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LAW JOURNAL

Vol 5, August 2018

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EDITORIAL

We are very pleased to inform the international community, particularly diplomatic missions, development partners, heads and members of the Judiciary, legislature, executive arm of governments, scholars and researchers of 'the birth' of the Novena University Law Journal (NULJ). The idea behind this publication is to address the innocuous absence of critical and detailed law reports that focus on the judgments of federal/ state high courts and customary courts of appeal in Nigeria and most Africa countries. These courts, although not the apex or supreme courts, are in the forefront of providing critical scholarly resources in the advancement of justice in the society. This is self-evident because the principles of law - Criminal Law, Environmental Law and Policy, Anti-corruption, Evidence, International Trade Law, Constitutional Law, good governance, terrorism, space and satellite communications, biotechnology and science regulation, etc., expressed in the judgments of these courts, shape the appellate decision making process of the various Supreme Courts. There is a consensus that judgments of these courts have contributed immensely to good governance. Being courts that are closer to the citizenry, they are the guarantors of the state institutions' effective functioning within their constitutionally mandated roles. Notwithstanding, in practice, the important decisions of these courts are not often reported except the few that go on appeal.

Novena University Law Journal (NULJ)'s novel and contemporary appeal is its commitment to report the recondite hallmark decisions of these courts from all over Africa. It is our editorial philosophy that we identify through a rigorous selection process and report the 'hallmark judicial research and reasoning' in the judgments of these courts in all aspects of law and policy. It is our hope that this rare platform of detailed reporting will draw attention to the important work being done in these courts by judges who have the calling, commitment and integrity to do justice.

It is an invaluable addition to legal and judicial literature and will continue to be a real tribute to the selfless work, effort and commitment of judges and lawyers who appear in these cases. It is against this backdrop that we feel compelled to reiterate our editorial philosophy that regardless of the political party in power, scholars must engage in meaningful discourse with a view to suggesting reforms to law and policy as it affects existing social, economic and political circumstances in Nigeria and the African continent. On our part, we will publish these scholarly contributions for the benefit of all citizens. This issue fits the balance forum for intellectual discourse. In it, we have articles that immediately remind us of contemporary events in Nigeria, the ECOWAS Sub region, African continent and the world. For instance, Professor Orubebe Bibobra Bello investigates the critical implications of President Donald Trump's 'America First' Policy and Nigeria's interest in the patenting of the human genome, insisting that when the international community agreed to collaborate on the Human Genome Project (HGP) three decades ago, the aim was to share the findings for the advancement of humankind. However, the United States has started allowing patent filings for partial gene sequences. A move Nigeria rightly believes has initiated an avoidable controversy in international relations. The US attempt to allow private property rights over the huge discoveries accruable by reason of global efforts on a material that rightly belongs to all humans appears invidious. This issue is thorny and critical in all ramifications. In reality, the consequences have the potential of generating feelings of unfairness and injustice in both countries relations, particularly on perceptions of business innovation and transfer of knowledge in science. This article attempts a conceptual legal and socio-economic analysis of Nigeria's fears over the United States' approach on the patenting of the human genome. It also makes suggestions that could reward or encourage innovation and deepen global efforts aimed at promoting this common human heritage exclusively for peaceful purposes. He however

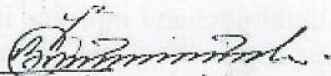
made passionate case for international legal reform. On his part, Chukwu, Johnkennedy Obinna reviewed land and property taxation on real property and infrastructural development in Lagos and Rivers States, Nigeria. Mahmud kayode Adebayo espoused the underlining's of gender equality and access to education reviewing the factors inhibiting the Girl Child Education in Northern Nigeria. Dr. Erimma Gloria Orie investigated the legal perspective of the role of the Prosumer in Nigeria's energy sector. While Elvis Akele Mannie re - visited the subsidiarity principle and its dominant role in federal systems concluding that inclusion was the best way forward for multi ethnic Nigeria.

As expected, Ngozi J. Udombana evaluated the statutory requirements that could achieve effective implementation of the institutional and reporting requirements under the Freedom of Information Act 2011. On their parts, Adamu Idris Tanimu and Habilah Isah Barau discussed the overview of electoral offences in the light of the Electoral Act, 2010. Oluwabusayo Temitope Wuraola and Solomon O. Afolabi appraises Hijab Perceptions in Selected Countries: A Legal Analysis. S.M. Abdulmalik discussed the Legal Protection of Maternity Rights of Women under Nigerian Employment Law. Razaq Justice Adebimpe writes on the fluidity of Nigerian law on the Question of Proper Custody of Documents. Dr. Tumbo H Brodrick and Asoro Ejoro Gladys evaluates Greater Local Government Autonomy, critiquing the meaningless exercise of executive power and authority by Chairmen, and recommended the need for checks on corrupt practices. Dr. Ganiat Mobolaji Olatokun expounds on the implementation of convention on the elimination of all forms of discrimination against Women (CEDAW) by the Malaysian government concluding that the Nigerian government could draw some lessons. The trio of Rilwan F. Mahmoud, Abdulazeez, Hamza Okene and Wuraola, Oluwabusayo Temitope writes on An Examination of the Challenges of the Nigerian Telecommunication Sector's Legal Regime and Joshua Ajasin unravels the negative impact of the Boko Haram Terrorism phenomenon on education in Northern Nigeria.

In keeping with the editorial philosophy of the Journal, we included in this volume the historical letter written by the former Governor of Delta State James Inanefe Ibori addressed to Late Chief Diepreye Solomon Peter Alamieyeseigha, former Governor of Bayelsa State. It is the thinking of the Editorial Board that this 'letter' contains issues that transcend the field of law, sociology, human relations, governance perceptions amidst others and could make an interesting read for those who care.

Publishing in Africa is fraught with a lot of challenges. A lot is therefore owed to our intellectual Honourable team of judges. Notably, we are grateful to the provost and Dean of the Novena University College of law, external assessors our respected Editorial Board of Advisers. Also deserving our sincere gratitude are the Vice Chancellor, Deputy Vice Chancellor, Registrar of Novena University, the editorial board and article contributors.

We hope that the readers and users of this Journal be they Judges, lawyers, students, scholars, researchers, and policy makers will by this publication expand the scope and coverage of future editions by sending to us well researched Judgments from their jurisdictions that will form the critical bases for the continuous publication of this high impact law and policy Journal.



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Hijab Perceptions in Selected Countries: a Legal Analysis

by

Oluwabusayo Temitope Wuraola*

Solomon O. Afolabi**

Abstract

The issue of wearing hijab by Muslim women has become notorious and politically debated in several countries in recent times. While some see it as a symbol of religious identity and modesty, others see it as a symbol of oppression and torture. However, there are controversies as to its acceptability in schools, work and other public places. Several countries have taken actions to ban the use of Muslim veils and headscarves in public through their constitutions. This has resulted to the expulsion and voluntary exit of some Muslim students from school and women from work. The ban is, however, assumed to be a violation of the rights to freedom of religion of Muslim women which has also led to the violation of the rights to education of these women. Some of the victims of the ban have sought redress in the courts of law and have had a couple of 'controversial' judgments. This paper will focus on the trends of banning the hijab in France, Turkey, the United States of America, Tunisia and Switzerland. The right to freedom of religion, the right to education and the constitutional validity of the prohibition of the hijab are considered alongside a couple of court decisions.

