“A CRITICAL ANLYSIS ON HIJAB ISSUE”

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**Abstract**

Muslim women wear the Hijab as a symbol of modesty and privacy. It displays a person's profound love for God. Wearing the Hijab is a visible way of showing a person's Muslim identity.

Despite being a secular nation, India has encountered numerous religious challenges, and there have been numerous situations in which minorities have attempted to overcome these issues; nonetheless, we are presently concerned about the issue of wearing a Hijab.

After the judgment of the Karnataka High Court, why is it only the Hijab of Muslims and not the turban of Punjabis?

One impactful and significant principle of all other principles is Secularism, which is based on the bias of the state towards the citizens of different religious faith. Does the word Secular in the Preamble only remain as documentation and will it not be practiced in reality?

This paper will cover Secularism defined in the Constitution, the recent judgment of the Karnataka High Court on the Hijab, the Doctrine of essentiality, and history of the Hijab in the Quran and in other Islamic texts. Through this paper, the reader will be able to understand all controversies relating to the Hijab after when six girls were barred to enter the classroom in a government college in Karnataka.

**Keywords**: Hijab, Modesty, Secularism, Judgment, Quran, Doctrine of Essentiality.

**Introduction**

When it comes to the right to freedom of religion, the Constitution does not expect citizens to be emotionless. It declares that while every citizen has the right to exercise his or her religion in his or her own home, such right must be balanced against public order, health, and morals.

Modesty is defined as behavior, demeanor, or look that avoids impropriety or indecency. This refers to the Islamic custom of covering girls and women from the vision of men and the general public. The 'Hijab' controversy in Karnataka is resonating across the country, with street protests and social media fury. In the Karnataka High Court, the state government defended its judgment, arguing that religious symbolism should not be worn in educational institutions which have a prescribed dress code. The state government and universities have maintained their position that a dress code must be maintained to and that religious attire has no place in an educational institution that is based on "equality and uniformity." While the Indian Constitution guarantees religious freedom in Article 25(1), it also allows the state to intervene in religious matters by regulating secular activities associated with religion (Article 25(2)(a)) and enacting social welfare reforms (Article 25(2)(b)). Second, while secularism in many Western jurisdictions is interpreted to mean that the State must be blind to all religions in order to promote religious neutrality, secularism in India is understood to require tolerance of religious diversity while not endorsing any one religion.

This is clearly rooted in patriarchy through history but today, it also has evolved into a matter of choice and not compulsion for the girls concerned. Let us take a closer look at the whole issue.

**Statement of Problem**

Six female students were restricted from entering college in Karnataka Udupi district for wearing the hijab. Hence, determining whether this act of restricting students to enter in college is infringing legal right or not.

Recently Judgment is given by Karnataka high court upholding the ban of hijab in educational institutions. Analyze the Karnataka high court judgment in context of current issue about hijab. Understanding the Supreme Court split verdict on hijab ban

**Objective and Scope of study**

To understand the concept, history and mention of hijab.

To understand the matter and controversy of hijab with respect to constitutionality, doctrine of essential religious practices and secularism.

To understand the Karnataka high court judgment and other judgment cited under Karnataka high court judgment.

To understand the split verdict of Supreme Court in the Karnataka Hijab ban case.

**Hypothesis**

Hijab does not come under the Quran and it is not even an essential religious practice, the judgment of the High Court is correct and that wearing a hijab is wrong and the school uniform code should be followed. Wearing the five K’s is justifiably considered essential religious practice under Article 25 and thus, Sikhs are permitted to wear the five K’s in educational institutions, therefore hijab is not essential religious practice as it does not fall under article 25.

**Research questions**

What is the issue of hijab and what is the history of hijab and where it is mentioned?

What is the judgment of Karnataka high court with respect to Constitution and Doctrine of Essential Religious Practices?

What are the reasoning of other cases cited under Karnataka high court?

What is the Supreme Court’s split verdict on hijab issue?

**Research Methodology**

This research paper is based on secondary data. Certain references have been taken from various journals, articles, websites, judgments and reports.

