

## “The Islamic and International Human Rights Law Perspectives of Headscarf: the Case of Europe”

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### Abstract

*Europe is home to an estimated of around 7% or 49 million Muslims out of the total 735 million of its population. Being the second largest religious group after Christianity, Muslims play a decisive role in shaping the colourful spectrum of Europe's so-called western society. Such a spectrum has contributed to debates on multiculturalism in Europe, particularly in the human rights issue of freedom of religion. While the existence of Islam has long been recognized by the constitutions of major European countries, the extent to which such religion could be practised is still debatable. The most notable issue is the wearing of religious dress, particularly the Islamic headscarf, in schools and public premises which was banned by some European countries. The Islamic headscarf debate has left major European countries in dilemma on whether to recognize it as a manifestation of freedom of religion or a merely religious symbol that neither required by religion nor does it compatible with the democratic society in Europe. Supporters of the right to wear the Islamic headscarf argue that the ban and similar prohibitions infringe a number of human rights. This article examines the issues by considering the Islamic and International Human Rights Law perspectives. In doing so, this article initially considers the various meanings and perceptions on headscarf, from which its position from Islamic perspectives could be drawn up. A brief comparative practice in selected European states is also examined. To identify whether the wearing of headscarf has any human rights basis, this article explores the provisions from various International Human Rights instruments in particular from the perspectives of freedom of religion, freedom from discrimination and the rights to education and work. The article makes concluding remarks by affirming the profound significance that lies behind the controversial headscarf ban thus emphasizing on the essentiality of addressing the issue from multiple perspectives as the way forward.*

**Keywords:** Headscarf, freedom of religion, International Human Rights Law

### 1. Introduction

Islam is widely considered as Europe's fastest-growing religion, with immigration and above average birth rates leading to a rapid increase in the Muslim population. It was, however, difficult to establish the exact numbers of Muslims, as census figures are often questioned and many countries choose not to compile such information anyway.<sup>2</sup> According to the German Central Institute Islam Archive<sup>3</sup>, the total number of Muslims in Europe in 2007 was about 53 million (7.2%), excluding Turkey. The total number of Muslims in the European Union in 2007 was about 16 million (3.2%). Other source<sup>4</sup>, on the other hand reveals that Muslims make up 6.6% or 49 million out of 735 million of Europe's total population. Such a big population is increasingly visible, more assertive of its Islamic identity, and increasingly claiming its human rights.<sup>5</sup>

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<sup>2</sup> “Muslims in Europe: Country guide” (2005) <<http://news.bbc.co.uk/2/hi/europe/4385768.stm>> accessed 4<sup>th</sup> May 2011

<sup>3</sup> Wolfgang Polzer, More than 53 million Muslims in Europe, WorldNetDaily, October 22, 2005, <<http://www.wnd.com/?pageId=32976>> accessed 4<sup>th</sup> May 2011

<sup>4</sup> Houssain Kettani, “2010 World Muslim Population”, Proceedings of the 8th Hawaii International Conference on Arts and Humanities, Honolulu, Hawaii, January 2010 <[http://www.30-days.net/muslims/wp-content/uploads/2008/03/muslim\\_populationsHICAH2010.pdf](http://www.30-days.net/muslims/wp-content/uploads/2008/03/muslim_populationsHICAH2010.pdf)> accessed on 4<sup>th</sup> May 2011

<sup>5</sup> Dominick McGoldrick, Human Rights and Religion: The Islamic Headscarf Debate in Europe (1<sup>st</sup> Edition Hart Publishing, Oregon 2006) p.1 citing F Fukuyama, ‘Identity, Immigration and Liberal Democracy’ 17(2) Journal of Democracy (2006) 5-20.

Of the notable consequences, there have been legal and political debates over the status or position of religion in schools in general, and wearing of religious dress in government schools, in particular. The events have been widespread across a number of European countries. The issue at hand is whether the state prohibition on the wearing of Islamic headscarf by a Muslim female while at a state school amounts to the violation of international human rights law? This question reached the international spotlight in 2003-2004 when the French Government under President Chirac introduced a law banning Muslim headscarves and other "conspicuous" religious symbols at state schools.<sup>6</sup>

The ban came into effect on 2 September 2004, and subsequently politicians in Germany and Belgium were also considering the similar move. Indeed, the laws containing such ban have sparked a recurring dilemma and a broader debate about multiculturalisms and human rights in many European countries. To address such issue, it is worthwhile to initially identify the extent to which the wearing of Islamic headscarf or *hijab* or its other types – including the full-face veil can be considered a religious obligation or merely a traditional or cultural practice. This is because, despite the unanimous consensus on the obligatory nature of headscarf, there have been conflicting views among Muslim scholars on the obligation of other aspects of veil, for instance, the full-face veil. The first part of this article seeks to define the multi-dimensional character of Muslims headscarf which, to some extent, has mixed with the various traditions originated from different Muslim societies. The definitional issues are important to ensure that the understanding of the obligatory nature of Muslim dress code is made based on Islamic requirement and not on the cultural practices and tradition.

This is because there has been a widespread misunderstanding among people, including from within Muslim communities, about the rightful Muslim dress code requirements according to the Quran and *Hadith*. As such, an assessment from the Islamic viewpoint is therefore necessary to establish the extent to which the Muslim dress code needs to be complied with. This will further affirm whether the act of wearing headscarf can be considered as a manifestation of religion which falls under freedom of religion protected by national and international laws. The other part of the article explores the comparative practice of Islamic headscarf from selected European countries. This will subsequently contemplate whether the Islamic headscarf ban is consistent with the various International Human Rights Law standards, in particular from the perspectives of freedom of religion, freedom from discrimination and the rights to education and work.

