

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS (ISSN 2582 - 6433)

VOLUME 2 ISSUE 6
(April 2022)

Email –

editor@ijlra.com

Website – www.ijlra.com



IJLRA

INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 5 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis


IJLRA
INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

EDITORIAL TEAM

EDITORS

Ms. Ezhiloviya S.P.

Nalsar Passout

Ms. Priya Singh

West Bengal National University of Juridical Science

Mr. Ritesh Kumar

Nalsar Passout

Mrs. Pooja Kothari

Practicing Advocate

Dr. Shweta Dhand

Assistant Professor

INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

2582-6433 is an Online Journal is Quarterly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN

2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

THE RIGHT TO FREEDOM OF RELIGION: THE HIJAB CONTROVERSY

**By: Divyanjali Nigam, First Year, B.A. L.L.B
(Hons) Symbiosis Law School, Pune**

ABSTRACT

Religion is a contentious topic in global affairs—no matter where in the world, religion dominates a significant aspect of our lives. Naturally, most democratic nations give their citizens the right to religious freedom. India is a highly diverse country, home to over two hundred ethnic communities. According to the constitution, every Indian citizen is entitled to the fundamental right to freedom of religion. However, when it comes to enforcing this right on the ground, what is on paper and what actually happens are two completely different things. In light of the recent school uniform controversy in Karnataka, this article seeks to analyze the controversy, the right to express one's religious beliefs and understand how religious freedom is implemented in India. This article seeks to make a contribution to continuing theoretical arguments about the legal protection accorded to religion.

“India has a great heritage and it is a model for religious harmony where people of different religions live peacefully and in harmony.”

~Dalai Lama

INTRODUCTION

Religion has made an unexpected resurgence in a post-secular society. Almost every major civilisation is coping with religious pluralism, some for the first time in recent history. At the same time, religious disputes and religious terrorism dominate the news, Islamophobia is on the rise, anti-Semitism is on the rising trend, and lower-level religious antagonism is common. Even major religions see themselves as victims of secularisation, multiculturalism, and feminist and homosexual rights “agendas”. The resurgence of religion has led to at least some of these issues being addressed in court, using the legally defined discourse of human rights. This issue is most

usually seen in terms of the right to religious freedom or the right against religious discrimination¹. Freedom of religion and belief is regarded as a fundamental human right in all civilised countries. Article 18 of the Universal Declaration of Human Rights² provides everyone with the right to free thought, conscience, and religion, including the right to change religion and belief. Giving weight to its secular credentials, India, as a democratic republic, has also granted all citizens equal freedom of conscience, profession, practice, and propagation of religion³. Our Constitution stands on the bedrock of freedom of religion even though the term “secularism” was not stated in the original Constitution⁴. Our apex court has also recognised that religion is not simply an opinion, doctrine or belief but also has its outward expression in acts⁵.

While the Constitution does not give a strict “definition” of religion, an attempt to articulate how religion can be defined was made in the Shirur Mutt Case⁶:

“Religion is certainly a matter of faith with individuals or communities, and it is not necessarily theistic. There are well-known religions in India like Buddhism and Jainism, which do not believe in God or any intelligent First cause. A religion undoubtedly has its bases in a system of beliefs or doctrines of spiritual well-being. However, it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical ceremonies and modes of worship, which are regarded as integral parts of religion, and these forms and observations might extend even to matters of food and dress.”⁷

THE HIJAB ROW

A school uniform conflict erupted in the Indian state of Karnataka in early January 2022, when six female Muslim students of a junior college who wished to wear Hijab to lessons were denied admittance because it was a breach of the college’s uniform code. Over the next few weeks, the disagreement extended to other schools and universities across the state, with groups of Hindu students organising counter-protests by refusing to wear saffron scarves. The Karnataka government issued an order on February 5th declaring that uniforms must be worn compulsorily where policies exist and that no exceptions may be made for wearing the Hijab. Several educational institutions referenced this order and refused admission to Muslim girls wearing the Hijab⁸.

The entire controversy comes down to whether or not the right to wear a hijab is an integral part of the right to freedom of religion.

