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ARTICLE

Challenging the hijab ban in India: plural embodiment and secular constitutionalism

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Abstract

This paper examines the core twin concepts of secularism and pluralism and their location within the Indian constitutional discourse, through a discussion of the hijab ban in the South Indian state of Karnataka. I suggest that attempts at Hindu majoritarian subversion of these core principles face challenges due to the structure of the Indian Constitution, and due to the constitutional agency and mutinies set in motion by women through their legal challenge of state action. I discuss the hijab ban in India and the two judgments on the ban as an example of this attempted subversion but also of its failure, suggesting that these judgments fall short in their reading of this interrelationship between secularism and pluralism. In doing so, I introduce a threefold analytical categorisation, *pluralist constitutionalism*, *constitutional appropriation* and *constitutional derailment*, to help us outline the tensions inherent in constitutional politics in the present.

Keywords: constitutional law; gender studies; secularism-pluralism; minority rights; discrimination; majoritarianism

1 Introduction

In January 2022, a government-run educational institution in the South Indian state of Karnataka barred Muslim women students from entering the college campus wearing a hijab. Following this, in February 2022, the Bharatiya Janata Party (BJP)-led state government passed a Government Order under the Karnataka Education Act, 1983, banning the hijab in classrooms and on campuses. The Order stated that restricting the headscarf did not violate Article 25 of the Indian Constitution, which guarantees the fundamental right to freedom of religion, subject to reasonable restrictions in the interest of 'public order, morality and health'. The Order allowed College Development Committees (CDCs) to impose dress codes, to ensure that students behaved as 'one family' and thus maintained public order.[1] The following of practices based on religion – that is, wearing the hijab – was stated to affect equality in these uniform spaces of learning. In institutions where a dress code was not fixed, due care was to be exercised to ensure that the clothes worn did not 'threaten equality, unity and public order' (Karnataka Government Proceedings 2022).[2]

[1]The original government order was in Kannada. 'Sarvajanika suvyavasthe' loosely translates to 'societal harmony' in English. In discussing the government order and its language in court, the petitioners and defendants loosely translated this term into the legal category of 'public order', which was subject to much debate during the hearings.

[2]Karnataka Government Proceedings (2022) Karnataka Government Order on Dress Code for Students (Translated to English). Available at: www.scobserver.in/journal/karnataka-government-order-on-dress-code-for-students/ (accessed 10 December 2024).

Young Muslim women affected by this ban petitioned the court challenging the ban, on the grounds that it violated their fundamental rights. While the hearings on the ban commenced and protests and counter-protests grew, the Karnataka High Court passed an interim order which restricted students from wearing any religious attire in classrooms, regardless of faith. The status quo – that is, the ban on the hijab – was maintained. This interim order in effect mainly affected Muslim women, by suspending their right to wear the hijab. In March 2022, the three-judge bench of the High Court upheld the ban. The case went up to the Supreme Court of India (hereafter: Supreme Court) – at this stage it consisted both of writ petitions directly challenging the ban and Special Leave Petitions challenging the Karnataka High Court judgment by interested parties. In October 2022, a two-judge bench of the Supreme Court delivered a split verdict on the constitutionality of the hijab ban.

In this article I argue that the meaning and interpretation of the values of secularism and pluralism and the understanding of them within the frame of Indian constitutionalism were central to these deliberations on the hijab ban. I examine what I see as the core twin concepts of secularism and pluralism and their location within the Indian constitutional discourse. While these core principles have become increasingly susceptible to majoritarian subversion and influence in the current political conjuncture in India, I suggest that these attempts at subversion face challenges due to the structure of the Indian Constitution, and due to the constitutional agency and mutinies set in motion by women through their legal challenge of state action (in this case). I discuss the hijab ban in India and the two judgments on the ban as an example of this attempted subversion but also of its failure, suggesting that these judgments fall short in their reading of this interrelationship between secularism and pluralism. I suggest that the reading that I put forth of these constitutional concepts has wider implications for how the protections offered by the Constitution, and the relationship between religion, gender, the state and the individual, can be understood in the turn to Hindu majoritarianism.

The Indian Constitution protects a range of fundamental rights under Part III, some of which are important to our reading of the hijab ban. Article 14 guarantees equality before the law and equal protection of the law, thus providing 'guarantee against arbitrariness'.[3] Article 19(1)(a) protects the freedom of speech and expression. The fundamental right to non-discrimination enshrined in Article 15 (especially clauses (1) and (2)) and the right to life and personal liberty under Article 21 are particularly important in this discussion.

An intersectional reading of Article 15 and Article 21 'enables an understanding of the ways in which the disaggregation of discrimination in the law produces counter-productive effects that further entrench the ideologies and practices of discrimination' (Kannabiran 2012, p. 18). The language used by those affected by the ban drew upon a range of fundamental rights which included the right to equality, non-discrimination, privacy (dignity), expression and education – and was not restricted to the nature of their religious practice. Dignity, as an inherent right, is thus under constant threat of subversion, especially in rhetoric that denies pluralism, or subsumes it, and compounds injustice.

The hijab ban, therefore, foregrounds the need for a discussion of religion, politics and the rights of Muslim women – informed by the intersections of minority rights with women's rights, specifically gendered personhood for Muslim women, and the intersections of the constitutional right to life, personal liberty, dignity and equality. The use of 'Muslim women' as a political category 'in order to assert political agency to enhance women's rights' (Hasan 2014, p. 264) helps us place the hijab ban within broader discourse. This is especially important when the standards set by courts and governments are informed by majoritarian frameworks, divesting minorities of choice and autonomy (Kannabiran and Ballakrishnen 2021).

This article is presented in eight sections including the introduction. In Section 2, I outline the discourse of secularism and pluralism in the Indian context; Section 3 examines the ways in which

[3]Chandrachud, J. Para. 96, *Justice K.S. Puttaswamy (Retired) & Anr. v. Union of India & Ors.*, AIR 2017 SC 4161.

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religious freedom has been adjudicated in India; in Section 4, I present analytical categories that interrogate the application of majoritarian standards to judicial and constitutional interpretation and its implications; Section 5 explores the hijab judgments and concepts used therein in light of the preceding discussion on the Constitution and majoritarianism; Section 6 discusses the resistance to judicial interpretation by young Muslim women framed as agency and mutiny. Section 7 brings together the key ideas discussed in the article, with a focus on the place of fraternity, fellowship and agonistic negotiation in an understanding of pluralism and secularism, and in an understanding of the resistance by Muslim women against the hijab ban. Section 8 is the conclusion, where I briefly recount the ways in which these constitutional framings are important for understanding the expression of minority rights in constitutional democracies.

