**IN THE SUPREME COURT OF INDIA**

CIVIL APPELLATE JURISDICTION

**SPECIAL LEAVE PETITION (CIVIL) NO. 5236 OF 2022**

**IN THE MATTER OF:-**

AISHAT SHIFA … PETITIONER

VERSUS

THE STATE OF KARNATAKA & ORS. … RESPONDENTS

AND

**WRIT PETITION (CIVIL) NO. 95 OF 2022**

**IN THE MATTER OF:-**

FATHIMA BUSHRA … PETITIONER

VERSUS

THE STATE OF KARNATAKA … RESPONDENT

**WRITTEN SUBMISSIONS BY MOHD. NIZAMUDDIN PASHA, ADVOCATE ON BEHALF OF THE PETITIONER(S)**

**THE TEST OF ESSENTIALITY**

1. The High Court at p. 57 of the Impugned Judgement holds that "if *essential religious practice* as a threshold requirement is not satisfied, the case does not travel to the domain of those constitutional values". It is thus clear that the essential religious practice test is central to the adjudication by the High Court of the present issue.

2. Therefore, in examining the correctness of the Impugned Judgement, this Hon'ble Court will have to examine this aspect of the matter. However, the first question that will arise will be what renders a religious practice essential and what is the test to be applied for essentiality. Secondly, it will have to be examined what the effect is of a religious practice being found to be essential or otherwise on the nature of protection accorded to it in our constitutional scheme. However, the answer to both these questions is not clearly known today as they are pending adjudication before the bench of 9 learned Judges of this Hon'ble Court.

3. A full bench of 7 learned Judges of this Hon'ble Court in ***Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005** rejected the argument that only essential practices are protected under Article 25. The following passages are noteworthy in this regard:

> *"**18.** The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Article 25. Latham, C.J. of the High Court of Australia while dealing with the provision of Section 116 of the Australian Constitution which inter alia forbids the Commonwealth to prohibit the "free exercise of any religion" made the following weighty observations [ Vide Adelaide Company v. Commonwealth, 67 CLR 116, 127] :*
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> > *"It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of Section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."*
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> ***19.** These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under Articles 25 and 26 on grounds of public order, morality and health. Clause (2)(a) of Article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-clause (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. <u>The learned Attorney-General lays stress upon clause (2)(a) of the article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.</u>*
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> ***20.** <u>The contention formulated in such broad terms cannot, we think, be supported. 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.</u> 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 the mere fact that they involve expenditure of money or employment of priests and servants or the use*

*of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b). What Article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. We may refer in this connection to a few American and Australian cases, all of which arose out of the activities of persons connected with the religious association known as "Jehova's Witnesses". This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. In 1941 a company of "Jehova's Witnesses" incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them under the National Security Regulations of the State. The legality of the action of the Government was questioned by means of a writ petition before the High Court and the High Court held that the action of the Government was justified and that Section 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations [Vide Adelaide Company v. Commonwealth, 67 CLR 116, 127]. These were undoubtedly political activities though arising out of religious belief entertained by a particular community. In such cases, as Chief Justice Latham pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery."*

4. Thereafter, a bench of 5 learned Judges in ***Durgah Committee* v. *Syed Hussain Ali*, (1962) 1 SCR 383** ignored the previous ruling of the larger bench and limited protection under Article 25 to only essential practices. Gajendragadkar J., speaking for this Hon'ble Court observed as follows:

*"**33.** …Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may have sprung from merely superstitious*

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

5. On this point, the above observation of Gajendragadkar, J. has been criticised by H.M. Seervai at Para 12.18 / Pg. 1267-68 (4th Edition, Vol. II) as being obiter and running directly counter to the judgement of Mukherjea J. in the *Shirur Mutt* case. The following is an extract from the commentary of H.M. Seervai where after extracting the above observation of Gajendragadkar, J. in the *Durgah Committee* case, the learned author states as follows:

> *"It is submitted that the above obiter runs directly counter to the judgment of Mukherjea J. in the Shirur Mutt Case and substitutes the view of the court for the view of the denomination on what is essentially a matter of religion. The reference to superstitious practices is singularly unfortunate, for what is "superstition" to one section of the public may be a matter of fundamental religious belief to another. Thus, for nearly 300 years bequests for masses for the soul of a testator were held void as being for superstitious uses, till that view was overruled by the House of Lords in Bourne v. Keane. It is submitted that in dealing with the practice of religion protected by provisions like those contained in s.116, Commonwealth of Australia Act or in Art.26(b) of our Constitution, it is necessary to bear in mind the observations of Latham C.J. quoted earlier, namely, that those provisions must be regarded as operating in relation to all aspects of religion, irrespective of varying opinions in the community as to the truth of a particular religious doctrine or the goodness of conduct prescribed by a particular religion or as to the propriety of any particular religious observance. The obiter of Gahendragadkar J. in the Durgah Committee Case is also inconsistent with the observations of Mukherjea J. in Ratilal Gandhi's case, that the decision in Jamshedhi v. Soonbai afforded an indication of the measure of protection given by Art. 26(b)."*

6. A bench of 2 learned judges[1] of this Hon'ble Court in ***Bijoe Emmanuel & Ors. v. State of Kerala*, (1986) 3 SCC 615** although subsequent to Durgah Committee has held that all beliefs that are conscientiously held are protected under Article 25. The following observations are relevant:

> *"**20.** The meaning of the expression "religion" in the context of the Fundamental Right to freedom of conscience and the right to profess, practise*

[1] This was mistakenly submitted during oral arguments to be 3 judges. However, a prior coordinate bench would also be binding under the doctrine of precedent.