## 2. Headscarf and Islam.

### 2.1 Headscarf – the language and meaning.

Indeed, there have been huge misconceptions about the wearing of headscarf as it has widely been mixed with cultural practices which are varied according to country and regime. Generally speaking, the headscarf is a form of veiling and it can be much more extensive, not only covering the head and neck, but also the face and some or most parts of the body.<sup>7</sup> The famous term that signifies headscarf is the *hijab*. The word *hijab* comes from the Arabic for veil and is used to describe the headscarves worn by Muslim women. These scarves come in myriad styles and colours. The type most commonly worn in the West is a square scarf that covers the head and neck but leaves the face clear. The full-face version of headscarf is commonly referred to the *Niqab*. It consists of covering up completely, including gloves and a veil for the face - leaving just a slit for the eyes, or covering them too with transparent material.<sup>8</sup>

Apart from the above two, there are other terms that reflect the different forms of veiling. For instance, the *bandanna*, which left the hair partly visible, was worn by modern women at funerals or by women in rural areas. The *burka* is the most concealing of all Islamic veils. It covers the entire face and body, leaving just a mesh screen to see through. It is worn by Afghan women and was an obligation imposed by the Taliban when in power and on the basis of their interpretation of Islam. The *chador* (worn in Iran) or *abaya* (worn in Arabic countries) is a black veil which covered the entire body from head to ankles.<sup>9</sup>

<sup>6</sup> The Islamic veil across Europe, BBC News UK (15 June 2010) <<http://news.bbc.co.uk/2/hi/europe/5414098.stm>> accessed 5<sup>th</sup> May 2011

<sup>7</sup> Dominick McGoldrick, Human Rights and Religion: The Islamic Headscarf Debate in Europe (1<sup>st</sup> Edition Hart Publishing, Oregon 2006) p.1 citing F EL Gundi, Veil:Modesty, Privacy and Resistance (Oxford, Berg, 1999).

<sup>8</sup> Martin Asser, Why Muslim women wear the Veil, BBC News, (5 October 2006) <[http://news.bbc.co.uk/2/hi/middle\\_east/5411320.stm](http://news.bbc.co.uk/2/hi/middle_east/5411320.stm)> accessed 5<sup>th</sup> May 2011

<sup>9</sup> The Islamic veil across Europe, BBC News UK (15 June 2010) <<http://news.bbc.co.uk/2/hi/europe/5414098.stm>> accessed 5<sup>th</sup> May 2011; See also Leyla Sahin v Turkey, European Court of Human Rights, Chamber, Fourth Section, Application No. 44774/98, Judgment of 26 June 2004, para 92.

The *khimar*, on the other hand, is a long, cape-like veil that hangs down to just above the waist. It covers the hair, neck and shoulders completely, but leaves the face clear.

## 2.2 Headscarf – the Islamic perspective.

It is understandable that the above-mentioned different forms of headscarf may have been influenced from the Islamic teaching. However, the extent to which the headscarf needs to be worn or which parts of body need to be covered in Islam is yet to be clearly identified. In this regard, it is noteworthy to refer to some Islamic rulings as well as the views of Muslim scholars. The Holy Quran, Islam's holy book and treated as the literal word of God, tells Muslims - men and women - to dress modestly. Male modesty has been interpreted to be covering the area from the navel to the knee - and for women it is generally seen as covering everything except their face, hands and feet when in the presence of men they are not related or married to. However, there has been much debate among Islamic scholars as to whether this goes far enough.<sup>10</sup> In general, there are some verses in the Holy Quran which mentioned about headscarf or *hijab*. Among others, in Surah Al-Ahzab, Allah SWT said;

يَا أَيُّهَا النَّبِيُّ قُلْ لَأَزْوَاجِكَ وَبَنَاتِكَ وَنِسَاءَ الْمُؤْمِنِينَ يُدْنِينَ عَلَيْهِنَّ مِنْ جَلَابِيبِهِنَّ ذَلِكَ أَدْنَىٰ أَنْ يُعْرَفْنَ فَلَا يُؤْذَيْنَ وَكَانَ اللَّهُ غَفُورًا رَحِيمًا  
*"O Prophet! Tell your wives and your daughters and the women of the believers to draw their cloaks (veils) all over their bodies. That will be better, that they should be known (as a free respectable Muslim women) so as not to be molested."*(Al-Ahzab: 59)

In the other verse, Allah SWT has said:-

وَقُلْ لِلْمُؤْمِنَاتِ يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا وَلْيَضْرِبْنَ بِخُمُرِهِنَّ عَلَىٰ جُيُوبِهِنَّ  
*"And tell the believing women to lower their gaze and to be mindful of their chastity, and not to display their beauty and ornaments [in public] beyond what may [decently] be apparent thereof; hence, let them draw their head-coverings over their bosoms."* (An-Nur: 31)

The word '*khumur*' or veil in the above verse refers to anything that is used to cover the head. Meanwhile '*juyub*' (the plural form of *jaibun*) is the curvature of the breast that is not covered with cloth. Therefore every woman must cover not only their head but also their chest including their neck and ears and all other parts that may lure a male.<sup>11</sup> Indeed, it was clear from the above verses that the wearing of headscarf by Muslim women is a religious obligation, simply like performing other obligations like performing five-time daily prayers, fasting in Ramadan and so on. Besides the *khumur* that covers the women's head and *juyub* which covers women's neck, breast and chest, an extraction from the above verse mentioned;

