**Muslim Women, Hijab And Indian Constitution**

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**INTRODUCTION**

Religion is a matter of belief or faith. The constitution of India recognizes the fact, how important religion is in the life of people of India and hence, provides for the right to freedom of religion under Articles 25 to Article 28.

Constitution of India guarantees Fundamental Right to all persons to freely profess, propagate and practice their Religion or Religious belief. Freedom of religion is part of the Indian Constitution. Nevertheless, it is the weakest fundamental right of all the available fundamental rights in Part III thereof. It is weakest for the simple reason that it is subject to all other fundamental rights; in addition to claw back clauses which are part of every fundamental right in the Indian Constitution. As Article 25 of Indian Constitution specifically provides that Freedom of Conscience and free profession, practice and propagation of Religion is subject to Public Order, Public Morality, Public Health and to other provisions of Part III of constitution. Thus, if there is conflict between Freedom of Religion under Article 25 and Equality in Article 14, it is the latter that will prevail. Similarly, in any conflict between Article 21 and Article 25, it is the former that prevails. Additionally, State has been empowered to regulate freedom of religion on the grounds of public order, health and morality. Thus, a state is well within its rights to regulate the freedom of religion on the grounds mentioned above.

the Apex Court has held that secularism is the basic structure of the Constitution, the most important being the Keshavanandan Bharti case. People in India mainly practice Islam, Hinduism, Jainism, Buddhism, Sikhism and, Christianity. In India, there are religion-specific laws and Goa is the only state to have a Uniform Civil Code known as the Goa Civil Code. The Constitution supports religious harmony which means the people of India show love and affection to different religions of the country.

**HOW ARTICLE 25 PROTECTS RELIGIOUS FREEDOM**:

* **Article 25(1)** of the Constitution guarantees the**“freedom of conscience and the right freely to profess, practise and propagate religion”.**
* It is a right that**guarantees a negative liberty** — which means that the state shall ensure that there is no interference or obstacle to exercise this freedom.
  + However, like all Fundamental Rights,**the state can restrict the right for grounds of public order, decency, morality, health and other state interests.**
* The implications of this are:
  + **Freedom of conscience:** Inner freedom of an individual to mould his relation with God or Creatures in whatever way he desires.
  + **Right to Profess:** Declaration of one’s religious beliefs and faith openly and freely.
  + **Right to Practice:** Performance of religious worship, rituals, ceremonies and exhibition of beliefs and ideas.
  + **Right to Propagate:** Transmission and dissemination of one’s religious beliefs to others or exposition of the tenets of one’s religion.

Freedom of religion is not merely to have faith in religion but includes the right to practice or manifest it. The Supreme Court has laid down that what is guaranteed under freedom of religion is core of religious belief, which constitutes essential religious practices but anything which is not core has no protection under Article 25.

The Supreme Court in**Tilkayat Shri Govindlalji Maharaj V. State of Rajasthan**[[1]](#footnote-2), held that the test to determine the question in deciding what is an integral part of a religion is whether it is regarded as integral by the community following that religion or not.

**Doctrine or Belief?**

In**Hasan Ali V. Mansoor Ali**[[2]](#footnote-3), the Bombay High Court held that Articles 25 and Article 26 not only prevents doctrines or beliefs of religion but also the acts done in pursuance of religion. It thus guarantees ceremonies, modes of worship, rituals, observances, etc which are an integral part of religion. What is the essential or integral part of a religion has to be determined in the light of the doctrines and practices that are regarded by the community as a part of their religion and also must be included in them.

The Supreme Court in Commissioner, **Hindu Religious Endownments, Madras V. Sri LakshmindraThirthaSwamiar of Sri Shirur**[[3]](#footnote-4)Mutt ruled that there is no doubt that religion finds its basis in the system of doctrines regarded by those who profess that religion, but it will not be correct to say religion is nothing but a doctrine or belief.

In the case of**SP Mittal V. Union of India**[[4]](#footnote-5) , the court held that Religion need not be theistic. It is not merely an opinion, doctrine or belief but has an outward expression in the act as well.

**HIJAB A ESSENTIAL PRACTICE OF MUSLIM RELIGION !**

The reference to modest clothing that appears in Quran is mentioned in Surah Noor (24:31), which reads:

“And tell the believing women to reduce [**some**] of their vision and guard their private parts and not expose their adornmentexcept that which necessarily appears thereofand to wrap [**a portion of**] their headcovers over their chests and not expose their adornment [i.e., **beauty**] except to their husbands, their fathers, their husbands’ fathers, their sons, their husbands’ sons, their brothers, their brothers’ sons, their sisters’ sons, their women, that which their right hands possess [i.e., slaves], or those male attendants having no physical desireor children who are not yet aware of the private aspects of women. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed.”