1. Introduction

The hijab is a veil used by Muslim women to cover the natural contours of their body in their associations with men to prevent the sexual imagination that comes with the lustful feasting of eyes of men on their beauty. The act of using the hijab is a way of exhibiting morality, modesty, preservation of human dignity and honour. In the practice of Muslims, the Islamic dress for women takes three main forms, namely (i) the head scarf (khimar), a veil covering the hair and neck or long enough to cover the bosom; (ii) a loose robe, the head-to-toe garment that obscures women's bodily features and hides all parts of the body except hands and eyes called jilbab and (iii) the full

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veil (an all-enveloping garment) covering the whole of the body (burka) and including the face (niqab/purdah).¹

It should be noted that not all Muslim women wear the hijab. Some wear the full veil which covers the hair, neck and long enough to cover the bosom, some use veils that cover their head only while some do not even wear anything at all like the non-Muslims. From an International human rights perspective, it has been accepted that "the wearing of distinctive clothing or head-coverings" constitutes part of the observance and practice of religion or belief.² Dr Ali Jumah, Mufti of Egypt also stated in 2004 that:

A Muslim woman is obliged to wear hijab as soon as she reaches puberty...Hijab is known to be essential and necessary in religion: it is not merely a symbol that distinguishes Muslims from non-Muslims. It is an obligation that forms part and parcel of the Islamic religion³

Muslim women view the hijab as part of their religious identity and claim to wear it voluntarily as a personal choice. For instance in Europe, most of the Muslim women that wear the hijab are college educated women and others are successful professionals who see the veil as part of their identity and feel uncomfortable without it.⁴

Westerners on the other hand see the hijab as a form of oppression and imprisonment. Theresa Perkins, a Boston scholar, gave three arguments the Westerners rely on against the hijab. The first is that women wear the hijab because they are forced to do so. Secondly, permitting women to wear the veil is a threat to the state. Thirdly, permitting some women to wear the veil will pressure others to do the same.⁵ Some other scholars in Western countries argue that those who wear the hijab are fundamentalists who take it to the extreme and thus influence other women who do not wish to veil themselves.

¹ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

² M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

³ Ali Jumah 'Hijab: Religious Symbol or Obligation?' <http://www.islamonline/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/Fatwa/FatwaE&cid=1119503547808> (accessed 03-02-2018).

⁴ P Theresa "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo" <<http://www.bu.edu/.../international/volume30n2/documents>> (accessed 06-01-2018).

⁵ P Theresa "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo" <<http://www.bu.edu/.../international/volume30n2/documents>> (accessed 06-01-2018).

However, on this note, some countries like France and Turkey have placed a constitutional ban on Muslim women from wearing the hijab to schools, work and some other public places in their respective countries. They see the hijab as a religious practice which contradicts the principle of secularism of their countries. As a result of this, some Muslim women have been expelled from schools for refusing to remove their veils; some relieved of their jobs and others harassed in public places.

The ban has resulted to the intersection of a number of international human rights, especially, the right to freedom of religion and the right to freedom of education. A couple of victims of the ban have sought redress both in the national courts and the European Court of Human Rights. It is on this background that this paper sets to examine the existence of the hijab, its contradictory view across selected Western countries and national laws on the hijab. The study also investigates the ban placed on it by a couple of these countries, the effect of the ban in schools, at work and public places, the right to freedom of religion and the decisions by national courts and the European Court of Human Right on hijab proceedings.

2. Conceptualisation of Terms

Religion: For the purpose of this study, religion means a set of strongly held beliefs in the existence of a divine being and the practices, way of life and manifestations relating to the dictates of the divine.

Proselytism: This means the act of inducing or persuading people either by direct or indirect means to convert to a particular belief or religion by requiring them to behave in a particular way in which the religion demands.

Secularism: For the purpose of this study, secularism is the strict separation of the state from religious institutions and the equality of different religions before the law.

3. The Basis of the Hijab

The Quran is the central religious text of Islam which Muslims believe to be a revelation from God. The existence of the hijab cannot be traced without reference to the Quran. The Quran on the hijab practice says:

Tell the believing women to lower their gaze, and protect their private parts and not to show off their adornment except only that which is apparent, and to draw their veils all over juyubihinna (i.e.

their bodies, faces, necks and bosoms, etc.) and not to reveal their adornment except to their husbands, their fathers, their husbands fathers, their sons, their husbands sons, their brothers or their brothers sons, or their sisters sons, or their women, or the female slaves whom their right hand possess, or old male servants who lack vigour, or small children who have no sense of the shape of sex.⁶

Furthermore, it says:

O Prophet! Tell your wives and your daughters and the women of the believers to draw their cloaks (veils) all over their bodies (i.e. screen themselves completely except the eyes or one eye to see the way). That will be better, that they should be known (as free respectable women) so as not to be annoyed⁷

From these verses of the Quran, it is deduced that Muslim women are expected to cover their bodies with the veil and not reveal their adornment to those not mentioned in the Quran. The Muslim women were further warned in the second verse about covering themselves with the veil to command respect in the society. This implies that the hijab is a modest dress worn to avoid being sexually suggestive.

Islamic jurists have stipulated a number of conditions for the hijab to be acceptable in the Islamic sense.⁸ These conditions are that one's clothing must cover the entire body in a way that the shape of the body is not apparent and the material must not be so thin that one can see through it. Clothing should not resemble that which is specific to men nor the disbelievers.⁹ It should not be attractive to men, nor should women be perfumed in public and the main aim of hijab is to stop men from committing sins such as fornication and adultery.¹⁰ It is assumed that wearing the hijab makes men deal with women on a mental level as equals, rather than sexual objects. The hijab, the headscarf tied around the neck and bosom is the most common, and it is now common practice to wear the hijab voluntarily by women without being compelled to do so by parents.

⁶ Quran 24:31

⁷ Quran 33:59

⁸ H Shaikh "Attractive Hijabs and Shariah" <<http://www.islam21c.com/islamic-law/2606-attractive-hijabs-a-sharia/>> (accessed 04-01-2018).

⁹ H Shaikh "Attractive Hijabs and Shariah" <<http://www.islam21c.com/islamic-law/2606-attractive-hijabs-a-sharia/>> (accessed 04-01-2018).

¹⁰ H Shaikh "Attractive Hijabs and Shariah" <<http://www.islam21c.com/islamic-law/2606-attractive-hijabs-a-sharia/>> (accessed 04-01-2018).

4.0 Human Rights and the Right to Freedom of Religion

Human rights are basic rights and freedoms based on core principles like dignity, equality and respect; they inspired a range of international and regional human rights treaties¹¹ that everyone is entitled to regardless of ethnicity, nationality, race, sex, religion or other status. These rights include: right to life, liberty; freedom of expression, culture, the right to practice religion, the right to food, and the right to work and receive an education.¹²

The Convention for the Protection of Human Rights and Fundamental Freedoms formed in 1950 a major human right convention on the right to freedom of religion. Each contracting Member State conforms to the convention's articles. However, the Convention and other human rights treaties like the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights (UDHR) documents recognize the right to freedom of religion as a fundamental right. Article 9(1) of the European Convention on Human Rights protects the right to freedom of thought, conscience and religion or belief and freedom, either alone or in the community with others and in public or private, to manifest that religion in worship or practice, subject to limitations.¹³ Article 9(2) of this instrument states that no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.¹⁴

The above two subsections encapsulate the scope of freedom of religion of citizens in European countries such as Turkey, France and Switzerland. This proposes that the citizens are free to "practice" their religion but this freedom is limited to public safety, public order and the protection of the rights and freedoms of others. This simply means that the religious practices must not contradict the maintenance of public safety, public order and the protection of the rights and freedoms of others. As a result of this and

¹¹ "EHRC- What are Human Rights" <<http://www.equalityhumanrights.com>> (accessed 24-01-2018)

¹² "Human Rights Basics" <<http://www.amnestyusa.org/research/humanrightsbasics.com>> (accessed 23-01-2018).

