

Accounting for *Hijab*: Interrogating the Post-Secular

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ABSTRACT

This article questions the idea of the 'post-secular' as a category for understanding Indian women's experience of religion as an existential practice in neocolonised capitalist patriarchy. The majoritarian state's manipulation of an identitarian regime of signification to use and control women's lives is located in a plural, democratic society that is currently riven by the violent politics of conflicting religious and secular constructions of *hijab*, a head covering worn by Muslim women. From an engaged ideological perspective that seeks radical transformation, feminist struggle includes the right to practice and profess one's faith, against a majoritarian norm that bulldozes difference and imposes its prescriptions as ideal. This article aims to show, from a feminist perspective, the manipulation of signifiatory practices in India, linking women's 'dress' with progress to essentialise and politicise identity. It questions whether redressal against violence wrought on women by religious fundamentalism can be found in a secular state policy, based on the norm of equality of difference. Feminist practice would actively use the guarantees given to the citizen by a pluralist secular constitution to challenge the violence of interlinked discriminations, necessary for the survival of a plural society in which diversities co-exist.

Keywords: hijab, Indian Constitution, plurality, South Asian feminism, secularism

INTRODUCTION

On 1 January 2022, women students of an Indian government-run PreUniversity college in Udupi, a district in the southern Indian state¹ of Karnataka, were denied entry into the classroom for wearing *hijab*, a shawl or scarf that covers the head. The head of the college asserted that this was done to ensure that everyone in the classroom wore the same uniform. On 3 January 2022, a section of students in Koppa, another district of the same state, wore saffron scarves as a mark of protest against allowing women students of a minority religious community to wear *hijab* in the classroom. Another group of students, of another government-run college in Balagadi village and Mangalore district of the same state, also publicly proclaimed that they had the right to wear saffron scarves inside the classroom if *hijab* was permitted therein.

In the ensuing months, students were shut out of regional schools and colleges for coming with their heads covered. Some were publicly made to remove their head-covering; others were refused admission to examination halls; in some places, this ban was extended to include teachers and examination invigilators. Classmates sometimes donned *hijab* in solidarity with their friends; in other cases, people studying in the same class opposed each other, one group wearing saffron shawls to 'protest' against a head covering worn by the other. On 10 February, in Mandya, a female student in *hijab* was confronted by a gang of men wearing saffron shawls. They shouted slogans that revealed their allegiance to a particular religion and attempted to prevent her from entering her college to fill out her examination form.² *Hijab*-wearing women congregated, asserting their right to religious freedom and self-expression in Karnataka and elsewhere. Demonstrations supporting the religious freedom, self-expression, and autonomy of the women students of the minority group were held in other parts of the country.

¹ The word 'state' in lower case is used for a political formation with powers of administration and part of a larger political formation, e.g., the state of Karnataka, part of the Indian union; State in higher case is used for the state as a theoretical category, as it has been used by the scholars quoted in this essay.

² 'For Piece of Cloth, Ruining Education': Girl Who Took on Saffron Scarf Group' *NDTV News* 9 February 2022. See also 'hijab row': The Indian woman who is the face of the fight to wear headscarf' *BBC* 10 February 2022.

This started a public discussion in India on whether the secularism of the State could ensure a gendered citizen's right to exercise religious freedom against discrimination, in a plural democratic society. The matter arrived in the High Court of Karnataka on 31 January 2022, when the first writ petition was filed by several students from the Udupi Pre University college, pleading that wearing of *hijab* be recognised as a fundamental right under Articles 14 and 15 of the Indian Constitution as it is an essential Islamic practice. The matter went before a full bench on 10 February. The High Court upheld the ban on *hijab* imposed by educational institutions on 15 March 2022, holding that *hijab* is not an essential religious practice under Islam and hence is not protected by Article 25 of the Indian constitution.

This article specifically locates the use of *hijab*, a practice signifying a particular religion, Islam, in the democratic state and plural society of India, wherein the Constitution³ gives every citizen the right to practice, preach, and profess a religion. This is distinct from the practice of compulsory veiling following the dictate of a patriarchal, theocratic State that enforces a particular State religion – in a democratic, secular State, wearing the *hijab* in public may well be the choice of an individual citizen. The State being secular, must uphold that right. Elaborating Hannah Arendt's concept of the 'intersubjectivity of the world' (1951: 475), Sophie Loidolt (2018: 116) says 'all conditions are actualized simply by human existence, i.e. by being a living body, by being involved in the world of objects/tools and by existing in the plural, being human means to dwell, however passively, in all of these meaning-spaces at the same time.' Using this relational conceptual frame, we posit religious freedom, secularism, and women's agency as *related discourses and practices* in the interaction between the State, pluralistic society, and gendered citizens. We ask whether the secular practices mandated for the state by the Indian Constitution protect the right of the individual female citizen to practice her religion in public. Or is the ideal and practice of 'post' secularism required to ensure the freedom and dignity of the citizen in a multireligious plural society stratified by class, caste and gender?

RELIGION AS PERSPECTIVE: LOCATING THE SECULAR AND THE POST-SECULAR

Modernity is characterised by the 'pluralization of diverging universes of discourse...' (Habermas, 1998: 403), in which incompatible and even competing or mutually antagonistic comprehensive doctrines, ultimate values, and worldviews coexist. Habermas (2008a, 2008b) identifies normative protocols based on the juridical view of post-secularism that facilitate religious freedom in public space. He remarks that 'religious communities owe their persisting influence to an obstinate survival of pre-modern modes of thought', thus revealing the location of his theory. Religious pluralism is a structural trait of the modern Western secular world adopted by India and affects our perception of the democratic polity. The pluralism of values and worldviews that mark modernity, undermines the authority of traditional metaphysical and religious worldviews, rendering a unified image of the cosmos unthinkable (Habermas, 2008a). He maintains that in modernising societies, the constitutional state is only able to guarantee its citizens equal freedom of religion under the proviso that they do not live separatist lives, barricading themselves within their religious communities and sealing themselves off from one another. All subcultures, whether religious or not, are expected to free individual members from their embrace so that these citizens can mutually recognise one another in civil society as members of the same political community. Democratic citizens give to themselves those laws thanks to which private citizens enjoy the right to preserve their identity in the context of their own particular culture and worldview. State neutrality is the fundamental tenet of secularisation (Habermas, 2008b). From the point of view of governance, Habermas recommends the expansion of 'the range of values of the dominant political culture. Without the inclusion of minorities in civil society the two complementary processes will not be able to develop hand in hand, namely the opening of the political community to a difference-sensitive inclusion of foreign minority cultures, on the one hand, and, on the other hand, the reciprocal opening of these subcultures to a state where they encourage their individual members to participate in the political life at large' (2008b).

