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Anatomising the Hijab Row through the Lens of Intersectionality, Indirect Discrimination, and the Test of Essentiality

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ABSTRACT

It is an unfortunate and bitter truth that, even today, clothing continues to dictate the lives of women who continue to constantly fall prey to the frequent targets of religious restrictions across the world. Their clothing is recurrently presumed too religious or not religious enough across several countries. These constraints usually take the form of individual or group harassment, but they can also take the form of formal government acts. Recently, the Karnataka State Government's pre-university education department has issued a directive using Section 133(2) of the Karnataka Education Act, 1933, prohibiting any female Muslim student from wearing hijab at educational institutions within its jurisdiction. However, in spite of the extensive nationwide protests against the directive, little attention has been given to the intersectional dimension of the discrimination meted out against Muslim women in particular. This paper aims to analyse the Hijab Row through the lens of Intersectionality and the test of essentiality. Furthermore, and as a natural extension, it aims to critically analyse why the Hijab row is also a distinct case of indirect discrimination.

I. BACKGROUND

Muslims account for about 13% of the Karnataka state's population. [2]Karnataka's education system consists of ten years of school and two years of pre-university college or "PU college"[3]. Using powers granted by Section 145(1) of the 'Karnataka Education Act, 1983,' the Government of Karnataka enabled recognised academic institutions to determine the uniforms of their students. According to PU department officials, uniforms were not prescribed by the government for PU colleges, but most college development committees (CDCs) adopted them over time.[4] A 2017 directive stating that PU students should not be required to wear uniforms

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[2] Claire Parker, Mohit Rao, "Hijab protests spread in India as girls face off against Hindu nationalist crowds". The Washington Post. 10 February 2022. Available at: https://www.washingtonpost.com/world/2022/02/10/india-hijab-protests-karnataka/

[3] '*Rules under the Karnataka Education Act'*, Government of Karnataka, pp. 6–10. Available at: https://dpal.karnataka.gov.in/storage/pdf-files/Kanunu%20padakosha%20PDF%20Files/Edu.rules.pdf

[4] Vincent D'Souza, "Uniform not must, says PU dept website, contradicts Karnataka govt stand" *The New Indian*

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still appears to be seen on the PU Education Department website as of February 2022, although it does not appear to have been implemented.[5]

II. THE EVENT

A school uniform controversy was reported in the state of Karnataka in early January 2022, when some Muslim students of a junior college who wished to wear hijab to classes were denied admittance on the grounds that it was a breach of the institution's uniform policy.[6] Six Muslim female students persisted on wearing hijab to class, claiming that it was a part of their faith as well as their constitutional right. Ansar Ahmed, the district president of Karnataka Rakshana Vedike, a non-profit organisation, brought the case to the notice of the media. [7]

The Karnataka government issued a directive on February 5th declaring that uniforms must be worn compulsorily where regulations exist and that no exceptions may be made for the donning of the hijab. Several educational institutions used this order in their refusal to admit Muslim females wearing hijab.[8] Consequently, there were several petitions filed in the Karnataka high court on the aggrieved students' behalf. There were widespread protests and disputes surrounding the wearing of a hijab and on 8 February, the government was forced to close high schools and colleges for three days. The High Court issued an interim order on February 10 prohibiting all students from wearing any religious clothing and this order was implemented once the institutions reopened. There were cases where teachers and students were asked to remove their hijabs and burqas outside the school gates before entering.

On March 15, 2022, after a hearing that lasted around 23 hours and spanned 11 days, the court handed down its decision, upholding the hijab restrictions. According to the court, the hijab is not an essential religious practice in Islam.[9] The petitions requesting an urgent hearing of the case were denied by the Supreme Court of India. The advocate asked the court to hear the matter as soon as possible so that the girls may take their school examinations and avoid losing their progress from the previous year. The Chief Justice of India, N. V. Ramana, denied the

Express, 10 February 2022. Available at: https://www.newindianexpress.com/states/karnataka/2022/feb/10/uniform-not-must-says-pu-dept-website-contradicts-karnataka-govt-stand-2417620.html

