

The Treatment of Religious Attire by Courts and International Fora reveals the need for new justifications for Religious Freedom beyond Personal Autonomy

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ABSTRACT

The affaire du foulard in France and neighboring countries has grown into an issue of great political controversy. While some nations such as France and Turkey have banned the manifestation of religious symbols in public schools under the garb of secularism, countries such as the United States of America have taken quite a contrary stance on the same. This essay reveals the lack of uniformity with the issue of right to religious freedom within countries, and the interpretation of the same by the international courts and foras. Furthermore, the Courts have taken a narrow-minded perspective evident from the lack of consideration for political and religious identity and the forced assimilation in the European way of life and feminism. This essay discusses the important considerations, courts forget to look into, before concluding this issue. It shows forcible assimilation in the European way of life and further discusses how it not only takes away the right to manifest religion but, it also encroaches upon their personal identity and group identity.

Keywords: *lacid ; manifestation of religious symbols; value pluralism; identity; assimilation; feminism.*

Introduction

The first part of the paper brings out the intersectionality of different aspects which affect the right to practice and manifest one’s religion. The second part of the paper addresses how religion forms a part of one’s identity and an assimilation to European ideals is an encroachment on one’s identity. The third part of the paper deals with how the European ideal of feminism might conflict with the ideals of feminism from the perspective of different female Muslim communities. It also discusses whether manifestation of religious attire in the public sphere causes a threat to national identity or is it just the

concept of Islamophobia and racism that construct the threat. The last part discusses the need for Courts to consider all these arguments when treating religious attire and how all these arguments are interlinked.

The controversy on the right to manifest religious freedom within secular countries such as France, Turkey and United States of America has been substantially discussed in the international community. In recent times, this controversy has deeply affected the right to education and healthcare in such countries¹. On December 11th, 2003, the Statsi Commission submitted a report to the French President, which was later converted into legislation, consequently, leading to a ban on religious symbols and attires in public schools. The ban was imposed to facilitate the proper implementation of the French policy of secularism or the idea of *laïcité*², deeming it as a liberal and democratic policy. The law affected the Muslim headscarf, Sikh turbans, Jewish skullcaps and large Christian crosses³. Similarly, in Turkey, the representation of religious symbols in schools and universities was banned based on the objective of secularism⁴. On the other hand, the United States of America has a more positive tone towards religious attire and the manifestation of religion. It allows individuals to manifest their religion and present any religious attire they choose to wear. For the sake of secularism, schools aren't allowed to include any religious prayers within their curriculum since it might psychologically coerce minority beliefs⁵. Similarly, in Germany any form of discrimination based on religious attire is not permitted and secularism is not the

¹ Leahy, Brendan. "The Meaning of Religious Freedom." *Studies: An Irish Quarterly Review*, vol. 103, no. 411, 2014, pp. 273–286, Available at www.jstor.org/stable/24347777, Last visited 30 April 2019.

² Article 2 of the 1958 French Constitution states that "France is a Republic that is indivisible, *laïque*, democratic, and social. It shall ensure the equality before the law of all of its citizens, without distinction as to origin, race, or religion. It shall respect all beliefs." 1958 CONST. art. 2. (Fr.).

³ Kuru, Ahmet T. "Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion." *World Politics*, vol. 59, no. 4, 2007, pp. 568–594. Available at: www.jstor.org/stable/40060173, Last visited 30 April 2019.

⁴ Human Rights Watch, Memorandum to the Turkish Government on Human Rights Watch's Concerns with regard to Academic Freedom in higher education, and access to higher education for women who wear the headscarf 27 (2007), available at <http://hrw.org/backgrounder/eca/turkey/2004/>, Last visited 30 April 2019.

⁵ *Lee v. Weisman* (1992) 505 U.S. 577; *Santa Fe v. Doe* (2000) 530 U.S. 290

objective of state policy.⁶ Hence, while France and Turkey have adopted a system of assertive secularism, the United States of America and Germany practice passive secularism, the reasons for the same are different historical and ideological struggles⁷. Unfortunately, in the European Court of Human Rights and domestic State courts there is no uniform manner of addressing the issue⁸. While in some States interference is necessary for maintaining religious pluralism, in other States there is policy of non-interference with an individual's personal autonomy to expression and practice of religion. However, personal autonomy is the central tenet for all such arguments and policies.