¹ Tarunabh Khaitan, Jane Calderwood Norton, *THE RIGHT TO FREEDOM OF RELIGION AND THE RIGHT AGAINST RELIGIOUS DISCRIMINATION: THEORETICAL DISTINCTIONS*, International Journal of Constitutional Law (2020).

² U.N. General Assembly, *ARTICLE 18, UNIVERSAL DECLARATION OF HUMAN RIGHTS*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 12 March 2022].

³ INDIA CONST. art. 25.

⁴ INDIA CONST. *preamble*, amended by The Constitution (Forty Second Amendment) Act, 1976.

⁵ *Ratial v the State of Bombay* AIR 1954 SC 388.

⁶ *The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Mutt* 1954 AIR 282, 1954 SCR 1005.

⁷ *Supra*, note 6.

⁸ The Times of India, <https://timesofindia.indiatimes.com/city/bengaluru/how-karnataka-hijab-row-unfolded-spread/articleshow/89443877.cms> (last visited Mar. 13, 2022)

BACKGROUND

The education system in Karnataka consists of ten years of school and two years of pre-university college. Using powers granted by the Karnataka Education Act, 1983⁹, the Government of Karnataka has enabled recognised educational institutions to decide on uniforms for their students. The state government requires uniforms for school children, and schools can choose the colours. Though uniforms are not required or compulsory in colleges, College Development Committees, generally led by local MLAs, have insisted on a dress code, including the prohibition of hijabs, in Udupi (where this incident took place in January 2022) and other areas¹⁰.

Karnataka's Muslim population accounts for 13% of the total. Muslim women in the state are increasingly enrolling in public schools. According to data, the Gross Attendance Ratio of Muslim women in higher education increased from roughly 1% in 2007-08 to about 16% in 2017-18¹¹. Many Muslim women consider Hijab an essential aspect of the Islamic faith. The wearing of religious symbols, such as the Hijab and burqa, is prevalent in India. According to PEW, in Karnataka, 71% of Muslim women and 42% of Hindu women cover their heads outside the home. In India, choosing to cover their head is a religious choice for many women. A majority of Hindu women (59%) and almost equal numbers of Muslim (89%) and Sikh (86%) women cover their heads outside their homes- however, the specific style of head covering varies significantly across and between religious groups.¹² Several Karnataka institutions stated that a small proportion of Muslim students "always" wore the headscarf in class.

The issue of wearing religious symbols in educational institutions is not new. However, one interesting aspect of the current row is the statement made by M Raghupathy, former Karnataka Education Minister (Ramakrishna Hegde-led government). When uniforms had been mandated, Hijab was not seen as a problematic issue as "it would not disturb the academic environment in schools and colleges in any way". Furthermore, while recalling the Karnataka government's scheme, he stated:

"We had clearly specified that girl students belonging to the minority community wearing the hijab or a nun's habit and coming to government institutions was not a problem because it would not disturb the academic environment in schools and colleges."¹³

ANALYSIS

From a legal perspective, the core question is whether or not the right to wear a hijab in public spaces comes under the protection accorded under Article 25 of the Constitution of India. This can be analysed by an analogy based on three grounds:

⁹Karnataka Education Act, 1983 § 145(1), No. 1, Acts of Karnataka State Legislature, 1995 (India).

¹⁰ The Hindu, <https://www.thehindu.com/news/national/karnataka/hijab-row-follow-dress-code-prescribed-by-college-management-committees-says-karnataka-government/article38384670.ece> (last visited Mar. 16, 2022).

¹¹ Indian Express, <https://indianexpress.com/article/india/steady-uptick-in-muslim-girls-going-to-schools-colleges-7769897/> (last visited Mar. 16, 2022).

¹² Pew Research Centre, <https://www.pewresearch.org/fact-tank/2022/02/17/in-india-head-coverings-are-worn-by-most-women-including-roughly-six-in-ten-hindus/> (last visited Mar. 16, 2022).

¹³ Meta, <https://www.facebook.com/108099121589917/posts/150957987304030/> (last visited Mar. 17, 2022).

IS WEARING RELIGIOUS SYMBOLS IN PUBLIC PLACES A VIOLATION OF THE INDIAN ETHOS OF SECULARISM?