¹³ "The European Convention on Human Rights – Council of Europe" <http://www.echr.coe.int/documents/convention-eng.pdf> (accessed 14-01-2018).

¹⁴ "The European Convention on Human Rights – Council of Europe" <http://www.echr.coe.int/documents/convention-eng.pdf> (accessed 14-01-2018).

the principle of secularism in most European countries, the ban on wearing hijab was placed in these countries.

Article 18(1) of the International Covenant on Civil and Political Rights also states that 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.¹⁵ Article 18(2) of this document states that no one shall be subject to coercion which would impair his freedom to have or to adopt religion or belief of his choice.¹⁶ Further, Article 18(3) states that to manifest one's religion may be subject only to such limitations as are prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms.¹⁷ In addition, Article 18(4) states that there should be respect to liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹⁸ On the other hand, Article 18 of the Universal Declaration of Human Rights states that everyone has the right to freedom of conscience and religion, the right to change and the right to manifest religion.¹⁹

It is pertinent to note that the Constitution of the United States of America and the Australian Constitution do not have restrictions to the practice of religion. Section 116 of the Commonwealth Constitution forbids the Commonwealth Parliament from passing a law establishing a religion, imposing a religious observance, or prohibiting the free exercise of religion, and forbids a religious test from being required as a qualification for office in the Commonwealth.²⁰ The First and Fourteenth Amendments of the U.S.

¹⁵ "The United Nations International Covenant on Civil and Political Rights"
<<http://www.hrweb.org/legal/cpr.html>> (accessed 14-01-2018).

¹⁶ "The United Nations International Covenant on Civil and Political Rights"
<<http://www.hrweb.org/legal/cpr.html>> (accessed 14-01-2018).

¹⁷ "The United Nations International Covenant on Civil and Political Rights"
<<http://www.hrweb.org/legal/cpr.html>> (accessed 14-01-2018).

¹⁸ "The United Nations International Covenant on Civil and Political Rights"
<<http://www.hrweb.org/legal/cpr.html>> (accessed 14-01-2018).

¹⁹ "The Universal Declaration on Human Rights"
<<http://www.un.org/en/documents/udhr/index.shtml>> (accessed 14-01-2018).

²⁰ G Anthony "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?"
<<http://www.forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf>> (accessed 06-02-2018).

Constitution also bars federal and state governments from making laws or rules that specifically prohibit women from practicing hijab.

It is observed that the controversy on the right to freedom of religion and the right to the use of veils by Muslim women varies from country to country. Italy has banned both the burka and the niqab under its counter-terrorism laws since 1970. Canada prohibits the wearing of veils during citizenship ceremonies.²¹ The United States, Ireland, Spain, Italy, Netherlands, Austria, Sweden and Denmark and some other countries don't have restrictions on the hijab in public schools. Some European states, under the cover of secularism and maintenance of public order, banned the religious practice of wearing the hijab by Muslim women. This, however, has led to the violations of the right to freedom of religion and also the rights to education of Muslim women in those states. In Judge Tulken's opinion, "it is ironic that young women should be deprived of that education on account of the headscarf"²² A couple of women who have had their rights violated in schools and at work have sought redress in the national courts and the international organizations.

4.1 European Court of Human Rights

The European Court of Human Rights is a body with jurisdiction over all matters that involve the interpretation and application of the convention and the protocols by nations. Individuals, as well as groups of individuals and non-governmental organizations have standing to bring complaints before the court if they have been injured by a member state's action.²³

5.0 The Hijab in Selected Countries

France

The identity of France is associated with the principle of secularism, also known as laicite. This principle involves two basic propositions: the first is the strict separation of the state from religious institutions; the second is that

²¹ "Turkey Lifts Headscarf ban in State Institutions" <<http://www.bbc.co.uk/news/world-europe-24454535>> (accessed 12-02-2018).

²² Leyla v Sahin (App No. 44774/98) See also Manisuli S, "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

²³ "Secularism and Freedom of Religion: The Approach of the European Court of Human Rights" <<http://www.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite>> (accessed 14-01-2018).

the people of different religions and beliefs are equal before the law.²⁴ It prevents religious group's interference with the affairs of state and state's interference with religious affairs.²⁵ The right of individuals to freedom of religion is also always balanced by the right to be free from religion.²⁶

The first confrontation over the hijab took place in Parisian suburb of Creil in October 1989²⁷ where the principal of a majority-Muslim middle school suspended three girls for refusing to remove headscarves in the classroom.²⁸ Within a week of the incident, headscarves dominated the national press while public response revealed a deep divide in French society.²⁹ The Minister for National Education requested an advisory opinion on the legality of the school's conduct from the Council of State (Conseil d'Etat).³⁰ However, in November 1989, the Conseil d'Etat, France's highest administrative court, after addressing the propriety of the principal's actions, ruled that wearing religious garb in schools was permissible, as long as it was not so "ostentatious" as to "constitute an act of intimidation, provocation, proselytizing, or propaganda..."³¹ In addition, no religious symbols that disrupt academic environment or threaten the dignity and freedom of other students should be allowed.³² The Council of the State later ruled that a ban would only be justified in extreme cases³³ where the headscarves are displayed in a proselytizing manner and also disrupt schools.

²⁴ "What is Secularism" National Secular Society <<http://www.nationalsecularsociety.com>> (accessed 26-01-2018).

²⁵ "Secularism – A failed Idea" <<http://www.qatarliving.com/mode/14048601>> (accessed 26-01-2014).

²⁶ "Secularism – The Secular Society" <<http://www.secular.ie/what-issecularism>> (accessed 27-01-2014).

²⁷ T B Elisa "The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society" (2004)39 Tex Intl Law Journal 581.

²⁸ Elisa T B "The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society" (2004)39 Tex Intl Law Journal 581.

²⁹ T B Elisa "The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society" (2004)39 Tex Intl Law Journal 581.

³⁰ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

³¹ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

³² M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

³³ "Opinion of the Conseil d'etat. No. 346.893, session of November 1989" <http://www.conseil-etat.fr/ce/rappor/index_ra_cg03_01.stml> (accessed 06-02-2014).

France adopted highly controversial legislation to regulate the wearing of the hijab in public about a decade ago. In 2003, the French President, Jacques Chirac, appointed a commission³⁴ charged to identify ways to reinforce the principle of secularism (*laïcité*). The Commission made a recommendation and one of the justifications for the recommendation of the Commission was the perception that Muslim girls were being coerced by families and communities to wear headscarves against their will, which in turn aggravated religious polarization and sexual discrimination.³⁵ The Commission stated that:

Pressures exert themselves on young girls, forcing them to wear religious symbols. The familial and social environment sometimes imposes on them a choice that is not theirs. The Republic cannot remain deaf to the cries of distress from these young women³⁶

This claim was not supported with concrete evidence and research. However, the commission concluded that the maintenance of public order was crucial.

