

## Minority Rights, Freedom of Religion, and the Issue of *Burqa*

Sanath Wijesundara

<sup>1</sup>Department of Classical Languages, University of Peradeniya  
✉ Faculty of Arts, University of Peradeniya, Peradeniya 20400, Sri Lanka  
E-mail: sanatpdn@gmail.com

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### ABSTRACT

The general stance of the Human Rights discourse is that minorities are subjected to discriminations, they are treated as second class citizens by the majority; hence, their rights are special to be protected. Religious minorities encounter typical problems in practising and observing their religions and cultures. Religious minorities in European countries, in which secular and liberal democratic form of governments are enjoying their rights comparatively better, is a fact not much contested. However, the *burqa* ban in France in 2010 followed by Belgium and many other European countries provides a testing field of religious minority rights and religious freedom under secular and liberal democratic states. This essay tries to explore whether and how the two of the cornerstones of Human Rights discourse, namely equality and non-discrimination, are protected or breached with the ban of the *burqa*. Views pro and against are evaluated on the basis of various theories and concepts. United Nations' (UN) declarations and conventions, as well as European conventions, were readily consulted for authorization, verification and validation of facts. European Court for Human Rights' (ECtHR) remarks on the validity of the ban are tested against human rights discourse, equality and non-discrimination in particular. The essay opens an avenue for discussion of different views about the ban from different perspectives.

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### INTRODUCTION

This essay is a modest endeavour to test selected theories and concepts of Human Right discourse to test the contemporary issue of the *burqa*. Theories and concepts such as post-colonialism, orientalism, Islamophobia, clash of civilizations, state – religion (church) relationship, secular state, liberal democracy, minority rights, freedom of religion and belief as a right, human dignity, equality and non-discrimination in Human Right discourse, and feminism are dealt with directly or indirectly. Edward Said, Talal Asad, Abdullahi An Na'im, John Rawls, Amartya Sen, Martha Nussbaum, Frantz Fanon, Nazila Ghanea, Wendy Brown, Esposito are some of the thinkers often

or sporadically referred to. Relevant UN declarations, treaties, conventions, international covenants and European declarations were extensively consulted. The *burqa* issue in the European context has been the subject of discussion here.

### **Minority Rights**

United Nation Declaration on the minority rights identifies three types of minorities, national or ethnic, religious and linguistic (1992), Article 1, 1 says that states should protect and promote the cultural and religious identity of minorities. Any individual of a minority should not be subjected to the disadvantage of not exercising the rights given in the declaration (article 3, 2). Article 4, 2 mentions that the religious characteristics of minorities should be compatible with national law. Further, specific practices should not be violating national law or international standards. It is also significant to note that article 8, 3 states that whatever the measures are taken for the enjoyment of the rights of the declaration should not be against the 'equality' notion in the Universal Declaration of Human Rights (UDHR). In addition, minority rights are protected by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (DEAFIDBRB) (1981), by the International Covenant on Civil and Political Rights (ICCPR) (1966) article 27 and fundamental human rights that are applied to all. General understanding of the UN is that minority rights are special, and they are beyond providing them equality because 'equality alone would not provide sufficient protection against discrimination', necessitating to provide them 'substantive equality' (Ghanea, 2012a). When a particular segment of society has been oppressed, treating them equally will be insufficient. Minorities are usually recognized in most cases as 'second class citizens' (Van der Ven, 2010). Non-discrimination may bring about equality, but it is not sufficient for the advancement of women, for instance. 'Substantive equality' is beyond formal equality; it is about preferential treatment to minorities which is called 'positive discrimination' or 'affirmation action' to bring minorities to the mainstream participatory process for the progress of the country along with the development of their cultural, religious and social identity. Thus, ethnic minorities, persons from scheduled and lower castes, persons with disabilities should be subjected to treat preferentially under substantive equality (Ghanea, 2012b). Indian constitution after the independence specially treated scheduled and lower caste people by granting a reasonable reservation of government privileges such as government recruitments. Unlike in case of other two types of minorities, when religious minority right issue arises, the case is addressed under the 'freedom of religion or belief' basis (culture included) in the international human rights regime (Ghanea, 2012a). Wearing a headscarf by a Muslim or a Sikh minority in certain circumstances is to be considered from a religious perspective because they are religious symbols. Religious minorities usually have their own language and culture. An example for exceptions to this is Christian minority in Sri Lanka whose language is either Sinhala (the language of the majority) or Tamil. Culture includes literature, symbols, cumulative manifestation and practice of relevant rites, customs, observances, dress codes, food habits, fasting etc. which are different from the wider culture of that society (Ghanea, 2012a). The religious minority is sometimes determined by the power dynamics of the state, in other words, the state religion or the state ideology scenario, not by the numerical criteria (number of people). In Syria Arabic Alawis to which president Bashar al-Assad belonged was numerically inferior to Sunnis and Christians but dominant due to power dynamics (Ghanea, 2012a). However, the situation becomes totally different if the state is a secular, neutral state.

