

ISSN :2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 6

[www.ijlra.com](http://www.ijlra.com)

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# **Hijab: A Fundamental Right Or Choice?**

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## **Abstract**

In recent years, the wearing of the female Islamic dress (generally referred to as the hijab), or any feature of this dress such as the headscarf (khimar), face-veil (niqab) and the head-to-toe all enveloping garment (jilbab) has raised complex human rights issues particularly in the context of women's rights to freedom of religion and its manifestation, equality and nondiscrimination, education and work. This article focuses on the status of the hijab in Islam and selected recent cases concerning the wearing of the Islamic dress in schools. On the basis of these, two conclusions are made. Firstly, to prevent a person from making a choice to wear religious clothing (like the hijab) in public or private schools or institutions, in the absence of justification compatible with human rights law, may impair the individual's freedom to have or adopt a religion. Secondly, the general exclusion of women from schools or work on account of the Islamic dress might lead to further discrimination against girls and women in education and employment. A human rights perspective to the Islamic dress should involve as a starting point respecting choices of individual Muslim women to wear or not to wear the hijab.

**Keywords:** Hijab, Human Rights, Personal Liberty, Privacy,

## **Introduction**

Freedom of religion is part of the Indian Constitution. Nevertheless, it is the weakest fundamental right of all the available fundamental rights in Part III thereof. It is weakest for the simple reason that it is subject to all other fundamental rights; in addition to claw back clauses which are part of every fundamental right in the Indian Constitution. Thus, if there is conflict between Freedom of Religion under Article 25 and Equality in Article 14, it is the latter that will prevail. Similarly, in any conflict between Article 21 and Article 25, it is the former that prevails. Additionally, State has been empowered to regulate freedom of religion on the grounds of public order, health and morality. Thus, a state is well within its rights to regulate the freedom of religion on the grounds mentioned above.

Freedom of religion is not merely to have faith in religion but includes the right to practice or manifest it. The Supreme Court has laid down that what is guaranteed under freedom of religion is core of religious belief and anything which is not core has no protection under Article 25.

Now let us examine if hijab is core of Islamic faith and if the Karnataka government is violating the fundamental right of Muslim by prescribing a uniform for schools and colleges.

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.

### **History Of Hijab In Islam**

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, was used interchangeably with "being Muhammad's wife".

However, the veil was neither compulsory nor widely accepted by many generations after Mohammad but gained momentum after male scriptural and legal scholars began using their religious and political authority to regain the dominance they lost in society due to the Prophet's egalitarian reforms.

### **Meaning Of The Hijab And Burqa**

The fundamental question arises as to whether a banning of either or both the hijab and burqa interferes with the person's right to freedom of religion, and their right to manifest that religion in practice. It is necessary to refer to religious documents as well as views as to the symbolism of such dress in order to answer this question. An important source of information in answering this question are the relevant provisions of the Koran (Qur'an) itself. Typically, the following passage is

quoted: “And say to the believing women that they should lower their gaze and guard, their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband’s fathers, their sons, their brothers or their brother’s sons, or their women.”<sup>1</sup>

As with many issues in religion, the above passage has been interpreted in different ways. A specific challenge with Islam is that, as Baker notes, there is no central authority figure, such that followers adhere to different forms and interpretations of Islamic tenets.<sup>2</sup> Opinions differ as what ‘guarding their modesty’ might mean; some interpret this strictly to require the full body garment (burqa) be worn; others see the headscarf as being sufficient; others argue that the woman merely cannot wear clothing showing the outline of her bosom.<sup>3</sup> Others say that the headscarf is a cultural tradition that has nothing to do with Islam, and the hijab referred to in the Qur’an is a curtain Muhammad used to separate his wives from male visitors, and is not a piece of clothing at all.<sup>4</sup>

There have been other suggestions as to the significance of the hijab or burqa that are based around culture rather than religion per se. Tiefenbrun summarises these as including:

- (a) It is a positive symbol designating the cultural and religious source of protection, respect and virtue;
- (b) It is a positive sign signifying Muslim identity, which might (arguably) be seen as opposition to Western civilisation;
- (c) It is a positive sign allowing Muslim women to freely participate in public life, preventing women from ‘tempting men and corrupting morality’<sup>5</sup>;
- (d) It is a negative symbol of Islam’s power over women<sup>6</sup>; for instance, Badinter claims the veil ‘is the symbol of the oppression of a sex ... putting a veil on the head, this is an act of submission. It burdens a woman’s whole life’.<sup>7</sup>

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<sup>1</sup> Qur’an 24: 30-31, 24: 60, 33: 59 and 33: 53; Abdullah Yusuf Ali The Qur’an Text, Translation and Commentary (2001) p904-905.

<sup>2</sup> Christina Baker ‘French Headscarves and the U.S Constitution: Parents, Children and Free Exercise of Religion’ (2008) 13 *Cardozo Journal of Law and Gender* 341, 359.

<sup>3</sup> Mukul Saxena ‘The French Headscarf Law and the Right to Manifest Religious Belief’ (2007) 84 *University of Detroit Mercy Law Review* 765, 779-780; Susan Tiefenbrun ‘The Semiotics of Women’s Human Rights in Iran’ (2008) 23 *Connecticut Journal of International Law* 1, 25; Jeremy Gunn ‘Religious Freedom and Laicite: A Comparison of the United States and France’ (2004) *Brigham Young University Law Review* 419, 471; Robert Kahn ‘The Headscarf as Threat: A Comparison of German and US Legal Discourses’ (2007) 40 *Vanderbilt Journal of Transnational Law* 417, 438.

<sup>4</sup> T Jeremy Gunn ‘Religious Freedom and Laicite: A Comparison of the United States and France’ (2004) *Brigham Young University Law Review* 419, 471-472

<sup>5</sup> Aliah Abdo ‘The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf’ (2008) 5 *Hastings Race and Poverty Law Journal* 441, 441, 449; Mark Levine ‘The Modern Crusade: An Investigation of the International Conflict Between Church and State’ (2009) 40 *California Western International Law Journal* 33, 41. Susan Tiefenbrun, ‘The Semiotics of Women’s Human Rights in Iran’ (2008) 23 *Connecticut Journal of International Law* 1, 19.

