WEARING RELIGION ON YOUR SLEEVE : AN ANALYSIS OF ECHR JURISPRUDENCE ON PUBLIC DISPLAY OF FAITH

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ABSTRACT

This paper attempts to understand and critique the jurisprudence behind the freedom of religion cases in EU jurisdictions, particularly those concerning religious attire, articles of faith and religious expression at public places and places of work. Therefore, the theme and thesis of this paper lie at the intersection of two question prompts- Should an individual's right to freedom of religion or belief be balanced with a company's desire to appear politically, religiously and/or philosophically neutral? ***and***, what notion/concept of equality should human rights norms on equality and non-discrimination follow?

ISSN 2581 3382

INTRODUCTION

Out of everything under the sun, nothing is perhaps as hotly debated or the subject of as much politicization, as the article of clothing that a woman puts on her back. One would think that it would normally be climate and convenience that determined what people wore. However, even a cursory glance at the pages of history or the society around us would reveal that clothes have always been used as the most potent mechanism to establish hegemony and power, signal one's position in a stratified society, indicate religious affiliation or enforce community honor.

Take for instance the Anglo missionaries who came to India during the British raj. They took great offence at the immoral *saris* which in their opinion, left the native women effectively seminude. One Annette Ackroyd who came to India in the 1870s found well to do Bengali women to be "savage(s) who had never heard of dignity or modesty' for the way she sat, and dressed 'in red silk, no shoes, no stockings".[i] Undoubtedly, as Britain transitioned from a trading partner to a ruling power in the subcontinent, it doubled down on its efforts to ensure that women wore long sleeved blouses that were considered chaste and conformed to the delicate Victorian sensibilities of the colonial missionaries and administrators. A similar story played out in the theatre of America's war on terror in Afghanistan. The blue burka was publicized in the west as a symbol of the Taliban's tyrannical rule and America's occupation was legitimized on the promise of heralding a new era of women's rights. In 2004, President Bush proudly proclaimed, "Three years ago, the smallest displays of joy were outlawed. Women were beaten for wearing brightly colored shoes. Today, we witness the rebirth of a vibrant Afghan culture"[ii].

In recent times, with the rising tide of immigration making cities more cosmopolitan and placing western values in direct conflict with those of the immigrants, attempts at regulating clothing, especially religious attire, have become more insidious. While it is true that most non-western nations that espouse communitarian values are not paragons of women's equality either, this paper will focus on the prohibition of religious symbols, chiefly the *hijab*, in the European Union (EU) as it presents an interesting case study of several intersecting and competing interests and phenomenon- religious freedom, neo- colonialism, the Eurocentric nature of international human rights, romantic paternalism and so on.

ISSN 2581 3382

THE RELIGIOUS SYMBOLS CASES

In 2004, France promulgated the *loi sur laïcité* (Law on Secularism) that prohibited pupils from wearing clothing or symbols through which they "*ostensibly* manifested a religious appearance". As a result, students were banned from wearing yarmulkes, large crucifixes, Sikh turbans and of course, Islamic headscarves.[iii] However, the insertion of the word "ostensibly," in the provision ensured that pupils could continue with the traditional French practice of wearing small Christian crucifixes.[iv] This legislation was questioned in *Bikramjit Singh v France*[v], on the basis that it violated France's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights (ICCPR).[vi] France's highest court and later the European Court of Human Rights upheld the law and stated that it was not "excessive" and promulgated secularism which was a legitimate aim and protected the rights of others.[vii]

Similarly, in the case of *S.A.S v. France*[viii], the European Court of Human Rights held that a French law which disallowed full face covering in public places did not violate provisions of the European Convention on Human Rights (ECHR). The petitioner had argued that her niqab was essential to her spirituality as a Muslim and even stated that she does not object to taking off her headscarf at security screenings or other places where it was necessary to ascertain her identity.[ix] Noting that countries have a wide margin of appreciation when regulating social matters, the court dismissed the challenge to the law on the ground that it was in accordance with Article 9(2) of the ECHR which allowed placing restrictions on religious freedoms that were "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".[x] Interestingly, in their dissenting opinion, judges Nussberger and Jäderblom submitted that the principle of "living together" is not linked to the rights protected by the ECHR and therefore cannot be considered a legitimate aim.[xi] They also stated that a blanket ban was a disproportionate and unnecessary measure and did not have a place in democratic societies.[xii]

It is notable that *S.A.S v. France* cited and engaged with the case of *Hudoyberganova v. Uzbekistan*[xiii], whose outcome was starkly different. In *Hudoyberganova*, the United Nations Human Rights Committee (UNHRC) ruled that a school's suspension of a pupil for her refusal to abide by its regulation that barred students from wearing religious dress to school violated Article 18 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits

ISSN 2581 3382

"coercion that would impair the individual's freedom to have or adopt a religion".[xiv] *S.A.S v. France* differentiated itself from *Hudoyberganova* by stating that firstly the facts were different since in the latter case, the court had not "ruled on the question of a blanket ban on the wearing of the full-face veil in public places"[xv]. Only Belgium had passed a law comparable to the French law in question and it had been upheld by Belgium's Constitutional Court as being "compatible with the right to freedom of thought, conscience and religion".[xvi] Secondly, unlike France, in Hudoyberganova, Uzbekistan had failed to produce any *justification* for why the restriction or limitation would be *necessary*.

