



Unveiling Justice: Analysing the Impact and Controversy of the Hijab Ban Case

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ABSTRACT:

In spite the Constitutional courts' held in various decisions their aim at advancing women's rights in India, the recent ruling by the Karnataka High Court regarding the wearing of the hijab by Muslim female students is seen as a setback, potentially encroaching upon women's entitlement to 'freedom of choice,' personal autonomy, 'freedom of conscience,' and 'freedom of religion' in a nation that values liberty and independence. This contentious verdict asserted that wearing the hijab is not an indispensable religious observance within Islam. The limited perspective of the judgment, framed within the context of 'freedom of conscience' as outlined in Article 25 of the Constitution, has raised numerous unresolved queries.

This article endeavours to shed light on these fundamental rights by initially delving into a brief historical exploration of the hijab, aiming to uncover the socio-cultural norms surrounding its usage. The analysis then shifts its focus to ascertain whether head-covering is a prevalent custom among both Muslim and Hindu women. Additionally, the article explores previous court rulings that upheld the hijab as an 'integral religious practice,' carefully balancing communal interest against personal rights.

In conclusion, the article dissects the rationale behind the High Court's judgment, examining the reasons it posits for the non-recognition of the hijab as an essential religious practice.¹

Keywords: Constitution, Hijab, Fundamental religious practice, Personal Freedom, Religious Autonomy, Freedom of Belief.

Introduction:

The verdict of the Karnataka High Court in the case of *Resham v. State of Karnataka*², concerning the wearing of Hijab and the State government's decision to curb Muslim women from wearing Hijab or Headscarf within classrooms, has raised significant concerns regarding the infringement upon 'individual autonomy' and 'freedom of choice'. The case revolved around a group of petitioners who approached the court to decide the matter, after the

¹ Surabhi Sharma "WEARING OF HIJAB: A CHOICE OF MUSLIM WOMEN OR WOMEN COMMUNITY AS A WHOLE?" by Bennett Journal of Legal Studies, Feb 2023

² AIR 2022 Kant 81

incident occurred at a government girls' PU College in Udupi, where a group of students were denied entry due to wearing headscarves or hijabs. This denial followed the issuance of a government order mandating uniforms in educational institutions, applicable to government, private, and pre-university schools. The order granted schools the authority to determine the uniform. However, the College Betterment (Development) Committee, responsible for establishing the uniform, did not include the wearing of Hijab within classroom attire. This omission was argued to be in violation of the petitioners' fundamental right to 'Freedom of Religion'.

The primary contentions raised by the petitioners was that wearing a hijab or headscarf constitutes an 'essential religious practice' in Islam, and thus, the order infringes upon their constitutionally protected 'freedom of religion,' as outlined in Article 25 of the Indian Constitution. The Karnataka High Court, however, upheld the government's order based on the grounds of 'public order,' considering it a reasonable restriction permitted by Article 25. Consequently, the court ruled against the petitioners, denying Muslim women the right to wear Hijab within educational institutions. The court's reasoning was centred on the belief that wearing Hijab is not an indispensable religious practice and, therefore, rejected the petitioners' argument.³

This judgment has faced criticism from the public, with many opined it as a serious violation of constitutional principles stated for protection of personal rights, and some viewing it as a measure that perpetuates the marginalization of Muslims. The Court's decision to uphold the ban on wearing the Hijab was grounded in the assertion that the practice cannot be considered fundamental practice by women belonging to Islam. This conclusion was largely drawn from the writings of Abdulla Yusuf Ali, an Indian jurist specializing in Islamic law.

Notably, the court overlooked the fact that 'wearing the Hijab' is safeguarded as an integral aspect of the right to freedom of conscience under Article 25, a matter of personal privacy as per Article 21, and an expression of freedom under Article 19(1)(a) of the Indian Constitution. In light of these constitutional provisions, the author of the paper has scrutinized the act of Muslim women wearing the Hijab as a right protected under the umbrella of freedom of conscience. The analysis underscores that prohibiting the Hijab within educational institutions could often result in the denial of women's right to education. Furthermore, as per the study highlights it was observed that, covering one's head is a customary practice observed not only by the Muslim community but also by Hindu women.