2 Pluralism and secularism in India

India is most commonly described as a country with 'unity in diversity'. This refers to the inclusion of multiple religions and cultures, a unity rooted in an entirely 'unself-conscious pluralism' (Bilgrami 2018), which has formed a part of social imaginaries and identity, especially during the Indian independence movement. The co-existence of different value systems that stem from modes of self-representation and ways of being, sometimes conflicting, is one such understanding of 'pluralism' (Ram-Prasad 2013). The nation's history and especially the Indian national movement prior to the country's independence from British rule in 1947 pushed forward the idea of a collective self-determination as an important part of nationalist identity, where this pluralism would in fact be the ground for an anti-imperialist struggle – an inclusionary anti-imperialism (Bilgrami 2018). Nationalism both emphasised these identities and subsumed them within this vision of a polity that was inherently pluralistic, where democracy meant the formation of a political community that was cohesive, with shared values and visions for the country (Parekh 2008). Contending with this plurality of a nascent nation, engaging with it and responding to it was an enduring commitment that guided the framing of the Indian Constitution (Bajpai 2011). As a philosophical and moral document, it thereby embodied an ethical vision of a newly independent nation state, whose key concepts – fraternity, secularism, equality and citizenship, to name a few – needed to be further studied in order to produce a 'coherent vision of society and polity' (Bhargava 2008, p. 5).

Secularism, though not explicitly mentioned, formed a part of this moral vision, and was firmly embedded in the Constitution. The conception of a secular state, articulated minimally, and in an instrumentalist view, describes the clear separation of religious and political institutions (Bhargava 2002) which originated in Europe, where political institutions and methods of governance were not directly influenced by religion (which was confined to the private realm). Secularism in this formulation raised a strict 'wall of separation' between religion and the state, evidenced in the American case, and was conceived of as a political doctrine.[4] Secularism in India, on the other hand, has been understood and interpreted in many ways. This conception of the separation of religion and the state does not necessarily hold true.

Indian secularism has been a highly contested concept – in political rhetoric, in legal and jurisprudential deliberation and as a philosophical category. In light of the subject of this article, it

[4]One such reading of secularism as a political doctrine discusses how the doctrine emerged to repair the damage done by the violence that accompanied the pursuit of European nationalism, where identities were organised along religious majoritarian and minoritarian lines – us vs. them – and the civil unrest that this fostered (Bilgrami 2018). In Bilgrami's view, this context of civil strife, which triggered the introduction of this political doctrine in Europe, was largely missing in India's national movement until the rise of Hindutva majoritarianism in the 1980s. Secularism, according to Bilgrami, was also not a core element of the rhetoric of the freedom struggle or that of the leaders of the nationalist movement. This was the case until the violence and political and communal strife that preceded and accompanied the Partition of India in 1947, which bore a resemblance to the conditions for the origin of secularism in Europe, meant secularism now entered the political discourse of an emerging nation.

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is pertinent to begin with the majoritarian view of secularism and move from there to examine briefly the complex discourse on secularism in India.

The Hindu right's reductionist rhetoric of 'appeasement' of minorities and 'pseudo-secularism' guides the BJP, the vehicle of Hindutva[5] in India. Seeing itself as the 'most capable of being secular' (Cossman and Kapur 1997; Rajan and Needham 2010), it accuses other parties of 'pseudo-secularism', specifically as a criticism of their policies protecting the rights of religious minorities, rather than a criticism of the form of Indian secularism itself (Rajan and Needham 2010). Thus, by asserting that they support 'justice for all, appeasement of none' (BJP Election Manifesto 1998), they pushed for a brand of secularism rooted in formal equality (Rajan & Needham 2010). In this imaginary, democracy meant rule of the (Hindu) majority, thereby effectively appealing to majority identity, fuelling bitter political strife and violence and marking little distinction from a theocratic state (Rajan and Needham 2010). As Bhargava (2002) points out, the mere absence of theocracy does not make a secular state nor is it testament to the state's secular credentials.

Broadly, Indian secularism has been construed as religious freedom and the non-interference of the state in the religious practice of the minorities – that is, equal respect for all religions. It was thus rooted in the commitment to non-discrimination, which is a core principle of the Indian Constitution, emphasising a composite polity. The understanding of secularism in India is not merely based on the tolerance of the Hindu majority, nor is it based on neutrality towards all religions. Scholars of secularism and political theory have argued that in India the protection of equal and differentiated citizenship requires that religious groups are differentially treated, which determines the extent and subject of intervention by the state (Bhargava 1998). This is also what Bhargava (2002), for example, calls a policy of 'principled distance', where the Indian state has adopted a flexible approach to intervention, based on the nature and context of the religions under review, with a consideration of how this intervention affects religious liberty and equal citizenship. This drew from the Indian state's dilemma stemming from respect for religious liberty and the commitment to justice and equality which required intervention in discriminatory social customs that were sanctioned by religion (Bhargava 2002), an approach termed 'ameliorative secularism' (Jacobsohn 2009) – a model that simultaneously undertakes social reform and protects religious plurality. Other scholars similarly suggest that the Indian Constitution adopts a restricted multiculturalism in making provisions for differential treatment on the path to equal citizenship, where equal citizenship might demand the unequal treatment of marginalised groups, identified along religious lines in some contexts (Bajpai 2022). There are still others who are sceptical of the possibility that secularism can be a truly functional doctrine in the Indian case. This article attempts to build on these debates through a particular focus on the (il)legality of the hijab ban.

3 Religious freedom and legal doctrine

The Constitution recognises the right to freedom of religion, outlined in Articles 25 and 26 in Part III, which discusses fundamental rights. The term 'secularism' was inserted in the Preamble to the Constitution through The Constitution (42nd Amendment) Act, 1976. It does not find explicit mention in any other part of the Constitution.

Article 25, dealing with individual rights, reads:

> '(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

[5]Truschke (2023, p. 265) observes that 'the advent of "Hindutva"', which is now synonymous with Hindu majoritarian nationalism 'constitutes a historical break where Indian thinkers attempted to fetter a fluid term and weaponize it to exclude and oppress', despite the 'textured history' of the term 'Hindu'.

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(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law – (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.'[6]

Article 26 deals with the establishment, administration and management of religious institutions and property.

The task before Indian courts was to affirm this commitment to religious freedom while simultaneously delineating the boundaries of intervention and protection based on what might constitute the sacred and the secular. With the expansion of the scope and extent of state intervention in religious practices and institutions, courts became critical spaces for arbitration and interpretation of religious practices and their content (Sen 2010). This led to varying interpretations by the courts of the concept of 'secularism' and what it entails – in some cases subscribing to majoritarian sensibilities to the detriment of minorities; privileging minorities in other cases; and often emphasising the centrality of secularism to Indian constitutionalism (Padhy 2004). Judicial interpretation entered the realm of religion and the sacred through discussions on secularism and the freedom of religion. These discussions, and the fact that the courts became the 'focal point' for 'tensions' between the Constitution's reformist values and other sources of authority in several cases (Sen 2010, p. 88), saw the Indian judiciary debating the content and source of religious practices and adjudicating on protections that could be granted, resulting in the Essential Religious Practices (ERP) doctrine, or the ERP test.

