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# COTTON CLOTH CREATES ROAR: THE HIJAB ROW

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**ABSTRACT**

Sustaining a Muslim women who is wearing a hijab away and out of classes is a typical and classic case of discrimination, unfairness and arbitrary behaviour under the Indian constitution's equality clauses. Exploiting ancillary inspection of imaginary, hypothetical putative writings, this article pursues to comprehend the idea of Hijab in the Islamic context and the recent controversy unfolding around it. The idea of secularism and how it operates in the country in its entirety.

## INTRODUCTION

Before discussing the aspect of the hijab ban in its entirety, it is extremely important to first understand "***how did we get here?***"

It all started even before we got the freedom and independence being fought for, the whole country was divided into two parts in the name of religion, by the Indian Independence Act, 1947. It is ironical as many people thought that after the partition this hatred would stop but, ever since then India has been burning in the flames of religious riots and intolerance.

In the year 1969, the most famous and the deadliest Hindu-Muslim riots broke out, also called the Gujarat riots. Large scale arsons, mascaras and incidents of looting were reported, there were flames all across the state. Corresponding to official reports, 660 people (*unofficial number has been claimed to two thousand deaths*) were killed during the riot while 1,074 were injured and 48,000 lost their properties. The people from the Muslim community agonized the loose of the shock of these riots. Of the 660-death toll, 430 were Muslims and a projected 32-million-rupee worth of property was either damaged or lost during this catastrophe.

But the fire didn't stop here, it was rather the beginning of an unfortunate future, in 1984 the Anti-Sikh riots broke out, the Sikh were part taking in a movement called the Khalistan Movement, wherein they demanded a separate state for the Sikhs, an internal mission was taken upon in order to remove these Sikhs from the Golden Temple, which marked a series of unfortunate events, This Indian Army operation claimed the lives of almost 83 army men and 49 civilians. To the extent that it resulted in the assassination of the then Prime Minister of India, Mrs. Indira Gandhi.

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Another historic Hindu-Muslim riot broke out in Bhagalpur, know as the Bhagalpur riots of 1989, at least 1000 deaths were reported as the aftermath, there was huge impact on life and property.

## HOW IT ALL STARTED

- **Where It Began**

Amidst the pandemic and its domestic destruction, India found itself in yet another wave of communal flare in the late 2021 when six students of Udupi Women's PU College were refused to sit in the class and marked absent, by the college authorities for wearing a hijab. As a result, to which, several Muslim students protested for weeks against the college authorities. This protest soon witnessed a counter sit-in protest wherein Hindu students of the Government First Grade College Chikmagalur, demanded to wear saffron scarves if the Muslim girl students were allowed to wear hijabs.

However, what started with the two colleges soon snowballed into a state wide issue and various similar protests emerged from other towns in Karnataka.

- **Effects of the Protests**

The protests spread to the colleges of Bhandarkars' Arts and Science College, Byndoor Government PU college, Belagavi Government PU college and many more colleges of Karnataka witnessing demonstrations of two communities and counter protests soon taking the shape of violence in the form of stone pelting and multiple videos depicting Hindu students heckling and harassing Muslims became viral.

On February 5, 2022 the Karnataka Government's order added furthermore fuel to this blazing wave, by ordering all government and private colleges in the state to follow a uniform dress code, thus banning hijab in the state. The Karnataka Education Department invoked S.133 (2) of the Karnataka Education Act-1983, which states a uniform style of clothes has to be worn compulsorily. While it is mandatory for the government schools' students to wear uniforms approved by the government, those going to private colleges or private school administration shall wear the uniform approved by their management[3].

A wide spread out of tussle over hijab and saffron scarves went on to be witnessed in many other colleges of Karnataka forcing the college managements to shut the gates on students sporting hijab as well as saffron scarves and schools to be temporarily closed by the state government in order to control this peril.

[3] https://indianexpress.com/article/explained/explained-reading-karnataka-order-on-college-uniforms-7761326/

- **Matter Reaches Court**

While wearing headscarves had not been an issue in prior years as per one of the students, the same isn't agreed upon by the college authorities due to which the students petitioned the Karnataka High Court seeking the right to wear Hijabs in classrooms under Article 14, 19 and 25 of the Constitution of India and also questioned how their hijab was hindering integrity equality, and law and order, the basis on which the state government had banned them from wearing hijab to college.

