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**The Headscarf in Liberal Democracies:
The Case of France, Germany and the United States**

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Synopsis

This thesis provides an overview of the history and current socio-economic situation of Muslim populations in France, Germany, and the United States. It then analyzes the protection of religious freedom in these countries by paying particular attention to the meaning and significance of *laïcité* in France, the traditionally cooperative relationship between the church and the state in Germany, as well as the idea that the right to religious freedom is a carefully guarded building block of American judicial and political theory. Next, the headscarf controversies that have occurred in all three countries are discussed. The thesis provides an analysis of France's recent law banning conspicuous religious symbols from public schools, and analyses relevant German and American court cases. This then is followed by an analysis of the relevant international human rights instruments, international jurisprudence, as well as other national jurisprudence. It is analysed whether France, Germany, and the United States' approach to dealing with the headscarf issue is in conformity with their obligations under international human rights law. Finally, it is evaluated whether each country's policies on the headscarf contribute to the integration or marginalization of the Muslim population.

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INTRODUCTION

"O Prophet, tell your wives and daughters and the believing women to draw their outer garments around them (when they go out or are among men). That is better in order that they be known (to be Muslims) and not annoyed..." (Qur'an 33:59)

"Say to the believing man that they should lower their gaze and guard their modesty; that will make for greater purity for them; and Allah is well acquainted with all that they do.

And say to the believing women that they should lower their gaze and guard their modesty; and that they should not display their beauty and ornaments except what must ordinarily appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands..." (Qur'an 24:30-31)

The above excerpts from the Qur'an, the source of greatest importance in Islam, are central to explaining why many Muslim women observe *hijab*,¹ meaning that they cover their head and body while they are in a public space. Islam requires modest dress of both men and women in order to desexualise the public social space. Modesty is prescribed in order to protect women from molestation, and observing *hijab* is thus seen as a way for women to protect themselves from unwanted male advances.

There are various opinions among Muslim scholars in regard to Islamic female modest dress. The great majority of scholars favours a full covering of the female body with the exception of the face and hands,² while a much smaller group of conservative scholars upholds the view that female dress should cover not only the whole body, but also the hands and face (except for the eyes or one eye only).³ A third group of mostly liberal thinkers and feminists rejects the validity in the present age of the Islamic prescriptions concerning *hijab* altogether.⁴ These three different approaches to female modest dress are mirrored by the dressing habits of Muslim women living in the Muslim world, as well as those living in the West.⁵

¹ Literally *hijab* means "veil", "curtain", "partition" or "separation".

² This view is held, *i.a.*, by the Jordanian scholar Nasir al-Din al-Albani, author of *The Hijab of the Muslim Woman in the Quran and the Sunna* (Beirut, al-Maktab al-Islami, 3rd edition, 1969).

³ See, for example, Darwish Mustafa Hasan, *Fasl al-khitāb fī mas'alat al-hijāb wa-'l-niqāb*, Cairo, Dar al-I'tisam, 1987.

⁴ See, for example, Mahmud Muhammad Taha, *The Second Message of Islam*, Syracuse, NY, Syracuse University Press, 1987.

⁵ W. Shadid and P.S. van Koningsveld, *Muslim Dress in Europe: Debates on the Headscarf*, in "Journal of

Muslim women who wear the headscarf thus try not to call attention to themselves. They often, however, achieve the exact opposite when wearing the headscarf in Western societies, where they immediately draw stares because they dress differently from the majority population. In fact, women who wear the headscarf in Western societies often face undue harassment in the public space.⁶

There is a wide array of reasons why Muslim women wear the headscarf in Western societies. In some cases, women are pressured into wearing the headscarf by their families or the Muslim community as a whole. In other cases, women do it out of religious conviction alone, while for others there is an added aspect of maintaining cultural identity. For oftentimes Islam may take on more importance to Muslim immigrants than it did in their home countries. The headscarf can serve as a social bond among the immigrant community which lives the common experience of marginalisation. It helps them emphasise what they have in common and what sets them apart from other people. Thus, the headscarf can be both a marker of individuality and identity, but at the same time a marker of inequality and sexist oppression if it is imposed on a woman against her will.⁷

While a well-informed debate on whether the headscarf promotes the oppression of women is justified, in the West the complexities behind the motivation to wear the headscarf are unfortunately barely taken into account. In the West there is the tendency to see the headscarf as a symbol, rather than a piece of clothing. It frequently is perceived as a symbol of fundamentalist Islam, as well as the oppression of women.⁸ It is seen as something threatening, and furthermore as an indication of an unwillingness to integrate. Thus, the majority in Western society does not feel pride that their country is tolerant and welcoming of other peoples and religions, but rather feels something foreign has infiltrated their society when they see women wearing the headscarf.⁹ This stereotypical

Islamic Studies", vol. 16, no. 1, 2005, p. 38.

⁶ Aminah B. McCloud, *American Muslim Women and U.S. Society*, in "Journal of Law and Religion", vol. 12, no. 51, 1995-1996, p. 54.

⁷ Nancy J. Hirschmann, *Eastern Veiling, Western Freedom?*, in "Review of Politics", vol. 59, no. 3, Summer 1997, p. 5.

⁸ Janbernd Oebbecke, *Das 'islamische Kopftuch' als Symbol*, in Stefan Muckel (Ed.), *Kirche und Religion im sozialen Rechtsstaat: Festschrift für Wolfgang Rüdner*, Berlin, Duncker & Humblot, 2004, p. 600.

⁹ Jeremy T. Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, in

view of the headscarf in Western societies has of course much to do with the way that the West views Islam in general. For Islam is represented in the West as a "jihad" culture, and is seen "as a pernicious virus that needs to be halted."¹⁰

To some observers the fact that the headscarf is cause for controversy in most Western countries, and particularly in Europe, confirms Samuel Huntington's cultural "clash" thesis. According to Huntington, great danger lies in "Islamisation", by which he means that Muslim immigrant communities will soon constitute a presence large enough to divide Western society.¹¹ Human Rights Watch rightfully referred to the headscarf debate as a "wake-up call" to the human rights movement, which arguably is rooted in a secular tradition. The human rights movement must be careful not to ignore or despise traditional cultures and religious beliefs, as this can hinder attempts to promote fundamental human rights, and in the end can contribute to the promotion of Huntington's idea that civilisations are more or less enclosed entities based on specific values, which runs counter to the idea that human rights are universal.

This thesis hopes to provide an overview of the Muslim populations in France, Germany and the United States, and to analyse how they have dealt with the headscarf issue (particularly in regard to public schools), while contrasting their approach with the general prescriptions that international law provides on this issue. I have chosen these three countries because each presents a different model of immigration and integration, which is mirrored in the way they have dealt with the headscarf. At its core, the headscarf controversy is a debate on the accommodation of cultural pluralism. Public schools have been central to this debate, since they in a sense are a microcosm of the conflicts that occur in society at large.

The headscarf has caused controversy in each of them. In March 2004 France passed a controversial Law, which prohibits the wearing of a headscarf, or any other conspicuous religious symbol, in French public schools. Germany is still dealing with an "avalanche of controversy"¹² that resulted from a September 2003 decision by the

"Brigham Young University Law Review", vol. 2004, pp 456-457.

¹⁰ Chouki El Hamel, *Muslim Diaspora in Western Europe: The Islamic Headscarf (Hijab), the Media and Muslims' Integration in France*, in "Citizenship Studies", vol. 6, no. 3, September 2002, p. 297.

¹¹ See Samuel P. Huntington, *The Clash of Civilisations*, in "Foreign Affairs", vol. 72, no. 3, Summer 1993.

¹² Axel Frhr. Von Campenhausen, *The German Headscarf Debate*, in "Brigham Young University Law

German Federal Constitutional Court in regard to the six-year legal battle of a Muslim school teacher for the right to wear a headscarf while teaching in a public school. While a similar *national* headscarf controversy is absent in the United States, the headscarf has nonetheless caused controversy on the state-level, with issues arising from Muslim women and the girl child wanting to wear the headscarf in public schools, as well as in other public spaces.

CHAPTER ONE

The Headscarf Controversy in France

1. Muslim Population in France

The majority of the French population is Catholic, while the second largest religion in France is Islam. No precise figures on the size of the Muslim population are available since France is a secular state, and therefore it is forbidden to inquire into questions of religion. However, according to recent estimates there are approximately 4,155,000 Muslims living in France, out of a total population of 58,520,688.¹³ Some scholars are more conservative in their estimation and argue that approximately 3.65 million Muslims live in France.¹⁴ In either case, France has the largest Muslim population in Europe.¹⁵

The majority of these Muslims originate from former French colonies, particularly Algeria, Tunisia and Morocco.¹⁶ The Muslim population in France is young, with one-third being under the age of 20 (compared to 21% of the French population as a whole).¹⁷ Muslims have been present in France since World War I,¹⁸ however it was not until the early 1960s that several waves of Muslim immigrant groups arrived in France. This was due to France granting asylum to Algerians who fought on the French side in Algeria's 1954-62 war of independence, as well as the fact that it encouraged immigration in order to obtain much needed manpower.

Half of the Muslim population has French citizenship, with children born in France of foreign-born, non-citizen parents usually attaining citizenship by their majority,

¹³ Open Society Institute, *Monitoring the EU Accession Process: Minority Protection: The Situation of Muslims in France*, New York, Open Society Institute, 2002, p. 74.

¹⁴ Harry Judge, *The Muslim Headscarf and French Schools*, in "American Journal of Education", vol. 111, November 2004, p. 7.

¹⁵ Jennifer Joan Lee, *Expulsions over Veil Intensify French Debate on Secularity*, in "International Herald Tribune", 21 October 2003.

¹⁶ Dominique Maillard, *The Muslims in France and the French Model of Integration*, in "Mediterranean Quarterly", Winter 2005, p. 62.

¹⁷ Timothy Savage, *Europe and Islam: Crescent Waxing, Cultures Clashing*, in "The Washington Quarterly", vol. 27, no. 3, Summer 2004, p. 28.

¹⁸ Milton Viorst, *The Muslims of France*, in "Foreign Affairs", September/October 1996, vol. 75, no. 5, p. 78.

dependent however on their year of birth.¹⁹ In France, the approach has been to promote the assumption of a single, national, public French identity for immigrants who attain to citizenship, while claims for special rights by any minority group "are perceived as a threat to the Republic's citizenship structures in the long term."²⁰ Thus, the feeling that immigrants and their descendants need to change in order to become part of French society is dominant.

As is the case throughout most of Europe, the Muslim presence in France is clustered geographically in socially disadvantaged areas, with one-third of Muslims living in or around Paris.²¹ Muslims constitute 50% of the prison population and a comparable imbalance is reflected in the statistics of unemployment.²² A recent study found, for example, that 30% of men of Algerian origin between the age of 25 and 39 are unemployed, compared to the national average unemployment rate of 10%.²³

A sense of religious belonging seems to be an important identity component of Muslims in France – and this importance is increasing. According to the results of a recent survey, "a higher percentage of Muslims engaged in daily prayers, visited the mosque regularly, or practiced other forms of religious observance in 2001" than in 1994 or 1989.²⁴ However, because of the non hierarchical character of Islam it is difficult to create forms of organisation and representation for the Muslim community that are comparable to the representation of other religious communities in France. Some official attempts have been made to provide a forum in which Muslim opinion can be articulated. In 1989, for example, Minister of the Interior Pierre Joxe sought to establish the Council of Reflection on Islam in France (CORIF), followed by Minister Charles Pasqua, who created a Council of Representation of French Islam, and Minister Jean-Pierre Chevènement who in October 1999 set up a Consultation of the Muslims of France.²⁵ The objective of all of these initiatives was the creation of a centralised, hierarchical

¹⁹ Richard Alba, *Bright vs. Blurred Boundaries: Second-Generation Assimilation and Exclusion in France, Germany, and the United States*, in "Ethnic and Racial Studies", vol. 28, no.1, January 2005, p. 28.

²⁰ Open Society Institute, pp. 77-78.

²¹ Savage, p. 29.

²² Judge, p. 7.

²³ Wide Angle, Young, Muslim, French, PBS, at: <http://www.pbs.org/wnet/wideangle/shows/france/info4.html>.

²⁴ Open Society Institute, p. 76.

²⁵ Ibidem, p. 133.

representation of Islam. Finally, in 2003 Minister Nicolas Sarkozy set up the French Council of the Muslim Faith, which France now officially recognises as a representation of the French Muslim community.

Despite these initiatives, many still argue that although Islam is the second largest religion in France, socially it is practiced "by a group of people that is dominated, unprivileged and reduced to political silence."²⁶ This is evident in voter registration, for example.²⁷ It is also evident in the fact that in contrast to Catholic places of worship in France, the places of worship of Muslims are usually makeshift. It is estimated that in 2000, Muslims had 1,558 prayer spaces, with only 20 of them being able to hold more than 1,000 congregants; in total, there are only five mosques in France that were built expressly as mosques, while there are about 40,000 Catholic buildings.²⁸

2. *Laïcité*: A Secular Tradition in France

*2.1 The Meaning and Significance of *Laïcité* in France*

*"France shall be an indivisible, secular ["laïc"], democratic and social Republic. It shall ensure the equality of all citizens before the law without distinction of origin, race or religion. It shall respect all beliefs."*²⁹

Some commentators believe that France's tradition of *laïcité* explains a particularly French sensibility to Islam which is not expressed in other major European countries with the same intensity.³⁰ It is important to note that *laïcité* is much more than a mere separation of the church and the state. Instead, it is a fundamental conception of citizens and society, within French Republicanism, in all its "indivisibility".³¹ *Laïcité* is meant to

²⁶ El Hamel, p. 294.

²⁷ In France, where 92% of adult citizens are registered to vote, the corresponding figure among Muslim citizens is only 37%. See Savage, p. 36.

²⁸ Alba, p. 34.

²⁹ *French Constitution of 4 October 1958, Article 1.*

³⁰ Gunn, p. 457.

³¹ Dawn Lyon and Debora Spini, *Unveiling the Headscarf Debate*, in "Feminist Legal Studies", vol. 12, no. 3, 2004, p. 335.

protect the freedom to believe as well as not to believe. In a recent letter to the United Nations Special Rapporteur on Freedom of Religion or Belief, the French government emphasised that *laïcité* should not be confused with an anti-religious attitude. It noted that the French state does not assess or evaluate the religious content of any movement, and that it refuses to define what is and what is not religious.³² *Laïcité* is considered a foundational value and to be at the core of French uniqueness. President Jacques Chirac has, for example, said that because of *laïcité* France is recognised world wide as the “homeland” of human rights.³³ However, others argue that “a rigid interpretation of *laïcité* makes it difficult to embrace multiculturalism, as culturally (and religiously) specific characteristics and differences are considered secondary to the concept of equality for all individuals.”³⁴

2.2 The Historical Origins of French *Laïcité*

The modern French conception of *laïcité* developed during the five years following the Revolution of 1789, and during the years 1879 to 1905 of the Third Republic (1870/75 – 1940). T. Jeremy Gunn argues that while the concept today is hailed as embodying tolerance, neutrality, and equality, one should be aware that *laïcité* actually “emerged from periods of conflict and hostility, most of which targeted the Roman Catholic Church.”³⁵ Gunn thus considers it a myth that the notion of *laïcité* embodies these positive characteristics.

He describes how in 1789 Catholic Church property was declared to belong to the state, how the Treilhard Decree dissolved all religious congregations, and how clergy were forced to take oaths of loyalty to the state. Many oath requirements were developed in that time-period and fact all state functionaries including the clergy had to affirm their oaths to the state. Gunn argues that when looking back at this history one notices a

³² Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief of the UN Commission on Human Rights, E/CN.4/2005/61/Add.1, 15 March 2005, para. 115 (hereinafter Jahangir Report).

³³ Jacques Chirac, *Discours Prononcé par Monsieur Jacques Chirac, Président de la République, Relatif au Respect du Principe de Laïcité dans la République*, 17 December 2003, (hereinafter Chirac, 17 December 2003) at: <http://www.laic.info>.

³⁴ Open Society Institute, p. 80.