> *and propagate religion, guaranteed by Article 25 of the Constitution, has been explained in the well known cases of Commissioner, Hindu Religious Endowment, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [Commr, HRE v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282 : 1954 SCR 1005] , Ratilal Panachand Gandhi v. State of Bombay [AIR 1954 SC 388, 392 : 1954 SCR 1055] and S.P. Mittal v. Union of India [(1983) 1 SCC 51] . It is not necessary for our present purpose to refer to the exposition contained in these judgments except to say that in the first of these cases Mukherjea, J. made a reference to "Jehovah's Witnesses" and appeared to quote with approval the views of Latham, C.J. of the Australian High Court in Adelaide Company v. The Commonwealth [67 CLR 116] and those of the American Supreme Court in West Virginia State Board of Education v. Barnette [87 Law Ed 1628, 1633 : 319 US 624, 629 (1943)] . In Rotilal's case [AIR 1954 SC 388, 392 : 1954 SCR 1055] we also notice that Mukherjea, J. quoted as appropriate Davar, J.'s following observations in Jamshed Ji v. Soonabai [(1909) 33 Bom 122 : 10 Bom LR 417] :*
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> > *"If this is the belief of the community and it is proved undoubtedly to be the belief of the Zoroastrian community, — a secular Judge is bound to accept that belief — it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind."*
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> *We do endorse the view suggested by Davar, J's observation that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but subject, of course, to the inhibitions contained therein."*

7. Finally, a bench of 5 learned judges of this Hon'ble Court constituted to review the judgement in ***Kantaru Rajeevaru v. Indian Young Lawyers Association,*** **(2020) 2 SCC 1** found that there is a conflict between the *Shirur Mutt* and *Durgah Committee* cases that has to be resolved by a larger bench. Accordingly, a bench of 9 learned judges has been constituted to decide the scope and ambit of Article 25 including whether or not the 'essentiality test' has any place in Indian jurisprudence. The following passages from the order are apposite:

> *"**7.** In this context, the decision of the seven-Judge Bench of this Court in Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (Shirur Mutt) [Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (Shirur Mutt), 1954 SCR 1005 : AIR 1954 SC 282] holding that what are essential religious practices of a particular religious denomination should be left to be determined by the denomination itself and the subsequent view of a five-Judge Bench in Durgah Committee, Ajmer v. Syed Hussain Ali [Durgah Committee, Ajmer v. Syed*

> *Hussain Ali, (1962) 1 SCR 383 : AIR 1961 SC 1402] carving out a role for the court in this regard to exclude what the courts determine to be secular practices or superstitious beliefs seem to be in apparent conflict requiring consideration by a larger Bench."*

8. Accordingly, the matter was referred to a larger bench along with a set of proposed issues. One of the questions thereby referred to a larger bench of 9 learned Judges was:

> *"**5.4.**(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."*

9. It is humbly submitted that when different sets of precedent binding on this Hon'ble Bench speak in different and contradictory voices and differ on the exact point of law that is applicable in the present case, and that very question is pending consideration of a bench of 9 learned Judges of this Hon'ble Court, this Hon'ble Bench should not decide this issue without referring the matter to a larger bench.

**COURTS INTERPRETING RELIGIOUS SCRIPTURES**

10. A note of caution has been sounded by 5 learned judges speaking in a single voice ***M. Siddiq* v. *Mahant Suresh Das*, (2020) 1 SCC 1**. This Hon'ble Court held that courts should not enter into an area of theology and attempt to interpret religious scriptures. The only test to be applied is to see if a believer truly holds that belief. This has to be done bearing in mind the diversity of views within each religion. It has been held that courts must "steer clear" of adopting one among the many interpretations of theological doctrines. The following paragraphs are apposite:

> *"**90.** During the course of the submissions, it has emerged that the extreme and even absolute view of Islam sought to be portrayed by Mr P.N. Mishra does not emerge as the only available interpretation of Islamic law on a matter of theology. Hence, in the given set of facts and circumstances, it is inappropriate for this Court to enter upon an area of theology and to assume the role of an interpreter of the Hadees. The true test is whether those who believe and worship have faith in the religious efficacy of the place where they pray. The belief and faith of the worshipper in offering namaz at a place which is for the worshipper a mosque cannot be challenged. It would be preposterous for this Court to question it on the ground that a true Muslim would not offer prayer in a place which does not meet an extreme interpretation of doctrine selectively*