The deliberations of judicial benches over theological sanction and validity for religious practices, especially through the ERP test, followed by their adjudication on whether or not practices of faith are subject to being struck down or protected by the Constitution, have been the subject of much debate and criticism in India. The test of essentiality in this doctrine was based on individual judges' assessments of the temporal nature of the practice – which often relied on their understanding of how old the practice is and its historical circumstances.[7] This was also used by judges to determine whether or not the practice was mandatory to the religion. The ERP test highlights the contradictions inherent in textualism, where individual judges draw on particular interpretations of scriptures to advance a specific set of arguments which are used to define the contours of constitutional protection. This is based on determining what is 'essential' to the religion, ostensibly according to the tenets of the religion itself. The judiciary thus became the chief arbiter of the 'sincerity of religious beliefs' (Gautam 2014) and whether these beliefs and practices are essential, in some cases going as far as differentiating between religious practices and beliefs based on superstition[8] (Sen 2010), rejecting the validity of the latter. Religious freedom was to be protected, subject to restrictions in cases where these beliefs and practices violated and infringed on other fundamental rights. There was, however, a blurring of lines in defining and extending the contours of this exercise. Justice D.Y. Chandrachud's discussion of the concept of essentiality and ERP in *Indian Young Lawyers Association v. State of Kerala*[9] on the subject of religious freedom

[6]Explanation I, which forms part of Article 25, is important: 'Explanation I – The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.'

[7]The court's definitional exercise on religion and essential practices has continued over the decades in post-colonial India. For a detailed discussion of this trajectory, see Sen (2018).

[8]This distinction between religious practice and superstition was made by Chief Justice Gajendragadkar of the Indian Supreme Court. Practices based on superstition were not considered an essential part of the religion, and thus the court took it upon itself to determine what constitutes 'real' religious practice and what does not (Sen 2010). Chief Justice Gajendragadkar's tenure was also a period when the ERP doctrine and the judiciary's involvement in religion was significantly expanded.

[9]In *Indian Young Lawyers Association v. State of Kerala*, AIR Online 2018 SC 243, the Supreme Court declared that the tradition banning temple entry to the Sabarimala shrine in the state of Kerala for women of menstruating age was unconstitutional. The judgment was based on the right to equality, non-discrimination and freedom of religion, where

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and gender equality with specific reference to Hindu women's entry in the Sabarimala temple in Kerala is informative in this regard:

> 'this Court used the word "essential" to distinguish between religious and secular practices in order to circumscribe the extent of state intervention in religious matters. The shift in judicial approach took place when 'essentially religious' (as distinct from the secular) became conflated with "essential to religion." . . . which now enjoined upon the Court the duty to decide which religious practices would be afforded constitutional protection, based on the determination of what constitutes an essential religious practice' (para. 32)

In moving from that which is essentially religious to that which is essential to the religion, there was a slippage from the attribute of the practice to the attribute of religion.

In thinking through the Indian variant of secularism, discussed in the previous section, and the application of the ERP doctrine by courts, there is a presumption of state neutrality, where intervention is legitimised based on whether or not a practice is essential to the religion. Some scholars have also stated that, subject to constitutional limitations, if a community establishes and believes a practice is essential, then it should be accepted, as interpretive liberty otherwise would lead to 'rewriting the faith' (Dhavan 2018). The doctrine itself is thus vague and ambiguous in its scope, rendering it a contentious form of judicial meaning-making which goes beyond constitutional exceptions. Although interpretation is a question of law, the judiciary's adjudication in the sphere of the religious and secular becomes a contested exercise on the question of religion.[10] In fact, with the risk of subscribing to a majoritarian sensibility in the interpretation of secularism as tolerance, it becomes all the more important to look at the protections of non-discrimination, dignity and liberty for minorities. Justice D.Y. Chandrachud also observed that in terms of priorities 'the individual right to the freedom of religion was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty and personal freedoms recognised in the other provisions of Part III'.[11]

The debate on the hijab ban and its constitutional validity through the application of the ERP doctrine, as well as within other commitments to equality and non-discrimination, will be discussed against the doctrine's context of limitations, permissibility and constitutionality.

4 Pluralist constitutionalism and its discontents

The rise of the Hindu majoritarian state in India has been marked by the weaponisation of legal mechanisms[12] and the law in suppressing dissent, mob vigilantism, restricting the exercise of rights and state impunity. The emphasis on 'duties' now focuses solely on the moral obligations of citizens towards the state, stepping away from the obligations of the state towards its citizens set out in Parts III (Fundamental Rights) and IV (Directive Principles of State Policy) of the Constitution. The burden of performing duties as a matter of patriotism and commitment to the 'nation' overrides the constitutional commitment to the protection of fundamental rights (that are justiciable and cast a duty on the state). The push by the Hindu right for cultural hegemony rooted in homogenous ethno-religious national identity militates against the spirit of the nation's post-colonial Constitution, which saw pluralism and secularism as core values at the founding

discrimination in the name of religion could not be justified. The case is one example of the Supreme Court undertaking its social reformist role in its deliberations on religion.

[10]An example of such an exercise is the Hindutva judgments by the Indian Supreme Court in the 1990s. In the use of Hindu theocratic frameworks for judicial deliberation, the political ideology of 'Hindutva' was conflated with 'Hinduism' and used interchangeably. Hindu scriptures were also drawn on in discussing tolerance of all religions. This takes us back to the earlier point on a belief that the Hindu majority is the 'most capable of being secular' (Cossman and Kapur 1997).

[11]Para. 7, *Indian Young Lawyers Association v. State of Kerala*, AIR Online 2018 SC 243.

[12]See Scheppele (2018) for a detailed discussion of this phenomenon in some constitutional democracies.

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moment of the Indian nation state. Reading majoritarianism as a problem of constitutionalism is critical, as it highlights how the Constitution in its framing as a counter-majoritarian document has been refashioned to expand the regime's leeway in defining and negotiating partisan terms of citizenship and belonging.

The Constitution has since its inception enabled citizens to reclaim, embody and vernacularise its ideals within a larger commitment to plurality, producing affective dispositions[13] that are constantly evolving, adapting and challenging the contingencies of difference and experience through interpretative dialogues within plural constitutional communities.[14] Pluralism has thus been fundamental to the constitutional imaginary from the beginning. Citizenship claims in the newly independent nation were rooted in the language of 'belonging', 'habit' and 'congeniality', which are terms that are articulated through a belief in lifeworlds imagined by the constitutional collective as decidedly plural in the nation's foundational moment (Kannabiran and Tella 2022). To accept such attachments to place and nation, rooted in pluralist constitutional imaginaries and lifeworlds at the particular political conjuncture after the nation gained independence, was challenging, precisely because the clear demarcation of 'self' and the 'other' was difficult and elusive. The history of foundational violence during the Partition of 1947 and what it meant for the nation state and individual belonging informed the nascent state's commitment to constitutional secularism and necessitated a recognition of plurality and equality, granting legitimacy to the claims made thereof, difficult and complex as they were.