<sup>6</sup> Susan Tiefenbrun ‘The Semiotics of Women’s Human Rights in Iran’ (2008) 23 *Connecticut Journal of International Law* 1, 22-23; Stefanie Walterick ‘The Prohibition of Muslim Headscarves from French Public Schools and

Some studies based on interviews with Muslim women suggest that while some Muslim women adopt the veil to comply with family values and expectations, it is becoming more common that women choose to wear the headscarf themselves, often without pressure and often against their parents' wishes. It is sometimes argued by Muslim women that the veiling forces males to deal with them on a mental level as equals, rather than sexual objects.<sup>8</sup> Baroness Hale engages with the complex symbolism of the wearing of religious dress such as the hijab or burqa in her judgment in *R v Headteacher and Governors of Denbigh High School*.<sup>9</sup> As Choudhury summarises it, 'Islamic scholars and feminists continue to debate whether hijab is compulsory and, if so, what practices of dress constitute valid observance.'<sup>10</sup>

Given this range of views, it would be difficult for a court to determine emphatically that the wearing of the hijab or burqa either was, or was not, a manifestation of a religious practice. The courts have sometimes expressed their reluctance to judge the 'validity' of an asserted religious belief, acknowledging that religious belief is intensely personal: "Emphatically, it is not for the court to embark upon an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant found his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual ... religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising."<sup>11</sup>

## **The Hijab As A Non-Oppressive Symbol**

Before turning to the relevant law and state prohibitions on the hijab, it is important to understand why some Muslim women wear the hijab. To say that women who wear the hijab only do so because they are forced to by religious leaders and relatives is an oversimplification and a

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Controversies Surrounding the Hijab in the Western World' (2006) 20 Temple International and Comparative Law Journal 251, 255.

<sup>7</sup> Elisabeth Badinter, Interview with L Joffin *The Nouvel Observateur* (1989) p7-11; Nilufer Gole 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70 *Social Research* 809, 817-818.

<sup>8</sup> Adrien Wong and Monica Smith 'Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf Ban' (2006) 39 *University of California Davis Law Review* 743, 761-763. Others note that in other cultures such as the Berber-speaking Tuareg of West Africa men veil, and masks are common in other cultures, which has not attracted the same controversy as that of a woman veiling: John Borneman 'Veiling and Women's Intelligibility' (2009) 30 *Cardozo Law Review* 2745, 2748-2749.

<sup>9</sup> [2006] UKHL 15, [94], quoting Yasmin Alibhai-Brown that 'what critics of Islam fail to understand is that when they see a young woman in a hijab she may have chosen the garment as a mark of her defiant political identity and also as a way of regaining control over her body'.

<sup>10</sup> Nusrat Choudhury 'From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls' (2007) 16 *Columbia Journal of Gender and Law* 199, 218.

<sup>11</sup> *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, [22-23] (Lord Nicholls); *Employment Division, Department of Human Resources of Oregon et al v Smith et al* 494 US 872, 887 (1990); *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27 (para 52); *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R 256, (para 35); *Manoussakis v Greece* (1997) 23 *European Human Rights Reports* 387, 45; cf early cases, where the Court appeared judgmental of the religious views of others whose opinions the judges presumably did not share: *Krygger v Williams* (1912) 15 CLR 366, 370-372; *Mormon Church v United States* (1889) 136 US 1, 49.

fundamental falsehood.<sup>12</sup> The reasons why women wear the hijab vary widely. While it is true that political and religious leaders in Saudi Arabia and Iran, for example, require women to wear veils in public<sup>13</sup>, which many view as a form of female oppression<sup>14</sup>, women in other parts of the world are not coerced by similar mandates. There are three popular uses of the hijab unrelated to oppressive symbolism, including the hijab as a sales mechanism, the hijab as a community identifier and the hijab as a personal identifier.

Many who live in the West and who do not wear a veil only view the hijab within the first context. Outside of news media and popular culture representations of the hijab, often focusing attention on the negative images of the hijab, non-veil wearers are exposed to representations of the veil in advertising. Typically the head covering is used as a symbol of exotic locations or authentic ethnic cuisine<sup>15</sup>, whether the portrayal is accurate or not.<sup>16</sup> These representations are stereotypes, but the advertisements also are not using the veil as a symbol of oppression. In different scenarios, the veil is presented to or by westerners as an element of fashion or beauty. Fashion shows and fashion products are a means of garnering business while simultaneously portraying the veil as an element of fashionable wear.<sup>17</sup>

In addition to the corporate use of the veil as a symbol, some people adopt the veil as a symbol of community identification and pride in a common heritage or culture. The veil is a symbol of solidarity and unification against perceived oppression or hate based on misconceptions of Muslims and Islam.<sup>18</sup> These expressions of community may be restricted to an individual or small group, or

<sup>12</sup> Mohja Kahf, *From Her Royal Body the Robe Was Removed: The Blessing of the Veil and the Trauma of Forced Unveilings in the Middle East*, in *The Veil: Women Writers On Its History, Lore, And Politics* 27 (Jennifer Heath ed., 2008); Pamela K. Taylor, *I Just Want to Be Me: Issues in Identity for One American Muslim Woman*, in *The Veil: Women Writers On Its History, Lore And Politics*, 27 (Jennifer Heath ed., 2008), at 120

<sup>13</sup> Headgear in Muslim Lands: Beyond the Burqa, *The Economist*, May 13, 2010, at 67, available at <http://www.economist.com/node/16113081>; Karima Bennouna, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 *Colum. J. Transnat'l L.* 367, 390 (2006).

<sup>14</sup> Olivier Guitta, *Why France is Right About the Burqa*, *Globalpost*, Feb. 26, 2010, <http://www.globalpost.com/dispatch/worldview/100225/france-burqa-banhuman-rights> (quoting Fadela Amara, the French Secretary of State for Urban Policies, who said "the burqa confiscates a woman's existence . . . I favor banning this coffin for women's basic liberties."); Maj. David J. Western, *Islamic Purse Strings: The Key to the Amelioration of Women's Legal Rights in the Middle East*, 61 *A.F. L. Rev.* 79, 140-41 (2008) (addressing the social problems created by forcing women to wear a hijab in Saudi Arabia).

<sup>15</sup> Faegheh Shirazi, *The Veil Unveiled: The Hijab In Modern Culture* 20 (2001).

<sup>16</sup> *Ibid.*

<sup>17</sup> Asra Q. Nomani, *Hijab Chic*, *Slate*, Oct. 27, 2005, <http://www.slate.com/id/2128906/> (describing a Nordstrom fashion show in Virginia that was directed to conservative Muslim women); Shaimaa Khalil, *Muslim Designers Mix the Hijab with Latest Fashions*, *BBC*, May 14, 2010, <http://www.bbc.co.uk/news/10105062>; *A Tribute to Arabian Beauty*, *Silvikrin* (2009), available at [http://adsoftheworld.com/media/print/silvikrin\\_veil](http://adsoftheworld.com/media/print/silvikrin_veil) (shampoo advertisement depicting a woman whose hair covers her face as a veil would; the advertisement was meant for Saudi Arabian audiences, but it was created by a British company).

