 The government order banning wearing of hijab is not a reasonable restriction as it is violative of art. 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 art. 19(2). And there is no evidence on record showing that wearing of hijab has caused, likely to cause, any public disorder or disturbance.

125 MANU/SC/0319/1992: (1992) 1 SCC 558.(Hereinafter, *St. Stephen's College)*

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

XV Issue of *hijab* in *Aishat Shifa* – whetherhijab prohibition GO nullifies preambular objectives of 'fraternity' and 'dignity of the individual',and also offends the fundamental duties enumerated under article 51-A (e) and (f) of the Constitution [Cryptic response to Justice Hemant Gupta's opinion]

Justice Gupta has examined the issue of violation of preambulatory objectives on a larger canvass by including within the ambit of his enquiry, whether the GO also offends the fundamental duties enumerated Under Article 51-A Sub-clauses (e) and (f) of the Constitution?[127] In his affirmed view, wearing of hijab,as an addition to the prescribed code of dress, nullifies its very objective of bringing uniformity.[128] It would rather breed indiscipline.[129] "The freedom of expression guaranteed Under Article 19(1)(a) does not extend to the wearing of headscarf," he said.[130] "Once the uniform is prescribed, all students are bound to follow the uniform so prescribed."[131] 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."[132] Again, the very "objective behind a uniform," is "to bring about uniformity in appearances;"[133] "the students should look alike, feel alike, think alike and study together in a cohesive cordial atmosphere."[134]

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.[135] "The wearing of anything other than the uniform is not expected in schools run by the State as a secular institution,"[136] 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."[137] "The

127 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)?"

128 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."

129 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."

130 *Ibid.*

131 *Ibid.*

132 *Ibid*

133 *Supra* note 128, para 163.

134 *Ibid.*

135 *Supra* note 128, para 162.

136 *Ibid.*

137 *Ibid.*

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."[138] "That is the objective behind a uniform, so as to bring about uniformity in appearances."[139]

So far as the issue of 'dignity'of the individual, as presaged in the Preamble, is concerned, Gupta J., meets this challenge by simply stating: "The argument that the wearing of a headscarf provides dignity to the girl students is also not tenable,"[140]inasmuch as the students (petitioners)in the given fact matrix of the case "are attending an all-girls' college."[141]

Moreover, it is important to notice, how another issue, whether *hijab* prohibition GO also offends the fundamental duties enumerated under article 51-A Sub-clauses (e) and (f)of the Constitution[142] 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 GO:

> 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 GO also offends the fundamental duties as enumerated above can be pursued notwithstanding the said prohibition order. Justice Gupta 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."[143]

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 studyingin'an all-

138 *Id.*, para 163.

139 *Ibid.*

140 *Ibid.*

141 *Ibid.*

142 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)?"

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

girls' college. Nor the students are allowed to carry with themthe" 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.[144]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."[145]

XVI Issue of hijab in *Aishat Shifa* – whether *hijab* prohibition GO distracts us from the basic principles of 'unity, equality and public order' [Cryptic response to Justice Sudhanshu Dhulia's opinion]

Engaging ourselves in responding to another question, whether wearing hijab distracts us from 'unity, equality and public order', which indeed is the singular objective of prescribing the dress code?[146] We consider this question 'basic' or 'fundamental'as it arises from the GO itself, which was passed under the relevant Rule. The statement to this effectmay be extracted as under:[147]

> 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 GO 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. Justice Dhulia aptly describes this Order as "an innocuous order, which is religion neutral,"[148] because it "only directs the school authorities of respective

144 See, *supra,*note 132, and the accompanying text.

145 *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.

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

147 See, *supra,* note 105.

148 *Aishat Shifa*, para 207, *pe*r Sudhanshu Dhulia, J.

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 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 and equality could not become a natural course of things.

In the exposition of the objectives of 'unity and equality' in the light of 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 against 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

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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, at 979, cited in *Aishat Shifa*, para 57, *per* Hemant Gupta, J.

151 Cl. (1) of Art. 29 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."

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.

