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The Flawed Logic of the Karnataka Hijab Ban

By: Faiza Rahman,John Sebastian

The Karnataka hijab ban does not advance the autonomy of Muslim women. Rather, it narrows the avenues available for them to question and resist community norms.

In December 2021, several Muslim girls wearing hijabs were prevented from entering the premises of a pre-university college in Udupi, Karnataka, on the grounds that the hijab did not conform to the dress code of the college. Subsequently, in February, the Karnataka government issued an order directing colleges in the state to follow their prescribed dress codes or to prescribe clothes which "do not threaten equality, unity, and public order". Following this, several educational institutions in Karnataka prevented students wearing hijabs from entering their premises or classrooms.

Many students filed petitions in the Karnataka High Court challenging these actions of the Karnataka government and educational institutions. In *Resham v State of Karnataka (Resham)*, the Karnataka High Court dismissed these petitions and upheld the validity of the hijab ban.

While the hijab ban was challenged on several grounds, we focus here on arguments based on autonomy and religious freedom, and the manner in which the court engaged with these. (A detailed research brief, which we co-authored with other scholars, discusses other legal aspects of the Karnataka hijab ban that we do not cover here.)

Enhancing autonomy?

The debate over the permissibility of religious clothes and symbols in educational and other public institutions is not new. In France, for instance, *laïciste* advocates of a ban on the hijab and other religious clothing in schools claim that it is aimed at the removal of what they view as an oppressive symbol of male domination (Laborde 2006: 352). Essentially, they argue that banning the hijab and other such religious clothing liberates wearers from oppressive religious practices, thereby enhancing their autonomy.

Autonomy here is broadly understood to mean the ability of individuals to choose how to live their lives without interference by others; that is, people become "authors" of their own lives (Raz 1988: 369). It can be contrasted with *heteronomy*, situations where others determine what an individual does with her life and what goals she pursues.

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Laïciste secularists see religious symbols like the hijab signifying the control of religions over people's lives, as determining the choices they make, and therefore, not autonomous. Such a view of religion, as being fundamentally opposed to autonomy, lies at the heart of the *laïciste* project of the construction of a secular civic nationalism, free from religion, and the strict separation of the state from religion.

In contrast, critics of the *laïciste* model highlight how bans on the hijab detract from autonomy. They argue that hijab bans coercively impose dominant or majoritarian cultural dress codes on believers belonging to minority communities and thereby interfere with their freedom to pursue their religious beliefs and decide what to wear (Laborde 2006: 361). In other words, the freedom to author one's life includes the freedom to lead a religious life, and these are sources of meaning and value in many individuals' lives. Choices to follow religious norms are therefore not necessarily non-autonomous and can even enhance autonomy (Ahmed 2015: 63).

The fact that wearing the hijab is not in itself harmful to the wearer adds force to this argument. Such a decision is also reversible (a person wearing a hijab can later choose not to wear it), and therefore does not negatively affect anyone's capacity for autonomy in the future (Sebastian and Sen 2020: 11-12).

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Whether the hijab symbolises oppression is deeply subjective, and takes away the ability of the wearer to decide for herself what it means. These critics are often wary of the manner in which *laïciste* secularists paternalistically impose dress codes compatible with the beliefs of dominant groups on those who differ (Hirschmann 1998: 349-350). *Laïcistes* additionally seem to unfairly focus on religious clothes while ignoring other cultural norms that determine what we wear. For instance, the cultural norm that boys should not wear skirts is a limitation on their freedom to wear what they choose to, but is imposed as a part of most school uniforms.

There is also something worrying about the state coercively enforcing a dress code on the grounds that it is protecting individuals from similarly coercive choices of their community. In this process, the individual concerned is herself not asked what she wants. The individual in question is now confronted with two sources of coercion—state and community—that takes her away further from the choices available to her, and thus her autonomy.

