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Freedom of Religion and Attire in Educational Institutes

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Abstract

Islam places much emphasis on modesty and chastity. Islam makes it compulsory for all Muslims to dress with great modesty. The modest dressing for females is referred to as the hijab. The exact ambit of the hijab is subject of controversies. Over the years, in compliance with this divine injunction, Muslim women have adopted all or one or more combination of these: loose outer garment (jilbab), headscarves (khimar), face veil (niqab), and stockings to cover their feet. Any pious Muslim woman would feel strongly, the imperative to adopt these. Teeming numbers of students in tertiary institutions in India are now turning to the hijab. However, some institutions have attempted to subvert the hijab by introducing dress codes for their students. These have caused frictions in many institutions. The affected students argue inter-alia that the dress codes violate their constitutionally guaranteed fundamental right to practice and observe the tenets of their religion and their right to freedom from discrimination on grounds of religion.This paper looks that the frictions generated by the clash between religious imperatives and dress codes in tertiary institutions (universities, colleges of education, secondary schools, and other institutes) in the context of religious rights in Nigeria, and the attitude of the courts thereto. The paper also examines the position under international human rights law and in other countries across the world.

Keywords: Religious symbols; religious freedom; secularism; school policy; human rights; religious diversity.

Introduction

Freedom of religion or belief and school education is a multifaceted issue that entails significant opportunities and far-reaching challenges. The school is the most important formal institution for the realization of the right to education. It provides a place of learning, social development and social encounter. At the same time, the school is also a place in which authority is exercised and some individuals, including members of religious or belief minorities, may find themselves in situations of vulnerability. Given this ambivalence of the school environment, safeguards to protect the individual‘s right to freedom of religion or belief are necessary.[1] Schools can offer unique possibilities for constructive dialogue among all members of society, and human rights education in particular can contribute to the elimination of negative stereotypes that often adversely affect members of religious minorities. However, freedom of religion or belief and school education has

[1] Rapporteur’s Digest on Freedom of Religion or Belief accessed 1 May 2022.

also sparked controversy in many societies, particularly with regard to contentious issues such as religious symbols in the school context and religious instruction.[2]

The role of religious symbols, including wearing religious garments in school and religious education, has been, and continues to be, a matter of controversy in a number of countries. Pupils/students or teachers/professors observing religious dress code, including Islamic headscarves and Sikh turbans, have in some countries been expelled from schools, denied access to higher education, suspended from their jobs or had other rights restricted. Parents and (or) children seeking to benefit from the exemptions from religious classes are forced to reveal their belief or the fact that they are nonbelievers that raises concerns about the proper implementation of the Article 9 ECHR and Article 2 of Protocol No. 1 of the European Convention on Human rights (hereinafter ECHR or the Convention). So far, the European Court of Human Rights (hereinafter ECtHR or the Court) has dealt with diverse forms of religious symbols. The relevance of the issue is demonstrated by the new applications raising new issues concerning the display/wearing of religious symbols. And, as the President of the Strasbourg Court Sir Nicolas Bratza indicated: 'this may be far from the Court's last word on the question of the wearing of religious dress or symbols.'[3]

EVER SINCE the *hijab* controversy broke out recently, popular debates across platforms and portals both within Bharat and abroad have generalised the issue as one that relates to discrimination against a particular religious minority, instead of examining the specifics of the row in Karnataka. The issue at hand is nowhere close to or even remotely comparable to France's *hijab* ban, so let's start with what educational institutions in Karnataka are permitted by law before we look into what transpired on the ground.

Controversy has raged in the corridors of educational institutions in Karnataka on the matter of uniforms. In the beginning of 2022, **the Karnataka government issued an order to government educational institutions**, insisting that the administration of each educational institution follow the policy of prescribing a singular uniform policy for their institutions. The order noted that clothes which disturbed public order, equality and integrity within the schools would be banned. The order noted that the government had noticed a trend of religious attire being worn instead of merely the prescribed uniform and argued that this disturbed equality and public order within schools. The order was used by administrations of educational institutions in colleges in Karnataka to bar

[2] Ibid.
[3] Nicolas Bratza, 'The "Precious Asset": Freedom of Religion under the European Convention on Human Rights' in Mark Hill (ed), Religion and Discrimination Law in the European Union (European Consortium for Church and State Research, 2012) 22.

Muslim women wearing the Hijab from entering the educational institute. In some cases, though the women were allowed to enter the institute, **they were segregated and attended classes separately from other students**.

Prima facie, the matter appears to be an issue primarily concerning the freedom to religion enshrined under Article 25. It may be argued that Hijabs are essential to the religion of Islam, and therefore by debarring Muslim women from educational institutions for wearing the Hijab, their freedom to express their religion is being infringed upon by the State. While intuitively an argument along the lines of freedom of religion is attractive – and indeed, it is precisely the line of argument counsel for the petitioning Muslim women argued in the Karnataka High Court, it presents several issues. This piece shall argue that rather than a freedom of religion-based judgement, the High Court ought to base its judgment on the grounds of Freedom of Expression.

The legislation that governs educational institutions in Karnataka is the Karnataka Education Act of 1983 which has been in force since January 20th, 1995. Under Section 133, the state government may issue any direction to any educational institution to achieve the purpose of the Act. Further, as is the case with most legislation, the 1983 Act also contains a specific provision, namely Section 145, which empowers the state government to frame rules. Under this provision, the Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula Etc) Rules, 1995 were notified. Here is Rule 11 which applies to the issue at hand (emphases added):

Provision of Uniform, Clothing, Text Books etc., (1) *Every recognised educational institution may specify its own set of Uniform. Such uniform once specified shall not be changed within the period of next five years.*
(2) When an educational institution intends to change the uniform as specified in sub-rule (1) above, it shall issue notice to parents in this regard at least one year in advance.
(3) Purchase of uniform clothing and text books from the school or from a shop etc., suggested by school authorities and stitching of uniform clothing with the tailors suggested by the school authorities, shall be at the option of the student or his parent. The school authorities shall make no compulsion in this regard."

Section 2(30) defines a "recognised educational institution" as an educational institution recognised or deemed to be recognised under the Act. When Section 2(30) is read along with Rule 11, this much is clear that a recognised educational institution in Karnataka has the power to prescribe its own uniform, which also includes the power to identify what *does not* constitute uniform. What does this translate to?

First, it is no one's case thus far that this power is not available to the institutions in Udupi which are at the centre of the controversy. Second, on the face of it, there appears to be no fetter on the power of these institutions to lay down a dress code so long as it is reasonable. Third, no one has been able to demonstrate that these institutions have laid down any rule, much less enforced one, which targets any one community.