Following the Commission's recommendations in 2004, France adopted legislation which amended its education code to prohibit the wearing of attire or articles that are explicit outward expressions of religious affiliation in schools.³⁷ The wearing of all outward forms of religious symbols or clothing in public elementary schools, junior high schools and high schools which conspicuously evince a religious affiliation were banned.³⁸ The legislation was justified in the name of maintaining public order and the secular state.³⁹ Although some scholars believe that the legislation was targeted at Islam and the hijab by its terms it prohibited all types of external

³⁴ The Stasi Commission named after its chair, Mr Bernard Stasi.

³⁵ G T Jeremy "Religious Freedom and Laicite: a Comparison of the United States and France" <<http://www.lawreview.byu.edu/archives/2004/5GUN-FIN2.pdf>> (accessed 27-01-2018).

³⁶ G Anthony "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?" <<http://www.forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf>> (accessed 06-02-2018).

³⁷ Elizabeth K D "Veiled Meaning: Tolerance and Prohibition of the Hijab in the United States and France" (2012) <www.fed-soc.org/publications> (accessed 19-01-2018).

³⁸ G Anthony "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?" <<http://www.forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf>> (accessed 06-02-2014).

³⁹ Elizabeth K.D., "Veiled Meaning: Tolerance and Prohibition of the Hijab in the United States and France" (2012) <www.fed-soc.org/publications> (accessed 19-01-2018).

displays of religious insignia and attire in public schools.⁴⁰ The law was not clear about how the practice of wearing the hijab by Muslim women affected public order in France.

The Effect of the Ban

Many girls who refused to remove their hijabs were expelled from schools. In France, in October 2004, two girls aged 12 and 13 in Mulhouse in Eastern France were suspended from school for wearing traditional Muslim scarves to class.⁴¹ In the school year 2004-2005, of the 143 pupils who refused to conform to the law, 47 pupils were suspended by the decision of the disciplinary board and 96 were transferred to private education.⁴²

About a year after the ban, the Collective against Islamophobia in France (CCIF) group estimated that around 60 pupils were ejected from the state school system, 42 Muslims and 6 Sikh teenagers.⁴³ The most shocking evidence of how it has been enforced is that the majority of the pupils were expelled for simply wearing bandanas.⁴⁴ There were also other cases where veiled girls were denied the right to sit in an exam or to enroll in University; veiled mothers were also denied access to pick up their kids from school.⁴⁵ As a result of this law, some Muslim families were left with no choice but to remove girls from state educational system or to abandon their religious convictions in the education of their children.⁴⁶

⁴⁰ Elizabeth K.D., "Veiled Meaning: Tolerance and Prohibition of the Hijab in the United States and France" (2012) <www.fed-soc.org/publications> (accessed 19-01-2018).

⁴¹ "French Girls Expelled over Veils" <<http://www.news.bbc.co.uk/1/hi/world/europe/3761490.stm>> (accessed 05-02-2014).

⁴² M Senyonjo, 'The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases' <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2014).

⁴³ "French Schools Expel 48 over Headscarf Ban" <http://www.expartica.com/source/site_article.asp?subchannel_id=58&story_id=15996&name=French+Schools+expel+48+over+headscarf+ban> (accessed 27-02-2018).

⁴⁴ "French Hijab Ban: One Year On" <<http://www.redpepper.org.uk/French-Hiab-ban-one-year-on>> (accessed 27-01-2018).

⁴⁵ "France and the Veil- the darkside of the law" <<http://www.newstateman.com/world-affairs/.../france-and-veil---dark-side-law>> (accessed 27-01-2018).

⁴⁶ M Senyonjo, 'The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases' <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

Court Proceedings

Two years after, a couple of legal challenges cropped up at the European Court of Human Rights (ECHR) in Strasbourg and in Paris.⁴⁷ In 2008, a Paris court upheld the right of Kindergarten school to fire a Muslim employee who insisted on wearing hijab headscarf at work. The head of the nursery school refused her demands, noting the rules of the school mandate that employees remain "neutral in terms of philosophy, politics and faith"⁴⁸

In 2010, the 2004 law was reviewed by the ECHR to include all types of facial concealment in the case of *S.A.S vs France* (Application number 43835/11) on the 27th November, 2013 where a French woman known by the initials SAS who claimed that the ban violated her right to freedom of religion, freedom of expression, freedom of assembly and a prohibition against discrimination was heard by the European Court of Human Rights in Strasbourg.⁴⁹ The French government's position, on the other hand, was that the law does not specifically discriminate against Islamic veils but applied to all types of facial concealment and that such a law only aims to promote normal societal life.⁵⁰

Turkey

In Turkey, 99% of the population comprises of Muslims and Turkey's history is principally that of an Islamic people – their empires, architecture, arts and literature.⁵¹ This has not in any way affected Islamic practices in the country. One of the prominent features of Turkey's constitution is secularism; all religious activities are supervised by the government. Citizens are free to worship but proselytism is not permitted.⁵² Turkey's restrictions on wearing overly religious- oriented attire are rooted in the founding of the modern, secular Turkish State when the republic's founding father, Mustafa Kemal

⁴⁷ European Courts of Human Rights 1, 2001.

⁴⁸ "French Court Upholds Firing of Muslim Woman Over Headscarf" (Israel National News) <www.israelnationalnews.com> (accessed 11-02-2018).

⁴⁹ "European Court to Hear France Veil Case" <<http://www.presstv.com>> (accessed 27-01-2018)

⁵⁰ "2010 Law Banning Full Islamic Veil Challenged in Court" <<http://www.loc.gov-law-library-of-congress-news-and-events>> (accessed 27-01-2018).

⁵¹ "Religion and Islam in Turkey" <<http://www.mymerhaba.com/islam-in-turkey-118.html>> (accessed 26-01-2018).

⁵² "Religion and Islam in Turkey" <<http://www.mymerhaba.com/islam-in-turkey-118.html>> (accessed 26-01-2018).

Ataturk introduced a series of clothing regulations designed to keep religious symbolism out of the civil service.⁵³

In 1930, women were permitted to wear the hijab in places of worship and at religious ceremonies but were prohibited to do so in other public areas. In the case of *Bulut v Turkey* and also *Karaduma v Turkey* in 1993, the European Commission of Human Rights held inadmissible two applications by Turkish students who were refused certificates by their Universities because they wore *Khimar* in the photographs they submitted to be affixed to their certificates.⁵⁴

In 1960, both female students and women employees were banned from wearing the hijab in educational institutions. This ban was aggravated in 1997 when the Turkish Army compelled the government to implement the ban without exception.⁵⁵

The Effect of the Ban

The ban resulted in several women barred from the higher education in Turkey each year because of the headscarf ban.⁵⁶ Thousands of women were unable to graduate and were forced to leave the country to complete their studies. Some Muslim women have also been refused treatment in hospitals because of the headscarf. Women working in public institutions and organizations became subject to dress codes.

Court Proceedings

In 2001 and 2005, the European Court rejected two separate complaints relating to the prohibition of the hijab.⁵⁷ The first case was *Dahlab v Switzerland*⁵⁸ which involved a school teacher who was banned from teaching in primary school because she dressed in traditional, modest clothing

⁵³ "Turkey Lifts Headscarf ban in State Institutions" <<http://www.bbc.co.uk/news/world-europe-24454535>> (accessed 12-02-2018).

⁵⁴ *Bulut v Turkey* (Application No. 18783/91, 3 May 1993) and *Karaduma v Turkey* (Application No. 16278/90, 3 May 1993)

⁵⁵ "Turkey: Headscarf Ruling Denies Women Education and Career" Human Rights Watch, New York (Turkey November 2005) <www.hrw.org/english/docs/2005/11/6/turkey12038_txt.htm> (accessed 20-01-2018).

⁵⁶ "Turkey: Headscarf Ruling Denies Women Education and Career" Human Rights Watch, New York (Turkey November 2005) <www.hrw.org/english/docs/2005/11/6/turkey12038_txt.htm> (accessed 20-01-2018).

⁵⁷ "European Union Rights Court Backs Turkey's Hijab Ban" Islam Online New (Turkey, June 2004) <<http://www.islamonline.org/English/News/2004-06/29/article05.shtml>> (accessed 27-01-2018).

⁵⁸ *Dahlab v Switzerland* (2001) V EC HR 449

including a headscarf.⁵⁹ The court held that it 'appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'.⁶⁰

The second case, *Sahin v Turkey*⁶¹ involved a University student who was prohibited from study because she wished to wear a headscarf in her lectures and examinations.⁶² Sahin, a Turkish national, enrolled in the Faculty of Medicine at Istanbul University on 26 August 1997, after completing four years of study at Bursa University, during which time she regularly wore the Islamic headscarf. On 23 February 1998, the Vice Chancellor of Istanbul University issued a circular that students whose heads are covered should not be admitted to lectures, courses or tutorials.⁶³ Consequently, Miss Sahin was denied access to lecture rooms because she was wearing the headscarf. In May 1998, the Dean of the University issued her a warning for violating the rules on dress.⁶⁴ Sahin applied to the Istanbul Administrative court alleging that the circular lacked a statutory basis and that the Vice-Chancellor's office had no power to regulate students' dress in institutions of higher learning.⁶⁵ The Istanbul court held otherwise and stated that the University had the power to regulate students' dress to maintain order and dismissed her complaint. Her appeal was similarly dismissed.⁶⁶ In April 1999, she was suspended from the school for a semester because she violated the dress code and participated in a

⁵⁹ Carolyn E "The 'Islamic Scarf' in the European Court of Human Rights" Melbourne Journal of International Law <<http://www.highbeam.com/1956/article-1G1-151763056/Islamic-scarf-european-courts>> (accessed 30-01-2018).

⁶⁰ Carolyn E "The 'Islamic Scarf' in the European Court of Human Rights" Melbourne Journal of International Law <<http://www.highbeam.com/1956/article-1G1-151763056/Islamic-scarf-european-courts>> (accessed 30-01-2018) 58.

⁶¹ *Leyla Sahin v Turkey* Application No 44774/98 (Unreported, European Court of Human Rights, Grand Chamber, 10 November 2005)

⁶² Carolyn E "The 'Islamic Scarf' in the European Court of Human Rights" Melbourne Journal of International Law <<http://www.highbeam.com/1956/article-1G1-151763056/Islamic-scarf-european-courts>> (accessed 30-01-2018).

⁶³ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁶⁴ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁶⁵ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁶⁶ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

student demonstration against the new regulation. Sahin abandoned her studies at Istanbul University and enrolled in Vienna University.⁶⁷ She then lodged a complaint with the European Commission of Human Rights claiming that the University's regulations banning the hijab violated her rights under Articles 8 (private life), 9 (religion), 10 (expression) and 14 (non-discrimination) of the ECHR, and Article 2 of Protocol No. 1 (unjustified interference with the right to education).

In the light of the above the Grand Chamber (GC) of the European Court of Human Rights (ECHR) found in November, 2005 that a ban on the (student) Islamic headscarf in a Turkish State University interfered with the Student's right to manifest her religion under Article 9(1) of the ECHR but found the interference justified under Article 9(2) of the ECHR in *Leyla Sahin v. Turkey*.⁶⁸ Two major arguments were put forward in that case: secularism and equality.⁶⁹ The GC recalled the judgment of March, 1989 of the Turkish Constitutional Court which stated:

The principle (of secularism) prevented the state from manifesting a preference for a particular religion or belief; it thereby guided the state in its role of impartial arbiter and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movement. However, the GC concluded that there had been no violation of Article 9 (freedom of thought, conscience and religion) of the ECHR and that Turkey had a legitimate interest in maintaining secularism in its State Universities by protecting the 'rights and freedom of others' and 'protecting public order'.⁷⁰

On the issue of right to education of the applicant, the GC accepted that "the regulations on the basis of which the applicant was refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education". The first reason the GC gave was that the right to education is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its

⁶⁷ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

⁶⁸ *Sahin v Turkey* (2005) 41 EHRR 8 (Chamber). See also Manisuli S. p.660

⁶⁹ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

⁷⁰ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

very nature calls for regulation by the State, the second reason was that the right to education does not, in principle, exclude recourse to order to ensure compliance with its internal rules and the third was that the restriction was foreseeable to those concerned and pursued the legitimate aims of protecting the rights and freedoms of others and maintaining public order.

Judge Tulkens gave a dissenting judgment in the case of *Leyla Sahin v Turkey*.⁷¹ According to her, there was no evidence that Sahin's wearing of the scarf had, or would likely, cause disruption on the campus and there was no prove that the applicant had fundamentalist views to pressurize the pupils because in her evidence, she stated that she wore the headscarf on her own freewill. Judge Tulkens was also of the view that the judgment failed to provide any concrete example of the type of pressure concerned and that the applicant's personal interest in exercising the right of freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.⁷² Tulkens added that the ban should have been applied to the whole Turkish society, rather than in schools and government institutions. This might have been targeted at the denying the Muslim women right to education. According to an estimate, the result of the Sahin case has been that thousands of Turkish Islamic women have dropped out of the Turkish Universities.⁷³ Tulkens also felt that the GC did not weigh up the competing interests of the applicant.⁷⁴ The first was the damage sustained by her via depriving her any possibility of completing her studies in Turkey and the second was the benefit to be gained by Turkish society from prohibiting the applicant from wearing the headscarf on the University premises.⁷⁵

Theresa Perkins highlighted the ruling of the Turkish Constitutional Court in 2008 which was to the effect that the legislature's attempt to lift the

⁷¹ *Sahin v Turkey* (2005) 41 EHRR 8.

⁷² Paragraph 10 *Sahin v Turkey* (2005) 41 EHRR 8

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⁷⁴ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁷⁵ Paragraph 15 *Sahin v Turkey* (2005) 41 EHRR 8

ban was unconstitutional.⁷⁶ The Court based its ruling on five constructions of constitutional language and purpose⁷⁷:

1. Permitting women to wear the hijab undermines "the concept of public peace" and national solidarity.
2. The hijab contradicts respect for human rights.
3. The hijab undermines the "nationalism of Ataturk"⁷⁸
4. The hijab undermines the constitutional purposes expounded in the Preamble.
5. The democratic, secular government is defined by the rule of law.⁷⁹

On the issue of public order and unity, the Court focused on the oppression of women forced to wear the hijab and the power of hijab as a symbol that influences others.⁸⁰ The court presumed that permitting public veiling will cause conflicts between those who choose to veil and those who do not; it will cause conflicts between Muslims and non-Muslims and lead to tension and clashes.⁸¹

The court relied almost exclusively on the Foreign Minister's statement in Leyla Sahin's⁸² that the hijab is a symbol of female oppression.⁸³ It was further contended that religious clothing obstructs collaboration, cooperation, affiliation because those with differing beliefs will refuse to work

⁷⁶ T Perkins "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo"

<<http://www.bu.edu/.../international/volume30n2/documents>> (accessed 06-01-2018).

⁷⁷ T Perkins "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo"

<<http://www.bu.edu/.../international/volume30n2/documents>> (accessed 06-01-2018).