Strategically too, it is now well established that coercive measures against religious norms only have the effect of further entrenching conservative voices in communities, because communities tend to react to such measures by re-asserting their beleaguered religious identities (Mahajan 2005: 312). Measures such as education, as we discuss below, are far more effective in enhancing the ability of individuals to question community practices.

Decisional autonomy

We now analyse the approach of the Indian Constitution and courts to these questions.

In *Resham*, the Karnataka High Court dismissed the petitioners' contentions that the hijab ban violated their rights to free speech, privacy, and autonomy. The court asserted that these rights are not available in "qualified public places" such as schools and colleges, as such "spaces by their very nature repel the assertion of individual rights to the detriment of their general discipline and decorum." Therefore, the court reasoned, these rights claimed by the petitioners in educational institutions were not "core" and "substantive," but instead "metamorphise" into "derivative" and "penumbral" rights. According to the court, such weaker "derivative" rights of the petitioners would not entitle them to wear a hijab in educational institutions.

However, the court's reasoning is flawed for the reasons we discuss below.

The fundamental rights in the Constitution safeguard various aspects of an individual's autonomy. These include the freedom of speech and expression, assembly, association, residence, business (Article 19), personal liberty (Article 21), and religion (Article 25). Recent Supreme Court cases highlight the importance of autonomy to all these rights.

In *K.S Puttaswamy v. Union of India (Puttaswamy I)*, the court recognised the right to privacy. Explaining the philosophical foundations underlying the concept of privacy, Justice D.Y. Chandrachud held that individual autonomy—the ability of an individual to make choices and decide how to develop her personality—is a fundamental part of the concept of privacy. He held that privacy:

> enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture. (*Puttaswamy I*)

Several important inferences flow from this. First, autonomy necessarily implies the ability to make decisions that go against social norms or "demands of homogeneity." In safeguarding autonomy, the right to privacy ensures heterogeneity and diversity in our plural culture. Therefore, any attempt by the state to impose homogeneity and uniformity throughout society would violate this guarantee.

Second, the preservation of autonomy is connected to the dignity of the individual and each is a "facilitative tool to achieve the other." Dignity is violated by the non-recognition of an individual's identity (*Navtej Singh Johar v. Union of India*). Since religion forms a key facet of the identity of individuals, the inability to express it would invade the right to dignity and privacy of individuals.

Third, privacy as a concept attaches to persons and not places. Therefore, unlike what the Karnataka High Court held in *Resham*, individuals have a right to privacy even in public spaces, which would include schools and other educational institutions. Further, decisional autonomy, or the ability of individuals to make choices that go against social demands for homogeneity, is neither "derivative" nor "penumbral" but instead lies at the heart of the right to privacy and is protected by the Indian Constitution.

> [W]hile many women wear the hijab to gain respect within their families and community, many find the hijab liberating them from the oppressive demands of western fashion...

In particular, the Supreme Court has held that the individual freedom to determine the way one dresses and expresses faith, including in public spaces, is protected under the fundamental right to privacy (*Puttaswamy I*, *Shafin Jahan*). However, can it be argued that the hijab or other religious clothing reduces the autonomy of those who wear them because they view the practice as obligatory? Does the state, therefore, have the paternalistic duty of banning the hijab or other religious clothing in the interests of the persons wearing them?

No.

First, the wearing of the hijab or other religious clothing may, in many instances, be an expression or positive affirmation of autonomy by Muslim women. For example, contrary to popular perception, while many women wear the hijab to gain respect within their families and community, many find the hijab liberating them from the oppressive demands of western fashion or the continuous sexualisation of female bodies (Laborde 2006: 365). Therefore, there are a number of reasons why Muslim women may wear the hijab, and many Muslim women may genuinely value the privacy and dignity that comes from wearing a hijab in public spaces.

This is equally true of all religious and cultural symbols such as turbans, *sindoors*, or *kadhas* and taking part in religious and cultural practices such as traditional marriages, forms of worship, and celebration of festivals. The state cannot enquire into whether every instance of wearing a religious or cultural symbol is purely autonomous in nature.