While the petitioners pleaded hijab to be an essential of Islamic faith, and that the right to wear hijab is a matter of privacy of the citizens, they also submitted that the State Government has no authority to issue an order mandating the College Development Committees to prescribe student uniform and that the dress & attire are a part of speech & expression and therefore institutions cannot compel them to remove the same[4].

The defence contended the that no prima facie case is made out for the grant of any interim relief and that the impugned order per se does not prescribe any uniform since the decision of prescribing the uniform should be left to the institution. The defence brought to the notice of the Court that several counter agitations involved students wanting to gain entry to the institutions with saffron and blue shawls and other such symbolic clothes and religious flags[5].

On February 10, 2022 a full bench of the Karnataka High Court comprising of Chief Justice Ritu Raj Awasthi, Justice J M Khazi and Justice Krishna S Dixit stated in an interim order that no religious garments shall be permitted on campuses until the court reaches a verdict. Thus, a temporary ban has been imposed in the interim order restraining all the students from wearing saffron shawls, scarves, hijab and any religious flags within the classroom till the Court decides the case relating to ban on hijab in certain government colleges.

- **Current situation**

Even after the interim order, the flare refuses to die down as students remain adamant to be allowed to attend classes with 'hijab' and 'burqa'. As a result, hijab wearing girls are being denied entry into their respective educational institutions.

On 25 February, 2021, after 11 days of hearing the matter, the Karnataka High Court, reserved its verdict in the batch of petitions filed by Muslim girls seeking protection of their right to wear hijabs in classrooms.

[4] http://karnatakajudiciary.kar.nic.in/judgements/WP_2347_2022.pdf
[5] http://karnatakajudiciary.kar.nic.in/judgements/WP_2347_2022.pdf

## THE ESSENTIAL RELIGIOUS PRACTICE TEST

Article 25(1) of the Indian Constitution promises freedom of conscience and the right to practise religion. Further, Article 26(b) also gives religious denominations the right to manage their "own affairs in the matters of religion". Over the years and through a catena of cases and judgements various High Courts and the Supreme Court has held that only those practices which are essential to a religion will be given the defence or rather be protected by these Articles. Owing to this, whenever there occurs a conflict as to the practice or propagation of any religion the test of essential religious practice comes into play, and the courts give the verdict accordingly.

The meaning of essential religious practice is not stated in any legislation, but the Supreme Court has held that an essential religious practice would be one which refers and relates to the "***core beliefs upon which a religion is founded***" and the test would then be, to check if the nature of the religion would be changed without the practice in question. Therefore, if taking away the said practice changes the fundamental characteristics of the religion then in such a case, the practice would be considered as essential religious practice.

## IS HIJAB AN ESSENTIAL RELIGIOUS PRACTICE?

In the aforementioned hijab controversy, the counsel on behalf of the petitioner Senior Advocate AM Dar, argued that, ***hijab is the "last commandment from Allah".***
***"It has come in 4 Hijri, by the time Quran was complete," he added.***
***"First commandment from Allah is daily five prayers. It is a different thing if every Muslim follows it. The second is zakat. If Muslim persons are rich, then they can give zakat. The third is ruling on inheritance. It is defined in Quran and it is obligatory. Fourth is fasting," Dar said, adding that the fifth is Haj.***
***"Hijab word is not there in Quran: The term refers to partition, in the literal meaning it is some kind of partition. Hijab is mandatory. Even the wives of prophet would wear it. I will read the suras," Dar said***
Whereas in the same case the counsel on behalf of the State argued that making hijab a mandatory requirement would be unfair towards Muslim girls to choose to not wear it. In his literal words he stated "***I am nobody to criticise and nobody to say anything but I can only say with a lot of responsibility that when a case of such kind where you not only want to bind yourself, the petitioners, you want to bind everybody, you ought to show more circumspection and discretion seeking declaration, particularly before a constitutional court,***"

He further argued that there is no materiality and viability to the claims of the Muslim girls, the petitioners in this case. He additionally, stated that Dr B.R. Ambedkar in a meeting of the constituent assembly spelled out that religious practices should be left outside educational institutions by all means. It was furthermore argued that food and clothes cannot be stated or termed as essential religious practice, as it is not fundamental to the religion and would in no way change the meaning or characteristic of the same. In addition, essential religious practice should be binding in nature, if it is optional then it cannot be termed as essential, as both these terms are contrary to one another, to a great extent and lastly, the act of protest has also resulted in the disturbance of public order, peace and tranquillity, which is highly unacceptable in nature.