Some States interpret the right to practice religion restrictively while others interpret it expansively. The restrictive school preaches that the personal autonomy over manifestation of religion only extends to the private sphere, while the expansive school believes that the right to manifest religion in the public or private sphere completely comes under the purview of personal autonomy and no State has the right to interfere with the same.

However, this paper argues that it is not only personal autonomy which is an important consideration while reaching a conclusion on the issue of religious manifestation, but also aspects such as an individual's identity associated with his religion, assimilation, racism and xenophobia, feminism and whether religious attires actually pose a threat to secularism.

⁶ Axel Frhr. Von Campenhausen, *The German Headscarf Debate*, *BYU L. REV.* 665, 682 (2004)

⁷ Kuru, Ahmet T. "Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion." *World Politics*, vol. 59, no. 4, 2007, pp. 568–594. Available at: www.jstor.org/stable/40060173, Last visited 30 April 2019

⁸ Merilin Kiviorg, "Religious autonomy in the ECHR", *Delta Publicaciones*, Available at: http://www.deltapublicaciones.com/derechoyreligion/gestor/archivos/07_10_31_124.pdf, Last visited 30 April 2019

Religious Freedom and Personal Autonomy

Before we dwell into other intersectionalist arguments supporting the right to manifest religious expression, it is important to understand the concept of religious freedom and personal autonomy. The central tenet of freedom of religion is the right to have personal autonomy over religion and the manifestation of it. The concept of personal autonomy can be traced back to Immanuel Kant's understanding of moral autonomy. According to Immanuel Kant, moral autonomy means having control and authority over your own actions instead of following laws laid down by legislation or society. Hence, instead of following the law laid down by the State or society, it is pertinent that in certain matters, an individual is allowed to choose as to what is right or wrong for him and consequently interlinking the concept of self-governance to morality⁹. Applying this in the context of freedom of religion, religious autonomy is the right to self-govern one's choice of religion (forum internum), how an individual wants to practice it, how he/she prefers to manifest it and the importance of that manifestation (forum externum) instead of the State determining the same.

The preamble of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief establishes the fact that dignity and equality are intrinsic to every human being and 'religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life'.¹⁰ The most important aspect of individual autonomy is to have the right to freedom of thought, religion and conscience, and expression which forms the cornerstone for democracy¹¹. Hence, every individual has the right to choose, practice and express religion individually and collectively¹². The same has been implied by Article 9 of the European Convention of

⁹ Immanuel Kant, 'The Metaphysics of Morals', Cambridge University Press, 1996, 17, Available at <https://philpapers.org/rec/KANTMO-4>, Last visited 30 April 2019

¹⁰ Declaration (adopted 25 Nov 1981) UNGA Res 36/35.

¹¹ Kokkinakis v Greece (1993) 17 EHRR 397 para 31.

¹² Danchin, Peter G., Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law. Yale Journal of International Law, Vol. 33, No. 1, pp. 1-61, Winter 2008; U of Maryland Legal Studies Research Paper No. 2007-42; Islamic Law and Law of the Muslim World Paper No. 08-25. Available at <https://ssrn.com/abstract=1058641>, Last visited 30 April 2019

Human Rights¹³, Article 18 of the Universal Declaration of Human Rights¹⁴, Article 10 of the Charter of Fundamental Rights of the European Union¹⁵ and Article 55(3) of the UN Charter¹⁶. On plain reading, wearing of religious attire that could be in the form of a turban, a hijab, etc. is protected by virtue of Article 9 of the Convention¹⁷ and Article 10 of the Charter¹⁸. Consequently, any punishment due to the wearing of religious attire and religious symbol will be in violation of one's right to manifest their religion¹⁹. However, the European Court of Human Rights has been inconsistent with its stance on the same and in contrary to the position taken by the United Nation Human Rights Council. The

¹³ The European Convention of Human Rights Freedom of thought, conscience and religion, 1953, Art 9, "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are 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."

