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Right to Religion and Its Rela-*Shun* to Essentiality of Hijab Practices

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ABSTRACT

This research article articulates the essentiality of the hijab practice and the consequence of the right to Religion in its relation/rela-shun. It aims to provide a viewpoint of the hijab practices as customary rights proving it to be fundamental whilst giving a multidimensional view from a spiritual and institutional angle. The misunderstanding of faith and Religion has proved to be of great hindrance in the generation of these controversies. To generate clarity, The Right to Religion in India have been stated. It uses sources from spiritual texts, articles, journals and landmark judgements for the same. The limitation of this article mainly pertains to the Karnataka Hijab Row and discusses religious essentiality and customary practices in the same regard. Thus, the results of the research article elucidate keystone solutions to combat the controversy and state the essence of the consequence of the hijab ban in Karnataka and the rest of India.

Keywords: Islam, Hijab, Rights, Essentiality, Customary.

I. INTRODUCTION

True Religion is real living; living with all one's soul, with all one's goodness and righteousness was quoted by Mahatma Gandhi, alluding that religions are credent systems that relate spirituality and humanity. Religions are portrayed as having a set of rules concerning sacred activities that sway over believers of a particular spiritual community but are not seen beyond those practices. The word 'religion' has personal and distinct connotations for each individual and hence cannot be generalized to a standard definition.

Some well-known worldwide religions such as Hinduism, Islam, Christianity, Buddhism, Confucianism, Daoism and Judaism gradually spread around the globe, with over a million followers in various capacities.² Many religions have customary practices that have not been inscribed in the spiritual texts but have been followed for centuries. One such customary practice is the veiling practices that have been followed even before the formation of the Islamic Religion.

¹ Author is a student at Christ University, Bengaluru, India.

² Little, W. (2016) "Chapter 15. Religion", *BCcampus*, p. <https://opentextbc.ca/introductiontosociology2ndedition/chapter/chapter-15-religion/>.

This customary practice of wearing the Hijab has recently been subjected to controversies because of it not being considered an essential religious practice. Despite Religion being influential among the masses, it is also the cause of many conflicts that are still prevalent today. Hence, when this is such a paramount socio-economic contention causing societal changes, questions such as- why do controversies exist because of misunderstanding faith and Religion? What is the history of veiling practices, and why is it a customary practice? What is right to Religion concerning the hijab controversy, how can we truly define an essential religious practice? are to be pondered upon.

II. MISUNDERSTANDING RELIGION AND FAITH

Religion and faith are not co-dependent on each other but are intertwined and used as tools that shape social and cultural structures.³ For a simple explanation, Religion is an institutional construct. It is a socio-cultural system that is based on ritualistic practices and various organizations. In contrast, faith implies fidelity, loyalty and trust, and that particular belief in the same deity is what enlarges communities. Just as growing faith strengthens religious structures and bonds within a group, riveting religious discussions bring a spark of faith to some people.

The common misunderstandings between Religion and faith can be straightened out by understanding that Religion is always based on faith, whereas faith isn't always dependent on Religion. People who take their Religion seriously interpret everything through their religious outlook and act in the mindset created by the worldview. Every perspective with its narratives and teachings must be considered a religion; hence, atheism, agnosticism and even secular humanism are forms of Religion.

This misunderstanding must be resolved to end controversies concerning any religion. For this, The hijab practices must be seen as essential because it is a valid custom, has customary rights that exist on its merit, and has been practised since immemorial times. The practices of the Hijab are more based on faith than Religion; hence faith being subject, its essentiality in the practices of the Religion cannot be driven down to generality of just Religion without accounting for faith and customary beliefs.

III. HISTORY OF VEILING PRACTICES

In Arabic, the root word of Hijab coming from h-j-b means barriers and screening. Wearing a

³ Themes, H. and Belief, R. (2022) *Religion and belief, Manual for Human Rights Education with Young people.* <https://www.coe.int/en/web/compass/religion-and-belief>.

veil is a prominent feature of women's clothing in the Middle Eastern and Islamic countries. It is not merely used as a fashion accessory but as a representation of culture and Religion.⁴ The different veil styles refer to the different religious practices of that particular woman, and it is their choice to do so. These practices of wearing veils existed before Prophet Muhammad, and the controversies around the Hijab are not just concerns of the Islamic Religion.