> *advanced by Mr Mishra. This Court, as a secular institution, set up under a constitutional regime must steer clear from choosing one among many possible interpretations of theological doctrine and must defer to the safer course of accepting the faith and belief of the worshipper.*
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> ***91.*** *Above all, the practise of religion, Islam being no exception, varies according to the culture and social context. That indeed is the strength of our plural society. Cultural assimilation is a significant factor which shapes the manner in which religion is practised. In the plural diversity of religious beliefs as they are practised in India, cultural assimilation cannot be construed as a feature destructive of religious doctrine. On the contrary, this process strengthens and reinforces the true character of a country which has been able to preserve its unity by accommodating, tolerating and respecting a diversity of religious faiths and ideas. There can be no hesitation in rejecting the submission made by Mr Mishra. Our Court is founded on and owes its existence to a constitutional order. We must firmly reject any attempt to lead the Court to interpret religious doctrine in an absolute and extreme form and question the faith of worshippers. Nothing would be as destructive of the values underlying Article 25 of the Constitution."*

**WHETHER WEARING OF A HIJAB CONSTITUTES AN 'ESSENTIAL' PRACTICE IN ISLAM**

11. The High Court at page 55 of the Impugned Judgement leads into the analysis of essentiality by citing the judgement in *Indian Young Lawyers Association (Sabrimala 5-J)* v. *State of Kerala*, (2019) 11 SCC 1, which is under review, to say that to be essential, the practice must be binding and must be compelling. It must be noted here that while the cited judgement does speak of the practice in question being binding and obligatory to qualify as essential, there is no reference in the Sabrimala judgement to the requirement of an element of compulsion. This element appears to have been inferred by the High Court on its own. The High Court then goes into its analysis on essentiality of the practice of wearing the hijab in Islam by quoting the Quran at p. 62 where it says "Let there be no compulsion in religion", suggesting that if there is no compulsion, the prescription in question cannot be said to be mandatory and essential. However, the prescription in the verse of the Quran cited is actually against forcing anyone to convert to Islam. This is actually clear from the footnote which is cited in the Impugned Order that says that "religion depends on faith and will, and these would be meaningless if induced by force". As such, this verse so understood has no relevance whatever to the subject under consideration. This verse was not put by the High Court to the petitioners before it, and therefore no opportunity was given to the petitioners to explain the meaning and context of the verse.

12. Therefore, the High Court has cited a test of compulsion from a judgement that does not lay down such a test, then referred to a verse of the Quran that is completely irrelevant to the analysis which states that nobody can be compelled to convert to Islam, and then gone on to hold that Hijab is not mandatory in Islam because there is no compulsion to observe it.

13. Coming to the verses of the Quran that prescribe wearing of a hijab, it is relevant to note that the word 'hijab' is not used in the Quran in this context, the two words used in the two different verses cited are 'khimar' and 'jilbab'. In the Quran, the word hijab is used elsewhere in the sense of 'curtain' or 'separation', and it is only in colloquial usage that the word hijab has come to be used as a synonym of the Arabic 'khimar'.

14. The first verse cited in this context is the Surah or Chapter titled Surah An-Nur verse 24:31, which contains a prescription to cover the head and chest, whereas the second verse Surah Al-Ahzab 33:59 contains a prescription to wear a full jilbab or burqa. The footnotes in Abdullah Yusuf Ali's translation, which are actually the author's comments expressing his own opinions and are not to be mistaken with the text of the Quran, have been taken out of their context by the High Court and stray sentences scattered across the footnotes have been pieced together to suggest that the author says that hijab is not mandatory. This becomes evident by simply cross-checking the quotations in the Impugned Judgement with Abdullah Yusuf Ali's translation and commentary.

15. For instance, Abdullah Yusuf Ali gives his opinion in footnote 3767 to Surah Al-Ahzab verse 33:59 concerning the jilbab that the prescription to wear a jilbab is not absolute and if there is some difficulty in observing it, God is forgiving and merciful. The footnote in the verse about jilbab is quoted by the High Court immediately after quoting another footnote 3760 where a cross-reference was being made to verse 24:31 and the obligation therein to cover the head and chest is mentioned, as if one follows the other in the text. The text of footnote 3767 is, in a gross misquotation, attributed by the High Court to the verse about hijab to suggest that hijab is not mandatory. This is explained more elaborately below.

16. Footnote 3760 concerns verses 33:53-55 that command Muslims to speak with the Prophet's wives only from behind a curtain. Verse 33:55 says that however, his wives were allowed to appear before their close male relatives. To this verse, Abdullah Yusuf Ali gives a footnote saying these male relatives may be compared to the list of male relatives mentioned in verse 24:31. The verses and the relevant footnote as extracted below:

> *"**53.** O ye who believe! Enter not the Prophet's houses, - until leave is given you, - for a meal, (and then) not (so early as) to wait for its preparation: but when ye are invited, enter; and when ye have taken your meal, disperse, without seeking familiar talk. Such (behaviour) annoys the Prophet: he is ashamed to dismiss you, but Allah is not ashamed (to tell you) the truth.*
>
> *And when ye ask (his ladies) for anything ye want, ask them from before a screen: that makes for greater purity for your hearts and for theirs.*
>
> *Nor is it right for you that ye should annoy God's Apostle, or that ye should marry his widows after him at any time. Truly such a thing is in God's sight an enormity.*
>
> ***54.** Whether ye reveal anything or conceal it, verily God has full knowledge of all things.*
>
> ***55.** There is no blame (on these ladies if they appear) before their fathers**3760** or their sons, their brothers, or their brother's sons, or their sisters' sons, or their women, or the (slaves) whom their right hands possess. And, (ladies), fear God; for God is Witness to all things."*
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> ***Footnote 3760**: "This refers back to the Hijab (screen) portion of verse 53 above. The list of those before whom the Prophet's wives could appear informally without a screen is their fathers, sons, brothers, brothers' or sisters' sons, serving women, and household slaves or servants. Commentators include uncles (paternal and maternal) under the heading of "fathers". "Their women" is held to mean all women who belonged to the Muslim community: other women were in the position of strangers, whom they received not so intimately, but with the formality of a screen as in the case of men. Compare with this list and the wording here the list and the wording in xxiv.31, which applies to all Muslim women. In the list here, husbands and husbands' relatives are not necessary to be mentioned, as we are speaking of a single household, that of the central figure in Islam, nor men-servants nor children, as there were none. In the wording note that for Muslim women generally, no screen or Hijab (Pardah) is mentioned, but only a veil to cover the bosom, and modesty in dress. The screen was a special feature of honour for the Prophet's household, introduced about five or six years before his death."*

17. A little later in the same chapter Al-Ahzab appears verse 33:59 that concerns the jilbab. The same is reproduced below along with its footnotes:

> *"**59.** O Prophet! Tell thy wives and daughters, and the believing women,[3764] that they should cast their outer garments over[3765] their persons (when abroad): that is most convenient, that they should be known[3766] (as such) and not molested. And Allah is Oft- Forgiving,[3767] Most Merciful.*
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> ***Footnote 3764**: This is for all Muslim women, those of the Prophet's household, as well as the others. The times were those of insecurity (see next verse) and they were asked to cover themselves with outer garments when walking abroad. It was never contemplated that they should be confined to their houses like prisoners.*
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> ***Footnote 3765**: Jilbab, plural Jalabib: an outer garment: a long gown covering the whole body, or a cloak covering the neck and bosom.*
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> ***Footnote 3766**: The object was not to restrict the liberty of women but to protect them from harm and molestation. In the East and the West a distinctive public dress of some sort or another has always been a badge of honour or distinction, both among men and women. This can be traced back to the earliest civilisations. Assyrian Law in its palmiest days (say, 7th century B.C.), enjoined the veiling of married women and forbade the veiling of slaves and women of ill fame: see Cambridge Ancient History, III, 107.*
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> ***Footnote 3767**: <u>This rule was not absolute: if for any reason it could not be observed, "God is Oft-Forgiving, Most Merciful".</u>"*
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> **(See page 15-16 of the Compilation of Additional Authorities)**

18. The High Court at page 65 extracts only the underlined sentence from footnote 3760 completely isolated from its context and then reproduces a footnote 3767 to another verse 33:59 concerning the jilbab after the said extract in such a manner that the two appear related and holds that "there is sufficient intrinsic material within the scripture itself to support the view that wearing hijab has only been recommendatory, if at all". The conclusion of the High Court is therefore clearly erroneous, as the conclusion is reached by relying on nothing other than a misquotation. The relevant extract of the Impugned Judgement is reproduced below:

> *"In the footnote 3760 to Verse 53, he states: "...**In the wording, note that for Muslim women generally, no screen or hijab (Purdah) is mentioned, but only a veil to cover the bosom, and modesty in dress. The screen was a special feature of honor for the Prophet's household, introduced about five or six years before his death**..." Added, in footnote 3767 to verse 59 of the same sura, he opines: "**This rule was not absolute: if for any reason it could not be***

> ***observed, 'God is Oft. Returning, Most Merciful.****'…" Thus, there is sufficient intrinsic material within the scripture itself to support the view that wearing hijab has been only recommendatory, if at all it is."*

19. In another such gross instance, in a footnote to a verse that says hypocrisy was rife in the Prophet's time, a rhetorical question is posed by Abdullah Yusuf Ali, "Alas, we must ask ourselves if the same conditions are present even today" (meaning that hypocrisy is as rampant today as it was then). This is again wrongly attributed to the verse about hijab and twisted to suggest that the author says that times have changes and the prescriptions in the Quran are no longer binding. The relevant verse from Abdullah Yusuf Ali's translation along with the relevant footnote is reproduced below:

> *"**60.** Truly, if the Hypocrites, and those in whose hearts is a disease, and those who stir up sedition in the City,[3768] desist not, We shall certainly stir thee up against them: Then will they not be able to stay in it as thy neighbours for any length of time:"*
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> ***Footnote 3768**: "It was necessary to put down all kinds of unseemly conduct in the Prophet's City. And here is the warning in the plainest terms. And the warning had its effect. The "Hypocrites" were men who pretended to be in Islam but whose manners and morals were anti-Islamic. Those "with diseased hearts" may have been the ones that molested innocent women. "Those who stirred up sedition" put false rumours in circulation to excite the crowd. Alas! we must ask ourselves the question: "Are these conditions present among us today?""*
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> **(See page 16 of the Compilation of Additional Authorities)**