<sup>18</sup> See Abdulaziz Sachedina, *Islam And The Challenge Of Human Rights* 159 (2009) (stating that young Muslim women "have embraced the headscarf as a protest against marginalized sources of native cultural institutions and consumerist homogenization of culture and lifestyle represented by Western ideas and values").

they may be part of a larger movement. For example, on some college campuses, student groups host fashion shows featuring the veil as part of a stylish and modern ensemble to “correct some

misconceptions” about the hijab.<sup>19</sup> After September 11, Qama, a New York teenager, began wearing a veil after her family and friends felt pressured to cease wearing clothing identifying them as Muslim.<sup>20</sup> Her decision was motivated by the “anti-Muslim sentiment.”<sup>21</sup> She used it as a means to assert her identity as part of a community and demonstrate that she was not bound by the opinions of her peers and neighbors.<sup>22</sup> There are numerous small-scale demonstrations of communal solidarity like Qama’s that go unnoticed, but the 2011 uprisings in the Middle East widely televised the use and non-use of the hijab as a symbol of choice and community. The media captured pictures of women protesting and cheering side by side with men, and, importantly, some wore various styles of the veil while others donned less conservative and western style fashions. These were pictures of a unified movement where women played a visible and vocal role, but the clothing of the female participants in the movement varied considerably. In other words, these were not the pictures of an oppressed community of women forced to veil or demanding a new government that might force them to veil.

Finally, a significant concern is that women are pressured by their families and social groups to wear a veil, and that this amounts to oppression. Familial pressure is a means of socialization and cultural engineering. Many families raise their children to share their belief system and encourage them to participate in religious observances or conform to religious practices. In some religions, this means children wear religious garments and symbols like the yarmulke, kirpan or a pendent of St. Joseph of Cupertino.<sup>23</sup> Muslims are no different. Although legal issues sometimes arise when parents impose their religious beliefs on their children<sup>24</sup>, parental socialization is not traditionally viewed as oppressive or improper.<sup>25</sup>

In many cases, young women freely choose to wear the veil. Many of these women are college educated, and others are successful professionals. They see the veil as part of their identity and feel uncomfortable without it, even though they may acknowledge that others consider it outdated. In

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<sup>19</sup> Univ. Coll. Dublin Islamic Soc’y, Hijab Fashion Show 2010, Wordpress (Feb. 13, 2010), <http://hijabfashionshow.wordpress.com/>.

<sup>20</sup> Marnia Lazreg, Questioning The Veil: Open Letters To Muslim Women 54-55 (2009).

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> St. Joseph of Cupertino is the patron saint of test-takers. The author presumes that St. Joseph pendants are quite popular with Catholic students on test days.

<sup>24</sup> See Jennifer Stanfield, Faith Healing and Religious Treatment Exemptions to Child-Endangerment Laws: Should Parents be Allowed to Refuse Necessary Medical Treatment for Their Children Based On Their Religious Beliefs, 22 Hamline J. Pub. L. & Pol’y 45, 85 (2000) (discussing parental rights to deny their children healthcare based on religious beliefs); Janna C. Merrick, Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System, 29 Am. J. L. & Med. 269, 297 (2003) (arguing that U.S. courts cannot permit parents to deny their children medical care based on religious beliefs).

<sup>25</sup> See Bennoune, *supra* note 9, at 406-07 (suggesting school girls may need state protection from “coercive family members” who force their children to wear hijabs); Carolyn Evans, The ‘Islamic Scarf’ in the European Court of Human Rights, 7 Melb. J. Int’l L. 52, 65 (2006) (arguing that “most religious obligations are ‘imposed’ . . . and the Court does not normally refer to the obligations in such negative terms.”).

some cases, younger students choose to wear the veil, although their family members do not wear one. This indicates that not all children wear religious symbols because they are pressured to do so by their families, which supports the argument that the hijab can be a symbol of personal identity.

## Westernization Of Muslim Countries

Westernization started dominating Muslim countries between the 1960s and 1970s. However, in 1979, widespread demonstrations were carried out in Iran after the hijab law was brought in. The law decreed that the women in the country would have to wear scarves to leave their houses. While the law over hijab was passed in Iran, it was not the same for all Muslim countries.

The resurgence of hijab began in Egypt in the late-twentieth century as a means to reunite and rededicate to the Islamic faith. The movement was known as Sahwah and the female pioneers of the movement adopted the Islamic dress which was made up of an unfitted, full-sleeved, ankle length gown with a head cover that covers the chest and back.

The movement gained impetus and the practice became more widespread among Muslim women. They wore it publicly to announce their religious beliefs as well as reject western influences of dress and culture that were prevalent at the time.

Despite many criticisms of the practice of hijab being oppressive and detrimental to women's equality, many Muslim women view the way of dress to be a positive thing.

## Is Hijab Mentioned In Quran And Islamic Texts?

In the Quran a total times (Q 7:46; Q 19:16-17; Q 33:53; Q 41:5; Q 42:51). These passages are listed below for easy reference.

Q 7:46

(46) سورة الأعراف ( آية )

(46) وَبَيْنَهُمَا حِجَابٌ وَعَلَى الْأَعْرَافِ رِجَالٌ يَعْرِفُونَ كُلًّا بِسِيمَاهُمْ وَنَادَوْا أَصْحَابَ الْجَنَّةِ أَنْ سَلَامٌ عَلَيْكُمْ لَمْ يَدْخُلُوهَا وَهُمْ يَطْمَعُونَ

A barrier divides the two groups with men on its heights recognizing each group by their marks: they will call out to the people of the Garden, 'Peace be with you!'-they will not have entered, but they will be hoping, etc."Q 19:16-17

(17) سورة مريم ( آية ) 16 و

وَأذْكَرُ فِي الْكِتَابِ مَرْيَمَ إِذِ انْتَبَذَتْ مِنْ أَهْلِهَا مَكَانًا شَرْقِيًّا (16) فَاتَّخَذَتْ مِنْ دُونِهِمْ حِجَابًا فَأَرْسَلْنَا إِلَيْهَا رُوحَنَا فَتَمَثَّلَ لَهَا بَشَرًا سَوِيًّا (17)

Mentioned in the Quran the story of Mary. She withdrew from her family to a place to the east and secluded herself away. We sent Our Spirit to appear before her in the form of a perfected man.”Q 33:53

(53 سورة الأحزاب (آية

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَدْخُلُوا بُيُوتَ النَّبِيِّ إِلَّا أَنْ يُؤْذَنَ لَكُمْ إِلَى طَعَامٍ غَيْرٍ نَاظِرِينَ إِنَاهُ وَلَكِنْ إِذَا دُعِيتُمْ فَادْخُلُوا فَإِذَا طَعِمْتُمْ فَانْتَشِرُوا

وَلَا مُسْتَأْذِنِينَ لِحَدِيثٍ إِنَّ ذَلِكَ كَانَ يُؤْذِي النَّبِيَّ فَيَسْتَحْيِي مِنْكُمْ وَاللَّهُ لَا يَسْتَحْيِي مِنَ الْحَقِّ وَإِذَا سَأَلْتُمُوهُنَّ مَتَاعًا فَاسْأَلُوهُنَّ مِنْ وَرَاءِ حِجَابٍ ذَلِكُمْ أَطْهَرُ لِقُلُوبِكُمْ وَقُلُوبِهِنَّ وَمَا كَانَ لَكُمْ أَنْ تُؤْذُوا رَسُولَ اللَّهِ وَلَا أَنْ تُنْكَحُوا أَزْوَاجَهُ مِنْ بَعْدِهِ أَبَدًا إِنَّ ذَلِكَ كَانَ عِنْدَ اللَّهِ عَظِيمًا (53)

