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ISSUE OF IDENTITY VIS-À-VIS THE RIGHT TO EDUCATION: A CONSTITUTIONAL ANALYSIS OF THE HIJAB VERDICT

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Abstract

The controversy surrounding the hijab ban in educational institutions in Karnataka has foregrounded a critical constitutional conflict between individual identity, religious freedom, and the right to education in India's pluralistic democracy. This article undertakes a comprehensive constitutional analysis of the hijab verdict, examining its implications for Muslim women students through the lenses of Articles 14, 19, 21, and 25 of the Constitution of India. By critically engaging with the "essential religious practices" doctrine and its judicial evolution, the study interrogates whether the exclusion of the hijab from constitutional protection reflects a principled application of constitutional law or an erosion of substantive equality and personal autonomy. The article situates the hijab not merely as a religious symbol but as an expression of conscience, dignity, privacy, and access to education, particularly for women from marginalized communities. It closely analyses the Karnataka High Court judgment, the subsequent split verdict of the Supreme Court, and the contrasting judicial philosophies of discipline, secularism, and reasonable accommodation articulated therein. Drawing upon constitutional morality, comparative jurisprudence, and the lived realities of affected students, the article argues that the hijab ban disproportionately burdens Muslim women and undermines India's commitment to inclusive secularism. It concludes that the debate is less about religious symbolism and more about safeguarding educational access and identity within constitutional bounds, calling for authoritative clarification by a larger bench to restore doctrinal coherence and protect minority rights.

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INTRODUCTION

India is a nation characterized by its diverse cultures, all of which deserve respect. It's a matter of an individual's personal autonomy to determine their dress code based on their chosen mode of expression. However, the hijab ban controversy in India resulted in the closure of educational institutions in Karnataka, sparking heightened tensions among student groups. This controversy also disrupted public order in the state.

The Hon'ble Supreme Court, in the case of *Masud Alam v. Commissioner of Police*², rightly emphasized that India is a secular state, and Article 25 of the Constitution grants everyone the freedom to practice their religion. However, a clear distinction must be drawn between religious faith and belief on one hand and religious practices on the other. While the state protects religious faith and belief, if religious practices undermine public order, morality, or health, they must yield to the greater good of the people as a whole.

In India, individuals are free to choose their dress code, but in educational institutions where the state prescribes a dress code, allowing students to wear religious attire might lead to conflicts. Nevertheless, students maintain the freedom to wear any attire of their choice outside of educational institutions. When it comes to safeguarding the constitutional right to freely practice and propagate religion as guaranteed under Article 25 of the Constitution, decisions should be made on a case-by-case basis, considering the essentiality of such religious practices in accordance with the principles of that specific religion.

In the current hijab ban controversy, wearing the hijab is not considered an integral part of the Islamic religion, and therefore, protection under Article 25(1) cannot be extended to this practice.

The '*essential practices*' test was formulated in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Muttw*³, where the court stated that "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. The essential practice test clearly states that the practices integral to the faith are exempted from state intervention, in order to determine whether a particular act constitutes an essential religious function or not reliance needs to place

² MANU/WB/0002/1956.

³ MANU/SC/0136/1954.

on the doctrines and religious texts of that particular religion".

The Notion of Hijab

Hijab is worn by Muslim women and symbolizes modesty and privacy in Islam. Contemporary English dictionaries have narrowed the definition of "Hijab" to refer solely to the covering of the head and neck by Muslim women. However, Islamic scriptures offer a broader interpretation of the term. Nearly all major Islamic schools define "hijab" as encompassing the complete covering of everything except the face and hands.

The Quran, which provides guidance for all practicing Muslims, extensively discusses the concept of veiling and covering. Islamic jurisprudence recognizes two primary sources of Islamic law: firstly, the Quran itself, and secondly, the Sunnah or Hadiths, which are derived from the lifestyle and teachings of Prophet Mohammad. The Quran contains specific verses that prescribe a dress code for women who practice Islam. The practices of wearing hijab have been evolved and recognised with the development of Islamic jurisprudence and origin of hadiths. These opinions relating to the hijab gives rise to the paradox of "the hijab" being recognised as the essential religious practices under Islam.

The Hon'ble Apex Court in the case of *A.S Narayana Deeshitulu v. State of A.P.*⁴, summarily held that, "Essential or integral part of religion to be ascertained from the doctrine of that religion itself according to its tenets, historical backgrounds and change in evolved process and only integral or essential part of religion is protected." As per the various precedents of the Supreme Court from the year 1954 onwards, it has now become clear that the practices which are integral part of religion are given protection as per the constitutional scheme.