20. This stray sentence in a different verse in which is the author begging the question he is posing to suggest the exact opposite of what the High Court has portrayed it to mean has been used in the Impugned Judgement to suggest that the practice of wearing hijab was confined to the socio-cultural conditions prevailing in that region. The High Court's completely erroneous conclusion on page 70-71 is extracted below for reference:

> *"History of mankind is replete with instances of abuse and oppression of women. The region and the times from which Islam originated were not an exception. The era before the introduction of Islam is known as Jahiliya - a time of barbarism and ignorance. The Quran shows concern for the cases of 'molestation of innocent women' and therefore, it recommended wearing of this and other apparel as a measure of social security. May be in the course of time, some elements of religion permeated into this practice as ordinarily happens in any religion. However, that per se does not render the practice predominantly*

> *religious and much less essential to the Islamic faith. This becomes evident from Ali's footnote 3768 to verse 60 which concludes with the following profound line* ***"Alas! We must ask ourselves the question: 'Are these conditions present among us today?'"*** *Thus, it can be reasonably assumed that the practice of wearing hijab had a thick nexus to the socio-cultural conditions then prevalent in the region. The veil was a safe means for the women to leave the confines of their homes. Ali's short but leading question is premised on this analysis. What is not religiously made obligatory therefore cannot be made a quintessential aspect of the religion through public agitations or by the passionate arguments in courts."*

21. In fact, it is relevant to note that for hijab, even Abdullah Yusuf Ali's footnote to the actual verse, in fact, suggests that it is mandatory to wear the hijab even in front of women strangers. The relevant verse Surah Noor 24:31 along with its footnotes is extracted below:

> *"**31.** And say to the believing women that they should lower their gaze and guard[**2984**] their modesty; that they should not display their beauty and ornaments[**2985**] except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments.[**2986**] And O ye Believers! turn ye all together towards God, that ye may attain Bliss.[**2987**]"*
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> ***Footnote 2984****: The need for modesty is the same in both men and women. But on account of the differentiation of the sexes in nature, temperaments, and social life, a greater amount of privacy is required for women than for men, especially in the matter of dress and the uncovering of the bosom.*
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> ***Footnote 2985****: Zinat means both natural beauty and artificial ornaments. I think both are implied here, but chiefly the former. The woman is asked not to make a display of her figure or appear in undress except to the following classes of people: (1) her husband, (2) her near relatives who would be living in the same house, and with whom a certain amount of negligé is permissible: (3) her women, i.e., her maid- servants, who would be constantly in attendance on her: some Commentators include all believing women; it is not good form in a Muslim household for women to meet other women, except when they are properly dressed; (4) slaves, male and female, as they would be in constant attendance (but this item would now be blank, with the abolition of slavery); (5) old or infirm men-servants; and (6) infants or small children before they get a sense of sex. Cf. also xxxiii.59.*

> ***Footnote 2986****: It is one of the tricks of showy or unchaste women to tinkle their ankle ornaments, to draw attention to themselves.*
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> ***Footnote 2987****: While all these details of the purity and good form of domestic life are being brought to our attention, we are clearly reminded that the chief object we should hold in view is our spiritual welfare. All our brief life on this earth is a probation, and we must make our individual, domestic, and social life all contribute to our holiness, so that we can get the real success and bliss which is the aim of our spiritual endeavour. Mystics understand the rules of decorum themselves to typify spiritual truths. Our soul, like a modest maiden, allows not her eyes to stray from the One True God. And her beauty is not for vulgar show, but for God."*
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> (**See page 13-14 of the Compilation of Additional Authorities**)

22. The High Court's attempt to explain away this Quranic injunction as being relevant only to the region, day and age when it was revealed is, in fact, completely contrary to the belief of Muslims reflected in the chronologically last revealed verse of the Quran which says that the religion of Islam was perfected for all times to come on the day God completed the Quran. To suggest that God did not foresee the passage of time and a general command to Muslims has lost its relevance over time is deeply offensive to the beliefs of a Muslim, who believe in a God who created time itself. The last revealed verse that is part of Surah 5 (Al-Ma'idah) 5:3 of the Quran is extracted below:

> *"**3**. …This day have those who reject faith given up all hope of your religion: yet fear them not but fear Me. This day have I perfected your religion for you, completed My favour upon you, and have chosen for you Islam as your religion."*
>
> (**See page 10 of the Compilation of Additional Authorities**)