Fourth, the power vested in recognised educational institutions under Rule 11 has not been called into question on grounds of unconstitutionality for vesting excessive power in schools. This is not to say that the rule cannot be challenged now; however, the point being made is that, legally, until the rule exists and is applied across the board to students of all faiths, it makes no sense whatsoever to argue that since the wearing of the *hijab* does not affect anyone, it should be permitted. After all, this undermines the purpose of a "uniform" whose underlying intent is to ensure that religious differences do not stand out in a classroom to the extent possible. Of course, it is open to an institution to permit visible religious symbols over and above the uniform, but it equally reserves the right to proscribe it.

On the limited power of Courts to interfere with the internal administration of educational institutions, here's an observation by the Madras High Court in *Sir M. Venkata Subba Rao vs Sir M. Venkata Subba Rao* (2004) wherein a dress code laid down for teachers by a school was the subject of challenge (emphases added):

On a combined reading of the above provisions, it is seen that the Board of Matriculation Schools has the overall control as to the maintenance of the school and also to issue directions from time to time to the teachers, and on such directions, the teachers shall confirm to the same. The power of the management of the school to issue the impugned circular prescribing dress code shall be traceable to clause 6 of Annexure VIII (Agreement). *In that view of the matter, we do not find any merit in the contention of the learned counsel for appellant that the respondent-school management has no power to issue circulars prescribing the dress code*.

Prior to the issuance of the said notification by the state government there were instances where students wore saffron scarfs, protesting against permission to Muslim women/girl students to wear *hijab* inside class rooms. The issue escalated further, leading to protests at several places in Karnataka. In view thereof, there was an apprehension that public order issues may arise. In this backdrop, the notification in question was issued.

The said notification is currently a subject matter of challenge before the High Court of Karnataka. The challenge to the said notification is on both procedural and substantive grounds. The substantive legal grounds for challenge to the said notification and the underlying socio-political implications of the said notification are required to be addressed.

Insofar as the substantive challenge to the notification is concerned, the arguments advanced by the petitioners before the Karnataka High Court can be found here. It is contended that the right to wear *hijab* is an essential religious practice which cannot be restricted by the State and that wearing of *hijab* is a facet of freedom of speech and expression under Article 19(1)(a) of the Constitution of India.

A reference was made to the verses of the *Quran* which impose an obligation on women to cover their bodies. It was also contended that exposure of the body by females was considered to be "haram" in Islam. References were also made to the Hadith which prescribes punishments for not covering the head.

Undoubtedly, the petitions have given the court the opportunity to delve deep into controversial questions of law relating to religious freedom and the interplay between the right to profess, practice and propagate religion and other fundamental rights including the Right to Equality under Article 14, as also the legitimate interests of the State to protect and preserve the social fabric and determine and enforce adherence to moral standards or principles in public institutions or educational institutions.

The wearing of *burqa/nikab/hijab*, etc, by Muslim women has been a subject matter of social and political debate for several years now. The conservative Islamists have always advocated *burqa* and *nikab* mandates. On the other hand, reformist voices within Islam and outside Islam have propagated ideas of liberation of Muslim women from practices which further gender stereotypes.

Amongst the Islamic scholars as well, there are differences of opinion on this issue. Interestingly, Dr BR Ambedkar, in his book *Pakistan and the Partition of India*, expressed strong views on this issue. It is pertinent to note that Dr Ambedkar extensively addressed the exclusionary effects of the *burqa* system and advocated social reform and liberation from such practices.

On quite a few occasions, the controversy surrounding *hijab/nikab* has been taken to the constitutional courts. In the case of *Amnah Bint Basheer v. Central Board of Secondary Education*, the Kerala High Court held that wearing a headscarf/*hijab/burqa* constitutes an essential practice in Islam. Despite this observation, a CBSE directive imposing a dress code for an examination was not quashed. Interestingly, the court noted that even if a practice is essential to a religion and protected by Article 25, restrictions on the grounds of public order, morality, and health can be imposed by the State. It then made an attempt to balance the right of the individual with the right of the institution.

In another case, (*Fathima Tasneem v State of Kerala*) the High Court of Kerala held that the collective rights of an institution would be given primacy over the individual rights of the petitioner. The case involved two girls, aged 12 and 8, represented by their father, who wanted his daughters to wear the headscarf as well as a full-sleeved shirt. The school that refused to allow the headscarf was owned and managed by the Congregation of the Carmelites of Mary Immaculate (CMI) under CMI St Joseph Province.

The court ruled in favour of the school and held that the petitioners cannot seek the imposition of their right as against the larger right of the institution. The court held that it was for the institution to decide whether the petitioners could be permitted to attend the classes with the headscarf and full sleeve shirt. It was further also held that it was purely within the domain of the institution to decide on the dress code and the court cannot even direct the institution to consider such requests.

The legal question that is required to be addressed is as to whether the State or any educational institution can legitimately restrict female students professing Islam from wearing a *hijab/niqab* or any other attire which is distinct from the prescribed uniform of such educational institution. It is noteworthy that in several foreign jurisdictions as well, restrictions on such attire have been imposed and even upheld by the constitutional courts.

For example, the European Court on Human Rights had upheld a ban on wearing a full face veil in any public place in France. The said ban was challenged by a woman professing Islam on the ground that it violated her privacy and religious freedom. The ban was defended by the French government on grounds of public safety and on grounds of gender equality, human dignity and the minimum requirements of life in society. The court upheld the ban on the ground that the only legitimate aim of the ban was to guarantee minimum requirements of "living together" in society.

In Germany, compulsory mixed swimming lessons in schools were challenged by parents of young Muslim girls on several occasions before the courts. The courts time and again upheld such stipulations of mixed swimming lessons for girls and boys by holding that this was a social norm in Germany and a way of life. Similar issues relating to mixed swimming lessons were also brought before the Federal Supreme Court of Switzerland which also took a similar view upholding mixed swimming lessons.

In the Indian context, arguments have been advanced that our country follows positive secularism, unlike several European countries which follow negative secularism. It is also argued that the right to privacy is recognised by the Supreme Court and the right to wear clothes of one's choice is also part and parcel of the said right. However, to argue that such a right extends to wearing clothes of one's choice even in educational institutions would amount to stretching the right too far.

Even if it is possible to so stretch the said right, the State would still be well within its rights to impose reasonable restrictions to achieve certain legitimate interests and the courts would normally have to show deference to the decisions of the State. Any interpretation to the contrary may also give rise to future claims of the right to wear *hijab* by women from uniformed services such as police force and such other services.

The evolving constitutional jurisprudence in India reveals a trend where the courts have frowned upon gender stereotypes and practices derogatory to women. It has been held that religious freedoms are subject to constitutional morality. It is evident that the religious freedom under Article 25 can be legitimately restricted by the State on the ground of public order and morality.
The said constitutional morality, according to the Supreme Court, is governed by principles of justice, liberty, equality, fraternity, and secularism. In the Sabrimala case, the court has held that the courts must deny protection to practices which detract from the constitutional vision of justice, liberty, equality irrespective of the source from which they claim legitimacy, even if it be a religious text.