XVII Our three summations

Diversity is the hallmark of Indian culture

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 democraticsociety,this three-fold objective can be attained only by preserving, and not destroying,diversity. This is most resolutely reflected in Ambedkar's exposition on inter-se relationship of Liberty, Equality. Fraternity.[154] It very eloquently reveals, how the cherished objective of unity, described in 'Preambulatory promise' as 'Fraternity', is required to be fulfilled. Assuredly, it cannot be achieved by destroying diversity in the name of uniformity, which is the hallmark of Indian culture.

Constitutional strategies to establish 'unity in diversity'

In the constitutional scheme of things, the strategies to bring about 'unity in diversity' are well laid down in theframe 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

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

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

154 See, *supra*, note 155 and the accompanying text.

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 nine-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, we 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, in the meanwhile we have already explored the relationship of right tofreedom 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.[155] Reflecting upon it, in our respectful submission, would enable us to resolve the riddle in the fact matrix of the present case.

Manifestation of religious faith represents the exercise of constitutional rights to freedom of expression and freedom of religion

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.[156] 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 Kerala*[157] in 1986.On facts, in that case three Christian children, including the petitioner Bijoe,

155 See, *supra*, note 31, author's *Monograph*, presenting a critique of *Sabrimala Temple* case (2018).

156 See generally, *supra*, part VIIII.

157 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.

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.[158] 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.[159] 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 Reddyin *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,"[160] and that" [t]his has to be borne in mind in interpreting Article 25."[161] The reactive response of Justice Guptato this extracted intent and import of Article 25 of the Constitution in relation to the fact matrix of *Aishat Shifa case* is:[162]

> "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 Justice Chennappa in *BijoeEmmanuel*to the fact matrix of *Aishat Shifa*, Justice Gupta 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 distinction is that

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

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

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

161 *Ibid.*

162 *Ibid.*

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 amark 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."[163] Nor did it constitute any 'breach' of the principle of equality by the State in permitting the Muslim girl students to wear *hijab*.[164]

XVIII Critical diagnostic question in closing requiring elaborative evaluative response

In closing, we may still raise a diagnostic question: Where does lie the fundamental amiss in decision-making in *Aishat Shifa* by the Constitutional Court in upholding the constitutionality of the government order? This is the question that cannot be answered in a cryptic manner. It requires an elaborative response.

By all accounts, the most critical function of the constitutional court is to explore the constitutional values, which are relevant not only in deciding the *lis* in the instant case

163 *Aishat Shifa*, para 116, *per* Hemant Gupta, J.

164 *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.*

but of futuristic import,what Justice Chandrachud said, "beyond the vicissitude of time"[165] In this respect, the first and foremost task of the constitutional court is to examine, if there was any violation of the fundamental rights of the petitioner, irrespective of the pleadings of the petitioner. Perhaps, it was here where there was amiss in the making of very diagnosis of the case! Instead of examining, whether prohibiting the wearing of religious symbol has violated the fundamental right to freedom of religion guaranteed under Article 25(1) of the Constitution, the constitutional court whether wearing of religious symbol was an essential attribute of the wearer's religious faith! This approach distracted the constitutional court from discharging its critical function, namely, exploration of constitutional values underlying the conflict problem.

In this respect, approach of Dhulia J., in *Aishat Shifa*is distinctly different, and, in our view, this is as it should be while dealing with an issue of constitutional import. This, of course, is relatively a difficult exercise: as it imposes a burden on the constitutional court to undertake differential analysis in the first instance, showing how and in what manner the present case is different from other past precedents, and that why and how the ratio of those precedents is to be applied. This is how the constitutional development takes place through interpretative processesin the common law tradition. This is what Dhulia J., has painstakingly and purposefully demonstrated in *Aishat Shifa* case.

Centrality of the issue to be decided by the constitutional court is, whether the GO, 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 under Article the19 and 25 of the Constitution?[166] 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."[167] 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,[168]This is so, because "[e]verything depended on the determination on this question."[169] This was "a very tall order for the Petitioners to prove,"[170] and

165 See, *The Tribune*, Oct. 25, 2023: Chief Justice of India DY Chandrachud during at an 'International conference on Dr BR Ambedkar' in Massachusetts, United States. on Oct. 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."

