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# THE HIJAB CONTROVERSY: TWO SIDES OF A COIN

AUTHORED BY - PRANJAL VASHISHT

& TANYA ROHILLA

*"Religion in India must be made as free and as easy to access as God's air." – Swami Vivekanand*

## Abstract

*Women who follow the Islamic religion wear the Hijab (a headscarf) as a sign of discretion and modesty. It is a Muslim religious practice resulting from centuries of compulsory usage. Wearing a Hijab demonstrates one's Muslim identity and profound faith in God. The prime aim of this research paper is to analyze and explain the concept of the Hijab and the claim of wearing a Hijab in the global Muslim community. It also attempts to gain an understanding of the present controversies surrounding it by using additional research of theoretical texts since, nowadays, excluding Muslim women from educational institutions for wearing Hijabs is a famous example of discrimination in violation of the Constitution's equality rights. Women are becoming a frequent focus of religious restrictions all around the globe because of how they dress, and compared to the general population, Muslim women's engagement in schools has diminished more quickly between the ages of 15-20 due to the recent ban on wearing Hijabs. These restrictions frequently take the form of individual or collective societal harassment, but they can also take the shape of official government actions. Lastly, this research also looks at the Modern perception of Hijabs and how Muslim women's fundamental rights to practice their faith are violated.*

**Keywords:** Muslim Women, Hijab, Hijab Ban, Fundamental Rights, Constitution.

## Introduction

Hijab is an Arabic word that means “covering.” It is referred to by various names, the most common of which is a veil or a headscarf. Hijab (primarily square or rectangular fabric) is worn by Muslim women, enveloping the head and neck but leaving the face. Other than the Hijab, the most prominent kinds of head scarf for Muslim women are the Burqa, and Niqab, which were all heavily influenced by their religion. It refers to the seclusion of women in some Islamic societies, which is customarily practiced in maintaining standards of modesty. In the Qur'an, the concept of the Hijab has a double meaning: not only something that has been protected but also something that can hinder. Wearing Hijab is a personal choice of every woman. They choose to wear Hijab or other coverings for a variety of reasons. Some also believe that God has instructed women to wear it to fulfill his commandment for modesty. Across India, about two-thirds of Muslim women wear them. Muslim females are not the only ones who wear headscarves in public. Hindu, Sikh, Christian, and Buddhist women also cover their heads when leaving the house. These are all examples of patriarchal societies as women cover their heads out of fear of gender. In many cases, wearing the Hijab is also used to challenge Western Feminist narratives that portray women who wear the Hijab as being oppressed or silenced.<sup>1</sup>

Fig: Share of Muslim women who cover their heads outside their homes (%)

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<sup>1</sup> Afroza Akter Rita, *Assertion of Wearing Hijab in the Community: an Analysis*, ASRJETS 340, 340-341 (2017).

**Region**

	TOTAL	Burqa	Niqab	Hijab
North	85	61	15	7
East	92	59	17	7
West	90	67	15	4
South	83	59	1	23
Northeast	85	55	3	7

**Financial condition**

	TOTAL	Burqa	Niqab	Hijab
Recent financial hardship	87	57	17	8
No financial hardship	90	69	8	8

**Religiosity**

	TOTAL	Burqa	Niqab	Hijab
Religion very important	88	64	12	7
Religion less important	91	63	11	13

*Survey conducted among adults in November 17, 2019-March 23, 2020 period*

Source: [Religion in India: Tolerance and Segregation](#), Pew Research Center • [Get the data](#) • Created with [Datawrapper](#)

## Background of the Case

The 'Hijab ban' controversy in India began when local university authorities in Karnataka's Udupi district refused to admit Muslim female students wearing Hijabs. The girls, outraged by the university authorities' order to deny them admission simply because they wore Hijabs, approached the Hon'ble High Court of Karnataka to seek redress for alleged injuries under Articles 14<sup>2</sup>, 19<sup>3</sup>, and 25<sup>4</sup> of the Constitution. The girls' petition to the court argued that wearing the Hijab was an essentially religious act and that "banning the Hijab" violated their right to freedom of conscience and the right to practice

<sup>2</sup> INDIA CONST. art. 14.

<sup>3</sup> INDIA CONST. art. 19.