Ultimately, the paper dissects the rationale behind the High Court's verdict that the Hijab does not constitute an essential religious practice within Islam.⁴

Historical Context

The term "Hijab" originates from Arabic and commonly refers to a 'veil' typically worn by Muslim women. Its etymology can be traced back to the Arabic verb "hajaba," signifying 'to hide' or 'to conceal.' This garment takes the form of a scarf or cloth donned by Muslim women to cover their heads, serving to safeguard their modesty and maintain privacy, particularly in the presence of males in the public sphere. The choice to wear or not to wear a headscarf is a matter of personal modesty for women. In certain societies, the practice of wearing the hijab is confined to public spaces, while women have the freedom to go without covering their heads in the company of family members such as fathers, mothers, and brothers.

The wearing of the hijab has evoked diverse opinions, with some perceiving it as a form of oppression against women in various societies. Despite this, Muslim women continue to embrace the hijab, viewing it as a meaningful symbol of their moral and ethical values.

Various types of hijab exist, each with distinct characteristics. One such type is the "niqab," which covers the entire body as well as the head or face, leaving only the eyes exposed. Another variant is the "chador," a shawl that envelops the entire body or head, permitting visibility of only the face. This particular style of hijab is notably prevalent in Iran. A third style is the "burqa," which provides full-body coverage while allowing vision through a mesh screen over the eyes.

Among these variations, the hijab stands out as the most recognizable head covering, covering everything except the hands, face, and feet. Women who adhere to wearing the hijab are often referred to as "Muhaajaba." Essentially, the concept of hijab extends beyond physical covering. For instance, it can also manifest as a figurative partition, such as a curtain, that separates a man and a woman while allowing them to converse. This practice was historically common in Islam, particularly among the wives of Prophet Muhammad.⁵

Hijab or Headscarf: A Practice Observed By Women

India boasts a rich heritage characterized by its traditions, cultural diversity, and unity, both within its borders and across the globe. The nation has embraced the concept of "positive secularism," wherein all religions are accorded equal respect and protection. This idea of secularism was reinforced through the 42nd Constitutional amendment, with secularism eventually being recognized as a fundamental tenet of the Constitution in the landmark case of *S.R. Bommai v. Union of India*.⁶ Every individual possesses the right to practice their religion in their chosen manner; however, practices that are

³ Hijab ban: Karnataka high court upholds government order on headscarves, BBC News, available at. <https://www.bbc.com/news/world-asia-india-60300009>, last seen on 28/07/2023

⁴ Government Order dated 05.02.2022 issued under Section 133 read with Sections 7(2) & (5) of the Karnataka Education Act, 1983.

⁵ <https://en.wikipedia.org/wiki/Hijab#:~:text=The%20tradition%20of%20veiling%20hair,act%20or%20Kashf%2De%20hijab>.

⁶ 1994 AIR 1918, 1994 SCC (3) 1

derogatory under the guise of religion are not endorsed, as emphasized by the *Shayara Bano vs. Union of India*⁷ case, wherein the Supreme Court declared the practice of 'Triple Talaq' in Islam unconstitutional.

In line with this, Muslim women assert that wearing the hijab is an exercise of their "freedom of conscience," a right that should be protected by the State. Article 25(1) of the Constitution ensures the equal right to freedom of religion, while Article 25(2) grants the State the authority to regulate religious practices for the promotion of social welfare. It's important to note that various groups of women in India adopt distinctive attire as expressions of their faith. According to a Pew survey report, not only Muslim women but also a significant number of Hindus (around 59%) and Sikhs (approximately 86%) cover their heads as a common practice. This indicates that religious expression through clothing is not exclusive to any particular group.⁸

In the Hindu community, there is a tradition of observing "Pardah" by women in public spaces. This practice is symbolic of dignity, honor, and respect among Hindu women. The concept of "Pardah" is synonymous with "laaj," historically practiced among Hindu women, wherein they covered their heads with a "chunni," "dupatta," or "pallu" in the presence of their in-laws. It's noteworthy that both Hindus and Muslims incorporate veiling and seclusion into their customs, albeit with distinct motivations. Muslims employ veiling to safeguard females from external males or outsiders, while Hindus adhere to the practice post-marriage. Despite the differences, the essence of these practices within both religions revolves around women's protection and the preservation of familial harmony.

In essence, the terms "hijab" and "purdah" serve a shared purpose: to cover the face, head, or hair as a manifestation of modesty and moral principles. The prohibition of the hijab not only encroaches upon the dignity and beliefs of Muslim women but also impacts women in general who don attire such as the "chunni" in educational institutions. In some rural communities, women are only permitted to pursue education if they choose to attend schools or colleges while covering their heads or hair. Consequently, the Karnataka High Court's ruling on the hijab ban may inadvertently impede women's fundamental right to education, thereby constituting a grave constitutional concern.