166 See, *Aishat Shifa*, para 210*, per* Sudhanshu Dhulia, J.

167 *Id.*, para 211.

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

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

170 *Ibid.*

since they couldn't prove, the matter ended there and then and that prompted the high court to hold:[171]

> ...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'*...(Emphasis added)

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, unlessthe 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, *ipsofacto*, 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 Values."[172] This very stand has been affirmed by Gupta J., in his judgment in *Aishat Shifa*.[173]

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. 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

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

172 *Ibid*.

173 Justice Gupta has upheld the Full Bench judgment of the High Court of Karnataka.

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

> 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] Dhulia's J., 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 seemed to have 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 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 (Emphasis added)

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' reasonfortaking 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 sombre reflections of Dhulia J., I venture to think, the remaining 'partly' reason to pursue ERP-issueas a preferential course of action, was that the High Court was

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175 See the two questions out of 11,formulated by Justice Gupta, as Questions 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)

177 *Ibid.*

seemingly oblivious of its own criticalroleas a Constitutional Court, which wasno other than to zealously protect the fundamental rights of allcitizens! In support of this critical function of the constitutional court, Justice Dhuli are calls what the Supreme Court stated ponderingly 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.* (Emphasis mine)

If the priority and supremacy of 'duty and function' of the constitutional court would have dawned upon, "[t]heapproach 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, Dhulia J., 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 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

178 *Aishat Shifa*, para 215, *per* Sudhanshu Dhulia, J *(citing Bijoe Emmanuel).* (Emphasis mine)

179 *Ibid*

180 *Ibid.*

181 *Aishat Shifa*, para 217, *pe*r 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 and* 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 art. 25 and art. 26 of the Constitution.

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 of ERP came to the fore in defining the contours of freedom of religion. Its exposition by the 7-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;*

183 The Constitution of India, art. 26. See also, generally, *supra*, note 31, 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*.

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?

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

> *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]

What is the most distinctive feature of Shubhanshu Dhulia J., approach in *Aishat Shifa* case that leads to 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 principlesare not hypothetical. Theseemanate 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 instance, for the resolution of the problem in hand, the facts are recapitulated and then abstracted from the concrete situation so that, in order to follow the rule of law, those become the matter of common concern and could be brought easily within the ambit of applicable principles of law. To wit, Justice Dhulia 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:

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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 31, author's *Monograph*.

191 Art. 25(2)(a) of the Constitution 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 The Constitution of India, art. 26.

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

> "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]

> "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!

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194 *Id.*, para229.

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 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 doneon 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 Karnataka High Court, 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 Justice O. Chinnappa Reddy 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 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

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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.See also, *id.*, para 233, citing *M. Siddiq (Dead) Through LR's* v. *Mahant Suresh Das and Ors.* MANU/SC/1538/2019 : (2020) 1 SCC 1; Para 90 and 91 (popularly known as the *Ram Janmabhoomi -Babri Masjid* Case).

203 *Ibid.*

204 See, *supra*, note 163.

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

206 High Court of Karnataka 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.*

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 Constitution," permits all persons to pursue their respective persuasionsirrespective 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 casewith a similar fact matrix, is not just a mechanical, but

208 See, *id.*, para 237.

209 *Ibid.* In his decision-making, 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.

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.

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 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, butthere 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

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

214 For the extracted statement, see, *ibid.* Reference to footnoteshas been omitted.

215 *Id.*, para 247.

216 *Ibid.*

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

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

> 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 codein schools, including in Pre-University classes, the State tried to justify the G.O. 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 pleaon 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 G.O.wasanchored, has been abandoned in view of extensive review of catena of casesundertaken 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

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

220 See, *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.*

224 See*, ibid.*

225 *Ibid*.

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 characteristic approach 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 especially 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 Sonali, 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, yetit 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 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

226 See, *id.*, para 251.

227 See, *id.*, para 252.

228 See, *id.,* para 253.

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."

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 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

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.

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].

