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THE RIGHT OF MUSLIM WOMEN IN WESTERN COUNTRIES TO WEAR HIJAB: HOW REALISTIC AND EFFECTIVE.

By

Ibrahim Zakariyya Olanrewaju* and Abubakar Sheu Ahmad Tijani**

ABSTRACT

The issue of wearing Hijab by Muslim women has become notorious and politically debatable 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, 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.

1.1 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 honor.

In the practice of Muslims, the Islamic dresses for women are of three main forms. They are namely: (i) the headscarf (Khimar) veil covering the hair and neck or long enough to cover the bosom; (ii) loose robe, the head-to-bee garment that obscures women's bodily features and hides all parts of the body except hand and eyes called Jilbab, and (iii) the full veil (an all-enveloping garment) covering the whole of the body (Burka) and including the face veil (Niqab/Purdah).[1]

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[1] Manisuli Ssenyanjo '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 on 03 February 2014

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 covers 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 and parcel of the Islamic religion.[3]

Muslims 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. There as Perkins, a Boston scholar, gave three arguments the Westerners rely on against the Hijab. The first was 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 that take it to the extreme and thus influence other women who do not wish to veil themselves.

Accordingly, on the above note, some countries like France and Turkey have placed a constitutional ban on wearing the Hijab by Muslim women 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 are expelled from schools for refusing to remove their veils, some are relieved of their jobs and some are harassed in public places. This 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 sought redress both in the National Courts and the European Court of Human Rights.

This paper seeks to examine the existence of the Hijab, the contradictory view of the Hijab across selected Western countries, National laws on the Hijab and the ban placed on it by a couple of these countries, the effect of the ban in schools, at

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[2] Ibid

[3] Ali Junnah "Hijab: Religious Symbol or obligation?' <http://www.islamonline/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/Fatwa/FatwaE&cid=1119503547808>accessed on 03 February 2014.

[4] Theresa P, "Unveilling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo" >http://www.bu.edu/.../international/volume30n2/documents> accessed on 06 January 2014

[5] Ibid

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.

1.2 Conceptualization and Basis of the Hijab

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.

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.

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 holy Quran on the Hijab practice says:

> tell the believing women to lower their gaze, and protect their private parts and not to show their adornment except only that which is apparent, and no draw their veils all over Juyubihinna (i.e. bodies faces, necks and bosoms, etc.) and not to reveal their adornment except to their husbands, their father, their husbands fathers, their sons, their husband sons, their brothers or their brothers sons, or their sisters sons, or their women, or the female slaves whom their right hand passes, or old male servants who lack vigour, or small children who have no sense of the shape of sex[6]

It continues thus:

> 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 annoyed[7]

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 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,

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[6] Quran 24.31

[7] Quran 33:59

[8] Shaikh H, 'Attractive Hijabs and Shariah'http://www.islam21c.com/islamic-law/2606-attractive-hijabs-a-sharia/> accessed on 04 January 2014

[9] Ibid

nor should women be performed 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.

1.3 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-inspired a range of international and regional human rights treaties[11] 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. 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) document recognize the right to freedom of religion as a fundamental right.

i. **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]

ii. **Article 9(2) of the European Convention on Human Rights** 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]

These 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

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[10] Ibid

[11] "EHRC-What are Human Rights" http://www.quilityhumanrights.com> accessed on 24th January 2014

[12] "Human Rights Basis" http://www.amnestyusa.org/research/humanrightsbasics.com>accessed on 23rd January 2014

[13] 'The European Convention on Human Rights-Council of Europe' http://www.echr.coe.int/documents /convention-eng.pdf> accessed on 14 January 2014

[14] Ibid

result of this and the principle of secularism in most European countries, the ban on wearing Hijab was placed in these countries.

iii. **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]

iv. **Article 18(2) of the International Covenant on Civil and Political Rights** 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]

v. **Article 18(3) of the International Covenant on Civil and Political Rights** 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]

vi. **Article 18(4) of the International Covenant on Civil and Political Rights** 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]

vii. **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. 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 counterterrorism laws since 1970. Canada prohibits the wearing of veils during citizenship ceremonies.[21] The

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[15] 'The United Nations International Covenant on Civil and Political Right' http://www.hrweb.org/legal/cpr.html>accessed on 14 January 2014

[16] Ibid

[17] Ibid

[18] Ibid

[19] 'The United declaration on human Rights' http://www.un.org/en/documents/udhr/index.shtml> accessed on 14 January 2014

[20] Anthony G. "Religious Freedom and Section 116 of the Australian Constitution: Would be banning of the Hijab or Burqa Be Constitutionally Valid?" http://www.forumonpublicpolicy.com/vol2011.no2/archievevo2011.no2/gray.pdf> accessed on 06 February 2014