Believers, do not enter the Prophet’s apartments for a meal unless you are given permission to do so; do not linger until [a meal] is ready. When you are invited, go in; then when you have taken your meal, leave. Do not stay on and talk, for that would offend the Prophet, though he would shrink from asking you to leave. God does not shrink from the truth. When you ask his wives for something, do so from behind a screen: this is purer both for your hearts and for theirs.Q 41:5

(5 سورة فصلت (آية

(5) وَقَالُوا قُلُوبُنَا فِي أَكِنَّةٍ مِمَّا تَدْعُونَا إِلَيْهِ وَفِي آذَانِنَا وَقْرٌ وَمِنْ بَيْنِنَا وَبَيْنِكَ حِجَابٌ فَأَعْمَلْ إِنَّا عَامِلُونَ

They [the unbelievers] say “Our hearts are encased against [the faith] you call us to; our ears are heavy; there is a barrier between us and you. So you do whatever you want, and so shall we.”Q 42:51

(51 سورة الشورى (آية

(51) وَمَا كَانَ لِنَبِيٍّ أَنْ يَكَلِمَهُ اللَّهُ إِلَّا وَحْيًا أَوْ مِنْ وَرَاءِ حِجَابٍ أَوْ يُرْسِلَ رَسُولًا فَيُوحِيَ بِإِذْنِهِ مَا يَشَاءُ إِنَّهُ عَلِيمٌ حَكِيمٌ

It is not granted to any mortal that God should speak to him except through revelation or from behind a veil, or by sending a messenger to reveal by His command what He will: He is exalted and wise.

Chapter 24 known as an-Nur (the Light), in verse 30, Allah commands Prophet Muhammad as follows:

قُلْ لِلْمُؤْمِنِينَ يَعْضُوا مِنْ أَبْصَارِهِمْ وَيَحْفَظُوا فُرُوجَهُمْ ذَلِكَ أَزْكَى لَهُمْ

“Say to the believing men that: they should cast down their glances and guard their private parts (by being chaste). This is better for them.”

This is a command to Muslim men that they should not lustfully look at women (other than their own wives); and in order to prevent any possibility of temptation, they are required to cast their glances downwards. This is known as “hijab of the eyes”.

Then in the next verse, Allah commands the Prophet to address the women:

...قُلْ لِلْمُؤْمِنَاتِ يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ

“Say to the believing women that: they should cast down their glances and guard their private parts (by being chaste)...”

This is a similar command as given to the men in the previous verse regarding “hijab of the eyes”.

In Chapter 33 known as al-Ahzab, verse 59, Allah gives the following command to Prophet Muhammad:

...يَا أَيُّهَا النَّبِيُّ، قُلْ لَأَزْوَاجِكَ وَبَنَاتِكَ وَنِسَاءِ الْمُؤْمِنِينَ يُدْنِينَ عَلَيْهِنَّ مِنْ جَلَابِيبِهِنَّ

“O Prophet! Say to your wives, your daughters, and the women of the believers that: they should let down upon themselves their jalabib.”

So what is Jalabi? Jalabib جَلَابِيبُ is the plural of jilbab جِلْبَابٌ, which means a loose outer garment. See any Arabic dictionary like Lisanu 'l-'Arab, Majma'u 'l-Bahrayn or al-Munjid.

Al-Munjid, for instance, defines jilbab as “the shirt or a wide dress—القميص أو الثوب الواسع.” While al-Turayhi, in Majma'u 'l-Bahrayn, defines it as “a wide dress, wider than the scarf and shorter than a robe, that a woman puts upon her head and lets it down on her bosom.

This means that the Islamic dress code for women does not only consist of a scarf that covers the head, the neck and the bosom; it also includes the overall dress that should be long and loose.

So, for instance, the combination of a tight, short sweater with tight-fitting jeans with a scarf over the head does not fulfill the requirements of the Islamic dress code.

## Hijab Row

Recently, six students were banned from entering a college in Karnataka's Udupi district for wearing a hijab (a head covering worn in public by some Muslim women).

The issue throws up legal questions on reading the freedom of religion and whether the right to wear a hijab is constitutionally protected.

Article 25(1) of the Constitution guarantees the “freedom of conscience and the right freely to profess, practise 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.

The implications of this are:

Freedom of conscience: Inner freedom of an individual to mould 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 dissemination of one’s religious beliefs to others or exposition of the tenets of one’s religion.

## **Essential Religious Practises Test**

Over the years, the Supreme Court (SC) has evolved a practical test of sorts to determine what religious practises can be constitutionally protected and what can be ignored.

In 1954, the SC held in the Shirur Mutt case that the term “religion” will cover all rituals and practises “integral” to a religion. The test to determine what is integral is termed the “essential religious practises” test. The test, a judicial determination of religious practises, has often been criticised by legal experts as it pushes the court to delve into theological spaces. In criticism of the test, scholars agree that it is better for the court to prohibit religious practices for public order rather than determine what is so essential to a religion that it needs to be protected.

As the Karnataka High court tries to resolve the Hijab controversy raging in the state, the state government this week made a creative argument in the High court saying that while the Right to wear hijab is a fundamental right, it is not a protected religious right under of the constitution.<sup>26</sup> “Hijab is a freedom of expression and not religious freedom” said the state's advocate general. What the state government basically means is that wearing of hijab can either be a form of expression or a religious right. It cannot be both. Because under Article 19, there is an element of choice, whereas when a right is claimed under article 25 there is a concept of compulsion or a mandate. And if the right to wear hijab is sourced to article 25, it will be compulsory for Muslim women to wear a hijab.

Article 19 gives citizens freedom of choice, freedom of choice to wear a hijab or not to wear it. And once an element of choice is there it cannot be a mandate or compulsion as is being argued by

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<sup>26</sup> Ashok Bagriya, “Can an essential religious practice also be a choice for followers: HC to decide in Hijab case”, *News9Live*, 24 Feb 2022.

the petitioners in the case, when they say that wearing hijab is part of essential religious practice in Islam.

“If their argument is accepted, persons who do not want to wear hijab will have the right to not wear also. It would mean there is an element of option. Claiming Article 19(1)(a) right is destructive to Article 25. Article 25 right is for compulsory practice. When you assert Article

19(1)(a), it means choice. Art 25 has an element of compulsion as far as dress is concerned. The consequences of a declaration of a court in ERP is that every member of the community is bound to abide.”

In several instances, the court has applied the test to keep certain practises out.

In a 2004 ruling, the SC 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.

