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Right to Hijab & Right to Expression – A Critical Study

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There are numerous laws present in a nation, but all may not be in use. With changing society and culture, the laws need to be revised and maintained to remove potential problems like obsolete laws. These obsolete laws have some serious repercussions on the entire legal system. There is a dire need to repeal these laws and adopt certain reforms to tackle them at present and prevent them from springing up in the future. Certain challenges are present in enacting these reforms and repealing Obsolete laws. Certain Acts and Initiatives have been undertaken for dealing with this problem. Many Obsolete laws are very offensive and affect a wide range of individuals especially certain laws about criminal offences. This article sheds light on the needs and hurdles regarding repealing obsolete laws. The procedure aspect is also briefly discussed alongside much-needed reforms while mentioning certain important laws.

Keywords: *obsolete, repeal, laws.*

INTRODUCTION

In today's world majority of the individuals think in a manner where their thoughts are projected in a fashion that allows them to express themselves in the best possible scenario. It is to be understood that regardless of how one perceives the other they have a right to express themselves in the way they wish as per Article 19 of the Indian Constitution. Therefore, it is

important to understand the current topic at hand at its value rather than what it could stem to be. This paper deals with the concept of the Right to Freedom of Expression and how the very same does or does not apply in the case of the Right to Hijab. To understand the very same, the content has been divided into five sections.

Section one deals with the concept of freedom of expression i.e., it will allow the reader to understand what Article 19 of the Constitution stands for and how the same may or may not be applied. The very same will be further divided into three parts,

- Understanding the Article from the constitution;
- Importance of freedom of expression;
- Restrictions and limitations under the same.

Section two deals with the case at hand i.e., the Karnataka High Court judgement and other judgments about the Right to Hijab. This will deal with the case at hand and conclude to attempt and prove the hypothesis as stated below. This section shall further be divided into two parts. They are,

- Judgements of the case;
- Analysis of the same.

Section three shall work with the international applications of the said judgement made by the court. This section shall also speak of the nature of thought behind international jurisprudence about something of such a nature. Furthermore, it will speak of what the Qu 'Aran asks of the members of their society and how that is implied across the world. *Section four* shall deal with recommendations and suggestions to the very same, by allowing one to understand what the researchers' ideas are and how the same could be made better. *Section five* shall deal with the proof of the hypothesis and conclusion on the topic.

FREEDOM OF EXPRESSION

Scope & Meaning

All people have the right to freedom of speech and expression, according to Article 19(1)(a). This privilege is solely available to Indian citizens; it is not available to anybody who is not an Indian citizen, such as foreign nationals¹. The right to freely express one's views and opinions through words, writing, printing, photographs, or any other methods is known as freedom of speech and expression. As a result, it encompasses the communication of one's thoughts through any communicative media or visual representation, such as gestures, signs, and the like². The rights granted by Article 19 of the Constitution are those of a free person. As a result, every citizen has the right to exercise such rights, subject to limitations established by the state as needed.³

“Freedom of expression serves four broad special purposes:

(1) It assists an individual in achieving self-fulfillment;

(2) It aids in the discovery of truth;

(3) It strengthens an individual's capacity to participate in decision-making;

(4) It provides a mechanism by which a reasonable balance between stability and social change can be established.”

Everyone in society should be allowed to create their own opinions and freely express them to others. The basic concept at play here is the right of the people to know. As a result, all individuals who believe in citizen engagement in government should generously promote freedom of speech and expression. The attitude of government should be more careful when levying taxes on items touching the newspaper business than when levying taxes on other matters because of the specific interest that society has in freedom of speech and expression⁴. Public demonstrations, whether political, religious, social, or other manifestations, that cause

¹ *Hans Muller of Nurenburg v Superintendent, Presidency Jail, Calcutta & Ors* [1955] AIR 367 (SC)

² *Lowell v Griffin* [1939] 303 US 444

³ *A.K. Gopalan v State of Madras* [1950] AIR 27 (SC)

⁴ *Indian Express Newspaper v Union of India* [1985] 1 SCC 641

public disturbances, act as nuisances, or threaten some concrete public or private harm are not covered by Article 19(1)(a)⁵.

IMPORTANCE

The principle of freedom of speech and expression opens up avenues of free debate of topics in a democracy like India. Freedom of expression is critical in the creation and dissemination of public opinion on social, economic, and political issues across the country. It guarantees, within its limits, freedom of expression and exchange of ideas, as well as the distribution of information that would, in turn, aid in the formation of one's opinion and position on specific problems, as well as discussions on public issues. E.g., the usage of the national flag in the expression of such feelings would constitute a Fundamental Right as long as the expression is limited to nationalism, patriotism, and love for our country.