The Quran provides clear guidelines for the dress code of Muslim women, emphasizing the preservation of modesty and privacy. However, it's important to note that while the Quran outlines the dress code, it does not explicitly use the word "hijab." This has led to varying interpretations among Islamic scholars. Dr Asghar Ali Engineer⁵, a renowned Indian writer and social activist, expressed the view that the Quran does not mandate the hijab for women. He explained that the term "hijab" is not found in the Quran when referring to veiling the face of

⁴ MANU/SC/0455/1996.

⁵Dr Asghar Ali Engineer, "Hijab Controversy: Certain Essential Aspects", retrieved from <<https://www.countercurrents.org/engineer100810.htm>> visited on 1.10.2023 at 12:30 p.m.

an ordinary Muslim woman. Instead, it was initially meant for the Prophet's wives. The practice of wearing the hijab is considered advisory rather than obligatory, and with the changing times, practices can be adapted.

India boasts a rich heritage, celebrated for its traditions, unity, and vibrant culture globally. The concept of "positive secularism" is firmly rooted in India, where all religions enjoy equal respect and protection. The term "Secular" was incorporated into the Constitution via the 42nd Constitutional Amendment, and secularism has been recognized as a foundational principle of our Constitution, particularly following the *S.R. Bommai v. Union of India*⁶ case.

In India, every individual has the right to practice their religion as they choose, but actions considered derogatory and carried out under the guise of religion are not tolerated. This stance was reinforced in the *Shayara Bano v. Union of India*⁷ case, where the Supreme Court deemed the practice of Triple Talaq in Islam as unconstitutional.

In this context, Muslim women argue that wearing the hijab is an expression of their "freedom of conscience," a right that the State should not infringe upon. Article 25(1) of the Constitution guarantees equal rights to freedom of religion, while Article 25(2) allows the State to regulate religion for the purpose of promoting social welfare.

The fundamental aspect of the Right to Privacy, as explained in the *Puttaswamy*⁸ judgment, is its acknowledgment of diversity and the importance of safeguarding differences among individuals. In this current situation, the ban directly contravenes Article 21 by infringing upon the personal choices of the affected students in practicing their religion. When there is clear evidence of a consistent religious practice observed by a specific community, it becomes the responsibility of the State, through the law, to uphold this right of its members, as guaranteed by both Article 21 and Article 25.

In the case of *Bijoe Emmanuel*⁹, the Supreme Court acknowledged the right to remain silent as a negative fundamental right protected under Article 19 of the Constitution. In this instance, law-abiding students declined to sing the National Anthem during the school prayer and were

⁶ 1994 AIR 1918, 1994 SCC (3) 1.

⁷ AIR (2017) 9 SCC 1.

⁸ K.S. Puttaswamy and Anr. v. Union of India AIR (2017) 10 SCC 1.

⁹ *Bijoe Emmanuel & Ors v. State Of Kerala & Ors* 1987 AIR 748, 1986 SCR (3) 518.

subsequently expelled by the school authorities.

The court ruled that the students' act of respectfully standing was sufficient to indicate that their intention was not to show disrespect to the National Anthem song. Therefore, it could not be a valid reason to deny the petitioners' right to remain silent, as guaranteed under Article 19. The Supreme Court's reasoning in this case underscores the concept of "constitutional morality" and underscores the protection of individual rights in such crucial matters.

India is a nation celebrated for its diverse cultures, the controversy surrounding the hijab ban in India resulted in the closure of educational institutions in Karnataka, triggering protests among student groups. This ban also disrupted public order in the state. The hijab ban in the State deprived several Muslim girls of their constitutional right to education, expression, dignity and non-discrimination, said 'Closing the Gates to Education, Violations of Rights of Muslim Women Students in Karnataka,' a report released by the People's Union for Civil Liberties (PUCL) Karnataka¹⁰.

In conclusion, While the majority sees the Hijab debate as a war for religious freedom, a closer examination reveals it to be a fight for education. In reality, in India, wearing religious symbols such as Hijab or saffron shawls in public places is not unusual. When variety creates divisions, then divisions become fault lines, and the country's integrity is jeopardised. However, strong as Justice Dhulia's opinion is, it remains a split verdict. This split verdict will only prolong the students' wait for justice. An urgent intervention by a larger bench of the Supreme Court is the only way the ambiguity over the future of lakhs of Muslim women students can be adequately addressed.