All these arguments made by the opposing counsel might seem to make sense at first, but on the inside, they are extremely vague, ambiguous and at some instances bias too. Referring to hijab as just a piece of cloth which is not the right approach.

After, the government order was passed there were targeting done on other religious minorities in the country, in a similar incident a Sikh Boy and a Sikh girl were stropped from entering the college premises because of the fact that they were wearing a turban, but contrary to the behaviour presented towards the six Muslim girls, this young lady was allowed to wear a turban in the college premises, and the statement that the college authorities provided was that they very well understood "***her circumstances***". It is as hypocritical as it sounds, the situation and circumstance of one religious minority in the country are UNDERSTOOD, but when the women of another religious community which has been targeted time and again, wears a head cover, with her own choice and will then her circumstances be named and called upon as, disturbance of public order.

On the date of 24$^{th}$ February, the Shiromani Gurdwara Parbandhak Committee, wrote a letter to the chief minister of Karnataka on this issue of the Sikh girl not being allowed to wear a turban, and condemned the actions of the college, to this the C.M responded that, the government order does not include the term "***turban***" anywhere, and the order does not even apply to it. In the same letter, the SGPC, called turban as an integral part of their religion.

Every individual from a majority and minority of any religion is an equal citizen to and in the territory of India, it is bias, unfair and arbitrary to allow one religion the liberty and right to wear their religious symbol which is a headcover, and another to not exercise the same exact right.

## DOES INDIA OPERATE ON CONVENIENT SECULARISM?

### ➢ History of Secularism in the Country

On the day of Independence, India was not a secular country but became one after the 42nd Amendment in 1976 wherein the word secular was introduced in the Preamble of the Indian Constitution making secularism one of the basic structures of the constitution. This addition meant that India does not have any official religion and treats all the religions equally, and with equal respect. Any person in the country has the liberty to choose his or her religion. The basic intent of the Legislative body behind such amendment was to promote fraternity while assuring unity and integrity of the nation along with individual dignity, consequently making India a niche for the prosperity of various religions. The constituent assembly had also visualized the peculiar situations of the country and arranged the preamble with an aim to secure justice, equality and liberty to its citizens.

The Constituent Assembly also declared that secularism, was not an anti-religious concept, instead, it prevented discrimination against the citizens based on religion. Mr. H.V. Kamath[6], (Member of the Constituent Assembly) "stated in the assembly that when a State doesn't identify itself with any particular religion it does not mean that a State should be antireligious or irreligious. India herein would be a secular State, which is neither a godless State nor an irreligious nor an anti-religious State". The same is explained in the case of St. Xavier's College v. the State of Gujarat[7] where the Supreme Court states that secularism in India did not mean anti-religion but it meant that the state will not follow any religion and will respect every religion without interfering in their practices.

This notion of secularism is adopted from the western concept wherein the church and state remained separate from each other. However, the philosophy of Indian secularism is quite different from that of western as secularism in the context of India does not mean the state remains absolutely away from the religion. Instead, it meant maintaining equidistance from all religions and the state's commitment to supporting different religions equally. In the case of Abhiram Singh v. C D Commachem[8], a question of whether secularism is a separation of religion from politics, arose before the Court. The Court held that secularism does not mean that the state should stay aloof from religion instead it should give equal treatment to every religion.

Unfortunately, such equidistance and equal treatment to every religion were hardly witnessed. India is not bound to any particular religion. However, religion has been adopted as an integral part of Indian social life, along with freedom of religion and secularism.