It is in this context that I submit that secularism as a value system in the Indian context needs to be conceptualised through a reading of difference and justice, thus making an articulation of secularism impossible without the articulation of pluralism – forming a dialectical relation between the two. The twinning of these two value systems – that is, secularism and pluralism – opens up the possibility of a novel articulation of political justice from within and without a constitutional frame. This twinning in the Indian context is a unique form, distinct from the varied Western notions of these value systems.[15] To expect the accommodation and *recognition* of plural lifeworlds and their embodiment in India is not a critique of secularism, but in fact logically flows from this very doctrine, which sees secularism as productively informed by its encounter with pluralism and thus necessitates its preservation. Indian secularism's entanglement with pluralism and its functioning through a modality of convivial existence between peoples thus makes it difficult for any political establishment – fundamentalist/supremacist/majoritarian and authoritarian – to disarticulate it in toto. This is also why we now see Hindu majoritarianism

[13]This is especially true for minorities and the marginalised in their position within the new polity. In the aftermath of the Partition of India in 1947, which was accompanied by communal and political violence between Hindus and Muslims in the nation, notions of citizenship and belonging needed to be constantly negotiated by the people and the state, including the Muslim minority. In this context, affective attachments to 'home' and notions of belonging were articulated in opposition to the delimitation of 'frontiers' imposed through political negotiation, where women occupied a position of liminality demarcated by the law's 'lines' (Kannabiran and Tella 2022). Nationalist sentiment and 'loyalty' to the nation were thus pluralised, as identity drew not just on attachment to the 'nation' broadly conceived; it drew also, and more strongly, on a notion of belonging to that which is familiar and intimate – an understanding of home (Kannabiran and Tella 2022).

[14]De and Shani (2024) discuss the multiple sites of the making of the Constitution, and how its drafting was an exercise in public and collective thinking and in fact in political practice, in articulating what constitutionalism would mean for personhood for the members of the new polity. This practice occurred well beyond the walls of Constitution Hall.

[15]This is not the same as the French republican notion of *laïcité*, which sets up binaries under secular law that make an articulation of plural subjectivity incommensurable with what it means to be 'French' (Fernando 2010). Fernando's study of French Muslim women places an emphasis on the centrality of Muslim subjectivity. She understands this as being constituted by these women as pious Muslim French citizens, where their framing moves beyond just the freedom to choose to an intrinsic part of their sense of religious duty. In their negotiations with norms and desire in following their 'true self', French Muslim women follow a path of the cultivation of piety that emerges through religious embodiment and authority and not apart from it (Fernando 2010 p. 24). Nor is this understanding similar to the American enunciation of the Free Exercise Clause of the First Amendment, which requires complete non-interference unless there is compelling state interest to intervene, where such interest passes muster (Pepper 1986). Both these contexts deal with pluralism in the context of religion in different ways, drawing on notions of (in)tolerance, commitments to neutrality and the separation of church and state.

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entering the realm of constitutional politics: this twinning embodied in the Constitution's form is an obstacle to the very core of Hindutva's political modality and a challenge to its legitimacy as *the Indian* (ethno-)nationalist enterprise.

Within this terrain of contested constitutional values, constitutionalism and its politics in the current conjuncture in India, the dialectic between secularism and pluralism is what makes majoritarian rhetoric run aground. The justification for the hijab ban is an example of this, which this article will address through the analytical categories of pluralist constitutionalism, constitutional appropriation and constitutional derailment.

Pluralist constitutionalism emphasises an ethos that undergirds constitutionalism, which is based on rights and equality, where equal and differentiated citizenship is embodied most directly by vulnerable communities and speaks to a democratic understanding of the Constitution and of the political. It is this character that has allowed marginalised communities in Indian constitutional history to summon the spirit of constitutional personhood in protesting violations of body and ways of being (De 2018).[16] In reading the Indian Constitution as a site of differentiated citizenship (Bhargava 2002), a political culture that ignores or undermines difference by insisting on the adoption of majoritarian practice and its proliferation risks alienating its people – which is true of both *laïcité* and Hindutva (Kesavan 2021). Where minorities are relegated to a state of exception, laws governing interreligious marriage ('love jihad') and the bans on cow slaughter and the hijab, for instance, become channels for redefining the 'normal'. The crux of this lies in the use of such law as a tool, instrument or modality of religious persecution (Patel 2022), which is at the core of Hindutva's self-identificatory practice. Hindutva public discourse thus treats secularism not as a pluralist enterprise, but rather through the law's coercive force it produces and authorises a majoritarian sensibility and disposition. The conjoining of these two value systems, secularism and pluralism, and their complementarity in promoting fraternity as a core value imagined in the Indian Constitution's originary moment works against this framing, thus making constitutionalism one of the sites for Hindu majoritarian politics, which is demonstrated in the arguments in favour of the hijab ban. This is at its core a reaction to pluralist constitutionalism's cultivation of solidarity enfolded by a secular and democratic ethos that lends it stability and is complemented by a commitment to constitutional morality which supersedes public morality.[17] The foundation of a pluralist constitution(alism) is the bringing about of a social revolution and the building of social democracy rooted in substantive equality as integral to the functioning of a political democracy.[18]

[16]De (2018) argues that the protection of life (liberty, cultures, dress, expression, etc.) was more contingent in a democratic state, where a diverse array of citizens were redefining the contours of 'virtuous citizenship' through their claims as constitutional actors. They were thus negotiating the contours of constitutional politics, which was a result of the production of a conceptual grammar and vocabulary of constitutional claim-making in the form of an (adversarial) encounter with the state. Quotidian practices are political when they are marked by the state's newly formulated lines of 'deviation'. They are recast and reiterated through encounters in the constitutional courtroom that challenge constitutional virtues and duties mandated by the state (De 2018).

[17]For a judicial enunciation of Dr B.R. Ambedkar's distinction between constitutional and public morality, see *Naz Foundation v. Govt of NCT Delhi* 2009 (160) DLT 277.

[18]Dr B.R. Ambedkar was emphatic in stating the importance of this fact for India's political future. He held a deep-rooted faith in democracy as a method to attain and maintain a form of life that is rooted in the ideals of dignity and equality. This was impossible without fraternity, as Ambedkar treated fraternity and democracy almost synonymously, where 'fraternity is only another name for democracy'. He put forth this idea most forcefully in statements he made at different points in the Constituent Assembly, where he spoke of democracy, the importance of fraternity and mutual respect and constitutional morality (Ambedkar 1994 p. 61) as the basis of a just sociopolitical order. He stated that '[p]olitical democracy cannot last unless there lies at the base of it social democracy . . . a way of life which recognises liberty, equality and fraternity as the principles of life . . . . Without fraternity, liberty and equality could not become a natural course of things' (Ambedkar 1994 p. 1216). This emphasis on a constitutional vision of fraternity, equality and dignity is central to a discussion of the hijab ban and what it means for Muslim women's citizenship.

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All these elements of pluralist constitutionalism – fraternity, constitutional morality and differentiated citizenship – are integral to trying to understand the language of justification for the hijab ban. It is also important simultaneously to understand how sovereign power weaponises law and delineates the boundaries of exception by tailoring this interpretation to a larger political agenda. Secularism and pluralism as part of a constitutional vision that embodies the ideal of a sociality (fraternity through equality) militates against an entrenchment of (Hindu) majoritarian politics. *Constitutional appropriation*, the second category I introduce, refers to any (mis) interpretation of these principles adopting (Hindu) majoritarian sensibilities.