GENESIS OF THE HIJAB VERDICT

The series of events which culminated into the Hijab verdict¹¹ pronounced by the Honourable Supreme Court of India on 13th October, 2022 started on December 31, 2021, when the Government Girls PU College in Udupi imposed an arbitrary restriction on female students wearing the hijab, and leading up to the split verdict by the Supreme Court on the legality of the hijab ban. The State of Karnataka witnessed a series of increasing limitations placed on the

¹⁰ "Closing the Gates to Education, Violations of Rights of Muslim Women Students in Karnataka," retrieved from < <http://puclkarnataka.org/?p=961> > visited on 22.09.2023 at 9:43 p.m.

¹¹ Aishat Shifa v. State of Karnataka AIR 2022 (SC) 842.

right to wear the hijab, thereby affecting the rights to education, dignity, and expression of Muslim female students. When students protested against the arbitrary hijab restriction at Kundapura Government PU College in December 2022, the Karnataka government issued a notification that essentially allowed for hijab restrictions in PU colleges, government schools, and private schools. Regarding institutions without a specific dress code, the government order stipulated that students' attire must align with principles of "equality and integrity" and should not disrupt "public order."

This Government Order (GO) was subsequently contested in the Karnataka High Court in the case of *Resham v. Karnataka*¹². On March 15, 2022, the Court ultimately upheld the constitutionality of this GO. Importantly, the court's decision did not include a directive to educational institutions to immediately implement a hijab ban. However, it was widely interpreted by politicians, bureaucrats, and the media as not only legitimizing the hijab ban but also mandating its immediate enforcement across the state. The Minister of Education, BC Nagesh, publicly stated that students wearing the hijab would be denied entry into examination halls. As a result, educational institutions throughout Karnataka began prohibiting the hijab, and educational authorities responsible for safeguarding the right to education implemented the ban during end-of-year exams.

The Karnataka High Court's decision in the case of *Resham v. State of Karnataka*¹³, which upheld the State government's order restricting Muslim women from wearing the Hijab or Headscarf within classrooms, raises significant concerns regarding the freedom of individual choice and autonomy for women. The petitioners took their case to court when a group of students from a government girls' PU college in Udupi were denied entry to the school while wearing headscarves. This denial occurred shortly after the State government issued an order mandating uniforms for educational institutions.

The specific government order applied to government, private, and pre-university educational institutions and granted schools and institutions the authority to establish school uniforms. However, the order did not explicitly include wearing the Hijab inside the classroom as part of the school uniform. This omission was seen as a violation of the petitioners' fundamental right to Freedom of Religion.

¹² *Resham v. State of Karnataka* (AIR 2022 LiveLaw (Kar) 75).

¹³ *Ibid.*

The primary argument put forth by the petitioners was that wearing the Hijab or headscarf constituted an "essential religious practice" in Islam, and the contested order infringed upon their fundamental right to "freedom of religion" as enshrined in Article 25 of the Indian Constitution. However, the Karnataka High Court upheld the government order by citing "public order" as a reasonable restriction under Article 25. Consequently, Muslim women were denied the right to wear the Hijab in educational institutions, with the court ruling that the Hijab was not considered an essential religious practice, ultimately rejecting the petitioners' argument.

The court's decision has faced criticism from citizens, with many seeing it as a significant constitutional error and some viewing it as a step toward marginalizing Muslims. In upholding the ban, the Court argued that the practice of wearing the Hijab could not be considered fundamental to Islam and relied heavily on the writings of Abdulla Yusuf Ali, an Indian jurist specializing in Islamic law.

Remarkably, the court overlooked that 'wearing the Hijab' is safeguarded as part of the right to freedom of conscience under Article 25, the right to privacy under Article 21, and the freedom of expression under Article 19(1)(a) of the Constitution of India. In light of these provisions, the author's paper has examined the practice of Muslim women wearing the Hijab, a right protected under freedom of conscience. The paper highlights that banning the Hijab in educational institutions would result in the denial of women's right to education. Additionally, the study illustrates that covering the head is a customary practice followed by the Muslim community, including Hindu women. Lastly, the paper delves into the rationale behind the High Court's judgment that the Hijab does not constitute an essential religious practice in Islam.

Once the fervour and controversy surrounding the hijab issue had subsided, it became evident that there were significant consequences stemming from the de facto policy of prohibiting the hijab. According to government data, a total of 1,010 Muslim women between the ages of 16 and 18 had discontinued their college education, citing reasons related to the hijab policy or other factors.

