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Case Comment: Resham vs State of Karnataka

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INTRODUCTION

One of the most important facets of a well-functioning democracy is secularism. In the context of the Indian sub-continent, secularism has always meant respect for all religions, whereas, in the global sense, secularism means the separation of State and religion. In the case of *Resham vs the State of Karnataka*¹, the Karnataka HC decided to uphold the ban on Hijab, which was a very controversial decision. While the petitioners claim that this decision directly violates fundamental rights enshrined under Article 19(1)(a)², (i.e., freedom of expression) and Article 21³, (i.e., privacy) of the constitution and that the court should account for the test of reasonable accommodation and proportionality, however, the court has stated that the ban on hijab in educational institutions is justified and valid. This article seeks to examine the case from the view of both supporters as well as opponents while providing a detailed critique of all the factors which have made this one of the most controversial High Court judgements of recent times. Vide Government Order dated 05-02-2022 issued under Sec. 133⁴ read with

¹ *Resham v State of Karnataka* (2022) SCC OnLineKar 315

² Constitution of India, 1950, art. 19(1) (a)

³ Constitution of India, 1950, art. 21

⁴ Karnataka Education Act, 1983, s 133

sections 7(2) and (5)⁵ of the Karnataka Education Act, 1983 government and private schools and colleges had proscribed the wearing of a Hijab (head-scarf) on the premises of their educational institute. Along with questioning the authority and legality of this act, schoolgirls have raised questions about the application of mind, the practice of the principle of reasonable accommodation, and the intention behind it. Article 19(1)(a), Article 21, Article 25 and International Conventions India has testified to have been called upon to protect. Another series of events, wherein hijab-wearing Muslim girls were barred from entering college premises and teachers' hostile behaviour, have led up to the controversial judgement delivered by the Karnataka High Court in the case of Resham vs the State of Karnataka. The news gained massive traction and soon, reports of various similar incidents started pouring in from numerous media outlets.

CONTENTION OF THE PETITIONERS

The broad contentions of the petitioners have been enumerated as follows:

- The hijab or headscarf is a Quranic injunction and an 'essential religious practice' in Islam, and proscribing it is violative of fundamental rights guaranteed under Article 25⁶ and thus, is impermissible.
- The impugned government order is contended to be violative of the fundamental right to freedom of conscience and Article 25.
- One's choice of dressing and appearance is protected under freedom of expression and is part of their identity and self-expression. The choice to wear and dress as one wants is protected under 'privacy jurisprudence' which has been laid down in the landmark judgement of *K. S. Puttaswamy vs Union of India*⁷.
- The government order is violative of the *doctrine of proportionality* taking such extreme steps without fully exploring the *least restrictive test*.

⁵ Karnataka Education Act, 1983, ss 7(2) and 7(5)

⁶ Constitution of India, 1950, art. 25

⁷ *K. S. Puttaswamy v Union of India* (2017) 10 SCC 1

- There is a non-application of mind along with misdirection in law and thus, manifests arbitrariness.
- Examples of schools that have permitted the wearing of a Hijab have been given.
- The power of prescribing dress codes in schools under the Karnataka Education Act, 1983 is contended to be mere 'police power'.
- The College Betterment (Development) Committee is said to have exceeded its jurisdiction in prescribing dress codes and attempting to politicize the educational environment. Their act is against the doctrine of separation of power and also fails the principle of accountability.
- The argument of public order is challenged by directing responsibility on the people responsible for destruction and not the ones wearing Hijab.
- Women's autonomy under Article 14⁸ is breached and gender-based discrimination prohibited under Article 15⁹ has been allowed. Rather than promoting homogeneity, the government should be promoting heterogeneity. The decision to ban Hijab is against the constitutional spirit of inclusiveness and diversity.
- The action is against international conventions and treaties of which India is a signatory which protect human rights, protect women and children from discrimination and promote the principles of reasonable accommodation.
- One petition also challenges the act of school teachers and prays disciplinary inquiry and action upon them.

CONTENTION OF RESPONDENTS

The respondents being the institutions, teachers, and the State, have stated their contentions as follows:

- Rights claimed under Article 25 by the petitioners are not absolute in nature and are open to reasonable restrictions and regulation. Hijab has been deemed to not be an 'essential religious practice' in Islam and is not covered under Article 25. There are no

⁸ Constitution of India, 1950, art. 14

⁹ Constitution of India, 1950, art. 15

injunctions on this practice and on referring to the guidelines laid down by the Apex Court for determination of essential religious practice, it is submitted that wearing a Hijab is a cultural practice and insignificant to the practice of religion.

- These educational institutions are viewed as 'qualified public places' wherein personal rights are not absolute and can be made subject to reasonable restrictions. The parents and students had agreed to adhere to guidelines and they cannot oppose the same.
- Prescription of a dress code is not a police power and is an inherent responsibility of educational institutes.
- The intention of the action which is to cultivate a secular and scientific outlook of education, which is a duty of the State, has been highlighted. The intention is to promote dignity and freedom and transcend *religious, linguistic, regional, or sectional* diversities.
- The action of the institutions was to promote peace and public order which was necessary due to social unrest and political agitation within these institutions.
- The College Betterment (Development) Committee is an autonomous body and is empowered to prescribe uniforms and has acted well within its authority.
- Respondents brought up repercussions of wearing a Hijab, which is derogatory to facets of human dignity and individual choice of Muslim women and girls and also attacks constitutional morality. The Shayara Bano Case¹⁰ held that the test for essential religious practice should be to decide whether the religion would cease to be the same without such practice.
- In light of Curricula Regulation, 1995, schools can impose restrictions on religious practice as they are qualified public places. They also are quasi-parental and parental authorities and can impose supervision.
- Disciplinary actions cannot be taken against college teachers as prayed because they were acting as per law and within permissible power.