[5] Supra note 3

[6] K. M. Rakesh "*Hijab-clad students denied entry to classroom in Udupi PU college*", 2 January 2022, *The Telegraph (India)*. Available at: https://www.telegraphindia.com/india/hijab-clad-students-denied-entry-to-classroom-in-udupi-pu-college/cid/1845798

[7] *Id*

[8] ABP News Bureau "Karnataka Govt Issues Fresh Order Amid Hijab Row, Says Uniform That Affects Harmony Must Be Banned", 5 February 2022, *ABP Live*. Available at: https://news.abplive.com/karnataka/karnataka-govt-issues-fresh-order-amid-hijab-row-says-uniform-that-affects-harmony-must-be-banned-1511101

[9] Special Correspondent, "Hijab row: Karnataka HC reserves verdict on petitions after 23 hours of hearing", *The Hindu*, 25 February 2022. Available at: https://www.thehindu.com/news/national/karnataka/hijab-row-karnataka-hc-reserves-verdict-on-petitions-after-23-hours-of-hearing/article65084779.ece

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plea, arguing that the examinations had nothing to do with the case and that it should not be sensationalised.[10]

The controversy over the wearing of hijab at academic institutions in Karnataka has thrown back into the limelight a dispute on the "scope and ambit" of religious freedom that has been pending for two years before a Constitution Bench of nine judges.[11] The latest order was issued on February 17, 2020. It was ordered to be listed again the following day. The Supreme Court website's trail of the case's hearing dates ended there, before COVID-19 struck.[12]

III. THROUGH THE LENS OF INTERSECTIONALITY

Discrimination is frequently linked to independent characteristics such as gender, caste, or class. Different forms of marginalisation, on the other hand, may foster a particularly specific sense of oppression for a victim of gender violence. Intersectional discrimination refers to the acknowledgement of several grounds of discrimination.

Intersectional Jurisprudence in India

Intersectionality, according to Shreya Atrey, rejects the notion of prejudice as the result of a "single categorical axis."[13] Thus, in the Indian Context, it values the awareness of overlapping forms of oppression characterized by factors such as gender, sexual orientation, caste, religion, or class, among others.

When it comes to jurisprudence in India, the acknowledgment of intersectionality is not novel. The joint reading of Article 14 and Article 15(3) of the Constitution of India, illustrates the framework of substantive equality. It has also been observed in Anuj Garg v. Hotel Association[14] and the previous case of Col Nitisha v. UOI[15], where gender discrimination and injustice were recognised as intersectional. The concept of 'intersectionality' may also be traced

[10] Sukirti Dwivedi, "Don't Sensationalise": Supreme Court Refuses Early Hearing On Hijab Ban"NDTV.com, 24 March 2022. Available at: https://www.ndtv.com/india-news/karnataka-hijab-ban-dont-sensationalise-supreme-court-refuses-early-hearing-on-karnataka-hijab-ban-2840067

[11] Krishnadas Rajagopal "Focus back on religious freedom case in Supreme Court after Karnataka hijab row", The Hindu, February 10, 2022. Available at: https://www.thehindu.com/news/national/focus-back-on-religious-freedom-case-in-supreme-court-after-karnataka-hijab-row/article38406645.ece#:~:text=The%20row%20over%20wearing%20hijab%20in%20educational%20institutions,ordered%20to%20be%20listed%20again%20the%20next%20day.

[12] Krishnadas Rajagopal, '*Sabarimala case: Supreme Court upholds referring religious questions to larger Bench, frames 7 questions of law',* February 10, 2020. Available at: https://www.thehindu.com/news/national/sabarimala-case-supreme-c

[13] Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15', Equal Rights Review, 2016, pp. 160-185. Available at: <http://www.equalrightstrust.org/ertdocumentbank/Through%20the%20Looking%20Glass%20of%20Intersectionality%20Making%20Sense%20of%20Indian%20Discrimination%20Jurisprudence%20under%20Article%2015.pdf>

[14] AIR 2008 SC 663, (2008) 3 SCC 1

[15] Writ Petition (Civil) No 1109 of 2020

back to Navtej Singh Johar v. Union of India[16], in which the Supreme Court struck down Section 377 of the IPC to legalise consensual sex between homosexual adults. The court, in this case, determined that the recognition of the junction of "varied identities and characteristics" is the basic content of the anti-discrimination statute. Furthermore, in the Patan Jamal case, the Court establishes the idea of intersectionality and recognises disadvantages experienced on several grounds. It says that discrimination can in no way operate "in isolation of other identities, especially from the socio-political and economic context" (para. 36).