<sup>4</sup> INDIA CONST. art. 25.

and spread their religion. In this context, Mr. Araga Jnanendra, who is the Home Minister of Karnataka, conferred a statement that religion ought to be kept away from educational institutions because students studying ought to appear a saffron shawl neither nor wear a Hijab as well as he said that students shouldn't appear in school to abide their religion custom because an educational institution is a temple of knowledge and should come here to get an education.

This event sparked a nationwide debate about the Hijab controversy, which raised several questions. Like

- Is wearing religious symbols in public a violation of Indian secularism?
- Is wearing a hijab or scarf obligatory in Islam?
- Is it possible to deny the right to education only on the premise of unification?

## Are the Fundamental Rights of Muslim Women Being Violated by the Hijab Ban?

The current Hijab controversy was started by a ruling against wearing one issued by a pre-university institution in Udipi, Karnataka. Similar requests for the Hijab's abolition were made in several other districts' educational institutions. Muslim women's fundamental rights may be at risk because of this trend. An essential component of the Islamic religion is wearing the Hijab. This prohibition, thus, first and foremost, violates Article 25(1)<sup>5</sup> of the Constitution. This Article guarantees freedom to freely profess, practice, and propagate their faith.

When it comes to literacy and employment, women already face disadvantages. Additionally, the Covid-19 shutdown has left students with substantial learning gaps. In this situation, choosing between education and identity is unjust and violates Article 21A's<sup>6</sup> fundamental right to education. Additionally, the ruling in *Justice K.S. Puttaswamy v. UOI*<sup>7</sup> expressly affirms that decisions made in public, like religion or attire, are part of the fundamental right to privacy. Therefore, it violates both the fundamental right to freedom of expression under Article 19(1)<sup>8</sup> and the right to privacy under

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<sup>5</sup> INDIA CONST. art. 25, cl. 1.

<sup>6</sup> INDIA CONST. art. 21.

<sup>7</sup> Justice K.S. Puttaswamy v UOI, (2017) 10 S.C.C. 1.

<sup>8</sup> INDIA CONST. art. 19, cl. 1.

Article 21<sup>9</sup> to forbid the expression of one's beliefs or manner of clothing. In addition, the freedom to wear Sikh turbans and Christian crosses raises concerns about the right to equality under Article 14<sup>10</sup>.

## The Test of Essentiality: Is Hijab a Core Component of Islam?

The essentiality test, employed to assess the sincerity and nature of religion and belief freedom, has significant flaws. Our legal system cannot be considered a theological authority when determining whether a practice is "integral" to a faith. Prof. Faizan Mustafa, a well-known expert on religious liberty, has stated that the test "restricts individual freedom and gives the courts excessive discretion in questions of religion. It effectively raises the judiciary to the rank of the clergy."

Furthermore, the criteria need to be more inclusive and consider how fundamental and fundamentally important practice is to one's religion and conscience. Instead, using literature and traditions, it analyses the significance of the practice to the religion. Individual autonomy and liberty are not taken into consideration. This paradigm, which puts the person at the center of the conversation, directly opposes how rights should be seen. According to Charles Fried, "Individuals come first. Anyone who asserts the opposite is using metaphors. There are communities, nations, families, yet each is composed of unique people."

Three factors must be taken into consideration to determine whether wearing a Hijab is a mandatory practice:

### a) What Does the Term "Essential Practice" Mean?

A doctrine established by the Apex Court in 1954 by the Shirur Mutt decision is the focus of most legal and non-judicial conversations.<sup>11</sup> According to the Supreme Court, "all religious ceremonies and practices are protected under Article 25<sup>12</sup>, which guarantees freedom of religion and conscience." The Supreme Court of India gave a clear definition of it in the case of *Commissioner of Police v. Acharya Jagdishwaranand Avadhuta*<sup>13</sup>. As per the Hon'ble Court, the essentiality test is "a test for

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<sup>9</sup> INDIA CONST. art. 21.

<sup>10</sup> INDIA CONST. art. 14.

<sup>11</sup> The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, (1954) S.C.R. 1005.

<sup>12</sup> INDIA CONST. art. 25.

<sup>13</sup> Commissioner of Police v Acharya Jagdishwaranand Avadhuta, A.I.R. 1984 S.C. 51 (India).

deciding whether a part or practice is necessary for the religion – to figure out whether the concept of religion will change without that part or practice."