وَلَا يُبْدِينَ زِينَتَهُنَّ  
*".. that they should not display their beauty and ornaments except what (must ordinarily) appear thereof" ..*

In the above verse, Allah commanded women to conceal the adornment without any exemption. However, the exemption was "what is apparent". The scholars therefore have differences in opinion about the meaning and extent of "what is apparent" but all of them agreed unanimously that hair and head are included. That is due to the following hadith :-

*Saidatina Aisyah RA narrated that her sister Asma' binti Abu Bakar entered the house of the Prophet s.a.w wearing attire made of transparent material that showed her skin. The Prophet s.a.w turned away from her and said: "O Asma'! Verily when a woman has achieved puberty, she should not reveal her body except for this and this - showing the face and the palms (hands)." (Narrated by Abu Daud)*

This *hadith* emphasizes the fact that women's head and hair are *aurah* and must be covered in accordance with Islamic principles. Only the face and palm or hand can be seen by the public. Despite the unanimous agreement among the scholars about the extent of the *aurah* for Muslim women which covers the whole body except face and the hands, there has been a dispute on the requirement of covering the face or wearing the *Niqab*.

## 2.3 The Islamic views on full-face Veil or *Niqab*

There are minority groups of scholars which consider the face is also part of women's *aurah* and therefore needs to be covered.

<sup>10</sup> Martin Asser, Why Muslim women wear the Veil, BBC News, (5 October 2006) < [http://news.bbc.co.uk/2/hi/middle\\_east/5411320.stm](http://news.bbc.co.uk/2/hi/middle_east/5411320.stm)> assessed 5<sup>th</sup> May 2011

<sup>11</sup> Zaharuddin Abdul Rahman, "Muslimah Veil (Tudung) Debate: A Reponse To Raja Petra of Malaysia Today", <<http://www.zaharuddin.net/senarai-lengkap-artikel/38/753-muslimah-veil-tudung-debate-a-reponse-to-raja-petra-of-malaysia-today-english.html>> accessed on 4<sup>th</sup> May 2011

However, majority of the scholars are of the views that the face is not an *aurah* and therefore, covering it is not compulsory for Muslim women. *Al-Imam Al-Nawawi*, in his book, *al-Majmu'* said; Verily, the *aurah* of Muslim women is the whole of her body except face and the palms (hands). This opinion also shared by *al-Imam al-Syafi'i*, *al-Imam Malik*, *al-Imam Abu Hanifah*, *al-Imam al-'Auza'i*, *al-Imam Abu Thaur* and others. This is also similar in a narration by *al-Imam Ahmad*.<sup>12</sup> Mohammad Tantawi, a leading Islamic scholar in Egypt and the head of Al-Azhar University, issued a fatwa in October 2009 arguing that veiling of the face is not required under Islam. He had reportedly asked a student to take off her *niqab* when he spotted her in a classroom, and he told her that the *niqab* is a cultural tradition without Islamic importance.<sup>13</sup> On a similar occasion, in Malaysia, the wearing of *niqab* was considered as not a religious obligation. Although headscarves are permitted in government institutions, public servants are forbidden from wearing the full-face *niqab*. A judgment from the then Supreme Court of Malaysia cites that the *niqab*, or *pardah*, "has nothing to do with (a woman's) constitutional right to profess and practise her Muslim religion", because Islam does not make it obligatory to cover the face.<sup>14</sup> In the case, the Supreme Court has held that the wearing of a *pardah* by a female Muslim was not an integral part of the religion of Islam. In this regard, the judge has considered the opinion from the Mufti of Federal Territories who said that Islam as a religion does not prohibit a Muslim woman from wearing, nor requires her to wear a *pardah*. As such, the prohibition of wearing *pardah* does not affect the woman's constitutional right to practise her religion.

#### 2.4 Brief Requirements on Dress Code of Muslim Women from Islamic Viewpoint

Islam has never provided any specific name of dress to reflect the Islamic one. In other word, any kind of dress could be considered as an 'Islamic dress' if it complies with the prescribed standards and requirements. Even if Malay attire worn by a Malay woman does not comply with such requirement cannot be considered as an Islamic dress despite Malay is Muslim by definition. In order to understand the correct dress code for Muslim women, it is worthwhile to take a look at the following requirements<sup>15</sup>;

**a. The extent of covering;** the dress must cover the whole body except the areas specifically exempted (face and hands).

**b. Looseness;** the dress must be loose enough and not tight so as not to describe the shape of a woman's body. A highly desirable way of concealing the shape of the body is to wear a cloak over the garment. The Prophet SAW, however, indicated that if the women's dress meets the Islamic standards it suffices (without a cloak) even for the validity of prayers.

**c. Thickness;** the dress should be thick enough and not transparent so as not to show the colour of the skin it covers, or the shape of the body which it is supposed to hide.

**d. Overall appearance;** the dress should not be such that it attracts men's attention to the woman's beauty. The Qur'an clearly prescribes the requirements of the woman's dress for the purpose of concealing *zeenah* (adornment).

**e. Additional Requirements;** In addition to the above four main requirements, there are other requirements whose specific applications may vary with time and location. These include:

- i. The dress should not be similar to what is known as a male costume. Ibn 'Abbas narrated that "*The Prophet cursed the men who act like women and the women who act like men.*"
- ii. It should not be similar to what is known as the costume of unbelievers. This requirement is derived from the general rule of Shari'ah that Muslims should have their distinct personality and should differentiate their practices and appearance from unbelievers.

