

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) NO. 15403 OF 2022

IN THE MATTER OF:-

WOMEN'S VOICE

...PETITIONER

Versus

STATE OF KARNATAKA & ORS.

...RESPONDENTS

WRITTEN SUBMISSIONS OF MS. JAYNA KOTHARI, SENIOR
ADVOCATE, ON BEHALF OF THE PETITIONER

MAIN ARGUMENTS

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1.	<p>THE G.O. DATED 05.02.2022 ISSUED BY THE STATE GOVERNMENT AND THE ACTION OF EDUCATIONAL INSTITUTIONS REFUSING ENTRY OF MUSLIM GIRL STUDENTS WITH THE HIJAB IS A VIOLATION OF THEIR RIGHT TO EQUALITY UNDER ARTICLE 14 AND AMOUNTS TO INDIRECT DISCRIMINATION ON GROUNDS OF SEX AND RELIGION UNDER ARTICLE 15 (1) OF THE CONSTITUTION</p> <p>A. Equality under Article 14 guarantees substantive equality and differential treatment to promote equality</p> <p>B. Indirect Discrimination is prohibited under Articles 14 and 15 (1) of the constitution</p>	

	<p>C. Not allowing Muslim girls to wear the Hijab amounts to indirect discrimination on the grounds of religion and sex under Article 15 (1) of the Constitution</p> <p>D. Muslim girls face intersectional and multiple discrimination under Article 15 (1) of the constitution</p>	
2.	<p>INTERNATIONAL LAW OBLIGATIONS UNDER THE CONVENTION FOR ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (‘CEDAW’) PROHIBIT DISCRIMINATORY POLICIES AGAINST WOMEN</p>	

The main arguments are as follows:

1. THE G.O. DATED 05.02.2022 ISSUED BY THE STATE GOVERNMENT AND THE ACTION OF THE EDUCATIONAL INSTITUTIONS TO REFUSE TO ALLOW MUSLIM GIRL STUDENTS TO WEAR THE HIJAB AND ENTER IS A VIOLATION OF THEIR RIGHT TO EQUALITY UNDER ARTICLE 14 AND INDIRECT SEX AND RELIGIOUS DISCRIMINATION UNDER ARTICLE 15 (1) OF THE CONSTITUTION:

A. Equality under Article 14 requires Substantive equality and differential treatment:

- (i) Equality under Article 14 is not merely formal equality, but substantive equality. Formal equality is treating likes alike and by itself will not be sufficient to address issues of discrimination on the ground that similar treatment is equal for all.

(ii) In some cases, different rather than the same treatment is required.

This approach is referred to as substantive equality, which requires different treatment to be provided that accommodates people's differences to provide a level playing field.

(iii) This Hon'ble Court has held in several decisions that merely formal equality would not be enough and expounded on substantive equality under Article 14. The Article 14 guarantee of substance equality mandates that all persons require equal concern and equal respect and therefore substantive equality also specifically recognises that sometimes it is fair to treat people differently. Hence, the fact the G.O. dated 5.2.2022 and orders issued by many of the educational institutions impose an identical uniform policy on all students, prohibiting any religious markers, would not be equal. Article 14 would require any regulations on uniforms to consider how it impacts persons from certain faiths and genders, and to provide for certain exemptions and accommodations where needed to ensure that students are not discriminated on the basis of their religion and sex. Hence, having a G.O. directing students to wear uniforms as directed by the institutions, which prohibit headscarves and religious gear, is violative of the right to equality of Muslim girls under Article 14 as no exemption or permission is provided to wear the headscarf along with any such prescribed uniform. Some of the decisions on substantive equality under Article 14 are as follows:

(iv) In *Ashok Kumar Gupta vs. State of U.P.*, (1997) 5 SCC 201, this

Hon'ble Court held as follows:

“30. By abstract application of equality under Article 14, every citizen is treated alike without there being any discrimination. Thereby, the equality in fact subsists. Equality prohibits the States from making discrimination among citizens on any ground. However, inequality in fact without differential treatment between the advantaged and disadvantaged subsists. In order to bridge the gap between inequality in results and equality in fact, protective discrimination provides equality of opportunity. Those who are unequal cannot be treated by identical standards. Equality in law certainly would not be real equality. In the circumstances, equality of opportunity depends not merely on the absence of disparities but on the presence of abilities and opportunities. De jure equality must ultimately find its raison d'etre in de facto equality. [para 30]

(v) In *Lt. Col. Nitisha and Ors. v. Union of India*, 2021 SCC OnLine 261,

“54. At its heart, this case presents this Court with the opportunity to choose one of two competing visions of the antidiscrimination guarantee embodied in Article 14 and 15(1) of the Constitution: formal versus substantive equality. The formal conception of antidiscrimination law is captured well by Anatole France’s PART F 47 observation: “The law, in its majestic equality, prohibits the rich and the poor alike from sleeping under bridges, begging in the streets and stealing bread.”

55. Under the formal and symmetric conception of antidiscrimination law, all that the law requires is that likes be treated alike. Equality, under this conception, has no substantive underpinnings. It is premised on the notion that fairness demands consistency in treatment. Under this analysis, the fact that some protected groups are disproportionately and adversely impacted by the operation of the concerned law or its practice, makes no difference. An apt illustration of this phenomenon would be the United States’ Supreme Court’s judgment in *Washington v. Davis*²⁸, which held that a facially neutral qualifying test was not violative of the equal protection guarantee contained in the 14th Amendment of

the American Constitution merely because African-Americans disproportionately failed the test.

56. On the other hand, under a substantive approach, the antidiscrimination guarantee pursues more ambitious objectives. The model of substantive equality developed by Professor Sandra Fredman views the aim of antidiscrimination law as being to pursue 4 overlapping objectives. She states as follows: "First, it aims to break the cycle of disadvantage associated with status or out-groups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participative dimension."

57. Recognizing that certain groups have been subjected to patterns of discrimination and marginalization, this conception provides that the attainment of factual equality is possible only if we account for these ground realities. This conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate an unjust status quo."

B. INDIRECT DISCRIMINATION IS PROHIBITED UNDER ARTICLES 14 AND `15 (1) OF THE CONSTITUTION:

- (i)** The examination of discrimination in the instant case by the uniforms policy issued by the GO and the educational institutions cannot be fully and satisfactorily determined on the test of direct discrimination alone. The said G.O. and the action of the institutions in issuing uniforms policies, may appear neutral and inoffensive on the face of it, but is discriminatory in operation. This indirect discrimination is against women of the Muslim community as it is only the wearing of the headscarf / hijab which is worn by Muslim girls, which is

prohibited and girls wearing the hijab have been refused entry into the colleges and schools. Such forms of action, which may appear neutral but impose a disadvantage only on certain categories of persons amount to indirect discrimination.

- (ii) In ***Lt. Col. Nitisha and Ors. v. Union of India***, 2021 SCC OnLine 261, indirect discrimination was held to be as follows:

58. Indirect discrimination is closely tied to the substantive conception of equality outlined above. The doctrine of substantive equality and anti-stereotyping has been a critical evolution of the Indian constitutional jurisprudence on Article 14 and 15(1). The spirit of these tenets have been endorsed in a consistent line of authority by this Court. To illustrate, in Anuj Garg v. Hotel Association of India , this Court held that laws premised on sex-based stereotypes are constitutionally impermissible, in that they are outmoded in content and stifling in means. The Court further held that no law that ends up perpetuating the oppression of women could pass scrutiny. Barriers that prevent women from enjoying full and equal citizenship, it was held, must be dismantled, as opposed to being cited to validate an unjust status quo.

61. We must clarify here that the use of the term ‘indirect discrimination’ is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion.”

66. Thus, as long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, we are in the territory of direct discrimination. However, when the focus switches to the effects of the concerned action, we enter the territory of indirect discrimination. An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences. In a case of direct discrimination, the judicial enquiry is confined to the act or conduct at issue, abstracted from the social setting or background fact-situation in which the act or conduct takes place. In indirect discrimination, on the other hand, the subject matter of the enquiry is the institutional or societal framework within which the impugned conduct occurs. The doctrine seeks to broaden the scope of

antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible.