Social differentiation leads to pluralisation and the loss of a single hegemonic religion as a socio-political force. Freedom of religion in a post-secular state must be 'granted by the liberal rule of law as a basic right [so that] the fate of religious minorities no longer depends on the benevolence of a more or less tolerant state authority' (Habermas, 2008b). Habermas' theorization of the post-secular is located in the same geopolitical areas, now 'caught in the painful process of transformation into postcolonial immigrant societies... the issue of tolerant coexistence between different religious communities is made harder by the difficult problem of how to integrate immigrant cultures socially'. He thus moves from secular modernity characterised by the private practice of religion and the strict division of the political, from the religious to post-secularism, 'a stance that recovers the existing vitality of religion in human life' such that 'the more blatant dissonances between different religions link up with the challenge of pluralism of ways of life typical of immigrant societies'. Building on Habermas' theories, Stoeckl *et al.* (2012: 4) define the post-secular as 'the co-presence or co-existence within the same public space of religious

³ Constitution in higher case refers to the Indian Constitution; in the lower case it refers to constitutions in general.

and secular world-views and practices... a post-secular society is not a de-secularised society, but a society where religious and secular views are called to live together, and to live together differently.'

Locating his research across Protestant and Catholic religious discourses in Spanish, Portuguese, and English-speaking cultures across the world, Casanova (1994) questioned Enlightenment models of secularism dividing public and private between religion and politics. The 'deprivatization' of religion re-makes the public sphere, with religious institutions contesting dominant political and social forces. In modern Western societies, post-secular practices and policies indicate that co-existence with plurality is imperative. Despite the 'pressure of globalized labor markets, social integration must succeed even under the undignifying conditions of growing social inequality' (Habermas, 2008b). The practices of daily life in changed socio-economic circumstances lead to conceptualising the post-secular 'not as an overcoming of the secular, but more so as its reform, an improvement based on a critical rethinking of the normative exclusion of religion from the public sphere (Parmaksiz, 2016: 4).

Talal Asad (1993) and Bhargava (2006) interrogate the essentialisation of the religious and secular as absolute binary opposites and the assumption that modernisation means the movement of a society from one end of the religious/secular binary to the other. Mahadevan (2018) points out that Habermas does not account for the existence of multiple religions. There can be no universal model of secularity. The 'secular' and the 'post-secular' are beliefs and practices that do not operate in isolation from each other and are meaningful in the context of political and social arrangements in particular locations; the vital religious life functions within an arrangement of social relations, put in place by conventions through state and social intervention. In Habermas' (2008a, 2008b) view, the post-secular emerges as a political and legally enforced normative for the survival of democracy in a particular type of society, where plurality is born of global capital. He raises as a normative issue the question of how citizens of such a society should understand themselves – 'as members of a post-secular society... what must we reciprocally expect from one another to ensure that in firmly entrenched nation-states, social relations remain civil despite the growth of a plurality of cultures and religious world views?' (2008b).

As Mendieta and Vanantwerpen (2011: 1) say, 'Religion is neither merely private ... nor purely irrational. And the public sphere is neither a realm of straightforward rational deliberation nor a smooth space of unforced assent.' Hence, religious practice in societies resulting from a particular level of integration in the global economic order, cannot be used to typify the practice and discourse of religion in societies differing in these aspects. India did not undergo the Western process of secularisation; it is historically a pluralistic society where religion as belief and way of life has been central to political debates. So, the gendered practices and discourses of religion and citizenship in a pluralistic stratified society like India would differ from a theocratic society regulated by a state religion, such as Pakistan or Afghanistan, as well as from postcolonial Western Europe states, where different iterations of plurality and secularism operate.

Hence, instead of looking at religion as an aspect of identity or viewing the post-secular as an interpretative stance that translates the spiritual, the mystical (Braidotti, 2008), and the ethical (Habermas, 2008a) into a 'post-metaphysical' philosophical perspective replacing religion, we may take a perspectival view of religion itself. '(G)rasped in an intuitive way a perspective constitutes the ground of what is explicitly articulated' (Sayeed, 2021: 207). We become aware of such frames 'only indirectly through their operation of organizing the structure of our experience' (207). Perspectives articulated in language go on to form metaphysical systems. 'Religion is one such dimension of a metaphysical schemata (which) fulfils the function of organizing life and experience into a coherent pattern... a framework whose function is to define a way of looking at human existence and its relationship to the ultimate mystery of the universe' (2021: 203). Thus the religious and the secular cease to be binary opposites. The secular and post-secular become relational structures of experience situated within the religious perspective, rather than absolute categories, independent of time and place.

By investigating the Indian state's mediation between religion and politics in a plural society, we attempt to understand State secularism as a doctrine constructed by the Indian Constitution, distinct from the current iterations of the secular and its revision in the concept of the post-secular.

CONSTITUTIONAL SECULARITY IN A PLURAL SOCIETY

Secularism is a doctrine for the State. It posits the equality of difference in the eyes of the State as a necessary value for the survival of a plural society. Smith (1963) describes Indian secularism as an experiment of the coexistence of religions and the ways of life and world views attributed to them. Thus in the Indian Constitution, the classic description of secularism, that is to say the separation of state from religion, is replaced with neutrality towards all religions, advocating freedom of religion and equal citizenship. Smith (1963) marks this as a residue of the British policy of neutrality towards all religions in addressing the religious plurality of its former Indian empire. The goal of ensuring equality of every citizen before the law in all spheres of life despite cultural differences and social stratification, was a political and ideological imperative facing the makers of the Indian constitution. They attempted to ensure a space within a plural society for the practice of diverse religions. Hence they had to discard

the idea of a rigid division between the public political and the private religious sphere. As Bhargava (2006: 110) says, Indian secularism

embodies a model of contextual moral reasoning (...), not erect[ing] a strict wall of separation, but propos[ing] instead a 'principled distance' between religion and state'. Moreover, by balancing the claims of individuals and religious communities, [Indian secularism] never intended a bludgeoning privatization of religion.