⁷⁸ The former President of Turkey

⁷⁹ The former President of Turkey

⁸⁰ June 5, 2008 Judgment E:2008/16 K:2008/116, Anayasa Mahkemesi (Constitutional Court) (Turk)

⁸¹ T Perkins "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo"

<<http://www.bu.edu/.../international/volume30n2/documents>> (accessed 06-01-2018).

⁸¹ T Perkins "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo"

<<http://www.bu.edu/.../international/volume30n2/documents>> (accessed 06-01-2018).

⁸² *Sahin v Turkey* (2005) 41 EHRR 8

⁸³ T Perkins "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo"

<<http://www.bu.edu/.../international/volume30n2/documents>> (accessed 06-01-2018).

together.⁸⁴ The court also held that the Principles of the Turkish Republic and the Constitution guarantee the individual right to choose whether to follow a particular religion, and that permitting the Islamic headscarf in educational institutions amounts to government endorsement of Islam because the educational institutions at issue are State Universities.⁸⁵

On the whole, it is rightly observed that the ECHR interpretation of the meaning and merits of the hijab is different from the general human right interpretation; the court supports fundamentalist secularism which assumes that religious manifestations should be kept within the realm of private areas, like private homes and the places of worship of the believing communities. However, the court has in a costly manner of sacrificing religious freedom and educational rights tried to impose its own conception of secularism. Thus, majority of people now believe wearing the hijab is contrary to the principle of secularism.

Switzerland

In 2001, hijab was an issue in Switzerland. A primary school teacher of a state school in a class of children (four to eight year olds) who had converted to Islam and had been wearing long, loose clothing and a cover over her hair to school, in order to observe a precept laid down in the Quran; it enjoined women to draw their veils over themselves in the presence of men and male adolescents. Sadly, she was prohibited from these garments in the performance of her educational duties by the Director General of Public Education after an attempt at mediation failed. She refused and challenged the prohibition in the Swiss courts and lost.

Court Proceedings

The above case was considered in 2001,⁸⁶ where the applicant, Dahlab, was a primary school teacher of a Swiss state school in a class of small children (four to eight year olds).⁸⁷ She converted to Islam and began wearing

⁸⁴ T Perkins "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo" <<http://www.bu.edu/.../international/volume30n2/documents>> (accessed 06-01-2018).

⁸⁵ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

⁸⁶ *Dahlab v Switzerland* (2001) V EC HR 449

⁸⁷ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

long, loose clothing and a cover over her hair (not her face) to school, "her intention being to observe a precept laid down in the Quran whereby women were enjoined to draw their veils over themselves in the presence of men and male adolescents."⁸⁸ She wore this for a long period of over four years (although some of that time was spent on maternity leave).⁸⁹ During that time, there were no complaints from her colleagues, her pupils or their parents.⁹⁰ When her students asked her why she covered her head, she said it was to keep her ears warm.⁹¹ She seemed to have been very sensitive to the idea that she should not proselytize so much that she used this excuse rather than identifying herself as Muslim to her students.⁹² She was prohibited from wearing these garments in the performance of her educational duties by the Director General of Public Education after an attempt at mediation failed. She refused and challenged the prohibition in the Swiss courts, where she lost.⁹³

This case arose in the ECHR as a jurisdictional matter.⁹⁴ It is noteworthy that despite the fact that Dahlab was limited from manifesting her religion, the Court agreed with Switzerland that the case was "manifestly ill-founded"⁹⁵ that it did not deserve to proceed to the merits phase for a full and proper consideration by the Court.⁹⁶ The Court was of the view that it was difficult to assess the impact and effect wearing of a headscarf may have on

⁸⁸ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁸⁹ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁹⁰ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁹¹ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁹² M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁹³ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁹⁴ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

⁹⁵ Article 35(3) of the European Court of Human Rights,

⁹⁶ M Senyonjo "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkley.edu/files/20...>> (accessed 03-02-2018).

the freedom of conscience and religion of very young children. The court also stressed that at the age of the pupils, they get easily influenced than older pupils thus the hijab wearing might have some proselytizing effect.

Tunisia

Tunisia's constitution propagates that there is a role for Islam in the state and the value of human rights generally. This, however, underscores its opposition to the hijab. To start with, the preamble of the constitution states that a "republican regime" is the "best guarantee for the respect of human rights... (and) equality among citizens" and that Tunisia guarantees "fundamental freedoms and human rights in their universality."⁹⁷ Article 5 of the Constitution⁹⁸ further states that the State "defends the free practice of religious beliefs provided it does not disturb public order."

The hijab ban in Tunisia has a long history.⁹⁹ In 1981, President Habib Bourguiba frequently referred to the hijab as an odious rag and prohibited women from wearing it in government offices.¹⁰⁰ President Z.A. Ben Ali, by referring to the hijab as an imported form of sectarian dress that failed to reflect Tunisia's cultural heritage, also prohibited women from wearing the hijab.¹⁰¹ It can be deduced that Ben Ali links the hijab to an extremist behaviour which should not be manifested in public places and, thus, believes that the hijab is worn by a particular ethnic group not considered part of Tunisia's cultural make-up. However, in 2006, he publicly demanded that Tunisia "must fight ethnic clothing" through a circular. After the promulgation of the Circular, police and authorities began to harass women wearing the hijab in public.¹⁰²

⁹⁷ Tunisian Constitution, 1955

⁹⁸ *ibid*

⁹⁹ T Perkins "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo"
<http://www.bu.edu/law/central/jd/organizations/journals/.../note_perkins.pdf>
(accessed 19-01-2018).

¹⁰⁰ Daniel W "Tunisia Veil Case Threatens "Odious Rag" Struggle"
<<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVnYog.7H.yI&refer=Europe>> (accessed 19-01-2018).

¹⁰¹ Daniel W "Tunisia Veil Case Threatens "Odious Rag" Struggle"
<<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVnYog.7H.yI&refer=Europe>> (accessed 19-01-2018).

¹⁰² T Perkins "Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo"
<http://www.bu.edu/law/central/jd/organizations/journals/.../note_perkins.pdf>
(accessed 19-01-2018)

Proceedings in Court

In 2007, Saeeda Adalah, a school teacher challenged the constitutionality of the hijab ban with the assistance of the prominent Human Rights Attorney Saida Akremi.¹⁰³ The Tunisian Administrative Court ruled that the ban was unconstitutional because it infringed on basic human rights including the freedom of believe.¹⁰⁴ The Tunisian government publicly decried the court's ruling and refused to enforce it on the grounds that it divides rather than unites¹⁰⁵ and it is a symbol of oppression forced on women. The rights of women were not considered in this context.