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[6] https://www.legalserviceindia.com/legal/article-6954-secularism-in-india-judicial-and-constitutional-perspective.html
[7] 1974 AIR 1389, 1975 SCR (1) 173
[8] (2017)10 SCC 1

- **Deep Embedded Hypocrisy**

While India has been a great example of secularism, its notion of secularism has been gradually reduced to its meaning since past few decades and is now being interpreted and operated on the convenience of political parties holding power for the maximum time in the country. They not only promote or privilege a religion in the wake community upliftment but adopt a path of divide and rule by using secularism for their political benefits.[9]

While the relationship between politics and religion is defined by the practice of giving equal treatment to every religion in country by the political parties as mentioned in the case of Abhiram Singh v. C D Commachem(supra), the same has not been practiced ab intio. Instead, the Supreme Court's observation in the case of S R. Bommai v. Union of India[10] seems to be coming true i.e., if a religion is not separated from politics, the religion of the ruling party tends to become the state religion.

And though secularism is one of the basic structures of the Indian Constitution, a bare definition or clarification of the same is absent, thus making its applicability in contemporary Indian conditions questionable because of the increasing use of religion in the social construction of ethnic and communal identity, consequently forming political mobilization.

Furthermore, a deep embedded hypocrisy is witnessed in the model of Indian secularism since the beginning wherein several questions on the acts or omissions of the Government are raised including questions as to the presence of different personal laws in a secular country, government's incompetency to initiate a Uniform Civil Code in the country, Central and State government's takeover on the management of Hindu temples but not on mosques and churches and a secular government's intent to provide financial assistance to educational institutions(for instance Madrasas) run by specific religious organisations in which while the intent of the government is to promote general literacy through Madrasas to millions of mostly poor Muslims free of cost, such a consideration is only intended for the Muslim children and not for the children of other religions in the country who might not have access to basic education as well. This selective approach of the government reflects nothing but its act of favouring a specific religion and its motive of appeasing the Muslims for their votes and relegating them to fringes in education, health, and economic activities. Hence reflecting its political convenience.

Not only this but many religion favouring acts of various governments in power has been witnessed. For instance, the presence of Haj Subsidy is one of the examples wherein even though the Constitution of India prohibits using taxes for religious purposes, (Article 27) but for looking after the welfare of

[9] https://economictimes.indiatimes.com/news/politics-and-nation/secularism-used-for-political-convenience-in-country-says-minister-mukhtar-abbas-

[10] 1994 AIR 1918, 1994 SCC (3) 1

minorities, the Ministry of Minority Affairs created financial assistance for minority religions in which Haj subsidy was provided to Muslims, but no such subsidy was available for other religions. Even though, this subsidy is now abolished; before such abolition the state discrimination against other religions which is against the concept of secularism.

However, it is also to be noted that not all acts were being carried out in the favour of religion of Islam. The introduction of permit system[11] in the year of 19 July 1948 directly discriminated against the Muslims wherein, a permit system was introduced which made it very difficult for Muslim "evacuees" to return to India if they had property back home. Articles 6-7 of the Constitution of India indirectly entrenched this preference for Hindu/Sikh (displaced persons) . The government did so by making it far easier for those who had come to India prior to 19 July 1948 (i.e., the date of the introduction of the permit system), presumed to be mostly Hindus and Sikhs, to become Indian citizens, while denying Muslim (evacuees) citizenship unless they had obtained an elusive permit for resettlement.

This fascist approach is once again witnessed in the ruling of the Hindu Nationalist Party BJP which has been the ruling government since 2014 and has taken steps promote their Hindutva ideology throughout the country by their actions. The introduction of the Citizenship Amendment Act is one such significant example of their anti-secularist act.

The Citizenship (Amendment) Act, 2019 (CAA) comes across as a violation to the Constitution of India as it is against the concept of secularism. However, the government has a contradictory opinion. The argument against the CAA is that it violates the concept of secularism because the Act grants citizenship to migrants belonging to Hindu, Sikh, Buddhist, Christian, Parsi, Jain, and communities who came to the country from Bangladesh, Pakistan, and Afghanistan on or before December 31, 2014 but it does not include Muslims, Jews, Ahmadiya agnostics, atheists, Shias, or Tamils in its purview.