Bhargava's contention that India has 'always been post-secular' (Bhargava, 2015: 109) however, seems driven by his need to fit India into a label originating in and recognised by the West. The accepted Western view of 'post-secular' outlined above does not describe India either historically or conceptually. If the post-secular condition is a 'conscious contemporality/co-existence of religious and secular worldviews leading to a condition of permanent tension' (Stoeckl, 2011), it is quite distinct from the State secularism outlined by the Indian Constitution which conceptualises secularity as an existential condition in a plural society. The State as a political formation is tasked with ensuring an egalitarian multireligious, multicultural multilingual society through policy and practice.

The Preamble to the Indian Constitution⁴ adopted in 1950 stated that all the people of India have the right to 'Justice, social, economic and political', 'Liberty of thought, expression, belief, faith and worship' and 'Equality of status and opportunity' (ibid 32). In 1976, the 42nd Amendment to the constitution declared that India was a 'sovereign socialist secular democratic republic'.⁵ The Supreme Court of India ruled in a 1994 case that the basic structure of the Constitution rendered the Indian state secular since the formation of the republic, even before the word secular was added to the Preamble of the Constitution:

In matters of State, religion has no place... The Constitution does not recognize, it does not permit, mixing religion and State power. That is the constitutional injunction. None can say otherwise so long as this Constitution governs this country. (S. R. Bommai vs Union of India 1994)⁶

The Indian Constitution recognises 23 official language-cultures, but no 'state' religion.⁷ A number of religions are practised, but the number of adherents of each is by no means equal: minority religious communities are those with fewer practitioners. Regardless of the size of her community, Article 25 gives every citizen the fundamental right to practise, profess and propagate her religion, subject to public order, morality and health.⁸ As a doctrine of the State, secularism ensures the just functioning of a democratic polity, upholding the fundamental rights of every citizen, by prohibiting discrimination on grounds of race, class, caste, sex or place of birth (Article 15).⁹ The Constitution mandates equality before law (Article 14) and enumerates the fundamental rights enjoyed by every citizen (Article 19).¹⁰

Though secularism of the Indian state means the state's equal tolerance for all religions, the 'reform' of inhuman practices is possible by legislation as well. In 1963, at the time Smith was writing, the state, by legislation, removed untouchability and caste discrimination as practices that the majority community believed had religious sanction. Smith (1963: 233) states that when 'religious practices tend to injure human beings physically or morally, or where social institutions connected to religion violate basic human rights'¹¹, reforms undertaken by the secular Indian state are incidental results of the state's protection of the public. Hence, though the state is neutral towards all religions, the constitution takes up the duty of protecting the fundamental rights guaranteed to all citizens. Protection of the human rights of citizens remains the highest objective of state policy – any reform of any religion is incidental, a by-product of this basic objective (1963: 234). Practices like 'untouchability' or ban on temple entry for 'lower' castes were discriminatory casteist practices banned by legislation – Constitutional secularity thus allowed the freedom of religious practice of one group to be curtailed to protect the human rights of other groups.

⁴ <https://ltdashboard.legislative.gov.in/sites/default/files/COI...pdf>. All references are to this edition, cited in the text with page numbers following.

⁵ See ff. 1 p. 32.

⁶ 2SCR 644 AIR 1994 SC 1918 (1994 3) SCC 1. Judgment available at: http://www.indiacourts.in/S.R.-BOMMAI-Vs.-UNION-OF-INDIA_da9d12c5-6e12-4881-ae4e-b5028a3abd1c. (Accessed 30 January 2023).

⁷ Article 356 outlines action that can be taken against a state government of the Indian union which pursues non-secular policies or non-secular course of action acts contrary to the constitutional mandate and renders itself amenable to action; state-owned educational institutions are prohibited from imparting religious instructions, and tax-payers money cannot be used for the promotion of any religion (Article 27). <https://ltdashboard.legislative.gov.in/sites/default/files/COI...pdf>, p. 46.

⁸ <https://ltdashboard.legislative.gov.in/sites/default/files/COI...pdf>, p. 45.

⁹ <https://ltdashboard.legislative.gov.in/sites/default/files/COI...pdf>, p. 37.

¹⁰ *ibid*

¹¹ The British rulers, urged by some progressive, modern-minded Indian subjects, had undertaken legislative reform of religion by ending practices like widow-burning, child-marriage and polygamy. See also Mahadevan (2018).

In this context, the state's ruling that certain items of women's clothing, like the *hijab*, must be discarded, because they threatened equality and modernity by displaying religious identity in a 'secular' public space, is a weaponisation of the idea of secularism. The state cast itself in the role of the champion of secularism, the modern, scientific saviour of women from exploitation by traditional patriarchal norms imposed by a particular religious community (Braidotti, 2014; Sherin, 2021). This implies a polarised view of religious plurality, whereby public practices manifesting the vital religious life of female citizens of a minority community are castigated as communal and anti-secular by a majoritarian state. This is made a legal argument for withholding the fundamental rights of those citizens, unless they stop using that item of clothing in shared public places.

Discussing the judgment of the Karnataka High Court will show that this institution claimed for itself the responsibility of educating women of a minority religious community about their rights as female citizens. It represented hijab as regressive, unscientific and oppressive to women. It was thus manipulating an identitarian regime of signification to use and control women's lives. It appeared to be usurping the political agency of women of a minority community as citizens with the fundamental human right to personal autonomy, education and the practice of religion: the very same rights which a secular, democratic State was supposed to protect.