The Legal Reasoning of the Karnataka High Court Judgement

The Karnataka High Court, in its judgment on the matter of Hijab, examined the 'Quranic' injunctions and determined that the Quran does not specifically mandate the wearing of the hijab; rather, it is suggested as a recommendation and not an absolute requirement. The court further highlighted that the absence of explicit penalties or punishments for not wearing the hijab indicates that it is not deemed an essential religious practice. Based on this perspective, it can be inferred that the court has effectively dismissed the significance of "freedom of conscience," which encompasses the freedom to hold beliefs, opinions, and thoughts, as well as the right to choose one's religion. The court's opinion seemingly implies that any religion lacking prescribed punishments should not be regarded as a valid religion. However, the absence of sanctions to enforce adherence to a particular religion does not render it void of its status as a religion. The essence of religion is grounded in individual belief, moral principles, and personal convictions.

While delving into the doctrine of essential religious practices, the court appeared to significantly curtail the scope of "freedom of conscience." This limitation also contravened the concept of "freedom of choice," which was recognized as a right in the Puttaswamy case under Article 21. Additionally, the court seemed to disregard the principle of "freedom of expression," encompassing the right to voice one's choices without fear, as enshrined in Article 19(1)(a). It is important to acknowledge that even individuals who identify with a "no-religion" category are entitled to the same safeguards and protection to express their choices dictated by their conscience, free from societal or state interference. The concept of "freedom of conscience" encompasses the right for citizens to openly articulate their religious beliefs or disassociations, permitting individuals to act and believe in accordance with their preferences and convictions.⁹

Conclusion

The comprehensive research and subsequent discussions have brought to light that the controversy surrounding the hijab is far from a novel discourse. Delving into history reveals that in ancient times, individuals adhered to socio-cultural norms that involved various practices of head covering, including purdah, hijab, chunni, or ghunghat. This historical exploration underscores that this practice wasn't exclusive to Muslim women; rather, it encompassed the entire women's community, grounded in values of autonomy, dignity, modesty, and individual choice. While certain circumstances demanded strict observance of veiling practices, modern society recognizes women's right to embrace these practices as an embodiment of "freedom of choice" and personal autonomy. Within this context, "freedom" signifies an individual's capacity to exercise religious practices in consonance with personal liberty, immune from unwarranted state interference.

Nevertheless, the verdict delivered by the Karnataka High Court bears potential repercussions that could hinder women's access to education. In several conservative households, girls are only allowed to attend school if they conform to the practice of donning head coverings like a chunni or hijab. Contrary to this, numerous landmark judgments by the Hon'ble Supreme Court have adopted a broader interpretation of constitutional rights. Notable instances encompass cases concerning women's entry into temples (*Indian Young Lawyers' Association v. State of Kerala*), the abolition of adultery (*Joseph Shine*

⁷ AIR 2017 9 SCC 1 (SC)

⁸ Pew Research Center, Religious clothing and personal appearance, available at <https://www.pewforum.org/2021/06/29/religious-clothing-and-personal-appearance/> last seen on 29/07/2023.

⁹ <https://www.outlookindia.com/national/karnataka-hijab-case-supreme-court-reserves-verdict-on-plea-against-hc-judgement-upholding-hijab-ban-in-classes-news-225090>, last seen on 31/07/2023

v. Union of India)²⁶, and the preservation of women's dignity. These cases underscore the court's commitment to equal rights and individual liberty. However, the Karnataka High Court's judgment appears to diverge from these precedents, potentially infringing upon women's ability to express themselves freely. Consequently, this judgment may be viewed as regressive, challenging the core principles of open expression and thought within the democratic framework. This is contradictory to the essence of constitutional jurisprudence rooted in the concept of "freedom of conscience."

The judicial precedents illuminate the journey of Constitutional courts in safeguarding the broader public interest in harmony with individual rights. However, a contrary perspective emerges from the recent Karnataka High Court judgment, which, in its assertion of "freedom of religion," demands that an essential religious practice must originate at the inception of a religion itself. If this perspective is endorsed, the notion of an Organic and Living Constitution ("the Constitution is a living document; it evolves with societal needs") might dissipate, especially in a progressively changing society where religions continue to evolve. As India is considered as a secular nation, any practice that an individual adopts in reference with "freedom of choice" should not be denied based solely on an essential doctrine test. Freedom of religion is premised on the notion that individuals are free to explore their conscience, while being subject to considerations of Public Order, morality, and health.