The concerns pertaining to the right to education for Muslim students found expression in Justice Dhulia's remarks in the Supreme Court's split verdict in the case of Aishat Shifa vs. The State of Karnataka. Justice Dhulia posed a crucial question to both the school administrations

and the state: What holds greater importance for them - the education of a girl child or the strict enforcement of a dress code? It has been brought to our attention by several senior counsel representing the petitioners that the regrettable consequence of enforcing the hijab ban in Karnataka's schools has been that some female students were unable to participate in their board examinations. Many others were compelled to seek transfers to other schools, likely madrasas, where the educational standards may not be equivalent. This predicament primarily affects young girls, who initially faced challenges merely to reach their school gates.

The issue of identity vis-à-vis the right to education

The conflict between education and dress code was a central concern in Justice Dhulia's perspective. He stressed the importance of striking a balance when making decisions that pertain to school discipline and the social and religious rights of minority communities. Justice Dhulia posed a fundamental question: What takes precedence, the education of a girl child or the enforcement of a dress code? He highlighted the challenges faced by girl students, emphasizing the need to consider their struggles in reaching school.

Justice Dhulia also raised a critical point about whether denying education to a girl simply because she wore a hijab improved her life. He questioned whether it was excessive for individuals in a democracy to request the freedom to wear a hijab and whether such a practice went against public morality, order, health, decency, or any other provision of the Constitution. In Justice Dhulia's view, the Karnataka High Court's judgment fell short in addressing these essential questions. He found no logical or reasonable basis for considering a girl wearing a hijab in a classroom as a threat to public or law and order. He argued that a mature society should exhibit reasonable accommodation and embrace its differences, a perspective that the Karnataka High Court had overlooked, dismissing it as mere "hollow rhetoric." Similarly, the notion of "unity in diversity" was brushed aside as a cliché.

Justice Dhulia emphasized the significance of diversity and the rich plural culture, particularly in pre-university colleges. He viewed these institutions as ideal places to cultivate empathy, sensitivity, and an understanding of various religions, languages, and cultures, recognizing that diversity is a source of strength for the country. He referred to the National Education Policy 2020, which stressed the importance of tolerance and an appreciation of India's diverse landscape. Justice Dhulia also cited the Karnataka Education Act of 1983, which emphasized the promotion of the nation's rich and diverse culture in school curricula.

He contended that the Government Order¹⁴ of February 5 and the restrictions on wearing the hijab contradicted constitutional values of fraternity and human dignity. While liberty and equality were well-established concepts in law and politics, fraternity, which symbolizes unity and social harmony, remained somewhat overlooked.

Justice Gupta, in contrast, upheld the Karnataka High Court's perspective that the hijab wasn't an essential religious practice. However, Justice Dhulia believed that neither the petitioners nor the court should have engaged in this debate. He suggested that the court should have initially assessed whether the restriction imposed by the Government Order (GO)¹⁵ was valid or whether it violated the doctrine of proportionality.

Justice Gupta emphasized that discipline was a quality students acquire in schools and that defying rules contradicted discipline. While students had the right to education under Article 21, this did not entail the insistence on wearing additional religious attire, beyond the uniform, in a secular school.

He argued that uniforms played a vital role in levelling differences among students. If students of one faith were allowed to wear specific religious attire, it could lead to similar demands from others. Granting one religion the right to wear religious symbols would be contrary to the principle of secularism. The right to education remained available, and it was the student's choice whether to avail it or not. According to Justice Gupta, the freedom of expression under Article 19(a) did not extend to the headscarf. He asserted that the Karnataka GO promoted an environment of equality. Anything worn beneath a student's shirt, in his opinion, couldn't be considered objectionable based on the GO.

Justice Gupta underscored that religion had no place in a secular school operated by the State. All fundamental rights, he argued, were not absolute and needed to be considered collectively. Justice Dhulia emphasized that, according to the Constitution, wearing the hijab should be a matter of personal choice. It might not merely be a matter of dress but a reflection of one's beliefs, conscience, and expression. For some, it's the only way conservative families allow girls to attend school; the hijab represents their access to education. Demanding the removal of

¹⁴ Gauri Kashyap, "Karnataka Government Order on Dress Code for Students" retrieved from <<https://www.scobserver.in/journal/karnataka-government-order-on-dress-code-for-students/>> visited on 13.09.2023 at 11:11 a.m.

¹⁵ *Ibid.*

the hijab is seen as an intrusion into their privacy, an affront to their dignity, and a denial of secular education. Justice Dhulia overturned the High Court's decision, nullified the Government Order (GO), and ruled that there should be no restrictions on wearing the hijab in schools and colleges in Karnataka.

With the split verdict, it will take some time before the final decision in this matter is reached. Ultimately, it's crucial to remember that the State has a responsibility towards a girl's education and her future. Presently, both of these aspects appear to be at risk due to the hijab ban in Karnataka's schools and colleges.