In respect of the *hijab* mandates, it is clear that the said mandates contained in the relevant religious texts are a clear manifestation of gender stereotypes and are contrary to the principles of liberty and human dignity. Undoubtedly, religion contains prescriptions concerning every aspect of the life of man. However, while examining the questions concerning rights of the state to impose restrictions

on religious freedoms, one must be mindful of the distinctions between matters which are strictly falling within the purview of religion and matters which are in the nature of social injunctions.

The *hijab* mandate in Islam is undoubtedly in the nature of social injunction and does not constitute any religious/ritualistic/spiritual teaching. The said mandates treat women as chattel and as such, can claim no constitutional or legal sanction whatsoever. Though the right to choose an attire, particularly when such choice of attire is based on religious affiliations and sentiments, is an important right, such a right cannot be extended to wearing such attire of choice even in the educational institutions.

Any restrictions in this regard by the state would be legitimate and would have to be upheld as reasonable. Needless to say that even if it be said that such a right could be covered by Article 25 or that it is an essential religious practice, the State would still be well within its rights to impose reasonable restrictions in the interests of public order, morality, health and the other fundamental rights guaranteed by the Indian Constitution.

Article 30 of the Constitution of India guarantees to all minorities the right to establish and administer educational institutions of their choice. The said right is available to both religious and linguistic minorities and is aimed at ensuring that such minorities are able to preserve their culture. Any dress code prescribed in such institutions will have to be adhered to. On the other hand, the right to wear *hijab* cannot be claimed in institutions which are of an inherently secular character. Interestingly, the Muslim Education Society had recently banned wearing of *burqa* in all its schools in colleges. The MES runs more than 150 educational institutions.

Clothes As A Form Of Symbolic Speech

There is a long history of small amendments to uniforms being used to send a political message. School children in the United States wore black armbands in protest of the Vietnam War in the 1960s and 1970s. In India, **students have worn black badges in Manipur**, as a sign of solidarity for public demands for strict punishments for certain murderers. University students wore black **armbands to protest lack of pay for Physiotherapists, violence in Jawaharlal Nehru University in 2020** etc. These are clear examples where political views were expressed through a piece of clothing such as badges or armbands. Students have used such simple, yet effective and symbolic means of protests for decades.

School children in Des Moines were punished for black armbands as it was argued the armbands violated the school uniform. The case reached the Supreme Court of the United States (SCOTUS) wherein the court laid down its famous judgment of ***Tinker v Des Moines Independent School District*** that the black armbands were constitutionally protected speech. The majority observed that school students had not surrendered any of their fundamental rights by deciding to enroll in a school, **observing that:**

"*First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers* ***shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.***"

The court noted that due to the circumstances surrounding the armbands, that is, the students were wearing it to specifically protest the Vietnam War and were therefore making a political statement, such symbolic conduct would amount to speech. The court **noted**:

"*It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.*"

As it was an issue of free speech, the court noted that the only reason for which restrictions may be placed on symbolic speech/conduct amounting to speech is when such conduct caused an immediate disturbance and disturbed the peace and order of the school. The majority noted that black armbands by themselves could not constitute a disturbance to any form of public order and

therefore the punishments faced by students were unconstitutional as it amounted to an infringement on their right to free speech. The majority concluded its **opinion, observing**:

"*These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide**. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known**, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.*"

Tinker represents the court's acknowledgement that deviations from school uniform can express a message, or a viewpoint and those deviations may not be punished by school authorities unless there was a countervailing interest in maintaining order which was threatened by the deviation.

The idea that certain non-verbal conduct is loaded with meaning due to the nature of conduct and the context the conduct occurs in that the conduct is akin to speech has been accepted in Indian Constitutional Jurisprudence as well. In ***NALSA v Union of India***, whilst dealing with several constitutional issues regarding the transgender community, the court makes an important observation that people express their gender-identity through their mannerisms and clothes, and such expression is a fundamental right guaranteed under Article 19(1)(a) of the constitution (**para 62**). The court refers to the US cases ***City of Chicago v. Wilson et al*** and ***Doe v. Yunits et al*** as examples wherein courts stated that expression of gender-identity through choice of clothes is a key aspect of a person's fundamental right to expression and autonomy. Having cited these cases the court concludes that:

"*Principles referred to above clearly indicate that the freedom of expression guaranteed under Article 19(1)(a)* ***includes the freedom to express one's chosen gender identity*** *through varied ways and means by way of expression, speech, mannerism,* ***clothing*** *etc*".

Through the *NALSA* judgment, the court broadened the scope of Article 19(1)(a) to include non-verbal speech as well. Much like in *Tinker* where, in the given context, the black armbands represented anti-Vietnam fervour in the students, in the societal context, the choices a person made regarding the clothes they wore could communicate an important part of their gender-identity to society at large. Thus, the meaning of the non-verbal speech did not have to be a purely political

one (that is relating to a governmental policy), it would suffice if the impugned conduct/action communicated an aspect of the person's identity to the audience.

This idea was further articulated in the judgment of ***Navtej Johar v Union of India*** dealing with Section 377 of the Indian Penal Code which criminalised homosexual sexual acts. Whilst striking it down on the anvil of privacy, autonomy and discrimination, Chief Justice Misra (along with Justice Khanwilkar) additionally struck down the section on the ground of violation of free speech (para 247). The court observed that the section caused many in the queer community to live their lives in secret, out of fear of being accosted by the police. This chilling effect amounted to a violation of the freedom of expression. Section 377 criminalised sexual acts, not any form of verbal speech of any form. However, due to the chilling effect on the queer identity caused by the legislation, it violated free speech. Thus, due to the impact of the provision causing a person to be unable to communicate an aspect of their identity to society, a freedom of expression violation had occurred. Justice Indu Malhotra in her concurring opinion cited the *NALSA* judgment that individuals have the right to express their gender identity in the manner they choose through mannerisms, clothes etc and extends this principle to sexual orientation as well, thus striking down the section on the anvil of free speech (para 17.1-17.2).

Further from home, in case similar to *NALSA*, the Malaysian Court of Appeal in **Muhamad Juzaili bin Mohd Khamis v. State Government of Negeri Sembilan** struck down legislation criminalising the act of cross-dressing on the grounds of it violating free speech, whilst citing *Tinker* and *NALSA*. The court held that cross-dressing involved a form of symbolic speech as the conduct communicated a part of the person's identity to the audience. Therefore, as the conduct did not cause a public order problem, the state had no justification for criminalising it (Page 23).