³⁵ Gunn, p. 433.

recurrent demand for citizens to choose between their religion and the state. It was as though "a person could not be genuinely Catholic and genuinely French."³⁶

The next major developments related to *laïcité* occurred during the second decade of the Third Republic, beginning in 1879. At this time the term had officially been coined and was being used with increased frequency. Freedom from the public influence of religion was considered crucial to the state the Republicans were creating. Secularism was particularly emphasised in schools, since this was where the new citizens and bureaucrats were being educated. It was in the Third Republic that schools were decreed secular, free and obligatory in order to build the French nation around the idea of *laïcité*. Between 1880 and 1905, more than two dozen laws were promulgated that "promoted *laïcité* in ways ranging from placing civil disabilities on those who had received a religious education to preventing religious manifestations in streets during funeral processions."³⁷ Gunn argues that in this sense "the spirit of *laïcité* could act with the same intolerance that it accused others of exemplifying."³⁸

An important date is 9 December 1905, when the National Assembly adopted the Law on the Separation of Churches and the State (the Combes Law), which created a legal framework whereby freedom of conscience and free exercise of religion are guaranteed and protected through a system of separation between state and religious affairs. All religious property that had been acquired or built prior to 1905 was expropriated and the Concordat of 1801, which had provided that the state would pay clerical salaries in compensation for lands seized during the Revolution, was revoked.³⁹

As the above discussion indicates, extricating the church from all involvement in governance was a way of asserting that "the old sources of authority, including the church and the military, had no place in the Republic of meritocracy and individual freedom of belief."⁴⁰ However, one must realise that even after its defeat in the political arena, Catholicism continued to be an important cultural force in French society, even up

³⁶ Ibidem, p. 439.

³⁷ Ibidem, p. 440.

³⁸ Ibidem.

³⁹ Ibidem, p. 441.

⁴⁰ Elisa T. Beller, *The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society*, in "Texas International Law Journal", vol. 39, no. 4, Summer 2004, p. 593.

to today.

3. The Headscarf Controversy in France

3.1 1989: First Phase of the Controversy

3.1.1 A National "Psychodrama"

Although the headscarf controversy in France has recently attracted considerable international attention, particularly due to the 2004 law which bans conspicuous religious symbols (including the headscarf) in public schools, it is not a recent phenomenon, tracing its origins back to 1989. In that year the principal of a majority-Muslim public school in Creil, a Parisian suburb, suspended three Muslim girls for wearing headscarves in the classroom (the girls were accused of having violated the principle of *laïcité*). Initially a compromise was agreed upon, which would enable the girls to wear their scarves everywhere in the school except for the classroom. However, 10 days after the compromise was reached, the girls again refused to remove their headscarves in the classroom, and therefore were expelled once again.

Hence, "a national psychodrama" (as the headscarf controversy has been referred to by *Le Monde*⁴¹) began, with the Muslim community seeing itself as victims of institutionalised racism, while most officials and teaching unions argued that Islamic fundamentalists were exploiting the controversy.⁴² The headscarf controversy became the top story in French media and France became deeply divided on the issue, although a clear division between the political left and the right did not occur. On the Left, for example, there were commentators who supported the girls' right to self-expression, but on the other hand there were also those who felt that allowing Muslim girls to wear headscarves in class could "ultimately undermine France's secular and liberal political

⁴¹ Sole Robert, *Derrière le foulard islamique: Les mesures annoncées par M. Bayrou s'inscrivent dans un débat de fond sur la religion musulmane en France*, in "Le Monde", 13 September 1994.

⁴² El Hamel, pp. 297-298.

heritage.”⁴³

One reason why the headscarf has caused so much controversy in French public schools is the special role that public schools play in French society. Part of the mission of the educational system in France is for the state to instil culture in its citizens. In France the state, and not the parents, is considered to have the main responsibility to educate a child, i.e. to teach it French culture and prepare it for French citizenship.⁴⁴ A comment by former Prime Minister Jean-Pierre Raffarin in 2004 mirrors the idea that the public school's task is to teach students French culture and prepare them for French citizenship. In the words of Raffarin: “The teacher does not have in his class Catholics, Protestants, Jews, and Muslims. He has first and foremost French youngsters, all of whom are members of the school of the Republic.”⁴⁵

3.1.2 (Un)lessening the Controversy: The *Conseil* Ruling of 1989

Former Education Minister Lionel Jospin became the first government official to speak out in favour of the girls' right to wear the headscarf, stating that the French school is made to educate, to integrate, and not to reject, adding that it would be a grave mistake to adopt a rigid attitude.⁴⁶ Under pressure, he referred the matter to the *Conseil d'État* (the highest French administrative court⁴⁷), asking it to clarify whether schoolchildren may wear “insignia” that identify their religious affiliation in public schools. The *Conseil* ruled on 27 November 1989 that wearing religious symbols in school is permissible as long as these symbols are not conspicuous (in French, *ostentatoire*) as to “constitute an act of intimidation, provocation, proselytising, or propaganda; threaten the dignity and freedom of students or other members of the educational community” or disrupt the school's normal functioning.⁴⁸ The *Conseil* stated that freedom of conscience is “one of

⁴³ Beller, p. 583.

⁴⁴ Ibidem, p. 612.

⁴⁵ As cited in Judge, p. 13.

⁴⁶ M. Jospin en appelle au respect de la laïcité mais demande qu'aucune élève ne soit exclue, in “Le Monde”, 26 October 1989.

⁴⁷ The government may call on the *Conseil* to advise it on a matter of public administration – the *Conseil's* ruling is considered definitive.

⁴⁸ Le Conseil d'État, *Assemblée générale (Section de l'intérieur)* – n° 346.893, 27 November 1989, at:

the fundamental principles recognised by the laws of the Republic [and] is operative in the domain of education.”⁴⁹ It also emphasised the right to education of everyone living within French borders, regardless of their religion. Perhaps most interestingly, the *Conseil* ruled that *laïcité* not only permits, but actually requires schools to respect students' freedom of conscience, including the right to express their beliefs by wearing religious clothing to school, but only if it does not infringe upon others' rights.

Overall this ruling clarified the headscarf question only to a certain degree, since in effect it virtually gave discretion to individual principals to decide upon the matter on a case-by-case basis, without providing them with clear guidelines to follow. It appears that the *Conseil* was either too insulated from the public debate raging on Islam and *laïcité* to realise that a strong statement would help the situation from becoming exacerbated, or on the other hand, that it was perhaps all too aware of the issues that were involved and instead wished to provide school principals with ample freedom in dealing with the headscarf issue.⁵⁰

3.1.3 The Jospin and Bayrou Circulars

In its ruling the *Conseil* stated that the minister of education may provide a guide as to how the *Conseil's* criteria should be applied. Jospin took up this invitation by issuing a circular⁵¹ that was to serve as such a guide for all educational administrators, bureaucrats and teachers. In his circular, he states that the wearing of religious symbols by students in public schools is not in and of itself incompatible with *laïcité*. However, conspicuous signs that have as their intention the promotion of a particular religion are not compatible with *laïcité*. The first directive he gives is that as soon as problems arise in regard to a student wearing the headscarf, school officials must engage in a dialog with the student concerned, as well as her parents. School officials are to make clear that it would be both in the student's and the school's interest for the student to cease wearing the headscarf. If

http://www.conseil-etat.fr/ce/rapport/index_ra_cg03_01.shtml.

⁴⁹ Ibidem.

⁵⁰ Beller, p. 608.

⁵¹ *Circulaire relative au port d'insignes religieux à l'école se référant à l'avis du Conseil d'État*, 12 December 1989, at: <http://islamlaicite.org/article133.html>.

initiating a dialog is unsuccessful, disciplinary action can be taken.

It was five years later that François Bayrou, who then was the education minister, issued a circular that referred only to “conspicuous symbols”, but was clearly directed at the headscarf controversy. His circular confirmed the principals’ authority to decide the headscarf issue on a case-by-case basis, which was criticised by those who had hoped he would take a stronger stance on the issue.⁵² The circular tries to further define what is meant by “conspicuous”, and emphasises that some symbols are so ostensible “that their meaning is precisely to separate certain students from the rules of the communal life of the school. Such symbols are, in and of themselves, elements of proselytism.”⁵³ According to *Le Monde*, the Bayrou circular is the first official text introducing the idea that the headscarf is in itself a manifestation of discrimination and foreign proselytism.⁵⁴ Thus, Bayrou seems to be arguing that the headscarf (although he never mentions the precise word) is in itself a sign of discrimination, and that it therefore must be banned, although he also emphasises that dialog should be sought with the students and their parents.

The issue of whether to remove headscarf-wearing girls from the classroom came in front of the *Conseil* many more times in the following decade. Although the *Conseil* sometimes decided against Muslim girls being able to wear headscarves in school on the grounds that they had been unnecessarily provocative, the vast majority of the *Conseil*’s judgments – 41 of 49 by one count – were against state officials who were improperly attempting to ban headscarves.⁵⁵

3.2 The Resurgence of the Controversy in 2003

The headscarf controversy did not become subject of a national media frenzy again until

⁵² Bernard Philippe, *La France et l’Islam – Islam et Société – La saga des foulards*, in “Le Monde”, 13 October 1994.

⁵³ *Circulaire n° 1649 du 20 septembre 1994, Neutralité de l’enseignement public: port de signes ostentatoires dans les établissements scolaires*, 20 September 1994, at: <http://www.assemblee-nationale.fr/12/dossiers/documents-laicite/document-3.pdf>.

⁵⁴ Bernard Philippe, *Dans une circulaire adressée aux chefs d’établissement à propos du port du foulard islamique François Bayrou souhaite l’interdiction des “signes ostentatoires” à l’école publique*, in “Le Monde”, 21 September 1994.

⁵⁵ Gunn, p. 457.



late 2003. By 2003 a high percentage of the French population wanted Islamic headscarves banned from schools, and a majority even wanted them banned from public spaces in general.⁵⁶ In July 2003 President Chirac created a commission charged with analyzing “the principle of *laïcité* in the Republic”, which later was known as the Stasi Commission, after the name of its chairman, Bernard Stasi. The Commission was composed of 20 members (14 men and 6 women), all of whom are distinguished scholars and officials. Reportedly one quarter of the members of the Commission were known to be in favour of a “strict” model of *laïcité*, another quarter were in favour of a more “open” interpretation of *laïcité*, while half of the Commission members either did not have a strong opinion on the issue or were between the two sides.⁵⁷

3.2.1 The 2003 Stasi Commission Report and the Ensuing Headscarf Ban

The Commission issued its report on 11 December 2003 and based its findings on several sources: schools representatives, headmasters, teachers, local associations, representatives of the main religions, as well as human rights organisations. The Commission conducted about 100 public hearings and about 40 hearings behind closed doors. Among other things, the Commission also travelled to other European countries and received several written contributions.

In its report, the Commission provides a historical and philosophical overview of the principle of *laïcité* and states that just as the state must abandon all authority within matters of personal conscience and spirituality, so must religion “renounce [its] political dimension. *Laïcité* is incompatible with any conception of religion that hopes to rule over... the social system or the political order.”⁵⁸ The Commission notes that *laïcité* is based on three indissociable values: freedom of conscience, freedom of belief and the neutrality of political power which may not interfere with the spiritual or religious

⁵⁶ Ibidem, p. 459.

⁵⁷ Jean Baubérot, *La Commission Stasi vue par l'un de ses membres*, in “French Politics, Culture & Society”, vol. 22, no. 3, Fall 2004, p. 135.

⁵⁸ Commission de Réflexion sur l'Application du Principe de Laïcité dans la République, *Rapport au Président de la République*, 11 December 2003, [hereinafter Stasi Commission Report], at: <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>, p. 13.

domain.⁵⁹

The Commission finds that young (Muslim) women in France are victims of a resurgence of sexism, which expresses itself through diverse pressures, these being verbal, psychological and physical abuse. According to the Commission, these young women are pressured to dress asexually, to lower their gaze when they see a man, or else they are stigmatised as “whores.”⁶⁰ Overall, the Commission concludes that the headscarf issue in France is not a question of liberty of conscience, but rather a question of the maintenance of public order.⁶¹ It states that the normal progress of educational instruction is no longer assured.

The Commission makes a total of 25 recommendations. Some of them are the official recognition of Muslim holidays in France,⁶² the improvement of living standards in economically disadvantaged communities, the instruction of Arabic in public schools, and ensuring that in teaching French history, slavery, colonisation, decolonisation, and immigration are covered as well.⁶³ The Commission made its now famous recommendation to ban the headscarf in public schools because it came to the conclusion that the vast majority of girls who wear the headscarf in France are forced to do so by the Muslim community. It stated that “the Republic cannot remain deaf to the cry of distress of these young girls” and that schools “must be for them a place of liberty and emancipation.”⁶⁴

Jean Baubérot, a historian and sociologist, was the only member of the Commission who abstained in the vote on the headscarf ban. His reasoning was that although the reasons for the law were good, the law itself was not good. In his opinion, the girls who wear the headscarf are not necessarily being manipulated by radical Islamists. Far from this, he says that some of them are feminists in their own way. He argues that *laïcité* is not threatened by a discrete headscarf, and that the Commission failed to make the distinction between a discrete headscarf and a conspicuous one.⁶⁵ His

⁵⁹ Ibidem, p. 9.

⁶⁰ Ibidem, p. 46.

⁶¹ Ibidem, p. 58.

⁶² Half of them are currently related to Christian, indeed Catholic, festivals. See Judge, p. 14.

⁶³ Stasi Commission Report, p. 67.

⁶⁴ Ibidem, p. 58.

⁶⁵ Baubérot, pp. 139-140.

other reason for abstaining was that he was not completely satisfied with the functioning of the Commission. He criticised that no quantitative analysis was done, and that the Commission had impressions, but no real knowledge based on inquiries and analysis.⁶⁶

Despite the many recommendations the Commission made, President Chirac chose to adopt only half of one of them; he suggested a law to ban conspicuous religious clothing from public schools, yet not political insignia, which was recommended as well. On 10 February 2004, the National Assembly adopted the law to ban conspicuous religious symbols in public schools (494 in favour, 36 against, 31 abstentions),⁶⁷ followed on 3 March by the Senate (277 in favour, 20 against).⁶⁸ The law was signed by the President and Prime Minister on 15 March 2004, and applies to France as well as its overseas territories, but overseas territories with a large Muslim community receive some exemptions.

The law's title is: "*Loi encadrant, en application du principe de la laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.*"⁶⁹ ("Law, implementing the principle of *laïcité*, on wearing symbols or clothing that indicate religious adherence in public schools, *colleges* [11-15 years] and *lycées* [16-18 years]").⁷⁰ The law (which is subject to review in one year's time) is very brief, stating in Article 1 that:

In public elementary schools, junior high schools and high schools, students are prohibited from wearing symbols or attire through which they conspicuously exhibit a religious affiliation.

Note that the internal regulations [of the schools] require disciplinary procedures to be preceded by a dialog with the student.

The law received wide public support in France. A February 2004 survey

⁶⁶ Ibidem, p. 140.

⁶⁷ Assemblée Nationale, *Analyse du Scrutin N° 436*, 10 February 2004, at: <http://www.assemblee-nationale.fr/12/scrutins/jo0436.asp>.

⁶⁸ Le Sénat, *Scrutin N° 155 – Laïcité*, 3 March 2004, at: <http://www.senat.fr/scrutin/s03-209.html>.

⁶⁹ Assemblée Nationale, *Texte Adopté n° 253*, 10 February 2004 [hereinafter *Texte Adopté n° 253*], at: <http://www.assemblee-nationale.fr/12/ta/ta0253.asp>.