While these issues are largely understood to be community-based, there are instances in which the court has applied the test to individual freedoms as well. For example, in 2016, the SC upheld the discharge of a Muslim airman from the Indian Air Force for keeping a beard. Armed Force Regulations, 1964, prohibits the growth of hair by Armed Forces personnel, except for “personnel whose religion prohibits the cutting of hair or shaving of face”.

The court essentially held that keeping a beard was not an essential part of Islamic practices.



While this has been put to courts on several occasions, two set of rulings of the Kerala High Court, particularly on the right of Muslim women to dress according to the tenets of Islam, throw up conflicting answers.

In 2015, at least two petitions were filed before the Kerala High Court challenging the prescription of dress code for All India Pre-Medical Entrance which prescribed wearing “light clothes with half sleeves not having big buttons, brooch/badge, flower, etc. with Salwar/Trouser” and “slippers and not shoes”.

Admitting the argument of the Central Board of School Education (CBSE) that the rule was only to ensure that candidates would not use unfair methods by concealing objects within clothes, the Kerala HC directed the CBSE to put in place additional measures for checking students who “intend to wear a dress according to their religious custom, but contrary to the dress code”.

In *Amna Bint Basheer v Central Board of Secondary Education* (2016), the Kerala HC examined the issue more closely. The Court held that the practice of wearing a hijab constitutes an essential

religious practice but did not quash the CBSE rule. The court once again allowed for the “additional measures” and safeguards put in place in 2015.

However, on the issue of a uniform prescribed by a school, another Bench ruled differently in *Fathima Tasneem v State of Kerala* (2018).

A single Bench of the Kerala HC held that collective rights of an institution would be given primacy over individual rights of the petitioner.

## **Hijab Ban And Public Order**

The case was regarding the arguments on whether the state can justify the ban on the ground that it violates ‘public order’.

Public order is normally equated with public peace and safety. Public order is one of the three grounds on which the state can restrict freedom of religion. Article 25 of the Constitution guarantees to all persons the right to freedom and conscience and the right freely to profess, practise and propagate religion subject to public order, morality and health.

Public order is also one of the grounds to restrict free speech and other fundamental rights. According to State List (List 2) of the Seventh Schedule of the Constitution, the power to legislate on aspects of public order rests with the states. However, the courts have broadly interpreted it to mean something that affects the community at large and not a few individuals.

In *Ram Manohar Lohia vs State of Bihar* (1965), the Supreme Court held that in the case of ‘public order’, the community or the public at large have to be affected by a particular action.

The contravention of law (to do something that is forbidden by the law or rule ) always affects order but before it can be said to affect public order, it must affect the community or the public at large.

One has to imagine three concentric circles, the largest representing ‘law and order’, the next representing ‘public order’ and the smallest representing ‘security of State’.

## **How Does It Relate To The Hijab Ban?**

According to the government order issued on February 5 under the Karnataka Education Act, 1983, “public order” is one of the reasons for not allowing students to wear a headscarf in educational institutions along with “unity” and “integrity.”

Previously, several courts have given orders on prescription of dress code for minorities in public institutions.

Petitioners Arguments: The petitioners have argued that public order is not every breach of law and order. Public order is an aggravated form of disturbance that is much higher than a law and order issue. The petitioners have asked the state to show how the mere wearing of a hijab by students could constitute a public order issue.

Karnataka Government' Stand: Karnataka's Advocate General has argued that the government order makes no mention of "public order" and that the petitioner's reading of the order could be an error in translation.

The order, in Kannada, uses the words "sarvajanika suvyavasthe".

### **Current status**

The court is considering the issue whether the wearing of head scarf comes within fundamental right under Article 25. One more question which may require consideration is whether the wearing of a head scarf is part of essential religious practice.

Interim order passed by Karnataka HC: The court said that till the matter is pending consideration before the Court, these students and all the stakeholders, shall not insist on wearing religious garments, maybe a head dress or saffron shawl.

### **The Fate Of Bans On Religious Dress In Other Jurisdictions**

With its melting pot of different cultures, religions and complex history, it is not surprising that these issues have received significant airing in Europe. In some parts of Europe veiling has not created difficulty. Major examples of controversy here have included the French banning of religious clothing in some contexts. In 2004, the Republic passed legislation stating that 'in public elementary schools, junior high schools and high schools, students are prohibited from wearing symbols or clothing through which they conspicuously evince a religious affiliation'. The legislation was, on its face, applicable to all religions; however the intention apparently was, and the practice has been, that the legislation has overwhelmingly been applied in relation to the wearing of the hijab, and to a lesser extent, the burqa.

France has a long and complex history concerning the relation between church and state, and a formal separation which occurred in a 1905 Act arguably completed the separation that commenced in 1789, with the Revolution creating the secular nature of the State, and the 1905 Act confirming the state's non-ability to regulate ecclesiastical matters. This principle of secularism, also known as laicite, has come to be associated very strongly with French identity and notions of equality, such that differences based on culture, ethnicity or religion, or things that symbolise such differences, may be seen as problematic.

Questions have arisen as to the extent to which the wearing of religious dress such as the hijab or

burqa infringes the French concept of laicite. In a 1989 opinion, the Conseil d'Etat, one of the three High Courts of France (the others being the Cour de Cassation and Conseil Constitutionnel) found that laicite and the wearing of religious dress could be compatible: "It results from the constitutional and legislative texts and from France's international engagements ... that the principle of laicite in public education, which is one of the elements of laicite of the state and of the neutrality of all of the public services, requires that education be dispensed with respect, on the one hand, for this neutrality by the programs and teachers, and on the other hand, for the students'

liberty of conscience ... This freedom on the students' part includes the right to express and to manifest their religious beliefs inside educational establishments (as long as such expression is done) with respect for pluralism and for the freedom of others, and without detracting from the (school's) educational activities (and) the content of (its) program."<sup>27</sup>

The Conseil concluded that wearing religious dress in a school 'is not in itself incompatible with the principle of laicite', but that it could not constitute an act of pressure, provocation, proselytism or propaganda' impinging upon the freedom of others.<sup>28</sup>

However, a very different approach was evident in a report by the Stasi Commission, set up to study the French concept of laicite. In its 2003 report, the Commission concluded that a tension existed between laicite and the wearing of religious dress or symbols, justifying a ban on wearing them in public institutions such as schools. Part of the argument that the Commission provided to justify this recommendation was that the wearing of religious dress or symbols often represented an involuntary act: "Pressures exert themselves on young girls, forcing them to wear religious symbols. The familial and social environment sometimes imposes on them a choice that is not theirs. The Republic cannot remain deaf to the cries of distress from these young women."<sup>29</sup>

However, critics of such findings counter that the reasons why an individual might wear religious dress or symbol are often complex and multiple. The Stasi Commission did not commission research to support its assertion that the wearing of religious dress was usually or often the product of pressure from others, and there is evidence to the contrary, as has been noted above.<sup>30</sup> Further, the ban implemented is far from complete; it only bans the wearing of such dress in a (public) school environment, but not in society more generally. If it really were about avoiding the oppression of people who might feel forced to wear religious dress or symbols, why is the ban confined to the wearing of such dress at (public) school? Why does it not apply to students in private schools? Or banned in any context?<sup>31</sup> Further, as Custos notes, the ban is confined to

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<sup>27</sup> Conseil d'Etat, 27/11/1989.

