

Hijab Case through the Lens of Constitutional Secularism: Critical Assessment

Author: Prof. Dr. Pooja Prashant Narwadkar

Principal, Bharati Vidyapeeth's New Law College, Sangli Maharashtra

Email: pnarwadkar@yahoo.com

Co -Author: Dr. Sapna Sukrut Deo

Vice Principal, School of Law, Kasturi Shikshan Sanstha, Shikrapur

Email: drsapnasukrutdeo@gmail.com

Abstract

Following Karnataka's recent restriction on pupils covering their school uniforms with a headscarf in class, many inquiries were raised. On March 15, 2022, a three-judge bench of the Karnataka HC dismissed the petitions contesting the ban, bringing some end to the conflict. The HC took a direct route to its conclusion, which was that donning a headscarf is not fundamentally religious nor a necessary practice of any religion. Although it affects the rights to privacy, autonomy, and agency, the Court finds that the ban is a legally allowed restriction. However, the focus of the paper is to concentrate on the Court's justification and conclusion, which is based on India's dedication to secularism. The religious fanaticism is dragging the nation to downward stage of growth, hence the deliberation is required in the light of Constitutional Secularism.

Key words – Secularism, religious fanaticism , hijab, religious practices

Introduction

In Karnataka, debate about uniforms has raged in the hallways of educational institutions. Beginning in 2022, the Karnataka government issued an order to all government-run educational institutions requiring the management of each to adopt a single, standard policy for their respective schools.ⁱ The directive stated that attire that interfered with equity, public order, or academic integrity would be prohibited. The government had seen a trend in which religious attire was worn rather than only the required uniform, and the government claimed that this “disturbed equality and public order in schools.” This was underlined in the order. In Karnataka, administrators of educational institutions used the order to prevent Muslim women wearing the hijab from visiting the facility. In certain instances, women were admitted to the institute but were segregated from other students and had separate classes.ⁱⁱ

At first glance, it appears that the issue principally relates to the freedom of religion guaranteed by Article 25.ⁱⁱⁱ One could claim that since Hijabs are fundamental to Islam, the State is violating Muslim women's right to freely practice their religion by excluding them from educational institutions because they choose to wear the hijab. Though it seems appealing on the surface, the freedom of religion argument offers a number of problems. In fact, the lawyer for the Muslim women who filed the petition in the Karnataka HC used this very line of reasoning. This write up will make the case that the HC should base its decision on freedom of expression rather than on a ruling based on a person's freedom of religion.

Constitutional Secularism

In breaking down the various arguments, I contend that the Court committed to operationalizing secularism through an equality perspective that sees everyone as removed from society. By emphasizing uniformity, assimilation, and sameness within the arbitrarily defined "quasi-public space" of a classroom, this lens prioritizes uniformity, assimilation, and sameness rather than seeing people as shaped by unique identities and, as a result, emphasizing the recognition, protection, and celebration of plurality.^{iv}

Two questions about secularism

Let's think about two relatively distinct questions: what is secularism and how is it operationalized/achieved, in order to analyze how the case lays the stage for secularism to be a matter for concern.

In regard to the first question, I suggest that the justification offered by the petitioners be understood as follows: To begin, India is committed to a type of secularism known as "positive" secularism, which values religious diversity, pluralism, and tolerance. Second, despite the fact that India is not a secular state, its constitution makes it illegal for the government to engage in behavior that is biased against individuals on the basis of their religious beliefs.

In response to the second question, I would suggest that the petitioners' rationale be understood as follows: To begin, putting secularism into reality necessitates not only the acknowledgment, protection, promotion, and celebration of variety but also the prohibition of any action that might result in the homogenization or erasure of distinct identities. When a state action unintentionally discriminates against a person based on their religion, the state has a duty to make reasonable accommodations for that individual.^v This argument is a direct continuation of the preceding point. The argument that was made at the time was that "positive secularism, which was understood to mean religious plurality, pluralism, and toleration, could be operationalized by acknowledging and defending variation through the application of the non-discrimination responsibility."

The reasons presented by the Petitioners in relation to the definition of secularism have been accepted by the Court; nevertheless, the Court has decided not to accept their arguments in regard to the second point (how is secularism operationalised).^{vi}

Bijoe Emmanuel v Nalsa^{vii}

Jehovah's Witness students who refused to play the national anthem at school were subjected to disciplinary action and ultimately kicked out of school in the well-known case of Bijoe Emmanuel. According to the Supreme Court, requiring students to sing the national anthem at school would violate the constitutional rights of the students and, as a result, would be illegal. The premise that the singing was being opposed on religious grounds was the foundation for the result that the court arrived at. As a result, any objections to the national anthem that are driven by politics might not be able to cite Bijoe Emmanuel as a precedent for their position. If an incident occurred in India that was analogous to the one that occurred with Colin Kapernick, the decision made by Bijoe Emmanuel might not be very helpful.

But was the context in which the problem first arose a significant one in this particular instance? Why should a decision to abstain from singing a song because it is politically motivated be

afforded less protection than a decision to refrain from singing because it is inspired by religion? Why should a decision to refrain from singing a song because it is politically driven? In either scenario, a person is coerced into engaging in an activity that puts them at risk of being punished, despite the fact that they are uncomfortable, disgusted, and aware that the activity goes against their deeply held moral beliefs. The fact that the individual is being forced to participate in the activity and utilize an expressive method that they object to should be regarded as being more important than the specific reason why they are objecting to participating in the activity. In the same way that one can have sincere religious convictions, one can also have sincere political beliefs. The thesis of this paper is not that politics in and of itself is a form of religion, but rather that the distinction between the two is meaningless when considered from the perspective of coercive speech and coerced expression. This is the main argument of the paper.