During the Mesopotamian civilization, the veil was a sign of a woman's status, honour and respect. As the Greek, Persian and Mesopotamian civilizations mixed – the practice of veiling started to infuse among one another through invasion.⁵

Veiling was a form of denoting the upper class and separating from the poorer section of society during the Muhammadian times. Soon after Muhammad's death, veiling was practised by all women, and this was no longer confined to the upper class as the practice of wearing the Hijab had more to do with modesty than it had to do with separation in the context of the Quran.

IV. SPIRITUAL ANGLE VS INSTITUTIONAL ANGLE

Verse 24:31 of the Quran "*Say to the believing women that: they should cast down their glances and guard their private parts (by being chaste) and not display their beauty except what is apparent, and they should place their khumur over their bosoms...*" (24:31)⁶ is known as the hijab verse. The meaning of khumur in the above verse is the plural word for 'khumrah' and is a word used for the veil covering the head.

The upper verse recommended women to wear loose-fitting clothes and wear their respective veils in the name of modesty and was also seen as a tool to fight against social security. However, the exact words of Hijab aren't mentioned. Many Muslim women wore it as a customary practice after the death of Prophet Muhammad, and it became a part of their daily lives having differing religious and cultural meanings for each woman.

Sharia or Islamic law is the law created by man based on God's guidelines. In this law, there are five categories of moral scale- mandatory, recommended but not required, neither recommended nor mandatory, reprehensible and prohibited or sinful.⁷ According to these categories, the dresses worn by Muslim women were a part of their etiquette, but it **wasn't a**

⁴ Aziz, R., 2022. *Hijab – The Islamic Dress Code: Its historical development, evidence from sacred sources and views of selected muslim scholars*. [ebook] South Africa: University of South Africa. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.873.8651&rep=rep1&type=pdf>.

⁵ Amer, S., 2022. *What is Veiling?*. North Carolina: University of North Carolina Press, p.256.

⁶ Corpus.quran.com. 2022. *The Quranic Arabic Corpus - Translation*. [online] <https://corpus.quran.com/translation.jsp?chapter=24&verse=31>.

⁷ Al-Allaf, M., 2022. *ISLAMIC DIVINE LAW (SHARI'AH) Structuring the Life of Man by Divine Law*. [ebook] pp.1-6. <http://www.muslimphilosophy.com/ma/works/ahkam.pdf>.

required Islamic behaviour;⁸ however, it was seen as a practice followed consistently since time immemorial with reasonableness and morality ticking all the boxes of the essentials for it to be a **valid custom**.

There are no legal punishments institutionally for not wearing a burqa or the Hijab. Holding the above information to be accurate, why are there legal punishments in our country for wearing the Hijab in public institutions being decided on 'essentiality' when Hijab is a choice and proves essential to the Muslims who follow it. Their reasons may not matter, but the practice must not be shunned by barring it legally and institutionally. Some argue that a woman who doesn't wear the Hijab faces the wrath of Allah after death, but that is open to speculation as spiritual beliefs cannot be unravelled.

In the author's opinion, modesty lies in the eyes of the beholder and modesty in dressing changes by how one looks at it. Hijab is a personal choice, and the spiritual texts have elucidated the same. Institutional laws should not override the natural divine laws, and there mustn't be any opinion on whether a woman wears a hijab. This debate can be perceived as a physical manifestation of Kahlil Gibran's 'On Laws' as the institutional laws in India essentialize barring the Hijab in educational institutions ironically because of its non-essentiality. The real question is, Are the consequences of the recent Indian judgement of barring the Hijab in educational institutions bigger than its essentiality? Why should the right to Religion be protected when the right to education will be in cliff-hanging danger?

V. HIJAB CONTROVERSIES – A WORLDVIEW

Various countries worldwide ban veiling practices due to "national security, gender equality, secularism", etc. Wearing the burqa was often well associated with Afghans. Even after the punishment for not wearing it was removed, women still continued to wear them as it was believed that it gave them freedom from being harassed by men. Some wore it to conceal their identity from others to protect themselves. Today, the only Muslim country that legally enforces the face veil is Saudi Arabia.

Various other countries, such as Bosnia, Herzegovina, and Germany, ban face-covering veils in places of work or public institutions. France, Belgium, Bulgaria, Austria, Denmark and Switzerland have completely banned the burqa.⁹ Turkey bans wearing any veils in public and private universities although 60% of the women in Turkey wear veils daily. France 2004 banned

⁸ *Cornell University Library*, 2022. Women in Islam and Muslim Realms: Dress Code. <https://guides.library.cornell.edu/IslamWomen/DressCode>.