Replying to the women's plea that they be allowed to attend classes in *hijab*, thus upholding their right to education and to freedom of religious practice, the 2022 Karnataka High Court judgment interpreted State secularism thus:

India is a secular but not an anti-religious State, for our Constitution guarantees the freedom of conscience and religion. Articles 27 and 28 emphasize the secular nature of the State...Indian secularism oscillates between *sarva dharma samabhāva*¹² and *dharma nirapekshita*¹³ rather than a strict separation of state and religion.¹⁴ (KHC2022 Part V, pt 2, p. 41)

'Secular but not anti-religious' differentiates Indian Constitutional secularity from the secularism that Habermas (2008a) attributes to the modern democratic State. The judiciary used this difference to justify its intervention in the public practice of religion, by barring women wearing *hijab* from educational institutions: hence arose the question of whether secularism means the State's equal tolerance for all religions, or whether it enforces uniformity upon a plural society, through erasure of visible difference. Sherin's (2021: 137) questions: 'Is violent erasure of identities required for maintaining secularism? Is modernity homogenous, and necessarily anti-religious? Is there is no place for reform within religion as an effect of modernity that shows in the outer world?' form the context of this discussion.

PUBLIC PRACTICE AND SIGNIFICANT DIFFERENCE IN A PLURAL SOCIETY

The 2022 Karnataka High Court judgement opined that wearing *hijab* threatened public order by exposing young impressionable minds to difference. In dealing with a plural society, it decreed uniformity instead:

...uniforms promote harmony & spirit of common brotherhood transcending religious or sectional diversities. This apart, it is impossible to instill the scientific temperament which our Constitution prescribes as a fundamental duty vide Article 51A(h) into the young minds so long as any propositions such as wearing of hijab or *bhagva* are regarded as religiously sacrosanct and therefore, not open to question. They inculcate secular values amongst the students in their impressionable & formative years. (KHC2022, Section XIV, pt i, p. 96)

The neutral scientific liberal voice of modernity represented by the paternalistic state claimed to facilitate women's emancipation as a sign of its own secular progressive thinking. It asserted in a court of law that visible identification markers worn by women of a particular religion symbolise collective backwardness, thus essentialising and politicising their identity. The women's insistence on retaining the head-covering was construed as stubborn identification with a (regressive) religion. Rejecting the equality of uniformity in the public sphere as enforced by a paternalist State, these women were seen as communal – but did they infringe the principles of constitutional secularism?

¹² Ascribed to Gandhi, meaning equal respect towards all religions, intended to foster religious pluralism and dialogue.

¹³ Without partiality towards any one religion.

¹⁴ Judgment pronounced on March 15, 2022 by three judge bench of the Karnataka High Court, consisting of Chief Justice Ritu Raj Awasthi, Justice Krishna S Dixit and Justice J M Khazi, on WP no 3247 of 2022 and others. Available at: <https://theprint.in/judiciary/restriction-on-wearing-hijab-reasonable-full-text-of-karnataka-hc-judgement-upholding-ban/874034/>. Cited in the text hereafter as KHC2022, with details.

The majoritarian State, when interrogated from a feminist perspective, manifests the xenophobic nature of patriarchy operating through State institutions and discourses against the political agency and fundamental rights of women of a particular religious community. Has secularism then failed as a state policy because of its disruptive relation to liberal feminist struggle for political agency and equality in a plural, democratic society?

In order to answer this question, we must understand the plural nature of social space formed by the relations between different actors belonging to various communities who share this common space. According to Loidolt (2018: 123) plural 'spaces of meaning' result from intersubjective normativity: '[the] actualization of plurality is one form of creating a space where the qualities of plurality can unfold...only they can guarantee that life is not measured and brought under economic, utilitarian and ultimately totalitarian conditions'. Sayeed (2008: n. p.) views plurality as a doctrine for society and secularism as a doctrine strictly for the State – 'the State is an instrument... hence all its virtues must be instrumental. The only function of secularism is to enable and ensure the proper practice of pluralism. It will be a mistake to allow secularism to exceed that brief and become a societal doctrine' (Sayeed, 2008: n. p.). As a doctrine for the State, secularism guarantees and protects the rights enjoyed by any citizen regardless of her religious belief, by creating and guaranteeing an 'intersubjective public space... in which relations between individuals and communities are structured by the concrete intersubjectivity of active cultural transactions' (Sayeed, 2008: n. p.) where these rights are operational.

Loidolt (2018: 97) suggests that 'visibility can enhance or diminish forms and characters of appearance but do not create them in an essentialist manner.' Difference signified as regressive promotes discord and hence must be countered by 'the harmonious development of the mental and physical faculties of students ... cultivating a scientific and secular outlook through education.' State institutions attempted to impose a discriminatory regime of signification by stifling uniqueness through imposing uniformity and linking difference with threat and danger:

The object of prescribing uniform will be defeated if there is non-uniformity in the matter of uniforms. Youth is an impressionable period when identity and opinion begin to crystallize. Young students are able to readily grasp from their immediate environment, differentiating lines of race, region, religion, language, caste, place of birth, etc. The aim of the regulation is to create a 'safe space' where such divisive lines should have no place and the ideals of egalitarianism should be readily apparent to all students alike. Adherence to dress code is a mandatory for students. (KHC2022, Section XIV, pt ix, p. 107)

The foundational principle of a plural society is jeopardised by the weaponising of difference, creating a space of meaning wherein difference is signified as a threatening manifestation of otherness. In the 2022 judgement, plural space where difference is allowed to flourish is presented as a dangerous abnormal condition. The insistence on a homogenised safe space shows the relation to difference as one of natural antagonism rather than acceptance or tolerance; the other is always a threat because of her otherness, her difference from some imagined norm which transcends class, caste, religion, and so on. This principle of safety in homogeneity, a divisive doctrine for a plural society, contradicts the principle of Indian Constitutional secularism. The Indian Constitution signifies difference as a natural human attribute, and in the right against discrimination, guarantees the equality of difference.