Second, ideas of romantic state paternalism, where the state intervenes to "protect" women based on patriarchal understandings of them as weak and lacking in agency have been rejected by the Supreme Court in favour of an approach that recognises the agency of women (*Joseph Shine*). In *Anuj Garg*, a law banning women from working in bars to similarly "protect" them was struck down by the Supreme Court. The court noted that such a law "ends up victimising its subject in the name of protection". Rather than curtailing their freedom in the guise of protection, it was the duty of the state to provide the necessary conditions of safety to facilitate women's greater participation in the workforce. Therefore, when confronted with choices on how to protect individuals, the state must choose the option which facilitates their autonomy.

> ... Justice D.Y. Chandrachud [in Puttaswamy] held that individual autonomy —the ability of an individual to make choices and decide how to develop her personality—is a fundamental part of the concept of privacy.

The same applies to the hijab matter. Instead of forcibly banning the hijab to "protect" women from their communities, it is the state's duty to provide them with the conditions (such as education) under which they can make that decision for themselves. To assume that women cannot make such a decision for themselves only furthers their subjugation under romantic paternalism.

Third, the prohibition of religious clothing such as the hijab results in excluding Muslim women and other religious persons from educational institutions. This has several negative effects. The provision of education is a prerequisite for the meaningful development of individual autonomy. Autonomy requires the ability to choose from a range of options (Raz 1998: 426). This requires a minimum level of education and information, and the minimum resources to give effect to our choices, along with the freedom to pursue them (Griffin 2008: 33).

An uneducated person has substantially fewer options than an educated person. Education not only provides individuals the ability to pursue many options in life (such as becoming a doctor, engineer, lawyer, or journalist), but also exposes them to alternative ways of life beyond their communities. The positive effects of education on the freedom of individuals, especially women, have been well

documented (Amartya Sen 1999: 191-92). The Supreme Court has held that the right to education is implicit in and flows directly from the right to life and personal liberty enshrined under Article 21 of the Indian Constitution (*Unni Krishnan v. State of Andhra Pradesh*).

Even if the wearing of the hijab is viewed as an oppressive community practice or the result of socialisation and indoctrination (Laborde 2006: 368), the ability to question, dissent, reform, and exit dominating social groups can only develop when individuals are provided the means to do so. Hence, the provision of education is a key component for ensuring that individual choices are meaningful and real. Education provides persons with the intellectual and financial resources to question and oppose community practices.

In contrast, prohibiting Muslim girls from receiving an education because they choose to wear the hijab obstructs their pursuit of what they consider to be a worthwhile life. It also harms their ability to make autonomous choices about their life and religion in the future. The same applies to religious clothing and the practices of persons belonging to all faiths.

It is ironic that, at around the same time the Karnataka government was banning the hijab, it was also passing an anti-conversion law, which makes it harder for individuals to leave their communities if they so desire. This makes it more difficult for individuals to oppose oppressive community practices. Similarly, the legal system does not make it easy for individuals to dissent from their community practices even if they want to. Laws which enable that, such as the Special Marriage Act, are riddled with loopholes and are notoriously ill designed, making escape from community norms difficult.

If the state were serious about protecting individual autonomy from overt and covert forms of domination arising from religions, families, or communities, these are the areas to focus on.

Constitutional position

The Indian Constitution does not follow the French *laïciste* model of secularism, as has been noted by several scholars (Ronojoy Sen 2016: 885). Article 25 of the Constitution provides for the right to freely "profess, practise and propagate religion." The right to practise religion necessarily extends to external manifestations of it such as dress, as has been stated by the Supreme Court. Article 25 specifically mentions that the "wearing and carrying of kirpans" by Sikhs is covered under freedom of religion. The Constitution also recognises the rights of religious groups (Article 26).