The Act is also discriminatory in nature as it violates Article 14 as well as Article 15(1) of the Constitution of India. Article 14 of the Indian Constitution clearly states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Wherein the word person has been used, so it protects both citizens and non-citizens. The Act is also discriminatory for various reason among which include: (i)The ignorance of other countries in India's neighbourhood (e.g., Myanmar, Sri Lanka, Bhutan,) (ii) the cut-off date of 31 December 2014 is arbitrary.), (iii) The act also ignores non-religious persecution (e.g., persecution on grounds of sexual orientation or race ) and (iv) the relaxation of the residence requirement from 11 years to 5 years is palpably arbitrary in other word why should a Parsi fleeing religious persecution from Iran have to

[11] https://indconlawphil.wordpress.com/2020/01/07/guest-post-the-wrath-of-caan-on-citizenship-secularism-and-equality/

reside in India for 11 years to seek citizenship by naturalization, while a Parsi fleeing religious persecution from Afghanistan has to wait only 5 years?

The aforementioned act not only excludes persons on the basis of their religion but also fails to abide by its basic structure of secularism. In the wake of promoting the Hindutva ideology the ruling government and the previous governments have interpreted secularism as per their convenience and for garnering certain community's votes or trust.

While the above-mentioned examples are not exhaustive, the author aims to highlight the deep-rooted hypocrisy of the Indian Legal system and opines to lift this veil of convenient secularism and witness the bare violation of the constitution in the present scenario of the Hijab Case. Time and again the ruling governments have used their powers to promote their ideologies or favour the communities who they find to befit them and same is being witnessed over here. With a majority 78.9% of Hindus in the country, the ruling government in order to please its voters have turned a blind eye on what is justified and what is not. The mere comparison of Hijabs with saffron shawls is unreasonable as the former has always been worn by Muslim girls with an intent of practicing their faith while the other was worn only as a way of counter protest and not with a positive intent. Moreover, the fact that turbans worn by the men of Sikh community have always been worn by the students throughout their lives is a fact which is being unseen. The Turban is also a reflection of the Sikh community's faith and shall be equally treated as that of Hijabs. However, a contrary is being witnessed as the turbans are nowhere considered by the Karnataka Government and the high court as well**. As witnessed in the above-mentioned case the turban wearing student was finally permitted in the college when a political backing was given to the same.** This incident not only mocks the Karnataka Government's order but mocks the secularism of this country as well which is subjected to power corruption. This whole scenario highlights nothing but a Hindu favouring ideology and islamophobia of the Indian legal system, whose violating secularism and constitution ex facie.

## CONCLUSION

The denial of entry into colleges by college authorities is an action bereft of any legality. By any standard of lawful action, the forcible prevention of girls from entering college without notice and without reason violates basic principles of rule of law. All of this is very far from the Indian ideal of 'unity in diversity' and is nothing other than an attack on fraternity and fraternal ways of living. While this flare may pass, the government order has done a permanent damage by legitimising unconstitutional interventions into the selfhood, identity, privacy and dignity of Muslim women.

Not only this but it is in clear violation of appreciating the difference between the importance of saffron shawls in Hinduism, and hijab in Islam. Courts do not make the religions, they merely interpret them, and therefore, as per the Essential Religious Practice test, they have to see whether a girl practicing Islam can be asked to drop her religion outside the school walls and pick it up again when she is out of school. The Constitution makers never meant to put those practicing their religion through such a dilemma. Therefore, the current row, fails the constitutional test and seems to suggest that the right to education and religion are 'either-or'. Education and religion have to co-exist and have always been interpreted so through the doctrine of harmonious construction.

And although India has adopted the concept of secular state, in fact religion has been politicized. Religious institutions are used for voting politics. Therefore, the principle of secularism is falling behind by increasing communalism. Communalism is anti-democratic, so the concept of secularism needs to be rooted in the promotion of democratic values. In a pluralistic society like India, politics based on religion is detrimental to national integrity. Therefore, in order to build a strong democracy, the values of secularism must be respected in the society while respecting religious values.