⁹ Outlook. 2022. [online] <https://www.outlookindia.com/international/countries-that-have-banned-burqa-but-what-does-international-law-tell-about-it--news-121782>.

religious symbols in public schools. Iranian women protested for their basic right to freedom to choose whether they wanted to wear the Hijab or not.¹⁰ In the Canadian province of Quebec hijab is not permitted in public institutions and has been legislated and created controversies.

All these controversies worldwide have been stimulated by a misunderstanding of Islamic Religion and faith and have various reasons. Some of these reasoning's are logically sound, and some are mere political distractions; however, the same has been adopted in the recent Indian judgement regarding the hijab controversy.

In India, the hijab controversies in Karnataka have sparked a fire. There have been instances as recent as June 9, 2022, where many Muslim students had to attend classes by removing Hijab due to the suspension of 31 other Muslim students for defying the dress code.¹¹ Even though this impacted the right to education immensely for a lot of Islamic women, there was a ban on Hijab in educational institutions due to it recognizing as a non-essential practice by the courts according to its Religion and hence has been not recognized under the purview of Article 25 of the Indian Constitution. Before discussing the Karnataka hijab row controversy, the constitutionally granted rights to Religion in India are discussed below for further clarity.

VI. RIGHT TO RELIGION IN INDIA

India is a country of various cultures, traditions and religions that try to attain peaceful co-existence, with humanitarianism being the basic foundational structure of every Religion in the world. The word 'secular' was added to the Constitution in 1976 and enacted by the Indira Gandhi government in the 42nd Amendment. Thus, being a secular country grants every individual the freedom to practice their Religion and their choice. The right to Religion is granted under articles 25 to 28, briefly discussed below.¹²

Article 25 explains the freedom of conscience and the freedom to profess, practice and propagate one's Religion. It prevents the state from making laws regulating or restricting any economic, political or financial activity associated with practices of Religion. However, over the years, the courts have ruled that this right protects only essential religious practices and not all religious practices and hence tests to decide what particular rights are protected.

Over the years, the courts have interpreted essentiality based on various approaches. Some

¹⁰ *The 'Girls of Revolution Street' Protest Against Iran's Compulsory Hijab Laws* (2022). <https://thewire.in/rights/the-girls-of-revolution-street-protest-against-irans-compulsory-hijab-laws>.

¹¹ Hindu E-Paper, 2022. Many Muslim students attending classes by removing hijab: MLA. [online] p.3. <https://epaper.thehindu.com/Home/ArticleView>.

¹² 2022. *The Freedom of Religion under the Indian Constitution*. [ebook] Lucknow: Babasaheb Bhimrao Ambedkar University, pp.116,117,161,166 .<https://www.bbau.ac.in/dept/HR/TM/Freedom%20of%20religion%20under%20Indian%20Constitution.pdf>.

included referring back to the spiritual texts, and others have followed empirical behaviour and verified if the customary practice existed at the time of existence of the Religion.

Article 26 grants the freedom to manage religious affairs. This right is imposed to certain limitations and isn't absolute. If any religious practices contravene any public health, morality or order, then those religious practices do not get to claim state protection.

Article 27 permits the freedom to pay taxes for promoting any particular religion. In the case of *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*,¹³ the Madras Hindu Religious and Charitable Endowment Act 1951 was enacted and contributions were levied.

Article 28 speaks about the freedom to attend religious instructions or places of worship in certain educational institutions. Although, it must be noted that the above doesn't apply to the institutions of education administered by the state.

Thus, the right to freedom of Religion is a fundamental right in our Constitution. The Supreme court of India has held secularism to be the basic structure in the Constitution laid down in the *Kesavananda Bharati* case¹⁴ and held it to be the basic feature in the *SR Bommai v UOI* case.¹⁵ It is observed that when Religion and politics are mixed, the fundamental rights of Religion are violated.

The controversies about the Hijab that were set ablaze in the state of Karnataka may have been a political distraction, or it could have also been due to 'non-uniformity'. However, despite the Honourable High Court's judgement, the consequences of barring the Hijab seem more devastating, with more children having to drop out of school because of not protecting their religious rights. Thus, the author critiques that when one fundamental right suppresses another – it cannot be held to be a fair judgement even if it may be legally accurate.