In the aftermath of the horrific Nirbhaya incident, the Justice JS Verma Committee Report acknowledged that "a woman may suffer a double disadvantage – a) because she is a woman, and b) because she belongs to a caste/tribe/community/religion which is disadvantaged, she stands at a dangerous intersection if poor" (page 38).

The term hijab is derived from the Arabic word *Hajaba*, which means "to prevent from seeing," and refers to larger concepts of modesty, privacy, and morality. Hijab discrimination affects Muslim women but not Muslim males or non-Muslim women. Because the veiling is solely required for women, it can be seen as a sign of oppression that delineates gender boundaries and disadvantages Muslim women. Regarding hijab bans only as incidents of religious discrimination misconstrues and distorts the 'nature' of the prejudice encountered, because hijab cases cover both gender and religion. [17]

It is thus evident that the hijab ban in Karnataka is also a textbook example of intersectional discrimination. As religion and gender are intertwined in the use of the Muslim veil, hijab cases are viewed as a paradigmatic representation of intersectionality. The term 'Intersectional discrimination', coined by Kimberly Crenshaw in the backdrop of racial disparity in the United States, acknowledges and recognises that individuals are not made up of monolithic identities, but of various identities that intersect with one another. Crenshaw contended that gender discrimination is multifaceted and that the "singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror."[18] Muslim women face current marginalisation, by virtue of their being in the junction of their two identities — being Muslim and being a woman. The Constitution forbids discrimination

[16] AIR 2018 SC 4321

[17] Sigtona Halrynjo, & Merel Jonker, '*Naming and Framing of Intersectionality in Hijab Cases — Does It Matter? An Analysis of Discrimination Cases in Scandinavia and the Netherlands. Gender, Work & Organization'*. 23. 10.1111/gwao.12089, 2015.

[18] Rongeet Poddar and Gursimran Kaur Bakshi, *'Intersectionality in Gender-Based Violence: The Supreme Court of India Breaks New Ground'*, THE CONTEMPORARY LAW FORUM, 7 August 2021. Available at: https://tclf.in/2021/08/07/intersectionality-in-gender-based-violence-the-supreme-court-of-india-breaks-new-ground/

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based exclusively on these protected reasons. Nonetheless, notwithstanding some limited acknowledgement of the intersection of religion and gender, in most cases, the prevailing political and legal framework of the headscarf cases hermetically closes off the problem as a religious matter. [19]

Hence the decision taken by the pre-university college and the high court which prohibit the girls to wear a hijab along with their school uniform, have the effect of intersectional discrimination upon Muslim women and it becomes imperative to acknowledge its presence in order to be able to render true justice to the victims. Not doing so will result in compounded discrimination that results in both a quantitative rise in the number of discrimination cases and a qualitative shift in how multiple discrimination impairs the Muslim woman's agency.[20]

IV. THROUGH THE LENS OF INDIRECT DISCRIMINATION

Indirect discrimination refers to restrictions that seem facially or superficially neutral but which has the potential of having a disproportionate influence on a certain community or group of people. The order of the High Court of Karnataka stated that:[21]

"Invoking 133 (2) of the Karnataka Education Act-1983 which says a uniform style of clothes has to be worn compulsorily. The private school administration can choose a uniform of their choice"

Even though the notification, for some, may appear to be neutral on the surface, the point is the differential impact it has had on female Muslim students whose self-expression and religious activities have been compromised. The High Court dealt with the issue of discrimination briefly, noting that the Karnataka State Government's uniform policy order, dated February 5, 2022, was "religion-neutral" and "universally applicable" to all pupils. Nonetheless, the Court's remark about the facially neutral criteria of the uniform dress code contradicts the nation's existing discrimination law jurisprudence, particularly that of indirect discrimination which has previously been recognised by the Supreme Court of India.

