

Welfare. Well, Fair?

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Abstract:

Aishat Shifa and Tehrina Begum, were about to enter the premises of Government Pre- University College, Kundapura on Feb 3, 2022, when they were stopped at the gate and denied entry unless they removed their hijab. The next day, upon approaching the Deputy Commissioner of Udupi, requesting for the college authorities to be directed to allow them entry, wearing the hijab, a Government Order (referred to as G.O. hereinafter) was passed in this regard by drawing power from Karnataka Education Act, 1983 and the Rules thereof.

The relevant portion of the G.O. which was contested in *Aishat Shifa v. State of Karnataka* is as under: “In exercise of the powers conferred under Section 133(2) of the Karnataka Education Act, 1983, we direct students of all government schools to wear the uniform fixed by the state. Students of private schools may wear uniforms prescribed by the management committees of the school.

In colleges that fall under the Karnataka Board of Pre-University Education, dress code prescribed by the College Development Committee or the administrative supervisory committee must be followed. If the administration does not fix a dress code, clothes that do not threaten equality, unity, and public order must be worn.”¹

The split judgement of *Aishat Shifa v. State of Karnataka* so delivered in order to establish the validity of the G.O., reduced the issue to a mere question of determining whether or not donning the hijab is an essential religious practice.

Furthermore, the G.O.’s provision applicable in situations where the administration fixes no dress code raises questions with regard to what clothing can be defined so as not to qualify as a threat to equality, unity and public order. This sparked a situation where the principles of equality, unity and public order found themselves to be more unguarded than before.

Through the G.O., access to education seems to have been reduced to a mere barter of rights. This barter however fails to acknowledge that by trading access to education against an

¹Kashyap Gauri, Karnataka Government Order on Dress Code for Students (Translated to English) (14th Feb 2022) <<https://www.scobserver.in/journal/karnataka-government-order-on-dress-code-for-students/>> Accessed 2 December 2023

allegedly uniform G.O., Muslim Women Students were left stranded at the crossroads of law and society. This paper evaluates the *Aishat Shifa v. State of Karnataka* judgement through the paradigm of social welfare by adopting a case-study based approach. By forming a critique of the judgement that turned a blind eye to the fundamental principle of creation of a Welfare State as was envisioned by our Constitution Makers, the chief argument against the G.O. is that it hinders the path towards realising the welfare state in its true sense.

This doctrinal study shall help evaluate how the G.O. has the effect of corroding the base of welfare state.

The objective of this socio-legal exploration is to study the effect of the G.O. on the idea of welfare state in three ways:

- Reinforcing patriarchy by discriminating against women.
- Limiting Muslim women's access to educational opportunities.
- Threatening the unity and integrity of the nation in the garb of uniformity.

By using available literature and reports, the aim of this study is for the Courts to incorporate legal realism in evaluating the outcome of G.O. on the society as a threat to the unity and integrity of India. In order to facilitate better and informed decision making by the custodians of the law. A feminist analysis shall reveal the nuanced patriarchal effect of the G.O. in furthering the sabotage of welfare state.

In order to delineate the implication of the G.O. on the society at large, the scope of the Research is to delve beyond religious rights and evaluate the G.O. as a State act that blurs the road to the State that our Constitution Makers wished-for.

Literature in connection with the Hijab Row controversy so far, has dealt with women's choice, secular narratives and intolerance in the society. However, the idea of welfare state being sacrificed at the altar of Government action, going against the idea of welfare state as envisioned by our Constitution Makers is the gap that the author aims to fill in through this research.

Reinforcing patriarchy

When a woman dons the hijab she carries the burden of a dual identity- of a Muslim and of a woman (Arafath 10) and therefore, any hindrance to her rights is a two-front attack on her minority status due to her religion and on her gender. The action of Pre-University colleges as compliant to the G.O. can be deemed inherently discriminatory as it resulted in disallowing Muslim women from donning the hijab when entering college premises. No reports of discriminatory action against men of any community were reported. Discrimination against women encompasses all social and cultural limitations by virtue of their gender and thus, they are at the receiving end of atrocities committed by the State, incrementing the persisting gender disparity. Therefore, such an arbitrary state action (PUCL-K 18) that results in imposition of a ban on wearing the hijab can be deemed excessive, disproportionate and capricious.

After the ban being imposed, PUCL- K reports reveal that Muslim women students were subject to segregation in classrooms, furthering their disadvantaged position by setting up spatial boundaries (Allport 53). Such instances qualify as evident acts of discrimination due to the denial of equality of treatment. By classifying Muslim Women as an out-group from Pre-University colleges through State authorised mechanisms, such arbitrary State action formulates a device of exclusion. Such arrangement refutes the assumption of the State as a neutral arena for interest groups to compete equally (Gough 36).

Muslim women are subject to the dual brunt of the forces of religious minority as well as a gender minority. Their social position, therefore, qualifies as a minority within a minority (Ghazala 305) thus, placing them at the crossroads of State and Society.

Even though the judgement rejects the claim of G.O. being discriminatory on the grounds mentioned in Article 14 of the Constitution of India, only a close evaluation of formal guarantees with the material realities of the experience of women reveal the position of the Constitution as a mere locus of rights and not a framework within which women can articulate their rights (Narain 99). This delineates the gap between formally guaranteed Constitutional Rights and Law in action, as was noted by J. Krishna Iyer in the case of *C.B.Muthamma v. Union of India*, strongly deploring the continued resistance of the State in enhancing women's equality.

Further in the case of *State of Kerala v. N.M Thomas*, the Court stated that the State must not only provide formal equality but endeavour to pursue substantive equality and equality of result, that has the scope to eliminate inequalities and provide opportunities to exercise claims through the Courts.

This again subjects women to seek paternal protection from Courts as individuals and drifts away from challenging the root of gender oppression as a systemic disadvantage (Minow).² Such claims then yield no result but reflect the hierarchies of social exclusion, further silencing the voices that have historically been silenced (Wisner 10).

Therefore, the Karnataka's Hijab Row serves as an apt example of a State Action that has a discriminatory implication on the society further buttressing patriarchal structures that prevent the upliftment of women in the society (Narain 103).

The Indian Constitution provides for State goals in Part IV which when achieved, would help the nation realise its ideals of being a welfare state. Under Article 38 (1), the Directive Principles enjoin the State to strive to promote welfare of the people through protection of social order, informed by values of social, economic and political justice. Furthermore, they strive to eliminate inequalities in status, facilities and opportunities by setting those as objectives of State action as opined in *D.S. Nakara & Others v. Union of India*.

The Courts in *Senior Divisional Commercial v. SCR Caterers*, provided that welfare as adopted by the Constitution makers covers an ambit beyond economic welfare and includes social welfare that covers general well-being of all sections of the society especially the vulnerable ones like women who require special protection. Welfare, therefore is conceived not only in material terms but also in terms of human progress and freedom (Ghosh 330). In other words, happiness of the people encompassing all social and cultural divisions, becomes the ultimate aim of a welfare State.

However, since the burden of taking the endeavour has been placed on the State, it has created an individual dependent on the State as well as on the Society (Venkataraman 160).

²Martha, Minow. as cited in Narain, Vrinda. *Reclaiming the Nation: Muslim Women and the Law in India*, University of Toronto Press, 2008. pg 71

Public goods and social welfare in such a State, can be achieved through commitment via egalitarian values and dedication to the Rule of Law as opined in *Ramana Dayaram Shetty v. The International Airport Authority of India and Ors*. The relationship between the State and the citizen is converted into that of a Giver and Receiver (Gopal 23) and welfare now only comprises of a need that is catered to by the State.

The philosophy of welfare adopted by the Indian State is such that the liberty rights (Fundamental Rights under Part III of the Indian Constitution) are made justiciable whereas welfare rights (Part IV of the Indian Constitution) are consigned to be non-justiciable Directive Principles. Thus, relegating welfare to a secondary station (Gopal 22). Furthermore, the ideals of Ram Rajya have manifested welfare to be a burden of charity (daan) and benevolence by the state, precluding the right to welfare, leaving Muslim Women begging for welfare by imposing a hijab ban.

Wheels of wisdom

According to John Keane, the relationship between the State and the individual is such that the State is an institutionalised public authority and everything with regard to the individual-its subjectivity and

dignity can exist to the extent that State safeguards the right to (Keane 162). Therefore, placing in this context education becomes a mere handout from the State in the Indian context.

Education plays a fundamental role in welfare state. Its scope has widened beyond merely being able to access education including reaping benefits like acquiring knowledge and belonging to a social community. Thus, education in a welfare state aids the individual to realise his full potential and develop. According to John Dewey, education for a social group is a means of self-renewal and a modicum through which the society transforms and thus can be implied to a condition of growth (Dewey 14). By creating personal aspirations and capacity to access economic opportunities (Gupta 20), an individual gets a choice to choose the life that she would want to live and any limitation on that choice would be against the principles of welfare. This curtailment of individual capacity is no less than a disability caused by State Action.

The G.O. posed a major hindrance in Muslim Women's access to education. Drop-out rates of Muslim Women from Pre-University colleges increased manifold after the imposition of the ban. The imposition of the hijab ban is considered a deliberate attempt to deny the entry to institutions of knowledge to Muslim Women (PUCL- K 21). Thus, relegating their rights unimportant.

This shed light on the foremost challenge that a welfare state needs to address- the fear of permanence of social ills which affect life chances. (Anderson 14). Shaheeda Lateef argues that right to education was of paramount importance in the 1920s women's movement to induce greater participation in social activities. The restriction caused as a result of State action therefore, does injustice to years of struggle that women have led in order to access education.

Education not just serves individual benefit but also caters to the demand of a unified nation. Latika Gupta emphasising on the importance of education argues that education provides a means to act individually thereby loosening bonds to kinship or community. Institutions of learning therefore can serve as places that allow communities and differences to be accepted and tolerated thus, fostering the vision of a united nation, again in the favour of moving ahead on the path to an ideal welfare state.

Melting pot

Indian society is a stratified society and such social hierarchies pose a major hindrance to realisation of the aspirations of the Constitution which envisages development of the potential of all citizens, irrespective of the social position (Gupta 13).

Preamble of the Act³ from which the G.O. derives authority, elucidates that it is "necessary to provide for the planned development of educational institutions to foster inculcation of healthy educational practices, maintenance and improvement in the standards of education and better organisation, discipline and control over educational institutions in the State with a view to fostering the harmonious development of the mental and physical faculties of students and cultivating a scientific and secular outlook through education."

³ Karnataka Education Act, 1983

Furthermore, Sec 7(2)(v) (v) aims to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities to renounce practices derogatory to the dignity of women;

(vi) to value and preserve the rich heritage of our composite culture.

India boasts of its Cultural diversity in the International arena. The challenge that remains with the State is to foster peace and harmony between diverse groups and help them stand united. Time and again Courts have reiterated the Constitutional aims to promote unity in diversity by assimilation of differences as in *Tehseen S. Poonawalla v. Union of India & Ors*

The Court, by not addressing the threat that the G.O. has caused to the preservation of cultural diversity has erred in exploring the impact of the G.O. on the society. Pluralism and intolerance are essential virtues for a free and democratic society but such values seem to have had no mention in the judgement so delivered. Thus, the judiciary which can act as a glue to hold the society together adopted a hands-off approach leaving it fragmented.

Merely allowing uniformity in public spaces neither fosters a spirit of unity nor encourages pro-social behaviour which a sense of shared Indian Identity has the potential of doing (Singh 231). Such a shared sense of an overarching Indian Identity despite accepting cultural differences would provide for social cohesion (Sen 62) which is critical for societies to prosper.

Thus, a shared blanket identity that doesn't hide the differences, instead embraces them shall cater to the Preambular values of unity and integrity of the nation. A successful example is the Nordic Countries that adopted 'school for all' as an important symbol that encouraged the inclusion of students from diverse cultural backgrounds to access education, equally (Arnesan 291).

The Courts have earlier in *St. Stephen's College v. University of Delhi* opined that every Institution is a 'melting pot' and therefore, there must be respect and tolerance of cultures and beliefs by a mix of students from different communities in order to erase social barriers (Arnesan 292).

Thus, the G.O., by targeting Muslim women stands in the way of the solemn pledge of unity that the State made 6 years ago (Bidwai).

Latika Gupta by quoting Krishna Kumar (1992) provides how education can serve as an agency of socialisation. Emphasising on the role of environment, Dewey provides that no education happens directly. A deliberate regulation of environment affects the educative effect it can have (Dewey 23). Social stratification can thus be dealt with by giving each individual an escape from the limitation of the social group and recognising that society is a composition of such several groups and communities.

Thus, the donning of hijab can in no circumstance be classified as a threat to equality, unity and public order nor can the restriction on being clad in the hijab be considered in the best interest of unity and integrity of nation.

The fact that the judgement adopts no remedial measure or directive to undo the harm, furthers the scepticism of Women of a community being targeted and facing humiliation (Guru 3) by fellow mates. Thus, G.O. runs against the spirit of unity by excluding cultural representation and therefore, lacks a spirit of accommodation.⁴

Conclusion

The author has advanced arguments addressing three main issues that are disparate with the idea of a welfare state. At first the author aims to shed light on the plight of Muslim Women who are dealing with the effect of state action and a society which is inherently patriarchal. Secondly, the author argues that by imposing a hijab ban, Muslim women's access to education is curtailed by denying them equal opportunity for realising individual goals. Finally, the author aims to evaluate how preservation of diverse cultures is essential to preserve unity of the nation and imbibe a sense of social cohesion in accordance with preambular values and educational institutions can serve as the best environment if left

unpolluted by derogatory state action.

Left to the state prerogative, the achievement of welfare to its full potential remains a distant dream as is revealed by the Aishat Shifa judgement. The failure to evaluate the harm that the G.O. has done by not evaluating the ancillary effects of the order, provide for scope for

⁴Scalon TM. The Difficulty of Tolerance in Bhargava Rajeev(ed), Secularism and its Critics, Oxford University Press 1998. pp.66

judges to incorporate legal realism in evaluating issues at hand. The nation envisioned by our Constitution Makers would never see the light of the day if the principal values are left at the mercy of the State and if the judiciary adopts a hands-off approach and doesn't determine issues in terms of neutral state principles.

With the State being at the giving end, more often than not the State adopted rights-based approach reduces welfare to charity and has the ability to create fragments in the society. Often in a nation like ours such affirmative action is reduced to a barter. Cultural expression and personal choice are negated in the public sphere. Thus, welfare comes at the cost of personal choices and by sacrificing a culture in order to impose uniformity.

Such curtailment of culture is a threat to the diversity of the nation as it deepens the divide between various cultures therefore, leaving unity vulnerable and at the mercy of the State.

Therefore, the need to foresee the impact on such State action on the society at large is imperative. Judiciary must refute the assumption in favour of State. It is the society that must shape the law and not the law that should be allowed to mould the society in order for people to live at the disposal of a presumably benevolent State.

Given the political context of Hindu-right wing ascent, the role of judiciary is even more crucial. Nuances of non-religious aspects of issues need to be engaged with in order to understand the severity of the impact a State Action has on the society. Negotiating between boundaries of gender and community, Muslim women are fraught with losing welfare rights that are not constitutionally enforceable.

Attempts at defining Public Interest must not be the prerogative of the State but in light of the Constitutional Principles reflected in policy decisions. A statist administration of social problems cut off from the realities of the society will never be accepted by those affected (Keane 212). Alternatives to arbitrary state action from within and "oppressed" position shall be more realistic and would acknowledge their dependence upon constitution within existent social locations.

Thus, the G.O. has the effect of running against the principles of welfare state by reinforcing patriarchy, denying opportunities of education and creating fragments in the society in the garb of imposing uniformity. Such State Action thus has the potential to leave welfare, unfair and defunct.

REFERENCES:

BOOKS:

1. Allport, Gordon W. The Nature of Prejudice, New York, Basic Books, 1979.
2. Anderson, Gosta Esping. Why we need a New Welfare State, Oxford University Press, 2022.
3. Dewey, John. Democracy and Education, Pennsylvania State University, 2001.
4. Francis, G. et al The Oxford Handbook of the Welfare State, Oxford Academic, 2010.
5. Gopal, Niraja Jayal. Democracy and the State: Welfare, Secularism and Development in

- Contemporary India, Oxford University Press, Delhi, 1999.
6. Gupta, Latika. Education, poverty and gender, Routledge, New Delhi, 2015.
 7. Guru, Gopal (ed.). Humiliation: Claims and Context, Oxford University Press, 2009.
 8. Keane, John. (ed) Contradictions of the welfare state, Hutchison & Co, 2012.
 9. Lateef, Shaheeda, Muslim Women in India, Zed Books Ltd, New Delhi, 1990.
 10. Mendelsohn Oliver. Law and Social Transformation in India, Oxford, 2014.
 11. Narain, Vrinda. Reclaiming the Nation: Muslim Women and the Law in India, University of Toronto Press, 2008.
 12. Niumai, Ajailiu and Chauhan, Abha (ed.) Gender, Law and Social Transformation in India, Springer, 2022.
 13. PK, Arafath. and G. Arunima (ed.) The Hijab: Islam, Women and the Politics of Clothing, Simon and Schuster India, New Delhi, 2022
 14. Scalon, TM. The Difficulty of Tolerance in R. Bhargava (ed), Secularism and its Critics, Oxford University Press 1998.
 15. Sen, Ragini, et al. Secularism and Religion in Multi-Faith Societies the Case of India. Springer International Publishing, 2014.
 17. Shapiro, Daniel. Is the Welfare State Justified?, Cambridge University Press, 2007
 18. Singh, Prena. How Solidarity works for welfare – Subnationalism and Social Development India, New York, Cambridge University Press, 2015.
 19. Wisner, Gabrielle Kruks, Claiming the State: Active Citizenship and Social Welfare in Rural India, Cambridge University Press, 2018

REPORT:

- People's Union for Civil Liberties, Closing the Gates to Education: Violation of Rights of Muslim women students in Karnataka, PUCL-K 2023

WEBSITES:

1. "Karnataka students wearing hijabs to be seated in separate classroom as college allows entry", Scroll, Feb 7, 2022 <<https://scroll.in/latest/1016802/karnataka-students-wearing-hijabs-to-be-seated-in-separate-classrooms-as-college-allows-entry>> accessed on 14 December 2023
2. Sreedeeep, "Hijab Ban: How the claim of ensuring uniformity is actually being used to divide Indians", Scroll March 15, 2022 <<https://scroll.in/article/1019583/hijab-ban-how-the-claim-of-ensuring-uniformity-is-actually-being-used-to-divide-indians>> accessed 12 December 2023
3. Prasad Sanath, Over 50% dip in number of minority students in govt PUCs at hijab protest epicentre, Indian Express Jan 9, 2023
4. <<https://indianexpress.com/article/education/in-hijab-protest-district-over-50-dip-in-minority-students-count-in-govt-pucs-8367929/>> accessed 14 December 2023
5. Bidwai Praful. "Combating Muslim Exclusion." Frontline, 30 Nov. 2006, frontline.thehindu.com/columns/article30211695.ece. Accessed 22 Dec. 2023
6. Bageshree, S. "No room for hijab yet in Karnataka", The Hindu, 28 December 2023 <https://www.thehindu.com/opinion/op-ed/no-room-for-hijab-yet/article67679450.ece>

ARTICLES:

1. Narain Vrinda, Muslim Women's Equality in India: Applying a Human Right's Framework, Human Rights Quarterly, Vol 35, pg 103
2. Singh, Nirmal and Ahmed, Rahil. Muslim Women and Human Rights, IJPS Vol 73 No1, (Jan-March, 2012) pg- 73-84 <<https://www.jstor.org/stable/41856562>> accessed 6 December 2023
3. December 2023
4. Muller, O. Being Seen: An Exploration of a Core Phenomenon of Human Existence and Its Normative Dimensions, Human Studies, Vol. 40, No. 3 (Fall 2017), pp. 365- 380 <<https://www.jstor.org/stable/44979865> > accessed 10 December 2023
5. Najmabadi, A. Veiled Discourse-Unveiled Bodies, Feminist Studies , Autumn, 1993, Vol. 19, No. 3, Who's East? Whose East? (Autumn, 1993), pp. 487-518
6. <<https://www.jstor.org/stable/3178098> > accessed 10 December 2023
7. Louis, Ryan. Muslim Women Negotiating Collective Stigmatization: 'We're Just Normal People' Sociology, Vol. 45, No. 6 (DECEMBER 2011), pp.1045-1060 <<https://www.jstor.org/stable/42857598> > accessed 11 September 2023
8. Orloff, Ann Shola. 'Gender', in Francis G. Castles, and others (eds), The Oxford Handbook of the Welfare State (2010; online edn, Oxford Academic, 2 Sept. 2010), <https://doi.org/10.1093/oxfordhb/9780199579396.003.0017>, accessed 4 Dec. 2023.
9. 2010), <https://doi.org/10.1093/oxfordhb/9780199579396.003.0017>, accessed 4 Dec. 2023.
10. 2023.
11. Kashyap, Gauri. Karnataka Government Order on Dress Code for Students (Translated to English) (14th Feb 2022) <<https://www.scobserver.in/journal/karnataka-government-order-on-dress-code-for-students/>> Accessed 2 December 2023
12. [order-on-dress-code-for-students/](https://www.scobserver.in/journal/karnataka-government-order-on-dress-code-for-students/)> Accessed 2 December 2023
13. Parveen, Ghazala. "MUSLIM WOMEN IN INDIA: PROBLEMS AND PROSPECTS." The Indian Journal of Political Science, vol. 75, no. 2, 2014, pp. 305–
14. JSTOR, <http://www.jstor.org/stable/24701138>. Accessed 24 Dec. 2023
15. Anne-Lise Arnesen & Lisbeth Lundahl. "Still Social and Democratic? Inclusive Education Policies in the Nordic Welfare States", Scandinavian Journal of Educational Research, Vol 50, no 3, 2006 DOI: [10.1080/00313830600743316](https://doi.org/10.1080/00313830600743316)
16. Narain Vrinda, Muslim Women's Equality in India: Applying a Human Right's Framework, Human Rights Quarterly, Vol 35, pg 103
17. Venkataraman, A. "THE CRISIS OF THE WELFARE STATE." The Indian Journal of Political Science, vol. 55, no. 2, 1994, pp. 159–65. JSTOR, <http://www.jstor.org/stable/41858804>. Accessed 18 Dec. 2023. pg 160
18. <http://www.jstor.org/stable/41858804>. Accessed 18 Dec. 2023. pg 160
19. GHOSH, SATYBRATA. "SOME THEORETICAL IMPLICATIONS OF A WELFARE STATE IN INDIA." The Indian Journal of Political Science, vol. 15, no. 4, 1954, pp. 327–
20. 38. JSTOR, <http://www.jstor.org/stable/41853818>. Accessed 24 Dec. 2023
21. Jayal, Niraja Gopal. "The Gentle Leviathan: Welfare and the Indian State." Social Scientist, vol. 22, no. 9/12, 1994, pp. 18–26. JSTOR, <https://doi.org/10.2307/3517911>. Accessed 18 Dec. 2023. pg 23
22. Gough, Ian. "Theories of the Welfare State: A Critique". International Journal of Health Services. 1978;8(1):27-40. doi:10.2190/W1U7-NXMM-YUCQ-PVJ1

TABLE OF CASES

Supreme Court of India. Aishat Shifa v. State of Karnataka, 2. SCC 1, 2023.

Supreme Court of India. D.S. Nakara & Others vs Union of India, AIR 130. SCR (2) 165, 1983.

Supreme Court of India. Ramana Dayaram Shetty v. The International Airport Authority of India and Ors, AIR 1628. SCR (3)1014, 1979.

Supreme Court of India. Senior Divisonal Commercial v. SCR Caterers, Civil Appeal Nos. 618-620 (Arising out of SLP (C) Nos. 9921-9923 of 2014), 2016.

Supreme Court of India. St. Stephen's College v. University of Delhi,1. SCC 558, 1992. Supreme Court

of India. Tehseen S. Poonawalla v. Union of India & Ors, 9. SCC 501, 2018. Supreme Court of India.

State of Kerala v. N.M Thomas, AIR 490. 1976 SCR (1) 906, 1976

Supreme Court of India. C.B. Muthamma v. Union of India, AIR 1868. 1980 SCR (1) 668 1979 SCC(4) 260, 1979.

Supreme Court of India. Subramanian Swamy v. Union of India, 7. SCC 221, 2016

CONSTITUTION/ STATUTES

1. The Constitution of India
2. Karnataka Education Act, 1983