¹⁴ The Universal Declaration of Human Rights, 1948, Art 18, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

¹⁵ The Charter of Fundamental Rights of the European Union, 2000, Art 10, "(1) Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance."

¹⁶ The Charter of the United Nations, 1945, Art 55 (3), "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: ...
(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

¹⁷ *Supra n. 13*

¹⁸ *Supra n. 15*

¹⁹ *Bikramjit Singh v. France* (2013) U.N. Doc. CCPR/C/106/D/1852/2008; *Hamidovic V. Bosnia and Herzegovina* (2017) 75 ECHR 5; *Lachiri v Belgium* [2018] ECHR 727; *Arslan v Turkey* (2001) 31 EHRR 264

ECHR under the garb of the principle of effective protection²⁰ has accepted State interference within the manifestation of religion through religious attire in various cases²¹. In the case of *Mann Singh v. France*²², the ‘United Sikhs’ association appealed against a Government notification which required driving license applicants to submit a photograph that is ‘bareheaded and facing forward’. However, Sikhism always requires every male Sikh follower to wear a turban, which consequentially conflicts with the notification. The European Court of Human Rights ruled that the impugned notification amounted to interference within the right to exercise freedom of religion and conscience. However, the amount of interference was proportional to the legitimate aims layed down in paragraph 2 of Article 9 of the Convention²³, that is, public safety. The Court accepted the French argument that removing the turban for driving license photographs was necessary to ensure public safety. Furthermore, the Court stated that Article 9 of the Convention does not protect every act motivated by religious beliefs and does not always assures a right to behave in accordance with religion.

The French and Turkish Governments state that in pursuit of pluralism and secularism, the ban on religious symbols and to avoid public religious pressure is necessary. The French identity and French nationalism is deeply intertwined with the concept of *laïcité*. The idea promises state neutrality in the public sphere, that is imperative, to achieve the objective of pluralism and secularism. The French policy is that since public schools are the future of civic spirits in the Republic, re-iterating the conception of *laïcité* in the public sphere is of utmost importance. Instead of a complete intolerance towards the right to personal autonomy over the freedom of religion, this represents a limit on the tolerance so that the State can maintain religious neutrality²⁴. For example, the French State isn’t allowed to interfere with the right to religion unless the objective of the interference

²⁰ Supra n. 10

²¹ *Mann Singh v. France* (2008) ECHR 1523, *Leyla Şahin v Turkey* [2005] ECHR 819, *Dakir v Belgium* [2017] ECHR 656

²² Ibid

²³ Supra n.13

²⁴ Anna Elisabetta Galeotti, “Toleration as Recognition”, Cambridge University Press, 123-124 (2002), Available at:

<https://www.cambridge.org/core/books/toleration-as-recognition/5F267E1C55308D4D2CDF135E8C24A2CA>, Last visited 30 April 2019

comes within the purview of Article 9 paragraph 2 of the Convention. Furthermore, the European Commission of Human Rights (further referred to as the ECHR) accepted the ban not deeming it as discrimination or a violation to freedom of religion, since the ban was common for all religions and was not favouring one religion over the other. The European Commission of Human Rights considered the ban to be legitimate since it only blocked the right to manifest religion to the extent that it hindered the general public and hence, implicitly agreeing to the policy of State interference in the public sphere. The ECHR deemed it as a liberal and democratic policy because the French government's ban was supported by 72% of the population²⁵. Turkey had a similar ban upheld on the grounds of secularism even though only 22% of the population supported the ban²⁶. One of the most popular cases in this controversy has been of *Leyla Sahin v. Turkey*²⁷, wherein the applicant was not allowed to wear hijab in her university. She challenged the rule at the ECHR, pleading that the ban violated her right to manifest religion protected under Article 9 of the Convention. The ECHR, referring to the constitutional status of secularism within Turkey, stated that the wearing of headscarves in the public sphere acted as a political representation of Islam. The Court did accept that the ban was an interference with the right to freedom of religion. However, according to the Court, the ban was proportional to the aim and objective of maintaining a neutral and secular society such that the rights and freedoms of others along with public order is protected. The wearing of the hijab is strictly prohibited by Turkish case law and the university was just following the law laid down by the State.