97. Therefore, an analysis of discrimination, with a view towards its systemic manifestations (direct and indirect), would be best suited for achieving our constitutional vision of equality and antidiscrimination. Systemic discrimination on account of gender at the workplace would then encapsulate the patriarchal disadvantage that permeates all aspects of her being from the outset, including reproduction, sexuality and private choices which operate within an unjust structure.”

(iii) In **Navtej Johar and Ors. v. Union of India and Ors.**, (2018) 10 SCC 1, this

Hon’ble Court held;

“442. Jurisprudence across national frontiers supports the principle that facially neutral action by the State may have a disproportionate impact upon a particular class. In Europe, Directive 2006 / 54 / EC of the European parliament and of the Council of 5.7.2006 defines “indirect discrimination” as:

“where an apparently neutral provisions, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”

(iv) In **Madhu & Anr. v. Northern Railways & Ors.**, 2018 SCC OnLine Del 6660,

the Delhi High Court also recognized indirect discrimination and held as follows:

“19. Thus, the touchstone of validity for state action is not the intention behind the action, but rather the actual impact and effect on a citizen’s life...

29. The reason that the drafters of the Constitution included Article 15 and 16 was because women (inter alia) have been subjected to historic discrimination that makes a classification which disproportionately affects them as a class constitutionally untenable. The Northern Railways’ decision to not grant the Appellants medical cards clearly has such a disproportionate effect. By leaving an essential benefit such as medical services subject to a declaration by the railway officer/servant, the dependents are subject to the whims and fancies of such employee. The large majority of dependents are likely to be women and children, and by insisting that the railway officer/servant

makes a declaration, the Railway authorities place these women and children at risk of being denied medical services.

30. It is irrelevant that the Railways did not deny them the medical card because the Appellants were women, or that it is potentially possible that a male dependent may also be denied benefits under decision made by the Railways. The ultimate effect of its decision has a disparate impact on women by perpetuating the historic denial of agency that women have faced in India, and deny them benefits as dependents.”

C. NOT ALLOWING MUSLIMS GIRLS TO WEAR THE HIJAB AMOUNTS TO INDIRECT DISCRIMINATION ON THE GROUNDS OF RELIGION AND SEX UNDER ARTICLE 15 (1) OF THE CONSTITUTION

- (i)** The uniform rule imposed that no religious gear would be permitted in colleges and the reference to headscarves and headgear being prohibited, is indirectly discriminatory against Muslim girls because such policies disadvantaged them on account of their religion and sex, which are both protected grounds under Article 15 (1) of the constitution. It puts Muslim girls at a disadvantage compared to other students, whose religious beliefs are not affected by the uniforms that are mandated.
- (ii)** It is submitted that Muslim girl students who wear the hijab, and have been wearing the hijab all along till the impugned GO was issued, have been discriminated as they have been denied entry to the college and not permitted to attend classes or write their examinations unless they remove the hijab. While this may seem facially neutral, this requirement would not affect students of other religions, who are not discriminated by being refused entry into the

educational institutions as the practice of their faiths is not affected by the uniforms.

- (iii)** It is submitted that both 'sex' and 'religion' are protected grounds of discrimination under Article 15 (1) of the constitution, and in the instant case it is submitted that the persons who are disadvantaged are Muslim girls, and hence they are discriminated both on grounds of sex and religion, which are both prohibited. Muslim girls are the only ones facing the disadvantage and hence discrimination has to be viewed from the angle of multiple discrimination or intersectional discrimination.
- (iv)** The comparators would not be would be all the students whose cultural beliefs or religious practices are not compromised by the uniform code at the PU colleges and are thus not denied entry to classes. The other students were treated better than the Petitioners because their compliance with the uniform rules did not subject them to any disadvantage or burden which was violative of their religious beliefs or practices. Other items of clothing or display such as the Bindi, or bangles, or the rosary with a cross, which are often worn by girls of other faiths, would also be worn along with uniforms, but girls wearing these have not been denied entry into the Pre-University colleges. Similarly, Muslim have also not been denied entry into classes. Hence Muslim girls have been placed at a unique disadvantage both by being female and by belonging to a certain faith which requires the wearing of the headscarf.
- (v)** It is also submitted that discrimination on the ground of religion under Article 15(1) of the constitution would not require a threshold of a religious action being