## **Freedom of Religion**

With reference to freedom of religion, all the international conventions employ the same terminology, ‘freedom of thought, conscience and religion’ to declare the religious liberty (Universal Declaration of Human Rights, 1948; European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; International Covenant on Civil and Political Rights, 1966; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief, 1981). The wordings of UDHR in 1948 on freedom of religion have been adopted by the subsequent documents or related subjects. Freedom to have a religion of one’s own choice, practice it individually or in the community are common to all these documents. Also, nobody is subject to coercion. Everyone has the freedom to change his religion or belief. This freedom is limited only in front of law related to the protection of public safety, order, health or morals or the fundamental rights and freedom of others. This limitation of the freedom of religion occurs with the intervention of the state. Parents have the liberty to decide on the religious and moral education of their children. The right to conscientious objection says that a person has a right to object something on moral or religious ground, for example, a doctor may refuse to undertake an abortion since killing is immoral according to his religion or belief. Prima facie observation reveals that the objective of the religious freedom is primarily to ensure a democratic society with the traits of tolerant of cultures, sensitivities and multiple beliefs of pluralistic societies especially resulted due to globalization (Bielefeldt, 2012). The pluralism includes not only the believers of different faiths but atheists, agnostics, sceptics, and indifferent people. Equality and non-discrimination are two principles underneath all human rights. These two are to be safeguarded on the grounds of sex, race, colour, language, political or another opinion, national or social origin, association with national minority, property, birth or another status other than the religion and belief. Talal Asad, Abdullahi A. An-Na’im and many other scholars hold that state and religion has an inseparable, paradoxical relationship. Therefore, the state’s involvement is indispensable even in here. Human rights conventions impose two types of obligations on states; negative obligation and positive obligation. Negative obligation means that states shall abstain from violating rights granted by conventions (Bielefeldt, 2012). Positive obligation means that states shall take all necessary measures for the individuals to exercise the rights including the right to freedom of religion and belief granted by the conventions. It should be reminded that Article 5 of the Vienna Declaration and Programme of Action at the World Conference on Human Rights in 1993 entered into the consensus that the human rights are equal as a totality, inseparable, interrelated and interdependent. Therefore, freedom of religion or religious rights are no higher in the hierarchy than any other right, for there is no hierarchy.

John Rawls discusses the role of religion in his ideal of ‘well-ordered constitutional democratic society of political liberalism’. He questions as to how one can hold religious doctrines and a reasonable political conception that supports a reasonable constitutional democratic regime simultaneously. He seems to be of the view that religion is an obstacle in forming public political culture, but that can be compromised as explained below:

“While a constitutional regime can fully ensure rights and liberties for all permissible doctrines, and therefore protect our freedom and security, a democracy necessarily requires that, as one equal citizen among others, each of us accept the obligations of legitimate law (Rawls, 2007).

According to Rawls, the balance/compromise between religion and public political culture is to be achieved through adhering to the law of a democratic country. The constitution should override the hegemony of religion. Also, he points out that the principles of toleration and liberty of conscience are essential in any constitutional democratic society to flourish. There are two types of toleration; political toleration and non-political toleration. The former is expressed in terms of the rights and duties protecting religious liberty in accordance with a reasonable political conception of justice. The latter is expressed from within a religious or nonreligious doctrine to admit the given social restrictions as God-given ‘reasoning from conjecture’ (Rawls, 1997, p. 780-783).

Liberty is a right in democratic societies, and the right to liberty is applied to religious liberty as well. Respect and human dignity, as the locus of all human rights, are in the spectrum of the freedom of religion. Religious freedom as a right is vertical, subjective, direct, active, natural, universal and not God-given. It is, as other human rights, related to three institutions; family, civil society and the state. These three institutions exist in the principle of reciprocity, mutuality and interrelatedness. According to Rawls (1997), individuals are only the initial drafts of human persons without these institutions. State, as the legislative power, establishes rights and duties for the social union of human persons; State, as the administrative power, applies those rights and duties; State, as the judicial power, interprets them (Van der Ven & Ziebertz, 2012).

### **Pro-Burqa Arguments**

Most of the countries which so far banned *burqa* are from Europe. Those who are against the ban argue such a ban as religiously intolerant, anti-woman, and anti-Western. At a time, worldwide exploitation of women as pornographic sex objects, the cover-up modest clothing should be regarded as welcoming and more dignified instead. Woman’s dress is her own choice out of her consciousness, modesty, faith, piety, pride, tradition, political ideology, oppositional excitement etc. neglecting which the ban is being enacted. The state should tolerate, if it cannot encourage wearers of *burqa*, in the same way, it tolerates bikinis, swimsuits, bathing suits, tank tops, beach wears, beach dresses etc. (Chesler, P. (2010). The ban infringes woman’s right to manifest her religion; it infringes the right to personal autonomy and integrity, and it mutilates her personhood. Further, it may lead to a greater marginalization and create a rift between some Muslim groups and society at large (Hewitt & Koch, 2011). Some are of the view that the ban implies the underlying vein of racism, Islamophobia, and inability to understand other cultures (*Burqa Battles*, 2010). The *burqa* covers the face in a modest way, which is the most attractive part of the body that stirs passions; and they avoid the attraction of others when going out. Being a Muslim woman, it is part and parcel of it to wear *burqa* or Niqab to be closer to the prophet. Most of the sexual harassments are due to sexist outlook of revealing body parts and these dress codes repel sexual harassments. When a woman in *burqa* or Niqab is harassed, the responsibility is on the perpetrator, not on the victim, which is not the case otherwise in other cases where body parts are uncovered.

### **Anti-Burqa Arguments**

“Say to the believing women that they should lower their gaze and guard their modesty ..... They should draw their files over their bosoms and not display their ornaments.”

(The Qur'an, Sura An-Nur, Verse 31)

Here is the authority which has been interpreted in many different ways. The interpretation of the majority of this verse is that Qur'an does not prescribe face covering. In fact, the Qur'an enjoins male and female to dress modestly and refrain from revealing any body parts except those which are necessary. It does not mention any headscarf – *burqa*, *niqab*, *hijab* or *veil*. The veil was neither compulsory nor widely adopted until many generations after Mohammed's death. Leaders of Islam who strived to gain dominance in the Muslim society introduced the veil (Aslan, 2005). *Burqa* first appeared in Persia during 10th century A.D. It is now practiced only in several Muslim countries such as Oman, Yemen, Saudi Arabia, Somalia, Afghanistan and Pakistan. It is usually known that Wahhabi and Deobandi traditions (Sunni) promote *burqa*. West Africa or Europe did not know *burqa* until recently, until 2-3 decades ago. Thus, the headscarf is a cultural symbol rather than a symbol based on a religious teaching, an alien and recent imposition, the history of which goes to the pre-Mohamedan period but Prophet Mohamad was not interested in. Why this practice is fast spreading in countries of Muslim minorities, not in Muslim dominated, Muslim majority countries is a million-worth question.

*Burqa* (hereafter B) covers the female from head to toe. B is an Islam religion-inspired dress code, according to some, a Muslim right-wing imposition, a patriarchal practice, and not a choice of one's own but a part of an ideology, symbolizes the oppression of women and offend the principle of sex equality. Since the wearer cannot be readily identified and weapons or explosives can be hidden under them, they are regarded to be a risk to public security. Concealing of the face is offensive to others in free and open Western society. People usually see the face and communicate. Revealing the face reveals one's identity and, conversely, concealing the face conceals the identity. Further, it creates the offence of forcing another person to hide their face because of sex (Hewitt & Koch, 2011). The person who wears it becomes a non-being whose public presence is wholly reduced to a member of a religious group, perhaps a member of a group of fundamentalists (Kumar, 2010). The chance of getting a job is diminishing with the *burqa* or *niqab*. Thus, this dress code does not empower a woman but loses her courage. Liberal Muslims who fled their countries to the West because of cruelty at home may feel haunted or followed when they see *burqas* on Western streets. Majority of Western Muslims do not want to wear B. Therefore, wearing them should not be construed as a religious duty. Their wearing is a political statement, an ethnic and misogynistic custom. It is the symbol of the end of modernity, human rights, liberal democracy and freedom. It violates the basic human rights of woman and creates mental and physical health hazards to wearers (Chesler, 2010). It is said that the women in B are subject to health risks, both in low and high temperatures, such as chronic vitamin D deficiency or feelings of suffocation anxiety and claustrophobia (Zamani & Gerber, 2014). Pro-ban of B does not have anything to do with Islamophobia. B is inconsistent with Western norms of equality, the backbone of the citizenship ideal. It erects a partition to interpersonal understanding and reciprocity. It is at the edge of solidarity and injurious to the democratic public sphere. This sort of foreign customs, symbols of diversity, are unwelcome in Western society. Since the pluralism is one of the hallowed values of Western liberalism, the existence of heterogeneous groups is welcome to Western society. However, it does not mean that Western society should tolerate the customs of those groups that are not befitting with Western culture. In Western traditions, the notion of citizenship equality is integrally related to citizens being visible to one another. This visibility idea is most potent in Western democratic terms and metaphors with the terms such as enlightenment,

openness, transparency, illumination, recognition, social legibility, accountability, publicity, public etc. B wearer in Western society is targeted to everybody's attention and she is not respected. This subjectivity of more eye-catching and staring lead to evoke the embarrassment. Face to face interaction is not only appreciated but the concealment of face impedes mutual openness and repels interaction as equals. If someone looks away while talking, it is an indication of inattentiveness and uninterestedness, which is translated as a distraction or rudeness. Response to such alienation is alienation in return. The wearer of *burqa* or niqab becomes sociological and political outsider within a Western environment. Politically, the wearing is by Western standards an uncitizenly posture that undermines the twin practices of civic; equality and reciprocity. Sociologically, the wearing impedes cross-cultural understanding, social integration and, a fortiori, social solidarity beyond the domestic unit (Baehr & Gordon, 2012).

### ***Burqa* Ban and Human Rights**

Human rights are natural. They are based on natural law for the benefit of all. Their universal character is felt in every sphere in different degrees. According to John Rawls (1997), every rational human is presumed to want human rights. Thus, the 'need-oriented paradigm' of human rights is proven. People need them for their survival. On the other hand, Amartya Sen and Martha Nussbaum contend that rights are entitlements for people to be able to act and live in a perspective of human dignity. Thus, for them, it is not needs but capabilities what matter with regard to human rights. This way, the capability-oriented paradigm of human rights is proven. In short, the pivotal role of human rights in day to day dignified life is established by need perspective and capability perspective.

Ban of B in a country is done by its relevant legislative institution such as the court in line with the constitution of that country. International human rights conventions and other such treaties or instruments, the country in question is a signatory, are secondary in this process. However, the citizens of European countries have the privilege of challenging the human rights-related convictions at the European Court of Human Rights (ECtHR) individually. The ECtHR hears the appeal mainly in contravention of European Convention of Human Rights (ECHR) and other UN conventions, treaties, covenants, and declarations in addition to the constitution of the country concerned. It has been clear from the verdicts passed during the recent past that the ECtHR has not been consistent. The reason for this seems that it considers case by case taking seriously into consideration the nature of the society, legal system, constitution, political system, positive and negative impacts of the verdict to be passed to the country in question. Therefore, it is not out of the context here to discuss if the ban of B in some of the EU countries is in breach of ECHR or other international instruments if it is a blanket ban which constitutes a disproportionate infringement of human rights. Before that, it should be noted that the ban of B is confined to public places such as streets, parks, shops, restaurants etc.

Thus, first, the ECtHR scrutinizes if the ban of would be regarded as constituting an infringement of the right to freedom of religion presuming that covering of the face in public is a religious rule/observance guaranteed in article 9 (1). Subsequently, the infringement is to be justified under Article 9 (2) as "necessary in a democratic society in the interests of public safety, for the protection of public order... or for the protection of the rights and freedom of others."

## DISCUSSION

How to address this dichotomy: the ban of B is pro-human rights or anti-human rights? Frantz Fanon writes:

“This woman who sees without being seen frustrates the colonizer. There is no reciprocity. She does not yield herself, does not give herself, does not offer herself.” (Fanon, 1959)