Indeed, the above clearly spelled out requirements draw a very comprehensible basis on which an Islamic dress code could be justified. The colour, fashion, style, cultural practices and so on should not be made the fundamental basis in justifying whether any dress is an Islamic one.

<sup>12</sup> Associate Professor Dr. Mohd Asri Zanol Abidin, "Hukum Memakai Purdah", <[http://drmaza.com/himpunan\\_fatwa/?p=35](http://drmaza.com/himpunan_fatwa/?p=35)> accessed on 4<sup>th</sup> May 2011

<sup>13</sup> "Fatwa stirs heated debate over face-veiling in Kuwait". Kuwait Times. October 9, 2009. [http://www.kuwaittimes.net/read\\_news.php?newsid=MTQwMTY5MzI5Mg==](http://www.kuwaittimes.net/read_news.php?newsid=MTQwMTY5MzI5Mg==). Retrieved October 9, 2009.

<sup>14</sup> See Hjh Halimatussaadih bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor [1994] 3 MLJ 61

<sup>15</sup> Muslim Dress Requirements According to the Qur'an & Sunnah, 14 July 2006 <<http://muslimdress.blogspot.com/2006/07/muslim-dress-requirements-according-to.html>> accessed 10 May 2011

As such, only the dress that meets the above requirements shall be deemed as Islamic dress that is an obligation for every Muslim woman. Complying with it is also an act of manifesting Islam as a religion whereas any act that may hinder such manifestation could be considered as a violation of the rights to freedom of religion.

### 3. Comparative state practises.

The various genealogies of Muslims communities in Europe contributed to the diverse styles of the wearing of headscarf among Muslim women. Some may have worn the headscarf based on a good understanding on the standards required whereas the rests might just do it based on the cultural understanding or practices which may not necessarily correct from Islamic principle. Because of such different understanding, there has been some glint of doubt from the eyes of European non-Muslim people on the obligatory nature of the wearing of headscarf among Muslim women. Some countries in Europe did not recognize wearing headscarf as a religious obligation, but rather a cultural practise. Hence, the governments of the respective countries have come to the extent of banning the wearing of headscarf in public premises like schools, hospitals and so on. Whilst a debate relating to the wearing of the headscarf or *hijab* could be expected in countries such as Tunisia and Turkey<sup>16</sup> where the issue has been controversial for some time, it is perhaps surprising that the debate has come to Europe - in countries traditionally considered as the champions of rights and freedoms. In this article, the cases of France, Germany, Belgium, Turkey and United Kingdom will be considered.

#### i. France

France has the largest Muslim population in Western Europe with around 5-6 million out of its 62.3 total population. The wearing of headscarf in France has been a very controversial issue since 1989. The debate essentially concerns whether Muslim girls who choose to wear headscarf may do so in state schools. On 10 February 2004, a bill containing proposals for legislation to the headscarf ban passed its first reading in Parliament with 494 parliamentarians voting in its favour. The bill would prohibit the wearing of the Muslim headscarf, Jewish kippa, Sikh turban and large crucifix in state schools. During its passage, Parliamentary Speaker, Jean-Louis Debré, a member of the ruling UMP party, stated, '[w]hat is at issue here is the clear affirmation that public school is a place for learning and not for militant activity or proselytism'. There were only 36 votes opposed to the legislation largely on the grounds that it was discriminatory against Muslims. The bill finally came into effect on 2 September 2004.

The ban, however, has not stopped at that point. In 2010, the French Government, has pushed ahead with plans to introduce a law banning women from wearing full-face Islamic veils in all public places. President Nicolas Sarkozy's cabinet has approved a bill making it illegal to wear in public clothes designed to hide the face, and the measure is now awaiting a vote in parliament. Parliament has already passed a non-binding resolution condemning the full Islamic face veil as "an affront to the nation's values of dignity and equality". Mr Sarkozy has said veils oppress women and are "not welcome" in France. The reasoning behind the legislation is based on the notion that France's principles of long-established secularism are under threat without such a law. Secularism, it is claimed, is crucial to the social harmony and national cohesion of France and its citizens. According to statistics, up to 70% of public opinion in France supports this ban and indeed, this is the culmination of a long history of incidents in France concerning the *hijab* beginning over a decade ago.<sup>17</sup>

#### ii. Germany.

This controversial issue has not remained specific to France. In September 2003, the highest Court in Germany ruled that a regional state was wrong to ban a teacher from wearing a headscarf in school. The state had argued that a teacher with a headscarf violated '*the strict neutrality of public schools in religious issues*'. The Court ruled that states must find 'arrangements acceptable for everyone' in striking a balance between religious freedom and neutrality in schools. However, the Court went on to declare that states could take such action to prevent undue influence on children but the matter was too contentious to be decided on an ad hoc case by case basis - thus seemingly leading the way for legislation on this issue. Unlike in France, in Germany, the debate is focused on the essential Christian nature of the country. Thus the law is specific to the *hijab* and will not ban Christian and Jewish religious symbols.

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<sup>16</sup> In 1999, in one of the most shocking aspects of its implementation, a democratically elected MP from Istanbul, Merve Kavakci, was publicly forced out of her elected position in the Turkish Parliament for refusing to remove her hijab.