The United States of America

The U.S. Constitution represents liberty than equality. The Federal Government in the United States is more constrained, and its constitutional authority is more closely circumscribed.¹⁰⁶ Muslim women are a fast-growing segment of the United States' population that reflects the breadth of the country's racial, ethnic, and multicultural heritage and includes U.S. born Muslims of diverse ethnicities, immigrants from many countries and regions, and converts from various backgrounds.¹⁰⁷ Muslim women in the United States, have the right to freedom of religion. Many of them, although by no means at all, practice *hijab* in accordance with their religious beliefs; these women may wear a headscarf, also known as hijab or khimar, and loose-fitting clothing when they are in public and also in the presence of men who are not part of their immediate family.¹⁰⁸ They also have the right to be treated equally and the right not to be discriminated against or harassed

- ¹⁰³ Daniel W, "Tunisia Veil Case Threatens "Odious Rag" Struggle"
<<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVnYog.7H.yl&refer=Europe>> (accessed 19-01-2018).
- ¹⁰⁴ M Ahmad "Tunisia's Ban Unconstitutional" Turkish Weekly (Turkey, 11 October 2007)
<<http://www.worldbulletin.net/index.php?aType=haberArchive&ArticleID=11861>>
(accessed 19-01-2018).
- ¹⁰⁵ "CSID Email Bulletin" <<http://www.ikhwanweb.com/article.php.10=15280>> (accessed 24-01-2018).
- ¹⁰⁶ Elizabeth K.D., "Veiled Meaning: Tolerance and Prohibition of the Hijab in the United States and France" (2012) <<http://www.fed-soc.org/publications>> (accessed 19-01-2018).
- ¹⁰⁷ "Discrimination against Muslim Women" American Civil Liberties Union- Women's Right Project.<<http://www.aclu.org/womenrights@aclu.org>> (accessed 11-02-2018).
- ¹⁰⁸ "Discrimination against Muslim Women" American Civil Liberties Union- Women's Right Project.<<http://www.aclu.org/womenrights@aclu.org>> (accessed 11-02-2018).

because of their religion, their gender or perceptions about their nationality or ethnicity.¹⁰⁹

Laws Protecting “the Hijab” in the United States of America

- The First and Fourteenth Amendments of the U.S. Constitution bars federal and state governments from making laws or rules that specifically prohibit women from practicing hijab. However, in some circumstances, the Constitution allows natural rules that apply to everyone, such as a rule barring all head coverings, whether religious or not.
- The Fourteenth Amendment and numerous Federal Civil Rights laws bar federal and state officials and some private sectors from discriminating against women who practice hijab.
- The Religious Freedom Restoration Act (RFRA) provides additional protection at the Federal level by barring the Federal Government and its officials from restricting women’s ability to practice hijab (either specifically or through applicable rules), unless the government can demonstrate that its action was “least restrictive means” for achieving a “compelling governmental interest.” Although RFRA does not apply to state governments, many states have adopted their own “mini-RFRAs” or interpreted their State constitutions to provide the same heightened protections.
- The Religious Land Use and Institutionalised Persons Act (RLUIPA) bars government officials from restricting women’s ability to practice hijab when they are confined to any institution that receives Federal funding (such as State prisons) unless the government can demonstrate that its actions was the “least restrictive means” for achieving a “compelling governmental interest”
- One Federal civil rights law, Title VII of the Civil Rights Act of 1964, prohibits an employer from firing, refusing to hire, or disciplining a woman because of religious practices like hijab, unless the employer can show that it offered a “reasonable accommodation” or that it could not offer such an accommodation without incurring an “undue hardship”.¹¹⁰

¹⁰⁹ “Discrimination against Muslim Women” American Civil Liberties Union- Women’s Right Project. <<http://www.aclu.org/womenrights@aclu.org>> (accessed 11-02-2018).

¹¹⁰ “Discrimination against Muslim Women” American Civil Liberties Union- Women’s Right Project. <<http://www.aclu.org/womenrights@aclu.org>> (accessed 11-02-2018).

The Equal Employment Commission specifically states that refusing to hire someone because of a concern that customers or co-workers may be "uncomfortable" with hijab is illegal. Many states and municipalities have additional laws protecting employees from discrimination, threats and harassment.¹¹¹

Effects of the Laws against Religious Restrictions

However, contrary to the legal protections against the infringement of the right to freedom of religion of the Muslim women, some have been harassed in some states, fired from jobs, denied access to public places and otherwise discriminated against because they wear hijab; because of their visibility.¹¹² For example, Civil rights complaints files with one Muslim advocacy group rose from 366 in 2000 to 2,467, an increase of 674%. The same group reported that, in 2006, there were 154 cases of discrimination or harassments in which a Muslim woman's head-covering was identified as the factor that triggered the incident. The most common complaint in these cases was being prohibited from wearing a head-covering, which accounted for 44 incidents.

Court Proceedings

In 1947, the North American Supreme Court¹¹³ alluded at some length the history creating the context in which religious freedoms were protected by the First Amendment.¹¹⁴ The court stated that a large proportion of the settlers of America came from Europe to escape the bondage of laws which compelled them to support and attend government's religious establishments. In its interpretation of the free exercise of religion and anti-establishment provisions of the First amendment, the Supreme Court moved from a requirement that a law affecting religious practices be justified by a 'compelling governmental interest'¹¹⁵ to a more modest requirement that the

¹¹¹ "Discrimination against Muslim Women" American Civil Liberties Union- Women's Right Project. <<http://www.aclu.org/womenrights@aclu.org>> (accessed 11-02-2018).

¹¹² "Discrimination against Muslim Women" American Civil Liberties Union- Women's Right Project. <<http://www.aclu.org/womenrights@aclu.org>> (accessed 11-02-2018).

¹¹³ *Everson v Board of Education* (1947) 330 US 1,8-9

¹¹⁴ G Anthony "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?" <<http://www.forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf>> (accessed 06-02-2014).

¹¹⁵ *Sherbert v Verner* (1963) 374 US 398

law not be directed at specific religious practices, or ban the performance of acts solely because of their religious motivation.¹¹⁶ This simply means that the law should be general about religious practices and not be specific about a particular kind of cloth or jewelry.¹¹⁷

A couple of courts in the United States have been prepared to uphold legislation prohibiting public school teachers from wearing religious clothing in the classroom.¹¹⁸ The decision to suspend a Sikh teacher for wearing white dress and a turban was upheld¹¹⁹ as was a decision to dismiss a Muslim teacher for wearing a headscarf in the classroom.¹²⁰

On the basis of alleged discrimination against Title VII of the Civil Rights Act, 1964, the court held in the case of *Webb v City of Philadelphia*¹²¹ that the defendant was justified in insisting the plaintiff not wear hijab to work owing to the need for uniformity, cohesiveness, co-operation and esprit de corps among police.¹²² This allowed religious neutrality among police and avoided divisiveness.¹²³

Conclusion

The right to freedom of expression and the right to freedom of religion are key features of human rights and democratic societies. The European Convention and other International human rights laws did not single out any religion, and member states have the relative autonomy to incorporate the provisions of the Convention into their National laws. However, the ban of the hijab by

¹¹⁶ G Anthony "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?"
<<http://www.forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf>>
(accessed 06-02-2014).

¹¹⁷ *Goldberg v Weinberger Secretary of Defense*, (1986) 475 US 503

¹¹⁸ For example in Oregon, Pennsylvania and Nebraska. This was originally directed at preventing Catholic Nuns and Priests from teaching in public schools, reflecting anti-catholic sentiment, although they were typically facially neutral in terms of religion. See also Anthony G. "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?"
<<http://www.forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf>>
(accessed 06-02-2018).

¹¹⁹ *Cooper v Eugene School District 723* (1986) P.2d 298

¹²⁰ *United States v Board of Education for the School District of Philadelphia* (3d Cir, 1990)

¹²¹ *Webb v City of Philadelphia* (2007) WL 1866763, 1

¹²² G Anthony "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?"
<<http://www.forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf>>
(accessed 06-02-2018).

¹²³ *Webb v City of Philadelphia* (2007) WL 1866763, 1

Europeans is a form of violation of the right to freedom to manifest one's religion as contained in the Convention¹²⁴ and also the International Covenant on Civil and Political Rights (ICCPR)¹²⁵ but this violation is covered by article 9(2) of the Convention which states that the freedom to manifest one's religion shall be subject only to such limitations as may be 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.¹²⁶ The nature of secularism of these countries also serves as a shield to violate the right to freedom of religion of citizens.