⁷⁰ Emphasis added.

published in *Le Parisien*, showed 69% of the population for the ban and 29% against. For Muslims in France, the survey showed 42% for and 53% against. Among surveyed Muslim women, 49% approved the proposed law, and 43% opposed it.⁷¹

The law of 2004 represents a very strict interpretation of *laïcité*. It should be mentioned that President Chirac strove to present this law as neutral and non-discriminatory. In December 2003 he invited, for example, the rector of the Paris Mosque along with leaders of other major religious faiths to join in the traditional exchange of New Year greetings at the Elysées. He also took this opportunity to point out that while this gesture was to convey a message of openness and inclusion, "it must not be misinterpreted as an endorsement of *communautarisme*, which France rejects."⁷² In another speech that same month he said that *communautarisme* [i.e. support of group rights, as opposed to only individual rights] is contradictory to France's history, traditions, and culture and contrary to France's "humanist" principles and its emphasis on the value of equality and brotherhood between all the French. He said that all the children of France, regardless of history, origin, or belief, are the daughters and sons of the Republic.⁷³

3.2.2 In Further Defence of the Commission's Report: The views of Patrick Weil

Patrick Weil, a prominent political scientist who was a member of the Stasi Commission, emphasised that in its decision, the Commission did not interpret the headscarf as a piece of clothing that has a particular meaning, since in his opinion, the state has no right to interpret religious symbols.⁷⁴ In fact, Weil writes that he initially was of the opinion that a law would be unnecessary to resolve the problems that the headscarf was causing in public schools. However, his opinion changed after the four months of public hearings that the Commission conducted. What seems to have influenced him the most was the testimony of Muslim girls who choose not to wear the headscarf, yet are subject to strong

⁷¹ The Economist, *The War of the Headscarves*, 5 February 2004, at: http://economist.com/world/europe/displayStory.cfm?story_id=2404691.

⁷² As cited by Judge, p. 14.

⁷³ Chirac, 17 December 2003.

⁷⁴ Patrick Weil, *Lifting the Veil*, in "French Politics, Culture & Society", vol. 22, no. 3, Fall 2004, p. 143.

pressure to do so. Weil notes that the pressure to wear the headscarf takes different forms, ranging from insults to violence, and that it usually originates from groups composed of males who view girls who choose not to wear the headscarf as "bad Muslims" or "whores".⁷⁵ Most importantly, Weil argues that these girls constitute the vast majority of Muslim girls whose right to freedom of conscience needs to be protected, and that furthermore, wearing the headscarf has become an issue not of individual freedom, but of a national strategy of fundamentalist groups using public schools as their battleground.⁷⁶ Weil favoured a law banning headscarves in schools because by the decision coming from the outside, these girls could be protected from fundamentalist pressure without them having to break their religious ties. He argues that another important factor is that the individuals involved in schools are minors, and that there is no question of forbidding religious signs in the future in universities or elsewhere in the adult world, since adults (as opposed to children) can go to court and claim their right to freedom of conscience.⁷⁷

It should be noted that Weil's impression of the situation contrasts greatly with that of other commentators. While he sees the situation prior to the headscarf ban as being very dramatic and out of control, other commentators argue that at the time the Commission was appointed, no new dramatic provocative cases regarding headscarves in schools had come to the public's attention, and that the guidelines offered by the *Conseil* appeared to be working. Some commentators argue that the revival of the headscarf crisis "seems to have arisen not from particular events, but from statements made by politicians that appealed to latent popular sentiments."⁷⁸

Weil emphasises that the headscarf ban was introduced in full respect for the European Convention on Human Rights, and bases his argument on the fact that the Convention allows for the limitation of the expression of religious faith in the case of problems of public order or attacks on the rights and on the freedom of conscience of others, which -Weil argues- was clearly the case in French public schools. The Convention requires that a law be passed in order to enforce such a limitation, and Weil argues that France was in this sense required to pass the law. Weil also addresses the fact

⁷⁵ Ibidem.

⁷⁶ Ibidem, p. 144.

⁷⁷ Ibidem.

⁷⁸ Gunn, p. 475.

that the Convention requires that any restriction of the expression of religious faith be proportionate to the aim, and says that this is why the Commission decided to ban conspicuous (and not discrete) religious signs only. Weil says his only regret is that the other twenty-four proposals the Commission made were not implemented.

3.2.3 The Aftermath of the Headscarf Ban

M. Fillon, Minister of Education, was very pleased at the beginning of the 2004 school year. According to him, in September 2003 more than 1500 girls attended school wearing a headscarf, however in September 2004 it was only 635 girls who came to school wearing the headscarf. On 21 September 2004 he said that 534 of these cases had been dealt with, while 101 cases remained "problematic".⁷⁹

According to *Le Monde*, until March 2005, 47 girls were excluded from their schools because they refused to remove their headscarf, while 550 girls were able to "find a solution through dialog."⁸⁰ These numbers reportedly, however, do not include those girls who registered with the National Centre for Distance Learning instead of entering a dialog with school authorities. According to a report written by Dr. Abdallah Milcent and published in March 2005, about 10 girls are now going to school in England, at least 27 in Belgium, at least 10 are in Germany and Holland, and more than 30 are in Turkey, which brings it to a total minimum of 77 students who decided to study abroad in order to evade the new regulations.⁸¹ Furthermore, according to this report at least three students transferred to Catholic schools, and about a dozen students in France were allowed to wear a "discrete scarf" because of a more "lenient" interpretation of the law by their respective school. The document also estimates that at least 26 students decided to register with the National Centre for Distance Learning instead of going through the mediation process.

⁷⁹ As cited by Virginie Malingre, *Loi sur la laïcité: M. Fillon satisfait malgré 101 cas "problématiques"*, in "Le Monde", 21 September 2004.

⁸⁰ Martine Laronche, *Un an après la "loi sur le voile", les difficultés des élèves exclues*, in "Le Monde", 15 March 2005.

⁸¹ Xavier Ternisien, *Des organisations musulmanes évoquent 806 "victimes"*, in "Le Monde", 15 March 2005.

4. Evaluation of Conflicting Arguments

4.1 *Lack of Serious Investigation*

In its report, the Commission presents the situation as such that the vast majority of girls wearing the headscarf do so because they are pressured by their families and the Muslim community, but barely acknowledges the possibility that some girls may freely choose to wear the headscarf. Unfortunately, however, the Commission does not provide reliable scientific evidence as to how it reached this conclusion. As Gunn argues, the Commission could easily have conducted surveys in order to determine why girls wear (or choose not to wear) the headscarf.⁸² The Commission did not deem it necessary to seriously investigate this issue and thereby legitimate its conclusions. The only evidence the Commission cites in support of its finding, is from unnamed witnesses, some of whom were interviewed behind closed doors. It is possible that the vast majority of headscarf-wearing girls in France are indeed coerced into doing so, yet the Commission failed to make this conclusion through any systematic inquiry, data or quantification.

4.2 *The Impact on the Right to Express and Manifest One's Religion*

An overall weakness of the report is that the Commission never gives any serious consideration to the right to express and manifest one's religious beliefs. While the *Conseil* in 1989 and its subsequent decisions pointed out that students have a right to express and manifest their religion in the school (as long as this does not infringe upon other students' rights or the school's educational mission), the Commission does not acknowledge this. The report would have been more balanced if it addressed the fact that rights of conscience would be affected by the headscarf ban (it could have addressed other groups, such as the Sikhs, for example, who would be negatively impacted by the ban). As Patrick Weil stated, rights of conscience can be limited in order to ensure public order, but in the Commission's report the fact that these rights are being limited is not

⁸² Gunn, p. 469.

even addressed. Furthermore, although the Commission states that minors who are coerced into wearing the headscarf need to be protected, it never addresses how minors who do wish to wear the headscarf out of free will are to be protected. As mentioned above, Weil argues that adults can go to court in order to argue for their rights of conscience, while minors cannot. What options then do minors have who wish to wear the headscarf to school out of free will?

Another dubious aspect of the report is its discussion of coercion. Coercion is only mentioned in the context of girls being forced to wear the headscarf. Yet the fact that girls are equally being coerced by French society *not* to wear the headscarf is not addressed. Furthermore, the Commission does not address the fact that its own headscarf ban is a form of coercion, and thus commits precisely what it accuses those who pressure girls into wearing the headscarf of doing. The Commission seems unaware that the answer "to one constraint (the religious obligation to wear the headscarf) cannot be another constraint (the obligation not to wear it)."⁸³ Prohibiting a girl from wearing a headscarf is just as oppressive as coercing her to wear it.

4.3 Possible Negative Impact on Girls Not Addressed

A further weakness of the report is that it does not discuss or acknowledge the possible negative impacts of a headscarf ban on girls who are forced to wear the headscarf. The fact that they might be removed from public schools, as has indeed occurred, is not even contemplated. The report does not address the possibility of these girls being segregated even further, and also does not acknowledge that the ban might lead to a further polarisation between Muslims and the general French population.

The headscarf ban does not promote gender equality, nor does it effectively fight radical Islam. In order to fight the spread of radical Islam, the French government would have to address the social and economic issues that have lead to such phenomena as Muslims comprising half of France's prison population, as well as the Muslim community having one of the highest unemployment rates. By focusing on these issues, the French

⁸³ Lyon and Spini, p. 341.

government might be able to increase Muslim integration into French society, which would not only prevent the spread of radical Islam, but would also promote gender equality within the Muslim community itself. With its headscarf ban, the French government is using Muslim schoolgirls as a battleground and in effect is punishing the ones it purports to protect.

The Committee on the Rights of the Child (the Committee which monitors the UN Convention on the Rights of the Child to which France is a party) in its concluding observations on the second periodic report submitted by France, expressed concern that France's headscarf ban in public schools may be counterproductive, by "neglecting the principle of the best interests of the child and the right of the child to access to education, and not achieve the expected results."⁸⁴ The Committee recommended that France, when evaluating the effects of the legislation, use the enjoyment of children's rights, as enshrined in the Convention, as the crucial criteria in the evaluation process and also consider alternative means, including mediation, of ensuring the secular character of public schools, while guaranteeing that individual rights are not infringed upon and that children are not excluded or marginalised from the school system and other settings as a result of such legislation.⁸⁵ The Committee stated that the dress code of schools may be better addressed within the public schools themselves, encouraging participation of children, and recommended that France continue to closely monitor the situation of girls being expelled from school as a result of the new law.⁸⁶

In addition, the UN Special Rapporteur on Freedom of Religion or Belief noted that she has received numerous complaints from different sources about the discriminatory character of the law. Although she opted not to take a formal position on the issue at that stage, she did wish to draw the attention of the French government to the risks of discrimination that the new law could lead to, as well as the development of tensions and Islamophobia that it could bring about.⁸⁷

⁸⁴ Committee on the Rights of the Child, *Concluding Observations: France*, CRC/C/15/Add.240, 30 June 2004, para. 25.

⁸⁵ *Ibidem*, para. 26.

⁸⁶ *Ibidem*.

⁸⁷ Jahangir Report, para. 113.

4.4 Religion Cannot be Completely Relegated to Private Sphere

Notwithstanding its tradition of *laïcité*, France cannot relegate religion completely to the private sphere if it purports to respect all faiths and ensure free practice of spiritual and cultural activities of all communities. This is because religious expression is “inherently social as well as personal or private.”⁸⁸ Furthermore, the complete exclusion of religion from the public arena homogenises the public sphere, which is discriminatory against those who have their origins in and wish to express a culture different from the state-promoted dominant French culture.⁸⁹ France should also be aware of the fact that despite the principle of *laïcité*, there is a Christian national identity that is held by the majority of the French population, and thus is a form of collective identity. Since the government does not otherwise pursue a strict interpretation of *laïcité* -by, for example, nonetheless following mainly Christian holidays- the headscarf ban runs the risk of appearing to some as an example of the dominant, French, Christian culture “policing the non-dominant culture to ensure the cogency of the dominant culture and label the non-dominant Muslim group as subversive.”⁹⁰

4.5 Group Rights Should be Revisited

Although France does not officially recognise the existence of minorities within its territory, group rights need to be part of the national debate if a further polarisation of communities is to be prevented. The argument that France cannot ignore the existence of ethnic, religious or linguistic minorities in its territory was already made in the 1983 concluding observations on France by the Human Rights Committee,⁹¹ which monitors the observance by states parties of their obligations under the International Covenant on Civil and Political Rights (the “ICCPR”). The rights of individuals are not always sufficiently protected under a framework of individual rights. Although France has made

⁸⁸ Lyon and Spini, p. 336.

⁸⁹ Beller, p. 622.

⁹⁰ El Hamel, p. 300.

⁹¹ Human Rights Committee, *Concluding Observations: France*, CCPR/A/38/40, 15 September 1983, para. 411.

a point to resist the Anglo-American model of interest group politics, it cannot disregard the various identities that its inhabitants have.

The headscarf ban amounts to a misrecognition of the Muslims in France. It expresses the negative image that French society projects onto the Muslim community. Instead of misrecognising the latter's differences in contrast to the general French population, the non-Muslim French majority should consider providing the Muslim community with a public affirmation of its differences. As Charles Taylor, known for one of the most influential interpretations of identity politics, has stated, due recognition is not just a courtesy we owe each other, but a *vital human need*,⁹² and mis- or nonrecognition "can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."⁹³ He argues that liberalism should not claim complete cultural neutrality, stating that liberalism is also a "fighting creed".⁹⁴ I would argue that the same can be said for France's principle of *laïcité*.

Taylor says that it is key to *recognise* the equal value of different cultures, by which he means to acknowledge their worth instead of just letting them survive. One of his main arguments is that "all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings."⁹⁵ He says that it would be ethnocentric to make a favourable judgment prematurely about a culture. However, he argues that there should be a willingness "to be open to comparative cultural study of the kind that must displace our horizons in the resulting fusions."⁹⁶ Thus, identity politics requires that groups be open to each other, which ultimately leads to a displacement and fusion of horizons. This fusion of horizons is a much better outcome than the minority either being excluded, or on the other hand being included, yet only through the neutralization of difference.⁹⁷

The French headscarf ban is a move in the wrong direction. It needs to be realised that a different cultural orientation does not necessarily mean a lack of political loyalty. It

⁹² Charles Taylor, *Multiculturalism and the Politics of Recognition*, New Jersey, Princeton University Press, 1992, p.26.

⁹³ Ibidem, p. 25.

⁹⁴ Ibidem, p. 62.

⁹⁵ Ibidem, p. 66.

⁹⁶ Ibidem, p. 73.

⁹⁷ Lyon and Spini, p. 340.

appears that while the French state is adhering to the principle of an indivisible French nation, it has not been keeping up with French society, which "has been evolving in a much more flexible and pluralistic fashion, implicitly imbued by a model of integration and cultural 'laissez-faire' much closer to the American experience."⁹⁸ The fusion of horizons that Taylor is speaking of is to a certain degree already taking place in France, despite the government's opposition to such a fusion. It is most evident in those Muslims who see Islam and France as compatible. An example is participants in a 1994 pro-headscarf demonstration in Grenoble, who held placards with slogans such as "Yes to Laicism, and to my Scarf!" and "France is my Liberty, So is my scarf!"⁹⁹ With these slogans these demonstrators were saying that it is a French thing for them to wear the headscarf, and that it would be a French thing to support them.¹⁰⁰

⁹⁸ William Safran, *Pluralism and Multiculturalism in France: Post-Jacobin Transformations*, in "Political Science Quarterly", vol. 118, no. 3, 2003, p. 465.

⁹⁹ Beller, p. 597.

¹⁰⁰ Ibidem.

CHAPTER TWO

The Headscarf Controversy in Germany

1. Muslim Population in Germany

About 3 million Muslims currently live in Germany (thus comprising 3-4% of the total population), the majority of which are of Turkish origin.¹⁰¹ While in France the presence of the Muslim population has much to do with a previous colonial relationship, the Muslim population in Germany is primarily due to Turkish workers being hired by the government to help rebuild Germany. After the construction of the Berlin Wall in 1961, there was a great demand for labour in West Germany, as the Wall set an end to the westward migration of refugees from East Germany. Due to this demand, the German and the Turkish governments negotiated in 1961 the recruitment of Turkish *Gastarbeiter* (Guest Labourers), the result of which being that one in two of all *Gastarbeiter* working in Germany was Turkish.¹⁰² Neither the German government nor the German people considered these workers members of the German society. In fact, until 1965, Turks (and all other non-Germans) were forced to leave Germany if they became unemployed. However, there was a change in legislation in 1965 that came about particularly due to the pressure of German employers. These employers were keen on keeping the workers they had spent time and effort to train, and as a result non-German workers gained residency permits and citizenship.