<sup>17</sup> Islamic Human Rights Commission, Muslim Women, Human Rights and Religious Freedom: Europe under the Spotlight of National and International Law. 8<sup>th</sup> March 2004 <<http://www.ihrc.org.uk/show.php?id=1025>>

In justification of this, the Regional Culture Minister, Annette Schavan declared that the state constitution placed Christian and Western values and culture at the heart of the education system. She further justified the ban by claiming that the headscarf is 'seen as a symbol of cultural division and part of a history of oppression of women.' President Johannes Rau stated his opposition to the discriminatory nature of the laws, stating, '*[s]tate schools must respect each and everyone, whether Christian or pagan, agnostic, Muslim or Jew...If the headscarf is an expression of religious faith, a dress with a missionary character, then that should apply equally to a monk's habit or a crucifix.*' Edmund Stoiber, Bavarian state prime minister and head of the Christian Social Union, Germany's main opposition in parliament, responded by stating that the President had no right to 'cast doubt on our national identity, distinguished by the Christian religion', further describing Islamic headscarves in schools as 'a political symbol incompatible with our democracy'. Other German states planning similar legislation are Baden-Wuerttemberg, Brandenburg, Lower Saxony, Berlin, Hesse, and Saarland (the latter three are proposing to extend the prohibition to all public institutions).<sup>18</sup>

### iii. Belgium.

Likewise, in December 2003, two Belgian Senators presented a draft law to the Belgian Senate to prohibit the wearing of the *hijab* and other overt religious symbols in state schools. The ban is once again being enforced in the name of secularism, Interior minister Patrick Dewael noting, '*[t]he government should remain neutral...in all circumstances and be represented as such...that means no distinctive religious symbols or veils for police officers, judges, clerks or teachers at public schools*'. Furthermore, Senator Anne-Marie Lizin offended Belgium's nearly 350,000 Muslims (mainly from North Africa and Turkey) by saying that the ban was needed to oppose Islamic sexism, as '*the veil amounts to the oppression of the individual in the name of religion*'. Even though the legislation is yet to take effect, there have already been incidents of enforcement of a *hijab* ban. In September 2003, a French speaking school near Brussels banned its students from wearing the *hijab*. Five public hospitals in Brussels and certain medical schools have also already banned the wearing of *hijab* by their staff or students.<sup>19</sup>

### iv. Turkey.

Despite being a country with an overwhelming Muslim population i.e. 99% of its total 70 million populations, Turkey has probably the strictest law relating to the headscarf ban. For more than 85 years, the Turks have lived in a secular state founded by Mustafa Kemal Atatürk, who rejected headscarves as backward-looking in his campaign to secularise Turkish society. Scarves are banned in civic spaces and official buildings, but the issue is deeply divisive for the country's predominantly Muslim population, as two-thirds of all Turkish women - including the wives and daughters of the prime minister and president - cover their heads. In 2008, Turkey's constitution was amended to ease a strict ban at universities, allowing headscarves that were tied loosely under the chin. Headscarves covering the neck and all-enveloping veils were still banned. The governing party, with its roots in Islam, said the ban meant many girls were being denied an education. But the secular establishment said easing it would be a first step to allowing Islam into public life.<sup>20</sup>

### v. United Kingdom.

Unlike the previous four countries, the UK portrays itself as a successful multicultural society that has positively embraced respect from cultural diversity through a policy of equal opportunity in an atmosphere of mutual tolerance and anti-racism.<sup>21</sup> Muslim community represent the majority of the UK's 10% ethnic minorities. Muslims play an increasing role in public sphere and some have even held strategic positions in local and national political bodies. In general, Muslim religious dress, including headscarf, is widely worn in public as well as in public schools. Indeed, the wearing of headscarf by Muslim schoolgirls has long been common in British schools. The Islamic headscarf is accepted by most teaching institutions. Dispute rarely arise and when they do they are generally resolved within the institution concerned. There are generally no legislative provisions that prohibit the wearing of headscarf. Meanwhile, there are growing efforts to place legal curbs on the full-face Muslim veil, known as the *niqab*. There have been numerous examples in the past years.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> The Islamic veil across Europe, BBC News UK (15 June 2010) <<http://news.bbc.co.uk/2/hi/europe/5414098.stm>> accessed 5<sup>th</sup> May 2011

<sup>21</sup> Dominick McGoldrick, Human Rights and Religion: The Islamic Headscarf Debate in Europe (1<sup>st</sup> Edition Hart Publishing, Oregon 2006) p.173

A lawyer dressed in a *niqab* was told by an immigration judge that she could not represent a client because, he said, he could not hear her. A teacher wearing a *niqab* was dismissed from her school. A student who was barred from wearing a *niqab* took her case to the courts, and lost. In reaction, the British educational authorities are proposing a ban on the *niqab* in schools altogether. A leading Labour Party politician, Jack Straw, scolded women last year for coming to see him in his district office in the *niqab*. Prime Minister Tony Blair has called the *niqab* a “mark of separation.”<sup>22</sup> In short, it was only the full-face Muslim veil or *niqab* that is being targeted for possible ban in the UK, but not the headscarf. This maybe because the *niqab* was seen as a hindrance to the interaction process within the society and to the fact that Islam neither requires nor prohibits the wearing of *niqab* by Muslim women.

#### **4. Applying International Human Rights Standards to the Headscarf.**

As far as the approach of the International Human Rights Law standards is concerned, the debates on the wearing of headscarf by Muslim women in Europe could be analysed from the following three-fold dimension of rights, namely; freedom of thought, conscience and religion, freedom from discrimination and the right to education and work.