23. It is submitted that the High Court has next proceeded on the basis that since no punishment is prescribed for not wearing a hijab, it implies that wearing a hijab is not mandatory. This is completely incorrect as the Quran does not prescribe earthly or temporal punishments for spiritual wrongs. Religion has spiritual implications for the after-life. The punishment for such wrongs is not a temporal/earthly punishment, but the Quran says that Hellfire awaits those who disobey Allah. Even for non-observance of other basic tenets like Namaaz, Roza, Zakaat and Hajj there is no temporal/earthly punishment. The punishment for disobeying Allah and the Prophet is variously described in several verses of the Quran

as incurring the wrath of Allah and being thrown into Hellfire. While there are several such verses including 3:32, 4:14, 4:42, 4:115, 8:13, 33:66, 48:17 and 72:23, the following two verses from Surah An-Nisa, 4:14 and Surah Al-Anfaal 8:13 are being reproduced here illustratively to indicate the punishment ordained in the Quran for disobeying the word of Allah and the Prophet:

> ***Surah An-Nisa, 4:14.*** *"But those who disobey Allah and His Messenger and transgress His limits will be admitted to a Fire, to abide therein: And they shall have a humiliating punishment."*[2]
>
> ***Surah Al-Anfaal 8:13.*** *"This is because they defied Allah and His Messenger. And whoever defies Allah and His Messenger, then (know that) Allah is surely severe in punishment."*[3] */ "This because they contended against Allah and His Messenger: If any contend against Allah and His Messenger, Allah is strict in punishment."*[4]

24. Thus, it is clear that the High Court has committed a grave error at page 65 in holding that:

> *"(iii) The Holy Quran does not mandate wearing of hijab or headgear for Muslim women. Whatever is stated in the above sūras, we say, is only directory, because of absence of prescription of penalty or penance for not wearing hijab, the linguistic structure of verses supports this view. This apparel at the most is a means to gain access to public places and not a religious end in itself. It was a measure of women enablement and not a figurative constraint."*

25. There are five pillars of Islam, commonly understood among Sunnis, which are considered the basic tenets of faith. They are Iman (faith), Namaaz, Roza, Zakaat and Hajj. The first principle of Iman itself comprises several components. These include belief in the oneness of Allah, belief in the prophet-hood of Prophet Mohammad, belief in the Books of Allah (Quran being the last of the revealed Books), belief in the Angels of Allah and belief in the Divine Decree. Belief in the Quran being the word of God and adhering to it is the first prerequisite of being a Muslim. In fact, modesty has also itself been included among the components of Iman by a hadith cited in Sahih Al-Bukhari, making modesty, in its own right, one of the precepts of being a Muslim. The following extracts of Hadith (pronounced Hadees) make the above propositions abundantly clear:

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[2] Translated by Abdullah Yusuf Ali.
[3] Translation by another translator, Dr. Mustafa Khattab.
[4] Translation of the same verse by Abdullah Yusuf Ali.

**Hadith 1 of Book 1 of Sahih Muslim states as follows:**

*"...He (Abdullah ibn Umar) further said: My father, Umar ibn al-Khattab, told me: One day we were sitting in the company of Allah's Apostle (peace be upon him) when there appeared before us a man dressed in pure white clothes, his hair extraordinarily black. There were no signs of travel on him. None amongst us recognized him. At last he sat with the Apostle (peace be upon him) He knelt before him placed his palms on his thighs and said: Muhammad, inform me about al-Islam. The Messenger of Allah (peace be upon him) said: Al-Islam implies that you testify that there is no god but Allah and that Muhammad is the messenger of Allah, and you establish prayer, pay Zakat, observe the fast of Ramadan, and perform pilgrimage to the (House) if you are solvent enough (to bear the expense of) the journey. He (the inquirer) said: You have told the truth. He (Umar ibn al-Khattab) said: It amazed us that he would put the question and then he would himself verify the truth. He (the inquirer) said: Inform me about Iman (faith). He (the Holy Prophet) replied: That you affirm your faith in Allah, in His angels, in His Books, in His Apostles, in the Day of Judgment, and you affirm your faith in the Divine Decree about good and evil. He (the inquirer) said: You have told the truth. He (the inquirer) again said: Inform me about al-Ihsan (performance of good deeds). He (the Holy Prophet) said: That you worship Allah as if you are seeing Him, for though you don't see Him, He, verily, sees you. He (the enquirer) again said: Inform me about the hour (of the Doom). He (the Holy Prophet) remarked: One who is asked knows no more than the one who is inquiring (about it). He (the inquirer) said: Tell me some of its indications. He (the Holy Prophet) said: That the slave-girl will give birth to her mistress and master, that you will find barefooted, destitute goat-herds vying with one another in the construction of magnificent buildings. He (the narrator, Umar ibn al-Khattab) said: Then he (the inquirer) went on his way but I stayed with him (the Holy Prophet) for a long while. He then, said to me: Umar, do you know who this inquirer was? I replied: Allah and His Apostle knows best. He (the Holy Prophet) remarked: He was Gabriel (the angel). He came to you in order to instruct you in matters of religion."*[5]

**Sahih al-Bukhari (Book 2 Hadith 2) states that there are 60 sub-divisions of Iman which include modesty. The following is an extract of the relevant Hadith:**

*Narrated Narrated Abu Huraira: The Prophet said, "Faith (Belief) consists of more than sixty branches (i.e. parts). And Haya (This term "Haya" covers a large number of concepts which are to be taken together; amongst them are self-respect, modesty, bashfulness, and scruple, etc.) is a part of faith."*[6]

[5] Sahih Muslim, Volume 1, Book 1, Hadith 1, Translated into English by Abdul Hamid Siddiqi, published in India by Kitab Bhavan, New Delhi.