Instead of following the path laid out by Bijoe Emmanuel, the alternative framework that has been proposed would make use of the understanding of symbolic speech that is found in NALSA. In Bijoe Emmanuel, the religious motivation behind the objection played a significant part in the Court's consideration of the right to freedom of expression. Under the alternative paradigm, every

action that divulges to the public some aspect of a person's identity that is normally kept private would be considered a type of non-verbal communication (aka symbolic speech). If such symbolic communication were to be restricted, it would need to be governed by the reasonable restrictions on freedom of expression stated in Article 19(2).^{viii}

When the alternative framework that was provided is applied to the hijab bans in Karnataka, it becomes obvious that the bans violate the law and should be overturned. Given the marginalization that Muslims face in society, some Muslim women have claimed that wearing a hijab in public is a form of resistance and togetherness for their community. A person's religious identity can be communicated through the article of clothing they wear called a hijab when they do it. The fact that the hijab is a religious symbol is one of the key reasons why it should not be permitted for students to wear it, therefore it should come as no surprise that the hijab makes it obvious to outsiders that the wearer is a Muslim.

Therefore, it should not come as a surprise that wearing a headscarf is a kind of symbolic communication. The government has the ability to defend the restriction on the grounds of Article 19 (2) by invoking one of the justifications against allowing the wearing of the hijab: the headscarf causes disruptions in law and order. Recent outbreaks in Karnataka would tend to lend credence to this assertion. However, there is a pressing need for a more in-depth investigation of the violence. The practice of Muslim women covering their heads with the hijab did not, on its own, incite acts of violence. After the government order was imposed and there were counter-protests, the law-and-order situation did not begin to deteriorate until after this point.^{ix}

Since this is the case, the hijab cannot be equated to "fighting language. The term "heckler's veto," which refers to the concept that if a person who objects to a specific sort of expression can create enough devastation, the state may choose to quiet the speaker rather than putting an end to the violence, is more suitably applicable in this situation. The Supreme Court of India made it abundantly clear in the cases Prakash Jha Production and Anr v. Union of India^x and

Viacom Media 18 Pvt. Limited v. Union of India^{xi} that the state was not permitted to utilize the Heckler's veto in an effort to silence individuals. The court stated that “it is the role of the state to guarantee that legal speech is given the necessary protection in order to stop it from being repressed by threats of physical harm and that this responsibility rests with the state. As a result of the conclusion that donning a hijab is a legitimate form of symbolic expression, the state is obligated to offer protection for individuals who make the decision to do so.”

As a final line of defense, one could argue that because India is a secular society, it is acceptable for public facilities to have policies in place that prohibit people from wearing religious clothing. This line of argument, on the other hand, completely disregards the undeniable fact that the concept of secularism in India has consistently diverged from that which is observed in the nations of Europe. The French conception of secularism regards religion as a private freedom that has no influence on the public arena of the state. In contrast, the Indian approach to secularism views religion as having some bearing on the public arena. In contrast to India, where wearing turbans in public institutions has never been deemed inappropriate, the educational system in France does not tolerate any manifestation of religious belief, including the wearing of turbans. As a consequence of this, Indian secularism has never advocated maintaining a distance between the state and religion; rather, it has always favored equal involvement in religious matters.

Conclusion

It is possible to argue that the proposed framework will kill the idea of uniforms since each student would find a way to express a unique component of their individuality by donning anything other than the required attire. The wearing of the Hijab and the rallies against the Vietnam War are similar in that the rest of the uniform is observed. While the student is still wearing the required uniform, only an addition is made. The House of Lords rejected the argument of a Muslim student in *R (Begum) v. Governors of Denbigh High School*^{xii} that “she should be able to wear a ‘Jilbab’ (Muslim full body attire) because the school permitted ‘Hijabs’” and that “the school had made efforts to ensure that the uniform code was ‘Muslim-friendly’.” So, if necessary, a line can be drawn to indicate that uniform variances still call for adherence to the rest of the uniform.

In conclusion, the Karnataka HC has a chance to advance the unique free speech jurisprudence that was sown in the NALSA decision.^{xiii} Instead of limiting itself to the considerably more limited grounds of protecting fundamental religious practices, the HC should base its decision on the broad-based principles of free expression.

References:

- [1] The Print, 5 February, 2022, “Karnataka govt banned students from wearing clothes that 'disturb equality, integrity and public law and order' in education institutions.” < <https://theprint.in/> >
- [2] Hari Kartik Ramesh, “Guest Post: The Hijab Case through the Lens of Article 19(1)(a)”, FEBRUARY 10, 2022 < <https://indconlawphil.wordpress.com/> >
- [3] Article 25, Constitution of India
- [4] Sharan Poovann, “Hijab-clad students segregated at Karnataka college”, Feb 07, 2022 < <https://www.hindustantimes.com/> >

- [5] GAUTAM BHATIA, “Between Agency and Compulsion: On the Karnataka HC’s Hijab Judgment”, MARCH 15, 2022 < <https://indconlawphil.wordpress.com/>>
- [6] Krishnadas Rajagopal, “Positive secularism is allowed, student tells Supreme Court in Hijab case”, SEPTEMBER 07, 2022 < <https://www.thehindu.com/>>
- [7] 1987 AIR 748, 1986 SCR (3) 518
- [8] Article 19 (2), Constitution of India
- [9] Minhaz Merchant, “The hijab case has allowed some to subvert the meaning of secularism”, March 22, 2022
- [10] <<https://www.firstpost.com/>>
- [11] JT 2011 (10) SC 102
- [12] (2018) 1 SCC 761
- [13] [2007] 1 AC 100
- [14] Bijoe Emmanuel v Nalsa, 1987 AIR 748, 1986 SCR (3) 518