<sup>28</sup> Jean Rivero 'Laicite Scolaire et Signes d'Appartenance Religieuse (1990) 6 *Revue Francaise de Droit Administratif* 1, 6; Elisa Beller 'The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society' (2004) 39 *Texas International Law Journal* 581, 611.

<sup>29</sup> Stasi Commission Report, 4.2.2.1; cf Dina Alsowayel 'Commentary: The Elephant in the Room: A Commentary on Steven Guy's Analysis of the French Headscarf Ban' (2006) 42 *Houston Law Review* 103, speaking of the French ban, 'A young French Muslim girl who was previously shrouded in the hijab removes it to go to school. By removing her cover, she is suddenly more receptive to other ideas regarding matters of faith and can now freely choose among them. This reasoning indicates a woeful lack of understanding about the hijab and Islam' (107).

<sup>30</sup> The Report has been trenchantly criticised: see Nusrat Choudhury 'From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls' (2007) 16 *Columbia Journal of Gender and Law* 199; Dominique Custos 'Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004' (2006) 54 *American Journal of Comparative Law* 337; T Jeremy Gunn 'Religious Freedom and Laicite: A Comparison of the United States and France' (2004) *Brigham Young University Law Review* 419, 468-473; Mukul Saxena 'The French Headscarf Law and the Right to Manifest Religious Belief' (2007) 84 *University of Detroit Mercy Law Review* 765.

<sup>31</sup> The French Government moved to extend the ban in 2010 beyond the educational context.

expressions of religious affiliations through the wearing of dress or symbols; in contrast, oral or written expressions of religious affiliation are not prohibited or confined, whether at school or elsewhere.<sup>32</sup> It may have the effect of alienating Muslim youth, denying young women an education and discouraging integration within French society.<sup>33</sup>

The French Government may have been emboldened in its decision to ban the wearing of religious dress in a school decision by some decisions interpreting the right to freedom of religion in this context. Somewhat surprisingly, several European Court of Human Rights decisions have apparently condoned such restrictions on the right of an individual to manifest their religious views, despite the strong protection given to religion by the Convention.

In *Dahlab v Switzerland*<sup>34</sup>, the court considered a Swiss law restricting the wearing of religious clothing, in this case applied against a teacher who wished to wear an Islamic headscarf. The court found that although there was an interference with the right to freedom of religion espoused in Article 9(1) of the Convention, it was justified within the 'margin of appreciation' granted to member states. Here allowing a teacher to wear the scarf would violate the notion of institutional neutrality associated with public schools. It was relevant that the teacher taught students aged 4-8, where their vulnerability was high. (However, the court acknowledged there was no evidence that the teacher had attempted to indoctrinate her students in any way). Further, the court concluded that the wearing of the Islamic scarf 'is hard to square with the principle of gender equality' and 'it appeared difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'.<sup>35</sup>

In *Sahin v Turkey*, the court considered a ban on the wearing of an Islamic headscarf at a Turkish University.<sup>36</sup> Sahin was excluded from the University because she refused to comply with the ban. Her arguments to the European Court of Human Rights were unsuccessful. By a majority of 16-1, the Grand Chamber dismissed her case. They held that although there was an interference with Sahin's right to freedom of religion, the ban fell within the Turkish Government's 'margin of appreciation', necessary to combat the headscarf's threat to secularism and gender equality, important values in the Turkish Republic.<sup>37</sup> The Court reiterated the value of secularism, to protect equality and liberty. The majority found the headscarf was 'difficult to reconcile with the message of tolerance, respect for others ... and non-discrimination'. Referring to the *Dahlab* case, the majority noted that the court in that case had stressed the 'powerful external symbol' which the wearing of the headscarf represented, and questioned whether it might have a proselytising effect,

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<sup>32</sup> Dominique Custos 'Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004' (2006) 54 *American Journal of Comparative Law* 337, 373.

<sup>33</sup> Stefanie Walterick 'The Prohibition of Muslim Headscarves From French Public Schools and Controversies Surrounding the Hijab in the Western World' (2006) 20 *Temple International and Comparative Law Journal* 251, 252.

<sup>34</sup> (2001) *European Court of Human Rights* 1.

<sup>35</sup> The findings have been criticised: see for example Ingvill Thorson Plesner 'Legal Limitations to Freedom of Religion or Belief in School Education' (2005) 19 *Emory International Law Review* 557, 572-573: 'it is hardly a sign of tolerance to not accept symbols that are carried by women of a particular religious tradition'.

<sup>36</sup> *Refah Partisi (The Welfare Party) v Turkey* App Nos 41340/98, 41343/98 and 41344/98, 37 *European Human Rights Report* 1 (2003); Kathryn Boustead 'The French Headscarf Law Before the European Court of Human Rights' (2007) 16 *Journal of Transnational Law and Policy* 167.

<sup>37</sup> The notion that Turkey is secular is contestable: Benjamin Bleiberg 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Sahin v Turkey*' (2006) 91 *Cornell Law Review* 129, 153.

given it was worn as a religious precept that was difficult to reconcile with equality.<sup>38</sup> The majority claimed that In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied 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, including, as in the present case, the Islamic headscarf to be worn.<sup>39</sup>

The dissentient, Judge Tulkens, noted there was no evidence of Sahin's reasons for wearing the headscarf, or that she was seeking to make any particular statement, or achieve any particular purpose, by wearing it. There was no evidence that Sahin's wearing of the scarf had, or would likely, cause disruption on the campus. As the Judge noted: "Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant had fundamentalist views. She is a young adult woman and a university student and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant's personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism."<sup>40</sup>

The judge noted that Sahin in her evidence said she wore the headscarf of her own free will, giving the lie to the suggestion of the majority that allowing Sahin to wear it would be perpetuating inequality or intolerance. The judge asked what the connection was between the ban and sexual equality, accusing the majority judgment of paternalism.<sup>41</sup> As has been noted, if the government really were serious about promoting equality, and really did believe that a ban was necessary to promote or preserve it, the ban actually implemented was grossly inadequate to the task – the ban should have been applied to all of Turkish society rather than in schools and government.<sup>42</sup> Further, the effect of such laws may be, in effect, to deny Islamic women the right to education, a result actually exacerbating inequality rather than addressing it. According to one estimate, the result of the Sahin case has been that thousands of Turkish Islamic women have dropped out of Turkish Universities.<sup>43</sup>

At the national level, courts have considered similar issues, in the context of both convention rights and rights under more general discrimination/equality legislation. An example is *R v Headteacher and Governors*

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<sup>38</sup> The ban was subsequently lifted in 2008: Frances Raday 'Traditionalist Religious and Cultural Challengers – International and Constitutional Human Rights Responses' (2008) 41 *Israel Law Review* 596, 613.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Nusrat Choudhury 'From the Stasi Commission to the European Court of Human Rights: L'Affaire Du Foulard and the Challenge of Protecting the Rights of Muslim Girls' (2007) 16 *Columbia Journal of Gender and Law* 199; Jennifer Westerfield 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate' (2006) 54 *American Journal of Comparative Law* 637; Natan Lerner 'How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance' (2005) 13 *Willamette Journal of International Law and Dispute Resolution* 65; Cindy Skach (2006) 100 *American Journal of International Law* 186; Jennifer Westerfield 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate' (2006) 54 *American Journal of Comparative Law* 637.