[21] 'Turkey Lifts Headscarf ban in State Institutions 'http://www.bbc.co.uk/news/world-europe-24454535> accessed on 12 February 2014

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 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 had course to bring complaints before the court whenever their rights is being breached by a member state's action.[23]

1.4 The Hijab in Selected Countries

i. France

The identity of France is associated with the principle of secularism, also known as laicize, this principle involves two basic propositions; the first is the strict separation of the state from religious institutions, the second is that 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 states 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 Corelli in October 1989[27] 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 division 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 (Conseild'Etat).[30] However in November 1989 the Conseild'Etat: France's highest administrative court after addressing the propriety of the principal's actions ruled that wearing religious garb in

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[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 on 03 February 2014

[23] 'Secularism and Freedom of Religion: The Approach of the European Court of Human Rights' http://www.lexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite> accessed on 14th January 2014.

[24] "What is Secularism" National Secular Society <http:www.nationalsecular society.com> accessed on 26th of January 2014

[25] 'Secularism-A failed Idea' http://www.qaterliving.com/mode/14048601> accessed on 26 January 2014

[26] 'Secularism-The Secular Society' http://www.secular.ie/what-issecularism>accessed on 27 January 2014

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

[28] 28 Ibid

[29] 29 Ibid

[30] 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-relisgious-freedom.berkley.edu/files/20...> accessed on 03 February 2014

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 cases[33] where the headscarves are displayed in a proselytizing manner and also disrupt schools.

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 commission charged to identify ways to reinforce the principle of secularism (calcite). The Commission[34] 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 families 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 women"[36]

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 in schools of attire or articles that are explicit outward expressions of religious affiliation[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 although by its terms it prohibited all types of external displays of religious insignia and attire in public schools.[40]. The law was not clear

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[31] 31 Ibid

[32] 32 ibid

[33] "Opinion of the Counseild'etat. No. 346.893, session of November 1989' <jtwy.copseiletat.fr/ce/rappor/index ra cg03 01.stml)> accessed on 06 February 2014

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

[35] Jeremy G.T. "Religious Freedom and Laicite: a Comparison of the United States and France" <http://www.lawreview.byu.edu.archives.2014/5GUN-FIN2pdf>accessed on 27th January) 2014

[36] 36 See Anthony G. "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?" <http:f!www.forumonpub1icpoilcvconi/vo120l1.no2!archivevol 2oll.no2/gray.pdf>accessd on 06 February 2014

[37] Elizabeth K.D., "Veiled Meaning: Tolerance and Prohibition of the Hijab in the United Sutes and France" (2012) <www.fed-soc.org/publications> accessed on 19 January 2014

[38] 38 Anthony G. "Religious Freedom and Section 116 of the Australian Constitution: Would a inning of the Hijab or Burqa Be Constitutionally Valid?" <http://www.forurnonpublicpoilcy.com/vo0iLPP2/archiVevo12011no.2/gray.pdf>accessed on 06 February 2014

[39] Elizabeth KD., "Veiled Meaning: Tolerance and Prohibition of the Hijab in the United States and France" (2012) <www.fed-soc .org/publications> accessed on 19 January 2014

[40] ibid

about how the practice of wearing the Hijab by Muslim women affected public order in France.

a. 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 Islam phobia in France (CCIF) group estimated that around 60 pupils were ejected from the state school system, 42 Muslims and 6 Sikh teenagers were expelled from schools.[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 at an exam or to enroll at 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 by reason of education of their children.[46]

b. Court Proceedings

Two years after a couple of legal challenges cropped up at the European Court of Human Rights (ECI-IR) 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 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

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[41] 'French Girls Expelled over Veils' http://www.news.bbc.co.uk/hi/world/europe/3761490.strn accessed on 05 February 2014

[42] 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-religion-freedom.berkley.edu files/20... accessed on 03 February 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 on 27th January 2014

[44] "French Hijab Ban: One year On" http://www.redpapper.org.uk/French-Hiab-ban-one-year-on> accessed on 27th January 2014

[45] "France and the Veil-the darkside of the law" http://www.newstateman.com/world-affairs/...france-and-veil---dark-side-law> accessed on 27th January 2014

[46] Manisuli S, 'The Islamic Veil and Freedom of Religion, the Rights of Education and Work: a Survey of Recent International and National Cases' http://www.politics-of-religious-freedom.berkley.edu/files/20...> accessed on 03 February 2014

[47] European Courts of Human Rights 1,2001

[48] "French Court Upholds Firing of Muslim Woman Over Headscarf" (Isreal, National News) www.israelnationalnews.com> accessed on 11//01/2014

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]

ii. Switzerland

In 2001, Hijab was an issue in Switzerland when a primary school teacher in a State school in class of small 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 whereby women were enjoined to draw their veils over themselves in the presence of men and male adolescents was prohibited from these garment 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 court and lost.