Bijoe Emmanuel v Nalsa

In the famous ***Bijoe Emmanuel*** case, students who were Jehovah's Witnesses were punished and expelled from a school due to their refusal to sing the national anthem. The Supreme Court held that compelling the students to sing the anthem would infringe on their fundamental rights and therefore would be a violation of the Constitution. The court's judgment revolved around the fact that the opposition to the singing was based in religion. Thus, any politically motivated reason for not wishing to sing the national anthem could perhaps not use *Bijoe Emmanuel* for precedential value in making their case. If a situation like Colin Kapernick (NFL athlete who kneeled during the national anthem to protest police brutality in the United States) occurred in India, the *Bijoe Emmanuel* judgment might not be of great assistance.

However, was the nature of the source of the objection relevant in the case? Why should a decision motivated by politics to not be compelled to participate in the singing of a song, be given less protection than a decision to not sing grounded in religion? In both instances a person is being compelled to participate in an activity at risk of sanction despite their personal discomfort, abhorrence and the fact that the activity goes against their beliefs. The important fact ought not to be the nature of the source of objection but rather the fact the individual is being **compelled** to participate in the activity and take part in a form of expression they object to. Sincerity of beliefs can exist in political ones just as they do in cases of religious beliefs. This piece is not arguing that politics in itself is a form of a religion, instead it is being argued that the distinction is irrelevant when looking at it from a perspective of forced speech/forced expression.

Instead of going down the path of *Bijoe Emmanuel* wherein the religious source of objection played a central role in the Court's analysis of freedom of expression, the proposed alternate framework would utilise an understanding of symbolic speech seen in *NALSA*. The alternate framework would be that, any conduct which communicates an intimate aspect of a person's identity to society would amount to non-verbal speech (aka symbolic speech). Censorship of such symbolic speech would have to abide by the reasonable restrictions placed on free speech as listed in Article 19(2).

On an application of the proposed alternative framework in the case of the Hijab bans of Karnataka it is clear that the bans are unconstitutional. Muslim women have argued that given the marginalisation faced by Muslims in society, publicly wearing a Hijab is an act of **resistance and solidarity**. When a person wears a Hijab, they are communicating their religious affiliation through the piece of clothing. The Hijab symbolises that person's Muslim identity to a viewer, it is not an unclear message as seen by the fact that a major argument against allowing students to wear the Hijab is that it is a religious symbol.

Therefore, it can be easily established that wearing the Hijab is a form of symbolic speech. One of the arguments against allowing the wearing of Hijab is that it creates a law and order situation, which is seemingly proven by the outbreaks of violence in Karnataka, thus allowing the government to justify the restriction on grounds of Article 19(2). However, a closer analysis of the violence is required. The fact that Muslims were wearing the Hijab by itself, was not a source for violence. **It was only after the enforcement of the government order**, and the counter-protests, that the law-and-order situation deteriorated.

Hijabs, thus, cannot be equated to "fighting words" (i.e., speech of such nature that, itself, provokes violence and chaos). The more appropriate applicable concept here is the "heckler's veto", i.e. if an objector to a certain form of expression is able to cause enough chaos, the state may opt for the easier option of silencing the speaker rather than stopping the violence. The SC has clearly stated in ***Prakash Jha Production and Anr v Union of India*** and ***Viacom Media 18 Pvt. Limited v Union of India***, that the state cannot utilise the Heckler's veto to attempt to silence individuals. The court observed that the state has an obligation to ensure that permissible speech is provided the adequate protection required in order to ensure it is not silenced by threats of causing violence. It has been established that the Hijab is a permissible form of symbolic speech. Therefore the state is obligated to protect the wearers of the Hijab.

A final argument may be made that due to the Secular nature of India, it is open for government institutions to prohibit religious attire. However, this line of argument fails to take notice of the fact that Indian secularism has consistently differed from the form of secularism practiced in European countries. The French idea of secularism of state and church being distinct, with religion being a private right with no relevance to the public sphere of the state, is distinct from Indian secularism. In France, **any form of religious imagery including turbans is banned in schools,** which is completely unlike India where turbans have never been banned in public institutions. Thus, Indian secularism has always seen equidistant involvement of the state with religion rather than maintaining an arm's-length distance.

Constitutional Articles Related To Freedom Of Religion And Educational Rights:

- **Article 25** says that all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.
  - **Freedom of conscience:** Inner freedom of an individual to frame his relation with God or Creatures in whatever way he desires.
  - **Right to Profess**: Declaration of one's religious beliefs and faith openly and freely.
  - **Right to Practice:** Performance of religious worship, rituals, ceremonies and exhibition of beliefs and ideas.
  - **Right to Propagate**: Transmission and promotion of one's religious beliefs to others. But, it does not include a right to convert another person to one's own religion.
  - Article 25 covers religious beliefs and also religious practices (rituals).
- **Article 26: Freedom to Manage Religious Affairs,** every religious denomination or any of its section shall have the following rights:

- Right to establish and maintain institutions for religious and charitable purposes.
- Right to manage its own affairs in matters of religion.
- Right to own and acquire movable and immovable property.
- Right to administer such property in accordance with law

- **Article 27 - Freedom from Taxation for Promotion of a Religion**
  - No person shall be forced to pay any taxes for the promotion or maintenance of any particular religion or religious denomination.
  - The State should not spend the public money collected by way of tax for the promotion or maintenance of any particular religion.
  - This provision prohibits the State from favoring and supporting one religion over the other. This also means that the taxes can be used for the promotion or maintenance of all religions.
  - This provision prohibits only levy of a tax and not a fee.
- **Article 28 - Freedom from Attending Religious Instruction**
  - No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
  - No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to attend any religious instruction or worship in that institution without his consent.
- **Article 29 - Protection of Interests of Minorities**
  - It provides that any section of the citizens residing in any part of India having a distinct language, script or culture of its own, shall have the right to conserve the same.
  - 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, or language.
  - These rights are subject to public order, morality, health and other provisions relating to fundamental rights.
  - The State is permitted to regulate or restrict any economic, financial, political or other secular activity associated with religious practice.

How To Do Draw The Line Between Matters Of Religion And Matters Other Than Religion?

- The **'essential practice' doctrine** can be traced to a 1954 decision of the Supreme Court in Commissioner, Hindu Religious and Charitable Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, commonly known as the **'Shirur Mutt' case.**
- This litigation involved action sought to be taken by the Madras government against a mutt over some disputes over the handling of financial affairs.
- The madathipathi's contention was that the Government could not interfere in the mutt's right to manage its own affairs under Article 26. Under this Article, what was protected was the right "to manage its own affairs in matters of religion".