<sup>42</sup> Benjamin Bleiberg 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Sahin v Turkey*' (2006) 91 *Cornell Law Review* 129, 162.

<sup>43</sup> *Ibid.*

of Denbigh High School.<sup>44</sup> The case involved a school with a very diverse ethnic student body; approximately 79% of its students were Muslim. A majority of the school governors were Muslim, as was the head teacher. The school had a uniform policy drawn up in consultation with the school community, including Muslim representatives. It provided for three uniform options, one of which was undoubtedly acceptable to Muslim requirements. Students were allowed to wear a headscarf. The school argued its uniform policy was designed to promote harmony and avoid students segregating along race or religious lines. A student turned up for school in a jilbab, a long coat-like garment. The student complained it was only this garment that satisfied her Muslim beliefs. The student was advised to go home and change dress, because what she was wearing was not consistent with the school's uniform policy. The student brought legal action asserting that her right to free exercise of religion in Article 9 had been unjustifiably infringed.

In the House of Lords, her claim was unanimously rejected. A majority found that the student's religious freedoms had not been infringed<sup>45</sup>; two judges (Lord Nicholls and Baroness Hale) concluded her freedoms had been infringed, but that such infringement was justified on the basis of the school's desire for harmony and collegiality within the school.<sup>46</sup> Although the decision leaves many issues resolved, at least some of the opinions suggest that the margin of appreciation granted to bodies to infringe religious freedoms may be similar in scope to the position reached by the European Court.

A student complaint was upheld in *The Queen on the Application of Watkins-Singh and the Governing Body of Aberdare Girls' High School and Rhondda Cynon Taf Unitary Authority*.<sup>47</sup> In this case, argued on the basis of indirect discrimination on the ground of race rather than the European Convention on Human Rights, a student complained about a school decision to refuse her permission to wear the Kara, a plain steel bangle, which was very significant to the student as a Sikh. The student stated that she wore the Kara out of a sense of duty, as well as an expression of her race and culture. An expert testified as to the importance of the bangle, reminding Sikhs of God's infinity and that followers were handcuffed to God. The school argued that its uniform policy prohibited the wearing of jewellery, and that it would be discriminatory to allow an exception to this particular student. The Court found that the school had unlawfully discriminated against the student on the ground of race and religion. Due to its significance to the later discussion of the Australian position, the basis of this finding is worthy of extended consideration.

The relevant Acts under consideration in this case were the Race Relations Act 1976 (UK) and Equality Act 2006 (UK). Section 1 of the Race Relations Act, as amended, set out the key definition of racial discrimination in terms of direct and indirect discrimination. Section 45(3) of the latter Act also deals with indirect discrimination, defined to include applying a provision or practice equally to those not of the complainant's religion or belief, such as to place those of the complainant's religion or belief at a disadvantage compared to some or all others (where there is no material difference in relevant circumstances), placing the complainant at a disadvantage compared with those not of their religion or belief, where there is no material difference in circumstances, and where the person committing the alleged discrimination cannot justify their actions by reference to matters other than the complainant's religion or belief.

In this case, the court found that the Sikhs comprised both a racial group and a religion. The

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<sup>44</sup> [2006] UKHL 15.

<sup>45</sup> This was largely on the basis that the complainant could choose to attend other schools which would accept her wearing the jilbab to school; the court concluded that the complainant had 'sought a confrontation' on the matter, and that Article 9 'does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life' (Lord Hoffmann, [50]); to like effect Lord Bingham [25] and Lord Scott [87-89].

<sup>46</sup> See also *R and Headteachers of Y School and the Governors of Y School* [2006] EWHC 298.

<sup>47</sup> [2008] EWHC 1865 (Admin).

relevant practice was the school's uniform policy and how it was implemented, specifically a ban on any jewellery apart from a pair of stud earrings, unless it was a compulsory requirement of the student's religion or culture. Comparing how the practice affected the complainant with those whose religious or racial beliefs were not compromised by the practice. In this context, the policy caused a particular disadvantage or detriment to the complainant, given the exceptional importance she (genuinely) placed on the wearing of the Kara. The school could not justify its policy. The court found that comparisons with cases in which bans on dress such as the niqab and jibab were not valid, because these forms of dress were much more visible, such that arguments about uniformity, coherence, communal spirit and whether students 'stood out' from others were not valid in the current context. As a result, the court concluded the defendants had indirectly

discriminated against the complainant on the ground of race contrary to the Race Relation Act, and on the ground of religion under the Equality Act 2006 (UK).

The United Kingdom Supreme Court considered these issues recently in *R v Governing Body of JFS and the Admissions Appeal Panel of JFS*. There a school policy gave preference in admission to those whose status as Jews was recognised by the Office of the Chief Rabbi (OCR). M was refused admission because he was not recognised as such by the OCR. His father was recognised as such but his mother was not. She was born in Italy and she had undergone a Jewish conversion process, but it was not recognised as effective by the OCR. As a result of this non-recognition, M was not recognised by the school as being Jewish. M argued that his exclusion from the school on this basis contravened s1 of the Race Relations Act 1976 (UK). The section prohibited both direct discrimination and indirect discrimination. A majority of the Court found the actions of the school to be discriminatory contrary to the Race Relations Act 1976 (UK). The majority was satisfied that the discrimination here was due to the person's racial or ethnic origins, such that it contravened the Act; for the majority it was artificial to distinguish here between ethnic status (to which the Race Relations Act applied) and religious status (to which the Race Relations Act did not apply). Some majority judgments considered the extent to which the motive or intention behind the behaviour argued to be discriminatory was relevant in considering whether there had been a breach of the Act. Members of the majority believed that such a factor was not relevant in assessing the validity of the challenged behaviour against the Race Relations Act. One of these judges, Lord Mance, considered the International Convention on the Elimination of all Kinds of Racial Discrimination to fortify this conclusion, referring to the Article 1(1) definition of racial discrimination as including race, national or ethnic origin discrimination committed with the purpose or effect of impairing the exercise of human rights. Directive 2000/43 EC, upon which the relevant definition of indirect discrimination in the (amended) RRA was based, was intended to give effect to this Convention. The inclusion of the words 'or effect' assisted in Lord Mance's conclusion that motivation was not relevant.