Secularism as an ideal is so vastly broad that it cannot be contained in a one-liner definition. It is open to subjective interpretation. One of the most powerful interpretations of secularism by our judiciary came when Bhandari J., in the case of *Ashok Kumar Thakur v the Union of India*¹⁴, where he quoted (with due approval) a speech of Pandit Lakshmikantha Mehta during the Constituent Assembly debates¹⁵:

“By a secular state, as I understand it, it is meant that the State is not going to make any discrimination whatsoever on the ground on religion or community against any person professing any particular form of religious faith. No citizen will have any preferential treatment simply on the ground that he professed a particular form of religion.”

Secularism in the Indian context is the state not having a religion. It is the duty of the state to treat all religions and religious groups equally with equal respect without in any manner interfering with their individual rights of religion, faith and worship¹⁶. In essence, a secular state cannot discriminate on the basis of religion, one which upholds and respects equality for all citizens, regardless of the religion they follow. In *Keshavananda Bharti v. the State of Kerala*¹⁷, the Supreme Court recognised **secularism as a fundamental tenet of the Constitution**. Both *Indira Gandhi v. Raj Narain*¹⁸ and *S.R. Bommai v. Union of India*¹⁹ confirmed this principle.

Furthermore, in the *Shirur Mutt case*²⁰, the following observation was made:

“Religion does not include only set of beliefs or doctrines it is much more than that. Religion is also about the ethical rules which it lay down for its believer to follow, and it also prescribes the rites and observances, ceremonies and the mode of worship which are regarded as integral part of religion.”

Unlike the European model of secularism, where the state is required to maintain impartiality through effecting separation of state and religion, in India, the state is meant to accommodate all religions equally. Nevertheless, in the landmark judgement of *Lautsi v Italy*²¹, the European Court of Human Rights in which it allowed the Schools of Italy to display crucifixes in their classrooms which was mandated by Italian Law.

In the landmark case of *MEC for Education: KwaZulu-Natal & Ors. v. Pillay*²², the Constitutional Court of South Africa recognised the right of students to wear religious attire to school. In this case, a Hindu mother contended that by preventing her daughter from wearing nose stud, the school

¹⁴ *Ashok Kumar Thakur v the Union of India* (2008)6 SCC 1 at p. 699.

¹⁵ 2 DD BASU, *CONSTITUTION OF INDIA* 11 (2010).

¹⁶ *Bal Patil v Union of India* (2005) 6 SCC 690.

¹⁷ *Keshavananda Bharti v. the State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461.

¹⁸ *Indira Gandhi v. Raj Narain*, (1975) AIR 865, 1975 SCR (3) 333.

¹⁹ *S.R. Bommai v. Union of India*, 1994 AIR 1918, 1994 SCC (3) 1.

²⁰ *Supra*, note 6.

²¹ *Lautsi v. Italy*, Application no 30814/06: ECHR (Grand Chamber).

²² *Pillay v. MEC for Education, KwaZulu Natal* AR 791/05 2006 ZAKZHC 8 (5 July 2006).

violated their right to equality and right not to be discriminated against on the 42 grounds of religion, conscience, belief or culture. The Constitutional Court held that the school had unfairly discriminated against her. The school governing body has to amend the school and dress code with a view not only to “accommodate religious and culturally based deviations but also to set out 43 the procedure for applying and possibly granting such exemptions”. This can be contrasted with positions of countries like France, which follow almost militant secularism and ban any type of religious symbols worn by anyone.

Religion is an integral part of our society, and it cannot exist in a vacuum. Members of a society depend on religion as their faith, belief system, and mental and emotional support system. Therefore, in a secular state like ours, wearing or showcasing religious symbols in the public sphere is not a violation of the ethos of secularism.

IS THE PRACTICE OF WEARING A HIJAB A PART OF ISLAM?

The subject of veiling in Muslim religious writings is not totally resolved. Several sections in the Quran, the Muslim holy book, and the Hadiths statements attributed to the Prophet Mohammad mention the Prophet’s wives veiling. Scholars are divided on whether these comments apply exclusively to the Prophet’s wives or all Muslim women. According to others, the veil has been utilised to suppress male sexual drive. Nonetheless, covering one’s head and body predates Islam. Jewish, Christian, and Hindu women have all worn headscarves at various historical points and parts of the world²³.