The current moment of majoritarian politics and the immunity that it enjoys for acts of violence makes the state of exception an everyday reality for minorities. By speaking through the language of constitutional commitments, the Hindu right has steadily sought to undermine enunciations of justice that do not privilege majoritarian sentiment. The hijab ban is a demonstration of this modality of appropriation, where judicial argumentation is replete with contradictions due to its approach to constitutional principles and a misrecognition of the Constitution's plural and secular spirit. My attempt has thus been to ask why Hindutva needs to engage in such an enterprise at all. Pluralist constitutionalism in contemporary India is *directly* confronted by the majoritarian state through active attempts of appropriation, which may manifest in different ways but at their core occur in an adversarial encounter with a pluralist constitution's guiding principles. The fact that majoritarianism's enterprise is antithetical to the Constitution's pluralist vision is precisely what makes the appropriation by the Hindu right imperfect and incomplete, thus frustrating it and rendering it unstable and fragile.

In the cases under discussion, this constitutional appropriation is selective: when the Constitution does not serve the majoritarian agenda, it is attacked, and Hindutva delegitimises and/or denigrates the Constitution and its principles through open contempt. I refer to this selectiveness in appropriating and denigrating the Constitution as a form of *constitutional derailment*, the third category I propose. The contradictions inherent in this modality of constitutional derailment are most evident in cases that lie at the intersection of gender and religion, where women's claims to dignity under the Constitution are weaponised in contradictory ways. This use of the Constitution as a tool is demonstrated in the belief that the fundamental right to equality (for women) cannot subsume the right to practise one's faith, thus prioritising (upper-caste Hindu patriarchal) culture over the Constitution, on the one hand, and criminalising minority practices, on the other, by appropriating these claims to dignity. I use the hijab ban as an example of constitutional appropriation and constitutional derailment to discuss these majoritarian modalities of legitimating oppression, and suggest ways of reorientating ourselves to think through the deep meanings of core constitutional principles.

5 Citizenship, (sartorial) uniformity and the law: the hijab ban in India

My discussion of the hijab ban is placed within an understanding of Muslim lifeworlds in India in the current moment and the struggle to occupy the public sphere when hegemonic majoritarian discourse shapes dominant sensibilities and legitimises practices that institutionalise harm. Here, judicial deliberations that attempt to define the boundaries of religious community in the public sphere only raise further questions about the extent to which the state might interfere in the lives of its citizens. More specifically, interference in the intimate lives of its citizens is an aspect that is given little consideration in the conversations around the ban. It is instead framed as a move made in the interests of unity, equality and public order, not as an action violative of a plurality of fundamental rights.

The hijab ban was heard by both the Karnataka High Court and the Supreme Court. Both courts dealt with a few key issues that I highlight. The Karnataka High Court's verdict focused on the ERP and quite heavily on the uniform and dress code itself, and came to its decision on the

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basis of these considerations. Constitutional values and principles found little place, and when they did were erroneously interpreted. The Supreme Court's split verdict, in contrast, considered the ERP test irrelevant to the case at hand, and instead focused on the meaning of secularism, notions of uniformity, discipline and fraternity as well as the right to freedom of expression and dignity.

5.1 Karnataka High Court

On 15 March 2022, a three-judge bench (hereafter: Bench) of the Karnataka High Court in *Resham v. State of Karnataka*[19] upheld the hijab ban in state educational institutions in Karnataka. The bench in its decision considered: (a) whether the hijab is an essential religious practice that is protected under Article 25; (b) whether the prescription of the uniform violates the freedom of expression under Article 19(1)(a) and the right to privacy under Article 21; and (c) whether the Government Order violates Articles 14 and 15. Of these, (a) took up the most time during the hearings and placed the responsibility for contradictions in doctrinal fidelity on these young Muslim women, while such a deliberation simultaneously made them the subject of public (and judicial) indignation within a particular framing of constitutional 'integrity' in the performance of citizenship.

5.1.1 Essential religious practices

On the first question, the petitioners were required to prove that wearing the hijab was an 'essential religious practice' in Islam. In outlining Article 25, protections for religious freedom, the Bench noted that since the article began with the words 'subject to . . . ' certain limitations in the interest of public order, morality and health, even some practices considered essential would have to be subject to other protections under Part III of the Constitution.[20] Religious freedom under Article 25 was 'placed on a lower pedestal' in relation to other fundamental rights in Part III. The Bench in its interpretation of the scriptures found that the wearing of the hijab was not obligatory or mandatory but merely 'directory', since there was no 'punishment or penance for not wearing the hijab', and was a 'measure of women enablement' as a means to 'gain access to public places and not a religious end in itself'.[21] At most, the hijab had to do with culture, but 'certainly not with religion'.[22]

The attribution of their religious practice to 'culture' as distinct from 'religion' underlines an expectation of its malleability to the 'national interest', which the state defines in homogenous terms. The secular is thus also simultaneously construed as the 'national'. There is an elision here: culture ('national culture'), purportedly secular, is infused with religion, normalised as Hindu. When some of the petitioners – that is, the young Muslim women affected by the ban – pleaded on the grounds of their freedom of conscience, the Bench found that insufficient evidence had been provided by these petitioners to justify that the overt act of wearing the hijab was associated with conscience. The Bench noted that there was also not enough material submitted by the petitioners specifying how long they have been wearing the hijab, nor was there a plea regarding whether they wore it prior to joining the institution. Prima facie, there was no material that proved that the hijab was an ERP or that the petitioners have always worn the hijab. We must, at this juncture, note the language of the Bench in concluding that the hijab is not an essential religious practice which highlights the role the courts assume in defining the terms and boundaries of religion. It

[19]*Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.

[20]This was also stated by Justice D.Y. Chandrachud in *Indian Young Lawyers Association v. State of Kerala*, AIR Online 2018 SC 243.

[21]Section IX (iii), *Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.

[22]Section IX (vi), *Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.

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commented, 'it is not that if the alleged practice of wearing hijab is not adhered to, those not wearing hijab become the sinners, Islam loses its glory and it ceases to be a religion'.[23]

It is well established in Indian jurisprudence that a guarantee of religious freedom for religious denominations and that of equality and dignity for the individual need to be considered concurrently when adjudicating on religious practice. The right to wear a hijab is an individual right, and a matter of religious choice, and thus must be viewed through the lens of intersectional discrimination, instead of placing the onus of proving sincerity or compulsion on those constituents being discriminated against. The use of the ERP test in this case is detrimental to the interests of Muslim women because it precludes the possibility of a consideration of gendered discrimination in a verdict that focuses solely on religiosity, especially when intersectional discrimination can and does manifest as a form of constitutional subversion. By looking at it solely in scriptural terms of obligation, rather than as a matter of choice, it denies agency to these young Muslim women.