In this Quranic injunction, the word hijab is not mentioned at all. What is mentioned is ‘wrap their head-covers over their chest’. One may ask if Hijab is the only way to wear a head-cover with which the female chest could be covered. Did Allah envision only a hijab while prescribing this verse for believing women? A book that has universal application cannot rule out the manifestation of covering the chest with myriad kinds of clothes. Salwar-dupatta and saree, as popularly worn in South India, is as good as hijab.

Can God favour one kind of clothes with identical outcome over hijab? For example, if a dupatta worn over the head in such fashion as to cover the chest, would it be non-confirming to 24:31?

Moreover, the verse allows to slavery, which is in direct contradiction with Constitution, Article 23. Additionally, the injunction also says not to expose their adornment [i.e., beauty] except to *“their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess [i.e., slaves], or those male attendants having no physical desire…”.* The question is could we be so selective in extracting the right to manifest religious faith from a Quranic source that all other conditions are ignored.

The Quran mandates women to show their beauty only to people who are mentioned therein. It gives birth to the concept of Mahram. The religious scholars are divided on the exact meaning of this verse when it comes to nice clothes & ornaments and body parts that can be shown to non-mahram men and women.

For Muslims, even non-muslim women fall into the category of non-mehram, and hence they are required to follow zinah from slaves and non-Muslim women too. The idea behind the verse is non-mahram should not see Muslim women unless there is need. What constitutes ‘need’ is, of course, not clear. In the tafsir on Quran, what is mentioned is the two sides of sheets — one over other which would constitute Hijab.

If we insist that hijab, as understood by muslim women in India currently, is the only piece of cloth that protects modesty, we will be arguing that all others clothes are vulgar and inappropriate for women — since these are the words of Allah for present and future both. So a future Muslim convert must give up the dresses or traditional outfit in order to comply with Quranic injunction under 24:31, which is absurd. Should a Japanese convert give up her traditional clothes to become Muslim because the whole world has to become Muslim sooner or later because it is the mandate of the Allah?

No one is objecting the hijab per se, what is in question is limited regulation of its wearing at certain places like schools and colleges. Therefore, the question is, by prohibiting the hijab within school or college, and not outside thereof, is there any violation of fundamental right under Article 25?

**HIJAB CONTROVERSY:**

The hijab has become the subject of a fierce debate in India. It all began last month when six teenagers at a government-run college in Karnataka's Udupi district began protesting after they were barred from classes for wearing headscarves.The issue quickly turned divisive with Hindu students turning up in colleges wearing saffron shawls, and right-wing groups on both sides making provocative statements. Fearing violence, the state government shut down high schools and colleges.

The question of whether Muslim girls and women in Karnataka can wear the hijab in school and college will be decided by the state's high court which is currently hearing the matter.The ban on the hijab in schools and colleges of Karnataka has resulted in a huge uproar and protests in the state. The state government has invoked Section 133 (2) of the Karnataka Education Act 1983, which says a uniform style of clothes has to be worn compulsorily. The ongoing protests have put forth a constitutional issue before India that if the hijab goes away, will all religious clothing go away equally from educational institutions? Well, if it’s an essential religious practice, then the constitution mandates the government to restrict every other religious clothing equally.

Article 14 guarantees every person the right to equality. However, a reasonable classification can be made by the Government in order to achieve a specific goal. Now, take other religions. In Sikhism, there are five articles of faith, known as ‘the five K’s’, that Sikhs are commanded to wear at all times, including educational institutions to demonstrate their religious faith. These include Kesh (uncut hair), Kara (a steel bracelet), Kanga (a wooden comb), Kachera (cotton underwear), and Kirpan (steel sword). Wearing the five K’s are justifiably considered essential religious practices under Article 25 and thus, are permitted to wear five K’s in educational institutions.

 Similarly, placed are Muslim women students who want to wear hijabs in educational institutions. The wearing of the hijab comes under essential religious practice under Article 25. Restricting such a practice by educational institutions on the premise of Article 19(1)(g) would have an equal effect on other religions too because both are at an equal pedestal. There seems to be no reason as to how the hijab is different from the religious clothing of other people. Thus, it seems that if the wearing of hijabs by Muslim women students is restricted, it would affect other religions, more specifically Sikhism.

* However, there were several instances where Indian Judiciary has put certain practices outside the preview of Essential Religious practices. For instances,
  + In a 2004 ruling, the SC held that the Ananda Marga sect had no fundamental right to perform Tandava dance in public streets, since it did not constitute an essential religious practice of the sect.
* While these issues are **largely understood to be community-based, there are instances in which the court has applied the test to individual freedoms as well.**
  + For example, in 2016, the SC **upheld the discharge of a Muslim airman from the Indian Air Force for keeping a beard.**
  + **Armed Force Regulations, 1964,** prohibits the growth of hair by Armed Forces personnel, except for “personnel whose religion prohibits the cutting of hair or shaving of face”.
  + The court essentially held that **keeping a beard was not an essential part of Islamic practic**

The essentiality test was also followed by the top court in 2017 when it held instant triple talaq to be invalid and unconstitutional. The fact that majority of Islamic countries have done away with the said practice also reflects that the said practice is not one which will be called as an essential religious practice, noted the court. It further underscored that the practice of triple talaq is against both theology and law and just because it is followed by a large number of people, cannot be validated.