VII. KARNATAKA HIJAB ROW

On January 22 2022, Muslim students were denied entry to a Pre-University College at Udupi because of wearing the Hijab, and a few Muslim girls weren't allowed to wear it in class as it didn't adhere to the school uniform. On February 5 2022, the Karnataka government made the uniform compulsory wherever policies existed. Unhappy with this decision, the students protested. All high schools and colleges were shut in Karnataka for three days from February

¹³ *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 AIR 282.

¹⁴ *Keshavnandha Bharathi vs. State of Kerala*, AIR 1973 SC 1461.

¹⁵ *SR Bommai v Union of India*, 1994 AIR 1918.

8, and the matter reached the High Court of Karnataka. On February 10, the High court issued an interim order that restrained students from wearing religious attire. During the protests, some Hindu students started wearing saffron shawls contrary to what was occurring. This order was implemented on February 14 and was not taken very well by the masses.

The High court of Karnataka delivered its verdict after 23 hours and 11 days on March 15, 2022,¹⁶ consisting of a full bench – Justice Krishna S Dixit, Justice JM Khazi, CJ Ritu Raj Awasthi. The petitioners argued that it violated article 14 and article 25 of the Constitution. The restrictions and ban on Hijab were upheld in the present case because it is not an essential practice in Islam and doesn't violate Article 25 of the Constitution. They also stated Ismail Farooqi's case and elaborated that the Quran stated the practice of wearing a Hijab due to social security and not because of Religion; hence, it was less essential to the Islamic Faith.

The High court's decision will highly impact the younger generations because if wearing the Hijab is not an essential practice,¹⁷ then there is no need to essentialize against not wearing it. The Qu'ran may state that the Hijab is for social security and not essentially a religious practice, but every young individual has their mini-religious customs, and it is up to them to decide whether it is of religious essence or not. The Supreme court of India rejected this petition that demanded an urgent hearing, and the government believed that the court's decision was right. Hijab spoils the uniformity of the students in a classroom.

Hindu protestors with saffron shawls to instigate the population with their protests almost caused the age-old Hindu- Muslim rivalry. It is open to conjecture how these protests occurred with the elections in the corner and created a divide among the population. How was it that all these years wearing the Hijab in the classroom was not a problem, but suddenly out of the blue, it became a tool of 'inequality' and 'non-uniformity'? The only viable conclusion leads to it possibly being a result of the political diversion.

This decision ultimately has prominent stakeholders and impacts a huge crowd. The Indian population is well aware of the difficulty in female education, and it is of no stupefaction that some students have had to leave their schooling because of their parents who wouldn't let their children go to educational institutions without their respective religious practices. This affects the right to education beyond means and sets a downfall in literacy rate in its re-occurrence. As a result, a piece of sacred clothing may not be prescribed in an institution's uniform rules and

¹⁶ The Hindu, 2022. Hijab not an essential practice of Islam, rules Karnataka High Court. [online] <https://www.thehindu.com/news/national/karnataka/wearing-of-hijab-is-not-an-essential-practice-as-per-islamic-faith-karnataka-high-court/article65226798.ece>.

¹⁷ Smt. Resham vs State of Karnataka, 2022 LiveLaw (Kar) 75.

regulations. Still, suppose the consequence is as severe as a loss to right to education to Muslim women because of the mere question of essentiality. In that case, the reason for building uniformity for equality and non-discrimination topples down.

VIII. RELIGIOUS ESSENTIALITY AND CUSTOMARY PRACTICE

Dr Bhimrao Ramji Ambedkar, the father of the Indian Constitution on December 2 1948, acknowledged that conceptions of Religion must cover every aspect from birth to death. He said certain laws don't need to be governed by Religion. Since then, his use of the term 'essentially religious' has been cited in various courts in the country to introduce the essential religious practice test.¹⁸

In the Shirur Mutt case in 1954, the court observed that the essentiality of a particular religion must be decoded regarding its religious doctrine. The Supreme court intended to distinguish and recognize those practices that were secular and essentially religious, and secular practices could be restricted through the law, whereas the latter couldn't.

However, the term 'essentially religious' began to be a test. It ruled out any faith as an essential practice if it hadn't existed before the origins of the Religion, as followed in 2004 when the Supreme court decided that the Tandava Dance was not an essential rite to the Ananda Marga Faith.¹⁹ This, however, is contradictory to the customary practice of the Hijab as history proves that it existed long before the Religion existed and has been continuing consistently to date.