While dealing with ‘phenomenology of encounters’ in which context this paragraph occurs, Fanon was very happy to see Algerian colonized woman’s response to the colonist. It would never mean that he is in favour of B because he speaks on a very different milieu here. What is significant for us here are the traits such as no reciprocity etc. of a veiled woman which are similar to that with a *burqa* or niqab. This may remind us some of the contemporary (controversial) remarks on *burqa* woman by eminent dignitaries including the president Sarkozy of France and British politician Boris Johnson such as ‘walking coffin’, ‘sign of debasement’, ‘letterboxes’ ‘bank robbers’, ‘sign of subservience and subjugation’. We learnt from the discussion of Esposito and Mogahed on the basis of Gallup survey (2007) under the topic “Who will speak for Islam?” that it is majority democracy friendly Muslims who should speak for Islam. However, in reality, it is a minority extremist radical Muslims who actually speak for Islam. For me, this is exactly so in the case of B case as well. Statistics show that there were only about 1200 *burqa* wearers in France and very much less than that in Belgium at the time of its ban which is a very small percentage of the total Muslim population of those countries. Gallup survey further reveals that what Muslims like most in the West are its political freedom, liberty, fair judicial systems, freedom of speech, and the co-existence of Islam and democracy (Esposito & Mogahed, 2007).

Nussbaum is of the view that B wearing is at root a matter of conscience, a right that demands protection and she should be left to practise it in peace and dignity. However, Nussbaum seems to be unaware that, apart from the religious flavour, there are other aspects such as family pressure, patriarchal impact involved in this practice. Moreover, privileging the conscience of the covered over established Western norms places the whole burden of adaptation on to the host population.

B, unlike other religious symbols like a rosary, crucifix etc., dissolves the public identity of the individual wearer and thereby imparts to her an overarching religious identification. It creates a partition to interpersonal understanding and solidarity. On the other hand, other religious symbols do not challenge public security since such makeup or ornament does not make it difficult to identify the face or person in public. This legislation of ECtHR is silence about the private/domestic wearing of B. So we say “public ban for the public good”. This legislation tries to establish a balance between concerns of public safety and security and equality of the sexes on one hand and the right to religious belief and expression, and personal liberty on the affected women on the other. The ban is an opportunity for Muslim women not only to enjoy a secularist free society but also to escape pressures within their family and community in terms of imposing them on their dress codes. Women in majority Muslim countries do not wear B. If it is the choice of a woman to wear it, and if it is liberal and open, and a matter of one’s own choice, it is very difficult to understand why majority Muslim women do not wear it in majority Muslim countries. Is it that when the majority of a country is Muslim, that liberty goes and people are asked by the

theocracy or the state what to wear and what to do? If the ‘stirring passion’ theory is valid, it should be applicable trans genders. Thus, men should also cover their faces because they would stir passions in a woman by exposing his face.

## CONCLUSION

It has been clear with the ban of B in some of the European countries that National law based on the constitution supersedes minority rights. *Burqa* ban is a good sign for substantive equality for Muslims. They should be receptive to substantive equality benefits. 100% adaptation and assimilation of Muslims to the secular and liberal democratic process in Europe is the easiest and most effective cure to the Islamophobia and the degradation of Muslims as second class citizens. *Burqa* creates separation, not unification. *Burqa* should not be a challenge to the equality and non-discrimination which are underlying factors of all human rights, two foundation stones of liberal democracy in a pluralistic society as well.

Freedom of religion of all in a secular state is guaranteed through the rule of law. Break of rule of law, therefore, harms the public safety, order, health, fundamental rights and freedom of others.

Rawls’ idea of a compromise between religion and public political culture through the law of democracy is very much relevant to B issue. History of the church, philosophical dialectics, science and technology may have influenced in shaping the modern Western state of the right-wing politicians what it is today overriding the hegemony of the religion. Thus, B as a religious symbol cannot supersede the liberal state law. Family, civil society and state should equally observe and preserve respect, dignity and reciprocity. The state as the power institution determines the limits for smooth coexistence of all three. B ban is such an instance. We cannot live without human rights. We all need them. They empower us. They secure social harmony, pluralism, our ability to ‘live together’. A particular right of a segment of a society may have to be sacrificed for the sake of majority rights, pluralism, and for social unification rather than separation.

*Burqa* seems a result of the fast-growing trend of introducing new radical (blind) practices to separate Muslims from the majority mainstream which is very much dangerous and harmful to Muslims and society as a whole.

The developing needs of society can be achieved through active and responsible readings of Islamic sources rather than blind and passive obedience to supposedly ordained legal rules. Most of the confusions in Islam may be avoided through proper education of Islam and adhering to the rational interpretation of Islam that yields to democracy, not the other way around. Shah Wali Allah who is an Indian Sufi (mystic) movement leader in 18th century A.D. says:

“If the world does not agree with you, you agree with the world.”

*Burqa* wearers who are unhappy with the ban should take this statement seriously.



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