5.1.2 Uniformity and fraternity

On questions (a) and (b), there were a few different observations that merit mention. The Bench found that not only did the prescription of a dress code to maintain the homogeneity of the classroom serve the objective of fostering a secular outlook in the Karnataka Education Act, 1983, and the fundamental duty under Article 51A(e) of promoting the spirit of a common brotherhood, but it also 'served constitutional secularism'. The possibility of the respect for plurality in fostering this spirit, as different from a unilateral view of uniformity as homogeneity of overt appearance, was absent. Instead, the preferred argument was that allowing the hijab would foster a sense of 'social separateness',[24] which would be divisive and trigger chaos on campus and in society at large, which was not desirable, and inegalitarian. This point on uniformity and homogeneity is one that I will elaborate on later. Suffice to say at this point that not considering the possibility of plurality as complementing a secular outlook defined secularism and fraternity narrowly. The Bench also observed that while choosing one's own attire is a part of autonomy and expression, this choice is subject to reasonable regulation, and 'by no stretch of imagination'[25] does the prescription of a dress code violate the freedom of expression and autonomy.

While the right to freedom of expression (Article 19(1)(a)) and the right to privacy (Article 21) are substantive rights, the rights under consideration were 'derivative rights', which lie in the 'penumbra' of substantive rights and are thus not eligible for the same protection under the Constitution.[26] This, I suggest, is an incorrect application of these principles. The Bench went further in this observation, explaining that since schools are 'qualified public places', individual rights are subject to the maintenance of discipline and decorum, where even substantive rights become derivative. In providing examples of 'qualified public places', though not explaining what it means, schools were placed in the same category as courts, war rooms and defence camps. What the similarity is between a school and the other places listed the court did not say, except that freedom could be curtailed in these spaces in the interest of discipline. It was considered too far-fetched to argue that the ban and the dress code violated Articles 14, 15, 19, 21 and 25, and the Bench upheld the power of the State Government to pass the impugned Government Order that prescribed the dress code. Not stopping there, the Bench observed that:

[23]Section XII (i), *Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.
[24]Section XIV (ix), *Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.
[25]Section XIV (iv), *Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.
[26]Section XIV (iv), *Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.

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> 'insistence on wearing . . . [the] veil, or headgear in any community may hinder the process of emancipation of woman in general and Muslim woman in particular. That militates against our constitutional spirit of "equal opportunity" of "public participation" and "positive secularism."'[27]

Excluding the hijab through the prescription of a dress code 'can be a step forward in the direction of emancipation and more particularly, to the access to education'. The Bench also observed that '[i]t hardly needs to be stated that *this does not rob off the autonomy of women or their right to education inasmuch as they can wear any apparel of their choice outside the classroom*' (emphasis added).[28]

The High Court, in grappling with the complex interconnections between pluralism-secularism and equality, and unable to find the constitutional trail, skipped to a reading of secularism akin to a French republican notion of *laïcité* (Laborde 2008) and in the process denied the right to substantive equality to Muslim women.

5.2 Supreme Court of India

The petitioners appealed against the Karnataka High Court decision in the Supreme Court of India. After significant delays in listing the case, hearings took place in September 2022. On 13 October 2022, in *Aishat Shifa v. State of Karnataka*,[29] the Supreme Court Bench consisting of Justice Hemant Gupta and Justice Sudhanshu Dhulia delivered a split verdict on the constitutionality of the hijab ban. Justice Gupta upheld the ban with the view that it did not violate the right to religion, was neutrally applicable and upheld discipline through uniformity. Justice Dhulia was of the opposite view in striking down the ban, holding that it was unconstitutional and that it violated the right to privacy (dignity) and expression, access to education and was discriminatory against young women. They also had significantly differing views on the ideal of fraternity, how a secular space was to be maintained and what it meant. Both judges addressed key questions and principles: ERP and core constitutional principles such as privacy, expression, religious freedom, fraternity, secularism and non-discrimination.

5.2.1 Essential religious practices and religious freedom

The Supreme Court Bench considered the question of religious freedom and briefly the applicability of the ERP doctrine to the present case. Justice Gupta stated that the Government Order aimed to promote uniformity, parity and a 'secular environment' in schools, which was consonant with the right to equality under Article 14. Since Article 25, the right to freedom of religion and conscience, is subject to limitations and other rights guaranteed under Part III of the Constitution, these restrictions, he opined, needed to be read together.[30] To ascertain whether the hijab is an ERP, Justice Gupta engaged in a lengthy review of the Quran and religious scriptures, and asked, if the hijab is an ERP, whether these religious beliefs and symbols can be brought into a secular school by students. Be it an essential religious practice, simply a religious practice or belief or a mode of social conduct for Muslim women, Justice Gupta found that these practices cannot be carried into a secular school maintained by the state, and the state can therefore restrict the practice of wearing the hijab. On whether wearing the headscarf inside the school was a matter of right, he found that the claim that students are being denied access to an education is untenable, since the state is not restricting entry to students and is in fact maintaining discipline. Rather, the

[27]Section XVII (ii), *Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.
[28]Section XVII (ii), *Resham and Anr v. State of Karnataka and Ors.* 2022 LiveLaw (Kar) 75.
[29]*Aishat Shifa v. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.
[30]Gupta, J. Para. 89, *Aishat Shifa v. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.

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young women are making a choice not to attend and not to adhere to discipline rooted in uniformity and the uniform.[31]

Justice Dhulia adopted a different approach to the question of ERP. He observed that in the Karnataka High Court judgment, the ERP question was the most crucial, since all the following considerations depended on it. In his opinion, however, the ERP was irrelevant to the case at hand, and petitioning based on this argument was ill advised. He marks a distinction here, which is that the genealogy of the ERP doctrine indicates that often the religious practice under scrutiny was an assertion of a community right against state action, dealing with both Articles 25 and 26. The right to wear the hijab was an assertion of an individual right against the state, and only Article 25(1) applied, conjointly with the right to freedom of expression under Article 19(1)(a).[32] He concluded that the Karnataka High Court was incorrect in its exercise of judging the practice on the touchstone of the ERP doctrine, since there could be multiple viewpoints on interpretation of religious doctrine – one could not be privileged over another, and that the court must only intervene if other rights or boundaries are violated.[33] Ultimately, if the belief was sincere, then there was no reason to ban the hijab in the classroom,[34] which strengthens the exercise of agency. The ERP doctrine was thus not central to the Supreme Court's deliberation.

