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Ref.: *Submission to provide inputs to a thematic report: freedom of religion or belief (FoRB) and sexual orientation and gender identity (SOGI) to be presented at the 53^d session of the UN Human Rights Council in June 2023.*

It is with great honor that UFU Moot Court Group, linked to the Study and Research Group in International Law (GEPDI/CNPq), affiliated to the 'Jacy de Assis Faculty of Law' of the Federal University of Uberlândia, Uberlândia/MG – Brazil, hereby, submit information regarding the issues concerning freedom of religion or belief and sexual orientation and gender identity, aiming at assisting the Commissioner on his report to the Human Rights Council 53rd Session.

It is our intention to provide input on two cases that discuss the right of religion vis-à-vis the right of non-discrimination in regard to sexual/gender orientation. We believe these cases can highlight (1) a few existing points of tension between the right to manifest one's freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity, and (2) some instances where freedom to gender/sexual orientation was restricted by religious manifestation, and the response of the international society to them. We will address them in two topics separately.

a) The Case of Pavez Pavez v. Chile before the Inter-American Court of Human Rights

The decision of the Case of Pavez Pavez v. Chile was delivered by the Inter-

American Court of Human Rights in February 4th 2022, condemning Chile for violating, among other procedural ones, “the rights to equality and non-discrimination, personal liberty, privacy and work, contained in Articles 1(1) and 24, 7(1), 11(2), and 26 of the American Convention [of Human Rights], in relation to Article 1(1) thereof, to the detriment of Sandra Pavez Pavez, due to the discriminatory treatment she suffered when she was removed from her position as a Catholic religion teacher, and assigned duties different from those she had, after her certificate of suitability to teach Catholic religion classes was revoked by the Vicariate of San Bernardo”.¹

Ms. Pavez Pavez, although holding a Professional Diploma as a “Teacher of Catholic Religion and Morals” issued by the *Universidad de Ciencias de la Educación*, was dismissed from teaching the subject of Catholic religion in a public educational establishment due to owing to her sexual orientation, as a member of the LGBTQIA+ community. Both the School and the Diocese of San Bernardo had received many anonymous phone calls regarding her private life, which were used as a basis for her dismissal.² Before being let go, she was told that, “in order to continue in her position, she [had to] undergo psychiatric treatment”³, and since she had turned “the spiritual and medical assistance” down, there was ‘no other way’ but to remove her from the position⁴.

While the domestic remedies did not support her claims of wrongful dismissal and discrimination⁵, the Inter-American Court decided otherwise. First, it found that the argument brought by the State of Chile in its defense that the schools are free to select/let go their teachers, thus, meaning they could “dispose” the instructors following a specific criterion that represents the religious community, could not have been based specifically on Ms. Pavez Pavez sexual orientation, as well as it should have provided her proper administrative/judicial review to challenge the certificate revocation.⁶

Particularly to sexual orientation, the Court recalled that both “sexual orientation and sexual identity are linked to the concept of freedom and the right of all human beings to self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own convictions, as well as the right to protection of privacy”.⁷ Moreover it said that the conduct of conditioning the maintenance of the position “upon her undergoing medical or psychiatric therapy [...] [was] totally

¹ IACtHR, *Case of Pavez Pavez v. Chile*. Judgment of February 4, 2022: Merits, Reparations and Costs. Series C, no. 449, para. 149, available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_449_ing.docx> (accessed on 14 Jan. 2023).

² *Ibid*, para. 23.

³ *Ibid*.

⁴ *Ibid*, para. 25.

⁵ *Ibid*, paras. 30-32.

⁶ *Ibid*. paras. 42, 100, 113 and 134.

⁷ *Ibid*, paras. 134, 58 and 63.

unacceptable”.⁸ And by not addressing this issue properly, the State connived to the wrongdoing.⁹

Besides, even though she was reassigned to another position, no “consideration of the effects that this measure would have on Sandra Pavez Pavez's personal life or on her teaching vocation” was made¹⁰, directly affecting her right privacy¹¹, her right to work¹² and her life project¹³. In view of this, the Court recalled that there “must exist a peaceful coexistence between the secular and the religious spheres”, never forcing one into the other¹⁴, meaning that in the case there was such a crossing, so that Ms. Pavez Pavez's rights were wrongfully affected.