Another case on banning the use of headscarves that deserves attention is that of *Leyla Sahin v Turkey*[xvii]. Unlike the previous two cases, the petitioner in this case was not the member of a minority community and the legal provision in dispute was enacted in a Muslim- majority jurisdiction. In this case, a woman pursuing higher education in Istanbul was not allowed to sit for a written exam or enroll in a course because she wore the Islamic headscarf. The college had passed a circular mandating that no one should sport 'beards' and 'headscarves', or else they will be barred from classes and exams. The European Court of Human Rights in its judgement stated that the law did not violate Article 9 of the ECHR, because "Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief"[xviii]. The court further stated that the measure was *justified* since such interference was prescribed "by law", namely the Turkish Dress Regulations Act that prohibited individuals from wearing religious clothing except while attending religious engagements or at places of worship. Case law from Turkey's Constitution was also cited which made it clear that under the Turkish conception of secularism, freedom of religion only amounted to having the liberty to follow or not to follow a particular religion. Freedom of religion was "not to be likened to a right to wear any particular religious attire"[xix]. The court held that Turkey considers secularism to be the foundation of democracy, and even if the college's circular compromised certain forms of religious expression, it was *proportionate* since it furthered the cause of secular and pluralistic values and principles.

In recent times, most of the cases mentioned above have come under severe criticism for their narrow reading of the right to religious freedom. In response to this, in the 2017 judgement of *Achbita v. G4S Secure Solutions*[xx], the European Court of Justice (ECJ) developed the jurisprudence of 'indirect discrimination'. The case concerned a Muslim woman who was

ISSN 2581 3382

dismissed from work as a receptionist upon her insistence on wearing an Islamic headscarf. Although the company had a similar but unwritten rule earlier, after employing Ms. Achbita, it amended its workplace regulations to prohibit employees "in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs"[xxi]. The ECJ stated in its ruling that though a ban like the one instituted by G4S Secure Solutions did not constitute a form of direct discrimination, it could count as indirect discrimination "if it disproportionately affected members of a class and did not have a legitimate aim that was appropriate and necessary".[xxii] Indirect discrimination can be recognized if the measure is apparently neutral nature but results in putting individuals of a particular religion or identity at a disadvantage when it is applied to them.[xxiii] Unfortunately, the ECJ further went on to add that even if such a treatment amounted to indirect discrimination, it could "still fall within the constraints of the law if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".[xxiv] Moreover, despite its progressive expansion of the freedom of religion jurisprudence in international human rights law, the case did not set a binding or persuasive precedent in any jurisdiction.

RELIGIOUS FREEDOM, PUBLIC ORDER, AND SECULARISM- A BALANCING ACT

As seen from the cases above, the most common arguments presented in favor of encumbering religious freedom and prohibiting religious symbols in particular derive from Article 18 (3) of the ICCPR and are those of protecting public order and liberal values such as the French principle of "living together", or in the wake of 9/11 protecting state security. Protecting gender equality and autonomy are also invoked, even if rarely. However, most of these measures often end up having a chilling effect on religious expression and increase intolerance and xenophobia towards an unpopular religious minority. They are also antithetical to liberal values in their form and effect. The appropriate response to religious diversity is to foster mutual respect, and to recognize and accept differences, not institute a blanket prohibition on the public expression of faith in an attempt to impose uniformity. Pluralism and tolerance are the cornerstone of a democratic society. While it is true that individual interests must sometimes be compromised

ISSN 2581 3382

for the sake of utilitarian needs, democracy cannot be subverted to pander to majoritarian anxieties.

Another oft- cited argument that is usually (wrongly) drawn from Article 18(2) of the ICCPR is that freedom of religion does not include the right of students to display religious symbols that individually or collectively constitute a provocation, an attempt at proselytization or religious propaganda. This argument which was invoked when France enacted the 2004 Law on Secularism is flawed and legally dubious. Firstly, it victimizes the individual who adorns the religious symbol by attacking their identity and their intrinsic sense of self. As was held in *Navtej Singh Johar v. Union of India*[xxv], a landmark judgement that led to the reading down of Section 377 of the Indian Penal Code, 1860, any law is undemocratic which criminalizes that which is central to a person's *self- identity*, whether it is consensual carnal intercourse for queer individuals or in the present case, wearing a religious outfit out of one's own choice. It goes against the basic tenets of privacy, freedom of expression, human dignity, and equality.