The situation in Turkey and France is quite similar apart from the fact that while the French ban affected the minority population of the country such as Muslims, Sikhs and others, the ban in Turkey affects the majority population within the country, that is, Muslims. The ECHR recognizes the State as an impartial organiser for religious faiths to maintain public order and peaceful co-existence²⁸ which, consequently, is essential for pluralism and the functioning of democracy²⁹. However, the ECHR and other national

²⁵ Debré (fn.42), 19.

²⁶ Carkoglu and Toprak (fn. 48), 75

²⁷ Supra n. 21

²⁸ Supra n.8

²⁹ Leyla Şahin (Supra n.21) para 107

courts in European Union fail to recognize that personal autonomy over religion is not the only aspect in consideration in the issue of freedom of religion. The ban on the manifestation of religion violates an individual's right to personal autonomy over freedom of religion and also violates their right to self-determination which is accepted internationally and is of a jus cogens nature³⁰. Further, it separates individuals from their individual identity by forcing them to assimilate to European ideals of freedom of religion and consequently, forcing patriarchal, racist and xenophobic laws on them, leaving them with no option but to forego their native traditions and customs to survive.

Individual and Collective Identity

The most important argument which the ECHR has failed to recognize is that by taking away an individual's right to manifest religion, they are directly encroaching on an individual's identity. Before we dwell into how and why the same happens, it is imperative to understand the concept of identity. An individual's identity is what defines his sense of self, his affiliations with various groups and how he considers himself to be placed in society. There are various factors that affect one's identity such as introspection, external aspects like society, laws and social experiences and one's understanding of such personal experiences. Identity is an evolving concept which is dynamic rather than static.³¹ Hence, the purpose of identity theory is how self-assessment affects one's thinking, acts and behaviour with society and vice versa.³²

³⁰ U.N. Charter art. 1, para. 2; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 1(1); the International Covenant on Economic, Social and Cultural Rights art. 1(1), G.A. Res. 2200A, U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (Dec. 16, 1966); and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (Oct. 24, 1970). It has also been considered and applied in various cases in the International Court of Justice. See, e.g., *Concerning East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 95 (June 30); *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 31-35 (Oct. 16); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, 1971 I.C.J. 16, 31 (June 21).

³¹ Dillon (1999:250); Haddad (1994); McMullen (2000); Nagel (1995)

³² Burke et al. (2003); Howard (2000)

There are a multitude of identities within one's understanding of self which can be ranked in a hierarchy. The more an individual plays a role, the higher it stands in the ranking of hierarchy³³. Hence, it can be implied that the more one gets to play the role of a Christian, Muslim or Hindu, the higher that ranks in terms of hierarchies of identities within one's sense of self.

Religion allows an individual to involuntarily accept a way of life due to social circumstances that allow for a group membership.³⁴ For example, a baby born into an Islamic family would naturally be substantially influenced by the Islamic way of life lead by the family. Even though the baby does not choose to be born into an Islamic family, his or her socialization would be impacted by Islamic ideologies and morals. By having similar religious beliefs and practices like his or her family, the baby becomes a part of not only the Islamic family but, also the Islamic community. When people participate in rituals, customs, traditions and beliefs, people get a sense of belonging to a group such that religious symbols, attires and objects are treated with wonderment.³⁵ Consequently, wearing hijab, turban and cross is more than just a choice. They become part of identity and tradition to the community they belong to. Since such symbols and attires are a representation of the continuity of traditions, it becomes an important aspect in the survival of their collective and individual identity.³⁶ Hence, when the France or the Turkey impose a ban on religious symbols and attires, they are not only taking away religious autonomy but also the continuity of individual and collective identity.

Since most of the controversies are concerning public schools and young children, it is important to address how religion and identity affect children and youths. The fact that children and young individuals are substantially affected by their personal experiences with themselves and society, they are in a continuous search of a sense of self. Children and young adults strive for independence and singularity, and search for a sense of

³³ Vryan et al. (2003:381).

³⁴ Hammond (1988)

³⁵ Ibid

³⁶ Supra n.12

belonging beyond themselves which substantially affects the development of their individual and collective identity³⁷.

