

# Group Rights vs. Individual Rights?

## Navigating the Tension in Western Liberal States

by Lyra Porras Garzon

As the term has been used in recent history, “nation-building” generally implies a “melting pot” or “national integration.”<sup>1</sup> This means that the various ethnic, religious and cultural groups that find themselves living within defined borders of an internationally recognised State are expected to give up parts of their collective identity so as to adopt the values of the dominant or majority groups.<sup>2</sup> And since the dominant groups are usually the ones that wield political power, they can then define the national culture in terms of their own cultural identities. Furthermore, the dominant groups expect all other groups to conform to this model, even if it means the erosion of a particular minority group’s collective identity, in the long run.

The right of a group to survive is the most fundamental. Only if groups are permitted to persist can they hope to assert claims and prevent the destruction

of their cultural, linguistic and religious identity as peoples. If the State disperses a group or prevents expression of its identity, the group may be destroyed.<sup>3</sup>

In order to traverse the multiple ambiguities that surround the term “group” in international law, the focus of this paper will be on minority rights as an aspect of group rights (or what other legal scholars refer to as “collective rights”). This paper’s definition of “minorities” (because of the absence of a concrete definition from any Convention) will be based on the Vienna Commission, which defined the concept of a “minority” in its proposal for a European Convention for the Protection of Minorities as:

A group which is smaller in number than the rest of the population of a State, whose members, although nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are

guided by the will to safeguard their culture, traditions, religion or language (Art. 2).<sup>4</sup>

Furthermore, Francesco Capotorti, Special Rapporteur of the UN Subcommission on the Prevention of Discrimination and Protection of Minorities, affirms this definition of minorities as:

A group, numerically inferior to the rest of the population of a State, in a nondominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>5</sup>

Although minority group rights may be subject to certain limitations at the discretion of states, such as for the protection of public order, it is imperative to meet the strict criteria required to impose these limitations on religious and cultural freedom that are “necessary in a democratic society.” The terms “public safety, order and morals”

are immensely elastic and have been used “as a pretext for arbitrarily favouring majority values” that have proven prejudicial to minorities.<sup>6</sup>

Minorities are bearers of religious, cultural and linguistic rights that are autonomous from the predominant community and which cannot be collapsed into a singular rubric of identity. Each group is a product of diverse histories (ranging from colonialism to immigration) whose collective identities must be preserved and protected. Unfortunately, there appears to be developing in the Western liberal states (that is, Europe, in general, and France, in particular) an approach to minority groups that is intolerant and possesses little sympathy for calls for cultural sensitivity or respect for minority practices that deviate from the polity.

Cultural rights are closely related to other individual rights and fundamental freedoms (expression, religion and belief, association, and education). The right to develop a culture has further been asserted by the UN Educational, Scientific and Cultural Organisation (UNESCO) that has proclaimed a “right to cultural identity” at the World Conference on Cultural Policies in 1982.<sup>7</sup> Thus, the right to culture must be interpreted as “the right to one’s own culture,” not only to the “general” culture. General culture and one’s own culture are not necessarily the same thing.<sup>8</sup>

Cultural and religious identities are primary indexes of participation in public life. “Private” does not equate to “secret” or removal from public view nor does it necessarily mean “purely

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personal.”<sup>9</sup> The misreading of a group’s identity results in the reduction of the different to the difference in the conception of good, thereby disregarding the intrinsic collective dimension of the claim.<sup>10</sup>

All human beings are equal and no matter the distinction, they have the same rights. Yet in talking about collective rights of a minority, the distinction implies a rejection of universality in order to recognise the specificities of different social groups, usually that of the dominant group within the State. Scholars have argued that liberal neutrality is not neutral because it is tailored to conceptions of the good that fit into the liberal polity, and filter out those produced by “alien” cultures (that is, the minority). The supposed universality of liberal theory then turns out to be merely a disguised form of particularism.<sup>11</sup> The problem is not that a specific group identity is different but that it conflicts with the normative identity of the majority or of the social group that is in the existing political order.

The State being the panoply of diversity, it is thereby inevitable that particular cultural traditions, because of its

deviation from the normative, may be considered repressive by some, and are viewed as legitimising hierarchies, inequality and absence of freedom. The right to innovate and to challenge is, however, a significant part of the individual’s cultural rights, and must be subject to transformation by the individual who is a part of that culture. Human beings are to have the possibility to follow their own “plan of life.”<sup>12</sup> The possibility to define one’s own ends and to be able to develop in different directions and be free to question those allegations are, in fact, the essence of liberalism.<sup>13</sup> This is where the essence of human dignity (individual rights) and minority protection meet. The existence of various ways of life, of various cultures and religion, some of which inevitably have a minority position, give access to “a range of meaningful options.”<sup>14</sup> The individual must have the freedom of entry and exit into his or her culture or religion without interference from the State. Renowned philosopher Will Kymlicka upholds this by arguing that not only are minority rights consistent with individual rights but actually promote these. His theory is that respecting minority rights can enlarge the freedom of individuals, because freedom is intimately linked with and dependent on culture by providing individuals access to a plethora of “meaningful options.” A person’s capacity to form and revise a conception of the good is intimately tied to his or her membership in a culture since the context of individual choice is the range of options passed down to every person within that culture. Culture is vital as a “context of choice.”<sup>15</sup>



outside the group (from those who see such women in terms of ethnicity, nationality, religion, etc.) and from within the group (from men who view women as inferior and subordinate).<sup>18</sup> This distinction further marginalises women by locking them into specific social roles and failing to recognise that women may wish to improve their rights and defend their culture.<sup>19</sup> Women possess multiple and intersecting identities. For instance, a Maghrebian or Muslim woman is solely neither Maghrebian or Muslim, nor female. She is clearly both. The existence of these multiple discriminations intersect and reinforce one another with cumulative adverse consequences for the full enjoyment of human rights in general and women's rights in particular.

The dilemma between individual rights and group rights is not a binary situation but instead possesses commonalities. The role of the individual in the reproduction and development of his or her culture becomes important when the individual finds existing traditions unacceptable or insufficient, either upon comparison with other cultural practices or because new conditions appear requiring significant changes in the existing cultural traditions of the community.

The reality, however, is that although both minority men and women experience discrimination, it is women who most suffer multiple discriminations.<sup>16</sup> Women who are members of a minority are discriminated against on two or more grounds: they are targeted because they are women and because of their identification with the group.<sup>17</sup> Discrimination emanates from

Under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), state parties condemn discrimination against women and undertake to eliminate it by all appropriate means. However, the text does not differentiate between women in different situations. There has been no separate reference to the discrimination incurred by a minority distinct from that faced by all women. By essentialising all women in a homogenous category, other factors such as sexual orientation, economic status, race, religion, culture, and ethnicity are ignored. Guatemalan indigenous women, for instance, wear their traditional dress as part of their spiritual practices as well as to assert their social and ethnic identity. However, by wearing their traditional dress in public places, they experience *de facto* discrimination and attitudes of rejection from the majority

(and predominantly white) population.

Currently, minority women's dress codes in the West have appeared to be a major source of discourse. At stake are contestations over women's individual autonomy and control of minority groups through "their" women, and claims by the government that it is saving or protecting women from their own community,<sup>20</sup> which Gayatri Chakravorty Spivak has cynically put as white men saving brown women from brown men.<sup>21</sup>

In the post-9/11 environment, there exists a claim that banning minority

stereotypes of Muslim men as overbearing and oppressive.<sup>23</sup> To quote Abu-Lughod, "Projects of saving other women depend on and reinforce a sense of superiority by Westerners, a form of arrogance that needs to be challenged....We have become politicised in race and class, but not culture."<sup>24</sup> By constructing "Muslims" as belonging to one homogeneous category and not as people who may, like the majority, have different ideas about dress and in the manifestation of their identity, the issue of culture is further displaced, resulting into colonial assumptions about cultural differences between the West and "the Rest."<sup>25</sup>

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women's distinctive clothing, such as the Islamic headscarf, is a means of emancipation and thereby protecting the women's inherent dignity and fundamental freedoms. However, the wearing of the "veil" must not be confused with, or made to signify, lack of agency.<sup>22</sup> This protectionist, and conservative, assertion by the state reinforces stereotypes of Muslim women as oppressed and solidifies pejorative

By portraying Muslim women as lacking agency and control over their own lives, the context behind the headscarves has been ignored and has been viewed by these women as a symbol of oppression rather than as a tool of freedom and emancipation. The portrayal of Muslim women as victims of their culture is arguably based on cultural essentialism, thereby reinforcing stereotyped and racist representations of that culture and privileges the culture of the West.<sup>26</sup>

It should be noted that the *hijab*<sup>27</sup> or the other various forms of Islamic "veiling"<sup>28</sup> encompass multiple meanings that vary depending on their cultural, religious and historical contexts. Although it has been interpreted in the linear manner of being oppressive through the erasure of women's physical and sexual identity, as well as symbolic of women's subjugation in Islam, there exists no universal opinion on the function and meaning of the *hijab* or other veilings.<sup>29</sup> For example, some Maghrebin immigrant women in France

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see the veil in dual lenses. Others view it as “barriers to assimilation” while others contend the opposite with veiling as “vehicles of integration into dominant society.”<sup>30</sup> For others, it also represents honour while it has also proven empowering for other Muslim women in some countries. In Iran, veiling symbolised rejection of the Shah and Western imperialism. Still, for some, the veil is a way to reclaim ethnic identity while others view it as a means to negotiate between the community of their parents and the society where they are immersed.

The *hijab* is a strong, loud and provocative expression of individual religious choice within the context of a group. Oftentimes, women who wear them only wish for a public recognition of their collective identity instead of being “shamed” as outcasts and suffering the perpetuation of discriminatory attitudes towards them as Muslim women. The quest for a public recognition of collective identities is, in fact, an assertion for the equality of

respect. If a social difference is denied visibility and legitimacy in the polity, the members associated with the particular carry the burden of social stigmata, making them incapable of “appearing in public without shame.”<sup>31</sup>

Culture is not static but is rooted in history and is capable of reproducing and developing over time. A scholar once mentioned that there is a need to “unpack culture, determine who is claiming it and on whose behalf, and to ensure the participation of minority women, free from the restraints of men from either their own or the majority community.” Other states have already put this in practice as provided for in Article 17 of the African Protocol on Women’s Rights, which stipulates the participation of women in the determination of cultural practices. Cultural practices should not be accepted or rejected in a wholesale manner; rather individual practices should be assessed for their impact on human rights.

Since international law recognises minority rights as a value worth protecting, it is therefore necessary to ensure the survival and further development of the religious, cultural and social identity of such minorities in order to enrich the fabric of society as a whole.

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*Lyra Porras Garzon’s work and interests involve women’s rights, film and social development. She is currently based at Columbia University in New York, USA.*

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## Endnotes

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- 2 *Ibid.*, pp. 63-78.
- 3 Sigler, J. A. (1993). *Minority Rights: A Comparative Analysis*. Greenwood Press, p. 6.
- 4 *European Commission for Democracy through Law*. (1991). Proposal for a European Convention for the Protection of Minorities. *Council of Europe, CDL (91)7*.
- 5 Capotorti, F. (1979). Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. *UN Doc. E/CN.4/Sub.2/384 Rev. 1*, p. 96.
- 6 Little, D. "Tolerating Intolerance: Some Reflections on the Freedom of Religion and Human Rights." 1994-1995 Bartlett Lecture.
- 7 *The Mexico City Declaration on Cultural Policies states, inter alia, that: 1. Every culture represents a unique and irreplaceable body of values since each people's traditions and forms of expression are its most effective means of demonstrating its presence in the world.*
- 8 Eide, A.; Krause, C.; & Rosas, A. (Eds.). *Cultural Rights and Universal Rights—Economic, Social and Cultural Rights (A Textbook)*.
- 9 Little, D. "Tolerating Intolerance: Some Reflections on the Freedom of Religion and Human Rights." 1994-1995 Bartlett Lecture.
- 10 Galeotti, A.E. (November 1993). "Citizenship and Equality: The Place for Tolerance." *Political Theory*, 21(4): 585-605.
- 11 *Ibid.*
- 12 Akermark, A.S. Justifications of Minority Protection in International Law. p. 77.
- 13 Kymlicka, W. (1995). *Multicultural Citizenship*. pp. 80-92.
- 14 *Ibid.*, p. 83.
- 15 *Ibid.*, pp. 75-91, 121-130.
- 16 Banda, F. and Chinkin, C. (12 January 2005). *Gender, Minorities and Indigenous People*. New York: *Minority Rights Group & International Service for Human Rights, United Nations*.
- 17 *Ibid.*
- 18 *Ibid.*
- 19 *Ibid.*
- 20 *Ibid.*, MRG.
- 21 Spivak, G. "Can the Subaltern Speak?" In C. Nelson & L. Grossberg (Eds.) *Marxism and the Interpretation of Culture*, pp. 271-313.
- 22 Abu-Lughod, L. (September 2002). "Do Muslim Women Really Need Saving?" *American Anthropologist*, p. 784.
- 23 *Ibid.*, pp. 783-790.
- 24 *Ibid.*, p. 789.
- 25 Kapur, R. "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics." *Harvard Human Rights Journal*, 15:12.
- 26 *Ibid.*, p. 6.
- 27 Usually refers to the Islamic headscarf. Hijab is the term used by many Muslim women to describe their head cover that may or may not include covering their face except their eyes, and sometimes covering also one eye. The Arabic word hijab can be translated into veil or yashmak.
- 28 There exists various styles of Islamic code of dressing. Some women wear the burqa, others the hijab.
- 29 Kapur, R. "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics." *Harvard Human Rights Journal*, 15:12.
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