an essential religious practice, but a much lower threshold of showing any discrimination or disadvantage caused. It is sufficient to show that Muslim girls have been discriminated on account of the uniforms policy as they are not permitted to wear the hijab which they want to wear as a religious measure, and the disadvantage imposed on them for pursuing their faith is a denial of entry to the educational institutions which others are not subjected to.

(vi) In other cases of religion-based discrimination relating to uniforms in schools, courts in other jurisdictions have recognised that bans would amount to discrimination on the ground of religion and held as follows:

a. Watkins-Singh, R (on the application of) v. Aberdare Girls' High School & Anr., England and Wales High Court [2008] EWHC 1865: Here the challenge to the uniform policy of the school was by a girl who wanted to wear the Kara which is important to the Sikh religion. The High Court of England and Wales held, "***That by not being allowed to wear the Kara the claimant is suffering "a particular disadvantage" or "detriment"***". It held that,

"...The decision of the defendants not to grant a waiver to the claimant to permit her to wear the Kara constitutes indirect discrimination on grounds of race under the Race relations Act and on grounds of religion under the Equality Act."

b. Mohamed Fugicha v. Methodist Church in Kenya and Ors. Civil Appeal No. 22 OF 2015, [2016] eKLR (Court of Appeal, Kenya): This was a case where wearing the Hijab in school was challenged. The Court of Appeal held that it should be permitted. It held as follows:

“As we have already observed, these averments were unchallenged and we have no hesitation in arriving at the conclusion that barring Fugicha’s daughters and other Muslim girls from donning the hijab did place them at a particular disadvantage or detriment because the hijab is genuinely considered to be an item of clothing constituting a practice or manifestation of religion. It is important to observe at this point that it is not for the courts to judge on the basis of some ‘independent or objective’ criterion the correctness of the beliefs that give rise to Muslim girls’ belief that the particular practice is of utmost or exceptional importance to them. It is enough only to be satisfied that the said beliefs are genuinely held.”

This decision was reversed by the Supreme Court on a technical ground of no separate petition being filed by the girls. However, the dissenting judgement in the Supreme Court held that

“the petitioner paid no, or insufficient, attention to the proscribed indirect discrimination and the principle of accommodation, as the answer to the problem of discrimination”.

c. JWM (alias P) v Board of Management O High School and 2 Others [2019]

eKLR, [60] (High Court of Kenya): Here the challenge was a ban on students keeping ‘rastas’ and a student following the Rastafarian religion challenged such a ban in the uniform rules. The High Court of Kenya held:

“I therefore find and hold that the respondents’ decision to exclude MNW from school for reason of keeping rastas on religious grounds is not only discriminatory but also violates her right to religion and education. She does not keep the rastas pout of choice but due to her strongly held religious beliefs. Her right to education cannot, therefore, depend on violating her right to manifest those religious beliefs. The Respondents are also acting in violation of the Constitution by not only excluding her from school but also forcing her to act in a manner that is contrary to her religion, beliefs and practice.”

D. MUSLIM GIRLS FACE INTERSECTIONAL / MULTIPLE
DISCRIMINATION UNDER ARTICLE 15 (1) OF THE CONSTITUTION

- (i) It is submitted that Muslim girl students face intersectional / multiple discrimination due to the prohibition of the Hijab. This has been recognised by this Hon'ble Court in several decisions.
- (ii) In ***Patan Jamal Vali v. The State of Andhra Pradesh***, 2021 SCC OnLine 343, this Hon'ble Court held as follows:

19. Intersectionality can be defined as a form of “oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone...”. While the model of intersectionality was initially developed to highlight the experiences of African – American women, there is a growing recognition that an intersectional lens is useful for addressing the specific set of lived experiences of those individuals who have faced violence and i=discrimination on multiple grounds. A single axis approach to violence and discrimination renders invisible such minority experiences within a broader group since it formulates identity as “totemic” and “homogenous”. Laws tend to focus on a singular identity due to the apparent clarity a monistic identity provides in legal analysis where an individual claiming differential treatment or violence can argue that “but for” that identity, they would have been treated in the same way as a comparator. Therefore, their treatment is irrational and unjustified. However, such essentialization of experiences of identity groups creates a problem where intersectional discrimination or violence has occurred. This is because the evidence of discrete discrimination or violence on a specific ground may be absent or difficult to prove. Nitya Iyer has argued that law based on single axis models forces claimants to ignore their own lived reality and “caricaturize themselves so that they fit into prebaricated, rogod categorie,” their claim will fail if they are not able to simplify their story to accord with the dominant understanding of how discrimination or violence on the basis of a given characteristic occurs.”

23. Intersectional analysis requires an exposition of reality that corresponds more accurately with how social inequalities are experienced. Such contextualized judicial reasoning is not an anathema to judicial inquiry. It will be useful to note the comments of Justice L'Heureaux-Dubé and Justice McLachlin in the Canadian Supreme Court's judgment in *R. v. S (RD)*¹⁶ that, "[j]udicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality...this process of enlargement is not only consistent with impartiality; it may also be seen as its essential pre-condition.

25. In India, the fundamental guarantees under the Constitution provide for such a holistic analysis of discrimination faced by individuals. One of us (Justice DY Chandrachud), in *Navtej Johar v. Union of India*¹⁷ applied the intersectional lens to Article 15(1) of the Constitution. In doing so, Justice DY Chandrachud observed that: "36. This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ('Sex plus') and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics."

26. Noting how the discrimination caused by intersecting identities amplifies the violence against certain communities (gendered/religious/otherwise), the Justice J.S Verma Committee appointed in the aftermath of the Nirbhaya incident to suggest reforms in Indian criminal law, observed that:

“34. We believe that while certain measures may have been taken over a period of time but they have been too far and too few and they certainly have not attempted to restructure and transform society and its institutions. If there has to be a society which is based on equality of gender, we must ensure that not only does a woman not suffer on account of gender but also not suffer on account of caste or religion in addition. Thus a woman may suffer a double disadvantage - a) because she is a woman, and b) because she belongs to a caste/tribe/community/religion which is disadvantaged, she stands at a dangerous intersection if poor.

30. The above analysis stresses on the need for the Court to address and unpack the qualitative impact of the various identities an individual might have on the violence, discrimination or disadvantage being faced by them in the society.”

2. INTERNATIONAL LAW OBLIGATIONS UNDER THE CONVENTION FOR ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (‘CEDAW’) PROHIBIT DISCRIMINATORY POLICIES AGAINST WOMEN

- (i) It is submitted that India ratified the Convention on Elimination of All Forms of Discrimination Against Women (‘CEDAW’) on 09.07.1993. CEDAW is rooted to reaffirm faith in fundamental human rights, dignity, worth, and equal rights of women and girls. It is the duty of the State under Article 51(c) of the Constitution of India to ensure that such international obligations are respected.
- (ii) Articles 2 and 3 of CEDAW prohibit discrimination against women in all forms and mandates the State to ensure that appropriate action is taken to eliminate discriminatory policies and practices against women including in public institutions. Relevant portions are as follows:

Article 2:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, and, to this end, undertake:

(a)...

(b)....

(c).....

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women

Article 3

States Parties shall take in all fields, in particular in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

(iii) Hence, the policies prohibiting the hijab in educational institutions cannot be sustained as it amounts to discrimination against women from minority faiths and disadvantaging them in educational institutions. In ***Vishaka & Ors. v. State of Rajasthan & Ors.***, (1997) 6 SCC 241, this Hon'ble Court has while issuing guidelines to deal with sexual harassment based on the principles set out in CEDAW has held that:

“ In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the

constitutional guarantee. This is implicit from Article 51 (c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution.”

Hence it is prayed that the above submissions may be taken on record and pass any such other orders in the interest of justice and equity.

Place : **New Delhi**

Counsel for Petitioner

Date: