

The French Burqa Ban: A Muslim Woman's 'Life' Under the Living Together Principle

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Abstract:

The burqa and the right to choice especially for Muslim women has been one of the most controversial issues in the world in recent times. This has been fueled by Islamophobic rhetoric in an increasingly polarized world where liberal minded people often find themselves in a fix. Such a fix exists because of the repelling nature of both the vehement anti burqa and the staunch pro burqa discourse. The French imposing a complete ban on the veil adds more fuel to this cultural fire. The main aim of this paper is to understand the burqa controversy with specific focus on France and analyzing how the ECHR's judgment upholding the French Burqa ban is endorsing a half-baked majoritarian law which undoes feminist principles and belittles veiled women and their autonomy in France.

The question of the burqa or the face veil has been a topic of contention all around the world for quite some time. The motivation behind the objections to it vary greatly from it being a security issue for some and a question of a woman's liberty for others. The discussion, however, can stem from anti-Muslim rhetoric too, especially in the wake of multiple instances of Islamic terrorism that the world has suffered. Leaders of the stature of the previous British Prime Minister, Mr. Boris Johnson are on record making derogatory comments about women wearing the burqa and comparing them to letter boxes.¹ As women in Iran face oppression and persecution at the hands of the regime forcing the veil on them, they are protesting by burning the veil and defying the law.² On the contrary the women in France, for instance have their rights of wearing the burqa taken away due to a complete ban on it. While these two instances are at the opposite ends of the spectrum, what remains common to both these sets of women is that the right to bodily autonomy and choice eludes them. As the Iranians elucidate that the mandatory burqa aims to protect the woman's honor and integrity, the French defend their ban as they claim to be self-proclaimed and self-appointed guardians of Muslim women saving them from unwillingly conforming to the pressures of their conservative, orthodox communities. Thus, a woman's choice to wear what she wants and express her own identity in the way she wants is slaughtered at the battlefield of ideologies.

French secularism or *laïcité* essentially emphasizes a church state division. However, it was never envisioned to be at odds with multiculturalism or a free practice of religion by citizens of France.³ The

¹ Kate Proctor, 'Boris Johnson urged to apologize for 'derogatory and racist' letterboxes article' (The Guardian, 4 September, 2019) <<https://www.theguardian.com/politics/2019/sep/04/boris-johnson-urged-to-apologise-for-muslim-women-letterboxes-article>> accessed 1 November 2022

² David Gritten, Oliver Slow, 'Iran unrest: Women burn headscarves at anti-hijab protests' (BBC, 21 September 2022) <<https://www.bbc.com/news/world-middle-east-62967381>> accessed 1 November 2022

³ Myriam Hunter-Henin, 'Why the French Don't Like the Burqa' [2012] PL 617

Law of 1905 envisages that French secularism does not possess a hostile attitude towards religion but instead aims to facilitate freedom to profess and practice religion to the extent that the French state can intervene so as to facilitate freedom of conscience being violated.⁴ A good example can be the French state funding private religious schools under contract.⁵ Such support for religious schools are not in contravention but in alignment with French secularism as the state not funding religious schools would put religious parents and their children at a disadvantage who would have to pay higher fees as compared to the public funded free secular education.⁶ Thus, this state entanglement with religion here protects freedom of conscience of children and parents belonging to religious backgrounds. Thus, banning the headscarf and burqa in France prima facie appears to be a violation of freedom of conscience where the state is interfering in religious affairs to not protect but actively violate a woman's right to freely practice her religion.

The first instance of a controversy regarding the headscarf in France arose in 1989 in Creil when three Muslim girls refused to remove their headscarves while attending school and were suspended by school authorities.⁷ There arose a massive controversy regarding the meaning of secularism in the public sphere following this incident. As the father of one of the girls demanded that the state make its policy clear on the matter, the school administration wrote to the Minister of National Education who in turn wrote to Conseil d'Etat seeking their legal opinion.⁸ The issue before the court was 'whether visible signs of belonging to a specific community aren't compatible with the tenets of French secularism.'⁹ The court held that wearing of the headscarf in and of itself was not a violation of the tenets of secularism and could not be an isolated cause of suspension for the student.¹⁰ The court however added some nuance to the situation by saying that the signs of religious affiliation could be restricted due to their 'ostentatious or protesting character' or by the context in which they were worn, if the purpose behind wearing was that of pressuring, propagandizing or attempts at proselytism.¹¹ However, the judgment did not elaborate upon how schools would identify religious signs which were benign and others which were sinister. The court left the matter to be decided on a case-to-case basis at the local level and advised against a blanket national policy regarding the matter. In 2004, however, the French banned any visible religious signs in public schools.¹² While this legislation technically banned such signs for all religions, it was essentially aimed at banning the Islamic headscarf from public schools as it had been a point of contention for years in France. In 2010, the ban reached a national level blanket ban on 'covering of the face'.¹³ Both the 2004 and 2010 legislations use phraseology which is not specific to Islam but in effect, aim at banning two different forms

⁴ ibid

⁵ ibid

⁶ ibid

⁷ Nicky Jones, 'Religious Freedom in a Secular Society: The Case of the Islamic Headscarf in France' [2012] PL 217

⁸ ibid PL 218

⁹ ibid 219

¹⁰ ibid

¹¹ ibid

¹² Elaine Sciolino, 'Ban on HeadScarves Takes Effect in France' (New York Times, 3 September, 2004)

<<https://www.nytimes.com/2004/09/03/world/europe/ban-on-head-scarves-takes-effect-in-france.html>> accessed 2 November 2022

¹³ 'Parliament approves ban on full veil in public' (France 24, 14 September, 2010)

<<https://www.france24.com/en/20100914-french-parliament-approves-ban-full-veil-public-senate-law-fine-sarkozy-islam>> accessed 2 November, 2022.

of Islamic clothing in the public sphere. The 2004 ban was justified by citing *laïcité* but the 2010 ban can be considered nothing but a complete misinterpretation of this principle. In the case of the 2004 ban on ‘ostentatious religious symbols’, teachers in a public school wearing such symbols could possibly be construed as a violation of *laïcité* as they can be considered indirect agents of the state but a student's wearing of such a symbol does not really express anything apart from a private affiliation of a private citizen. As far as the 2010 ban is concerned, *Laïcité* is required from the government, where the state wants to appear neutral to all religions. Such an expectation, however, from private individuals in general public spaces was never imagined as part of French secularism and the complete ban on burqas and niqabs thus, cannot be justified by this principle.¹⁴ The 2010 ban thus, conflates *laïcité* or separation of church and state with secularization of France or reducing or removing religion and its impact from the public sphere in France.

France is one of the member states of the European Convention and thus, has to act in accordance with the principles enshrined in it. The European Court of Human Rights (hereinafter referred to as ECHR) was established in 1959 for enforcing the human rights requirements enshrined in the convention. Thus, the 2010 French ban on burqa was adjudicated upon by the ECHR. Article 9 of the convention relates to freedom of conscience and religion. The article provides all citizens of member states, the right to freedom of religion and conscience but manifestation of such religious beliefs can be curtailed under the provided circumstances. The conditions for the restrictions include public safety, protection of public order, health or morals or for the protection of the rights and freedoms of others. The 2010 French Burqa ban was challenged before the ECHR in the case of *S.A.S v. France*¹⁵ where a Muslim woman from France filed a challenge to the law claiming that it violated the ECHR Article 3,8,9,10,11 and 14 rights conferred on her. She claimed that she wore the burqa on her own accord and was not pressured by anyone in her family or community to do so. She also clarified that she was comfortable showing her face for security checks etc and thus, it would not even qualify as a security concern. The court dismissed all other violations claimed by the petitioner but deliberated on the Article 9 violations. The State of France defended the ban by invoking gender equality and dignity of women, but both these arguments were rejected.

The concept of ‘living together’ was also argued by France and this principle found favor in the eyes of the court. The argument of the principle of living together construes the face as the most important part of the body so far as human interaction goes. The French defended their stance by arguing that its the face that communicates the uniqueness of each individual, their laugh, their sighs, each and every expression, thus formulating the entire human experience and this experience can only be shared with others when they can communicate without having any barrier of cloth hiding their facial expressions.¹⁶ Thus, France argued that a burqa would be a hindrance to free and complete social interactions in the society and thus, breach the rights of others in the society to socialize, interact and ‘live together’. This argument was accepted by the court in defense of the burqa ban. As protection of the rights of others constitutes a valid ground for restriction of freedom of conscience, the principle of living together became a justifiable ground to ban the veil. The court, however, disregarded that in a free democratic society which gives a great

¹⁴ Myriam Hunter-Henin, ‘Why the French Don't Like the Burqa’ [2012] PL 617

¹⁵ *S.A.S. v France* (Application no. 43835/11), Judgment of 1 July 2014 (Grand Chamber).