Right to Information: The right to receive any information is another facet of the right to freedom of speech and expression, according to India's independent judiciary, and the right to transmit and receive any kind of information without interference is a fundamental feature of this right. This is because, without enough knowledge, a person cannot create an educated opinion, make an informed decision, or successfully engage socially, politically, or culturally.

Freedom of Press: Print media is an effective means of disseminating any type of information to any person in the country. As a result, access to printed materials is critical for exercising a person's constitutionally granted right to freedom of speech and expression. Any failure on the part of the state to make legislative provision for people with print impairments to have access to material in alternative accessible formats would be a deprivation of their right to freedom of speech and expression, and such inaction would fall in the wrong place of the Constitution.

It is the State's responsibility to ensure that adequate arrangements are established in the legislation to allow individuals with print disabilities to access printed content in accessible forms. There is no special guarantee of press freedom under the Freedom of Speech and Speech

⁵ *Bimal Gurung v Union of India* [2018] AIR 1459 (SC)

Act because it is already contained in the freedom of expression granted to all inhabitants of the country.

RESTRICTIONS AND LIMITATIONS

There are several reasons why the state might limit the freedom of speech and expression to certain acceptable limits. Such limitations are stated in clause (2) of Article 19 of the Indian Constitution, which places constraints on free expression in the following ways:

Security of the State: In areas dealing with the state's security, some justifiable limits on freedom of speech and expression can be imposed. Because the phrases are similar but differ in severity, the term 'security of the state' must be separated from the term 'public order.' As a result, state security refers to significant and intensified types of public unrest, such as revolt, waging war against the state, even if just against a portion of the state, and so on.

Friendly relations with foreign States: The Constitution (First Amendment) Act of 1951 introduced this reason for the ban. If the freedom of speech and expression is badly hurting India's cordial ties with other state or states, the state can place reasonable limits on it.

Public order: The Constitution (First Amendment) Act, 1951, inserted this reason for the restriction to address the situation created by the Supreme Court's judgement in the case of *Romesh Thapar v The State of Madras*⁶. According to the Indian Supreme Court, public order is distinct from law and order, as well as state security. The concept of 'public order' refers to a sense of public peace, safety, and quiet. Anything that upsets public order also bothers the general population. However, merely criticising the administration has little effect on public order. Legislation that offends anyone's religious emotions is a legal and reasonable limitation aimed at protecting public order.

⁶ *Romesh Thapar v The State of Madras* [1950] AIR 124 (SC)

Decency and Morality: These are specified in Sections 292 to 294 of the *Indian Penal Code 1860*, which forbids the sale, distribution, or exhibition of obscene language and places limits on freedom of speech and expression on grounds of decency and morality.

Contempt of court: A person's right to freedom of expression does not give them the authority to defy the courts. The term "contempt of court" is defined under Section 2 of the 1971 *Contempt of Courts Act*. Under the Act, the term 'contempt of court refers to either civil or criminal contempt.

Defamation: Article 19 (2) of the Indian Constitution prohibits any individual from making any comment that harms another's reputation in the eyes of society. In India, defamation is a severe offence outlined by Sections 499 and 500 of the *Indian Penal Code*. Although 'truth' is regarded as a defamation defence, it would only be effective if the statement was made 'for the public good,' which is a matter of fact that must be decided by an impartial tribunal.

Incitement to an offence: Another ground added by the Constitution (First Amendment) Act of 1951 is this one. A person is likewise prohibited under the Constitution from making any speech that incites or urges others to commit a crime.

Sovereignty and integrity of India: The Constitution (Sixteenth Amendment) Act of 1963 was later amended to include this ground. This is solely for the purpose of prohibiting or restricting anybody from making remarks that directly question the country's integrity and sovereignty. One of the fundamental rights guaranteed by the Indian Constitution is the right to express oneself through speech. In today's world, the right to freedom of speech and expression includes not only the expression of one's views through words, but also the circulation of those views through writing, audio-visuals, and any other means of communication. The right to freedom of the press, the right to knowledge, and other rights are included in this right. As a result, this essay concludes that the notion of freedom is critical to the efficient functioning of a democratic state. Article 19 of the Indian Constitution uses the wording "in the interest of public order" and "reasonable limits" to suggest that the rights granted under this provision are not absolute and can be limited for the protection of other citizens and to maintain public order and decency.