> The Constitution ... follows a model of 'celebratory neutrality' where the state does not distance itself from religion, but focuses on equal recognition and respect ... along with a celebration of religious diversity.

Importantly, in the sphere of education, the Constitution does not envisage a complete absence of religion. While educational institutions wholly maintained by the state are prohibited from imparting religious instruction, religious education is permitted in state-aided and recognised schools, as long as no student is compelled to attend such instruction (Article 28). Similarly, religious minorities have a right to establish educational institutions, where the teaching of their religious values is permitted (Article 30). The Constitution therefore follows a model of "celebratory neutrality" where the state does not distance itself from religion, but focuses on equal recognition and respect for all religions along with a celebration of religious diversity (Dhavan 2001: 311).

How has the Supreme Court understood the relationship between religious freedom and autonomy? Interpreting Article 25, the Court has extended protection to religious practices, depending on whether the practice in question is considered by believers to be integral or essential to their religion (the essential religious practices or ERP test). Later court decisions narrowed down the ERP test to protect only "core" or "fundamental" practices, without which the very character or nature of a religion would not remain. In many cases, this was interpreted to include only mandatory religious duties — duties which were optional for believers would not be protected under Article 25.

To determine the centrality of a practice to a religion, courts would engage in detailed interpretations of religious practices and texts, an activity which they are not trained (or competent) to do. The Karnataka High Court decision in *Resham* is emblematic of the problems with this approach.

Even though the practice of the hijab is mentioned in several Islamic religious texts, the Karnataka High Court held that the practice of wearing it was extrinsic to Islam. According to the court, it was merely a cultural practice that existed at the time of Islam's founding, which found its way into Islamic practice as a result. In addition to the questionable foundations of this claim, the views of Muslim girls themselves on the nature of their belief were not even considered in the entire exercise.

In terms of autonomy, the court taking on the mantle of interpreting religious texts takes away from the ability of followers of a religion to themselves interpret their religion, and thereby, their autonomy. For instance, many Sikh men believe that not cutting their hair is a sacred religious duty. Many, however, do cut their hair. A freedom of religion approach that respects autonomy would nevertheless protect the right of those who choose to not cut their hair, as long as they do so out of sincere religious belief.

This was the approach taken in the *Bijoe Emmanuel* case, where the Court held that religious beliefs which are "genuinely and conscientiously held" would be protected, irrespective of the personal views of the judges in question. Such an approach, which defers to the beliefs of the individual in question, distinctly enhances autonomy, and is in conformity with the text of Article 25, which emphasises the "free" exercise of religion.

> [T]he views of Muslim girls themselves on the nature of their belief were not even considered in the entire exercise.

An autonomy-based approach to freedom of religion is visible in Supreme Court cases such as in *Puttaswamy*, where many of the judges linked freedom of religion to autonomy and the ability to make free choices. The *Bijoe Emmanuel* approach to freedom of religion is more in line with this approach towards religion, and is, therefore, preferable. If applied to the hijab controversy, such a standard would lead to the protection of the practice of wearing a hijab under Article 25, since many Muslim women do indeed genuinely believe that the practice is a religious duty.

If, on the other hand, the ERP test were to be applied, it would largely make the right of Muslim women dependent on dominant community practices, and not their free choice to interpret their religion the way they want to.

Conclusions

The Karnataka hijab controversy has brought to the fore several debates over the nature of individual autonomy, freedom of religion, secularism, and state paternalism. Our discussion has demonstrated that banning the hijab in educational institutions does not protect the autonomy of Muslim women and instead substantially diminishes it. If the state were to genuinely safeguard and enhance the ability of all individuals (including Muslim women) to question and resist community norms, the best way would be to provide an education that facilitates autonomy, and strengthen legal and institutional mechanisms to support those who dissent from their communities.

Faiza Rahman is a PhD scholar at Melbourne Law School, University of Melbourne. John Sebastian is a PhD scholar at Melbourne Law School and an Assistant Professor at OP Jindal Global University, Sonipat.

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