- It was in this context that the court said: "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."
- However, this attempt to differentiate what essentially distinguishes a religious matter from other matters was taken up in subsequent judgments to mean that courts are required to distil the essence of a religion to see whether a particular practice or act fell under the category of religion or not.
- Hence, some acts obtained constitutional protection by being declared "essential" to the practice of that religion and some were denied protection on the ground that they were not essential to it.
- In several instances, the court has applied the test to keep certain practices out. In a 2004 ruling, the Supreme Court held that the Ananda Marga sect had no fundamental right to perform Tandava dance in public streets, since it did not constitute an essential religious practice of the sect.
- In 2016, a three-judge Bench of the Supreme Court upheld the discharge of a Muslim airman from the Indian Air Force for keeping a beard.
- In Sardar Syedna Taher Saifuddin Saheb vs. Bombay (1962), the Supreme Court struck down a law that prohibited the head of the Dawoodi Bohra community from excommunicating members. The majority ruled that the power of excommunication exercised by the religious head on religious grounds was part of the management of affairs on religious matters, and the Act infringed on the community's rights.
- In the Sabarimala case (2018), the majority ruled that the bar on entry of women in the age-group of 10 to 50 was not an essential or integral part of the religion, and denied the status of a separate religious denomination of devotees of Lord Ayyappa.

Religious Clothing And Symbols In Public Schools

In several cases, attempts by educational institutions, including schools, to implement policy that bans or restricts religious dress or symbols have been met with litigation by both teachers and students. These challenges are generally based on a violation of the right to religious freedom and, in some instances, discrimination based on religion, gender or race. However, in a number of decisions the courts, in particular the ECHR, have consistently found no interference with the claimant's right to manifest and practise their religious beliefs. In so doing, the courts have recognised the authority of educational authorities to implement policies and regulations restricting religious clothing and symbols in educational institutions. In this section of the article, the decisions of several key cases are examined with regard to the three prevailing themes — the right to freedom of religion and it limitations; religious dress and discrimination; and secularism as a basis for limiting rights.

A. Right To Freedom Of Religion And Its Limitations

International human rights law and domestic law recognise the right to freedom of religion and conscience, and the importance of this right in culturally diverse, democratic societies has been recognised by courts internationally. In the oft sited seminal Canadian case R v Drug Mart Ltd[4] Dickson CJC stated that 'the essence of the concept of religious freedom is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrances or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination'. The importance of religious freedom is also summed up by Sachs J in Christian Education South Africa v Minister of Education: "There can be no doubt that the right to freedom of religion, belief and opinion in the open democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act and not to act according to his or her beliefs or non beliefs, is one the key ingredients of any person's dignity."[5]

Relevant to the discussion in this article is Article 9 (Freedom of thought, conscience and religion) of the European Convention on Human Rights (1950) (the 'Convention') which provides that
(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

The first paragraph of Article 9 defines the content of the right to religious freedom and the second paragraph explains when the right may be limited. Article 9 makes provision for the freedom of thought, belief and conscience as well as the manifestation of such beliefs.[6] In Kokkinakis v Greece[7] it was stated that: freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

Although the ECHR has largely refrained from defining the concept 'religion'[8] the provision is

[4] R v Drug Mart Ltd (1984) 5 DLR (4th) 121 (in which the Lord's Day Act and Sunday observances was an issue).
[5] Christian Education South Africa v Minister of Education [2001] 1 LRC 441, 36
[6] Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 9.
[7] Kokkinakis v Greece, 14307/88 Eur Court HR (25 May 1993), 31.
[8] Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 9.

nonetheless broadly construed to include a wide range of theistic and non-theistic belief systems such as Scientology, Druidism[9] and Moon Sect.[10] Judge Tulkens in Şahin v Turkey observes that 'the right to freedom of religion guaranteed by Article 9 of the Convention is a "precious asset'' not only for believers, but also for atheists, agnostics, sceptics and the unconcerned'. Article 9 encompasses both individual and collective belief, as well as the practice of belief in both public and private spaces. Manifestation may take the form of worship, teaching, practice and observance. Murdoch[11] states that a manifestation implies a 'perception on the part of the adherent that a course of activity is in some manner prescribed or required'. Manifestations are thus central to the person's religious beliefs and practices. However, not every act or 'manifestation' motivated or encouraged by religion or belief will fall within the ambit of Article 9.[12] The wearing of religious dress and symbols is recognised by the courts as a manifestation, observance and practice of one's religious beliefs. In the cases discussed below, wearing the Muslim headscarf is a manifestation of one's religious beliefs. In Dogru v France[13], the court reiterated that 'according to its case-law, wearing the headscarf may be regarded as "motivated or inspired by a religion or religious belief".

The second paragraph provides for the 'balancing of rights against competing considerations found elsewhere in the European Convention of Human Rights, and most obviously Articles 8, 10 and 11'.[14] Whilst the right to religious freedom is recognised, like other fundamental human rights, it is not absolute and may be limited. Other equally competing and compelling rights may limit the exercise of religious freedom in public spaces. It is recognised that the practice of religious beliefs may be in conflict with other rights, for example, the right to equality or the right to safety and security. The right to freedom of religion does not mean that one can exercise that right at any time or place without limitation. For instance, in Ahmad v United Kingdom[15], the court stated 'the freedom of religion, as guaranteed by Article 9, is not absolute, but subject to the limitations set out in Article 9(2)'. This is reiterated in the ECHR decisions. In Kalaç v Turkey[16] it was stated that 'while religious freedom is primarily a matter of individual conscience it also implies, inter alia, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private' and that 'article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising the freedom to manifest his religion, an individual may need to take his specific situation into account'. This

[9] Ibid.
[10] See, eg, X v Austria, (8652/79) Eur Court HR (15 October 1981) DR 26 (concerning the Moon Sect), X v United Kingdom (7291/75) Eur Court HR (4 October 1977) DR11 (concerning the Wicca faith).
[11] Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 9.
[12] See, eg, Arrowsmith v the United Kingdom (1978) DR 19 page 5. For example belief in assisted suicide does not fall within art 9 as demonstrated in Pretty v the United Kingdom (2346/02) ECHR Reports 2002-III.
[13] Dogru v France (27058/05) ECHR, Chamber (4 December 2008), 47.
[14] Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 15, 10.
[15] Ahmad v United Kingdom (1981) 4 European Human Rights Reports 126, 11, in which a schoolteacher employed by a local authority claimed that he was forced to resign from his full-time post because he was refused permission to attend a mosque for the purposes of worship during hours of employment.
[16] Kalaç v Turkey (1997) IV Eur Court HR 1199, 27.

was endorsed by the Grand Chamber in Şahin v Turkey in which it was held that 'Article 9 does not protect every act motivated or inspired by religion or belief' and that 'in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interest of various groups'.[17] Article 9(2) thus sets out the 'test' to determine whether or not an interference with or limitation on the right to religious freedom is justified. The test requires that the limitation or interference must be (a) prescribed by law, i.e. have a basis in law; and (b) be necessary in a democratic society, i.e. have a legitimate purpose, and it must be proportionate in scope and effect.[18] The limitation or restriction on religious clothing and symbols in schools is not automatically or necessarily a violation of the right to religious freedom. The key consideration is whether such limitation serves a legitimate aim, and may be justified in a pluralistic, democratic society. The challenged measure must have a basis in domestic law that is accessible and foreseeable. Justifiable grounds for limiting freedom of religion, thought and conscience have included the public health, public safety, national security, protecting the rights and freedoms of others[19] and preventing fundamentalist religious movements from exerting pressure on others.[20]

