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THE LEGAL IMPLICATIONS OF THE PROPOSED BAN OF THE HIJAB: PERSPECTIVES FROM FUNDAMENTAL RIGHTS

By

Owoade, Abdul-Lateef. A.* & Apalando, Ishaq. O.**

Abstract

There is an incessant increase in terrorist attacks and this has led to the adoption of various measures by governments in combating terrorism. One of such measures is banning the Hijab which is used for carrying out suicide bombings. The Nigerian government hinted recently on placing a ban on the Hijab and this has caused reactions from the public. It is argued, especially, that use of the Hijab is a human right, and the implications of this argument are considered: that it may justify the ban as well as nullify it. It is concluded that the ban cannot be justified, and recommendations are made for alternative measures to counter terrorism.

Introduction

From as far back as 2003, Nigeria has started facing insecurity threats from an Islamic terrorist group which goes by the formal name *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad.*, popularly known as Boko Haram, a Hausa term which means "Western Education is forbidden". It came into much prominence in 2009 after it reacted to the extra-judicial killings of its leader, Mohammed Yusuf, in police custody.¹

Various means have been employed by the sect to carry out its dastardly plans of terror against its targets which include mosques, churches, government buildings, prisons, police stations, schools etc. One of these means, which concerns us in this piece, is suicide bombing. According to The Free Dictionary, Suicide Bombing refers to a terrorist bombing carried out by someone who does not hope to survive it.² It is estimated that since its inception, the sect is responsible for the deaths of over 10,000 souls.³

In recent times has resorted to the use of the full face veil (loosely, the *Hijab*) to carry out suicide bombings. This is especially possible considering this perfect concealment the item of clothing affords terrorists to carry explosive devices into public places. This development has led some governments to ban use of the *Hijab*. Of these governments, France is most notable; it passed into law in 2010 a bill that bans use of the *Burqa* and *Niqab* in public places.⁴ Other such governments include that of Belgium which was the

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¹ Morris M., 10 Dark Facts About Boko Haram <<http://listverse.com/2015/01/31/10-dark-facts-about-boko-haram/>> accessed Wednesday 6, 2016

² The Free Dictionary Suicide Bombing <<http://www.thefreedictionary.com/suicide+bombing>> accessed Wednesday 6, 2016

³ IB Times <<http://www.ibtimes.com/nigerians-debate-hijab-ban-after-headscarves-outlawed-chad-2010077>> accessed Wednesday 6, 2016

⁴ Steven E, Parliament moves France closer to a ban on face veils <http://www.nytimes.com/2010/07/14/world/europe/14burqa.html?_r=1#> accessed 13 July. 2010. Note that the French Constitutional Court permitted its use in public places of worship so as to not violate religious freedom.

first-in Europe to outlaw the use of the *Hijab* in public places⁵. African countries which have followed suit more recently include Niger⁶, Cameroun⁷, Gabon⁸ and Chad⁹.

The President of Nigeria, Muhammadu Buhari, in a media chat on the 30th of December, 2015, stated that his administration may ban the use of the *Hijab* if the Boko Haram sect continues to use it to carry out suicide bombings.¹⁰ This has provoked reactions from the general public, particularly Muslims though the government responded that stakeholders will be consulted should it want to consider the ban.¹¹

The proposed ban has led to debates on its propriety. Opposition to the ban is especially grounded on the fact that the use of the *Hijab* is a fundamental right, being an expression and manifestation of religious beliefs. Freedom of religion as well as freedom of expression is guaranteed under the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as the Constitution or CFRN 1999).¹² It is thus the thrust of this paper to examine the legal implications of the basis of this argument i.e. the legal implications of arguing that use of the *Hijab* is a human right.

The Meaning of *Hijab*

On the meaning of the word *Hijab*, it is written in the Encarta Encyclopaedia thus:

Arabic term for the seclusion of women commanded by the Qur'an (Koran), the sacred scripture of Islam. *Hijab* also refers to the modest, covering dress that Muslim women wear when they are outside their homes or in the presence of men not closely related to them.¹³

A consensus exists among Islamic law jurists that the *Hijab* is binding on all matured female Muslims¹⁴ but its scope is one seriously debated amongst the Muslims whether learned in Islamic jurisprudence or not. For differences in the interpretation of the same religious text, the controversy specifically borders on how much of the body should be covered and when it should or not be covered. On this, Oba notes:

The practical result is that some Muslim women apart from adopting the long loose outer garment (*jilbab*) and headscarves (*Khimar*) that cover the

⁵ The Independent, *Belgium passes Europe's first ban on wearing the burka in public* <http://www.independent.co.uk/news/world/europe/belgium-passes-europes-first-ban-on-wearing-burka-in-public-1959626.html> accessed May 1, 2010

⁶ BBC World News, *Africa Highlights: Wednesday 29, 2015* <<http://www.bbc.co.uk/news/live/world-africa-33666413>> accessed Wednesday 6, 2016

⁷ BBC World News, *Cameroon Bans Islamic Face Veils After Suicide Bombings* <<http://www.bbc.com/news/world-africa-33553041>> accessed Wednesday 6, 2016

⁸ BBC World News, *Chad Ban Islamic Face Veils After Suicide Bombings* <<http://www.bbc.com/news/world-africa-33166220>> accessed Wednesday 6, 2016

⁹ *Ibid.*
¹⁰ Vanguard, *Presidential media chat: We may ban hijab because of Boko Haram — Buhari* <<http://www.vanguardngr.com/2015/12/presidentialmediachat-we-may-ban-hijab-because-of-boko-haram-buhari/>> accessed Wednesday 6, 2016

¹¹ Premium Times, *No Decision on Hijab Ban Yet* <<http://www.premiumtimesng.com/news/top-news/196044-no-decision-on-hijab-ban-yet-presidency.html>> accessed Wednesday 6, 2016

¹² Naij News, *Banning of Hijab in Nigeria is Unconstitutional* <<https://www.naij.com/70816.html>> accessed Wednesday 6, 2016

¹³ "Hijab", Microsoft® Student 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008.

¹⁴ Oba A.A., 'The Hijab in Educational Institutions and Human Rights: Perspectives from Nigeria and Beyond' (2009) 10(1) CODESRIA ICP p. 52

head, neck and the upper body, also adopt the face veil (niqab). Others go further by covering their hands with gloves and their feet with stockings. In this way, no part of the body is exposed to the gaze of strangers. Some others do this but leave the hands, feet, and face exposed.¹⁵

The Islamic Encyclopaedia, writing on the Hijab, notes even a difference over its scope amongst the founders of the four Sunni jurisprudential schools. It is stated:

Accordingly, the four Fuqaha' [Jurists] have declared the veil necessary for women except that Imam Abu Haneefah added that a woman may lift her veil (remaining covered in the clothes she wears) in situations free of *Fitnah*, where *Fitnah* is defined as men staring at her face with *Shahwah* (carnal desires). (emphasis ours)¹⁶

It is conclusive from the above that the term *Hijab* is used to refer to all the different pieces of clothing adopted by Muslim women to comply with the religious requirement of covering certain parts of or the whole of their bodies as the case may be. It will therefore be used in this sense throughout this paper.

Hijab as A Human Right

International Human Rights Laws

Various international human rights laws provide for certain human rights which include those of freedom of religion, freedom of expression and equality of men and women. Relevant international Human Rights treaties include the Universal Declaration of Human Rights (UDHR)¹⁷, African Charter on Human and Peoples' Rights (ACHPR)¹⁸, International Covenant on Civil and Political Rights (ICCPR)¹⁹ etc. Of all the international treaties on human rights, only the African Charter has been domesticated by Nigeria as required by Section 12 of the Nigerian Constitution (1999).²⁰ The Section Provides:

No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

The provisions of these laws on freedoms of religion and expression are similar though with varying explicitness but those of the ACHPR will be focused on in this work. This is particularly because it has been pronounced by the Supreme Court of Nigeria to be a law in force in the country.²¹

Article 8 of the Charter provides:

¹⁵ *Ibid.*

¹⁶ Islamic Encyclopaedia, *Hijab*, <<http://islamicencyclopedia.org/public/index/topicDetail/id/1055/page/22>> accessed Wednesday 6, 2016

¹⁷ Adopted on 10 December 1948, G.A. Res. 217A (III). UN Doc. A/810, at 71 (1948). Article 18 of the Declaration provides for freedom of religion

¹⁸ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

¹⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49 into force 23 March 1976, in accordance with Article 49

²⁰ African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act

²¹ *General Sani Abacha & Ors v Chief Gani Fawehinmi* [2000] 4 S.C.N.J. 401

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 18 of the UDHR provides:

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.

Article 18 of the ICCPR reads:

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

In the General Comment No 22 on Article 18 of the ICCPR, which is similar in substance to the UDHR as above, it is stated:

The observance and practice of religion or belief may include not only ceremonial acts but also such customs as ... the wearing of distinctive clothing or head coverings.²²

Notwithstanding the above, the position of international courts on the *Hijab* as a human right has been somewhat unclear. Different positions have been taken by the courts towards this issue. It will be instructive to consider some of the common cases.

In *Bulut v Turkey*²³, two Turkish students submitted to their school photographs depicting them with the *Hijab*. These were to be affixed to their certificates. They were denied their certificates thereafter. They forwarded applications to the then European Commission on Human Rights (now European Court on Human Rights since 1998) but their applications were denied.

In *Dhalab v Switzerland*²⁴, the court rejected the application of a Muslim primary school teacher stating about the “powerful external symbol which her wearing a headscarf represented: not only could the wearing of this item be seen as having some kind of proselytising effect since it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality, but also this could not easily be reconciled with the message of tolerance, respect for others and equality and non-discrimination that all teachers in a democratic society should convey to their pupils.”

²² Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 para 40.

²³ *Bulut v Turkey* (Application No. 18783/91, 3 May 1993) and *Karaduman v Turkey* (Application No. 16278/90, 3 May 1993) Note that Turkey's ban on the *Hijab* is in furtherance of the principle of secularism or separation of church and state.

²⁴ Decision of 15 February 2001, Application No. 42393/98, 2001-V. ECHR 447.

In *Leyla v Turkey*²⁵, the European Court held that ban on the Hijab was necessary in a democratic society as it furthers the separation of church and state. It further held that it must be taken into consideration the effect of wearing such a symbol, which was presented or perceived as a compulsory religious duty, could have on those who chose not to wear it. However, in *Hudoyberganova v Uzbekistan*²⁶, an Uzbek national contended that her expulsion based on her insistence on wearing the *Hijab* to lectures in a national tertiary institution was a violation of her religious right under the ICCPR. The court held in her favour by a majority

The 1999 Nigerian Constitution

One of the rights guaranteed in Chapter IV of the Constitution is freedom of thought, conscience and religion. Section 38 (1) of the CFRN 1999 provides as follows:

Every person shall be entitled to freedom of thought, conscience and religion, including the freedom to change religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

The salient words in this provision are “to manifest...his religion...in practice and observance” Murdoch states about manifestation:

A “manifestation” implies a perception on the part of adherents that a course of activity is in some manner prescribed or required.²⁷

Fortunately, in *Bashirat Salisu and Ors v The Provost, Kwara State College of Education, Ilorin and Ors*²⁸, the court stated regarding these words:

According to the LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH NEW EDITION at page 867, the word “manifest” means to show, or to appear or become easy to see while “OBSERVANCE” is defined at page 973 to mean “... a part of a religious ceremony; ritual observances”. The word “practice” is defined at page 1104 to mean “Something that you do often because of your religion or... religious beliefs and practices.”²⁹

The court thereafter pronounced invalid, null and void a provision of a school’s dress code which prohibited the use of the *Niqab* (full face veil) as it, in the opinion of the Court, violates the applicant’s freedom to manifest her religion in practice and observance as guaranteed under the CFRN 1999. It is thus settled law that use of the Hijab is protected as a human right: a fundamental right protected by the Constitution

²⁵Judgment of 10 November 2005, Application No. 4474/98 (Grand Chamber) affirming *Sahin v Turkey* (2005) 41 EHRR 8 (Chamber).

²⁶Human Rights Committee, Communication No. 931/2000 of 5 November 2004, U.N. Doc. CCPR/C/82/D/931/2000 (2004).

²⁷ Murdoch J, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, Council of Europe, 2012, p.21

²⁸(Unreported) Suit No. KWS/28M/2006 delivered by Kawu J. on 8 May 2006.

²⁹*Ibid.* 6

Legal Implications of the Hijab as a Human Right

Limitations to Human Rights in International Laws

It must be noted, however, that the rights guaranteed by the international laws on human rights are not absolute as they can be limited or derogated from.³⁰ This is evident in the provision of Article 8 of ACHPR which provides that:

No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

The main phrase in this provision is “*subject to law and order*”. What constitutes the phrase *subject to law* is clearly stated in Article 18(3) of the ICCPR thus:

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.

It has been provided that for any such limitations to be valid, it must be clearly provided for by law and made so explicit and comprehensible to those whose rights are being infringed so as to make them appreciate the reasons thereof. It is further provided that reasonable grounds must exist to justify such limitations.³¹ What always has been subject of controversy, however, is if such grounds for derogation are, as claimed by governments, justifiable.

Limitations to Fundamental Rights Under the Constitution

It has been established earlier that following both international and local standards, use of the *Hijab* is a fundamental right under the CFRN 1999 (as amended). However, as rights under international laws are not absolute, so are they not under the CFRN 1999.³² Section 45 provides:

- (1) Nothing in sections 37, 38, 39, 40, and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society –
 - (a) in the interest of defence, public safety, public order, public morality or public health; or
 - (b) for the purpose of protecting the rights and freedom of other persons

In *Hassan & Ors v EFCC & Ors*³³, the Court of Appeal stated on the constitutional provision above:

Section 45 provides that all fundamental rights can be circumscribed in the interest of defence, public safety, public order, public morality or public

³⁰ Article 18 Freedom of Religion and Belief Human Rights and Equal Opportunity Commission (J.S. McMillan Pty. Ltd., 1998) p. 10

³¹ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4 Annex para 10 cited in *Bans on the Full Face Veil and Human Rights: A Freedom of Expression Perspective*, London, Free World Centre, 2010

³² *Ukaegbu v National Broadcasting Corporation* [2007]14 NWLR (Pt. 1055) 551

³³ (2013) LPELR 22595 (CA) at 40

health or for the purpose of protecting the rights and freedom of other persons.

According to the Court in *Dokubo-Asari v Federal Republic of Nigeria*³⁴,
They [fundamental rights] can be curtailed by the appropriate authorities where there are grounds for doing so. (emphasis ours)

A community reading of the holding of the Court and the Constitutional provision will leads us to outline the grounds as follows:

- a. interest of defence
- b. public safety
- c. public order
- d. public morality
- e. public health
- f. for protecting the rights and freedom of other persons.

First, it will be noticed that the constitutionally recognised grounds for derogation from fundamental rights are quite similar to those found under international laws, particularly the ICCPR. The reason is probably because both sources or all laws use rely on the same source for the list of rights.

In considering the propriety of any derogation of human rights, what to note is the range of competing human rights and the public interests put forward by governments as justifications for such derogation. It is therefore logical that the question which follows from here is: What public interests or grounds have been put forward by the Nigerian government for the ban and are such constitutionally justifiable?

The Nigerian President stated in the media chat that “*Banning the Hijab is not enough. But if this [suicide bombings by full-face-veiled terrorists] continues, it may be banned*” (emphasis ours). Quite glaring from this is that the grounds or public interests put forward by the government are public safety and defence.

Arguments for the Ban

Section 14(1)(b), CFRN 1999, makes the security of the Nigerian citizens the primary purpose or aim of the Nigerian government. It states:

The security and welfare of Nigerians shall be the primary purpose of government.

Therefore is in order that to achieve this purpose, circumstances may dictate that the rights of certain persons be derogated from temporarily. The soldiers deployed to battlefields sacrifice their rights to life. Citizens, generally, for example, sacrifice their right to freedom of movement in cases of states of emergency. If the full face veil is being used to effectively carry out suicide bombings, it is not then too much of the government to ask Muslims to sacrifice their right to wearing it in order to combat the insecurity and threat to life emanating from it. The proposed ban may therefore be in the interest of defence,

³⁴[2007] 12 NWLR (Pt 1048) 320

public safety and public order and may comply with the statutory requirements of derogation from human rights as required by both local and international laws.³⁵

Another ground for justifying the ban is that it is to protect the fundamental rights of others guaranteed in the Constitution and the Charter. Muslims constitute a quite considerable unit of the Nigerian population and adherents of other faiths, especially Christianity, are of no small numbers.³⁶ There are as well people with no religious affiliations such as deists, agnostics and atheists. Since all of these peoples, Muslims inclusive, have their rights to life being threatened by the precarious security situation in the country, then the ban may be a means of protecting the rights and freedom of other Nigerians, whether non-Muslims or Muslims and whether the latter see the *Hijab* as compulsory or not.

The use of the *Hijab* for suicide bombings has led to the public being suspect of anyone wearing it. Muslim women who use it are now subjected to further measures by security officials and are stigmatised by the public. This is clearly a violation of the rights of Muslim women and it is submitted that the proposed ban will in fact protect the freedom of women from discrimination on the basis of religion.³⁷

It may be argued that the ban will set in motion a chain of further fundamental rights infringements. For example, that a Muslim woman who protests the ban by contuing to use the *Hijab* may be denied access to public places and peaceful assemblies or that her freedom of movement, personal liberty etc will be infringed. If, as argued earlier in this section, the ban is justified on constitutional grounds, then non-compliance with the provisions of the law or orders made by lawful authorities, the ban in this case, will be justified grounds for such lawful authorities to infringe on the rights of any such persons who do not comply. Common examples of this are found in the Nigerian Constitution (1999) itself wherein it is provided in Sections 33 and 35 that a person's right to life and right to personal liberty may be denied in cases such as execution of a court sentence or ensuring a person's compliance with an obligation or any reasonably justifiable measures.

Arguments against the Ban

It is clear that the reason for the proposed ban is that it is in the interest of public safety, order and defence. But it should be noted that an assessment of the effectiveness of the ban is necessary to determine whether it is a feasible solution or some wild goose chase. It is submitted that the ban of the *Hijab* will not solve the security situation in the country but rather exacerbate it for reason which will be discussed in subsequent paragraphs.

The ban will only provoke reactions, violent reactions, most likely, from the Muslims whose right to practice their religion will be infringed by it. Matters of religion are such that touch quite quickly on the passions rather than reason of adherents. If anything, our history as a human race and as a nation has taught us religion is more likely to provoke

³⁵ See *Phull v. France* (dec.), 11 January 2005 (requirement to remove turban during airport security screening: inadmissible). The Strasbourg Court is likely to recognise a certain "margin of appreciation" on the part of state authorities, particularly where the justification advanced by the state is public safety...

³⁶ See the statistics in Oba A.A., 'Religious Rights and the Corporate World in Nigeria: Products and Personnel Perspectives', 2004, *Recht in Afrika* pp. 195 - 196.

³⁷ See Section 43 of the CFRN 1999, Articles 4 and 26 of the ICCPR, Articles 18(3) and 28 of the Charter etc.

civil unrest. If the ban is successful in provoking unrest, another form of insecurity or disorder arises from within and it will be difficult to identify which Muslims support the ban or oppose it thereby leading to false accusations of innocent people. The fragile bond of this nation may as well be broken there from.

The ban will set in motion breach of even more fundamental rights. Not only will the freedom of religion be curtailed but also freedom of expression as guaranteed by both local and international laws.³⁸ Use of the *Hijab* is an expression of religious beliefs. It will alienate and stigmatise Muslim women and communities thereby leading to a breach of their right to freedom from discrimination.³⁹ Restrictions may be placed on the movement of women who use the *Hijab* and they may be denied access to socialise or relate with others in groups. Both these will curtail their right to peaceful assembly and freedom of movement under Sections 40 and 41 of the CFRN 1999.

The argument that such further infringement will be justified as they will be aimed towards ensuring compliance with ban is a weak one. It has been argued earlier in this section that what the consequences of the ban will be is what matters and not whether the ban is constitutionally justified or not. In other words, its possibility in solving the problem or worsening it should be forefront in our consideration. Since, as demonstrated earlier, the ban will worsen it, then it is not justified.

Conclusion

It has been established earlier on that use of the *Hijab* can, to a great extent, be considered a fundamental right or human right both in local and international laws. It has also been established that if human rights are not absolute and can be infringed through provisions of the law, then the implication is in twofold: on the one hand, so long as a government can provide reasonable grounds for derogation, especially when such are hinged on public security, the *Hijab* may be rightly banned; on the other hand, it has been concluded that any such ban will be counterproductive as it will lead to more security challenges from protests, and will as well set in motion infringements of even more rights.

Recommendations

Considering the realities of both arguments for and against the ban, it is imperative to throw our weight to a particular side of the divide and make some recommendations thereof. It is recommended, with particular reference to the possible insecurity and unrest thereof, that the proposed ban be not proceeded with. It will be the ban may cause, that the proposed ban be not proceeded with. It will be counterproductive and will most likely escalate security situations in the country or, even, ultimately divide it. In this case, the objective of the Constitution as a uniting force will be wholly defeated and the government will have failed further in its duty to provide security of lives and property as required in Section 14 of the Constitution. We reiterate, here, that matters of religion appeal more quickly to the passions of adherents than to their reason.

It is further recommended that the government pursue some other sophisticated means of counter-terrorism. This especially can be achieved through the use of state of the art technologies and effective intelligence gathering. Also, the government should consider,

³⁸ See Section 39 of the CFRN 1999

³⁹ See Note 32 See Section 34 of CFRN 1999 for right to dignity of the human person

albeit with due caution, funding and arming volunteer vigilante groups in the north-east region where terrorism reigns supreme. Statistics has shown that these groups are effective in combating terrorism in the region.⁴⁰

⁴⁰ Stevenson J, *Statistical Analysis of Event Data Concerning Boko Haram in Nigeria (2009-2013)* Maryland, National Consortium for the Study of Terrorism and Responses to Terrorism, 2015