Since religion provides curious children and young adults a sense of belonging, a socio-historical matrix, answers to difficult questions of life and creates an environment for the development of allegiance to a particular ideology, it plays a substantial role in their identity formation.³⁸ Consequently, when France, Turkey and the European Council of Human Rights ban religious manifestations in public schools and universities, it hinders the identity formation of the child and leaves them more confused. In furtherance of that, the pressure to abide by non-religious norms becomes higher followed by States attempting to change a child's identity.³⁹ It has a worse impact when an individual is a part of the minority since, it gives them the feeling of getting singled out in public as the 'other' because the individual has to accustom himself to particular ideals which do not represent his own identity.⁴⁰

Identity Politics through a Western Narrative

Analysing the justification of France for imposing the ban, we notice that the majority is protecting their own identity of secularism, under the garb of neutrality while denying the minority their own identity. In fact, France allows the manifestation of crosses and yarmulkes in Christian and Jewish schools and the teaching of religious texts. In addition to this, it also subsidizes and pays salaries for priests and pastors⁴¹. As Asad argues, the French majority embodies a Jacobin narrative which consequently implies that the

³⁷ King (2003)

³⁸ Erikson (1965)

³⁹ Lori Peek. "Becoming Muslim: The Development of a Religious Identity." *Sociology of Religion*, vol. 66, no. 3, 2005, pp. 215–242, Available at: www.jstor.org/stable/4153097, Last visited 30 April 2019

⁴⁰ Keaton, Trica. "Arrogant Assimilationism: National Identity Politics and African-Origin Muslim Girls in the Other France." *Anthropology & Education Quarterly*, vol. 36, no. 4, 2005, pp. 405–423, Available at: www.jstor.org/stable/3651365, Last visited 30 April 2019

⁴¹ *Laïcité et République*, Commission Présidée par Bernard Stets (Laïcité and the Republic: Commission presided by Bernard Stets) 113 (2004)

majority represent Christian and post-Christian citizens⁴². Hence, religious diversity and religious freedom is only accepted if they are in accordance with French ideals.

Neutrality in France means the privatization and disestablishment of your own identity with the objective of adjusting to the French identity. The concept of neutrality is the Europeanization of Islam and other religions, with the objective of detaching individuals from their historical experiences which form an important part of their identity.

The French law is in accordance with past Christian experiences since the “Judeo-Christian” and colonial values still exist within French perception. Instead of pluralism, multiculturalism and neutrality, the French state functions like a powerful lens by making judgments backed by Eurocentric and French reasoning with the help of identity politics.⁴³

Even though Germany has not banned manifestation of religious attires, there have been cases of work-based discrimination for wearing the Hijab upheld by the Courts.⁴⁴ According to a study conducted by Study of Labour (IZA), Germany, a woman applicant with a hijab received an interview call-back rate of a mere 4.2 % compared to that of a non- Muslim German woman with the same credentials receiving an interview call-back rate of 18.8%⁴⁵. The majority of the population supported a ban on the hijab as it would promote the integration of young Islamic people into society.⁴⁶

Lecter and Uccellari argue that laws relating to the termination of pregnancies and euthanasia in the United Kingdom have been inspired by three Abrahamic religions.⁴⁷ It is pertinent to note that the ECHR allows discriminatory policies of European Countries. Hence, even though the Courts direct States to not interfere with religious beliefs, the

⁴² Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* 176 (2003)

⁴³ *Supra* n. 40

⁴⁴ Barbieri, "Group Rights," 922.

⁴⁵ Doris Weichselbaumer, "Discrimination against Female Migrants Wearing Headscarves", IZA DP No. 10217, September 2016, Available at <http://ftp.iza.org/dp10217.pdf>, Last visited 30 April 2019

⁴⁶ Michael Lüders, "Ich bin doch kein Alien," *Die Zeit*, 1998, No. 31, Available at: http://www.archiv.zeit.de/daten/pages/199831.kopftuchl_.html, Last visited 30 April 2019

⁴⁷ A Lester, P Uccellari, 'Extending the Equality Duty to Religion, Conscience and Belief: Proceed with Caution' (2008) 5 EHRLR 567.