¹⁶ *ibid*

degree of liberty to its citizens, citizens are not expected to oblige every social interaction and can decide who to interact with and who not to engage with. Thus, the assumption that each individual has the right to interact and engage with everyone is flawed at a very instinctual level. If that would be the case, then denial of conversation to any other person would be illegal. As free agents, citizens should have the agency to decide their social interactions, their friends, acquaintances and strangers and about where and when they wish to interact with others without any obligation of a state sanctioned responsibility to engage equally with every person on the street. In approving the living together principle, the court sidelined proportionality and failed to use the proportionality test which is specifically mentioned in the second paragraph of Article 9 and thus, a statutory requirement under the convention.¹⁷ The court thus, did not pay close attention to the vast extent of the proposed law and the very vague and inconsequential ‘living together’ dilemma it aimed at correcting, thus equating the value and importance of the right to freedom of religion and conscience with a rather vague notion of societal politeness and courtesy. The living together principle consists of a conception of fraternity which is highly majoritarian at its core and pushes an idea of fraternity which is acceptable to the majority white population¹⁸ and at the detriment of the Muslim minority who have no say in this construction which adversely affects them. This coupled with the ECHR’s constant, wide use of the margin of appreciation in favor of nation states leads to problematic results. To correctly examine whether a law has majoritarian impulses and underpinnings, the ECHR should do an in-depth analysis and come to its conclusions but the leeway it provides in the name of margin of appreciation, basically helps the court abdicate its responsibility to justice and defeats the purpose of the existence of the ECHR.¹⁹

The issues with banning the headscarf and burqa are manifold. The French attitude towards Muslim women is looking at them as roadblocks to gender equality in their modern, liberal, equal society where gender inequality is a thing of the past.²⁰ The ban on it, thus, stemming for some, from a place of condescending paternalism and for others from a place of removing hindrances to and preserving their carefully crafted secular, equal utopia from ‘the other’ who does not share the same noble values. Thus, what seems to bother the French is the savagery of the ‘benighted heathen’ and the ban seems to serve the purpose of bringing ‘civilization’ to them in an attempt to improve the minority’s rights, their consent being immaterial. The kippah, the cross, the rosary, etc. are all visible signs of religion still permitted in France, thus, it is difficult to imagine how one or two items of clothing alone seem to destroy French laïcité. What is required is a balanced approach where women are left to their own devices without a state prohibition. A state prohibition makes life of the veiled women even worse as many would prefer avoiding public spaces in general and the ban would have the opposite of the intended effect. Instead of having a liberating effect, it would isolate these women even further. Those women who willingly decide to cover their faces due to their own interpretation of modesty should be allowed to do so while other women facing wrath of the Muslim fundamentalists should find support of liberal minded individuals to lead the life of their choice.²¹ Fighting the burqa and the perceived misogyny behind it, with misogynistic paternalistic

¹⁷ Tania Pagotto, 'The Living Together Argument in the European Court of Human Rights Case-Law' [2017] PL 26

¹⁸ Ilias Trispiotis, 'Two interpretations of "Living Together"' [2016] PL 591

¹⁹ *ibid*

²⁰ MÜŞERREF YARDIM, ALİ HÜSEYİNOĞLU, 'Veil and Burqa in the French Public Sphere' [2021] PL 193

²¹ 'Burqa Battles: The Left needs to reclaim its space in the battle for secularism and against fundamentalism' Economic and Political Weekly (AUGUST 7- 13, 2010), p. 9



attitudes by the west in the name of feminism would prove detrimental to the very feminist movement, liberals aim to protect. The feminist movement fought for agency for women and not morally objective notions of dignity for women. Dignity and modesty might mean different things to different women and the true spirit of feminism and liberalism lies in recognizing the moral subjectivity at the very heart of the burqa/hijab question.