When the Turkish workers first came to Germany in the 1960s, most of them intended to remain in Germany for a short period of time, and planned to return to their home country with a large amount of money with which to support their families. Yet in many cases the return date was postponed on numerous occasions, until many workers asked for their wives and children to move to Germany with them. Before having their families join them, the Turkish *Gastarbeiter* did not attempt to establish mosques. Yet the

¹⁰¹ Heinhard Steiger, *Der Streit um das Kopftuch – Plädoyer für eine aktive Neutralität*, in "MRM – MenschenRechtsMagazin", vol. 9, no. 2, 2004, p. 115.

¹⁰² David Horrocks and Eva Kolinsky, *Turkish Culture in German Society Today*, Oxford, Berghahn Books, 1996, p. 157.

role of religion changed once their families moved to Germany, as Islam began to provide the framework for social interaction among Turks in Germany.¹⁰³ Thus, it was not until the late 1970's (when the guest workers and their families became permanent residents and were actively practicing their faith), that Germany's self-image and civic self-definition was challenged.¹⁰⁴

Comparing Germany and France in their reception of a Muslim population is an interesting undertaking, since these countries are viewed as representatives of two opposing models of immigration and integration: France is considered the classic territory of integration, while Germany is viewed as a country that defines membership in its polity exclusively along "blood" lines.¹⁰⁵ In the nineteenth century Germany organised herself along pre-existing ethnic ties and, as such, Germany is "the quintessential 'ethnic nation' which established a sense of nationhood first, and based on this conception created the corresponding institutions and state structures later."¹⁰⁶ German nationalism preceded the political organization of the nation-state. Thus, in Germany "the state is the representation of the 'Volk', and not, as in France, the nation the representation of state values and institutions."¹⁰⁷ This perhaps helps explain why some commentators consider Germany to be a country that creates "bright boundaries" that make it difficult for immigrants and their second generation to integrate into German society.

2. Bright Boundaries to Integration into German Society: Religion and Citizenship

2.1 Religion

Richard Alba argues that in Germany "religion creates a bright boundary, which is reinforced ... by the barriers to citizenship."¹⁰⁸ An example for how religion in Germany creates a bright boundary that keeps immigrants and their second generation from

¹⁰³ Ibidem, p. 161.

¹⁰⁴ Silvia Maier, *Multicultural Jurisprudence: A Study of the Legal Recognition of Cultural Minority Rights in France and Germany*, PhD Thesis, University of Southern California, May 2001, p. 86.

¹⁰⁵ Ibidem, pp. 68-69.

¹⁰⁶ Ibidem, p. 72.

¹⁰⁷ Ibidem, p. 73.

¹⁰⁸ Alba, p. 39.

integrating, is the fact that in Germany the established religions receive financial support through the tax system, which allows each taxpayer to designate one of them to receive a non-obligatory "church tax". Similar to the situation in France, Islam's non-hierarchical character makes it difficult to create forms of organisation and representation for the Muslim community that are comparable to the representation of other religious communities in Germany. Therefore, the Muslim community has not been able to benefit from the financial support that is made available to the other faiths through the tax system.

Another example for this religious boundary in Germany is the fact that established religions are taught in public schools during hours set aside for religious instruction. Except for in Berlin, Islam has not been accorded the same status. If it is taught, then only on a non-regular basis, where classes are taught in Turkish by instructors provided by the Turkish consulate, for example.¹⁰⁹

Most Germans would argue that religion, even the main Christian dogmas, do not play a big role in German society. However, in reality the main Christian religions are deeply embedded institutionally as well as culturally in German society, and thus present a boundary to the integration of non-Christian immigrants and their second generation. This is particularly apparent in the *Länder* (states) of the south and southwest of Germany. In Bayern, for example, crucifixes hang at the front of the classroom in most public schools, despite court decisions that found this to be in conflict with the constitutional guarantee of religious freedom.¹¹⁰

2.2 Citizenship

A fundamental aspect of the boundary between a native ethnic majority and an immigrant minority concerns citizenship, since it governs access to fundamental rights in a society. In 1999 there was a fundamental change in Germany, in that legislation was passed that created provisional birthright citizenship for all second-generation children born after 1999. Prior to this change, second generation children were foreign at birth and had to

¹⁰⁹ Ibidem, p. 32.

¹¹⁰ Ibidem, p. 33.

undergo a naturalisation procedure in order to acquire German citizenship (the procedure was essentially the same as that for foreign-born individuals).¹¹¹ One of the requirements to obtain German citizenship was to give up the other nationality, which was particularly difficult for Turkish families because it posed a problem in regard to Turkish inheritance law. These problems may help explain why naturalisation was very low in the Turkish second generation.¹¹² This low naturalisation rate is a further indication of a lack of integration of the Turkish immigrant community into German society.

3. Secularism and Religious Freedom in Germany

3.1 German Basic Law

The German Basic Law ("Grundgesetz")¹¹³ guarantees the right to religious freedom. As Edward Eberle notes, there exists a wide expanse for the individual exercise of religious freedom and a further expanse "where citizens can enlist the state to facilitate religious practice through provision of such services as religious instruction in the public schools, the grant of public corporate status to religious organizations, and the collection and administration of taxes for churches, synagogues, or other religious organizations."¹¹⁴ Article 4 of the Basic Law explicitly protects freedoms of faith, conscience, and religious or philosophical creed. This protection is textually without limitation, and is restricted only by other provisions of the Basic Law, in particular those that protect the right of third parties or that guarantee the protection of collective goods. This absolute guarantee of basic rights is exceptional, since most *Grundgesetz* rights are stated with express textual reservation.¹¹⁵ It should be noted that Article 2 is also relevant, as it protects the right to the free development of the individual's personality, which is inextricably linked

¹¹¹ Requirements included a long period of residence, competence in the German language, a significant fee, a clean police record and surrender of previous citizenship.

¹¹² Alba, p. 29.

¹¹³ *Grundgesetz für die Bundesrepublik Deutschland*, at: <http://www.bundesregierung.de/Gesetze/-4222/Grundgesetz.htm>.

¹¹⁴ Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, in "Tulane Law Review", vol. 78, March 2004, p. 1024.

¹¹⁵ *Ibidem*, p. 1029.

to the freedom of religion.

3.2 Cooperative Relationship Between Church and State

A major difference between France and Germany is that in Germany there is a historic tradition of a cooperative relationship between the church and the state. The outline of the relationship between church and state is centred on Article 140 of the Basic Law, which incorporates the provisions of the 1919 Weimar Constitution. Article 137 of the Weimar Constitution, for example, states that there shall be no state church, which, however, does not mean that there must be a strict separation of the church and the state. Among other things, Article 137 also guarantees religious bodies the right to "acquire legal capacity according to the general provisions of civil law," including as "corporate bodies under public law," which corporate status allows them "to levy taxes in accordance with the Land [state] law."¹¹⁶ These rights are available not only to religious associations, but to associations of philosophical persuasion as well. The tax is between 8% and 10% of a person's income tax, and a person whose name is on the church or religious body's register is automatically subject to the tax. In practice, the main beneficiaries of governmental aid are dominant religious bodies, such as Protestant, Roman Catholic, and Jewish groups. As mentioned earlier, this arrangement is disadvantageous to minority religions in Germany, such as Islam for example. This system may work well in a homogenous society; however, the more religiously pluralistic German society becomes, the more difficult it will become to implement this system without it appearing discriminatory.

Another important aspect of the Basic Law is that Article 7 makes religious classes part of the ordinary curriculum in state schools. However, it does provide that the persons entitled to bring up a child have the right to decide whether the child attends religious classes, and that no teacher may be obliged against his or her will to give religious instruction.

¹¹⁶ Ibidem, p. 1030. For original text see: http://www.datenschutz-berlin.de/recht/de/gg/gg-wv_de.htm#wv137.

4. The Headscarf Controversy in Germany

4.1 Identifying the Debate

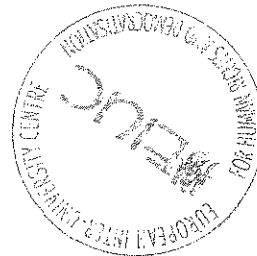
In contrast to France, the wearing of the headscarf by students in public schools has not been cause for any "national psychodrama" in Germany.¹¹⁷ Students are required to attend and take part in school ("Anwesensheits- und Teilnahmepflicht"), and only behaviour that directly negatively influences the functioning of class or the school in general may be forbidden. Students' clothing may be banned if these clothes themselves are a sign of a lack of willingness to take part in class or if they are a sign of aggressive intolerance against a third party, or provoke a third party to become aggressive and thus make teaching impossible or extremely difficult. The general consensus appears to be that the headscarf in and of itself does not fall into this category of clothing. However, it is argued that students may be banned from wearing the headscarf in special circumstances, when it is worn with the intent to provoke students in an oppressive manner or when it leads to a fundamental persistent disruption of teaching.¹¹⁸

The main issue in the German headscarf debate is whether teachers in public schools should be allowed to wear the headscarf while teaching. The German approach to the public school system is much different than that of France. The French Constitution completely "outlaws" any religiously influenced instruction in public schools or even the use of religious content during instruction. As discussed above, Germany is less strict in preventing religious influence in public schools. Nonetheless, the issue of whether public school teachers should be allowed to wear the headscarf has been cause for debate in Germany, since the crucial issue is that the teacher is wearing the headscarf not in her own private life, but while performing a public act, i.e. teaching as a public servant.¹¹⁹

¹¹⁷ Some estimate that about 20-30% of Muslim students wear the headscarf at school. See Christine Langenfeld, *Integration und kulturelle Identität zugewanderter Minderheiten in der Bundesrepublik Deutschland – eine Untersuchung am Beispiel des allgemeinbildenden Schulwesens*, Tübingen, Mohr Siebeck, 2001, p. 50.

¹¹⁸ Ibidem, p. 51.

¹¹⁹ Karl-Hermann Kästner, *Religiös akzentuierte Kleidung des Lehrpersonals staatlicher Schulen*, in Karl-Hermann Kästner, Knut Wolfgang Nörr, Klaus Schlaich (eds.), *Festschrift für Martin Heckel*, Tübingen, Mohr Siebeck, 1999, p. 363.



This is a complicated debate, since the state has a responsibility to protect the teacher's right to freedom of religion, while at the same time the public school teacher to a certain degree represents the state itself.

4.2 The Case of Fereshta Ludin

The case that has attracted the greatest attention is that of Fereshta Ludin, a public school teacher who engaged in a six-year litigation to be able to wear the headscarf while teaching at a public school. On 24 September 2003, the German Federal Constitutional Court ruled that a Muslim public school teacher can theoretically be prohibited from wearing a headscarf while teaching, however the Court "declared the specific legal regulation at issue insufficient and therefore mandated elected legislatures to create a 'sufficiently clear legal basis' on which to justify such a limitation of religious freedom."¹²⁰ As a consequence, Germany's sixteen federal states (*Länder*) had to either amend existing legislation or pass a new law if they wished to curtail the public school teacher's right to wear a headscarf while teaching. The Federal Constitutional Court's decision was widely criticised for being unhelpful in trying to resolve the controversy. Wolfgang Thierse, the President of the German Parliament ("Bundestag"), even referred to the decision as being "strangely cowardly."¹²¹ However, before analyzing this important decision, let us first turn to the history of the case.

4.2.1 Facts and History of the Case

Fereshta Ludin was born in Afghanistan, is the daughter of a former Afghan ambassador, has been living in Germany continuously since 1987 and became a German citizen through marriage in 1995. Trouble began in 1997, when the Stuttgart School Supervisory Authority (SSA) rejected her application for a position as a student teacher. However, Annette Schavan, then Land Minister of Education, intervened on her behalf, and Ludin

¹²⁰ Von Campenhausen, p. 666.

¹²¹ *Kopftuch-Urteil des Bundesverfassungsgerichtes: Das Kreuz mit dem Kopftuch*, Goethe-Institut/Qantara.de, 2004, at: http://qantara.de/webcom/show_article.php/c-548/nr-14/p-1/i.html.

was allowed to finish her studies. It was difficult to find a school that would employ her as a student teacher. At the school that finally accepted her, parents at first were sceptical of a student teacher wearing a headscarf. However, Ludin quickly became integrated into the school's community, and no conflicts arose from her wearing the headscarf.¹²²

Upon completion of her studies in 1998 things became complicated again when the SSA denied Ludin's application for employment in the state school system because of her "lack of personal qualifications." This time Schavan, who faced much criticism for previously supporting Ludin, approved of the decision. Ludin appealed the administrative denial of her application for employment, but her case failed at all levels of administrative appeal. Ludin then made an internal appeal of the initial administrative denial of her application for employment to the SSA, where she argued that "wearing a headscarf is not only a characteristic of her personality, but is also an expression of her religious conviction. According to the precepts of Islam, wearing a headscarf is part of her Islamic identity."¹²³ The SSA rejected this internal appeal, and Ludin then appealed this decision to the Stuttgart Administrative Court, which rejected her complaint. The Court found that "[w]earing a headscarf for religious reasons by a teacher constituted a lack of qualification in the sense of section 11, paragraph 1 of the Baden-Württemberg's Law on State Civil Servants" because of the interplay between the teacher's religious freedom and the neutrality of the state, on the one hand, and the rights of the students and parents on the other.¹²⁴ The Court found that the symbolism of the headscarf is religious, but that the state may not pass judgment as to whether Islam requires Muslim women to wear it. Nonetheless, it concluded that Ludin wearing the headscarf constitutes a demonstrative religious acknowledgment. Furthermore, the Court found that the right to religious freedom of the teacher may be curtailed because the students would be forced to constantly look at her wearing the headscarf. Even though there had not been any complaints whatsoever against Ludin wearing her headscarf thus far, the Court assumed

¹²² Even the children became used to her attire: "Sieht Kacke aus – aber sonst kein Problem" ("Looks shitty but other than that, not a problem") one student reportedly said. *Die letzte Schlacht*, in "Der Spiegel", 20 July 1998, at: <http://www.spiegel.de/spiegel/0,1518,7820,00.html>, p. 58.

¹²³ BVerfGE 108, 282 (284), 2 BvR 1436/02, para. 4, (hereinafter BVerfGE Headscarf Decision).

¹²⁴ BVerfGE Headscarf Decision, para. 6.

that these complaints would soon arise.¹²⁵ The Court addressed the Constitution of Baden-Württemberg and the fact that it makes numerous references to Christianity. It argued that because of the Christian values present in this Constitution, non-Christian teachers would have to express their religion under more narrow circumstances than Christian teachers. As Heide Oestreich notes, the Court in effect argued that because so much Christianity is already present in the school, the female Muslim teacher in particular must restrain her own religious expression.¹²⁶ The Court found, furthermore, that public servants may not cause conflict, and that this constitutes yet another reason why public school teachers may not wear the headscarf.

Ludin appealed this rejection to the Baden-Württemberg Court of Administrative Appeals, the Land administrative appellate court, which upheld the Stuttgart Administrative Court's denial of Ludin's complaint. The Court particularly emphasised the impact the headscarf might have on each individual student. It again mentioned that the students cannot remove themselves from seeing the headscarf – that they are forced to constantly be confronted by it. The Court also noted that the suggestive value of the headscarf should not be underestimated. Thus, the Court implied a danger in students potentially becoming Muslim by being taught by a Muslim woman who wears the headscarf.

Ludin then appealed this decision to the Federal Administrative Court in Berlin where she was also unsuccessful. The Court found that the Basic Law requires a limitation of religious freedom, particularly in public schools, and that “the right of the teacher to act according to her convictions must retreat from the competing religious freedom of the students and parents while teaching.”¹²⁷ This court, however, was less certain of the strong impact the headscarf has on students, saying that it is difficult to assess its impact, but that it cannot be completely dismissed. Most interestingly, the Court acknowledged that society is becoming more pluralistic, but it argued that this is precisely why the state must handle religions in public spaces more strictly than it

¹²⁵ Heide Oestreich, *Der Kopftuch-Streit: Das Abendland und ein Quadratmeter Islam*, Frankfurt am Main, Brandes & Apsel, 2004, p. 52.

¹²⁶ Ibidem.

¹²⁷ BVerfGE Headscarf Decision, para. 14.

previously has handled Christianity.¹²⁸ Thus, the public servant must become even more neutral than he or she has been before, and therefore female Muslim teachers may not be allowed to wear the headscarf.