RIGHT TO HIJAB

Hijab Ban Judgement:

A three-judge bench of the Karnataka High Court, consisting of *Chief Justice Ritu Raj Awasthi, Justices Krishna Dixit, and J.M. Khazi*, upheld the hijab prohibition at the state's educational institutions on March 15, 2022. On February 5th, 2022, the Karnataka government issued an order prohibiting students from wearing the hijab at state educational institutions with a dress code. The Karnataka High Court was then asked to review the order. On February 11th, the Court issued an Interim Order prohibiting the wearing of all religious insignia in schools, including hijabs and saffron shawls⁷.

The Court addressed four main concerns in its March 15th decision sustaining the ban.

1. "Is the Right to Freedom of Conscience Protective of Hijab Wearing?"

Muslim students contended that the hijab prohibition infringed on their right to freedom of conscience as guaranteed by Article 25 of the Indian Constitution of 1950. Muslim students contended that because wearing the hijab is a component of their religious religion, it must be protected, citing *Bijoe Emmanuel v State of Kerala*. It is not necessary to investigate the need for the practice to decide if a Right to Freedom of Conscience is in jeopardy⁸. The Court contrasted 'Conscience Freedom' and 'Religious Expression' in the judgement, noting that although conscience is an internal conviction, the religious display is an outward expression of that belief. The hijab must pass the Essential Religious Practices test since it is a form of religious expression⁹.

2. Is Wearing the Hijab an Essential Religious Practice under Islam?

Wearing the headscarf is not an essential religious practice, according to the Court. It was not entitled to protection under Article 25 of the Indian Constitution of 1950. The hijab ban has been

⁷ 'Hijab Ban Judgment Summary (Karnataka HC)' (*Supreme Court Observer*, 15 March 2022)

<<https://www.scobserver.in/reports/hijab-ban-judgment-summary-karnataka-hc/>> accessed 17 October 2022

⁸ *Ibid*

⁹ *Ibid*

alleged to be a violation of Muslim students' right to religious expression under Article 25. Muslim students argued that wearing the hijab is an essential religious practice, citing Islamic scriptures and claiming that it is an unavoidable element of their religion. This Essential Religious Practice cannot be restricted by the state. The hijab is not a religious practice, according to the Court. It is, rather, a cultural activity. The hijab developed as a means of ensuring women's safety, and it had a connection to the socio-cultural conditions that existed at the time the Quran was written. It cannot be considered a fundamental part of religion.

Furthermore, even if the Court agreed that wearing the hijab constitutes an Essential Religious Practice, the Court ruled that the practice would only be protected by the Constitution if it did not interfere with fundamental principles like as equality and dignity. The practice of wearing the hijab, on the other hand, does not breach this line in this circumstance.

3. Does the Ban on the Hijab in Classrooms Violate the Right to Freedom of Expression and the Right to Privacy?

The Court ruled that the hijab prohibition in public schools did not infringe on their constitutional right to freedom of speech and expression under Article 19(1)(a). According to the Muslim students, wearing the hijab constitutes an aspect of "expression" under Article 19(1)(a), citing the *National Legal Services Authority v Union of India*. The pupils also argued that the right to privacy protects them from wearing the hijab. Students must be given "reasonable accommodations" so that they can exercise this privilege. The Court cited a worldwide agreement that uniforms and dress regulations can be enforced in educational institutions. Because it is 'religion-neutral' and 'universally applicable to all students, the State government's enforcement of a clothing code is a legitimate limitation that does not violate constitutionally protected rights. It was pointed out that the clothing rule encourages secularism. The Muslim students were also claiming a breach of their 'derivative rights,' not their 'substantive rights,' according to the Court.

The freedom to select what one wears is an element of one's autonomy and expression, according to the Court. This, however, must be subject to reasonable limitations. In certain

public areas, such as schools, freedom may be limited to maintain order and decorum. The Court rejected the argument that pupils should be permitted to wear a headscarf that matched their uniform in colour and pattern. This is because if it is permitted, "the school uniform ceases to be uniform."¹⁰

4. Is the Government Order Purportedly Banning the Hijab Valid?

The State government's Order, which was issued on February 5th, was affirmed by the Court. The Order was made by the *Karnataka Education Act, 1983*, according to the court. Under § 133(2) of the Act, which allowed the government to give effect to the Act's aims by making Orders and constituting organisations like the College Development Committees, the government can prescribe a dress code¹¹." *The Court declined to order a disciplinary investigation of the principal and teachers of the Government PU College, where students were originally forbidden from wearing the hijab*¹².