The essential religious test has four essentials for it to be considered under the same purview.²⁰ Firstly the practice must precede the birth of the Religion, which the hijab practices have met as it has happened even before the formation of the Islamic Religion. Secondly, it must compel people of the Religion to follow it. While the words of Hijab aren't specifically mentioned in the Quran, there are mentions of spiritual consequences as disobeying the verses mentioned in this research paper. The third essential is that the practice if not followed, would change the Religion. This has been contradicted in court, but the author also critiques that this has been ambiguous with the Sabarimala case.²¹ Essentiality must not deal with the Religion in itself but with its practice and consequences on the community. If the hijab practice ceased to be followed, the author argues that the Religion would change drastically as the customary rights

¹⁸ SCO, 2022. Essential Religious Practices: Court in Review. <https://www.scobserver.in/journal/essential-religious-practices-court-in-review/>.

¹⁹ Acharya Jagdishwaranda Avadhuta & Others v. The Commissioner of Police, Calcutta & Another, (1983) 4 SCC 522.

²⁰ Panchal, K., 2022. "The Essential Religious Practice Test/ Doctrine of Essentiality". [ebook] Miramar,Goa: V.M. Salgaocar College of Law, pp.1-5. <http://www.penacclaims.com/wp-content/uploads/2020/07/Kartik-Panchal.pdf>.

²¹ Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors, (2019) 11 SCC 1.

would cease to exist. The verses related to attire will not be applicable. Lastly, the practice must be fundamental in the Religion. The Hijab is fundamental because it is a customary right, and customary rights are protected in the Constitution and prove to be as fundamental as any other binding law on the spiritual texts. As all of the above essentials are fulfilled, customary rights must be placed on the pedestal in the case of the Hijab, and the rights of the Muslim women must be protected.

Justice DY Chandrachud, in the Sabarimala case, mentions how compulsions have led the court to don a theological mantle, as the judges become authoritative beings often for religions not even their own. The court, in this case, quoted, "what is not religiously made obligatory therefore cannot be made a quintessential aspect of the religion through public agitations or by the passionate arguments in courts".²² But this unforeseen the huge consequences for the rights of those Muslim women whose Hijab has been an essential practice, at least in their respective homes. Thus, The Hijab should not be forced upon or away from anyone.

IX. LIMITATIONS

This article limits the essentiality of the hijab practices and understanding that as a customary right, it must be fundamental and given equal rights as any other essential religious practice. However, the author's reasoning to disagree with the judgement has more to the consequences of thousands of children forcefully removed from colleges shunning the right to education and its after-effects on literacy. In the end, it is very clear that to overcome these controversies; people must be educated and made aware of the same. The problems and solutions remain clear, but the road path to the destination is muddy and ambivalent.

X. CONCLUSION

The history of Hijab has been complex, intertwining cultures and religions over centuries. Despite the controversies in Karnataka, the author firmly believes that Hijab is one's preference. It shouldn't be essentialized to not wear it when it isn't essentialized to wear it as everyone has their mini-Religion as part of their respective mega-communities. These controversies can be stopped when Religion and politics don't merge and constitute a political diversion. Customary rights are completely valid because its essentiality is determined by the people who follow the Religion and must be prioritized over the specificity of its mention in religious texts. Hence, hijab practices are valid customs and must be treated as an essential right and students must be

²² Sharma, D., 2022. 16 pointer report on why wearing of Hijab is not a part of essential religious practice in Islam: Karnataka High Court unfolds. [Blog] *SCC Online Blog*, <https://www.sconline.com/blog/post/2022/03/16/16-pointer-report-on-why-wearing-of-hijab-is-not-a-part-of-essential-religious-practice-in-islam/>.

allowed to attend their education as it is on the whole more essential to women rights and important to the future of India than the essentiality of the practice.

On the surface, Hijab is a simple concept, but this deceiving simplicity represents each person's individual preferences, religious customs, traditions and beliefs. Masking oneself shouldn't be forced, nor should it be forcefully abandoned since the masked faces have to be eventually unmasked by their truth and will. There must not be flaws in the judgement of the same because only the flawed create flaws in flawless existence. Thus, to conclude, personalized complexity lies behind the veil of each woman questioning their own freedom because in the end, is it freedom if the choice of that freedom is judged and restricted?

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