4.2.2 The Decision of the Federal Constitutional Court

Ludin's final remedy was to enter a complaint with the Federal Constitutional Court, where she alleged that the administrative regulation of the SSA prohibiting her from wearing a headscarf while teaching violated her fundamental rights under the Basic Law. What sets this decision apart from the previous ones is that the Court took into serious account what the motivations for wearing the headscarf may be, and interviewed an expert, Yasemin Karakasoglu (of Essen University) on the issue. The Court acknowledged the different motivations that exist for wearing the headscarf and stated that the headscarf should not simply be viewed as a symbol of the suppression of women. It thus argued that by simply wearing the headscarf Ludin would not convey an inferior image of women to her (Muslim) students.¹²⁹

At the same time, however, the Court acknowledged the importance of the headscarf's symbolic value. As the previous courts did, the Court addressed the fact that students cannot avoid the headscarf. The Court acknowledged that religiously motivated clothing can lead to disturbances in the school. It, however, pointed out that this is an abstract danger and that there is no empirical proof of the influence a headscarf-wearing teacher has on the religious orientation of the schoolchildren. In fact, this is what makes the Federal Constitutional Court's decision different from the previous ones: in its decision it emphasised that the danger that had been interpreted into the headscarf in the previous court decisions, has not been proved empirically.¹³⁰

As mentioned earlier, the Court ruled that there needs to be a law in order to justify the curtailment of the teacher's right to religious freedom. It stated that this curtailment cannot be based on assumptions, but that there must be some empirical

¹²⁸ Oestreich, p. 55.

¹²⁹ BVerfGE Headscarf Decision, para. 52.

¹³⁰ Ibidem, para. 55.

evidence, and that adherents of different religions need to be treated equally. The Court said that on the one hand the increasing religious diversity in public schools should be used to practice and teach tolerance, and to thus contribute to integration. However, it acknowledged that there also may be an increase in conflicts in school because of this increase in religious diversity, and stated that because of this, it might be better to make the neutrality obligation in public schools stricter in the future.¹³¹ The Court argued that this is why the issue needs to be decided through the democratic process, because this would enable the *Länder* to come to different solutions that depend on school traditions, the confessional composition of the population and the religious roots of the particular state. Thus, the Court allowed for the principle of state neutrality to be open to the *Länders'* interpretation.

As Eberle has stated, in Germany "civil servants are traditionally viewed as neutral agents of the legal order and, therefore, not able to exercise full basic rights in their official capacity."¹³² The dissent in this court decision argued that Ludin should be denied the position as a teacher, since her exercise of rights "would fundamentally violate civil service norms of neutrality and restraint."¹³³ The majority opinion, however, argued that a public school teacher does not completely leave his or her religious freedoms at the school door and that the public servant is not identical with the state. Therefore, if a public school teacher wears the headscarf while teaching, this does not automatically mean that the state identifies itself with Islam. According to Eberle, the Court "envisioned the state role to be 'not a distant, absent role... but rather a respectful, nourishing neutrality' that accords 'equality to the beliefs of all believers, understanding the attitudes advanced [by people] on equal terms.'"¹³⁴ Thus, it follows that a teacher cannot be refused merely because of a certain religious conviction to wear a certain kind of dress.

¹³¹ Ibidem, para. 65.

¹³² Eberle, p. 1066.

¹³³ Ibidem.

¹³⁴ Ibidem, p. 1067.

4.3 Länder Legislation

It is now interesting to examine how the *Länder* have thus far legislated on the headscarf in reaction to this important court decision. Not surprisingly, *Länder* with a particularly strong Catholic tradition (especially those in the south), have drawn a boundary between Christianity and Islam which they seem to think is self-evident, and generally are on the course of prohibiting public school teachers from wearing the headscarf. Baden-Württemberg, for example, passed a law on 1 April 2004¹³⁵ which establishes that public school teachers may not convey any political, religious or other expressions that would endanger the neutrality of the state *vis à vis* the student and the parents (the law does not mention the headscarf specifically). This law, however, makes an exception for Christianity, stating that Christian educational values are part of the educational mandate.¹³⁶ On 24 June 2004 the Federal Administrative Court ruled that Baden-Württemberg's refusal (based on this new law) to employ Ludin as a public school teacher was lawful. Annette Schavan, now the Minister for Culture of Baden-Württemberg, welcomed the Court's decision, stating that the headscarf among other things is a symbol of political Islam, which seeks to isolate itself culturally, and therefore is not reconcilable with the values of the Basic Law or Baden-Württemberg's Constitution.¹³⁷ According to *Süddeutsche Zeitung* three teachers were affected by this ban.¹³⁸

On 23 November 2004 Bayern passed a law similar to that of Baden-Württemberg,¹³⁹ which mandates that public school teachers may not wear symbols or pieces of clothing that give students and parents the impression that they are contradictory to the fundamental values and educational goals, including Christian

¹³⁵ *Gesetz zur Änderung des Baden-Württembergischen Schulgesetzes*, 1 April 2004, at: <http://www.uni-trier.de/~ievr/kopftuch/GesetzBadenWuerttemberg01042004.htm>.

¹³⁶ The law also makes an exception for Judaism, since Jewish teachers may continue to wear the *kippa* while teaching. See Bernd Dörries, *Baden-Württemberg beschließt Kopftuchverbot*, in "Süddeutsche Zeitung", 2 April 2004, at: <http://www.sueddeutsche.de/deutschland/artikel/614/29585/>.

¹³⁷ *Schavan begrüßt Entscheidung zum Kopftuch-Gesetz*, Baden-Württemberg Press Release, 25 June 2004, at: http://www.baden-wuerttemberg.de/sixcms/detail.php?id=57150&template=4_1_pressemit_detail.

¹³⁸ *Baden-Württemberg beschließt Kopftuchverbot*, in "Süddeutsche Zeitung", 2 April 2004.

¹³⁹ *Gesetz zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen*, 23 November 2004, at: <http://www.uni-trier.de/~ievr/kopftuch/GesetzBayern23112004.htm>.

educational and culture values, of Germany. It too does not specifically mention the headscarf, since the Federal Constitutional Court's decision explicitly states that minority religions should not be discriminated against and that all religions should be treated the same.¹⁴⁰ However, a headscarf ban is implicit in this law.

Niedersachsen is also very similar in its approach. Its law of 29 April 2004 states that the exterior appearance of public school teachers, even if for religious or philosophical (creed) reasons, may not call into question the teacher's ability to effectively fulfil the school's educational mandate.¹⁴¹

Saarland enacted a similar law on 23 June 2004,¹⁴² which mandates that, taking into account students who "think differently" (i.e. who are either of a different faith or non-religious), students are to be educated with a foundation on Christian educational and cultural values. It states that this mandate must be fulfilled in such a way that political, religious, philosophical creed or other testimonies do not endanger or disrupt the neutrality of the state towards the students and parents, nor the peace/harmony of the school.

Hessen passed a law on 18 October 2004,¹⁴³ which is also formulated similarly, the difference being that it outlaws the wearing of headscarf not only by public school teachers, but by all public servants in general. It states that public servants may not wear clothing, symbols or other features that raise doubt as to the neutrality with which they carry out their mandate. In regard to public school teachers the law states that the "Christian" and "humanist" tradition of Hessen must be taken into consideration.

In contrast, there are also more moderate *Länder*, such as Nordrhein-Westfalen, for example, where about twelve public school teachers teach wearing the headscarf.¹⁴⁴ Besides, Nordrhein-Westfalen has declared that passing a law on the headscarf is

¹⁴⁰ Sebastian Beck, *Das Tragen religiöser Symbole im Schulunterricht ist künftig verboten: Landtag beschließt Kopftuch-Verbot, Gesetz findet nur die Zustimmung der CSU-Mehrheit / SPD spricht von 'überflüssiger Regelung'*, in "Sueddeutsche Zeitung", 12 November 2004, Section: München/Bayern.

¹⁴¹ Gesetz zur Änderung des Niedersächsischen Schulgesetzes und des Niedersächsischen Besoldungsgesetzes, 29 April 2004, at: <http://www.uni-trier.de/~ievr/kopftuch/GesetzNiedersachsen29042004.htm>.

¹⁴² Gesetz Nr. 1555 zur Änderung des Gesetzes zur Ordnung des Schulwesens im Saarland, 23 June 2004, at: <http://www.uni-trier.de/~ievr/kopftuch/GesetzSaarland23062004.htm>.

¹⁴³ Gesetz zur Sicherung der staatlichen Neutralität, 18 October 2004, at: <http://www.uni-trier.de/~ievr/kopftuch/GesetzHessen18102004.htm>.

¹⁴⁴ Oestreich, p. 89.

unnecessary.¹⁴⁵ Another interesting aspect is that most East German *Länder* (formerly the German Democratic Republic) have declared that they see no need to pass a law in regard to the headscarf – Mecklenburg-Vorpommern, Sachsen-Anhalt, and Thüringen are some of them. This, however, may also have to do with the fact that the vast majority of the Muslim population in Germany lives in the West German *Länder*.

Berlin is thus far the only state that is pursuing a *laïc* model in regard to whether public school teachers (and public servants in general, for that matter) are allowed to wear the headscarf or other religious symbols. On 27 January 2005 Berlin enacted legislation¹⁴⁶ that outlaws all visible religious symbols, such as the headscarf, but also the Christian cross and the Jewish *kippa*, in schools, in the police and in the justice system.

5. Analysis of Conflicting Arguments

5.1 General Remarks

As in the case of France, the key background issue of the headscarf debate in Germany is how the state deals with a society that is becoming (religiously) more pluralistic. In my view, the decision of the Federal Constitutional Court was unhelpful, because it merely shifted the decision-making burden to the *Länder*. Given the predominant role of Christianity (and particularly Catholicism) in several *Länder*, the decision of the Federal Constitutional Court has in effect paved the way for the Southern, Catholic states to openly discriminate against minority religions, in particular Islam. As a result, such *Länder* legislation is inconsistent with the Court's ruling that all religions and religious symbols should be treated equally and its implementation by executive organs seriously risks violating German Basic Law, such as Article 3, which mandates that all people are equal before the law and which prohibits prejudice because of, *inter alia*, religion. The Court should have anticipated such undesirable outcomes and should have, therefore, laid the standard itself by ruling, for example, that the headscarf may only be outlawed in

¹⁴⁵ NRW toleriert weiterhin Kopftuch an Schulen, in "Sueddeutsche Zeitung", 18 March 2005, Section: Politik.

¹⁴⁶ Gesetz zur Schaffung eines Gesetzes zu Artikel 29 der Verfassung von Berlin und zur Änderung des Kindertagesbetreuungsgesetzes, 27 January 2005, at: <http://www.univ-trier.de/~ievr/kopftuch/GesetzBerlin27012005.htm>.

individual cases, when it causes severe disturbance in the school. In my view, the headscarf is more of a human rights issue than it is an educational issue, i.e. for the Federal Government rather than for the *Länder* to decide.

5.2 Conveying Gender Equality

One of the arguments raised in support of banning public school teachers from wearing the headscarf is that a teacher who wears the headscarf cannot transmit to her students the idea of gender equality. This is a weak argument since the headscarf-wearing teacher, by the very fact of working as a teacher, shows how important education is.¹⁴⁷ It is also not acceptable to hastily conclude that a headscarf-wearing teacher is a follower of fundamentalist Islam. As mentioned earlier, wearing the headscarf can have many different meanings. Especially in the Muslim diaspora, the headscarf can have an emancipatory function. It is thus important to take into account the woman as an individual, and not the mere fact that she is wearing a headscarf. For it is the *behaviour*, and not the clothing, of the teacher that is relevant to whether or not a teacher can convey gender equality to her students.

5.3 Right to Religious Freedom of the Schoolchildren

The argument that the right to religious freedom of the schoolchildren is violated by a teacher wearing a headscarf is also weak. There is no empirical data on what impact a headscarf-wearing teacher may have on schoolchildren. *Assuming* that the headscarf has a negative impact on the schoolchildren does not warrant and stands in no proportion to curtailing the teacher's right to religious freedom. What could be the negative impact of a teacher wearing the headscarf? Could it be that children of Christian families will want to convert to Islam because their teacher is Muslim? Is this a realistic fear? More realistic is the likelihood that a headscarf-wearing teacher will convey to schoolchildren that many different religions exist in the world as well as in Germany. What about the impact a

¹⁴⁷ Ute Sacksofsky, *Die Kopftuch-Entscheidung – von der religiösen zur föderalen Vielfalt*, in "Neue Juristische Wochenschrift (NJW)", vol. 56, no. 46, 2003, p. 3299.

headscarf-wearing teacher may have on Muslim students? Could her wearing the headscarf increase the pressure on Muslim girls in the class to wear the headscarf as well? Will Muslim parents feel obliged to make their daughters wear the headscarf? This might be a legitimate concern that needs to be addressed, but on which there also do not exist any empirical data. On the other hand, a headscarf-wearing teacher could perhaps do better at conveying to her Muslim female students the importance of employment and education. She could also be more effective in conveying the importance of female education to the parents of these girls.¹⁴⁸

5.4 "Crucifix" Decision and State Neutrality

Several commentators¹⁴⁹ have argued that a headscarf ban would be the logical sequel of the earlier "Crucifix"-decision concerning the provision of the Bavarian School Regulations that a cross had to be affixed to the wall of each classroom. In its decision of 16 May 1995, the Federal Constitutional Court declared this provision unconstitutional and ruled that it violated Article 4 of the Basic Law (which protects freedom of faith).¹⁵⁰ The Court argued that the state may not create a situation in which the individual would be left without the opportunity to avoid being subjected to the influence of a specific faith. Some commentators compare the headscarf to the crucifix, and reason that in the same way that students cannot remove themselves from seeing the crucifix and that public school teachers should therefore be banned from wearing it.

However, this logic is flawed, since it would mean that the teacher herself somehow is being treated as a religious symbol.¹⁵¹ State neutrality has two sides, namely freedom and non-discrimination. The principle of non-discrimination forbids the state to identify with a particular religion. This principle played an important role in the "Crucifix-decision". If the state attaches a crucifix at the front of every classroom, it

¹⁴⁸ Ibidem.

¹⁴⁹ See, for example, Kästner, p. 365.

¹⁵⁰ Crucifix Decision, BVerfG 93, 1 BvR 1087/91.

¹⁵¹ Christine Langenfeld, *Darf eine muslimische Lehrerin in der Schule ein Kopftuch tragen? - Anmerkung zum Urteil des Verwaltungsgerichts Stuttgart vom 24. März 2000*, in "Recht der Jugend und des Bildungswesens: RdJB", 2000, Berlin, p. 313.

identifies itself with Christianity and expresses who is included and excluded.¹⁵² The case of the headscarf is different in that the headscarf expresses the teacher's individual religious belief.

The second aspect of state neutrality, freedom, guarantees the right to be free from coercion, and, in the case of the headscarf, guarantees the schoolchildren's negative religious freedom. Thus, a teacher who attempts to indoctrinate his or her students should not be allowed to teach in public schools. A Muslim teacher who tries to convey to his or her students that Islam is the best religion and that wearing the headscarf is obligatory for women, would not be qualified to teach at a German public school (the same way that a Christian teacher who conveys to his or her students that not believing in Jesus will result in being sent to hell would not be qualified).¹⁵³ It is, therefore, the *behaviour* of the teacher that is crucial. It is not necessarily the wearing of religious symbols that violates the principle of state neutrality.

By banning the headscarf the way the Southern, Catholic states are currently doing, the *Länder* are violating Germany's principle of state neutrality, because it discriminates against Muslims, making it harder for them to manifest their religion than it is for Christians to manifest theirs. The state may not identify itself with a particular religion (in the present case, Christianity), to the extent that such identification results in making it disproportionately burdensome for female Muslims to manifest their own religion.

It is regrettable that the Court did not to issue a clear decision. As indicated above, states can employ headscarf bans for Muslim teachers while allowing Christian teachers to freely express their faith, which does not solve the problems that an increasingly pluralistic German society is facing. Prohibiting Muslim teachers from wearing the headscarf could be interpreted as evidence of cultural difference being instrumentalised to lock in social inequality.¹⁵⁴ For decades Turkish maids wearing the headscarf have cleaned German schools without anyone complaining that they were

¹⁵² Sacksofsky, p. 3299.