As a result, there is some clear overlap between the provisions of the European Convention on Human Rights through the Human Rights Act 1998 (UK), and legislation such as the Race Relations Act 1976 (UK) and Equality Act 2006 (UK). Further muddying the waters is that some of the provisions of the domestic legislation are as a result of European Commission directives. Article 9(2) of the Convention provides that the right to freedom of religion is not absolute and is subject to limits provided by (domestic) law; however it requires that these limits be necessary in a democratic society in the interests of public safety, public order, health, morals and the rights of others. Extensive exceptions to racial discrimination laws appear in the Race Relations Act 1976 (UK) and Equality Act 2006 (UK). Whether these extensive exceptions meet the 'margin of appreciation' allowed by the Convention in this area is a contentious matter.

The United States Supreme Court considered a religious ban in *Goldberg v Weinberger*, Secretary of Defense. At issue here was an air force regulation prohibiting employees from wearing headgear while indoors, as part of the uniform policy. An employee who was serving as a psychologist on an air force base was an Orthodox Jew and ordained rabbi, and wore a skullcap (yarmulke) while on duty indoors, and under his service cap whilst outdoors. He was informed by his commander that he was in breach of the air force uniform regulation, and that if he persisted, he could be the subject of a court martial. The employee claimed that the regulation was an infringement of his First Amendment right to free exercise of religion.

A majority of the Supreme Court (Burger CJ, White, Powell, Stevens and Rehnquist, Brennan Blackmun O'Connor and Marshall JJ dissenting) upheld the validity of the regulation. The majority suggested that the court should be more deferential in the context of military provisions than in respect of provisions with civilian application. The majority claimed that great deference should be given to the professional judgment of military authorities concerning the relative importance of a particular military interest. The military had a legitimate interest in ensuring 'instinctive obedience, unity, commitment and esprit de corps'. The regulation was not aimed at a particular religion. The dissenters said the regulation set up an absolute bar to fulfilment of a religious duty; dismissing the contention that the wearing of the skullcap would affect discipline within the forces as 'surpass(ing) belief'. It would not affect the government's military mission in the slightest.

Courts in the United States have been prepared to uphold legislation prohibiting public school teachers from wearing religious clothing in the classroom. In this context, courts have had to grapple with possible inconsistencies that could arise between the anti-establishment aspect of the First Amendment in relation to religion, and its free exercise. So a decision to suspend a Sikh teacher for wearing white dress and a turban to school was upheld; as was a decision to dismiss a Muslim teacher for wearing a headscarf in the classroom.

Some of these cases have been argued on the basis of alleged discrimination on the basis of religion contrary to Title VII of the Civil Rights Act 1964. For instance, in *Webb v City of Philadelphia*, the United States District Court found that the defendant was justified in insisting the plaintiff not wear hijab to work; this was due to the need for uniformity, cohesiveness, co-operation and esprits de corps among police. Disallowing the hijab here ensured religious neutrality among police and avoided divisiveness.

The most directly relevant case for present purposes in Canada is *Multani v Commission Scolaire Marguerite-Bourgeoys*. G was a student of the Sikh faith enrolled in a Canadian school. He believed that his religion required him to wear a kirpan at all times. This is a religious object resembling a dagger and required to be made of metal. The school's governing board claimed that wearing of the kirpan violated the school's code of conduct, which prohibited the carrying of weapons. It cited concerns with safety. It was suggested that G could wear a kirpan, as long as it was made of a non-metallic substance. G refused this; he subsequently brought legal action alleging a breach of the freedom of religion provisions of the Canadian Charter of Rights and Freedoms.

All members of the Supreme Court of Canada overturned a finding that the interference with religious freedom was justified by s1 of the Charter. The court was satisfied there was no doubt that the wearing of the kirpan had religious significance to G, and that it was a genuinely held belief. G also believed that the wearing of a kirpan made of wood or plastic would not meet his religious

obligations. The risk of G using his kirpan as a weapon was extremely low, and there had been no history of any violent incidents involving kirpans in Canadian schools. While the kirpan could in theory be used as a weapon, it was above all a religious symbol; the word deriving from 'kirpa', meaning mercy, kindness and honour. Although the school's concern with safety was laudable, they were required to provide a reasonable level of safety, not guarantee absolute safety. A ban on metallic kirpans was not a proportional response to the public interest in providing a safe environment in schools given the lack of any history of violence involving them, particularly when Canada had strongly embraced multicultural values.

Would a Commonwealth or State Law Banning the Hijab or Burqa Be Constitutionally Valid?

## **Uniform Civil Code**

A generic set of governing laws for every citizen without taking into consideration the religion. Article 44 of the Constitution says that there should be a Uniform Civil Code. According to this article, "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India". Since the Directive Principles are only guidelines, it is not mandatory to use them.

## **India Needs A Uniform Civil Code For The Following Reasons:**

A secular republic needs a common law for all citizens rather than differentiated rules based on religious practices.

Gender justice: The rights of women are usually limited under religious law, be it Hindu or Muslim. Many practices governed by religious tradition are at odds with the fundamental rights guaranteed in the Indian Constitution.

Courts have also often said in their judgements that the government should move towards a uniform civil code including the judgement in the Shah Bano case.

Indian laws do follow a uniform code in most civil matters – Indian Contract Act, Civil Procedure Code, Sale of Goods Act, Transfer of Property Act, Partnership Act, Evidence Act etc. States, however, have made hundreds of amendments and therefore in certain matters, there is diversity even under these secular civil laws.

## Way forward

Pluralism and inclusiveness are characterised by religious freedom. Its purpose is to promote social harmony and diversity. There is no one uniform code today which is mandated throughout the State. It would be a depressing response from a government that prioritises uniformity over diversity. Religious fanaticism, whether by the majority or the minority, has only damaged the secular mosaic.

Despite many criticisms of the practice of hijab being oppressive and detrimental to women's equality, many Muslim women view the way of dress to be a positive thing. The dress code was seen as a way to avoid harassment and unwanted sexual advances in public and works to desexualize women in the public sphere to allow them to enjoy equal rights of completely legal, economic, and political status. Clothing is a secular aspect of a religion, law can govern it. Clothing is not, and never, about religion. It is a matter of comfort and individual expression which is based in sexual/gender/dignity/health related aspects and only these alone. However, controversy erupted over the dress code and people from all backgrounds questioned the donning of hijab and what it stood in terms of women and their rights. People questioned whether in practice the hijab was truly a female choice or if women were being coerced or pressured into wearing it.

The dress code was seen as a way to avoid harassment and unwanted sexual advances in public and works to desexualize women in the public sphere to allow them to enjoy equal rights of completely legal, economic, and political status.

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