**Issue**

Matter in State

A controversy about school uniforms was reported in the Indian state of Karnataka at the beginning of January 2022, when some Muslim students of a junior college who wished to wear hijab to classes were denied entry on the grounds that it was a breach of the college's uniform code. The disagreement extended to other schools and universities across the state over the next few weeks, with Hindu students holding counter-protests by demanding to wear saffron scarves. The Karnataka government issued an order on February 5: The state government on Saturday ordered banning wearing clothes which disturb equality, integrity and public order in schools and colleges. "Invoking 133 (2) of the Karnataka Education Act-1983, which says a uniform style of clothes has to be worn compulsorily. The private school administration can choose a uniform of their choice," the government order said. Several educational institutions have refused to admit Muslim girls wearing the hijab, citing this mandate.

**What the government says in matter?**

**The incidents were met with disdain by ministers in the Bharatiya Janata Party-led Karnataka government. B. C. Nagesh, the education minister, called it a "act of indiscipline." He blamed "political figures," presumably referring to the PFI, for inciting the students, who he claimed were "playing politics." Home Minister Araga Jnanendra stressed that "we are all Indians" must be a universal sense in schools and colleges, and that the uniform code established by colleges must be observed.** **Even if the college development committees did not impose a uniform, students must dress in a manner that promotes "equality and togetherness while not jeopardizing public order." "Those who choose to flout the government's school uniform regulations cannot enter their schools and attend courses," education minister B. C. Nagesh said in a statement.**

Matter in Court

This writ petition is filed under article 226 and 227 of the Constitution of India, praying for appropriate writ or order or directions in the nature of mandamus or any other appropriate writ order or directions be issued to the respondents to declare all the students of various schools and colleges in Karnataka and in the country shall attend their institutions by sporting the stipulated uniform. Due to protests and disagreements over the wearing of the hijab, the government closed high schools and universities for three days on February 8th. The High Court issued an interim ruling on February 10 prohibiting all students from wearing religious attire. When schools reopened on February 14, the interim ruling of the high court was implemented in all Karnataka schools and colleges, with students and staff being required to remove hijabs and burqas outside the school gates.

The Karnataka government contended before the Karnataka High Court that the hijab is not an essential religious practice of Islam and preventing its use did not violate Article 25 of the Indian Constitution, which guarantees religious freedom. February 25: The Karnataka High Court reserved its verdict on petitions filed by some Muslim girls challenging ban on wearing hijab in educational institutions on the ground that it's an essential practice of Islam.

After a hearing of about 23 hours spread over 11 days**, On March 15, 2022, the Karnataka High Court upheld the ban on hijab in educational institutions. The court ruled that hijab is not an essential religious practice in Islam, and so is not protected by Article 25 of the constitution, which states that everyone has the right to profess their religion.** The court also ruled that the hijab is not an essential religious practice in Islam.

September 22: The Supreme Court reserved its order on various petitions challenging Karnataka High Court order upholding the ban on Hijab in educational institutes. October 13: The SC pronounced a split verdict in the Karnataka Hijab ban case.

**History**

**In the Arabian Peninsula, Islam originated as a small faith community. The prophet Mohammed (c. 570–632 CE) founded the community in Medina. It expanded from there via the Middle East to Saharan and Sub-Saharan Africa, Central Asia, and a variety of communities around the Arabian Sea.**

**What Is Hijab?**

Hijab is a scarf or clothing worn by Muslim women to cover their hair in order to maintain modesty and privacy from unrelated males either in public or at home. The concept, however, is not unique to Islam but embraced by other religions too such as Judaism and Christianity[[1]](#footnote-1).

**Mention of Hijab**

Although the tradition of wearing hijab is deeply rooted in Islam, it is not directly mentioned in Quran.

Historic pieces of evidence suggest that veiling was not introduced in Arabia by the last Prophet of Islam, but already existed there and was associated with high social status.

Sura 33:53 of Quran states, "And when you ask [his wives] for something, ask them from behind a partition. That is purer for your hearts and their hearts." The verse descended upon the Islamic community in 627 CE and the term for donning the veil, *darabat al-hijab* (the hijab of wisdom), was used interchangeably with "being Muhammad's wife".

On the subject of women veiling, Muslim religious writings aren't totally clear. Several verses in the Quran and Hadith mention Mohammed's wife veiling.