Finally, deriving from such discussion, another interesting point regarding this case is related to the right of education, freedom of religion and religious education. Even though “religion is a protected category with respect to any differential treatment that may be discriminatory”¹⁵, and that “this right has an individual and a collective dimension, [which] also includes the right to religious education”¹⁶, the Court recalled that, although “one of the guarantees of religious freedom, namely, the right of parents [...] to have their children or wards receive the religious and moral education that is in accordance with their own convictions”¹⁷, education should not only “foster understanding, tolerance and friendship”¹⁸, but also be “directed toward justice, freedom, and peace”¹⁹.

Therefore, it seems that the Court's view was that of that parents could indeed choose where their children may study²⁰, but that the right to religion could not be used as an excuse to violate one's human rights as to force a change in a person's own life and personality under penalty of dismissal, especially due to the own meaning of the right to religion in regard to tolerance and justice. This would not mean coexistence, but the imposition of one right onto another, as previously stated.

And because of the above, the State of Chile was order to pay compensation to

⁸ Ibid, para. 135.

⁹ Ibid, para. 116.

¹⁰ Ibid, para. 144

¹¹ “*The effective realization of the right to private life is decisive for the possibility of exercising personal autonomy in relation to the future course of events that are relevant for an individual's quality of life. Furthermore, private life encompasses the way in which individuals see themselves and how they decide to project themselves towards others, this being an essential condition for the free development of the personality*”. Ibid, para. 58.

¹² Ibid, para. 89 and 140

¹³ Ibid, para. 70

¹⁴ Ibid, para. 71

¹⁵ Ibid, para 74

¹⁶ Ibid, para. 75

¹⁷ Ibid, para. 97 (in relation to Article 19 of the American Convention)

¹⁸ Ibid, para. 78 (in relation to Article 13 of the Protocol of São Salvador)

¹⁹ Ibid, para. 72 (in relation to Article 3[n] of the OAS Charter)

²⁰ Ibid, para. 97

Ms. Pavez Pavez, both for material and moral damages, amounting to a total of US\$ 35.000,00 (thirty-five thousand US dollars).²¹ Besides, it was order to acknowledge its international responsibility²², publicize the judgment²³, provide for guarantees of administrative/judicial review²⁴, and of non-repetition in the form of a training plan for “the persons responsible for evaluating the suitability of teachers in public schools on the scope and content of the right to equality and non-discrimination, including the prohibition of discrimination based on sexual orientation”²⁵.

As a conclusion, we may say that the discussions had in this case are very important in regard to “clash” of the right to education and the right of non-discrimination based on sexual orientation and gender identity, since they point to the idea that the freedom of religion, although being a peremptory norm²⁶, is not to be considered an absolute right, meaning it must be read in light of other rights such as the right to privacy and the right to non-discrimination and equality, particularly when it comes to the protection of minority groups such as LGBTQIA+, which are entitled to a special protection due to their vulnerable situation.

b) The Case of Miriana Hebbadj v. France before the Human Rights Committee

Miriana Hebbadj, the author of the communication submitted to the Committee on March 3rd 2016, is a national of France. As a Muslim, she wears a niqab (a full-face veil) but, in an episode on November 21st of 2011, she was stopped for an identity check while wearing her niqab in Nantes, being prosecuted and convicted on March 26th 2012 of the minor offence of wearing an article of clothing intended to conceal the face in a public space. She was ordered by the Community Court in Nantes to pay a fine of €150 (one hundred and fifty Euro) – the maximum penalty for the offence in question, which was established by the Act No. 2010-1192 of 2010.²⁷

Miriana challenged, on the basis of article 18 of the Covenant of Civil and Political Rights (ICCPR)²⁸ the ban on concealing the face in public spaces, which deprives women

²¹ Ibid, para. 175, 193 and 198.

²² Ibid, para. 172.

²³ Ibid, para. 168.

²⁴ Ibid, para. 183.

²⁵ Ibid, para. 179.

²⁶ Ibid, para. 74 (in relation to Article 27[2] of the American Convention)

²⁷ Human Rights Committee, *Case of Miriana Hebbadj v. France* (communication No. 2807/2016), Doc. No. CCPR/C/123/D/2807/2016 adopted on 17 July 2018.

²⁸ Article 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,

the possibility to wear a full-face veil on religious beliefs. The Act, which prohibited the wearing in a public space of an article of clothing intended to conceal the face and established the legal basis for the infraction of which she was convicted, was also contrary to article 9 of the European Convention on Human Rights (ECHR)²⁹, which protects the right to manifest one's religion, and was discriminatory since it undermined pluralism by discriminating against a minority practice of the Muslim religion, since wearing the niqab or the burka amounts to wearing a garment that is customary for a segment of the Muslim faithful.

According to the Committee's General Comment No. 22 of 1993, the observance and practice of religion also includes customs such as the wearing of distinctive clothing or head coverings and also the freedom to manifest religion or belief exercised either individually or in community with others and in public or private. Wearing the niqab or the burka amounts to wearing a garment that is customary for a segment of the Muslim faithful, an act that is part of the practice of religion, and freedom to manifest a religion is guaranteed by article 18 of the ICCPR.

Hence, it was the Committee's conclusion that France interfered in the religious freedom of the minority of Muslim women who wear the full-face veil, being such Act and the actions perpetrated against Miriana also conflicting with her gender identity as a woman. Forcing women who wish to wear full-face veils to remove them in public spaces constitutes the imposition of a male/western dress code on women, and that presumptions relating to their attitudes towards gender inequality are based solely on prejudices held by some people about the way of life of certain groups that do not make up the one considered standard (such as male, white, European, Christian, patriarch, heterosexual, cisgender and anti-socialist, as decolonial human rights studies puts it).

No woman wearing a full-face veil had advocated inequality between men and women before the Committee, but this was indeed the case of Miriana. The argument was that the right of equality between men and women used to remove her head-covering could not be associated *per se* with any of the purposes set out in article 18(3),

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. (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.

²⁹ Article 9 - Freedom of thought, conscience and religion: 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.

which allows for the restriction of the right of religion to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, and was basing the French Act No. 2010-1192 of 2010

Furthermore, while the Act was supposed to apply without distinction to any persons who conceal their faces in public, the fact that it had the effect of indirectly discriminating against women who wear the full-face veil was to be noted. The numbers brought in the discussion of the case support it: there are 2,000 women who wear the full-face veil in France and they account for more than half of the persons subjected to checks under the Act. It thus demonstrates that women are disproportionately subjected to checks based on the Act in France.

Hence, the Committee further observed that the Act, despite being drafted in general terms, was primarily enforced against women wearing the full-face Islamic veil. The Committee then recalled that regulations that govern the clothing to be worn by women in public may involve a violation of a number of rights guaranteed by the ICCPR, such as article 26, of non-discrimination, since it was not based on reasonable and objective criteria.

In accordance with the Committee, restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The protection of the fundamental rights and freedoms of others requires identifying what specific fundamental rights are affected and the persons so affected. The exceptions set forth in article 18(3) are to be strictly interpreted, especially when considering that, in the case at hand, the Committee observed that the concept of “living together”, which was a very vague and abstract term, was not being affected by women wearing head-coverings to justify their removal/fines. This is because France has not identified any specific fundamental rights or freedoms of others that were being affected by the fact that some people present in the public space have their face covered, as per fully-veiled women.

As a final note, the Committee noted that the plain ban on the full-face veil introduced by the Act based on the assumption that the full-face veil is inherently discriminatory and that women who wear it are forced to do so is *per se* discriminatory, acknowledging that even if some women may be subject to family or social pressures to cover their heads/faces, the wearing of the full-face veil can be a choice or even a means of making a claim based on a religious belief. Hence, the ban, far from protecting fully veiled women, could have the opposite effect of confining them to the home, impeding their access to public services and exposing them to abuse and marginalization.

As a conclusion, we may say that the discussions had in this case are also very important in regard to the “clash” of the right to freedom from risk and the right of religion, because it can also affect the right of women to non-discrimination and private

life (relating to their gender identity). In this case, religion plays a central role to protect women/gender identity.

In light of the inputs provided, we hope to have helped the Independent Expert with enough information to ponder over the freedom of religion or belief and sexual orientation and gender identity, aiming at presenting a comprehensive report over the matter to the Human Rights Council.

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