> 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 succeededin 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 matrixin 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:

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

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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.*

240 *Ibid.*

241 *Ibid.*

242 *Ibid.*

- "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]
- 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.
- 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]
- 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 far Shabina 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 heldby the House of Lords that jilbab (and not hijab, which was not an issue at all) that 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, Dhulia J., has posed a few searching questions that must be taken into account while enforcing the dress code principle. To wit:

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243 *Ibid.*

244 *Ibid.*

245 *Id.*, para 258.

246 *Ibid.*

247 *Ibid.*

(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,involvingparticularly 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]

Sudhanshu Dhulia J., has answered all these questions in his own unique way, albeit perfectly and 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., who 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."

Dhulia J., 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:

> 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.[252]

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

> 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

248 See*, id*., para 261.

249 See, *id.,* para 262.

250 *Id*., para 263.

251 MANU/USSC/0083/1929: 279 US 644 (1929), Para 22, cited in *Aishat Shifa*, para 262, *per* Sudhanshu Dhulia, J.

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

> a document of Trust. It is the trust the minorities have reposed upon the majority….[253]

The value of diversity is forcefully expressed to bring out the innate strength of 'our rich plural culture' by stating pithily what we truly needis'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

253 *Id.*, para 264.

254 See, *id.*, para 265.

255 *Id.*, para 266.

256 *Id.*, para 267.

257 See, *id.*, para 268.

> that the essence of every religion is common, only the practices differ...[258]
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> 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, our 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 institutionsis desiderated for promoting the constitutional values of "secularism and equality;"[262] to this effect has been quoted K Jagannatha Shetty J., 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

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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, *ibid,* 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.

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

> 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]
>
> Besides, as if to complete the narrative of 'unity in diversity', one more set of constitutional values is addedunder Fundamental Duties in Part IV-A of the Constitution,[265] 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 Sudhanshu Dhulia J., 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 as 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 chancesfora 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]

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264 *Id,* para 81.

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

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, Volume XI.

271 *Id*., para 278.

> "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 Sudhanshu Dhulia J., has ordered that "[t]here shall be no restriction on the wearing of hijab anywhere in schools and colleges in Karnataka."[272]

In sum, the amiss caused by the Full Bench judgment of the High Court of Karnataka in their decision-making was remedied by Justice Dhulia. It was primarily owing to the non-recognition, non-appreciation or non-comprehension of the real, absolute, substantive preambular objective-value of establishing 'inclusive social order'. The strategy for realization of this constitutional value through the instrumentality of the Secular State has been elaborately provided particularly in Part III (Fundamental Rights), Part IV (Directive Principles of State Policy) and Part IVA (Fundamental Duties) of the Constitution. In relation to the most critical value of the Secular State, namely the fundamental right to freedom of religion under Article 25(1), read with other cognate values under Articles 19(1)(a) [Freedom of expression] and Article 21 [Protection of life and personal liberty], the same is required to be reinforced by the emphatic understanding that it is one of the *pious duties* of every citizen under Article 51A(f) of the Constitution of India, to "value and preserve the rich heritage of our composite culture."

XVIII Our predicament: How to approximate the inviolable constitutional values to the eternal values of Dharma by overcoming the cultural deficitbetween the Western and Indian classical traditions in defining 'religion' in term of 'dharma' !

Truly, as a matter of fact,the entire philosophical basis of our Constitution, that, we, the people of India had given to ourselves at the very threshold, way back on the day of November 26, 1949, stands subsumed in the overarching Doctrine of Dharma, which spells out the foundational principles for regulating human conduct in a civilized society. This reality is most manifestly as well as officiallydisplayed in the emblem of the Supreme Court which carries the philosophical Sanskrit edict, **यतोधर्मस्ततोजयः** (Where there is Dharma, there is victory).[273] This philosophical precept is a continual reminder

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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 Mar. 15, 2022, and quashing the G.O. dated Feb. 5, 2022.

