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Understanding the Karnataka HC's Hijab Row Judgement for CLAT UG & PG

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Yesterday, the High Court of Karnataka pronounced a critical judgment on the Hijab Row. Through this article, we shed light on the important aspects of the Hijab Row judgement from the CLAT UG and PG examination perspectives.

An important question before the Court, in this case, was if the wearing of the hijab constituted an 'essential religious practice' of Islam. It further questioned whether the State warrants interference in such matters.

The judgment was initially referred to justice Krishna Dixit, who referred the judgment to a higher bench considering the nature of questions so asked. An important aspect we shall be breaking down through this article is whether the wearing of hijab forms part of the right to expression under Article 19(1)(a) of the Constitution and whether restriction can be levied only under Article 19(2), which highlights reasonable restrictions.

The court held that the **wearing of hijab is not a part of Essential Religious Practice** in Islamic faith and thus, is not protected under Article 25 of the Constitution. A Full Bench of the High Court further held that prescription of school uniform by the State is a reasonable restriction of the students' rights under Article 25 and thus, the Government Order issued by the Karnataka government dated February 5 is not violative of their rights.

In providing their judgment, the court relied on a judgment of the Constitutional Court of South Africa, in [KwaZulu-Natal and Others v Pillay](#), which upheld the right of a Hindu girl from South India to wear a nose ring to school.

It was further the State's contention that wearing hijab does not stand the test of constitutional morality and individual dignity, laid down by the Supreme Court in [Young Lawyers Association v. State of Kerala](#) (Sabarimala judgment).

HIJAB ROW JUDGEMENT ANALYSIS: CRITICAL COMMENTS

1. The Court had identified the following as the key question in the matter:

“Whether wearing of hijab is a part of essential religious practice in Islam, is the jugular vein of all these matters...”[i]

In our opinion, the Court erred in limiting the consideration of the matter to the examination of ‘essential religious practice’. The Court also framed issues on Article 19(1)(a), 21, 25, 14 and 15—however, primacy was given to the question of ESR.

The considerations undertaken by the Court can be effectively critiqued on the following grounds:

First, the Court did not consider the question of right to education of the Muslim girl students. Granted, the question was not raised by the petitioners. However, considering the factual background of the case, this should have been a relevant consideration in the Court’s decision.

Second, the ‘right to conscience’ argument—slightly divorced from religion *per se*, that was claimed by the petitioners — was rejected by the Court on a detailed examination of the facts and law laid down in the *Bijoe Emmanuel* case[ii]. The decision eventually doesn’t rely on *Emmanuel*, and is detached from this judgment in spirit.

Third, the test of essential religious practice as laid down, and so far it is determinable by Courts, is open to scrutiny. A detailed critique is [available here](#) and [here](#). Moreover, in the judgment, the Court over simplified the test, and concluded that hijab isn’t a part of the Muslim essential religious practice.

[Gautam Bhatia writes: “ERP is both constitutionally unprincipled and impractical, because it involves a secular Court making ecclesiastical judgments. I am not alone in this criticism: for the last four decades, ERP has been criticized by both scholars and practitioners; apart from a dissenting judgment by Justice Lakshmanan in 2004, however, it has never been seriously challenged within the judiciary.”]

2. The Court also failed to consider the aspect of ‘indirect discrimination’—a doctrine that forms a part of the Indian legal system, most recently detailed by Chandrachud, J. in *Lt. Col. Nitisha & Ors . v. Union of India*[iii].

Indirect Discrimination can be explained in the following manner:

“In fact, this is the whole point of the prohibition of indirect discrimination: even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons.”[iv]

To explain further, “the doctrine seeks to broaden the scope of anti-discrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible”[v].

Global legal jurisprudence has shown that banning of head covers, those in the nature of *hijab* and beyond have been considered to be discriminatory practices, whether employed by State or private institutions. Banning differential clothing in the manner prescribed by University certainly fulfils the requirements of indirect discrimination—which the Constitution of India doesn’t permit.

3. Questions of Reasonable Restrictions vis-à-vis Article 14,15,19 and 21:

In saying that the restrictions were ‘religion-neutral’ and ‘universally applicable’ to all the students[vi], the Court blatantly ignores the test of indirect discrimination.

The Court says, “Such ‘qualified spaces’ by their very nature repel the assertion of individual rights to the detriment of their general discipline & decorum.” This would imply a situation where in Universities/schools, the personal identity of students will be allowed to be actively repressed. This is against the spirit of *NALSA v. Union of India*[vii].

Dubbing the argument on the importance of reflection of diversity in a classroom as a “hollow rhetoric”, the Court concluded that the uniform formed a reasonable restriction and upheld the same.

4. The Court denied permitting *hijab* on the ‘principle of reasonable accommodation’ as well. Stating that (they) were not impressed, the Court stated that this would counter the very uniformity of the uniform—and the ‘social separateness’ that would result would be undesirable.[viii]

Some contentions of the respondent also merit a critical response, in the process of analyzing the judgment.

It was claimed:

“The right to wear hijab if claimed under Article 19(1)(a), the provisions of Article 25 are not invocable inasmuch as the simultaneous claims made under these two provisions are

not only mutually exclusive but denuding of each other.”[ix]

This argument attempts to reinforce the archaic understanding of Fundamental Rights application that believes the rights to exist in water-tight compartments.

It was also claimed:

“Permitting the petitioner - students to wear hijab (head - scarf) would offend the tenets of human dignity...”[x].

Use of patronizing terms like “permitting” while talking about ‘choice’ and ‘dignity’ of a woman appears highly hypocritical.

Given that the remedy claimed by the petitioners was denied, it was incumbent upon the Court to clarify that it did not stand for these irregular arguments.

What do you think of the Hijab Row judgement? Let us know in the comments below!

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Endnotes:

[i] Judgment, p.16

[ii] 1986 SCR (3) 518

[iii] Writ Petition (Civil) No 1109 of 2020, decided on 25.03.2021 (Supreme Court)

[iv] Coleman v. Attridge Law, [2008] IRLR 722

[v] Nitisha, p.53

[vi] Judgment, p.96

[vii] AIR 2014 SC 1863

[viii] Judgment, p.106

[ix] *Id.*, p.35

[x] *Id.*, p.35-36