Court itself does the same with respect to various cases inspired by Europe's Christian background. In the case of *Lautsi v. Italy*⁴⁸, the applicant complained to the ECHR that a crucifix displayed on the wall of her child's state-controlled classroom should be removed as it enforces Christian beliefs on children. However, unlike other cases, the ECHR allowed for the manifestation of the crucifix in the public school even though the crucifix clearly refers to the majority religion in Italy, that is, Christianity, which is consequently, given preponderant visibility in the State school. The Court did not consider the display of the crucifix as an act enough to constitute indoctrination. Quite hypocritically, it deemed the crucifix to be a passive symbol. It further justified its ruling by stating that there was no evidence placed before it to show that religious symbols have an impact on pupils. In fact, the Court opined that the child's rights have not even been interfered with. Even though there is no ban on religious manifestation in Italy, by allowing a crucifix to be hung on the wall of public school, the ECHR is promoting the majority religion. Courts are treating differently an individual wearing a headscarf since the State has the duty to maintain neutrality and equality unlike the individual. The symbol might be passive according to the Court, but the message sent by the State is very active. Even though the crucifix does not directly violate the personal autonomy over the right to freedom of religion, it does substantially affect the child's identity formation and socialization of the child.

Essentially, the ECHR is maintaining an inconsistent and discriminatory stance. Hence, it is pertinent for Courts to consider the argument of identity and assimilation along with personal autonomy over religious manifestation, since the reasoning behind the Court's decision to uphold these laws is, they are neutral and non-discriminatory.

Feminist Perspective of the Ban

The ban on religious symbols and manifestation has a major impact on women. In the case of *S.A.S. v. France*⁴⁹, the ECHR ruled that the ban on religious manifestation in a public place, such as the burqa that covers the entire face, does not violate Article 9 of

⁴⁸ (2012) 54 E.H.R. R. 3

⁴⁹ *S.A.S. v. France*, [2014] ECHR 695

the Convention since it is the least restrictive means to achieve a ‘legitimate aim’ behind the ban. The ‘legitimate aim’ behind the ban is to achieve a society where people are ‘living together’ under the ‘rights and freedom of others’ ground mentioned in Article 9 paragraph 2 of the Convention. The Court accepted the argument that covering the face might create an unhealthy social space which could create an environment wherein ‘living together’ might be adversely affected. Furthermore, the Court agreed to the fact that if a Muslim woman chooses to wear a hijab or a veil and she is prohibited from doing so, it would make a case of indirect discrimination under Article 14 of the Convention⁵⁰ read in conjunction with Article 9 of the Convention, unless it has a legitimate aim, which in this case was ‘living together’. Thus, the Court ruled in favour of the French Government and upheld the law.

However, the UNHRC had come to a completely opposite ruling on analogous cases. In the case of *Hebbadj v. France*⁵¹ and *Yaker v France*⁵², the UNHRC rejected France’s argument to include ‘living together’ as a legitimate aim since it is ‘very vague and abstract’ under Article 18⁵³ paragraph 3 of the International Covenant on Civil and

⁵⁰ The European Convention of Human Rights Freedom of thought, conscience, and religion, 1953, Art 14,

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

⁵¹ *Hebbadj v. France*, Communication No. 2807/2016, Views of 17 July 2018, UN Doc. CCPR/C/123/D/2807/2016

⁵² *Yaker v. France*, Communication No. 2747/2016, Views of 17 July 2018, UN Doc. CCPR/C/123/D/2807/2016

⁵³ The International Covenant on Civil and Political Rights, 1976, Art 18,

“(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

(3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Political Rights (further referred to as the ICCPR). In contrast, the UNHRC ruled that the ban violated Article 18 of the ICCPR and Article 26⁵⁴ of the ICCPR. The UNHRC noted that even though the law banning any clothing covering the face might be drafted in a neutral manner, it excessively affected Muslim women and also provided for substantial exceptions for the religious majority⁵⁵. They reiterated the fact that the Muslim population in France is not one that is homogeneous. Hence, removing the burqa and the veil might lead to the upliftment of some Muslim women in France but it may subject some women to confinement within their homes, restriction on freedom, excessive family and social pressures and introducing them to further abuse and marginalization. For some Muslim women, wearing the burqa may be a choice more than a compulsion. Hence, the UNHRC established that the ban constituted ‘intersectional discrimination based on gender and religion’.⁵⁶ The UNHRC in its ‘Concluding Observations on the fifth periodic report of France in 2015’, conveyed that ‘the view that these laws [including the burqa ban] infringe the freedom to express one’s religion or belief and that they have a disproportionate impact on members of specific religions and on girls’.⁵⁷