¹⁵³ Ibidem.

¹⁵⁴ Claudia Schöning-Kalender, *Textile Grenzziehung – Symbolische Diskurse zum Kopftuch als Symbol*, in Judith Schlehe (ed.), *Zwischen den Kulturen – zwischen den Geschlechtern: Kulturkontakte und Genderkonstrukte*, Münster, Waxmann, 2000, p. 193.

somehow negatively impacting the children. How can it be that it is unacceptable for teachers to wear the headscarf in these same schools? This critique is pointed out by young Turkish women of the second generation, who argue that the majority population is fearful of minorities climbing the social ladder. These young Turkish women wear the headscarf with pride saying: "Look here, Germans: Women who wear the headscarf aren't born to be maids." ("*Schaut her, ihr Deutschen: Wer ein Kopftuch trägt, ist nicht die geborene Putze.*").¹⁵⁵ What is actually at issue is that traditionally disadvantaged groups, such as the Muslim community are now qualifying for jobs that previously were held by non-Muslim Germans only. Thus, one could argue that the wish of Muslim women to be able to wear the headscarf while performing a public office is not only a seeking of recognition for its own sake. Surely they seek to have their identity accepted by society in general, but the claim to this recognition is also linked to claims against discrimination, unequal opportunity and political marginalisation.

It should be noted that the Committee on the Rights of the Child expressed concern in its concluding observations on the most recent report submitted by Germany, about "laws under discussion in some *Länder* aiming at banning schoolteachers from wearing headscarves in public schools."¹⁵⁶ The Committee argued that these laws do not contribute to the child's understanding of the right to freedom of religion and to the development of an attitude of tolerance as promoted in the aims of education under Article 29 of the CRC.¹⁵⁷ The Committee recommended that Germany take educational and other measures aimed at children, parents and others to develop a culture of understanding and tolerance, particularly in the area of freedom of religion, conscience and thought by, *inter alia*, avoiding measures which single out a particular religious group.¹⁵⁸

It should also be noted that the Human Rights Committee, in its concluding observations on Germany's most recent report, reiterated its concern "that adherence to certain religious organizations or beliefs constitutes one of the main grounds for

¹⁵⁵ Ibidem, pp. 193-194.

¹⁵⁶ Committee on the Rights of the Child, *Concluding Observations: Germany*, CRC/C/15/Add.226, 26 February 2004, para. 30.

¹⁵⁷ Ibidem.

¹⁵⁸ Ibidem, para. 31.

disqualifying individuals from obtaining employment in the public service and that this may in certain circumstances violate the rights guaranteed in articles 18 and 25 of the Covenant.”¹⁵⁹

5.5 Islamic Threat?

Finally, it is unhelpful that some commentators are speaking of an Islamic threat to German society. Michael Bertrams, for example, argues that Germany's Constitution is threatened, and that Muslims in Germany must accept the constitutional order.¹⁶⁰ He says that Islamist groups are influencing Muslim children and teenagers and that the state should concern itself with these youths, especially through the public school system. Bertrams argues that Germany must defend its fundamental value system against the influences of Islam by, *inter alia*, prohibiting teachers from wearing headscarves.

However, it is clear that this prohibition will not solve the problems that German society is facing. The difference between cultures becomes particularly apparent in public schools because this is a place where people cannot avoid each other and are forced to deal with their differences. Arguing that Muslim teachers should be restricted in the expression of their faith (while Christian teachers are not required to do so) goes against what should be one of the public school's main educational goals: that of fostering tolerance. For, as Heinhard Steiger has stated, tolerance does not develop from artificially removing differences and oppositions.¹⁶¹ On the contrary, problems can be solved through active tolerance. As society becomes more pluralistic, it is counter-productive to attempt to privatise this pluralism. Instead, the public sphere (including its institutions) must reflect this development. Otherwise, society runs the risk of splitting into enclaves, which endangers solidarity and finally questions the very foundation of the democratic state.¹⁶² Furthermore, the most effective way for Germany to fight the spread of

¹⁵⁹ Human Rights Committee, *Concluding Observations: Germany*, CCPR/CO/80/DEU, 4 May 2004, para. 19.

¹⁶⁰ Michael Bertrams, *Lehrerin mit Kopftuch? Islamismus und Menschenbild des Grundgesetzes*, in “Deutsches Verwaltungsblatt (DVBL)”, vol. 118, no. 19, 2003, p. 1233.

¹⁶¹ Steiger, p. 126.

¹⁶² *Ibidem*, p. 128.

fundamentalist Islam is through promoting the integration of its Muslim population. If the Muslim community is recognised with its differences and is integrated, then it will become more unlikely that individual members of the community turn to fundamentalist Islam.

Steiger says it best when he argues that it must be made clear that the reference to Christian educational and cultural values in several *Länder*'s constitutions is not meant to be exclusive, but rather that it creates a core developed from the German heritage and that new layers can and must form around this core as society changes and becomes more pluralistic.¹⁶³ In the words of Richard Alba, it can be extremely difficult for immigrant populations to cross bright boundaries. Germany exemplifies a country where bright boundaries abound. The current approach to resolving the headscarf debate keeps these boundaries bright, and thus is unhelpful in leading to a true integration of the Muslim community in German society.

¹⁶³ Ibidem.

CHAPTER THREE

The Headscarf Controversy in the United States of America

1. Muslim Population in the United States

1.1 Age, Education and Diversity

There are no official statistics on how many Muslims live in the United States because neither the census data¹⁶⁴ nor the Immigration and Naturalization Service¹⁶⁵ provide information on religious affiliation of citizens or immigrants.¹⁶⁶ Nor do many mosques in the United States have formal membership policies that would allow one to estimate the size of the Muslim population. Consequently, there is great disparity in the figures reported and estimates vary from four to eight million, the most frequently cited figure being that of seven million (which is 2.3% of the national population).¹⁶⁷

What, however, can be said with certainty is that the Muslim community in the United States is unique in its ethnic, linguistic and also religious diversity. This diversity is mirrored by the fact that 36% of American Muslims were born in the United States, while 64% were born in 80 different countries around the world.¹⁶⁸ The three major ethnic groups in the Muslim community are South Asians (32%), Arabs (26%) and African Americans (20%), with the remaining 15% being comprised of various other ethnicities.¹⁶⁹

On the whole, it can be said that the American Muslim community is young and

¹⁶⁴ The United States Constitution mandates a separation of church and state, and consequently US Census Bureau survey forms do not ask recipients about religion.

¹⁶⁵ On 1 March 2003 the Immigration and Naturalization Service became part of the U.S. Department of Homeland Security and was renamed the Bureau of Citizenship and Immigration Services.

¹⁶⁶ Yvonne Haddad, *Islam in the United States*, in Shireen T. Hunter with Huma Malik (eds.), *Islam in Europe and the United States: A Comparative Perspective*, Washington, DC, Centre for Strategic and International Studies, Luso-American Foundation, 2002, p. 34.

¹⁶⁷ Ghulam M. Haniff, *The Muslim Community in America: A Brief Profile*, in "Journal of Muslim Minority Affairs", vol. 23, no. 2, October 2003, p. 306.

¹⁶⁸ Zahid H. Bukhari, *Demography, Identity, Space: Defining American Muslims*, in Philippa Strum and Danielle Tarantoto (eds.), *Muslims in the United States*, Washington DC, Woodrow Wilson International Centre for Scholars, 2003, p. 9.

¹⁶⁹ Haniff, p. 309.

well-educated. 74% of the whole Muslim population is under age 49 in comparison to the general public, where 61% is under age 49.¹⁷⁰ And although the Muslim world has one of the lowest literacy rates, the American Muslim population is highly educated, with 58% being college graduates, compared to 37% of the general public.¹⁷¹ Half of American Muslims have an annual family income of more than \$50,000,¹⁷² with 28% having an income in excess of \$75,000 as compared to only 17% for the general public, which probably is due to the Muslim community's high level of education.¹⁷³

In comparison to members of the general American public, the American Muslim community considers religion to be slightly more important in their daily lives (79% versus 63%), which among other things is reflected by the fact that more American Muslims (55%) attend religious services (go to the mosque for prayers) than do members of the general public (40%).¹⁷⁴

Perhaps the great diversity of the American Muslim population becomes most evident when discussing its origins. Islamic roots in America are old, it being believed by some that Muslims were the first immigrants to come to America from Spain after the *Reconquista*.¹⁷⁵ However, the actual growth of the Muslim community occurred particularly in the past half century, and is thus a recent phenomenon, and "one of the early consequences of globalization involving the movement of peoples from the developing to the more developed parts of the world."¹⁷⁶

1.2 Muslim Immigration to the United States

The first wave of Muslim immigrants to the United States came in the 1870s, when people from (what today is) Lebanon and Syria, came to the United States.¹⁷⁷ However, once the United States established immigration quotas that assigned the vast majority of

¹⁷⁰ Ibidem, p. 308.

¹⁷¹ Ibidem.

¹⁷² Bukhari, p. 10.

¹⁷³ Haniff, p. 309.

¹⁷⁴ Bukhari, p. 12.

¹⁷⁵ Haddad, p. 34.

¹⁷⁶ Haniff, p. 303.

¹⁷⁷ Ibidem.

visas to Europeans, Muslim immigration to the United States declined. Nonetheless, those initial Muslim immigrants who remained formed the nucleus of Muslim presence in the United States (particularly in some industrial cities in the Midwest) and founded at least one mosque in 1919 in Highland Parks, Michigan that survived into the 1970s.¹⁷⁸

During the interwar period Muslim immigration to the United States continued, with most Muslim immigrants still being Lebanese and Syrian, but also including other ethnicities, such as Turks, Tartars, Yugoslavs and Albanians.¹⁷⁹ This more diverse collection of Muslims had much to do with the founding of three mosques in the Midwest before World War II. On the West coast Indo-Pakistani immigrants established a mosque in Sacramento, California in the late 1930s.¹⁸⁰

Similar to the Turks in Germany, many of the Muslim immigrants who came to the United States intended to make money with which to return home, and thus maintained a belief in the myth of return.¹⁸¹ However, the vast majority ended up settling permanently in the United States and slowly but surely began to participate in civic and political affairs. Muslim participation began slowly in the late 1940s and was primarily due to the second-generation descendants of the earlier Muslim immigrants, who were better educated and even with military experience in the Second World War. They founded the Federation of Islamic Associations of the U.S. and Canada (FIA) in 1953.¹⁸² Furthermore, in the 1950s the United States recruited students from the Middle East to study in the U.S. in order to create "a core of pro-American, anti-Communist leadership upon their return to their homelands."¹⁸³ All this led to the creation in 1963 of the Muslim Student's Association of USA and Canada (MSA). Then in the 1970s it became easier to immigrate to the United States, which resulted in more skilled and professional workers immigrating to the U.S. from Muslim countries. Realising that resident Muslims needed an organisation of their own, a new body was spun off from the MSA in 1981, called the Islamic Society of North America (ISNA), which today "is the premier umbrella

¹⁷⁸ Ibidem, p. 304.

¹⁷⁹ Ibidem.

¹⁸⁰ Ibidem.

¹⁸¹ Nadir, p. 22.

¹⁸² Haniff, p. 304.

¹⁸³ Haddad, p. 35.

organization that strives to represent the entire Muslim community in America.”¹⁸⁴ In the 1980s immigration laws were liberalised even further, which resulted in even more Muslim immigrants coming to the United States.¹⁸⁵ As a result, many more Muslim organisations were founded, such as the Islamic Circle of North America (ICNA), the American Society of Muslims (ASM) and the Muslim American Society (MAS).

1.3 Political Participation

Project MAPS (Muslims in American Public Square), based at Georgetown University's Centre for Muslim-Christian Understanding, made some interesting findings in 2004 when it analyzed the internal dynamics of the Muslim community. One finding is that Muslims are a politically active group, with a high proportion of registered Muslim voters (95%) planning to vote in national elections.¹⁸⁶ The project also found that Muslims are interested in being a part of the political system in the long-term. In the MAPS survey, 86% of Muslims said it is important to them to participate in politics, with nearly the same number saying that it is just as important for their children to do so. Nearly two-thirds of Muslims said they follow what is going on in government and public affairs most of the time.¹⁸⁷ Interestingly, MAPS also found that three-in-five American Muslims are dissatisfied with the way things are going in American society today, although a majority of American Muslims said this is a good time to be a Muslim in America.¹⁸⁸

Bukhari mentions that in the last two years, the American Muslim community has been going through the last stages of integration, by becoming champions of Muslim issues in the United States, as well as becoming fully involved in other issues of the country.¹⁸⁹ He says that, paradoxically, the events of 11 September enhanced the Muslim community's involvement in American politics and civil society. According to Bukhari,

¹⁸⁴ Haniff, p. 305.

¹⁸⁵ Ibidem.

¹⁸⁶ Project MAPS: Muslims in American Public Square, *Project MAPS: Muslims in American Public Square: Shifting Political Winds & Fallout from 9/11, Afghanistan, and Iraq*, Washington DC, October 2004, p. 9.

¹⁸⁷ Ibidem.

¹⁸⁸ Ibidem.

¹⁸⁹ Bukhari, p. 17.

the Muslim community is now "entering a phase of participation in the voluntary life of the larger society, interaction with the media and other opinion-makers, and, most importantly, institution-building."¹⁹⁰

2. Religious Freedom in the United States

2.1 Transatlantic Divide

The French decision to ban headscarves in schools received a lot of publicity in the United States, and was widely criticised by American officials and the media as being religiously intolerant. Some commentators stated that while in France and Germany it is considered "un-French" or "un-German" to wear a headscarf, in the United States "it should be un-American to make someone take it off."¹⁹¹ In fact, Americans are usually "quick to point out the superiority of American law, assuming that the wearing of headscarves by Muslims in the nations' public schools is protected activity."¹⁹²

Much of this difference in perception has to do with the fact that religion plays a different role in the American versus the European society. For according to public opinion polls, Europeans are relatively unreligious, while Americans are very religious. According to the Pew Global Attitudes Project, transatlantic differences over foreign policy pale in comparison with the differences on religion and morality. According to this study, 58% of Americans say that belief in God is a prerequisite to personal morality, while just 33% of Germans and 13% of the French agree.¹⁹³ This difference is evident in a variety of aspects, one of them being, for example, that the US Congress has insisted that religious language remain in the Pledge that is recited in public schools. Thus, as Gunn argues, this might give the impression that "France seems to prohibit religious

¹⁹⁰ Ibidem, p. 18.

¹⁹¹ Charles Haynes, *Dress Codes vs. Religious Practice: What kind of nation are we?*, First Amendment Centre, 19 October 2003, at: <http://www.firstamendmentcenter.org/commentary.aspx?id=12080>.

¹⁹² Derek H. Davis, *Reacting to France's Ban: Headscarves and other Religious Attire in American Public Schools*, in "Journal of Church and State", vol. 46, issue 2, Spring 2004, p. 222.

¹⁹³ The PEW Global Attitudes Project, *Views of a Changing World: How Global Publics View: War in Iraq, Democracy, Islam and Governance, Globalization*, Washington DC, The Pew Research Centre For the People & the Press, June 2003, at: <http://people-press.org/reports/pdf/185.pdf>, p. 115.

expression while the United States promotes it.”¹⁹⁴ It appears that the greatest difference between the United States and France is that “in France, any religious activity in public space is a threat to society’s commitment to *laïcité* and church-state separation. In the United States, however, religious activity in public space is proscribed only when government is sponsoring or promoting the activity.”¹⁹⁵

In its initial report to the Human Rights Committee, the United States emphasised that early immigrants to the United States “came to the New World to practice their respective religions free from governmental persecution” and that consequently freedom of religion, thought and conscience are “among the most fundamental and carefully guarded building blocks of American judicial and political theory.”¹⁹⁶ Gunn, however, argues that any serious examination of American religious history reveals this notion as being inaccurate.¹⁹⁷

Another aspect that may help explain the transatlantic divide on the perception of France’s headscarf ban, is that in the United States emphasis is often put on the liberty of the individual versus the state, while in France many think that liberty is obtained thanks to the state. Jean Baubérot, a member of the Stasi Commission, says that when he speaks of the headscarf affair in the United States, American feminists oftentimes consider the headscarf ban as a contradiction to the liberty of women. Baubérot says that conversely, most people in France consider the headscarf ban to constitute a protection (by the state) of the liberty of women.¹⁹⁸

2.2 *The First Amendment: the Establishment Clause and the Free Exercise Clause*

It should be noted that similar to France and Germany, the separation of church and state is a constitutional norm in the United States. In the United States, this separation is codified in the Establishment Clause of the First Amendment to the U.S. Constitution,¹⁹⁹

¹⁹⁴ Gunn, p. 424.