Tradition of Hijab

Soon, the Upper-class Arab women adopted veiling while the poor ones were slow to adopt as it interfered with their work in the fields. The practice was both adopted as an appropriate expression of Qur'anic ideals regarding modesty and as a silent announcement that the women's husband was rich enough to keep her idle.

**Hijab And Constitution**

**Constitutionality**

Article 25(1) of the Indian Constitution guarantees the “freedom of conscience and the right freely to profess, practice and propagate religion”.

It is a right that guarantees a negative liberty — which means that the state shall ensure that there is no interference or obstacle to exercise this freedom.

However, like all fundamental rights, the state can restrict the right for grounds of public order, decency, morality, health and other state interests.

Wearing hijab does not infringe any of the restriction given under Article 25 of the Constitution.

This has the following implications:

Freedom of conscience: Inner freedom of an individual to adapt his relation with God or Creatures in whatever way he desires.

By wearing hijab, women of Islam community consider that this is the way to connect with Prophet Muhammad.

Right to Profess: The open and free expression of one's religious views and convictions.

Right to Practice: Performance of religious worship, rituals, ceremonies and exhibition of beliefs and ideas.

Right to Propagate: The act of transmitting and disseminating one's religious views to others, or the presentation of one's religion's precepts.

It is the Fundamental Duty of every citizen, under Part IV A of the Constitution of India to ‘value and preserve the rich heritage of our composite culture.’[[2]](#footnote-2)

**Secularism**

Secularism as practiced in India differs from secularism as practiced in the West. While secularism evolved in western countries as a concept resulting from the separation of the Church and the State, giving individuals the freedom to practice the religion of their choice, secularism in India is much older than the realization of the common individual. Secularism in India is multi-faceted and embraces multiple ethnicities.

The version of Indian secularism is derived from the old Indian philosophical concept of "sarva-dharma sambhava". Thus, neither it is anti-religion, nor does it separate the State and religion thoroughly. Contrary to the West, the Indian Constitution embodies positive secularism, i.e. protecting all religions. Equally and giving equal respect to all the religions.

Doctrine of Essential Religious Practices

In the 'Shirur Mutt' case in 1954[[3]](#footnote-3), a seven-judge Supreme Court bench invented the doctrine of "essentiality." The court ruled that the term "religion" encompasses all "integral" religious rituals and practices, and it assumed responsibility for establishing what constitutes essential and non-essential religious practices.

Integral means that which form core of the religion and without which the religion is considered incomplete.

The court developed the essential religious practice standard to safeguard only those religious activities that were important and vital to the religion.

In this case, the Court made a distinction between 'religious' and 'secular' practices, where 'religious' practices were considered to be those of utmost importance to the religion, and 'secular' activities were defined as practices associated with the religion but do not really constitute an essential part of it, such as economic, financial, and political activities, and thus, only 'religious practices’ were considered to be essential and integral and could be available.

Morality in the Constitution: Constitutional morality provides a guiding concept for carrying out the task of government. It establishes standards for institutions to follow in order to exist, as well as an expectation of behavior that is consistent with the Constitution's spirit as well as its content.

**Karnataka High Court Judgment**

In *SMT RESHAM AND ANOTHER VS. STATE OF KARNATAKA AND OTHERS[[4]](#footnote-4)*, the High Court's decision dated March 15, 2022, to uphold the hijab prohibition is based on three fundamental reasons. The first is that, under Islam, wearing the hijab is not a "essential religious practice," and thus is not immune from state regulation; the second is that, to the extent that wearing the hijab is an aspect of freedom of expression or the right to privacy, the ban is a reasonable restriction on the exercise of those rights; and the third is that, because the Government Order under challenge is facially neutral and non-sectarian (i.e., it does not discriminate based on religion), there is no unconstitutional discrimination against Muslim women students.

Court has given the verdict considering these 3 constitutional grounds. That the first ground, being wearing of Hijab is not an essential religious practice in Islam, secondly that the freedom of expression and privacy is not violated and the ban is a reasonable restriction upon the same and finally that the government order under the challenge is neutral and non-sectarian and thus there is no discrimination against the Muslim women students.