These cases leave us with an important question, that is, whether the banning of the hijab really uplifts the position of Muslim women? Before we dwell into this argument, it is pertinent to understand the demography of the female Muslim population in France. The female Muslim population in France has differences within it. The population isn’t homogeneous in nature. Rather, they consist of different groups of women such as

(4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

⁵⁴ The International Covenant on Civil and Political Rights, 1976, Art 26,

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁵⁵ Supra n. 52

⁵⁶ Ibid

⁵⁷ UN Human Rights Committee (HRC), Concluding Observations on the fifth periodic report of France in 2015, 17 August 2015, CCPR/C/FRA/CO/5, available at:

<https://www.refworld.org/docid/5645a3624.html>, Last visited 30 April 2019

refugees, asylum seekers and from different national and financial backgrounds. The Muslim female population consists of women from South East Asia, Africa, the Caribbean, etc⁵⁸. Thus, these women have had different social and cultural upbringings compared to each other and compared with the European women.⁵⁹

European feminist scholars state that the ban on the veil shall lead to the upliftment of women in society. However, due to different social experiences, the value and consequence of the banning of the hijab would be substantially different for European feminists and the women who wear the hijab.

In 1899, Qasim Amin, advocated for women and the reformation of patriarchal laws. One of his primary arguments was advocating for the lifting of the veil. This argument caused serious uproar and intense debate throughout the Muslim community and is regarded as the beginning of feminism in the Arab culture. Amin states that the veil is a major obstacle between the upliftment of Muslim women in society and consequently, acts as a barrier between the progress of the nation. For Amin and other European feminists, the veil is a sign of inferiority of the Islamic society and hence, he deems himself as a feminist.⁶⁰ Ironically, European feminists have also stated in the past that women should not receive more than primary education. Hence, can you really deem such view as feminist views just because they are against the veil? Amin's idea of the veil representing inferior Islamic culture is part of the Eurocentric Western narrative shadowed by concepts of European supremacy and a colonial mindset. His work is based on the Western perspective of Islamic civilization. More than feminist, his views seem more in line with patriarchal and misogynistic ideals. The concept that abandoning native traditions and customs represent an androcentric colonial view of male dominance.⁶¹ The

⁵⁸ De Wenden, Catherine Wihtol. "Young Muslim Women in France: Cultural and Psychological Adjustments." *Political Psychology*, vol. 19, no. 1, 1998, pp. 133–146., Available at: www.jstor.org/stable/3792118, Last visited 30 April 2019

⁵⁹ *ibid*

⁶⁰ Leila Ahmed, "The Discourse of the Veil", *Women and Gender in Islam- Historical Roots of a Modern Debate*, Yale University Press, pp. 144-168, 1992, available at: www.jstor.org/stable/j.ctt32bg61.12, Last visited 30 April 2019

⁶¹ *Ibid*

primary reason for such a construction of feminism comes from the different social experiences of Europeans compared to that of the Muslim female population in France. For example, while some black African Muslim women have been brought within a polygamic culture due to their respective African matriarchal systems and would not be that bothered with polygamy which is completely against French ideals, Turkish women on the other hand, have great difficulties between negotiating with the French way of life and their rural upbringing. Since different groups of Muslim women have different social experiences compared to European women, the ideas of feminism from the perspective of a white European woman might be contrary to what black African Muslim women or Turkish women believe. I am not arguing that Islamic norms haven't suppressed women through patriarchal norms but the European ban on the veil will lead to upliftment of Muslim women is inaccurate.