A direct violation of fundamental right would have taken place if the state had proscribed Muslim student to not to wear hijab per se, assuming that wearing hijab is fundamental right under Article 25. An indirect violation takes place when a general rule, such as policy of neutrality, breaches the fundamental right of a section of society inadvertently and because of the generic nature of the rule in question. The present case is the question of indirect violation of fundamental rights, if any, on the basis of neutrality. The essential requirement for such rules to be valid is that the rule treats everyone equally to establish a neutrality of value system. The European Court of Justice has approved the rules that indirectly prohibit the wearing of any religious symbols on the ground of rule of neutrality. As said, the only test is that such a rule must not target any particular section of society.

**How have courts ruled so far on the issue of a hijab?**

* While this has been put to courts on several occasions, **two set of rulings of the Kerala High Court**, particularly on the right of Muslim women to dress according to the tenets of Islam,**throw up conflicting answers.**
* In 2015, at least**two petitions were filed before the Kerala High Court challenging the prescription of dress code for All India Pre-Medical Entrance** which prescribed wearing “light clothes with half sleeves not having big buttons, brooch/badge, flower, etc. with Salwar/Trouser” and “slippers and not shoes”.
  + Admitting the argument of the**Central Board of School Education (CBSE)** that the rule was only to ensure that candidates would not use unfair methods by concealing objects within clothes, **the Kerala HC directed the CBSE to put in place additional measures for checking students who*“intend to wear a dress according to their religious custom, but contrary to the dress code”*.**
* In ***Amna Bint Basheer v Central Board of Secondary Education (2016)***, the Kerala HC examined the issue more closely.
  + The Court held**that the practice of wearing a hijab constitutes an essential religious practice** but did not quash the CBSE rule.
  + The court once again**allowed for the “additional measures” and safeguards put in place in 2015.**
* However, on the issue of a uniform prescribed by a school, another Bench ruled differently in***Fathima Tasneem v State of Kerala (2018).***
  + A single Bench of the Kerala HC **held that collective rights of an institution would be given primacy over individual rights of the petitioner.**

In **Nadha Raheem Vs CBSE (2015),** two girls challenged the dress code for All India Pre-Medical Test (AIPMT), which prescribed wearing “light clothes with half sleeves not having big buttons, brooch/badge, flower, etc. with Salwar/Trouser” and “slippers and not shoes”. The girls said that dress code would prejudice them because their religious custom mandates them to wear a headscarf and also full sleeve dresses. The CBSE defended its decision, pointing out that the dress code was prescribed in the light of the Supreme Court judgment, which scrapped the 2015-16 AIPMT after noting mass copying and cheating in the exam.

The Kerala high court, however, steered clear of the question of whether hijab is an essential religious practice protected under Article 25. It opted to rather harmonise the interests of the parties and affirmed the prescription of dress code while making an arrangement for the petitioners. The court said that the two petitioners can wear hijab to their examination centres if they present themselves for checking by invigilators half an hour before the exam. “It is also desirable that the CBSE issue general instructions to its invigilators to ensure that religions sentiments be not hurt and at the same time discipline be not compromised,” the high court said in a four-page order.

A year later, the issue of the dress code prescribed by CBSE for the same examination came for consideration before the Kerala HC in **Amnah Bint Basheer Vs CBSE (2016).** A single-judge bench of justice A MuhamedMustaque cited Quranic injunctions and the Hadiths to hold that “covering the head and wearing a long sleeve dress by women have been treated as an essential part of the Islamic religion” and therefore, such religious attire should be protected under Article 25.

 M **Ajmal Khan Vs Election Commission of India**, the Madras high court held that covering of head by scarf is obligatory for Muslim women but added that this right is subject to public order, morality or health and also to the other provisions of Part III of the Constitution (on fundamental rights). The judgment came while rejecting a petition that wanted to restrain the Election Commission of India from publishing photographs of Muslim Gosha women (women in purdah) in the final electoral roll.

While a definitive and dependable ruling of a constitutional court on hijab is still awaited, it cannot be doubted that all educational institutions should afford a sense of being welcomed, valued and safe, regardless of faith or belief. The environment should celebrate students’ culture and language while protecting their religious freedom and, furthermore, their ability to reach their educational dreams.

A row over hijab reflects tensions in increasingly pluralist societies struggling with integration, national identity and security. Therefore, it becomes the duty of constitutional courts to rise to the occasion and deliver an authoritative ruling that can guide the executive as well as citizens of the country.

1. 1963 AIR 1638 [↑](#footnote-ref-2)
2. (1948) 50 BOMLR 389 [↑](#footnote-ref-3)
3. 1954 AIR 282 [↑](#footnote-ref-4)
4. 1983 SCR (1) 729 [↑](#footnote-ref-5)