[6] Sahih Al-Bukhari, Volume 1, Book 2, Hadith 9, Translated into English by Dr. Muhammad Mohsin Khan, published by Darassalam, Riyadh, Saudi Arabia.

26. Therefore, obeying what is commanded in the Quran, following the Hadith and modesty itself are all part of the first pillar/tenet of Islam, and constitute an integral and essential part of the religion.

27. The hadith or traditions of the Prophet highlighting the importance of hijab from Sahih Al-Bukhari were placed before the High Court, but the High Court at page 72 of the Impugned Judgement simply brushed them aside without explanation on the ground that the credentials of the translator, Dr. Muhammad Mohsin Khan, were not known. It is submitted that no doubt had been raised during the hearing by any party about the accuracy of the translation of Sahih Al-Bukhari that was sought to be relied upon, nor was any alternate translation cited. The High Court has expressed doubts about the translation of Sahih Al-Bukhari published by Darussalam, Saudi Arabia placed before it and doubted the credentials of the translator, Dr. Muhammad Mohsin Khan without any such doubts having been put to the petitioners during the course of hearing for their response.

28. It is submitted that Hadith (pronounced Hadees), which are narrations of the practices and sayings of Prophet Mohammad, and are a primary source of Islamic doctrine. Obedience of Allah and of the Prophet is made the foundation of faith in the Quran itself. There are several verses in the Quran where obeying the Prophet has been commanded and made an article of faith. Such verses include 4:59, 4:80, 5:92, 8:1, 8:20, 8:46, 33:33 and 64:12. One of these, Surah An-Nisa 4:59 is reproduced below by way of illustration:

> *"**59.** O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination."*
>
> **(See page 9 of the Compilation of Additional Authorities)**

29. Other verses make it clear that the Prophet was the source of guidance and the one who was charged with explaining the meaning of the Quran to Muslims. Two such verses are reproduced below illustratively:

> ***Surah An-Nahl 16:44.** "(We sent them) with Clear Signs and Books of dark prophesies; and We have sent down unto thee (also) the Message; that thou*

*mayest explain clearly to men what is sent for them, and that they may give thought."*

**(See page 12 of the Compilation of Additional Authorities)**

***Surah Al-Ahzaab 33:21.*** *"Indeed, in the Messenger of Allah you have an excellent example for whoever has hope in Allah and the Last Day, and remembers Allah often."*[7] */ "Ye have indeed in the Messenger of Allah a beautiful pattern (of conduct) for any one whose hope is in Allah and the Final Day, and who engages much in the Praise of Allah."*[8]

30. There are several hadith that show that when Surah Noor 24:31 was revealed, women of the Prophet's household and other early Muslim women of that time tore their aprons etc. and covered their heads and faces with them. Other narrations of hadith state that the Prophet mandated wearing of the hijab, to the extent that the Prophet has said that to a Muslim woman, her veil is more precious than all the world and everything in it. It is submitted that in this light, we must ask ourselves how a Muslim girl, who believes that her hijab is more important than anything this world has to offer, can be then forced to choose between her hijab and her education, and what do we expect the outcome of that choice to be. The following extracts of Hadith from Sahih Al-Bukhari are relevant in this regard:

*"The Prophet added, "A forenoon journey or an afternoon journey in Allah's Cause is better than the whole world and whatever is in it; and a place equal to an arrow bow of anyone of you, or a place equal to a foot in Paradise is better than the whole world and whatever is in it; and if one of the women of Paradise looked at the earth, she would fill the whole space between them (the earth and the heaven) with light, and would fill whatever is in between them, with perfume, and the veil of her face is better than the whole world and whatever is in it.""*

**(See page 5 of the Compilation of Additional Authorities)**

*"4758. Narrated 'Aishah': May Allah bestow His Mercy on the early emigrant women. When Allah revealed: "...and to draw their veils all over their Juyubihinna (i.e., their bodies, faces, necks and bosoms)..." (V.24:31) they tore their Murut (woolen dresses or waist-binding clothes or aprons etc.) and covered their heads and faces with those torn Muruts.*

[7] Translation by another translator, Dr. Mustafa Khattab.
[8] Translation of the same verse by Abdullah Yusuf Ali.

**(See page 440 of Volume 1 of the Compilation of Pleadings, Statutes, CAD and Other Materials)**

*4759. Narrated Safiyya bint Shaiba: Aishah used to say: "When (the Verse): '... and to draw their veils all over their Juhubihinna (i.e., their bodies, faces, necks and bosoms, etc.)...' (V.24:31) was revealed, (the ladies) cult their waist-sheets from their margins and covered their heads and faces with those cut pieces of cloth."*

**(See page 440 of Volume 1 of the Compilation of Pleadings, Statutes, CAD and Other Materials)**

31. The State allowing Sikhs to wear the turban but prohibiting Muslim girls from wearing a hijab demonstrates that this has nothing to do with discipline or uniformity and is hostile discrimination by the State against Muslims. It cannot be that the speculative reasons supplied by the High Court for the prohibition at page 107 of the Impugned Judgement such as discipline, need for uniformity, possible feelings of "social-separateness" among children who do not practice the faith, the need to keep "differentiating lines" of religion out of "safe spaces" such as schools since "youth is an impressionable period" apply selectively to Muslim girls and are not factors in the case of Sikh students. Just like growing the hair and wearing a turban is one of the 5 K's essential to Sikhism, obeying the word of Allah in the Quran, obeying the Prophet and maintaining modesty are part of Iman/faith, which is one of the 5 pillars of Islam. Therefore, the double standard adopted by the State shows that none of the reasons attributed by the High Court are genuine factors and this is nothing more than discrimination by the State against one particular community for political reasons. While the 5K's declared to be essential for Sikhs by Guru Gobind Singh in 1699 are no doubt essential and worthy of respect and accommodation, the differential treatment being meted out to Muslims for a practice that has been inextricably entrenched in their religion and culture for over 1450 years reflects the *mala fides* of the State.

**THE HUMAN COST OF THE PROHIBITION**

32. It is humbly submitted that if the Impugned Judgement is upheld, India would stand alone in the international community as the only country that singles out Muslim women for a prohibition against practicing their religion and maintaining their religious identity. Even

France, which is strongly criticised in the international community for its prohibition, prohibits all religious markers in schools without discrimination and does not target only one community.

33. A report commissioned by the UN High Commission for Human Rights prepared by the International Centre for Advocates Against Discrimination surveyed the social, political and emotional impact of the prohibition in France on Muslim girls and Sikh boys. The following extracts of the report indicate the imminent human impact if the Impugned Judgement is upheld:

> *"Beginning with the children, a survey of 42 Sikh students in the Bobigny region of Paris showed that over half of the students felt humiliated and singled out, even as they complied with the law; moreover, over a third felt that they had lost their identity altogether. ICAAD recently solicited testimony from several additional Sikh boys, who likewise stated that they underwent significant hardship as a result of compliance with the law. Specifically, the students all endured bullying because their uncut hair was not covered in the Sikh style—their peers called the young boys girls, and they were continually singled out both because of their different identity and because the law required them to behave differently from other Sikhs (i.e., Sikhs not in school). One of the children testified that he was considering leaving the country because of the law.*
>
> *Muslim children have reported similar experiences. An organization founded to analyze the Act published a report estimating that at least 806 children were negatively affected by the Act in its first year, aggregating the number of children who had left school with those who chose to remain in school without their religious identities. The report also collects testimonies from individuals, including children affected by the law and those who defended them in their disciplinary hearings. The children report, in their own words, the intense shame and isolation they felt upon being commanded to remove headscarves, and also the negative impacts that these interactions had on their relationships with their teachers and peers. Evidence is also mounting that many members of the public do not understand the full scope of the Act, and some have interpreted it to permit (indeed, to require) employment discrimination against observant Muslim women and girls. France's focus on the decline of religious dress in schools fails to account for these harms, which are real and growing.*
>
> *There is also evidence that the Act has failed to achieve its goal of easing social tensions, which are on the rise. In 2012, Muslims in France experienced a 28 percent increase in instances of assault, harassment, and vandalism versus the same time period in 2011. The number of physical and verbal attacks against Jews increased by 82 percent, resulting in a substantial number leaving the country. Indeed, all evidence indicates that the Act has only exacerbated religious fragmentation: religious minorities have either withdrawn from*

*mainstream schooling, or are pursuing education under duress; meanwhile, the Act sends a clear message that minority children are not truly a part of French society. After all, the government itself has taken the position that students who wear "ostentatious" religious symbols are engaged in activity that "is tantamount to excessive religious proselityzing." In other words, the Act signals that religious minorities are not merely different, but dangerous, because their beliefs threaten the cherished French value of secularism."*

(**See page 18 at 24 of the Compilation of Additional Authorities**)

**VIOLATION OF RIGHTS UNDER ARTICLE 29(1) AND 29(2) OF THE CONSTITUTION**

34. The right to wear hijab is also protected by the right of minorities to conserve their culture provided in Article 29(1) of the Constitution. This Hon'ble Court has consistently extended the protection under Article 29 to religious minorities. (**See Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717**) Unlike Article 25, Article 29 does not have any in-built limitations prescribed. It is submitted that a reference to a larger bench under Article 145(3) is required to analyse Article 29 in this context and to define its contours.

35. Further, in light of the discussion above that demonstrates that Muslims believe that wearing of the hijab is a binding injunction on them in terms of their religious beliefs, denial of entry in government schools to Muslim girls wearing the hijab falls foul of Article 29(2) which prohibits denial of entry into educational institutions run by the government on the basis of religion.

**New Delhi**
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