Opposition to the demand for wearing the *hijab* in the classroom came from liberal civil society as well as the state: the argument offered was that the similarity in uniform imposed by secularism would free women from the shackles of patriarchal control which religious fundamentalism imposed upon them in 'other' theocratic nation-states governed by the same religious community, i.e., practitioners of Islam.¹⁵ Instead of prioritising the fundamental right of every Indian citizen to education, the issue became diverted to a violent debate over whether the *hijab* was an essential religious practice.¹⁶ This linked *hijab* to the on-going debate regarding personal law and 'essential' religious practices in Indian civil society. Discussions of these matters are not exclusive to either Hindus or Muslims, though they are increasingly being used by the Hindu right to foster disaffection among people of different communities in order to obstruct the functioning of plurality as a condition of life.¹⁷

CONSTITUTIONAL SECULARISM AND 'ESSENTIAL' RELIGIOUS PRACTICES

The Indian state's doctrine of constitutional secularism is the tool to ensure that no religious group imposes its practices upon followers of another – whether majority or minority. The aim of this neutrality is to protect diversity in a plural society by ensuring equal coexistence of all religions. Secularism as a State doctrine can hence be

¹⁵ <https://kafila.online/2022/02/06/why-feminists-must-oppose-the-hijab-ban-in-karnataka-colleges/>. See also <https://www.theindiaforum.in/forum/wearing-hijab-normalising-difference>.

¹⁶ <https://scroll.in/article/1037405/why-has-the-muslim-personal-law-board-suspended-its-womens-wing>.

¹⁷ <https://indianexpress.com/article/opinion/columns/indian-politics-tainted-as-intolerant-towards-hijab-and-religious-freedom-7777222/>. That the positions for or against hijab cannot be identified with the religion of the individual, is clear, for instance from <https://thewire.in/women/muslim-women-hijab-kashmir>.

effectively used to separate religious freedom as *subject to reasonable restrictions*, from fundamental human rights such as the right to personal autonomy and the right to education, both guaranteed by the Indian Constitution *without restriction*. The state upholds religious freedom as long as religious practices do not infringe public order, morality and health. It is unclear how any of these were infringed by women covering their heads in the classroom – yet the court gave this as the reason for ruling that they forfeit the basic human right to education unless they discarded *hijab*.

If the right to religious freedom had been separated from the right to education, the debate could have been resolved by taking recourse to the distinct secularity advocated by the Indian Constitution. Instead, it hinged on defining religious freedom through essential religious practices, which anyway fall outside the purview of legislation by the secular state. The bench ruled that constitutional secularism limited the right to freedom of religious practice by reasonable restrictions. Claiming to implement constitutional secularism, the judiciary upheld what was in its view a ‘reasonable restriction’ on the clothing of female citizens. *Hijab* was seen by the court as a coercive and regressive practice that was not essential to the religion. The court ruled that it should be discarded in the interests of a healthy scientific secular milieu. Women asserting their personal autonomy through choice of clothing manifesting religious identity, were seen as violating ideals of equality, progress and secularism.

The argument of the plaintiffs against the banning of *hijab* rested on the right to privacy and freedom of conscience and emphatically, on the principle of essential religious practices. This gave the judiciary scope to subject freedom of religion to reasonable restriction and argue that *hijab* did not fall within the scope of essential religious practices. Quoting the reference order passed by the empowered committee on 5 February 2022, the three-judge bench of the High Court, agreed that ‘Whether wearing of hijab is a part of essential religious practice in Islam, is the jugular vein of all these matters...’ (KHC2022, p. 16). It argued ‘inasmuch as the practice robs away the individual choice of Muslim women; the so called religious practice if claimed as a matter of right, the claimant has to prima facie satisfy its constitutional morality’ (KHC2022, Part XVII, pt ii, p. 124).

The petitioners emphasised education and the right to personal autonomy as fundamental rights but did not separate these from the right to religious freedom, which as we have seen, may be subject to restrictions in order to protect the fundamental rights of all citizens. The educational institutions and the court appeared as champions of secular, scientific modernity against the patriarchal conservatism of minority religions that oppressed women. Thus, the judgement claimed that *hijab* violated ‘the individual choice of Muslim women’. This was substantiated by arguing further that:

It hardly needs to be mentioned that ours is a country of plural cultures, religions & languages. Being a secular State, it does not identify itself with any religion as its own. Every citizen has the right to profess & practise any faith of choice, is true. However, such a right not being absolute is susceptible to reasonable restrictions as provided by the Constitution of India.¹⁸

Invoking the question of essential religious practices, it castigated the minority religious community of violating secularism and painted itself as upholding the same. Citing the restrictions in Article 25 clause 2, the bench stated: ‘Whichever be the religion, whatever is stated in the scriptures, does not become per se mandatory in a wholesale way’ and reminded us that they had used the same argument ‘in Shayara Bano, [to] proscribe(.) the 1,400-year-old pernicious practice of triple talaq in Islam’ (KHC 2022 Part IX, p. 73).

The uniform was upheld as a necessary pre-condition to education. The plea from women students to cover their heads in the classroom was likened to a ‘pernicious’ religious practice, against the interests of public order, health, and *snnyavasthe*¹⁹, which, the court claimed, had secularism at its core. Trapped within the ambit of essential religious practices and reasonable restrictions, the debate hinged on religious freedom vs secularism as essential ideas rather than located relational practices. The fact that it was unconstitutional to deprive women of the right to education because they proclaimed their religious identity in public through choice of clothes, escaped attention.

As the guardian of a secular constitution, the judiciary went beyond its scope by airing its views on the ‘pernicious practices’ of a religion rather than reflecting upon the cognisable deeds of practitioners and interpreters of that religion. Constitutional expert Mustafa (2017) questions the court’s authority to give judgements based on the essential practices of any given religion – he argues that the courts have no competence to decide what is essential to any religion. The courts are not clergy. They have no jurisdiction in religious law; they are educated to rule on civil and criminal procedures, not on religious practices, essential or otherwise. Indian Constitutional secularism acknowledges the plurality of Indian society by upholding the equality of difference through the state’s neutrality towards all religions, without structuring difference into value-loaded hierarchies.

¹⁸ Quoted from the Government Order on WP NO. 2347/2022 and connected matters, pt 8, p. 5 (https://karnatakajudiciary.kar.nic.in/judgements/WP_2347_2022.pdf).

¹⁹ Literally, proper or good arrangements. Mentioned in the judgement as not akin to public order, but close to it.

RIGHTS IN SECULAR DEMOCRACY: EDUCATION ‘VERSUS’ RELIGIOUS FREEDOM?

The educational institutions claimed that ‘Permitting the petitioner - students to wear *hijab* (headscarf) would offend the tenets of human dignity’ (KHC2022, Section XVII, pt ix, p. 35-6). The fundamental right to equality was made contingent on uniformity, making personal attire a basic threat to secular society.

Prescription of school dress code to the exclusion of *hijab*, *bhagwa* (saffron), or any other apparel symbolic of religion can be a step forward in the direction of emancipation and more particularly, to the access to education. It hardly needs to be stated that this does not rob off the autonomy of women or their right to education, in as much as they can wear any apparel of their choice outside the classroom”. (KHC2022, Section XVII, pt ii, p. 124)

The court expressed its neutrality by adding ‘saffron’ to ‘*hijab*’ in the category ‘apparel symbolic of religion’, and made education and personal autonomy, contingent upon this neutrality. Plurality thus emerged not as a condition of social being, but as an aberration to be managed. The Government Order dated 05.02.2022 justified its stand by quoting a 1983 Act, which provides for

cultivating a scientific and secular outlook through education (...) These Sections and the Rule intend to give effect to constitutional secularism and to the ideals that animate Articles 39(f) & 51(A). The children have to develop in a healthy manner and in conditions of ‘freedom and dignity’; the school has to promote the spirit of harmony and common brotherhood transcending religious, linguistic, regional or sectional diversities. The practices derogatory to the dignity of women have to be renounced. This will help in nation building. (KHC2022 Contentions of Respondents, pt v, p. 33-4)

This call for transcendence of diversity, replaced the ideal of plurality with equality manifesting in uniformity. It implied that secularism could only be upheld in a uniform homogenous society, not in a pluralistic, heterogenous one. Both secularity and personal autonomy were instrumentalised, forcing women citizens of a religious minority to choose between the right to education and the right to practise their religion.

It is signification rather than reason that deems it ‘reasonable’ to restrict women from covering their heads in a classroom. Banning an item of women’s clothing signifies control – it is not synonymous with releasing women from the clutches of religious bigotry. By the conventions of majoritarian patriarchy, it is scientific to force women to forego education because they wish to follow a religious practice by covering their head. Appearing for one of the plaintiffs, Sanjay Hegde urged that,

... the expulsion of the students for violating the dress code would be grossly disproportionate to the alleged infraction of the dress code. Nobody should pollute the congenial atmosphere required for pursuing education...the institutions should not insist upon the removal of *hijab* as a condition for gaining entry to the classrooms.²⁰

This ‘congenial atmosphere’ was impossible if the court’s interpretation was to be followed. Its contention was that the secular doctrine of the state does not allow the woman of a minority religious community to educate herself if she wishes to wear, in the classroom, clothes signifying her religion. The February 10, 2022, reference order stated: ‘Ours being a civilized society, no person in the name of religion, culture or the like can be permitted to do any act that disturbs public peace & tranquillity’ (G.O. 2022 pt. 9, p. 6). It is unclear how the wearing of *hijab* threatened public order, peace and tranquillity. The court expressed fear that if students were given the freedom to choose their attire in the school, ‘it would only breed indiscipline that may eventually degenerate into chaos in the campus and later in the society at large’ (KHC 2022, Section XIV, pt viii, p. 105). ‘Endless agitations and closure of educational institutions’ as predicted by the G.O. 2022 (pt. 9, p. 6) followed the unrest on campus and outside created by the protesters who threatened women wearing the *hijab*. Peace and tranquillity were disturbed by the failure of the state institutions to control the protestors and ensure the rights and safety of citizens. The majoritarian state’s imposition of a uniform as a reasonable restriction on the practice of religion in public places, seemed like systemic discrimination against women of a minority religion, an obstruction to their education. By erasing difference in the name of uniformity, safety in school and scientific temper, by not enforcing the equality of difference as a secular policy, the state institutions compromised the citizen female’s fundamental right to education.

²⁰ Quoted from the Government Order dated 10.2.22 on WP NO. 2347/2022 and connected matters, p. 2, p. 3 (https://karnatakajudiciary.kar.nic.in/judgements/WP_2347_2022.pdf). Henceforth referred to in the text as G.O. with date and page numbers following.

History documents the fact that the *hijab* as a practice had made possible the education of many women who would have been deprived of that benefit had they not followed this practice.²¹ Women's empowerment through education and their professional success was achieved by using *hijab* to their advantage in negotiating the power of patriarchy (Akhtar and Bhowmick, 1998; Chanda and Bagchi, 2014; Sherin, 2021). State institutions and liberal critics also ignored the fact that wearing *hijab* could be a choice – it gave a woman freedom to operate in the public sphere without being obstructed by opinions of the conservative and patriarchal sections her own society that frowned upon her very presence in public. The possibility that a woman might choose to cover her head because she wished to acknowledge her adherence to her faith, through her own agency and choice, were also ignored. The judicial and educational institutions assumed that the absolutist majoritarian view constructing the *hijab* as contrary to freedom, modernity and progress, was sacrosanct and uniformly beneficial to all women regardless of faith or circumstances. Thrusting these norms upon women of a minority community was construed as combating communalism, advocating secularism and rescuing women of a religious community from the oppression of their own religion. Feminist opposition to patriarchy as an institution that usurped women's human rights, was used by the majoritarian state to castigate and demonise a minority religious community for usurping the rights of 'their' women. Arguments in favour of rejecting the *hijab* echoed the interim court order²² which forbade the use of *hijab* in classrooms, espousing the cause of modernity and castigating the backwardness of the minority religious community, signified by this practice.

The court insisted that the unshakeable discipline of uniformity alone could fulfil the requirements of progress and secularism. For the judiciary and the institutions upholding majoritarian values, women of a minority community were a threat to the secular and modern fabric of India, their oppression by fundamentalist religious patriarchy made evident in their use of *hijab*.

MAJORITARIAN CHALLENGE TO CONSTITUTIONAL SECULARISM: FEMINIST PRAXIS AS TRANSFORMATIVE POLITICS

Striking down the plea that women have the personal autonomy to choose their own clothing, the court said:

... such a proposal if accepted, the school uniform ceases to be uniform. There shall be two categories of girl students viz., those who wear the uniform with hijab and those who do it without. That would establish a sense of 'social-separateness', which is not desirable. It also offends the feel of uniformity which the dress-code is designed to bring about amongst all the students regardless of their religion and faiths". (KHC2022, Part IX, pt ii, p. 106)

The secular space of meaning constructed by the judgement includes the paternalistic enforcement of uniformity that signifies progressive scientific modernity. The bench claimed that the judiciary had ensured progress and emancipation of (Muslim) women through laws put in place to ban triple *talaq* and to uphold divorcees' right to maintenance (KHC2022 Part IX, p. 36). The banning of hijab in the classroom it was claimed, was 'another step in the right direction'.

The 2022 Karnataka High Court order interpreted equality as synonymous with uniformity, thus opposing plurality and difference. The judgement held that the petitioners' argument that 'the goal of education is to promote plurality, not promote uniformity or homogeneity, but heterogeneity' was 'thoroughly misconceived' (KHC 2022 section XIII, pt iii, p. 57). So they rejected the plaintiffs' submission that 'prescription of student uniform offends the constitutional spirit'. The judiciary's position contradicts the distinct secularism of the Indian Constitution (Bhargava, 2006). Unlike theocratic nations ruled by a religious patriarchy or those with official state religions, the secular democratic Indian state has no official religion, and cannot privilege the practices of one religious community over another. Since its aim is to ensure the equality before law of all citizens, it cannot allow the practices of any religion to obstruct the rights of any citizen. The judiciary's interpretation thus replaced constitutional secularism with an absolutist majoritarian and paternalistic iteration of both religion and secularism.

For a secular democracy to function in a plural society, citizens *must be equal in the eyes of the state because they are different from each other*. The constitution decrees state secularism committed to protecting the equality of difference, rather than creating hierarchies between the differences of belief and practice which form the basis of each citizen's personal autonomy. The debate around *hijab* occurs within a patriarchally structured polity, judiciary and society. A patriarchal regime of signification instrumentalises religious and gender identity through clothing. The feminist

²¹ 'Impact of Hijab Ban on Educational Institutions', People's Union of Civil Liberties, Karnataka September 2022.

²² WP NO. 2347/2022 Connected Cases: WP NO. 2146/2022, WP NO. 2880/2022, WP NO.3038/2022 and WP NO.3044/2022. https://karnatakajudiciary.kar.nic.in/judgements/WP_2347_2022.pdf.

interrogation of majoritarian paternalistic state practices would raise the question: can a secular State enforce the uniformity of practice in a society where plurality is constitutionally upheld by the equality of citizens regardless of caste, creed or gender?

Sherin (2021: 26-7) takes Indian feminism to task for failing to ‘incorporate the multiple points of identification and inclusive/exclusive frameworks that apply to different citizens’, tracing it to the mistake of ‘addressing women in essentialist terms’. She states that gender is not a secular formation in India: not only does the state take on a paternalistic attitude of deciding what is good for women citizens, but also, acts as the agent of their freedom: ‘Instead of viewing religion as a viable tool of female agency, the secularist model of women’s emancipation views it as a monolithic tool of oppression’ (Sherin, 2021: 26-7). The state ‘decides the moral code’ (Sherin, 2021: 26-7).

Braidotti’s (2008) critique of secularism interrogates the humanist subject at the centre of liberal feminist analysis, ‘including the subject of feminism itself’ (Sherin, 2021: 16). Rethinking subjectivity as flows of inter-relationality, Braidotti (2008) asserts that feminism has moved on from the strategy of classical transcendence, towards feminist anti-foundationalism. Her view that the ‘subject’s ethical core is not moral intentionality but rather effects of relations of power and the potential for empowerment through her effect upon the world’ (2008 :15) is in agreement with our location of secularism and postsecularism in the intersubjective realm as structures of experience with religion as a frame of reference. However, Braidotti (2008) too does not take account of the contradictions between ‘collective national consciousness and moral heterogeneity’ (Sherin, 2021: 27) which emerge from the majoritarian state’s manipulation of the regime of signification to deny women of a particular religious community their constitutionally guaranteed rights. Sherin (2021: 24) observes that ‘feminist rights and individual autonomies cannot be juxtaposed against fraught relations that secular citizenships have with minority identities’. Thus, the existing iterations of the postsecular in western European Marxist and feminist discourses cannot properly address the issue of religious freedom in a pluralistic society.

Sherin’s (2021: 24) submission that challenging secular nationalism does not mean giving in to religious fundamentalism, behoves us to think of ways to interrogate patriarchal ‘spaces of meaning’ and signification manifested in religious fundamentalism as well as in the progressive opposition to it, whether from a liberal or a majoritarian perspective. In the final section, we ask whether social transformation can result from the implementation of constitutional secularism in order to fulfil the demands for women’s political agency, equality and freedom.

ADVOCATING *HIJAB* – RELIGIOUS FREEDOM, SECULAR STATE AND GENDERED RIGHTS

Contextualising the roles of men and women in the gender organisation of a society and locating the discourse and practice of religion in a plural space, this article has thus far investigated the flawed operation and manipulation of constitutional secularism by the majoritarian state. Describing humanity as a ‘paradoxical plurality of unique beings’, Arendt (1958: 176) shows that, plurality belongs to the human condition which takes man (*sic*) as acting/being. Equality and distinction are aspects of the perspective through which alterity is viewed in society. They constitute the basic condition of action and speech, the modes in which humans appear to each other not as physical objects, but *qua* human.

The majoritarian state’s isolationist idea of safety espoused by the state institutions, albeit located in a plural society, hold the ideal of plurality itself as the cause of constant imminent danger, as if difference is an abnormal condition. This perspective construes difference as a hierarchy of deviations from some preset imagined norm imposed by state-decreed homogenisation. Secularism as a doctrine of State implies that religion and the functions of the State cannot be mixed – the State has no role to play in religious affairs but is the main actor in ensuring human rights and freedoms. In a secular State, practices decreed or proscribed by any single religion cannot be allowed sovereign status over all aspects of human rights and freedoms of every citizen. But, as Mahmood (2008: 11) says, ‘mere legal equality (...) in these liberal societies (...) is often contradicted by an uneven political and economic status’. So, the practice of secularism by the state becomes crucial for the functioning of a democratic polity in a plural society. The challenge then lies in the negotiation of difference and the ethics of engagement between different communities in a stratified plural society.

Regarding the political formation constructed by the Indian Constitution, Ambedkar held the view that in a democracy, no way of living could be prescribed as best for the future. He noted that colonised India’s exposure to modern ideals neglected both equality and solidarity (Ambedkar, 2002: 189); decolonised India had to redefine them in its own way through syncretic social practice. Hostile relations between different communities which constitute a plural culture may threaten the very existence of a plural society: hence not normative prescriptions of

dialogue or tolerance (Habermas, 2008b), but practices following the principles of fraternity are advocated by the Indian Constitution.²³

But, as the case discussed shows, the state machinery's religious majoritarianism and identitarianism instrumentalised the clause of reasonable restrictions on religious practices in public to deprive female citizens of their fundamental rights. In a secular polity where the right to education and the right to freedom of religion are both fundamental rights, an identitarian regime of signification makes secularism itself the weapon to deprive women of a particular community of the right to education and personal autonomy. The plaintiffs wished to identify as belonging to a particular religious community and appealed to the secular state to allow them to do so. The state institutions refused, imposing on them a progressive, modern scientific homogenous identity, thus enforcing an unconstitutional interpretation of secularism.

Arendt's (1958) idea of plurality as the dynamic of political power and Braidotti's (2008) idea of the relational subject can be used to address Sherin's (2021) complaint that Indian feminism and the secular Indian state essentialise women, by not accounting for their diverse religious experiences or political citizenship. Feminist praxis espouses an anti-foundational concept of the self as processual. Identity is neither prefixed nor absolute; gendering is a process of the becoming of a human self in relation to the world. The argument for human rights of citizens is founded on the principle of plurality, that is to say, equality of difference, rather than on categorical identities, gendered and religious.

Though his view of the ideal state was based on liberty, equality and fraternity, Ambedkar (2010) accepted at the outset, that equality is a fiction. His thinking on the equality of incommensurables (Kumar, 2013) has a stated practical, political motive in a democratic plural society:

if it is good for the social body to get the most out of its members, it can get the most out of them only by making them equal as far as possible at the very start of the race...

...treat all men alike, not because they are alike but because classification and assortment is impossible. The doctrine of equality is glaringly fallacious but, taking all in all, it is the only way a statesman can proceed in politics—which is a severely practical affair and which demands a severely practical test.' (Ambedkar, 1990: 24)

Invoking the need for mobility and contact between different parts of society, he calls for social endosmosis, or 'fraternity (...) only another name for democracy [which] is primarily a mode of associated living, of conjoint communicated experience. It is essentially an attitude of respect and reverence towards one's fellow men' (Ambedkar, 1990: 24-5).

Constitutional secularity bars the state from legislating on religious practices; the Constitution also gives every citizen the right against discrimination on the grounds of race, class, caste, gender and place of birth. Hence, constitutionally, the right to education of a female citizen from a minority community cannot be compromised due to the difference in clothing that identifies her religion. Operating the pluralist principle of the equality of difference, the plaintiffs argued that the court should guarantee their right against discrimination.²⁴

Linking plurality with feminism is a political practice (Sherin, 2021) which forces a question to essentialism and squarely raises the issue of difference: Whose rights do human rights ensure? From the perspectival view of religion as an organising frame for experience, the secular and the postsecular are located practices framing our relations with difference in a multireligious, multicultural plural society. How do they inform our understanding and engagement with difference as existential reality rather than as norms and protocols rooted in abstract categories or chronologies? Loidolt (2018: 154) notes that 'the ontological fact of plurality demands a realisation in a special and particular form, and not just in any form of collectivity as such. Plurality is a located, actual transactional state attained through and making possible transformative practice.' The actual location, the social space itself must be refigured as plural and intersubjective, rather than as identitarian, totalitarian or transcendental. Ethical claims are implicit in the experience of actualised plurality, which for Arendt (1958), is a politically informed and ethically sensitive elaboration of Being-with-another. Instead of Habermas' (2008a) normative prescriptions, then, the relational framework opens the possibility of transformation: 'in everyday encounters with difference, a phenomenology of plurality does not aim at a neutral description of all possible forms of collectivity, but focuses instead on the fact that being plural is something that must explicitly be realised and defended against all other forms of collectivity that swallow individuality' (Loidolt, 2018: 155).

²³ Aishwary Kumar (2019), Cabrera (2021) and Christine Keating (2021) all point to the replacement of 'fraternity' with '*maitrī*', friendship, in Ambedkar's later writings.

²⁴ The court justified its refusal to grant relief by interpreting constitutional secularity as transcending diversity rather than upholding plurality.

Conscious of plurality as an existential condition in Indian society, the makers of the Indian Constitution made the Indian state a secular formation by enumerating secular principles of State practice even before the word was added to the Preamble. To this end, the Constitution upholds social and religious plurality through the principle of equality before law and the right against discrimination which supersedes all sociocultural stratifications and divisions. As a doctrine for society, pluralism requires the State's neutrality towards and equal tolerance of all religions, regardless of the size of the community they comprise. The challenge posed by majoritarian patriarchy to constitutional secularism, may be met by feminist politics aiming for pluralisation of the hegemonic majoritarian socio-political space through principles of gender justice and egalitarianism. In such a space of meaning, women citizens of a religious community can exercise their right to personal autonomy and education, without being signified as regressive and anti-secular in choosing to wear the *hijab*.

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