The above case was considered in 2001,[51] 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).[52]She converted to Islam and began wearing 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.[53] She wore this for a long period of over four years (although some of that time was spent on maternity leave).[54] During that time, there were no complaints from her colleagues, her pupils or their parents.[55] When her students asked her why she covered her head, she said it was to keep her ears warm.[56] 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.[57] 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.[58]

This case arose in the ECI-IR as a jurisdictional matter.[59] 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"[60] that it did not deserve to proceed to the merits phase for a proper consideration by the

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[49] "European Court to Hear France Veil Case" http://www.presstv.com> accessed on 27th January 2014

[50] "2010 Law Banning Full Islamic Veil Challenged in Court" http://www.loc.gov-law-library-of-congress-news and events> accessed on 27th January 2010.

[51] *Dahalab v Switzerland (2001)* V EC HR 449

[52] 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 on 03 February 2014

[53] Ibid

[54] Ibid

[55] Ibid

[56] Ibid

[57] Ibid

[58] Ibid

[59] Ibid

[60] See Article 35(3) of the European Court of Human Rights,

Court.[61] The Court was of the view that it is difficult to assess the impact and effect wearing of a headscarf may have on 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.

iii. Tunisia

Tunisia's constitution propagates that there is a role for Islam in the state and it propagates 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"[62] Article C of the Constitution[63] 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.[64] In 1981, President Habib Bourguiba frequently referred to the Hijab as an odious rag and prohibited women from wearing it in government offices.[65] 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.[66] It can be deduced that Ben Au links the Hijab to an extremist behavior 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.[67]

a. 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.[68] The Tunisian administrative court ruled that the ban was unconstitutional because it infringed on basic human rights including the freedom of believe.[69] The Tunisian government publicly decried the court's

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[61] 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-religous-freedom.berkley.edu/files/20...> accessed on 03 February 2014

[62] Tunisian Constitution, 1955

[63] Ibid

[64] Theresa P, '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>accesed on 19 January 2014

[65] Daniel W, 'Tunisia Veil Case Threatens "Odious Rag" Struggle' http://www.bloomberg.com/apps/news/?pid=newsarchive&sid=aVnYog.7H.yI&refer=Europe> accessed on 19 January 2014

[66] Ibid

[67] Theresa P, '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 on 19 January 2014

[68] Daniel W, 'Tunisia Veil Case Threatens "Odious Rag" Struggle' http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVnYog.7H.yI&refer=Europe> accessed on 19 January 2014

[69] Mohammad Ahmad 'Tunisia's Ban Unconstitutional' Turkish Weekly (Turkey, 11 October 2007) http://www.worldbulletin.net/index.php?aType=haberAchive&ArticleID=11861> accessed on 19 January 2014

ruling and refused to enforce it on the grounds that it divides rather than unites[70] and it is a symbol of oppression forced on women. The rights of women were not considered in this context.

iv. 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[71]

Muslim women are a fast-growing segment of the United States (U.S) population that reflects the breadth of this 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.[72]

Muslim women in the United States, have the right to freedom of religion. Many Muslim women, 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.[73] They also have the right to be treated equally and the right not to be discriminated against or harassed because of their religion, their gender or perceptions about their nationality or ethnicity.[74]

a. 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.

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[70] 'CSID Email Bulletin' http://www.ikhwanweb.com/article.php.10=15280> accessed on 24 January 2014

[71] Elizebeth K.D., "Veiled Meaning: Tolerance and Prohibition of the Hijab in the United States and France" (2012) http://www.fed-sec>.org/publication> accessed on 19 January 2014

[72] "Discrimination against Muslim Women" American Civil Liberties Union-Women's Right Project. http://www.aclu.org/womenrghts@aclu.org> accessed on 11/01/2014

[73] Ibid

[74] Ibid

- The Religious Land Use and Institutionalized Persons Act (RLUPA) 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".[75]

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."[76]

b. 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.[77] 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.

c. Court Proceedings

In 1947, the North American Supreme Court[78] alluded at some length the history creating the context in which religious freedoms were protected by the First Amendment)[79] 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[80] to a more modest requirement that the law not be directed at specific religious practices, or ban the performance of acts solely because of their religious

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[75] Ibid
[76] Ibid
[77] Ibid
[78] See ***Everson v Board of Education*** (1947) 330 US 1,8-9
[79] Anthony G. "Religious Freedom and Section 116 of the Australian Constitution: World banning of the Hijab or Bruqa Be Constitutionally Valid?" http://www.forumonpublicpoilcy.com/vol2011.no2/archivevo 2011.no2/gray.pdf> accessed on 06 February 2014
[80] ***Sherbert v Verner*** (1963) 374 US 398

motivation.[81] This simply means that the law should be general about religious practices and not be specific about a particular kind of cloth or jewelry.[82]