273 The singular source of the philosophical precept, यतोधर्मस्ततोजयः(Yato Dharmastato Jayah), is the Great Epic, *The Mahabharata* [verse 13.153.39]On the battlefield of Kurukshetra, Arjuna tries to shake the despondency of Yudhisthira by stating: "victory is ensured for the side standing with Dharma."[Researchers tell us that the precept, यतोधर्मस्ततोजयः (Yato Dharmastato Jayah) , occurs in The Mahabharata at least as many as 13 times!]

to the occupant of the seat of highest court of Justice of the Nation to protect, preserve and promote Dharma, for under the Indian classical tradition, 'Dharma is the king of kings', that is, Dharma is The Supreme Sovereign.[274]And the discharge of this bounden duty, it needs to be noticed, is self-contained and self-justified, as is reflected resolutely in the cognate precept, **धर्मोरक्षतिरक्षितः** - He who preserves Dharma, himself stands preserved.[275]

The usage of the word 'Dharma' should not be misconstrued in narrow pedantic sense of 'religion'; it is of much wider import, which of course includes religion and religious duties as well. Indeed, Dharma is a repository of values that are relative to all aspects of human life and culture and those values eventually result in promoting truth, unity, and welfare of all. Eventually, all such values become manifest in terms of duties (actions) – duties of different kinds and ofdiverse nature – duties of the King, duties of the subjects, duties of religious nature, duties of social nature, and so on so forth. Thus, Dharma becomes a way of life – a righteous course of conduct, propelled from within rather than form outside.[276]

Under the Indian classical tradition, *Dharma* represents the cumulative wisdom of generations of ancestors, and thereby unarguably becoming the paramount source of eternal values for the benefit of all - **'सर्वेभवन्तुसुखिनः'**- let all beings be happy and peaceful in all respects.[277] In our submission, the foundational principles of Dharma,

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274 The author addressed National Webinar on July 6, 2024, under the title, "What does 'Yato Dharmastato Jayah' mean, serve and speak for? A Critique of an Inscription on the Emblem of the Supreme Court with refence to Basic Structure Doctrine of the Constitution." This lecture was delivered under the aegis of Institute of Applied Sanskrit Shaastriya Knowledge (An undertaking of Angiras Clan), Chandigarh, and other associate Organizations devoted to restructuring knowledge on the basis of classical principles of Dharma as propounded by Rishi Vedavyas. See, "YouTube link" - https://youtu.be/sbS1LSYeGZAn.

275 *The Mahabharta* (3.313.128): धर्मएवहतोहन्तिधर्मोरक्षतिरक्षितः। तस्माद्धर्मंनत्यजामिमानोधर्मोहतोऽवधीत् -He who sacrifices virtue is himself destroyed. And he that preserves it is himself preserved. I, therefore, do not sacrifice virtue, considering that if it is destroyed, it will destroy us. [Gita Press Translation]

276 A classic example of the foundational value that has hitherto served in sustaining the institution of Hindu Undivided Family is that of 'pious obligation' of a son, grandson, or great-grandson to repay the debts of their deceased or debt-ridden father, grandfather, or great-grandfather under Mitakshara Hindu law.

277 See, author's write up: "Hindu Law: Overview" [Published in The Oxford International Encyclopaedia of Legal History (Oxford University Press, USA, (2009)] The remarkable resilience of the of the foundational principles of the Indian classical tradition is brought out In the prefatory statement: "Hindu law has the oldest pedigree of any known system of jurisprudence, and even now it shows no signs of decrepitude.' This is how John D. Mayne eulogised the commendable ability and vision of the Hindu jurists and their grasp of principles and their seminal ideas in his 'Preface' to the first edition of *Treatise on Hindu Law and Usage* (1878). After more than a century and a quarter, an erudite scholar [Werner Menski, Hindu law: beyond tradition and modernity (Oxford University Press, 2003)could not help stating that the value of the 'religious' legal systems such as Hindu law should not be perceived as 'irrelevant' in today's modernist society."