The issue of proselytism was raised in *Dahlab v Switzerland*.¹²⁷ The court was of the view that wearing hijab by the teacher might influence the tender pupils' freedom of conscience and religion by luring them to practice Islam. It is pertinent to note that there was no evidence of any harmful influence of the hijab on the children the teacher taught. The teacher neither told the pupils she was a Muslim nor disclose the true reason why she was using the hijab to cover herself. This indicates that the teacher did not in any way try to convert the pupils into believing in Islam or Islamic practices. There had also been no disturbance of order at the school caused by her headscarf and no complaints from any child, parents or from other teachers about her behaviour at school as a result of the hijab.¹²⁸ Teachers should be entitled to exercise all human rights generally enjoyed by everyone.¹²⁹ Article 6 of the International Covenant on Economic, Social and Cultural Rights provides for the right to work in a general sense and the right not to be deprived of work unfairly.¹³⁰

Another issue raised was that of gender inequality created by a precept laid down in the Quran. Apparently, the court implied that Dahlab's religion discriminated against her on the basis of sex and, therefore, in the court's

¹²⁴ Article 9 (2) of the European Convention on Human Rights

¹²⁵ Article 18

¹²⁶ Article 9(2) of the European Convention on Human Rights

¹²⁷ *Dahlab v Switzerland* (2001) V EC HR 449

¹²⁸ Carolyn E "The 'Islamic Scarf' in the European Court of Human Rights" Melbourne Journal of International Law <<http://www.highbeam.com/1956/article-1G1-151763056/Islamic-scarf-european-courts>> (accessed 30-01-2018).

¹²⁹ "ILO/UNESCO Recommendation concerning the Status of Teachers adopted by the Special Governmental Conference on the Status of Teachers" <<http://www.ilo.org/public/english/dialogue/sector/techmeet/ceart/teache.pdf>> (accessed 16-02-2018).

¹³⁰ Article 6 of the International Covenant on Economic, Social and Cultural Rights, 1966

view, the State had a duty to eliminate this discrimination.¹³¹ In my opinion, men and women do not have same features; they are not equal. Muslim women wear the hijab to cover the natural contours of their body in their associations with men to prevent the sexual imagination that comes with the lustful feasting of eyes of men on their beauty. Men don't have natural contours and bosoms to cover. However, wearing the hijab by Muslim women cannot be seen as a form of gender inequality and if it is, then the inequality cannot be attributed to Islam but to the existence of human beings as man and woman. Judge Tulkens was also of the view that wearing an Islamic dress cannot be associated with discrimination against women.¹³²

However, on the perception that the hijab is imposed on women by a precept laid down in the Quran, it seems the Quran¹³³ directs that the hijab should be worn by "all believing women". The 'believing women', in this context, tends to be the Muslim women, while the unbelieving women are non-Muslims. In the words of Dr Ali Jumah, Mufti of Egypt, in 2004: 'A Muslim woman is obliged to wear hijab as soon as she reaches puberty...Hijab is known to be essential and necessary in religion; it is not merely a symbol that distinguishes Muslims from non-Muslims. It is an obligation that forms part and parcel of the Islamic religion.'¹³⁴

The hijab, in the above statement is seen as a symbol that distinguishes Muslims from Non-Muslims. If a "Muslim woman" refuses to wear the hijab, does it make her Non-Muslim? The Muslim women's religious obligation to wear the hijab cannot be freely chosen, it is compulsory for "believing women" and part of the religion. Any woman that believes in Islam as a religion must also abide by the precepts of the Quran.¹³⁵ Even though the Quran¹³⁶ says "there shall be no compulsion in Islam", which means there must not be coercion in matters of faith, "whoever accepts it does so by his

¹³¹ Manisuli S "The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases" <<http://www.politics-of-religious-freedom.berkeley.edu/files/20...>> (accessed 03-02-2018).

¹³² *Sahin v Turkey* (2005) 41 EHRR 8

¹³³ Surah 24:31

¹³⁴ Ali Jumah 'Hijab: Religious Symbol or Obligation?' <http://www.islamonline/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/Fatwa/FatwaE&cid=1119503547808> (accessed 03-02-2018).

¹³⁵ "Headgear in Muslim Lands: Beyond the Burqa" *The Economist* <<http://www.economist.com/node/16113081>> (accessed 04-01-2018).

¹³⁶ Sura 2:256

own choice”¹³⁷ Religious belief itself is a personal choice, whoever chooses to be a Muslim must be ready to abide by the precepts of the Quran.

It is also trite to mention that the ban on the hijab is a form of violation of the right to freedom of religion of Muslim women if the hijab is what really makes the women Muslims. It also indirectly violates their right to education. The ban should have resulted in other means of implementation than debarring a section of womankind from education. It is surprising to have the European Court of Human Right giving judgments not favourable to the human rights embedded in its articles. Each of the assertions of the ECHR judgments begs for clarification.

Apparently, it is the secularism of European States that led to the ban of hijab. All other reasons are secondary. Religion as a result of secularism is given little or no role in the society and the government has given its role separate from religion. Secular government developed in Europe by new scientific discoveries and industrial revolution which led a stronger and a richer Europe. It is however believed that Westerners who wear the hijab are only concerned about their economy; they see it as a sales mechanism used in advertising and an element of fashion or beauty.¹³⁸ For example, in college campuses, student groups host fashion shows featuring the veil as part of a stylish and modern ensemble.¹³⁹ Thus, the ban on the hijab may be seen as a way of preventing the redundancy in the market-based sector of the economy. The hijab makes women less concerned about what clothes, jewelries or shoes they wear. This could affect demand for these products, thus, become harmful to the economy of these countries. Moreover, there have always been clashes between the Islamic culture and Western culture on so many values. This ban placed on the hijab might be another angle of those clashes. Several Muslims rightly perceive the opposition to the hijab as a continuation of the long standing hostility for Islam and its values in the West.¹⁴⁰

¹³⁷ “Abulala.M. “Human Rights in Islam” 13 1976 in Heiner Beielefeldt(ed) “Muslim Voices in the Human Rights Debate” Human Rights Quarterly 17.4 (1995) 587-617
¹³⁸ T Perkins. “Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo”
http://www.bu.edu/law/central/jd/organizations/journals/.../note_perkins.pdf
 (accessed 19-01-2018).

¹³⁹ “Hijab Fashion Show 2010”, (2010) Word Press University College Dublin Islamic Society<<<http://hijabfashionshow.wordpress.com>>> (accessed 14-01-2018).

¹⁴⁰ A.A Oba “The Hijab in Educational Institutions and Human Rights: Perspectives from Nigeria and Beyond”<http://www.codesria.org/img/pdf/3-final_oba_new_hijab_2009_codesria_revised_plus_abstract> (accessed 03-01-2018).

The world should develop a culture of tolerance and acceptance of, and even respect for otherness in matters of religion.¹⁴¹ The effects of the ban placed on the hijab should be the first to be considered before the preservation of the secular nature of states. It is confusing that public disorder, which is one of the justifications for the ban placed on the hijab, is the resultant effect of the ban. To ensure a peaceful co-existence of people, the human rights of the people should be observed without limits.

¹⁴¹ AA Oba "The Hijab in Educational Institutions and Human Rights: Perspectives from Nigeria and Beyond" <http://www.codesria.org/img/pdf/3-_final_oba_new_hijab_2009_codesria_revised_plus_abstract> (accessed 03-01-2018).