¹⁹⁵ Davis, p. 223.

¹⁹⁶ *Initial Reports of States Parties Due in 1993: United States of America*, CCPR/C/81/Add.4, 24 August 1994, para. 545.

¹⁹⁷ Gunn, p. 442.

¹⁹⁸ Baubérot, p. 136.

¹⁹⁹ *Amendments to the Constitution, Article 1*, at: <http://www.house.gov/Constitution/Amend.html>

"which the U.S. Supreme Court has interpreted as requiring all government actions to reflect both a secular purpose and a secular effect."²⁰⁰ The Establishment Clause of the First Amendment is thus key to the protection of religious freedom in the United States.

Another key aspect to the protection of religious freedom in the United States is the Free Exercise Clause²⁰¹ of the First Amendment, which requires that governments at all levels refrain from making laws or engaging in activity that limit the free exercise of religion. As Davis points out, the scope of the clause's protection has fallen into two general categories of interpretation.²⁰² Roughly from 1963 to 1990, a broad conception predominated the Supreme Court, which held that government legislation is permitted to curtail religious free exercise only if it is the least prohibitive means of achieving a clearly compelling government interest. However, the Court shifted its interpretation in the 1990 case of *Employment Division v. Smith*,²⁰³ where it interpreted the clause more narrowly and held that the Free Exercise Clause protects citizens only from "non-neutral" laws that purposefully burden religious practices.

Smith involved two members of the Native American Church. They both were fired from their jobs as drug rehabilitation counsellors with a private organisation in Oregon because they had taken the illegal drug of peyote as part of a sacramental ceremony in their church. Both were denied unemployment benefits because they had been released from employment for illegal conduct, and there was no religious exception in Oregon's controlled substance law. The Supreme Court upheld this decision, and ruled in *Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."²⁰⁴ The government would thus no longer have to show a "compelling state interest" in order to be able to refuse granting an exemption to a law that curtails someone's religious

[hereinafter *Amendments to the Constitution*].

²⁰⁰ Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defence of the French Approach to Religious Expression in Public Schools*, in "Houston Law Review", vol. 42, no. 1, Symposium 2005, The Ninth Annual Frankel Lecture Address, p. 2.

²⁰¹ *Amendments to the Constitution*.

²⁰² Davis, p. 224.

²⁰³ *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

²⁰⁴ *Ibidem*, p. 879.

freedom. Some have expressed concern that this shift in interpretation endangers the religious rights of minorities, however Davis argues that "all state or federal laws which have the effect of discriminating against religious practices represent a challenge to the constitutional right to religious freedom and become subject to 'strict scrutiny' by the courts."²⁰⁵

In response to this more narrow interpretation by the Supreme Court, the U.S. Congress passed the Religious Freedom Restoration Act (RFRA),²⁰⁶ which requires the government to demonstrate an interest of highest order in order to be able to turn down a request for exemption based on religious grounds. The RFRA also requires the government to demonstrate that there is no less-restrictive way of accomplishing that interest. Furthermore, in 1995 then-President Clinton issued an important memorandum on religious expression in public schools to the U.S. Secretary of Education and the U.S. Attorney General.²⁰⁷ The memorandum asserts that "nothing in the First Amendment converts our public schools into religion-free zones", and although "the government may not use schools to coerce the consciences of our students, or to convey official endorsement of religion, the government's schools also may not discriminate against private religious expression during the school day." The guidelines specifically state that "[w]hen wearing particular attire, such as yarmulkes and *head scarves*, during the school day is part of students' religious practice, under the Religious Freedom Restoration Act, schools generally may not prohibit the wearing of such items."²⁰⁸

However, the RFRA was struck down by the Supreme Court in 1997 in the case of *City of Boerne v. Flores*,²⁰⁹ where it ruled that Congress exceeded its powers by forcing the states to give more free-exercise protection than was required by the *Smith* decision. Because the RFRA was struck down, the U.S. Department of Education had to revise its guidelines for schools to read: "Students generally have no federal right to be exempted from religiously neutral and generally applicable school dress rules based on

²⁰⁵ Davis, p. 227.

²⁰⁶ Religious Freedom Restoration Act of 1993, at: <http://religiousfreedom.lib.virginia.edu/sacred/RFRA1993.html>.

²⁰⁷ Memorandum for the U.S. Secretary of Education and the U.S. Attorney General, Subject: Religious Expression in Public Schools, at: <http://fact.trib.com/1st.pres.rel.html>.

²⁰⁸ Ibidem (emphasis added).

²⁰⁹ *City of Boerne v. Flores, Archbishop of San Antonio, et al.*, 521 U.S. 507 (1997).

their religious beliefs or practices.”²¹⁰ Then in 1998, however, U.S. Secretary of Education Richard W. Riley issued guidelines which reinforced that “(1) schools may not prohibit students from expressing their individual religious views solely because they are religious in character; and (2) schools may not discriminate against religious expression of students but, instead, are required to allow students equal rights to engage in religious activity just as given to other comparable non-religious activity.”²¹¹ Furthermore, twenty states to date have implemented RFRA at the state level.²¹²

Thus, in regard to the headscarf debate in the United States, what appears to be at issue is whether school dress codes that do not include religiously motivated exceptions, violate the Free Exercise Clause under the pre-Smith law, or whether they are permissible under the “generally applicable” rule of Smith. Interestingly, “most schools seem to ignore Smith, giving preference, knowingly or unknowingly, to the spirit of freedom and tolerance marked by the pre-Smith law.”²¹³

2.3 Religious Expression in American Public Schools

A very important Supreme Court decision in regard to the religious rights of students and faculty is *Tinker v. Des Moines Independent School District* (1969).²¹⁴ The case involved two public high school students and one junior high school student who were suspended for wearing black armbands protesting the Vietnam War, which violated a school policy. While the district court ruled that the School's actions were necessary in order to maintain school discipline, and the U.S. Court of Appeals affirmed this decision, the Supreme Court reversed the decision. In its majority opinion, the Court stated that “First Amendment Rights, applied in light of the special characteristics of the school environment, are available to teachers and students,” and that in this case the school officials were unable to demonstrate that their action “was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an

²¹⁰ Davis, p. 227.

²¹¹ Ibidem, p. 232.

²¹² Ibidem, pp. 231-232.

²¹³ Ibidem, p. 232.

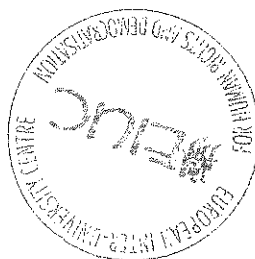
²¹⁴ *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

unpopular viewpoint.”²¹⁵

In fact, in *Tinker*, the Court developed a test for schools to use in order to determine if a school regulation that violates a student's First Amendment right to free expression, including religious expression, is constitutional. The Court stated that if “(1) the expression materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school, and/or (2) it invades the rights of others”, it is not protected by the Constitution.²¹⁶ As Davis argues, *Tinker* established “a precedent affirmed in later rulings whereby religious expression must be protected by public schools to the same extent as nonreligious expression.”²¹⁷

In addition to *Tinker*, there are a series of cases protecting the religious speech of students in public schools that indicate a clear trend “to protect religious students' rights to engage in religious expression while at school.”²¹⁸ There is also a second set of cases that protects parents' rights to dictate the religious upbringing of their children. Gey concludes that if “these two lines of jurisprudence are combined, there is very little likelihood that American courts would uphold a law prohibiting students from wearing conspicuous religious symbols or clothing at public schools.”²¹⁹

Obviously the public school teacher has a special role, and in a sense is the representative of the government, thus one could argue that the teacher's right to religious expression is not protected to the same extent as that of the students. However, it should be noted that in *Tinker*, which specifically dealt with the First Amendment rights of students, the Court did emphasize that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to *teachers* and students.”²²⁰



²¹⁵ Ibidem, p. 509.

²¹⁶ Davis, p. 228.

²¹⁷ Ibidem.

²¹⁸ Gey, p. 20.

²¹⁹ Ibidem.

²²⁰ Davis, p. 233 (emphasis added).

3. The Headscarf Controversy in the United States

There are no U.S. Supreme Court cases that deal with the headscarf issue, and there also are only very few lower court cases that deal with the issue. Of the few cases that deal with the student's right to wear the headscarf, the recent case of Nashala Hearn has the highest profile. There are also two cases in Pennsylvania, that of Alima Dolores Reardon and that of Cynthia Moore, which deal with the teacher's right to wear the headscarf.

3.1 Students Wearing the Headscarf: the Case of Nashala Hearn

In 2003, 11-year-old Nashala Hearn was twice suspended from her school, the Benjamin Franklin Science Academy in Muskogee, Oklahoma for wearing a headscarf. On 11 September 2003, the principal of the school informed Hearn that she would no longer be able to wear the headscarf to school, since the school dress code did not allow it. She was also told that other students were frightened by her scarf.²²¹ Hearn, however, continued attending school wearing the headscarf, which resulted in her being suspended for three days on 1 October 2003. Upon returning to school, Hearn was again suspended for wearing the headscarf, this time for five days. A district administrative hearing committee upheld Hearn's suspension on 10 October 2003 and informed her parents of this through a letter from its chairman.²²² After an outcry from civil liberty groups Hearn was allowed to return to her school wearing the headscarf, yet pending a review of the School's dress code policy.

Hearn was suspended because it was argued that her headscarf violated the School's dress code, which, among other things, bans "hats, caps, bandannas, plastic caps, or hoods on jackets inside the [school] building."²²³ This ban on headcoverings is similar to that in many other school districts throughout the United States, the purpose for which is to curb gang activity. This dress code, however, did not make an exception for

²²¹ *Muslim Student, Oklahoma District Settle Hijab Lawsuit*, The Associated Press, 20 May 2004, at: <http://www.firstamendmentcenter.org/news.aspx?id=13379>.

²²² *Complaint filed by Hearn's Attorneys*, obtained through email correspondence with Nisha N. Mohammed (Rutherford Institute Media Coordinator), p. 5.

²²³ *Ibidem*, Exhibit A.

religious clothing.

In October 2003, Hearn filed a lawsuit in federal court against the Muskogee Public School District. The lawsuit asked the court to declare the School's dress code unconstitutional, to require school officials to revise the dress code, and to expunge the two suspensions from Hearn's educational record. The lawsuit argued that the School's actions violated her right to free speech, exercise of religion as well as due process, as guaranteed by the First and Fourteenth Amendments. The lawsuit also argued that the School's actions violated Hearn's parents' right to direct a child's religious upbringing as guaranteed by the First and Fifteenth Amendments.²²⁴

In reference to her right to free speech the lawsuit argued that the School had not and could not cite "any evidence that Nashala's wearing of the [headscarf] at school has caused or will cause any substantial disruption of the school's educational function or that it interferes with the rights of any other students."²²⁵ In reference to her right to exercise of religion, the lawsuit stated that the School's "acts of prohibiting Nashala from wearing her [headscarf] at school and of disciplining her for wearing it were not in furtherance of any compelling governmental interest and were not narrowly tailored to further any governmental interest."²²⁶ Hearn's attorney, John Whitehead, stated that "the purpose of the First Amendment is to 'protect the devoutly religious, such as Muslims, Orthodox Jews and Christians, from such unconstitutional discrimination,' but [that] in cases like this ... 'school districts that pay lip service to pluralism and diversity but send a message of exclusion to religious adherents whose faith imposes certain dress requirements repudiate those same values in practice.'"²²⁷

It should be noted that in March 2004 the Justice Department joined the lawsuit by filing a motion to intervene in the case, in which it affirmed the public interest in Hearn's constitutional right to religious expression and equal protection under the law. Hearn was able to settle the lawsuit. As part of this agreement the School District agreed to change its dress code to allow for exceptions for religious reasons, and it also was

²²⁴ Ibidem, pp. 6-11.

²²⁵ Ibidem, p. 6.

²²⁶ Ibidem, p. 8.

²²⁷ Adelle M. Banks, *Muslim Student Sues School District Over Headscarf Ban*, in "Religion News Service", 5 November 2003, at: <http://pewforum.org/news/display.php?NewsID=2827>.

required to establish a training program for all teachers and administrators about the new dress code.²²⁸

3.2 Similar Controversies

Several similar controversies in academic environments have occurred recently, however they were settled in early litigation or before litigation even commenced. One such controversy occurred in the state of California. On 27 February 2004, Robert Daniel, an instructor at Antelope Valley College (a state-funded college), ordered a 19-year-old Muslim student, Fajr Burhan, to remove her headscarf in his class. Burhan says that she refused to remove it and explained that she was wearing it for religious reasons. She took her seat, but Daniel then asked her to walk outside with him, where they encountered the dean, who told Daniel that he had to respect Burhan's right to wear the headscarf. Burhan then returned to class even though she felt very uncomfortable. Daniel resigned the next day before the school's board of trustees could decide whether to fire him.²²⁹

As in France and Germany, the headscarf has not only been an issue in educational environments. The following are some of the issues that have arisen: whether a 12-year-old girl should be allowed to wear a headscarf while participating in a basketball tournament,²³⁰ whether prison visitors should be allowed to wear a headscarf,²³¹ whether the headscarf can be worn in identification photos,²³² whether a woman can wear a headscarf at a public pool,²³³ whether Muslim women may wear the

²²⁸ *Institute Succeeds in Protecting Muslim Girl's Right to Wear Religious Head Covering*, Rutherford Institute Press Release, 19 May 2004, at: http://www.rutherford.org/articles_db/press_release.asp?article_id=492.

²²⁹ Davis, pp. 229-230.

²³⁰ *Muslim Girl Can Wear Scarf in Orlando Basketball Tournament*, Associated Press, 2 April 2005, at: http://ad.doubleclick.net/jump/bradenton.news/local;kw=center6;c2=local;c3=local_homepage;pos=center6;group=rectangle;ord=1114162356446?; Ron Matus, *Islamic USF Player: Dispute over uniform led to dismissal*, in "St. Petersburg Times", 11 September 2004, at: <http://www.prohijab.net/english/USA-hijab-news.htm>.

²³¹ Ryan J. Foley, *Wisconsin Prisons to Change Policy on Religious Headwear*, Associated Press, 27 May 2005, at: <http://www.prohijab.net/english/USA-hijab-news7.htm>.

²³² *Maryland Muslim Allowed Islamic Scarf in ID Photo*, CAIR News Release, 21 December 2004, at: <http://www.cair-net.org/default.asp?Page=articleView&id=1360&theType=NR>.

²³³ *Nebraska City Agrees to let Woman Wear Muslim Garb at Pool*, Associated Press, 22 February 2005, at: http://www.fac.org/rel_liberty%5Cpubliclife/..%5C..%5C/news.aspx?id=14860.

headscarf in jail and when they appear in court²³⁴ and whether Muslim female police officers may wear the headscarf to work.²³⁵

3.3 Teachers Wearing the Headscarf: The Cases of Alima Dolores Reardon and Cynthia Moore

In *Tinker* the Supreme Court ruled that First Amendment rights are available to teachers as well as to students. However, this ruling stands in contrast to the fact that there exist in the United States so-called "religious garb laws" that limit the religious dress of government employees while on the job, particularly that of schoolteachers.²³⁶ Of particular interest is a statute originally enacted in 1895 in Pennsylvania, which states that "no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."²³⁷ The statute states that teachers who violate this proscription the first time shall be suspended for one year, and teachers who violate this proscription a second time shall be permanently disqualified from teaching in the public school. It should be noted that recent case law has called into question the constitutionality of the statute,²³⁸ and that currently there is a bill pending to repeal this statute.²³⁹

There are two cases on Pennsylvania's religious garb statute that are directly related to the headscarf. The first is the Third Circuit case of *United States of America v. Board of Education for the School District of Philadelphia and Commonwealth of Pennsylvania* (1990).²⁴⁰ This case was brought under Title VII of the Civil Rights Act of

²³⁴ *Muslims Find Range of Acceptance for Hijab*, Associated Press, 27 October 2003, at: <http://www.firstamendmentcenter.org/analysis.aspx?id=12120>.