ANALYSIS

It is to be understood that the fundamental aspect of the case at hand is not with the freedom of expression but rather with the understanding of the situation at hand i.e., understanding the four primary concerns and the key factor being educational institutes. Firstly, the difference between 'Conscience Freedom' and 'Religious Expression'. In the case at hand, expression of one's faith and belief according to the High Court deals with one of a very personal nature rather than expression through a form of show. Therefore, there exists a need for the hijab to pass the test as mentioned above. This means that the essence of the uniform is much larger than that of conscience freedom, as then the uniform no longer remains as a single unit and loses the very sense of such expression i.e., unity. Secondly, and most importantly as per the facts of the case is the fact that the Hijab is not a mandatory attire as per the practices in Islam. Therefore, it does not fall under an essential religious practice. This very argument resulted in the weakening of the case. Thirdly, this does not violate freedom of expression as the uniform is the State

¹⁰ Hijab Ban Judgment Summary (Karnataka HC) (n 7)

¹¹ *Ibid*

¹² *Ibid*

government's enforcement of a clothing code and therefore a legitimate limitation that does not violate constitutionally protected rights. For all of the above reasons ban on hijab in educational institutes, was held by the government to be valid under the law and not violative of any articles under the Indian Constitution.

INTERNATIONAL IMPLICATIONS UNDER IHRL

This section deals with the international implications of the above-mentioned case. The section will deal with the perspective of the International Human Rights Laws i.e., the IHRL perspective to understand the broader ambit of the said situation. This is a requirement to understand the case because it is not just the fundamental rights that are spoken about but also human rights. To understand the very same, this section shall be divided into three concerns. To do so, the researcher shall compare the the³ situations in France and conclude the same.

FIRST CONCERN: IS THE WEARING OF A HEADSCARF PROTECTED UNDER THE IHRL?

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) reads,

“Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and public [emphasis mine] or private, to manifest his religion or belief in worship, observance, practice, and teaching.”

The *United Nations Human Rights Committee* (part of the United Nations) interpreted the meaning of this Article to include “not just ceremonial activities but also such practises as dietary limitations, the wearing of distinguishing apparel or head coverings” in its *General Comment No. 22* from 1993. On October 11, 2010, France approved Act No. 2010-1192, which said, “No one may, in a public space, wear any article of clothing intended to conceal the face”. Penalties for breaking the statute included jail and fines. Two French Muslim women, Miriana Hebbadj and Sonia Yaker were punished under this statute for wearing a burqa in public. The Convention has been signed and ratified by France, India, and the majority of countries

throughout the world. This implies it has a legal duty to observe, safeguard, and execute the Covenant's obligations inside its borders.

*"The two ladies addressed the UNHRC, claiming that the French law breached their right to religion as granted by the ICCPR and that they were offended by it. In two major judgements in 2018, **Miriana Hebbadj v France** and **Sonia Yaker v France**, the Committee found that the French burqa ban did indeed violate the ICCPR's rights to freedom of religion (Article 18) and equality (Article 26). The wearing of a burqa or complete face covering is protected as a right to religion under the IHRL, based on these judgements and general comment."*

SECOND CONCERN: DO LEGITIMATE RESTRICTIONS OR LIMITATIONS EXIST TO THE RIGHT?

Like most other rights, the right to religion is not absolute. *"Freedom to exhibit one's religion or views may be subject only [emphasis mine] to such limits as are imposed by law and are necessary to preserve public safety, order, health, or morality, or the basic rights and freedoms of others,"* according to Article 18(3) of the Convention. This is analogous to Article 25 of the Indian Constitution, which states that religious freedom is "subject to public order, morals, and health" as well as other Part II provisions.

The regulation was justified by France as required to protect "the Republic's ideals," since hiding one's face would "impair human contact and weaken the conditions for living together in a varied society." It also used public order and public safety as justifications for the prohibition. The Committee concluded that prohibiting the burqa in public places did not achieve any of the declared goals of fraternity, public order, or public safety. It determined that "living together" was a fairly broad condition that was not covered by Article 18(3). There was also no evidence that *"wearing the full-face veil in and of itself constitutes a threat to public safety or public order that would warrant such an absolute ban,"* according to the court.

The Committee noted a few significant observations when making its conclusion. They are,

- The prohibition was "*based on the idea that the full-face veil is fundamentally discriminatory and that women who wear it are compelled to do so,*" according to the statement. While some women wear the burqa as a result of family or social pressures, the Committee noted that it "may also be a decision – or even a way of asserting a claim – based on a religious conviction."
- It was also noted that the restriction, "*far from protecting fully veiled women, could have the opposite effect of confining them to the home, impeding their access to public services and exposing them to abuse and marginalisation.*"
- As a result, the UNHRC determined that French law violated both gender equality and religious freedom.