5.2.2 Secularism and secular spaces

What is the effect of incremental changes in interpretive doctrine on approaches to and perspectives on core constitutional principles? The constitutional values of secularism, pluralism and, through them, fraternity are central to a reading of the hijab ban in the present. In the Supreme Court judgment, Justice Gupta's commitment to discipline and uniformity informs his reading of secularism. In the preface to his written opinion, Justice Gupta provides a background to Indian secularism and how it is understood in the constitutional context. At the outset, in laying out his understanding of the *ethos* of Indian secularism, his interpretation vests authority and draws on conceptual sources beyond the Constitution.[35] In doing so, he engages in a discussion of 'dharma' as absolute and eternal, positing that the 'upliftment of citizens' lies in this dharma. He supplements this point by quoting from another judgment:[36]

> '" . . . used in the context of duties of the individuals and powers of the King (the State), it means constitutional law (Rajadharma). Likewise, when it is said that Dharmarajya is necessary for the peace and prosperity of the people and for establishing an egalitarian society, the word dharma in the context of the word Rajya only means law, and Dharmarajya means rule of law and not rule of religion or a theocratic State." Any action, big or small, that is free from selfishness, is part of dharma. Thus, having love for all human beings is dharma.' (para. 5)

This was said in the context of making a distinction between religion and dharma, where the latter supersedes the former in its reading as an inclusive and non-discriminatory ethos, which sees all as equals. This also erases the possibility of the consideration of difference, while using the idea of

[31]Gupta, J. Para. 169, *Aishat Shifa v. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.

[32]Dhulia, J. Paras 28, 32–33, *Aishat Shifa v. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.

[33]Dhulia, J. Para. 36,*Aishat Shifa v. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.

[34]Dhulia, J. Para. 34, *Aishat Shifa v. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.

[35]Prof. Mohan Gopal's lecture on theocratic judges and the collegium highlights the move towards this form of interpretation succinctly. He states that 'dharma' here is Sanatana Dharma (Gopal 2023).

[36]*A.S. Narayana Deekshitulu v. State of A.P. and Ors.* 1996 9 SCC 548. This judgment also consists of Justice Ramaswamy's discussion of dharma, where he states that dharma 'is the core religion which the constitution accords protection'. In doing so, not only does he redefine religion and religious freedom by relating 'secularisation' of religion to religious freedom, but he posits dharma as the way to an egalitarian and unified social order (Sen 2018).

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non-discrimination enshrined in Article 15. This interpretation treats the Indian Constitution as dharma[37] and thus embeds the doctrine of the rule of law and equality before the law *in and as* dharma. Dharma is thus construed as a *secular* (and universalist) ethos that guides balanced and responsible conduct, entrenched in the Constitution, and the state thus cannot exist without dharma. This translation of meaning demonstrates the possibility of constitutional appropriation through the language of inclusivist nation-building that undermines the functioning of a pluralist constitutionalism. This attribution entrenches an idea of higher religion, which in the contemporary context is rooted in Hindu textual orthodoxy. This then informs an *interpretation* of secularism and pigeonholes the possibility of pluralist constitutional deliberation on the subject by grounding reasoning in the importance of, in this case, (sartorial) homogeneity. Such reasoning treats fraternity not as a pluralist commitment but as a duty on the part of minorities. Their religious claims thus fall outside of this secular conception and are seen to be in contravention of aspirations for national unity.

The classroom as spatially secular and simultaneously a space of exception, in this case denoted through sartorial uniformity, contributes to the overarching ethos of dharma, which as 'secular power' avowedly renounces 'sectarianism' and sectional diversities. What is left unsaid is that it also renounces a commitment to pluralism by denying sociality. Law's role is that of a discursive practice that determines how spaces ought to be regulated and governed and draws from a legal interpretive engagement underwritten by spatial imaginaries (Liang 2023). It is in gauging how this manifests that we begin to understand the actualisation of constitutional politics, drawing from Delaney's idea of the 'nomosphere'. Delaney argues for a spatio-legal reading of world-making and the 'cultural–material environs that are constituted by the reciprocal materialisation of "the legal", and the legal signification of the "socio-spatial", and the practical, performative engagement through which such constitutive moments happen and unfold' (Delaney 2011, p. 25 quoted in Liang 2023). The construction of the 'secular space' and the interactions and engagement that it permits leads to the framing of that which is seen as disruptive, abnormal and transgressive. The maintenance and promotion of public order, and even fraternity for that matter, then, entails de-legitimising the claims of those that these values affect and/or protect most directly. Discipline and uniformity are posited as central to the integrity of secular spaces and their embodiment of constitutional values – thereby framing citizenship through the surveilled boundaries of virtuous conduct. This animates a legal and consequently political and public discourse that treats difference and agency as recalcitrance.

5.2.3 Dignity and expression

The hijab as an exercise of agency and choice by young Muslim women is explicitly recognised only by Justice Dhulia in his written opinion. In fact, Justice Gupta's approach implies that the exercise of autonomy and insistence on sartorial choice is in defiance of rules and discipline, thus fostering 'rebel and defiance [sic]' instead of fraternity.[38] Minoritarian expression violates the sanctity of these spaces. Justice Dhulia finds that since wearing the hijab is a part of their individual religious practice and social conduct, it follows precedent in being protected through the conjoint application of Articles 19(1)(a) and 25(1) – that is, the freedom of expression and the freedom of religion and conscience. Though discipline in schools is important, Justice Dhulia states, 'not discipline at the cost of freedom, not at the cost of dignity',[39]and asking young women to take their hijab off before entering school is an invasion of dignity and privacy – rights which continue to operate even inside these spaces, and are not derivative. The ban represents a violation and infringement upon these constitutional values of freedom and dignity. In his concluding

[37]This is an extremely important point made by Prof. Mohan Gopal in his lecture on theocratic judges (Gopal, 2023).
[38]Gupta, J. Para. 191, *Aishat Shifa v. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.
[39]Dhulia, J. Para. 52, *Aishat Shifa v. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.

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remarks, Justice Dhulia emphasises the importance of ensuring that access to an education for these young girls is not restricted, acknowledging that wearing the hijab might in fact facilitate access to such an education, and asks the court to strongly consider whether allowing the hijab denies this. Asking them to remove their hijab is first an 'invasion of privacy', second 'an attack on their dignity' and third a 'denial to them of a secular education'.[40] It is within the same judgment that we see the tension between the appropriation of constitutional principles and its simultaneous pluralist possibilities.

6 Agency and mutiny

The intersection of gender and minoritarian expression and identity has in fact historically been a source of anxiety for the state, and more so for Hindu majoritarianism. The gendered composition of spaces is acknowledged only in the imposition of a restriction. Intersectional modes of discrimination get obscured when religious identity is considered in isolation. Shreya Atrey's (2019) formulation of intersectional discrimination helps us to understand better Muslim women's insistence that belonging in particular ways is located within their understanding of pluralist constitutionalism. Simultaneously, the incomprehension of courts of this expression of identity within the larger claim to dignity, equality and liberty under the Constitution, and the derailment of the women's larger political claim through easy resort to the single-axis conflation of (Hindu) dharma (religious or moral law) with constitutionalism, drives home Atrey's point that 'the project of redressing discrimination of any kind will miss the mark if it does not actually understand what those experiences of discrimination really are' (Atrey 2019, p. 30). Gendered subjectivity for these young women is thus denied. Marginalised women are *made* visible through rhetoric that is circulated in the public sphere around a violation of their rights. The discursive sphere that is created and sustained by the media and formal law creates a weaponised space that partakes in the consensus-building exercise. This grants the public the role of judge and jury, erasing the particulars of experience and the boundaries of consent, rendering Muslim women visible and their space violable.[41] The sphere of public discourse thus acquires a punitive character.