¹⁰ *Shayara Bano v Union of India and Ors.* (2017) 9 SCC 1 (SC)

HELD

The Court rejected the Writ Petitions and held that no case can be made out of them as they are void of merit. Thus, the hijab proscribing and ban in educational institutions was upheld and said to be a constitutionally valid action.

REASONING GIVEN BY KARNATAKA HIGH COURT

The Court considered 4 questions to adjudge and decide the matter-

1. *“Whether wearing Hijab is part of ‘essential religious practice’ in Islam, protected under Article 25 of the Constitution.*
2. *Whether prescription of school uniform is not legally permissible, as being violative of petitioner’s Fundamental Rights inter alia, guaranteed under Article 19(1)(a) and Article 21 of the Constitution.*
3. *Whether the government order dated 05-02-2022 apart from being incompetent is issued without application of mind and is further manifestly arbitrary and therefore violates Articles 14 and 15 of the Constitution.*
4. *Whether any case is made out in W.P. for issuance of a direction for initiating disciplinary enquiry against Respondents 6 to 14 and for issuance of Writ of Quo Warranto against Respondents 15 and 16?”¹¹*

The Court concluded wearing of Hijab (headscarf) is not a part of *essential religious practice*. The Court distinguished between 'Freedom of Conscience' and 'Religious Expression' in its decision, noting that while conscience is an internal conviction, the religious display is an outward expression of that belief. The hijab is a form of religious expression that must pass the Essential Religious Practices criteria. The Court stated that it is a cultural practice, rather than being an essential one. The hijab arose as a security precaution for women, and it was linked to the socio-cultural conditions that existed at the time the Quran was written. It cannot be considered a fundamental part of the faith. Furthermore, the Court ruled that even if it accepted that wearing the hijab constitutes an Essential Religious Practice, it would only obtain

¹¹ *Ibid*

constitutional protection if it did not contradict fundamental ideals such as equality and dignity. The need that an activity is an Essential Religious Practice in order to be protected by the Constitution is a threshold condition. However, in this case, the practice of wearing the hijab does not cross this threshold. The Court looked into the definition and application of Secularism and 'positive secularism'. The Fundamental duty of citizens under Article 51A(e) promotes citizens to take steps to transcend linguistic, religious, sectional, and regional diversities. The Court examined Article 25 and how it does not include 'cultural practices'. An inspiration from American Constitution has been drawn to understand the whole concept of religious freedom. The court upheld that if a practice is claimed to be essential to practice religion is being carried out due to practice for a long time or on basis of religious texts, the same cannot be given constitutional protection unless it satisfies the *test of essentiality*. The practice's *constitutional value* has to be proven. The structure laid down in *Shayara Bano*¹² has been relied on and that merely mandating hijab in *Ahadith* does not necessarily guarantees it being essential, as was the take on triple talaq.

The Court also focused on schools' and colleges' authority to prescribe their dress code and uniform to promote and confirm harmonious development and physical and mental faculties of students. Uniform, being religion-neutral and universally acceptable to all and must be complied with and issued to fulfill Fundamental Duty under Article 51A(e). It held that schools must prescribe uniforms to promote constitutional secularism.

CRITICISM

The order of the Karnataka High Court dated 15th March 2022 is being met with backlash and criticisms. The critics have expressed their disappointment over the non-inclusive approach adopted by the State towards the Muslim students who choose to wear a Hijab to their colleges and schools. The order is also being criticized for neglecting the test of reasonable accommodation and proportionality, according to which, the State should try to find a way to ensure the implementation of a dress code without the unnecessary and unprovoked ban upon the wearing of Hijab in their educational institutions. Since the Hijab is merely a headscarf that

¹² *Ibid*

does not interfere with the uniform, it should be allowed inside the educational institutes because such institutes also share the ideal of secularism, which has always meant respect to all religions in the context of the Indian sub-continent. In recent times, when the intolerance towards people who follow Islam has exponentially increased in the country, the court should take steps that show the acceptance and inclusivity in the nature of the government. The same was not reflected in the impugned order of the High Court. The Human Rights Watch has also stated its dissatisfaction with the order passed by the Karnataka HC as it stands opposed to India's obligation prescribed under international human rights law, which recognizes and ensures an individual's freedom to manifest their religious beliefs and the right to education without discrimination. The Human Rights Watch has held both the forcing and banning of religious garments at the same pedestal: to be violative of religious freedom and privacy rights. The government is being accused of hampering the growth of Muslim women and girls by not ensuring that schools are inclusive and safe spaces where they can practice their religious beliefs such as wearing a Hijab, free from intimidation. An approach that embraces religious beliefs and practices should have been applied in the impugned order. The three-judge bench which was established to take adjudge the dispute has failed to ask the relevant questions pertaining to the constitution and fundamental rights guaranteed by it. It narrowly focuses on the question of freedom of religion under Article 25, while treading very lightly on questions of a right to education, personal autonomy, and freedom of speech and expression.

CONCLUSION

The Court has nevertheless, taken a huge step towards bringing equality and removing bars on religion but failed to be inclusive. Providing a different direction to Muslim girls and women and helping them explore the world outside of the hijab. The intention behind the State Action and the judgement is to bring uniformity, but the same must be done with care and handled delicately. The intention and priority must be to look towards the agenda and purpose of this institution, i.e., imparting education. No action should be taken which eventually hampers this right of education.