in the phraseology of modern constitutionalism, are akin to the inviolable foundational values envisaged by/under the Basic Structure Doctrine (BSD) of the Constitution.[278] However, the proximity between Dharma and BSD has hitherto remained both elusive and evasive.[279] So much so, most recently a former Judge of the Supreme Court of India[280] vehemently pleaded for the removal the Supreme Court's motto **यतोधर्मस्ततोजयः** " (Where there is Dharma, there is victory), and deeply desired that the Chief Justice of India must consider the idea of its removal.[281] In his view themotto," **यतोधर्मस्ततोजयः** (Where there is Dharma, there is victory), bears the notion of Dharma "as stipulated in the Hindu fold, is not always the truth and therefore, does not deserve to be the motto of the Constitution of India," and that "The truth is the Constitution, Dharma - not always".[282] This view is reinforced by arguing that all the High Courts across the country had adopted the motto "Satyameva Jayate", there was no reason why the Supreme Court has chosen to keep "the Dharmic notion, which is but a set of duties," and that the very presence of this motto "makes a huge difference in the approach of the Supreme Court in justice delivery."[283]

In our respectful submission, the apprehensions of the learned Judge are somewhat misplaced or lost at least for two reasons. First, the word 'Dharma' in the Supreme Court motto should not be mistaken or construed in a narrow pedantic sense of 'religion'; it is much wider import in terms of universal human values promoting truth, unity, and welfare of all as manifested in the jurisprudence of duties of all kinds and of diverse nature.[284] Second, the reason, why the motto of the Supreme Court **यतोधर्मस्ततोजयः** is at variance from that of the high courts' **सत्यमेव जयते** should not be difficult to discover or visualize. We need to recall the wider, exclusive and comprehensive jurisdiction of the Supreme Court to explore and expound the fundamental constitutional values[285] that stand informed by Dharma, to be read as profound principles Basic Structure of the Constitution.

278 See the author's critique, "Reservation for EWS via Basic Structure Doctrine under 103rd Amendment of the Constitution: A juridical critique of 5-Judge bench judgment of the Supreme Court in *Janhit Abhiyan* v. *Union of India* [Delivered on Nov. 7, 2022]. 65(4) *Journal of the Indian Law Institute*, (Oct.-Dec. 2023), 351-377.

279 See author's article, "Crucifying the concept of Mitakshara Coparcenary at the altar of income-tax law

(A critique of Chander Sen and catena of cases dittoing its decision-principle)," 53 *Journal of the Indian Law Institute*, 413-436 (2011).

280 Justice Kurian Joseph, who retired from the top court in 2018 after serving it for about five and a half years (2013-2018)

281 Views expressed on Feb. 28, 2024 at the website "The Wire".

282 *Ibid.*

283 *Ibid.*

284 See, *supra,* notes 282 and 283, and the accompanying text.

285 See the author's article, "Statement of Indian Law - Supreme Court of India Through its Constitution Bench Decisions Since 1950: A Juristic Review of its Intrinsic Value and Juxtaposition," 58(2) *Journal of the Indian Law Institute*, 189-233 (2016).

Moreover, it hardly needs emphasis to affirmthat we should not feel unduly worried and suspect about the usage of the word **धर्म** in the precept of **यतोधर्मस्ततोजयः**, simply because it has emanated from the 'Hindu fold'. Under the Indian classical tradition, *Dharma* represents, as stated earlier, the cumulative wisdom of generations of ancestors, and thereby unarguably becoming the paramount source of eternal values for the benefit of all - **'सर्वेभवन्तुसुखिनः'** let all beings be happy and peaceful in all respects.On hindsight, the lingering reason of non-appreciation of proximity between the eternal values of *Dharam* and inviolable values as envisaged under the BSD, the venture to proffer,has been due to some, which may be called, 'cultural deficit.' I tend to identify such a deficit primarily in the absence of our ability of coining the corresponding term for *Dharma* in English. Hitherto, the translated term 'religion' for Dharm is not capable of carrying the comprehensive character of *Dharma* and its **'सार्वभौमिक'** (universal) philosophy to promote the interest of all (as we are witnessing in construing the role of 'secular State' in giving effect to the Directive Principles of State Policy under the Indian Constitution).[286] May be, such an absence could be traced to a cognate reason of cultural differentiation – Indian culture is intrinsically 'holistic' in nature; whereas the Western culture is strongly 'specific'. This might be the singular reasoneven for obviating the need for coining the term in English, which would be analogous to the term '*Dharma*'! Isn't it ironic, the *Constitution of India*, the basic document of the Nation for constitutional governance in Independent India, is translated from English to Hindi with the background of western culture, rather than theeternal values of the Indian classical traditionpivoted on the profound principles of Dharma!