THIRD CONCERN: DOES THE BAN VIOLATE THE RIGHT TO RELIGION UNDER IHRL?

The prohibition of Muslim women from wearing burqas/hijabs at colleges is a violation of their right to freedom of religion as guaranteed by the IHRL. The question that is to be answered is whether or not the limitation is lawful. The Government PU College's decision to bar hijab-wearing students from entering the institution appears to be unsupported by any legislation or official authority, making it unlawful. Following that, as the hijab row grew in intensity and more colleges became embroiled in the debate, a government order was issued on February 5, 2022, which, in essence, empowered schools and colleges to prohibit the hijab as part of a uniform dress code on the grounds of unity, equality, and public order.

RECOMMENDATIONS AND SUGGESTIONS

This section will mention the problematic scenario that exists with the implementation of such a ban and how the very same can be understood via national and international barriers. To do so, the aspect of Human Rights must also be brought about. Thereby, the issue is no longer limited to Fundamental Rights but is now also part of Humanitarian laws. The Karnataka High Court issued an interim ruling prohibiting all students from wearing religious attire in response to writ petitions brought by certain Muslim pupils. Based on public order, this ruling essentially

prohibits the wearing of the hijab. The limitation, it claims, is equally applicable to saffron shawls and hijabs. The directive, however, is based on the false and deceptive premise that the saffron shawl and the hijab have the same religious and cultural importance. The shawl was worn solely to politicise and exacerbate the situation; it is neither a strongly believed religious practice nor a component of the wearer's identity. As a result, when Hindu males were instructed to leave their religious attire at the gate, they took off their saffron shawls and went to college, while Muslim women stayed at home.

The Karnataka government and the High Court in their judgement cite the same grounds as France - equality, fraternity, and public order. And in IHRL, all three of these justifications are insufficient.

“Even though the law's aim was equality, as previously stated, its effect is blatantly discriminatory towards both women and a religious minority. It discriminates against Muslim women significantly more than it does against men and women of other faiths, including Muslim males. Even in situations like S.A.S. v France, where the ban was upheld on other grounds, the argument of equality was rejected as a rationale to prohibit the burqa from being worn in public. Similarly, the HRC rejected the unity argument, which is similar to France's 'living together' argument, because it is imprecise and not covered by the Convention's exceptions.”

Article 25 of the constitution does not include the foundation of "unity." Otherwise, the term "unity" might be taken as uniformity that seeks to remove all diversity. By prohibiting the wearing of the hijab in schools and colleges, educational institutions would become discriminatory environments. Finally, the foundation of public order is likewise false and devoid of evidence. As time goes on, it becomes evident that the prohibition, not the wearing of the hijab, is posing a threat to public order. It's worth noting that outlawing the burqa did not make France more peaceful or secular. On the contrary, it has deepened polarisation in French society by increasing suspicion among the country's Muslim minority. One thing should always be kept in mind when discussing the hijab. Therefore, the researcher believes that the outlawing of the hijab, not the headscarf itself, should be scrutinised in light of constitutional law and human rights principles.

CONCLUSION

This section shall deal with whether the said paper has answered the two statements of the research hypothesis as mentioned in Part I of the paper. They are,

H₀: The Right to Hijab is a fundamental right i.e., freedom of expression.

The very same hypothesis has been deemed to be not proven throughout the length of the paper. This is because as per the Indian Constitution and judicial system, it has been stated that the same i.e., ban of Hijabs in educational centres by giving a comparison with shawls does not have the Essential Religious Practice under the practice of the said religion. Therefore, the Court ruled that the hijab prohibition in public schools did not infringe on their constitutional right to freedom of speech and expression under Article 19(1)(a).

Hence, the hypothesis fails.

H₁: The ban on Hijab violates the rights of individuals.

This hypothesis is considered to be true on the international platform but untrue in terms of national jurisdiction. Therefore, the researcher shall take into account the bigger ambit and ratifications under the IHRL to allow this hypothesis to be deemed as proven. This is done because the wider ambit of the said problem has been taken into account by the IHRL i.e., violation of Human rights and not just a concern of Fundamental ones. It has been proven in the above paper.

Hence, the hypothesis is proven.

Therefore, we can conclude that there are various aspects to be considered throughout the duration of attempting to understand how exactly the situation or case at hand must be dealt with. But the step with the least political and social backlash is the process such situations should be handled. Especially in a nation like India, the same has to be dealt with extreme caution and with great understanding and precaution. Keeping all of the above in mind we must respect the

very nature of the constitution that is even though secularism is key diversity in living trumps the very same.