A narrowing of freedom

The hijab judgment privileges discipline and control over liberty and diversity

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RELIGION HAS BEEN at the centre of human societal existence since time immemorial. Religion is, and has always been, an indispensable and ineffaceable part of our lives. The Karnataka High Court's much-awaited judgment on hijab has upheld the state government's circular of February 5. The 129-page judgment is on the expected lines with the three-judge full bench headed by Chief Justice Ritu Raj Awasthi discussing at length the doctrine of essentiality and how hijab is not an essential religious practice of Islam, and, therefore, concluding that the petitioners' arguments against hijab are liable to rejection.

Strangely, the learned judges made no reference whatsoever to the acceptance of the review of the *Sabarimala* judgment (2018) and framing of seven questions by the seven-judge bench of the Supreme Court. The *Sabarimala* review (2020) clearly shows that the Supreme Court itself is in doubt about the correctness of the essentiality doctrine and whether courts should assume the role of clergy. The judgment is also historic as it has given much importance to discipline and control over liberty and diversity: The high court has upheld the dress code because it would promote harmony.

Religious freedom is premised on the belief that every human being has the inherent dignity to explore his or her conscience and pursue the truth. Religious practice promotes the well-being of individuals, families, and the community and its denial may unnecessarily lead to frustration, depression and exclusion. The judgment begins with a quote from Sara Slininger that the history of the hijab is quite complex and has been influenced by the intersection of religion and culture. While some women no doubt veil themselves because of societal pressure, others do so by choice. But the judgment spent hardly any time on the question of "choice" made by the few Muslim girls.

The court has rightly concluded that freedom of religion under Article 25 has been subordinated and made subservient to all other fundamental rights. But in this case, there was no question of conflict between competing fundamental rights. To say that freedom of religion is merely an individual right is equally controversial as freedom of religion under Article 26 is indeed a group right given to every religious denomination or any section thereof, and unlike Article 25, it has not been subjected to other fundamental rights. In fact, the essentiality doctrine originated in the context of the expression "in matters of religion" used in Article 26.

The Supreme Court in *Shirur Mutt* (1954) held that the term "religion" in Article 25 covers all rituals and practices that are "integral" to the religion. In this manner, the judiciary took it upon itself to determine what is integral — and what is not — to religion. In doing so, it implicitly rejected the "assertion test" of the United States, "whereby a [plaintiff] could just assert that a particular practice was a religious practice" and courts would not probe it any further.

The Karnataka HC has now said that hijab is not integral to Islam. This author has been writing that essential religious practices doctrine is erroneous and gives courts extremely wide powers in purely theological matters. It looks too simplistic to say this or that is not a core belief. But then should we privilege one practice over another? The insistence that essential practices must originate at the time of the founding of the religion is also absurd. On the matter of the *tandav* dance in the *Anand Margi case*, the apex court denied protection to *tandav* dance because the Anand Margi faith came in 1955 but dance was introduced in 1966. Religions do evolve over time. To say whatever is not in the Vedas or the Srutis is not an essential Hindu practice may greatly undermine the freedom of religion of Hindus.

The *Indian Young Lawyers Association* judgment (2018) that insists on the foundation of the practice and has been relied upon by the Karnataka HC that the foundation of the practice must precede the religion itself or should be co-founded at the origin of the religion is itself deeply problematic and is now under review in the Supreme Court. In *Gandhi v. State of Bombay* (1954), the Supreme Court had said that no outside authority has any right to say that these are the essential parts of religion and it is not open to the secular authority of the state to restrict or prohibit them in any manner they like.

If we go by the Karnataka High Court judgment that hijab is not essential Islamic practice because there is no punishment for not having hijab, it may lead to the conclusion that adultery and homosexuality are to be considered as *haram* (prohibited) as there are severe punishments for them under Islam. In spite of their decriminalisation, these will remain sins in the eyes of religion.

The judgment clearly says that, "the Holy Quran does not mandate wearing of hijab or headgear for Muslim women. Whatever is stated in the 66 above suras, we say, is only directory, because of absence of prescription of penalty or penance for not wearing hijab, the linguistic structure of verses supports this view". The conclusion of the court that, "It is not that if the alleged practice of wearing hijab is not adhered to, those not wearing hijab become sinners, Islam loses its glory and it ceases to be a religion," would seriously curtail the scope of religious freedom of all religions because this can be said about most religious practices. No religion would lose glory because of the state disallowing a particular practice.

The judgment has taken an extremely narrow view of the freedom of conscience and has demanded too heavy a burden of proof.

Academic administrators may celebrate this judgment as it gives them extraordinary powers to discipline their students. The judgment is a milestone as far as the control model of administration is concerned. Strangely the court found it fit to quote *Rex v Newport* (1929) judgment about the upholding of caning for smoking a cigarette outside school. The judges are not aware that there are schools that do not have uniforms.

The judgment is a clear setback to the liberty model of administration as it says fundamental rights have relative content and their efficacy levels depend upon the circumstances in which they are sought to be exercised. The court even said that the petitions do not involve the claim about substantive rights such as the right to privacy and freedom of expression but merely derivative rights. Finally, the court strangely held that in so-called "qualified public places" like schools, there cannot be the assertion of individual rights to the general detriment of general discipline and decorum. The court went on to conclude that even the substantive rights themselves metamorphose into a kind of derivative rights in such places. In fact, the court has quoted fundamental duties provisions at several places as if the same were justiciable like fundamental rights.

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