The high court of Karnataka relied on commentary of Holy Quran text that was translated by Abdulla Yusuf Ali says that “There is sufficient intrinsic material within the scripture itself to support the view that wearing hijab has been only recommendatory, if at all it is. What is not religiously made obligatory therefore cannot be made a quintessential aspect of the religion through public agitations or by the passionate arguments.”

**Indian Young Lawyers Association Vs. State Of Kerala*[[5]](#footnote-5)***

The case was filed in 2006 by Indian Young Lawyers Association in the matter of “Entry of Women in Sabarimala Temple” the court said that-

Not every practice associated with the religion is essential practice to such religion. And such practice should be followed from time immemorial.

Foundation of practice must precede the religion itself or should be co-founded at the origin of the religion.

Such practice forms the cornerstone of religion itself.

Such practice must be binding in nature of the religion itself and it must be compelling.

**Acharya Jagdishwaranand Avadhuta, Etc. V Commisioner of Police, Calcutta & Anr.[[6]](#footnote-6)**

Essential Practices are not only rituals and doctrine. Trust will be included in essential religious practices and all things that are written religious scriptures also included. And whatever ritual done by person to fulfill things written in religious scriptures are essential religious practices.

**Seshammal Case 1972[[7]](#footnote-7)**

Religious practices in pursuance of the religion are congruent to the faith in the tenets of that religion. Although such religious practice in question must be proved to have been practiced and followed since time immemorial, so as it forms a basic tenet of the faith of the Individual.

**Supreme Court’s Split Verdict In Hijab Case**

On October 13, 2022, a two-judge Supreme Court bench issued a split decision in the Karnataka Hijab Ban petition. In agreement with the Karnataka High Court, Justice Hemant Gupta upheld the Hijab Ban. Justice Dhulia, on the other hand, overturned the High Court's verdict.

Justice Gupta found that the Karnataka government was perfectly within its rights to prohibit the wearing of the hijab in educational institutions. He remarked that the State government's policy promoted intercommunal harmony. Allowing kids to wear the Hijab in a secular setting will foster emotions of inequality among students.

During the pronouncement of the judgment, Justice Dhulia stated that his top priority was the education of girls. It's up to you to decide. He stated, "nothing more, nothing less." He noted in his Judgment that the Rights to Equality and Freedom of Speech ought to have been the primary topics of the hearings.

“The High Court took a wrong path. It is ultimately a matter of choice and Article 19(1)(a) and 25(1). It is a matter of choice, nothing more and nothing less” Justice Sudhanshu Dhulia said.[[8]](#footnote-8)

"The main thrust of my judgment is that this entire concept of essential religious practices, in my opinon, was not essential to the disposal of the dispute. And the Court probably took a wrong path there. It was simply a question of Article 19(1)(a) and 25(1). It is ultimately a matter of choice. Nothing more, nothing less. I have also held the ratio laid down by the Supreme Court in the case of Bijoe Emmanuel[[9]](#footnote-9) squarely covers the issue. The thing which was uppermost in mind was the education of girl child. It is a common knowledge that a girl child primarily in rural and semi-rural areas has a lot of difficulties, they have to do daily chores before she goes to school. There are other difficulties as well. Are we making her life any better? That was also a question in my mind"- Justice Dhulia.[[10]](#footnote-10)

*80. Under our Constitutional scheme, wearing a hijab should be simply a matter of Choice. It may or may not be a matter of essential religious practice, but it still is, a matter of conscience, belief, and expression. If she wants to wear hijab, even inside her class room, she cannot be stopped, if it is worn as a matter of her choice, as it may be the only way her conservative family will permit her to go to school, and in those cases, her hijab is her ticket to education.[[11]](#footnote-11)*

*83. By asking the girls to take off their hijab before they enter the school gates, is first an invasion on their privacy, then it is an attack on their dignity, and then ultimately it is a denial to them of secular education. These are clearly violative of Article 19(1)(a), Article 21 and Article 25(1) of the Constitution of India.*[[12]](#footnote-12)

*84. Consequently, I allow all the appeals as well as the Writ Petitions, but only to the extent as ordered below:*

*a) The order of the Karnataka High Court dated March 15, 2022, is hereby set aside;*