In light of the above discussion, the first case that is considered relating to banning of religious clothing in schools is the UK case of R (on the application of Begum) v Headteacher and Governors of Denbigh High School ("Begum")[21], in which the House of Lords reversed the Court of Appeals decision that a school violated a student's right to freedom of religion by refusing to allow her to wear the traditional jilbab to a public school.[22] In this case Shabina Begum attended a co-educational school that was culturally and linguistically diverse, although the students were mostly Muslim. The school had a specific school uniform policy that offered three uniform options. However, it did not permit students to wear the jilbab (a long loose fitting garment worn by Muslim women). For two years Shabina and her sister wore the prescribed school uniform without complaint or objection. In 2002 Shabina started wearing the jilbab on her brother's insistence. Shabina was advised by the school that she would not be permitted to wear the jilbab which the school uniform policy did not permit. The school was concerned that Shabina should attend school but the brother acting for Shabina, would not compromise on the dress requirement as an absolute obligation of the Muslim faith. The applicant pursued legal action on the basis that the school had breached her human rights under UK and European human rights law, in particular Articles, 9, 8 and 14 and Article 2 of Protocol 1 of the Convention. Shabina Begum lost her case in the High

[17] Şahin v Turkey (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 105-106.
[18] See, R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15, 26; Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 15.
[19] Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 15.
[20] Karaduman v Turkey (1993) 74 DR 93 (Eur Comm HR); Kalaç v Turkey (1997) 27 European Human Rights Reports 552.
[21] R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15.
[22] It should be noted that the Grand Chamber judgment in Şahin v Turkey had not been decided at the time of the Court of Appeal decision in the Begum case

Court[23] but succeeded on appeal where the Court of Appeal held that there was a violation.[24] On appeal to the House of Lords it was held that Article 9 of the Convention had not been violated or interfered with. The Lords accepted that wearing religious clothing is a manifestation of religious belief and therefore fell within the ambit of Article 9(1).[25] However, in applying the test in Article 9(2) it was unanimously held there were justifiable grounds to limit the applicant's right to wear religious clothing of her choice. It was affirmed that 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'.[26] Lord Bingham of Cornhill noted the authority set down by the Grand Chamber of the European Court of Human Rights that in some situations it is necessary to restrict freedom to manifest one's religious beliefs citing 'the value of religious harmony and tolerance between opposing or competing groups; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others; the variation of practice and tradition among states; and the permissibility on some contexts of restricting the wearing of religious dress'.[27]

In all the cases considered, the banning of religious clothing and symbols did not amount to a denial of religious freedom and it was recognised that protection of the rights of others may require rights to be limited in certain circumstances. The cases illustrate the difficulty of proving a violation of the right to freedom of religion and establishing an interference with the right to manifest one's religious and practices. The ECHR has consistently recognised and reiterated the importance of freedom of religion in a democratic society. However, rights are not absolute and the right to freedom of religion may be limited. There is a substantial body of ECHR jurisprudence that demonstrates the balance in favour of upholding limitations that are grounded in the pursuit of a legitimate aim and necessary for a 'democratic society'. For instance in Kokkinakis v Greece, the court emphasised that Article 9 'recognises that in democratic societies, in which several religions co-exist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.[28] The crux of the matter is aptly summed up by Judge Tulkens: 'Freedom to manifest a religion entails everyone being allowed to exercise that right, whether individually or collectively, in public or in private, subject to the dual condition that they do not infringe the rights and freedoms of others and do not prejudice public order'.[29] Moreover, the ECHR has generally applied the principle of a 'margin of appreciation' which essential means that the court will defer to national decision-making as the court is not necessarily in the best position to know the local circumstances.[30] An assessment of the necessity of an interference with Article 9 is, therefore,

[23] The Queen on the application of Shabina Begum (through her litigation friend Mr Sherwas Rahman) v The Headteacher and Governors of Denbigh High School [2004] EWHC 1389 (Admin).
[24] The Queen on the application of SB v Headteacher and Governors of Denbigh High School [2005] EWCA Civ 199.
[25] R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15
[26] Ibid.
[27] Ibid.
[28] Kokkinakis v Greece (14307/88) Eur Court HR (25 May 1993), 32.
[29] Şahin v Turkey no (44774/98) Eur Court HR, Grand Chamber (10 November 2005) (Tulkens J), 8.
[30] Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 15.

'closely allied to the issue of subsiduarity' which holds that 'the primary responsibility for ensuring that Convention rights are practical and effective is that of the national authorities'.[31] There is, however, not an 'unlimited power of appreciation' on the part of Contracting States.[32] In regard to religious practices in educational institutions, the court also acknowledges the authority and expertise of educational authorities to draft rules and regulations.[33] In Dahlab v Switzerland, the court noted that it is settled law that 'Contracting States have a certain margin of appreciation in assessing the existence and extent of any interference, but this margin is subject to European supervision'.[34] To this end the court is concerned whether the measures taken by the State are proportionate to the aims that it seeks to achieve.

B. Religious Dress And Discrimination

The primary basis on which claims have been brought in relation to the limitation or restriction on religious clothing and symbols, is the right to religious freedom, conscience and thought under Article 9 of the Convention. However, it is also possible to frame the claims under protections against discrimination. Article 14 of the Convention provides that the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is an associated and overlapping right that is read with Article 9. However, it does not confer a 'free-standing right or substantive right but rather expresses a principle to be applied to the substantive rights conferred by other provisions'[35], that is, by the rights set forth in the Convention. Hence read with Article 9 a claimant can also bring an action for discrimination based on religion. In determining discrimination Murdoch[36] notes that the crux of the test is whether or not the applicant has been treated in a different way to a relevant comparator, and if there is differential treatment, whether such treatment is justified. The onus is on the State to show the limitation was both objectively and reasonably justifiable. Different treatment is not automatically discriminatory under Article 14. In Dahlab v Switzerland, it was reiterated that for the purposes of Article 14 'a difference in treatment is discriminatory if it does not pursue a legitimate aim or if there is not a relationship of proportionality between the means employed and the aim sought to be realised'.[37] In the cases considered above, discrimination was not considered separately but in association with

[31] Ibid.
[32] Handyside v the United Kingdom, 7 December 1976 cited in Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 15, 32.
[33] See, eg, Şahin v Turkey (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 122.
[34] Dahlab v Switzerland (2001) V Eur Court HR 449, 14.
[35] Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 15, 32.
[36] Ibid.
[37] Dahlab v Switzerland (2001) V Eur Court HR 449, 16.

Article 9, where applicable.[38] To this end, the court is not likely to consider the issue of discrimination if there is no violation of Article 9. Similarly, according to Murdoch the 'European Court of Human Rights will generally decline to consider any complaint of discrimination under Article 14 when it has already established that there has been a violation of a substantive guarantee raising substantially the same point'.[39] In Şahin v Turkey, the court held that 'the reasons which led the Court to conclude that there has been no violation of Article 9 of the Convention or Article 2 of Protocol No. 1 incontestably also apply to the complaint under Article 14, taken alone or in conjunction with the aforementioned provisions'[40] and therefore there was no violation of Article 14.

In the context of school uniform policies, rules that favour one group over another or where a rule has less favourable impact on one group may be construed as discriminatory. This is illustrated in the UK case of Mandla v Dowell Lee[41], in which a Sikh boy who wore a turban for religious reasons was refused admission to the school. The school uniform rule that required all boys to wear a school cap but not a turban was declared to be indirect discrimination. Thus, a school that ordered a Catholic student to remove a crucifix necklace, while allowing Muslim and Sikh students to wear religious symbols[42], and a school that banned students from wearing Christian purity rings but allowed Sikh students to wear kara[43] bracelets[44] have been accused of acting discriminately. The French law specifically prohibits overt or obvious religious signs or dress. According to a report on the French law a total of 639 religious signs were recorded in 2004-2005 that fell within the ambit of the law.[45] The Islamic headscarf is one such item that is considered overt and by which the wearer's religious affiliation is immediately identifiable[46] and it is the banning of Islamic headscarves that has been at the centre of most cases and discrimination claims.

It has been argued that prohibiting Islamic headscarves amounts to indirect discrimination because it has a greater impact on Muslim students because of the visible nature of the clothing and the fact that it is more prescriptive. Plesner[47], for instance, argues that French laws banning headscarves are not neutral and do discriminate indirectly as they have more impact on particular Muslim students with little impact on Christians and 'those who do not feel obliged to wear any religious signs'.

[38] Article 14 was not raised in Dogru v France.
[39] Jim Murdoch, Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights (2007), 15, 55.
[40] Şahin v Turkey (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 165.
[41] Mandla V Dowell Lee [1983] 2 AC 548
[42] 'School Bans Catholic Girl From Wearing Crucifix', Catholic News Agency, 15 January 2007, at 3 June 2007.
[43] An iron bracelet commonly worn on the right arm as a symbol of humility and eternity. See also R (on the application of Watkins-Singh) v Aberdare Girls High School [2008] EWHR 1868 (Admin).
[44] School bans Christian chastity rings but allows Muslim and Sikh symbols. See also R (on the application of Playfoot) v Governing Body of Millais School [2007] ELR at 3 June 2007.
[45] Dogru v France (27058/05) Eur Court HR, Chamber (4 December 2008), 32.
[46] Dogru v France (27058/05) Eur Court HR, Chamber (4 December 2008), 31.
[47] Ingvill Plesner, (2005) 'The European Court on Human Rights between Fundamentalists and Liberal Secularism. (Paper presented at a seminar on The Islamic Headscarf Controversy and the Future of Freedom of Religion or Belief, Strasbourg, July 2005) at 3 May 2007.

Knights[48] also contends that the French law may amount to indirect discrimination because it disproportionately affects certain religious groups for instance Muslims, Sikhs and Jews as against the Catholic majority who will be able to comply by wearing a small cross. The distinction made here is whether or not the requirement to wear religious clothing is a mandatory (obligatory) tenet. However, as Thomas points out there are students in France 'wearing headscarves as a matter of personal conviction and those who do not want to wear headscarves but are forced to do so by familial or community pressure'.[49] This was the situation in the Begum case in which it was evident on the facts and history of the case that for two years the respondent Ms Begum wore the school uniform without complaint, until her brother (the litigation friend) intervened after the death of the parents and insisted that his sister comply with strict Muslim dress code and wear the jilbab.[50] It was the brother who challenged the school on its uniform policy and encouraged his sister to conform to a strict dress code. However, in the case of headscarves, there is not consensus as to whether certain religious clothing is a religious mandate. In the Begum case, the school had received a statement from the Muslim Council of Britain on Muslim dress code for women stating that 'there was no recommended style; modesty must be observed at all times; trousers with long tops or shirts for school wear were absolutely fine'.

C. Secularism And Maintaining Denominational Neutrality

A recurring theme throughout the Strasbourg decisions discussed above is the right of schools, and in fact in some countries a duty, to 'maintain denominational neutrality'. In all the cases considered, the fundamental principle of secularism and state neutrality has been invoked as a legitimate ground for limiting the right to freedom of conscience, thought and religion as 'necessary in a democratic society'. The thrust of the argument is that the prohibition on religious dress and symbols is based on the legitimate interest in upholding secularism and maintaining religious neutrality in educational institutions in order to protect the rights and freedoms of others, and recognising religious diversity. The court has accepted this position stating that 'the Court notes that in a democratic society in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of various groups and ensure everyone's beliefs are respected'.[51] The court considers the 'notion of secularism to be consistent with the values underpinning the Convention'[52] and reiterates that 'an attitude that fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention'.[53]

[48] Samantha Knights, 'Religious Symbols in the School: Freedom of Religion Minorities and Education' (2005) 25 European Human Rights Law Review 499.
[49] Elaine Thomas, 'Keeping Identity as a Distance: Explaining France's New Legal Restrictions on the Islamic Headscarf' (2006) 29 Ethnic and Racial Studies 2, 237.
[50] R (on the application of Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15, 9–14.
[51] Dogru v France (27058/05) Eur Court HR, Chamber (4 December 2008), 62.
[52] Şahin v Turkey (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 114
[53] Dogru v France (27058/05) Eur Court HR, Chamber (4 December 2008), 72.