##### **a. Freedom of thought, conscience and religion**

Despite persistent controversies, the core of freedom of religion is not disputed. It is largely explicit from the text of the major international human rights instruments. The Universal Declaration of Human Rights 1948 spoke of the ‘advent of a world in which human beings shall enjoy freedom of speech and belief’. Indeed, freedom of thought, conscience and religion is considered a fundamental human right. As noted by the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief 1981 (‘1981 Declaration’) ‘*religion or belief, for anyone who professes either, is one of the fundamental elements of his life*’.<sup>23</sup> Article 18 of the International Covenant on Civil and Political Rights (ICCPR) 1966 is probably the most widely accepted text, with 155 states parties as of 1 April 2006. It provides;

*“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

*2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

*3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

*4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”*

In addition, under the Article 9(1) of the European Convention of Human Rights (ECHR), it was mentioned that;

*“Everyone has the right to freedom of thought, conscience and religion; this right includes...freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.”<sup>24</sup>*

The European Court of Human Rights has consistently stated that this right of freedom of religion is at the core of a democratic society, claiming that ‘*[i]t is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.*

<sup>22</sup> Jane Perlez, Muslims' Veils Test Limits of Britain's Tolerance, Spiegel Online International, 22 June 2007 <<http://www.spiegel.de/international/0,1518,490082,00.html>> accessed 11 May 2011

<sup>23</sup> Preamble, para. 4.

<sup>24</sup> This is also guaranteed by the 1981 Declaration. Further, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992 provides that ‘States shall protect the existence and the...religious...identity of minorities within their respective territories’. (A.1). Further, it provides that minorities have the ‘right to enjoy their own culture, to profess and practise their own religion...freely and without any interference or any form of discrimination’ (A.2).

*The pluralism indissociable from a democratic society, which has been won over the centuries, depends on it*<sup>25</sup>. The second part of Article 9(1) protects the freedom to ‘manifest’ ones religion or belief ‘in public or in private, alone or with others’. The manifestation may include ‘worship, teaching, practice or observance’. Indeed, having mentioned previously that the wearing of headscarf constitutes an observance of Muslim women to the duty that is mandatory for them, wearing of headscarf should therefore be deemed as a form of manifestation of religion. Any act that could hinder the right to manifest the religion as prescribed in Article 9(1) of the ECHR could amount to the violation of people’s right to freedom of religion. The fact that there are some Muslim women who failed to properly observe such obligation cannot form a basis to conclude that the wearing of headscarf is not compulsory in Islam. It was the people to be blamed for not complying with the rule and not the rule itself. The justification whether the wearing of headscarf in Islam is a form of religious manifestation should therefore be made on the Islamic perspectives but not on the Muslim practices. In *Vereniging v Netherlands*,<sup>26</sup> the European Commission of Human Rights stated ‘Article 9 primarily protects the sphere of personal beliefs and religious creeds....[i]n addition it protects acts which are intimately linked to these attitudes such as acts of worship or devotion which are aspects of the practice of the religion or belief in a recognised form’. Indeed, in *Mannousakis v Greece*<sup>27</sup>, the Court held that the right of manifestation of belief excludes the discretion of states to determine ‘whether religious beliefs or the means used to express them are legitimate’.

On the other hand, the subsequent article i.e. Article 9(2) of the ECHR has drawn up some limitations to the right to manifest religion. The Article states; ‘[f]reedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of rights and freedoms of others’. Indeed, the right enshrined in Article 9 is so fundamental that the limitations in Article 9(2) are even narrower than those relating to the freedom of expression, association and assembly contained in the ECHR. The European Court has consistently stated that there must be a narrow construction of these limitations together with a broad interpretation of the freedoms guaranteed. Any restrictions on freedoms must be ‘construed strictly’ and can be justified only by ‘convincing and compelling reasons’.<sup>28</sup> Hence, if a state were to ban the headscarf, it should firstly determine whether such ban is ‘prescribed by law’ or ‘necessary’ insofar as to protect ‘the interests of public safety, for the protection of public order, health or morals or for the protection of rights and freedoms of others’. Despite being an individual right, not a group one, the Article 9(1) makes it clear that the freedom of religion has a community dimension, *viz.*, ‘either alone or in community with others’. It was the state that will have the margin of appreciation and power to make national assessment on deciding whether to limit the extent of a religious manifestation.

Additionally, there have issues of the religious manifestation could also fall under the protection of freedom of expression provided in Article 10 of the ECHR. Consider the case of *Leyla Sahin v. Turkey*<sup>29</sup> where Ms. Sahin argued that the ban on the Islamic headscarf by Turkish government in higher education was an ‘unjustified interference with her right to freedom of religion’ and ‘her right to manifest her religion’, under Article 9 of the ECHR.<sup>30</sup> The Court, however, perceived the wearing of *hijab* or headscarf for Muslim women as ‘not a direct expression of the religion concerned’, but rather as a mere-religiously motivated act which could not be protected under Article 9.<sup>31</sup> The wearing of the headscarf was thus seen to be a form of ‘manifestation of conscience or thought’, rather than a ‘manifestation of religion’. Although the judgment was also been challenged as a violation of Article 10’s freedom of expression, the Court maintained its judgment, stating that the impugned measures were justifiable for their legitimate aims; to protect the rights and freedom of others and public order, ‘to uphold the principle of secularism and to ensure the neutrality nature of Turkish universities.’<sup>32</sup> Hence, a conclusion could be drawn from this issue is the rights to religious manifestation provided in Article 9 are divided into two clusters, namely; the ‘manifestation of religion or belief’ and the ‘manifestation of thought and conscience’.