*b) The G.O. dated February 5, 2022 is hereby quashed and,*

*c) There shall be no restriction on the wearing of hijab anywhere in schools and colleges in Karnataka.[[13]](#footnote-13)*

**CRITICAL ANALYSIS**

**And say to the believing women**

**That they should lowerTheir gaze and guardTheir modesty; and theyShould not display theirBeauty and ornaments exceptWhat (must ordinarily) appearThereof; that they shouldDraw their veils overTheir bosoms and not displayTheir beauty…**

 **~Sura xxiv (58-64) (Nur)*[[14]](#footnote-14)***

Hijab is not directly mentioned in Quran although it is indirectly mentioned in Quran. As we see in *Sura XXIV Nur* it is written that they should lowertheir gaze and guardtheir modesty; and they *s*hould not display theirbeauty and ornaments. The word khimar is mentioned in Quran in 24:31 which means a head covering or veil worn in public by women, mainly to cover their head, neck, and shoulders.

*O Prophet, tell your wives and your daughters and the women of the believers to bring down over themselves [part] of their outer garment. That is more suitable that they will be known and not be abused. And ever is Allāh Forgiving and Merciful.*

*~Surah al-ahzab 59[[15]](#footnote-15)*

After analyzing the overall judgment of *SMT RESHAM AND ANOTHER VS. STATE OF KARNATAKA AND OTHERS* with respect to Quran, secularism, constitutionality, essential religious practices and other judgment cited in hijab verdict.

As the dress & attire are a part of speech & expression; right to wear hijab is a matter of privacy of the citizens and that institutions cannot compel them to remove the same.

One’s personal appearance or choice of dressing is a protected zone within the ‘freedom of expression’ vide *NATIONAL LEGAL SERVICES AUTHORITY vs. UNION OF*

*INDIA[[16]](#footnote-16)*; what one wears and how one dresses is a matter of individual choice protected

Under ‘privacy jurisprudence’ vide *K.S PUTTASWAMY vs. UNION OF INDIA*.[[17]](#footnote-17)

The government order and the action of the schools to the extent that they do not permit the students to wear hijab in the institutions are repugnant to these fundamental rights constitutionally availing under articles 19(1)(a) & 21.

Islam has 5 pillars; one of them is “*shahadah*” which means the muslim declaration of belief in the oneness of Allahu ta’ala and acceptance of Muhammad as God’s Prophet. In Quran veiling is given and Quran is given by Prophet Muhammad and directly it means that women should follow rituals of hijab.

Proscribing hijabin the educational institutions apart from offending women’s autonomy is violative of Article 14 inasmuch as the same amounts to ‘gender–based’ discrimination which Article 15 does not permit. It also violates right to education since entry of students with hijab to the institution is interdicted.

In India the literacy rate of girls is already less than males, if the hijab is banned, then the parents of muslim girls will not send them to the school and other institutions without hijab, which will be a violation of their right to education under article 21 and their literacy rate will be further reduced. According to the 2011 census, the literacy rate for Muslims, who comprise 15.4% of India's population, was a little over 57%. Additionally, the [female literacy rate](https://thewire.in/education/census-literacy-religion) was only about 52% — one of the lowest in the country.

The unfortunate fallout of the hijab restriction would be that we would have denied education to a girl child. A girl child for whom it is still not easy to reach her school gate. This case here, therefore, has also to be seen in the perspective of the challenges already faced by a girl child in reaching her school. The question this Court would put before itself is also whether we are making the life of a girl child any better by denying her education merely because she wears a hijab![[18]](#footnote-18)

The concept is that ban hijab or promote education. Experts noted that the verdict comes at a time when the country’s majoritarian forces are turning increasingly hostile toward minorities and people from marginalized backgrounds, and a move to ban the hijab from educational institutes will undo years of progress on the issue.[[19]](#footnote-19)

In ***NALSA v Union of India****[[20]](#footnote-20)* 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.This 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.

In my opinion, the judgment is erroneous and should be overturned on appeal. It is incorrect for the following reasons: first, it incorrectly assumes that the rights to freedom of expression and privacy are diminished, or derivative, in this case; second, it misapplies the reasonable accommodation test, failing to demonstrate how allowing the hijab as a uniform accessory is incompatible with the educational goal; and third, it fails to consider that the ban amounts to indirect discrimination against Muslim women.