Secularism essentially refers to the absence of religion in state affairs: 'this principle contains the notion that government and society must be protected from religious overreaching in order to preserve the secular nature of government and the public'.[54] However, the meaning of 'secularism' or 'neutrality' is far from simple and may have different meanings and applications in different states.[55] As Gibson cogently argues 'secularism appears in liberal and fundamentalist forms; liberal secularism only requires religion to be removed from any position of power whereas fundamentalist secularism is the removal of religion from society altogether'.[56] Gibson further argues that this is an important distinction in that requiring the 'government to be devoid of religious affiliation does not necessarily require that society be secular as well'.[57]

A number of countries, including France, Turkey and Switzerland, have a system of government and a constitution based on secularism, while in other countries, such as the United Kingdom and Ireland, there is a strong connection between the state and church. France is unequivocally a secular state as stated in the French Constitution of 1958: 'France is an indivisible, secular, democratic and social republic'.[58] The consequence of this is the acknowledgement of religious pluralism and state neutrality towards religion. It does not imply, nor does it have the effect, of the removal of religion from society, In Dogru v France, it is noted that the basis for secularism is: the Act of 9 December 1905, known as the Law on the Separation between Church and State, which marked the end of a long conflict between the republicans, borne out by the French Revolution, and the Catholic Church. Section 1 provides: "The Republic shall ensure the freedom of conscience. It shall guarantee free participation in religious worship, subject only to the restrictions laid down hereinafter in the interest of public order". The principle of secularism is affirmed in section 2 of the Act: "the Republic may not recognise, pay stipends to or subsidise any religious denomination".[59]

Likewise in Turkey, secularism and state neutrality are a fundamental Constitutional principle but religious activity is not expunged from society. Article 2 of the Constitution of the Republic of Turkey states 'the Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble'.[60] The Constitution provides that '[e]veryone possesses inherent fundamental rights

[54] M Todd Parker, 'The Freedom to Manifest Religious Belief: An Analysis of the ICCPR and the ECHR' (2006) 17 Duke Journal of Comparative and International Law 91, 91.
[55] It is not the purpose nor is it within the scope of this article to give due consideration to a comprehensive discussion on secularism. For a thorough discussion on this matter see Michel Troper, 'French Secularism or Laïcité' (2000) 2 Cardozo Law Review 1269
[56] Nicholas Gibson, 'An Unwelcome Trend: Religious Dress and Human Rights Following Leyla Sahin v Turkey' (2007) 25(4) Netherlands Quarterly of Human Rights 616.
[57] Ibid, 617.
[58] Michel Troper, 'French Secularism or Laïcité' (2000) 2 Cardozo Law Review 1269, 500.
[59] Dogru v France (27058/05) Eur Court HR, Chamber (4 December 2008), 18.
[60] The Constitution of the Republic of Turkey at 8 December 2009.

and freedoms which are inviolable and inalienable'.[61] This includes the right not to be discriminated against[62] and freedom of religion and conscience; however, none of these rights may be exercised in a manner that would endanger 'the existence of the democratic and secular order of the Turkish Republic based upon human rights'.[63] The ECHR has to this end recognised that secularism in Turkey was the guarantor of democratic values and the principle the freedom of religion is inviolable and the principle that citizens are equal, that is also served to protect the individual not only against arbitrary interference from the State but also from external pressure from extremist movements and that freedom to manifest one's religion could be restricted to defend those values.[64]

Therefore, public schools in France and Turkey are strictly secular and non-denominational, and are generally prohibited from engaging in religious activities. Religion is viewed primarily as a private matter; a matter for parents and the church.[65] Although controversial, the French law banning overt religious clothing and symbols in public schools gives effect to the fundamental principle of secularism or religious neutrality (Laïcité) in the public sphere, which is considered a cornerstone of French democracy. Vaïsse[66] argues that Laïcité is a principle of neutrality that is intended to 'create conditions for religious freedom'. He notes that this has been an important historical development in French public schools, which have been places 'where a new civic identity could be nurtured, free from anti-democratic influences of the Catholic Church'.

In the cases of Dahlab v Switzerland, Şahin v Turkey and Dogru v France, secularism and the right to education that is religiously neutral was upheld and validated by the court as a legitimate basis for limiting the exercise of religious freedom in public educational institutions. In Dahlab v Switzerland the court accepted the government's position that it was necessary to prohibit the teacher from wearing the headscarf in the interests of protecting the rights and freedoms of others.[67] The court held that it 'appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance and respect for others'. In Şahin, the court noted, with reference to other cases, that 'in a democratic society the state was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and safety'.[68] The court further expressed the view that '[i]t is the principle of secularism which is the paramount consideration underlying the ban on the wearing of religious

[61] Ibid art 12.
[62] Ibid art 10.
[63] Ibid art 14.
[64] Dogru v France (27058/05) Eur Court HR, Chamber (4 December 2008), 66, Şahin v Turkey (44774/98) ECHR, Grand Chamber (10 November 2005), 114.
[65] For a comprehensive and insightful discussion on secularism in different states, see Aernout Nieuwenhuis, 'State and Religion, Schools and Headscarves, An Analysis of the Margin of Appreciation as Used in the Case of Leyla Şahin v Turkey' (2005) 1 European Constitutional Law Review 495.
[66] Justin Vaïsse, Veiled Meaning: The French Law Banning Religious Symbols in Public Schools (2004) The Brookings Institution at 7 November 2006
[67] Dahlab v Switzerland (2001) V Eur Court HR 449, 15
[68] Şahin v Turkey (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 111.

symbols in universities. In such a context, where values of pluralism, respect for the rights of others, and in particular, equality before the law of men and women, are being applied and taught in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire …'.[69]

Religious freedom can be limited in the interests of public safety, which one would expect would require a consideration of factors that would support such decisions. Judge Tulkens, for instance, notes that in the Şahin case no concrete examples were provided to show that the applicant had contravened the principle of secularism through her attitude, conduct or actions.[70]

Way Forward

The Law Commission in its report mentioned that 'Cultural diversity cannot be compromised to the extent that our urge for uniformity itself becomes a reason for threat to the unity and integrity of the nation'. Difference does not always imply discrimination. Diversity, both religious and regional should not be subsumed under the louder voice of the majority. Codification of all religious laws is necessary to avoid the controversies related to what is and what is not essential religious practices under Right to freedom of religion guaranteed by Indian Constitution. There are some protocols developed for regulating educational institutions, any amendment in them must be made after consulting all stakeholders, and once a decision is made then there must be a time limit to implement them, for example any change introduced in the dress code must be

made from next academic year and not in the middle of the year, so that parents and students could plan in advance.

An argument against the proposed framework may be made that it would lead to the death of uniforms as a concept as every student would find one aspect of their identity they wished to represent through a deviation from the standard uniform. The common thread between the protests against Vietnam War through black armbands and the Hijab is that the rest of the uniform is followed. There is merely an addition made whilst the student continues to be clothed in the prescribed uniform. In the case of ***R (Begum) v Governors of Denbigh High School***, the House of Lords rejected the contention of a Muslim student that she ought to be able to wear a 'Jilbab' (Muslim full body attire) partially because the school allowed for 'Hijabs' and that the school had taken efforts to ensure that the uniform code was 'Muslim-friendly'. Thus, a line of distinction can be drawn if necessary that deviations of uniform still require that the rest of the uniform be abided by.

[69] Ibid, 116.
[70] Dogru v France (27058/05) Eur Court HR, Chamber (4 December 2008), 69.

In sum, therefore, the Karnataka High Court has an opportunity to continue the growth of a novel jurisprudence of free speech which was germinated in the *NALSA* decision. The High Court ought to base its ruling on broad-based grounds of free-speech rather than restricting itself to the comparatively narrower grounds of protection of essential religious practices.