<sup>25</sup> *Kokkinakis v Greece*, 25 May 1993, p.31.

<sup>26</sup> (1995) App. No. 16616/90

<sup>27</sup> 26/09/1996, Report 1996-IV, 47.

<sup>28</sup> *United Communist Party of Turkey v Turkey*, 30 January 1998

<sup>29</sup> App. No. 44774/98 ECHR June 29, 2004

<sup>30</sup> *Ibid.*, para. 64.

<sup>31</sup> *Ibid.*, para. 66.

<sup>32</sup> *Ibid.*, paras. 82-84.



This has much to do with the distinction between ‘religion or belief’ and ‘thought or conscience’, in that manifestation of thought or conscience may fall within the freedom of expression under Article 10. This is the manifestation of thought or conscience is always treated as ‘merely an idea dictated from religious belief’, rather than an ‘obligation or direct devotion of the religion concerned’ which should be protected unconditionally.<sup>33</sup> Nevertheless, it is fundamental to remember that, to a Muslim woman, the wearing of the headscarf is not merely a personal display of faith - it is an obligation imposed by her religion. Proponents of the ban claim that the headscarf cannot be tolerated in a secular state educational system because the mere fact of wearing it amounts to proselytism. Yet for those who wear it, it is simply a matter of personal obedience to God. It is also imperative to remember that even if evidence is adduced to show that the headscarf amounts to proselytism - this is not a legitimate reason under international human rights law to ban it from being worn. In fact, such a manifestation of one’s religion would be protected under ECHR provisions relating to freedom of expression. Article 10 of the ECHR provides that this right includes, ‘freedom to hold opinions and to receive and impart information and ideas without interference’. This right is often considered the cornerstone of personal freedom and is vigorously upheld. Indeed, the Court has stated that it ‘constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man’ and applies to the freedom to express an opinion, even when it might ‘offend, shock or disturb’.<sup>34</sup> In reality, this is the same freedom of expression advocated by European countries which criticise states such as Saudi Arabia or Afghanistan for their human rights standards. Human rights law is not specific to culture or country - it exists precisely to contradict every form of state oppression - whether it is in the name of religion or secularism.

A further argument being made to support the ban is that children’s’ autonomy is being overridden by parents and communities who are coercing them into wearing the headscarf. However, once again, there is little evidence to support this and even if this is the case - it is impossible to justify replacing parental control over a child’s actions with state control over the dress of individuals of an entire section of the community. Indeed, the idea of human rights is based on the notion that for each individual there is an area of personal liberty immune from state invasion. In recognition of this principle, Article 2 of the First Protocol to the ECHR (1952) (to which France, Germany and Belgium are signatories) states, ‘[n]o person shall be denied the right to education...the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions’. This is one example of the intention of international legislation to endorse the right of parents to protect children against the use of educational institutions by the state for ideological indoctrination of its own ideas. It seems that while the apparently proselytising nature of the headscarf is being criticised by state authorities, the same authorities are also engaging in their own form of proselytism by banning religious symbols - that of furthering their own secular agenda. This has particularly serious consequences if we remember that it is precisely in the human mind that attitudes and prejudices take form. By imposing the fictional absence of religion in schools that exist within a multi-faith society, it is arguable that the Government is simply promoting the development of uniform intolerant attitudes within young minds.

## **b. Freedom from discrimination**

Under the ECHR, the limitations on freedom under Article 9(2) are subject to Article 14 which, among other things, provides that the Convention rights ‘shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.<sup>35</sup> The European Court has stated that discrimination on the basis of certain grounds, such as race and sex, is particularly serious and has stated that ‘very weighty reasons’ would have to be advanced before such treatment could be regarded as compatible with the Convention<sup>36</sup>. A ban on the headscarf, turban and *kippa* is unfairly discriminatory towards particular ethnic groups - namely Jews, Sikhs and generally Muslims from a particular racial group. Furthermore, in Germany, the ban is only applicable to the headscarf and specifically excludes Jewish and other religious symbols - a clear instance of religious discrimination.

<sup>33</sup> Nisar Mohammad Ahmad, ‘Manifestation of Religion as Freedom of Expression under European Convention on Human Rights’ (Unpublished LL.M thesis, University of Exeter 2006) p. 56

<sup>34</sup> Handyside v UK (1976), para. 49

<sup>35</sup> The 1981 Declaration recognises the gravity of discrimination, noting that ‘[d]iscrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and...a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights’ (A.3).

<sup>36</sup> Inze v Austria, App. No. 8695/79

Although Germany has purported to justify this on the grounds of the Christian nature of the country, it is unlikely that the European Court will consider Germany's margin of appreciation in interpreting the ECHR wide enough to allow such flagrant discrimination. Furthermore, a ban on the headscarf would clearly affect women for whom this religious dress is considered mandatory under Islam. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, to which France, Germany and Belgium are signatories, provides that the term '*discrimination against women*' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women...on a basis of equality of men and women, of human rights and fundamental freedoms...<sup>37</sup>. Article 2, on the other hand, places an obligation on states to '*condemn discrimination against women in all its forms*' and '*to pursue by all appropriate means and without delay a policy of eliminating discrimination against women...*'.