However, we may rejoice the recent recalling oftherich heritage of Indian culture as a panacea to the complex problems of the tormented worried world. We may refer to the adoption of Sanskrit precept of **'वसुदैवकुटुम्बकम'** (Vasudhaiva Kutumbakam), signifying that the Whole World is One Big Family – at G-20 Summit in India under India's Presidency (from December 1, 2022 to November 30, 2023). Through this precept we wanted to share with the world large" India's Timeless Philosophy for Global Harmony."[287] The imperative need for taking such an inspired initiative was to showcasethe world how this philosophy of 'global harmony'enables us to deal with most of the critical socio-economic issues, including piercing issues of environment,

286 See generally, the author's article, "Access to Justice towards the Creation of Inclusive Social Order as Envisaged under the Constitution: A Juridical Critique of Human Rights Perspective," 21, *Journal of the National Human Rights Commission*, New Delhi, India, 1-30 (2022).

287 This precept is one of the foundational principles of Dharma, expounded in Upnishadic verse, अयंनिजःपरोवेतिगणनालघुचेतसा। उदारचरितानांतुवसुधैवकुटुम्बकम्॥ *Maha Upanishad* VI.71-73. This verse is also engraved in the entrance hall of the old Parliament building. What should it mean to our Parliamentarian? We daresay, it must convey, to say the least,that while enacting laws, the Parliament should always bear in mind that their laws must result in the welfare of all.

climate change, health, agriculture, energy, tourism, trade and investment, etc. by bringing together civil societies from the G20 countries that are inherently pregnant with diversities of all sorts for the collective benefit of all.

A plaque with the inscription 'Vasudhaiva Kutumbakam' has also been installed in the premises of the Permanent Mission of India to the United Nations at the UN headquarters in New York City, embodying India's commitment to unity and global collaboration. What is the pragmatic premise of **'वसुदैवकुटुम्बकम'** (Vasudhaiva Kutumbakam) that has prompted India to adopt and showcasing the world that it is the magic remedy to all the conflicting complex problems?The realistic basis isfirmly rooted in its down-to-earth utilitarian principle, which is crystalized as 'unity in diversity,' in contradistinction to the approach of 'unity in uniformity'. Perhaps, the best and the simplest elucidation on this count has come from Swami Vivekananda, the Wandering Monk of India, who was one of the greatestexponent of Vedant philosophy. While delivering his classic Address at the final session of the World's Parliament of Religions in Chicago on September 27, 1893, he expounded the philosophy of *Vasudhaiva Kutumbakum*, by exhorting the world at large, when he unequivocally argued and affirmed:

"If anybody dreams of the exclusive survival of his own religion and the destruction of others, I pity him from the bottom of my heart, and point out to him that upon the banner of every religion will soon be written, in spite of resistance: 'Help and not fight', 'Assimilation and not Destruction', 'Harmony and Peace and not Dissension'."

Vivekananda's prophetic exposition of Religion, as inherent in the philosophy of Vasudhaiva Kutumbakum, in our view, has found a clear resonance in the fundamental right to freedom of religion under Articles 25 and 26 of the Constitution. Our Supreme Court needs to decipher the notes of this constitutional resonance in the light of Vivekananda's elucidation, which tells us that the place of religion in the complex of secular State needs to be secured through the liberal, tolerant, and unprejudiced pragmatic principle of 'unity in diversity' and not narrow, dogmatic, sectarian unnatural principle of'unity in uniformity.' Nor, the right to freedom of religion be made subservient to the rights of others on grounds of equality and non-discrimination under Articles 14 and 15 of the Constitution, excepting on the limited grounds of 'public order, morality and health'![288]

288 We have adequately dealt with this issue in our critique of *Sabrimala Temple* case (2018), which is now pending before the nine-Judge bench for its final disposition.