Some Muslim women feel that the veil is not a symbol of oppression but rather that of emancipation which gives them a sense of collective identity and solidarity in a foreign land⁶². The veil might also be worn to allay parental anxieties that their daughter is keeping her religious identity in a foreign land and consequently, lead to more freedom and independence when they leave their house⁶³. Some intersectionalist French feminists⁶⁴ have also argued that by practicing Muslim norms such as wearing the veil, women can escape patriarchal customs such as forced marriage and domestic servitude, by getting the autonomy to work and study from their families. The veil is a path for them to get freedom outside the family structure. Some Turkish women have gone to extremes of hunger strikes to demand the right to veil. Some Iranian women consider the veil as a protection from the eyes of perverted men. When the police were ordered to deal harshly with any woman wearing headgear that is not in accordance with European ideals, many women decided to stay at home rather than have their veil snatched by the police.⁶⁵ Hence, even though the French and Turkish consider that banning the veil for the better

⁶² Rivers, J. (2001). *Islam and European Legal Systems*. Edited by Ferrari Silvio and Bradney Anthony. [Aldershot: Ashgate. 2000. ix 203pp. ISBN 1-84014-466-1. £50. (H/bk.)]. *International and Comparative Law Quarterly*, 50(4), 994-995. doi:10.1093/iclq/50.4.994

⁶³ *Supra* n. 58

⁶⁴ Gaspard and Khosrokhavar 1995; Khosrokhavar 1997; Tietze 2002; Venel 2004

⁶⁵ *Supra* n. 60

integration of Muslim women into society, the effect is sometimes quite the opposite as Muslim women tend to get more isolated into their traditional world as they are deprived of their right to manifest their religion through their hijab.⁶⁶

Roy argues that religion in modern times needs to be one's own choice according to their inner voice, instead of functioning in accordance with prescribed laws.⁶⁷ Hence, the intersectionalist perspective of feminism is an important consideration when concluding as to whether banning the hijab will lead to social upliftment of women in such a heterogeneous society. Another important consideration that Courts must introspect is the need to stop the growth of Islamophobia⁶⁸. There is nothing that suggests that wearing a hijab or a turban would cause any political unrest or would violate peaceful co-existence. There have been no cases of forceful conversions or any pressure on other individuals to move away from their ideals of secularism. Hence, the French ban is nothing but a classic example of Islamophobia which is the reason why the French consider the wearing of the hijab as a threat to the French identity.

Conclusion

It is imperative that the international community starts recognizing the fact that there is a lot more to consider on the treatment of religious attire than personal autonomy over the right to religious freedom. The ban takes away an individual's identity and forces them to assimilate in accordance with Eurocentric ideals. In furtherance of that, there is no guarantee as to whether a ban on the veil will uplift women socially because European ideals of feminism are different to that of other female Muslim group.

⁶⁶ Supra n. 58

⁶⁷ Fernando, Mayanthi L. "Reconfiguring Freedom: Muslim Piety and the Limits of Secular Law and Public Discourse in France." *American Ethnologist*, vol. 37, no. 1, 2010, pp. 19–35., Available at: www.jstor.org/stable/40389876, Last visited 30 April 2019

⁶⁸ Jailani, Yusuf. "The Struggle of the Veiled Woman: 'White Savior Complex' and Rising Islamophobia Create a Two-Fold Plight." *Harvard International Review*, vol. 37, no. 2, 2016, pp. 51–54. Available at: www.jstor.org/stable/26445581, Last visited 30 April 2019

Another important question that Courts must answer is that does wearing a religious symbol actually pose a threat to secularism or is it just racism and Islamophobia that plays a significant role in constructing the threat? Lastly, all these arguments are interlinked with one another. The right to freedom of religion consists of choosing what religion one wants to follow and how they want to express it, which in turn forms an integral part of one's individual and collective identity. However, one's identity is encroached upon by assimilation to European ideals of what manifestation of religion is necessary and what is not. Hence, when considering the treatment of religious attire all these points need to be considered, before reaching a conclusion.

The need to maintain neutrality and pluralism is significant for any State and is the cornerstone of democracy. However, that religious freedom cannot be sucked out of all its meaningful content in the name of neutrality, pluralism, tolerance, and equality, and especially, when the State is not actually neutral. Religious freedom is not a special privilege, but a fundamental norm every individual inherits. Without the right to religious freedom, all other fundamental rights are in danger.