It is unfortunate that while dealing with freedom of religion cases, the European Court of Human Rights or the UNHRC have barely engaged with equality jurisprudence that has been developed by constitutional courts around the world. In the 1952 case of *State of West Bengal v. Anwar Ali Sarkar*[xxvi], the Indian Supreme Court struck down a law that empowered the state government to create special courts of criminal jurisdiction with special judges for speedy trials because it did not pass the reasonable classification test. The reasonable classification test is an important element of substantive equality and comprises of two elements- firstly, if a law attempts to make a classification among people, it must be founded on an intelligible differentia which distinguishes those that are grouped separately from others. Secondly, the differentia must have a rational nexus with the object sought to be achieved by the Act. If the laws banning religious symbols are tested on the anvil of the reasonable classification test, they will most likely not hold up. The is a clear lack of intelligible differentia and a rational nexus to the object sought to be achieved.

In the cases mentioned above, while the European Court of Human Rights has discussed the concepts of *legitimate aim* and *proportionality*, it has avoided a thorough analysis of the provisions that sanction it such as Article 18(3) of the ICCPR or similar provisions in the ECHR. Important questions such as the burden of proof a state needs to discharge to prove that the aim it seeks to achieve by encumbering religious expression is legitimate and the quantum

ISSN 2581 3382

of evidence needed to be furnished by states to establish a real and imminent threat to public safety and order remain unanswered. It is true that nations have the right of self- determination and to preserve national customs, traditions and the "cultural essence" of their societies. However, it cannot come at the cost of curtailing individual freedoms and personal choices that do not harm the public in any way. To this end, it is surprising that courts have also not sufficiently dealt with Article 27 of the ICCPR even in favorable decisions such as that of *Hudoyberganova v. Uzbekistan.* The Article states that religious or ethnic minorities "will have the right to enjoy their own culture, to profess and practice their own religion, or to use their own language".[xxvii]

It is important to re- visit the jurisprudence of the religious symbols cases and assess their place and validity in societies that claim to uphold values of democracy and individual autonomy. An individual's clothing- worn out of choice or due to compulsions of religious or communitarian considerations- is an important aspect of the person's identity and self- worth and cannot be decided by those who have little interest in understanding the historical or sociological origins of the dress code. Often, such decisions instead of protecting the autonomy and freedom of choice of the target women's group, prevent them from participating in the workforce and public life and reek of toxic romantic paternalism. This form of "protective discrimination" was perhaps best described by the US Supreme Court in *Frontiero v. Richardson*[xxviii] which stated,

"*Traditionally… discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes*".

ISSN 2581 3382

ENDNOTES

[i] Rafia Zakaria, 'Clothes and Daggers' (*Aeon*, 8th September 2015) <https://aeon.co/essays/ban-the-burqa-scrap-the-sari-why-women-s-clothing-matters> accessed 14th October 2021.
[ii] Ibid.
[iii] Becket Role, 'Jasvir Singh v. France, Bikramjit Singh v. France' (*The Becket Fund for Religious Liberty*) <https://www.becketlaw.org/case/jasvir-singh-v-france-bikramjit-singh-v-france/> accessed 14th October 2021.
[iv] Ibid.
[v] CCPR/C/106/D/1852/2008.
[vi] Becket Role (n 3).
[vii] Ibid.
[viii] [2014] ECHR 695.
[ix] S.A.S v France (*Global Freedom of Expression*) <https://globalfreedomofexpression.columbia.edu/cases/s-a-s-v-france/> accessed 10th October 2021.
[x] Ibid.
[xi] Ibid.
[xii] Ibid.
[xiii] Communication No. 931/2000
[xiv] Hudoyberganova v. Uzbekistan (*Global Freedom of Expression*) <https://globalfreedomofexpression.columbia.edu/cases/hudoyberganova-v-uzbekistan/> accessed 10th October 2021.
[xv] S.A.S v. France (n 8) para 39.
[xvi] Ibid para 40.
[xvii] EHCR 2005 ECHR 819.
[xviii] Ibid para 66.
[xix] Ibid.
[xx] C-157/15.
[xxi] Ibid para 21.
[xxii] Achbita v. G4S Secure Solutions (*Global Freedom of Expression*) <https://globalfreedomofexpression.columbia.edu/cases/achbita-v-g4s-secure-solutions/> accessed 10th October 2021
[xxiii] Ibid.
[xxiv] Ibid.
[xxv] 2018 (10) SCALE 386.
[xxvi] AIR 1952 SC 75.
[xxvii] Article 27, ICCPR.
[xxviii] 411 U.S. 677, 93 S.Ct. 1764.

ISSN 2581 3382