Indirect discrimination jurisprudence in India

The Indian judiciary has, in the past, dealt with various cases of indirect discrimination. However, it cannot be denied that the doctrine is still in its nascent stages of legal development

[19] Maleiha Malik, '*Complex Equality: Muslim Women and the 'Headscarf'*', Droit et Société, vol. 68, no. 1, 2008, pp. 127-152. URL: https://www.cairn.info/revue-droit-et-societe1-2008-1-page-127.htm
[20] Id
[21] Kiran Parashar, Apurva Vishwanath, '*Karnataka Govt invokes state law to back hijab ban: 'Don't wear clothes that disturb law & order'*, Bengaluru, New Delhi, February 6, 2022. Available at: https://indianexpress.com/article/cities/bangalore/karnataka-hijab-controversy-clothes-ban-harmony-public-order-7758633/

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in the country. Notably, the courts have mainly relied on two primary cases while dealing with indirect discrimination; Fraser Vs. Canada[22] and Griggs V. Duke Power Company.[23] The argument before the Supreme Court of the United States of America in Griggs Duke Power case was whether the employment criteria had a discriminatory impact on African-Americans due to their race. The Supreme Court of Canada developed the indirect discrimination test in the Fraser v. Canada case, in which a pension scheme had an unfavourable impact that was discriminatory towards women. Considering that the discrimination in the Karnataka Hijab case was an intersectional one, the Courts cannot and should not apply these two tests because they were developed in the context of persons who have been exposed to indirect discrimination based on a singular component of their identification, such as race or gender.

The Indian Judiciary has, in the past, applied these two cases while deciding on cases involving indirect discrimination. In Nitisha V. Union of India[24], the court, applying the Fraser Test, examined whether the need for women to obtain permanent commission in the Indian Army was discriminatory exclusively on the basis of gender. Furthermore, even in the Madhu vs Northern Railways and Anr[25], the Delhi High Court, by applying a principle laid down in Griggs V Duke Power, analysed indirect discrimination in which the sole discriminating element was gender.

A crucial point to be noted here is that both these cases are greatly dissimilar to the Hijab row, thus warranting a different set of principles to be applied while dealing with the latter. The standards in 1 and 2 should not be applied to the Hijab Case, because here, the aggrieved were being discriminated against indirectly owing to their intersecting identities. If any of the standards is used in the latter scenario, it obscures the prejudice suffered by female Muslim students by categorising them into a religious group classified as "Muslims" and failing to see the exclusive component of their identity that is unrelated to their religion and gender.

A more fitting application could be the *Sarikha Test* laid down in the Sarika Angel Watkins v. The Governing Body of Aberdare Girls High School[26]. The present case demands for the import of the test laid down in the Sarikha judgment. It becomes extremely important to note that the court, in this case, which deals with whether a female student from a minority religious community, the Sikhs, was indirectly discriminated, rightly recognises the girl student a ‘Sikh Girl’ or ‘Sikh School girl’, thus acknowledging her intersecting identity. Even in the Mohamed

[22] 2020 SCC 28,
[23] 401 U.S. 424 (1971)
[24] Supra Note 13
[25] W.P.(C) 3329/2022
[26] [2008] EWHC 1865

Fugicha v Methodist Church case[27], the Kenyan Court of Appeals applied the Sarikha Judgement and examined a similar problem of Hijab ban resulting in indirect discrimination of school students, who were female Muslim students thus, with intersectional identities.

Even though the courts may not have explicitly dealt with the issue of intersectional discrimination in each of these cases, they have identified the groups with intersectional identities as Sikh schoolgirls or female Muslim students, thereby applying a specific test to acknowledge indirect discrimination through the intersectional lens. This is why the Sarikha test appears to be more suited when dealing with the Karnataka Hijab Row.