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.[83] The decision to suspend a Sikh teacher for wearing white dress and a turban was upheld[84] as was a decision to dismiss a Muslim teacher for wearing a headscarf in the classroom.[85]

Based on alleged discrimination against Title VII of the Civil Rights Act, 1964, the court held in the case of Webb v City of Philadelphia[86] that the defendant was justified in insisting the plaintiff not wear Hijab to work owing to the need for uniformity, cohesiveness, co-operation and espies de corps among police.[87] This allowed religious neutrality among police and avoided divisiveness.[88]

1.5 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 Hijab by the Europeans is a form of violation of the right to freedom to manifest one's religion as contained in the Convention[89] and also the International Covenant on Civil and Political Rights (ICCPR)[90] 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.[91] 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 Dahiab v Switzerland.[92] 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

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[81] Anthony G. "Religious Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?" http://www.forumonpublicpoilcy.com/vo12011.no2.archivevo12011.no2/gray.pdf> accessed on 06 February 2014

[82] See also ***Goldberg v Weinberger Secretary of Defense,*** (1986) 475 US 503

[83] For example in Oregon, Pennysylvania 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 neural in terms of religion. See also Anthony G. "Religion Freedom and Section 116 of the Australian Constitution: Would a banning of the Hijab or Burqa Be Constitutionally Valid?"http://www.forumonpublicpolicy.com/vol12011.no2/archivevo12011.no2/gray.pdf> accessed on 06 February 2014

[84] *Cooper v Eugene School* District 724 (1896) P.2d 298

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

[86] Webb v City of Philadelphia (2007) WL 1866763, 1

[87] 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/vo12011.no2/archivevo12011.no2/gray.pdf> accessed on 06 February 2014

[88] ***Webb v City of Philadelphia*** (2007) WL 1866763, 1

[89] Article 9(2) of the European Convention on Human Rights

[90] Article 18

[91] Article 9(2) of the European Convention on Human Rights

[92] ***Dahlab v Switzerland*** (2001) V EC HR 449

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 behavior at school as a result of the Hijab.[93]

Teachers should be entitled to exercise all human rights generally enjoyed by everyone.[94] 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.[95]

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 view, the State had a duty to eliminate this discrimination.[96] 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 Turkmens was also of the view that wearing an Islamic dress cannot be associated with discrimination against women.[97]

However, on the perception that the Hijab is imposed on women by a precept laid down in the Quran, I feel the Quran[98] directs that the Hijab should be worn by "all believing women". I think the 'believing women' in this context are the Muslim women while the unbelieving women are non-muslins. 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

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[93] 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 on 30 January 2014

[94] '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 on 16 February 2014

[95] Article 6 of the International covenant on Economic, social and cultural Rights, 1966

[96] 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-freedom.berkley.edu/files/20...> accessed on 03 February 2014

[97] *Sahin v Turkey* (2005) 41 ETHRR 8

[98] Surah 24:31

obligation that forms part and parcel of the Islamic religion.[99]

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.[100] Even though the Quran[101] 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 own choice"[102] 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. 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[103]. For example, college campuses student groups host fashion shows featuring the veil as part of a stylish and modern ensemble.[104] 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

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[99] Ali Jummah 'Hijab: Religious Symbol or Obligation?" http://www.islamonline/servlet/Satalite?pagename=islamOnline-English-Ask Scholar/Fatwa/FatwaE&cid=11950347808accessed on 03 February 2014.

[100] "Headgear in Muslim Lands: Beyond the Burqa" The Economist http://www.economist/com/node/16113081> accessed on 14th January 2010

[101] See Sura 2:256

[102] "Abulala.M. "Human Rights in Islam" 13 1976 in HeinerBeielefeldt(ed) "Muslim Voices in the Human Rights Debates" Human Rights Quarterly 17.4 (1995) 587-617

[103] Theresa P., 'Unveiling Muslim Women: The Constitutionality of Hijab Restriction in Turkey, Tunisia and Kosovo' http://www.bu.edu/law/central/jd/organizations/journals/.../note_perkins.pdf> accessed on 19 January 2014

[104] "Hijab Fashion Show 2010", (2010) Word Press University College Dublin Islamic Society <<<http:/hijabfashionshow.wordpress.com>> accessed on 14th January 2014

to the Hijab as a continuation of the long standing hostility for Islam and its values in the West.[105]

The world should develop a culture of tolerance and acceptance and even respect for orderliness in matters of religion.[106] 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.

[105] Oba A.A 'The Hijab in Educational Institutions and Human Rights: Perspectives from Nigeria and Beyond' <httpa://www.codesria.org/img/pdf/3-final_obanewhijab2009codesri_revisedplusabstract> accessed on 03 January 2014

[106] Ibid