Within contemporary discourse, Hijab broadly refers to modest Islamic dress and, more specifically, the head-covering practice of Muslim women. Although there are many different forms of Islamic headscarves or veils, the term “hijab” most commonly refers to a style consisting of a cloth wrapped around the head and neck, concealing the hair, neck, and ears, leaving the face visible²⁴.

Although the Quran urges both Muslim men and women to dress modestly, there is a dispute about how these directives should be carried out. One of the most precise verses on the requirement of modest dress is **Surah 24:30–31**. The word khimar, in the context of this verse, is commonly translated as “head coverings”²⁵. Of course, wearing a hijab has a religious connotation to it, but in the modern era, it is also becoming a symbol of free expression of people’s religion. It has become a symbol of ethnic pride to fight Islamophobia.

For instance, on World Hijab Day 2018, a Meta post that went viral, by Columbia College student Toqa Badran wrote,

“I wear this scarf because when I was a child, I was socialised to be embarrassed, even ashamed, of my religion and my culture. I was told that to be a Muslim was to be a terrorist and that to be

²³ The Conversation. 2022. Why do Muslim women wear a hijab? [online] Available at:

<https://theconversation.com/why-do-muslim-women-wear-a-hijab-109717> [Accessed 24 March 2022].

²⁴ MARK JUERGENSMEYER & W.C. ROOF, *ENCYCLOPAEDIA OF GLOBAL RELIGION*, 515-516 (SAGE Publications 2012).

²⁵ SAMIRA HAJ *RECONFIGURING ISLAMIC TRADITION: REFORM, RATIONALITY, AND MODERNITY*, 134 (Stanford University Press, 2008).

outwardly Muslim was to endorse violence and oppression ... I understood that I would be unwelcome as long as I wore symbols of my heritage and chose to, in however modern a way, embrace my ancestors.”²⁶

Today, the Hijab is a religious symbol, but it is also so much more than that. It has become a symbol of freedom, of expression, and of pride.

CAN THE RIGHT TO EDUCATION BE DENIED ON THE BASIS OF ACHIEVING UNIFORMITY?

In my opinion, the right to education- an integral part of the fundamental right to life- cannot be denied, let alone to achieve uniformity. While it is true that the Right to Education extends to the age group of 6-14 years, in the context of the controversy, it raises a more significant issue. Can schooling be put secondary to uniformity or prevalence of religious symbols? In my opinion, the answer to that is a no. Furthermore, in the Shyam Sundar case²⁷, it was established that the “right of a child should not confine only to free and compulsory education, but should be enhanced to have quality education without any discrimination on the basis of their economic, social and cultural background.”

Sikh students are allowed to wear turbans in school as long as they are in tangent with the colours of the school uniform, beards are allowed to members of the Sikh community in the armed forces, children all over the country put on tika before going to school as part of their prayers. Recently, Sikh employees of airports were allowed to carry kirpans as it is a part of their religious practices. In essence, religion or uniformity cannot become reasons to deny children education in our country.

CONCLUSION

Article 25 of the Constitution allows one to not only entertain their religious beliefs but also exhibit their beliefs in such a manner as one thinks is proper and to propagate or disseminate his ideas²⁸. Restricting this would amount to violating our country’s secular system.

Being a secular country that respects all citizens’ rights, freedoms, and beliefs without discrimination, it is my view that students must be allowed to wear hijabs expressing their religious beliefs, subject to reasonable restrictions such as the Hijab being in tangent with the colour of the school uniform. On a personal note, I am not afraid to disagree with the recent judgement of the Karnataka High Court, which ruled Hijab as not an essential practice of Islam²⁹.

A blanket ban is not the solution, but healthily embracing our differences is. Being the diverse country that we are, we can only live together and thrive if we are accommodative towards each other’s differences.

²⁶ *Supra*, note 22.

²⁷State of T.N. v. K. Shyam Sunder, (2011) 8 SCC 737.

²⁸Sri Sri Sri Lakshamana Yatendru & Others v State of A.P. & Another (1996)8 SCC 705 (para 14).

²⁹ Resham v. State of Karnataka, 2022 SCC OnLine Kar 315.