Based on this idea, wearing a Hijab should be considered an essential Islamic practice. Muslim women's culture has always included the Hijab. The Holy Qur'an (Verses 24.31 and 33.59) also discusses its significance in Islam.

### **b) What have the Court Decisions in the Past been on the Hijab Controversy?**

In *Amnah Bint Basheer and Anr. v. Central Board of Secondary Education (CBSE)*<sup>14</sup>, the Kerala High Court accepted the Hijab as a fundamental Islamic custom. The verdict was delivered in reaction to the CBSE's dress rule for the All-India Pre-Medical Tests—the clothing code aimed to stop the pervasive practice of exam cheating. However, because of these limitations, Muslim women were not permitted to wear the Hijab in examination rooms. In this ruling, the Hon'ble High Court acknowledged that for Muslim women, donning the Hijab is a significant custom that should be upheld.

### **c) What is the Hijab's Legal Status According to International Law?**

The "International Bill of Human Rights" contains the "International Covenant on Civil and Political Rights" (hereafter ICCPR). Regarding women's freedom to don the Hijab, two incredibly significant ICCPR provisions are relevant.

"First off, Article 2(1) of the ICCPR expressly calls state parties to respect and uphold the rights of all people without regard to their race, religion, nationality, or political affiliation." Secondly, Article 18(1) of the ICCPR also states that: freedom, either individually or in community...in public or private, to demonstrate his religion or belief in worship, practice, observance, and teaching."

The United States Supreme Court ruled in *Brown v. Board of Education*<sup>15</sup> that segregating Black and White children in public schools was unlawful. Nine African-American students arrived at 'Little Rock Central High School' in Arkansas, where they were welcomed by a furious White crowd and several troops that Arkansas Governor Mike Beebe had sent to prevent them from accessing the building.

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<sup>14</sup> *Amnah Bint Basheer and Anr. v Central Board of Secondary Education (CBSE)*, W.P. (C). No. 6813 of 2016 (B) (India).

<sup>15</sup> *Brown v Board of Education*, 347 U.S. 483 (1954).

Thus, it is self-evident under international law that any action or practice, such as donning a Hijab, that restricts these freedoms likewise breaches fundamental human rights.

## Hijab Ban: An Indirect and Intersectional Form of Discrimination

Noting that this is an instance of intersectional discrimination—a term coined by Kimberly Crenshaw—is equally important. The idea behind intersectional discrimination is that people are made up of various intersect identities rather than having just one identity. Muslim women are now marginalized since their identities as women and Muslims overlap. Discrimination solely based on these protected factors is prohibited under the Constitution. Recognizing the intersection of many identities and attributes is the "essential content of the anti-discrimination provision," the Supreme Court stated in *Navtej Singh Johar v. UOI*<sup>16</sup> in 2018.

Furthermore, it constitutes indirect discrimination for the government to prohibit clothes that obstructs "public order." In the case of *Lt. Col. Nitisha v. UOI*<sup>17</sup>, the Supreme Court acknowledged the idea as a part of our Constitution. Indirect discrimination occurs when a seemingly neutral action disproportionately negatively impacts a protected class.<sup>18</sup>

## Conclusion

Whether Muslim students should remove their Hijabs at the school gates was decided by a split verdict of the Supreme Court. A higher Bench would hear the matter again at this point. While the majority views the Hijab controversy as a battle for religious liberty, a deeper look reveals that it is a battle for education. It is common for Indians to wear religious garb in public areas, such as the Hijab or saffron scarf. The nation's integrity is threatened when diversity breeds division, and divisions breed fault lines. Therefore, the Indian court must address these significant constitutional conundrums before their polarizing effects extend to the election-bound states. It's high time this controversy is taken seriously since it is the root cause of communal riots in many country regions.

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<sup>16</sup> Navtej Singh Johar v UOI, W.P. (Crl.) No. 76 of 2016.

<sup>17</sup> Lt. Col. Nitisha v UOI, W.P. (C). No. 1109 OF 2020 (India).

<sup>18</sup> Silvasahu, *Indirect Discrimination*, LEGAL SERVICE INDIA, <https://www.legalserviceindia.com/legal/article-6743-indirect-discrimination.html>