This results in an overarching structure of thinking in which the sanctity of the uniform is prioritized over both educational purposes and constitutional rights.

The country’s 200 million Muslim minority community fear the ban on hijab violates their religious freedom guaranteed under India’s constitution. The US ambassador-at-large for International Religious Freedom on Friday said the hijab ban would stigmatize and marginalize women and girls.[[21]](#footnote-21)

The visuals of Muslim girls removing their hijab outside their schools created a furore, with public calling it “humiliation”

**Conclusion**

The current issue does not only deal with the right to freedom of religion but it opens up to the maintenance of religious standards in institutions and further on to the aspect of secularism practiced. Hijab is more than just a piece of cloth that covers one's head; it also expresses one's mind. Hijab isn't just about covering one's head; living a simple life is also important in meeting the hijab's requirements. The essential feature of the hijab is modesty. Many claim that the hijab creates a barrier between men and women, allowing them to avoid premarital or illicit relationships, which are forbidden in Islam. The hijab is necessary for women to wear because it maintains society pure in many ways. Hijab ensures a woman's respect, dignity, and safety. The Islamic hijab's long-standing culture strives to instill modesty and draw as little attention to oneself as possible.

Muslim girls should be given a common piece of clothing to wear in schools and other institutions so, that the common uniform or dress code is observed in accordance with government and college standards and the fundamental rights of girls are not infringed.

An increasing number of Muslim women are fusing the hijab's essence with modern culture in a unique way. They take inspiration from modern culture and adapt it to ensure that it covers and adheres to Islamic rules.

Schools and colleges have been closed for nearly two years. At a time when schools and colleges need to focus on bringing children back to classrooms and helping them overcome the learning deficits that are likely to have accumulated, the diversion created through the hijab controversy is counterproductive for all students, most for the students who were already burdened by the learning gaps.

“Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance; let us not dilute it.”

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2. Article 51A(f) of the Constitution of India [↑](#footnote-ref-2)
3. https://indiankanoon.org/doc/1430396/ [↑](#footnote-ref-3)
4. https://int.nyt.com/data/documenttools/Karnataka%20High%20Court%20Statement/dc55d690afe7a408/full.pdf

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5. https://indiankanoon.org/doc/163639357/ [↑](#footnote-ref-5)
6. https://indiankanoon.org/doc/798012/ [↑](#footnote-ref-6)
7. https://indiankanoon.org/doc/641343/ [↑](#footnote-ref-7)
8. https://www.livelaw.in/top-stories/hijab-ban-supreme-court-split-verdict-karnataka-religion-fundamental-right-article-25-211510 [↑](#footnote-ref-8)
9. 1987 AIR 748, 1986 SCR (3) 518 [↑](#footnote-ref-9)
10. https://www.livelaw.in/top-stories/hijab-ban-supreme-court-split-verdict-karnataka-religion-fundamental-right-article-25-211510 [↑](#footnote-ref-10)
11. C.A. No.-007095-007095 / 2022 [↑](#footnote-ref-11)
12. C.A. No.-007095-007095 / 2022 [↑](#footnote-ref-12)
13. C.A. No.-007095-007095 / 2022 [↑](#footnote-ref-13)
14. The Glorious Quran [↑](#footnote-ref-14)
15. The Glorious Quran [↑](#footnote-ref-15)
16. https://indiankanoon.org/doc/193543132/ [↑](#footnote-ref-16)
17. https://indiankanoon.org/doc/127517806/ [↑](#footnote-ref-17)
18. C.A. No.-007095-007095 / 2022 [↑](#footnote-ref-18)
19. https://www.devex.com/news/in-india-hijab-ban-threatens-access-to-education-for-muslim-girls-103114 [↑](#footnote-ref-19)
20. https://main.sci.gov.in/jonew/judis/41411.pdf [↑](#footnote-ref-20)
21. https://www.aljazeera.com/news/2022/2/15/what-lies-beneath-the-indias-hijab-ban-row [↑](#footnote-ref-21)