Contestations over secularism in India have historically been located on the Muslim woman's body. These range from the state's protectionist rhetoric to its open contempt in response to the demonstration of resistance. For the Hindutva regime, disobedience and dissent by marginalised women is construed as a transgression, framed in the language of traitorous conduct. The interplay of agency, conscience and mutiny in the case of political resistance by Muslim women is evident in resistance to the hijab ban and in other instances of collective resistance on questions of equal citizenship. For the hijab ban, judicial interpretation of constitutional principles is constantly resisted by the young women petitioners and their peers. In challenging hegemonising rhetoric and the public–private dichotomy both in gender and religion in the most direct way, the mutinies by these young Muslim women reconfigure the nature of the secular public sphere. They also challenge the dominant narrative of Muslim women as lacking in agency and power. On the contrary, as Ghazala Jamil observes, '[t]heir challenge to the mainstream public sphere and dominant frames of what should women's activism concern itself with can be construed to form Muslim women's counterpublics' (Jamil 2023).

[40]Dhulia, J. Para. 83, *Aishat Shifa vs. State of Karnataka and Ors.* 2022 LiveLaw (SC) 842.

[41]The young Muslim women affected by the ban were chased by TV cameras and reporters and aggressively heckled. The college premises were also made increasingly hostile, as non-Muslim students wore saffron shawls as a protest against the wearing of the hijab, encouraged by Hindutva organisations in the area. As the issue escalated, students from Dalit and other marginalised communities wore blue scarves in support of the hijab-wearing girls. For a report on the saffron scarves, see *The Hindu* (2022). For a report on the blue scarves, see *Times of India* (2022).

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7 Fraternity, plurality and agonistic negotiation

How can we think through justice as a secular ideal that entails the recognition and translation of plural ways of being as imagined in the Constitution, at the intersection of religion and gender? Secularism as a core democratic value in the constitutional experiment is rooted in agonistic negotiation, which is conceptually opposed to the antagonistic formulation of the Hindu right's recourse to violence, discrimination and resentment in the public sphere. Reading secularism in this way allows us to conceive of 'a people' and popular sovereignty as grounded in notions of mutual respect and well-being. B.R. Ambedkar articulated this through the Buddhist concept of *maitri* (convivial fellowship) (Keating 2021), which was not just an 'extension of brotherhood. On the contrary, [it]... is a form of autonomy grounded in responsibility towards the "incommensurability" of every individual,' a 'fellowship towards all', which made it both a moral and a political commitment (Kumar 2015, pp. 294, 328, cited in Keating 2021, p. 276). Ambedkar saw *maitri* as a notion that is at once both force and kindness grounded in difference that underlies a democratic solidarity (Keating 2021). By bringing this into our reading, secularism may be conceptualised through an inter-reading of difference and justice, thus making its articulation impossible without it being twinned with the principle of pluralism.

On the hijab ban, the courts particularised citizenship through a notion of uniformity as discipline posited by the state. A discursive frame that emphasises uniformity as a core ideal also renders claims to wear the hijab unintelligible. Here, the hijab transgresses the boundaries of performing citizenship in expected ways defined by the state. In focusing on the ERP test, the Karnataka High Court's verdict denied the possibility of framing the insistence on wearing the hijab as a matter of individual agency for Muslim women. I would argue that any action or move that in turn rejected this denial and expressed resistance is considered mutinous by the state. The construction of the classroom as a secular space that fosters fraternity leads to fraternity being narrowly imagined as possible only through uniformity.

The attempt to define a secular space as characteristically uniform to promote democratic fraternity then begs the very question – how is uniformity necessary for fraternity when the constitutional commitment to fraternity in India is impossible without the cultivation of a sociality founded in difference? In fact, how is it that this reading, explicitly set out by B.R. Ambedkar in the Constituent Assembly Debates, does not find its way into the judicial imagination in consideration of the hijab ban? What does it mean to state that 'fraternity cannot be seen from the prism of one community alone' when it stands 'fragmented' if the hijab is allowed?[42]

I suggest that this interpretation of fraternity as homogeneity follows a pattern of disavowal that we have seen in the Hindutva position of secularism as appeasement. What does not find a place in this imagination is fraternity and, through it, dignity, as fundamental components of this twinning of secularism and pluralism and the ethos of constitutional secularism in India. The tension between pluralist constitutionalism and constitutional appropriation is thus one that is most pronounced on issues that lie at the intersection of religion and gender in the political climate of Hindutva dominance. Constitutional secularism is then appropriated to ends that are antithetical to its foundational basis. Reading dharma as a secular ethos embodying the rule of law and non-discrimination forms a part of this process, pushing us to think through its 'jurispathic attributes', which involves the 'social reproduction of rightlessness' (Baxi 2014, p. 332). The co-opting of language used in the assessment of rights claims for Muslim women makes it all the more important to consciously and constantly reassess if and how hegemonic politics and the constitutional politics of courts intersect (Baxi 2020), to contend with the possibility of jurispathic outcomes and their basis and to reflect on the role of proactive jurisprudence, looking forwards.

I also suggest that this tension and the deepening of an understanding of how the meaning of secularism might change in its encounter with pluralism present radical opportunities to rethink

[42]Gupta, J. Para. 159, *Aishat Shifa v. State of Karnataka and Ors*. 2022 LiveLaw (SC) 842.

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ideas of justice for subaltern citizens in India, such as challenging the hijab ban. Disobedience and dissent form part of everyday embodiment for the marginalised. Pluralism is thus both a plea for civility and justice and an affront to the rhetoric of majoritarianism, and the struggle for a secular democracy in India is grounded in a pluralist ideal, at the heart of which lies a constitutionally enshrined commitment to social transformation.

8 Conclusion

Constitutional embodiment is a constantly emergent, plural and transformative enterprise, where adherence to the principles enshrined in the Constitution take precedence over public morality, which is informed by the majority's sensibilities and worldview. The challenge lies in thinking through identity and difference and 'how the practices of subaltern nonviolent normative insurgency may begin to reshape politics'.[43] These are themes and issues that I have attempted to discuss in this article on the hijab ban, its politics, judicial enunciations of constitutional principles and what all of these together mean in the context of a strident majoritarian regime. The three analytical categories I introduced – pluralist constitutionalism, constitutional appropriation and constitutional derailment – help us outline the tensions inherent in constitutional politics in the present. In showing the twinning of secularism and pluralism as core constitutional principles and value systems, this article reads a pluralist orientation – especially in its gendered resonances and manifestations – as central to defences of individual rights and dignity. When Hindutva hegemony is at its strongest, the acknowledgement and recognition of difference, dignity and mutual respect, especially in the realm of minority rights, is integral to justice in all its forms.

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Competing interests. None.

Case appendix

A.S. Narayana Deekshitulu v. State of A.P. 1996 9 SCC 548.
Aishat Shifa v. State of Karnataka and Ors. 2022 LiveLaw (SC) 842.
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[43]See note 9 in Baxi (2020).

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