V. THE ESSENTIAL RELIGIOUS PRACTICES TEST

Much of the debate surrounding the Karnataka Hijab Row, judicial and otherwise, appears to centre on essentiality, a concept created by the Supreme Court in the Shirur Mutt case. The constitutional guarantee under Article 25(1) not only guarantees the freedom of religious thought or opinion, but it also allows a person to exercise their beliefs according to their religious standards and permits specific acts in the name of religion. Article 25(1) refers to religious practices as practices that are an integral part of the religion.[28] The Court must rule on an essential aspect of religion or a religious practice in light of the doctrine of that specific religion.[29] The 'essential practices' test was developed in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt[30], where the court said that

"*"what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. The essential practice test clearly states that the practices integral to the faith are exempted from state intervention, in order to determine whether a particular act constitutes an essential religious function or not reliance needs to place on the doctrines and religious texts of that particular religion".*[31]

This description of the Essential Religious Practices doctrine is in accordance with the current use; the doctrine directs the judiciary to make a distinction between practices that are essential to a religion and practices that are not.

However, the doctrine appears to have been criticized due to certain shortcomings, thus rendering it inappropriate for application in the present case. Firstly, it is quite difficult to

[27] (2016) eKLR,
[28] John Vallamattom v. Union of India, MANU/SC/0480/2003.
[29] Seshammal v. State of Tamilnadu, MANU/SC/0631/1972.
[30] 1954 Air 282, 1954 Scr 1005
[31] Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, MANU/SC/0072/1962.

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determine the validity and character of religious freedom and freedom of belief and it would be a disproportionate power on the hand of the judiciary to determine them. The courts are not theological authorities when it comes to evaluating whether or not a behaviour is "integral" to a religion. Faizan Mustafa, an expert on religious freedom, has claimed that the criteria is flawed and has argued that the test "impinges on individual freedom and gives too much power to the courts in matters of religion. In effect, it elevates the judiciary to the status of clergy."[32]

Secondly, there has been a shift in the intended meaning of the usage of the words 'essential to' as laid out in the Shirur Mutt case. At this juncture, it becomes important to remember that the Essential Religious Practices doctrine was designed to protect religious autonomy rather than undermine it. Judges were supposed to make this difference "with reference to the doctrines of that religion itself.". However, on a closer reading of the judgement, one finds out that the idea behind the Shirur Mutt's formulation of Essential Religious Practices was not intended to differentiate between religious practises that were essential and those that were not. It was intended to differentiate between religious practices and non-religious practices. This can be observed in the following lines of the judgement[33]:

"If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day… all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character…"

This demonstrates why the doctrine's "*essential to*" understanding is incorrect. In this initial version, practices that were not covered by the concept were those that were regarded non-religious in nature, rather than those that were religious but not sufficiently essential. However, since 1954, as a product of various judicial interventions, the doctrine has evolved from being "essentially religious" to being "essential to religion". Even in the Sabrimala Judgement, Justice Chandrachud wrote,

"this Court used the word 'essential' to distinguish between religious and secular practices in order to circumscribe the extent of state intervention in religious matters…... "[t]he shift in judicial approach took place when 'essentially religious (as distinct from the secular) became conflated with 'essential to religion'".[34]

[32] Freedom of Religion in India, 2017.
[33] Supra Note 29.
[34] Sabrimala Judgement. Available at: https://www.scribd.com/document/389669250/Full-text-Supreme-Court-Sabarimala-temple-verdict#fullscreen&from_embed

This shift becomes important and problematic to an extent because it highlights the fact that the doctrine is now easy to weaponize. Because the doctrine is a product of judicial decision making, it is in the hands of the courts now to decide if a specific act is essential to religion or not. The doctrine's goal was to give religion agency and independence, not to restrict religious practice

VI. CONCLUSION

India is a country with several diverse cultures, and it becomes imperative that all of them are recognised and respected. It becomes the individual's sole autonomy to choose their dress code based on their mode of expression. However, as was seen in Karnataka, the hijab ban dispute resulted in the closure of educational institutions across the state, resulting in further protesting among student organisations. Aided by a thorough reading of various judicial precedents, it becomes imperative that the Supreme Court produces a verdict that is in line with or similar to the Sarikha Test.

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