### c. The right to education and work

The right to education is recognised in many major human rights instruments, including the Convention on the Rights of the Child 1989 (Article 28) and CEDAW, which provides for equal rights for men and women the field of education (Article 10) and employment (Article 11)<sup>38</sup>. UNICEF has recently reported that millions of children worldwide are still denied the basic right to education - with gender disparity ensuring that the majority of those children (65 million) are girls<sup>39</sup>, many of them being in the Arab states or sub-Saharan Africa. Perhaps it is then ironic that the ban on headscarves in public schools will deny girls access to schooling in countries of the so-called 'developed' world. No child should have to choose between practicing the tenets of their faith and acquiring a basic education - yet for Muslim girls in certain European countries - this may be the stark choice that they face.

Furthermore, for the proponents of the ban to argue that the headscarf inhibits the successful integration of Muslim girls into French society is paradoxical. Integration is, after all, a two way process. France cannot expect Muslim girls to become its integrated citizens while marginalising them by effectively denying them education. A ban would lead to increased educational exclusion, lack of employment opportunities and thus social deprivation - ironically adding to the myth of the 'oppressed' Muslim woman in a veil. The end result would be the creation of an 'apartheid' system in the heart of Europe - discrimination against a group of citizens who are denied education (or forced into substandard educational systems) and effectively the right to work thus forcing them into a spiral of economic and social isolation.

## 5. The Way Forward.

The fundamental issue behind the headscarf debates in Europe lies in the failure of majority of European people and governments to properly understand the obligatory nature of wearing headscarf from the Islamic perspectives. Some have made justification that headscarf is not a religious manifestation based on the diverse type of practices relating to wearing of headscarf by Muslim in Europe which are inherent in various cultural backgrounds from different Muslim communities. Such practices, however, might not necessarily conform to the rightful Islamic principles. Islam has made it clear about the requirements on covering the *aurah* for Muslim women, and thus the dress being worn by them should aim to meet such requirements and not to reduce or add something which is beyond what is required for them. Apart from the prescribed requirements, other additional 'thing', for example *niqab* cannot be considered as something compulsory under Islamic rules or *syariah* as discussed before, i.e. due to the conflicting views among the Muslim scholars. Hence the ban on *niqab* could be justifiable based on its non-compulsory nature under *syariah* and the states may have the role and margin of appreciation to decide on whether such dress consistence with its democratic identity. Nevertheless, the ban cannot be extended to the wearing of headscarf as the headscarf is part of the dresses that will meet the requirements on dress code of Muslim women. As such, the compulsory nature of headscarf should be made clear in the first place to avoid any possible violation of the right to religious manifestation protected in the virtue of the freedom of religion. Additionally, the States must implement measures under CEDAW to abolish all discriminatory laws and ensure the effective protection of women against discrimination.

<sup>37</sup> Article 1

<sup>38</sup> Belgium in its Country Report to the Committee on the Elimination of all Forms of Discrimination Against Women noted that it will promote initiatives 'that will promote the emancipation and integration of women of foreign origin, within a spirit of inter-cultural dialogue', Combined third and fourth periodic reports, 2002, p.6

<sup>39</sup> State of the World's Children 2004, Ch.3.

In contrast to CEDAW, the ECHR has well developed enforcement machinery enabling an individual who believes his rights have been violated to bring a case before its Court in Strasbourg. Whilst an increasing number of cases are being taken to the Court, the process is not ideal - it can be costly and time consuming because all remedies before national courts must be exhausted first. Thus, even if a girl seeking to challenge the headscarf ban in France knows that she will not succeed in French Courts, she must take her case up to the highest Court in France (a process which may take years) before she is able to make an application to the European Court in Strasbourg. Furthermore, the Court receives a large number of applications and it can take several years for a case to be decided. Added to this, many cases which are lodged before the Court are declared 'inadmissible' on various criterion and therefore do not even get to the Court for a full hearing. Finally, a problem that may be of significance in this area is that a ban of religious symbols in schools concerns children. Under the ECHR, children are unable to make a claim to the Court directly - an application must be made by an adult on their behalf. Indeed, it is important to remember that it is states that have primary responsibility for enforcement of human rights standards, which must be protected first and foremost, at the national level. By its citizens, law is seen as the principle carrier of the values shared by the community and national laws must not become neglectful when it comes to the protection of individual rights. It is only where national laws fail that international law has its most crucial role to play - to step in and safeguard fundamental freedoms that would otherwise be overridden.

## **6. Conclusion.**

Freedom of religion constitutes the core principle of a democratic society. As such, a democratic country that denies this right from being enjoyed by its people could be deemed as undemocratic. Islamic headscarf, being a manifestation of the freedom of religion, has indeed ignited a recurring dilemma among various European countries on whether to accept it as part of their multicultural diversities or a mark of separation which is not compatible with their democratic societies. Even though the discussion about headscarf was seen by some, including Muslims, as something trivial and less important, it should be viewed as a paramount element of a religious manifestation. Despite the fact that there are a significant number of Muslim women out there who chose not to comply with the headscarf obligation, this does not mean the wearing of headscarf has no basis in Islam. The acts and behaviour of Muslim cannot be a basis in justifying the Islamic principles. Having analysed the headscarf from the perspectives of Islam and the International Human Rights standards, this article believes that the wearing of headscarf should not be banned as it is an observance to the religion, simply like worship, and the claim that wearing headscarf could contribute public disorder or social dissention is totally unjustifiable and unacceptable.

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