²³⁵ *Ibidem*.

²³⁶ Gey, p. 19.

²³⁷ *Pennsylvania Consolidated Statutes*, (Title 24) Education, Public School Code of 1949, Article XI., Professional Employees, at: <http://members.aol.com/DKM1/24PA1112.html>.

²³⁸ *Tenaflly Eruv Association v. Borough of Tenaflly*, 309 F. 3d 144 (3d Cir. 2002) [hereinafter *Tenaflly*].

²³⁹ Debbie Kaminer, *Religious Expression in the Workplace*, in "New York Law Journal", vol. 231, 19 February 2004, p. 3.

²⁴⁰ 911 F. 2d 882 C.A.3 (Pa.), 1990 [hereinafter *U.S.A.*].

1964,²⁴¹ alleging discrimination in employment on the basis of religion. It concerned Alima Dolores J. Reardon (a devout Muslim who was wearing a headscarf in public), who filed a charge with the Equal Employment Opportunity Commission (EEOC). Reardon was refused employment as a teacher at three Philadelphia elementary schools in the fall of 1984 on the grounds that because of the religious garb statute, she could not be allowed to teach while wearing the headscarf. This occurred despite the fact that she had taught at an elementary school in Philadelphia wearing the headscarf during the 1983-1984 school year.

The Third Circuit Court determined that Reardon does not have the right to wear a headscarf while teaching, since such an accommodation would require a violation of the statute. The Court ruled that it would be undue hardship to require the Board to violate the statute, since its administrators might face fines and even expulsion. It also argued that the religious garb statute advances the compelling state interest of preserving an atmosphere of religious neutrality in public schools.²⁴²

It is interesting to contrast the above decision with the other case that is specific to the headscarf, namely *Equal Employment Opportunity Commission v. READS, Inc. (1991)*.²⁴³ This is a lower district court decision, in which the Court ruled that Cynthia Moore, also a Muslim schoolteacher, has the right to wear a headscarf while teaching, however only if it is a discreet one. As for the facts of the case, READS is a private corporation which provides auxiliary services to non-public school students under a contract with the Philadelphia School District. Moore interviewed with READS for a position as a third grade counsellor at two Catholic elementary schools, however was refused employment because she wore a headscarf to the interview and also indicated that she would wear it on the job. She subsequently filed a complaint against READS with the EEOC alleging discrimination in hiring based upon religion. The Court ruled in Moore's favour and held that READS failed to demonstrate that accommodating Moore would mean undue hardship. The Court concluded that the garb law is not applicable to READS because it is a private organisation and therefore READS employees do not fall under the

²⁴¹ Title VII of the Civil Rights Act of 1964, at: <http://www.eeoc.gov/policy/vii.html>.

²⁴² U.S.A., p. 895.

²⁴³ *Equal Opportunity Commission v READS, Inc.*, 759 F. Supp. 1150, E.D. Pa., 1991.

statute because they are not public school teachers. Furthermore, the Court decided that although Moore wore the headscarf for religious reasons, it was not "religious garb", since it did not look like a traditional Muslim headscarf (the Court contrasted this to the case of Alima Dolores Reardon, stating that her headscarf did indeed constitute "religious garb").²⁴⁴

The above cases suggest that the public school teacher's right to wear a headscarf is seriously restricted under such legislation, as the one still in force (but currently under reconsideration) in Pennsylvania. However, there is no indication that any other states of the US has enacted similar legislation, while even in Pennsylvania recent case law has called into question the constitutionality of this statute. The most important case in this context is the case of *Tenafly Eruv Association v. Borough of Tenafly* (2002).²⁴⁵ Here, the Third Circuit Court applied Supreme Court precedent and determined that "an interest in more separation between church and states than the Establishment Clause requires cannot justify restricting rights shielded by the Free Exercise Clause."²⁴⁶

3.4 Wearing the Headscarf in the Workplace

Although the focus of this thesis is on the headscarf issue in public schools, a brief discussion of religious expression in the workplace in the United States is also relevant and helpful. As Debbie Kaminer states, "while students in the United States do have a strongly protected First Amendment right to wear religious garb in public schools, the right of both public and private employees to religious expression in the workplace is not as strongly protected as many might believe."²⁴⁷ It is important to point out, however, that there is a marked difference in the protection of the right to religious expression of federal employees, as opposed to private employees.

²⁴⁴ Ibidem, p. 1160.

²⁴⁵ This case involved a group of Orthodox Jews in the Borough of Tenafly who requested permission to erect an *eruv* (a religious structure that symbolically extends the confines of what is considered one's home for the purposes of Jewish law). The Borough council denied the request and the Eruv Association then sued, arguing that the town's decision abridged their Free Exercise Clause rights.

²⁴⁶ *Tenafly*, p. 37.

²⁴⁷ Kaminer, p. 1.

3.4.1 Federal Employees

Federal employees are directly protected by the free exercise clauses of the First Amendment.²⁴⁸ The comparatively greater protection of their right to religious expression also stems from the guidelines on Religious Exercise and Religious Expression in the Federal Workplace issued on 14 August 1997 by then-President Clinton. In its section on accommodation of religious exercise, the guidelines state that federal law “requires an agency to accommodate employees’ exercise of their religion unless such accommodation would impose an undue hardship on the conduct of the agency’s operations.”²⁴⁹ As an example, the guidelines mention that an employee “must be permitted to wear religious garb, such as a crucifix, a yarmulke, or a *head scarf or hijab*, if wearing such attire during the work day is part of the employee’s religious practice or expression, so long as the wearing of such garb does not unduly interfere with the functioning of the workplace.”²⁵⁰ Thus, not much controversy (apart from the religious garb laws discussed above) has arisen from federal employees wearing the headscarf at the workplace. It should be noted, however, that “to the extent that a public employee’s speech is viewed as government expression, this religious speech can also be prohibited by the establishment clause of the First Amendment.”²⁵¹

3.4.2 Private Employees

As for the rights of private employees, Title VII of the 1964 Civil Rights Act “both mandates accommodation of an employee’s religious expression in the workplace and protects the countervailing right of other employees to be free from religious expression that creates a hostile work environment.”²⁵² Under Section 701(j) of Title VII, “employees have the right to have their religious practices - including wearing religious

²⁴⁸ Ibidem, p. 3.

²⁴⁹ *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, at: <http://clinton2.nara.gov/WH/New/html/19970819-3275.html>.

²⁵⁰ Ibidem (emphasis added).

²⁵¹ Kaminer, p. 3.

²⁵² Ibidem, p. 1.

garb - 'reasonably accommodated' in the workplace unless such accommodation would cause their employer 'undue hardship.'"²⁵³ Kaminer argues that Courts have "tended to be more concerned with prohibiting hostile work environment harassment than with accommodating an employee's right to religious expression in the workplace."²⁵⁴ She also says that "to the extent that the courts do require accommodation of religious expression or religious symbols, they have shown a clear bias against unusual or uncommon religious expression."²⁵⁵

A relevant case in this context is the Washington district court case of *Equal Employment Opportunity Commission v. Presbyterian Ministries, Inc.* (1992).²⁵⁶ The case concerned a retirement home operated by Christian denomination. A former receptionist at this retirement home, Jacqueline Brooks, brought suit under Title VII of the Civil Rights Act, alleging that she was constructively discharged when the home insisted that she not wear a headscarf. The Court found that the retirement home could not be held liable because the retirement home is covered by limited exemption to Title VII for religious organisation with respect to employment of individuals of a particular religion for work connected with such organisation. The Court found that Title VII may not be construed to force a religious institution to accept the display of religious symbols contrary to the image and environment that the institution wishes to create and maintain. The Court noted that to protect Brooks' exercise of her religion on the premises of the retirement home, would be to favour her religious exercise over that of Presbyterian Ministries, Inc. The Court ruled that Presbyterian Ministries justifiably considered Brooks' display of her own religious preference at the highly visible reception desk inappropriate.²⁵⁷

²⁵³ Ibidem.

²⁵⁴ Ibidem.

²⁵⁵ Ibidem, p. 2.

²⁵⁶ *Equal Employment Opportunity Commission v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154, 59 Fair Empl. Prac. Cas. (BNA) 579, No. C90-1294 M, March 19, 1992.

²⁵⁷ Ibidem, p. 1158.

4. Conclusion

As the above discussion indicates, the public school student's right to wear the headscarf is more protected in the United States than in France. This is particularly due to the fact that public school students enjoy First Amendment protection of their right to religious expression. This was confirmed by the Supreme Court's decision in *Tinker*. However, this protection may be weakened by school dress codes that do not provide for religious exceptions. Yet, apart from some individual cases, it appears that on the whole, public schools in the United States are willing to furnish religious exceptions to their dress codes.

Furthermore, it appears that the right of the public school teachers to wear the headscarf is more protected in the United States at large than in both France and Germany. This protection also stems from the Supreme Court's decision in *Tinker*, as well as from the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace. However, as evidenced by the discussion of Pennsylvania's "religious garb" statute, the teacher's right to wear the headscarf might not be protected equally as well throughout the entire United States. Yet, as pointed out, recent case law has challenged the constitutionality of the statute, and there is a bill pending to repeal it.

Even if Gunn is correct in arguing that freedom of religion is a founding myth of the United States, it nonetheless has contributed to religious minorities in the U.S., in this case the Muslim community, being granted more freedom to manifest their religion than in France or Germany.

CHAPTER FOUR

The Headscarf Ban under International Human Rights Law

1. Introductory Remarks: Which human rights are at stake?

One of the greatest international legal achievements in the past half century was the codification of human rights through international law as a universally recognised system of values. As demonstrated in the discussion of how the headscarf has been dealt with in France, Germany and the United States, several fundamental human rights are at issue in the debate on whether women or the girl child should be allowed to wear the headscarf in public schools and in other public spaces.

Some of these fundamental rights are the right to religious freedom, the right to education, children's rights, women's rights, and the prohibition of discrimination. When analyzing how governments have dealt with the right to wear a headscarf, it is therefore important to assess whether their practice is in conformity with their obligations under international human rights law. Human rights are recognised in numerous universal and regional instruments, many of which France, Germany, and the United States are parties to, and which are examined below.

2. Relevant Provisions in International Human Rights Instruments

2.1 Relevant International Instruments

The United Nations (UN) has been a pioneer in developing a universal system of human rights protection. Some of the most important instruments that comprise this universal system and are relevant to the headscarf debate are: a) the Universal Declaration of Human Rights²⁵⁸ (the "Universal Declaration"), which was the first comprehensive human rights instrument to be proclaimed by the UN General Assembly, some provisions

²⁵⁸ *Universal Declaration of Human Rights*, GA Res. 217 A (III), 10 December 1948.

of which are considered to have achieved the status of customary law²⁵⁹; b) the International Covenant on Civil and Political Rights²⁶⁰ (the "ICCPR"), which expands on the civil and political rights provided in the Universal Declaration; c) the International Covenant on Economic, Social and Cultural Rights²⁶¹ (the "ICESCR"), which contains a longer and much more comprehensive list of economic, social and cultural rights; d) the Convention on the Elimination of All Forms of Discrimination Against Women²⁶² (the "CEDAW"), which unfortunately is the UN convention that has the most reservations; e) the Convention on the Rights of the Child²⁶³ (the "CRC"); and f) the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief²⁶⁴ (the "Declaration on Religious Intolerance"). The most important regional instruments that codify human rights are the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁶⁵ (the "ECHR"), the American Convention on Human Rights²⁶⁶ (the "ACHR"), the African Charter on Human and Peoples' Rights²⁶⁷ (the "African Charter"), and the Arab Charter on Human Rights²⁶⁸ (the "Arab Charter").

2.2 Religious Freedom

Article 18 of the Universal Declaration states that "everyone has the right to freedom of thought, conscience and *religion*" and that this freedom includes, *inter alia*, the freedom

²⁵⁹ Manfred Nowak, *Introduction to the International Human Rights Regime*, Leiden, Martinus Nijhoff Publishers, 2002, p. 77.

²⁶⁰ Adopted 16 December 1966, entered into force 23 March 1976, GA Res. 2200 A (XXI), 999 UNTS 171 (France ratified in 1981, Germany in 1976, United States in 1992).

²⁶¹ Adopted 16 December 1966, entered into force 3 January 1976, GA Res. 2200 A (XXI), 993 UNTS 3 (France ratified in 1981, Germany in 1976, United States signed in 1977, not yet ratified).

²⁶² Adopted 18 December 1979, entered into force 3 September 1981, GA Res. 34/180, 1249 UNTS 13 (France ratified in 1984, Germany in 1985, United States signed in 1980, not yet ratified).

²⁶³ Adopted 20 November 1989, entered into force 2 September 1990, GA Res. 44/25, 1577 UNTS 3 (France ratified in 1990, Germany in 1992, United States signed in 1995, but not yet ratified).

²⁶⁴ Adopted 25 November 1981, GA Res. 36/55, at: <http://www.un.org/documents/ga/res/36/a36r055.htm>.

²⁶⁵ Signed 4 November 1950, entered into force 3 September 1953, 213 UNTS 221 (France ratified in 1974, Germany in 1952).

²⁶⁶ Signed 22 November 1969, entered into force 18 July 1978, OASTS 36 (the United States signed it in 1977, has not ratified it yet).

²⁶⁷ Adopted 27 June 1981, entered into force 21 October 1986, reprinted in 21 ILM 58 (1982).

²⁶⁸ Adopted on 15 September 1994 by the Council of the League of Arab States in Cairo, reprinted in 18 HRLJ 151 (1997).

“to *manifest his religion* or belief in teaching, practice, worship and observance.”²⁶⁹ Article 18 of the ICCPR states, almost identically, that “everyone shall have the right to freedom of thought, conscience and *religion*” and that this right shall include the right “to *manifest his religion* or belief in worship, observance, practice and teaching.”²⁷⁰ Furthermore, under Article 12 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families²⁷¹ (which, however, has not been signed or ratified by any of the states in question), migrant workers and members of their families shall enjoy the freedom “either individually or in community with others and *in public or private to manifest their religion* or belief in worship, observance, practice and teaching.”

The right to religious freedom is also enshrined in several regional instruments: Article 9 of the ECHR, Article 12 of the ACHR, Article 8 of the African Charter, and Articles 26 and 27 of the Arab Charter. It should be noted that Article 37 of the Arab Charter is also relevant, in that it states that “[m]inorities shall not be deprived of their right to enjoy their culture or to follow the teachings of their religions.” The ICESCR (Article 2), the ICCPR (Article 2.1), and the CRC (Article 2.1) require states parties to respect and ensure the rights enumerated in the respective Conventions “without distinction of any kind, such as ... religion, political or other opinion.”²⁷² This prohibition of religious discrimination is also present in the regional instruments.²⁷³ It should be noted that the Human Rights Committee observed in its General Comment No. 22 on Article 18, that the manifestation of religion or belief in worship includes “the display of symbols” and certain customs, such as the wearing of distinctive clothing or head coverings, i.e the headscarf.²⁷⁴

Article 18.3 of the ICCPR acknowledges that freedom of religion “may be subject

²⁶⁹ Emphasis added.

²⁷⁰ Emphasis added.

²⁷¹ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, adopted 18 December 1990, entered into force 1 July 2003, GA Res. 45/158, reprinted in 30 ILM 1517 (1991).

²⁷² Emphasis added.

²⁷³ Article 14 of the ECHR, Article 1 of the ACHR, Article 2 of the African Charter, as well as Article 2 of the Arab Charter.

²⁷⁴ Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 4.

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.”²⁷⁵ In its General Comment No. 22 the Human Rights Committee observed that this paragraph is to be strictly interpreted. It stated that limitations may only be applied for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. The Committee noted that restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner, and stated furthermore that Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, and that policies or practices having this intention or effect, such as, for example, those *restricting access to education*, are inconsistent with said article.²⁷⁶ Furthermore, the Committee expressed particular concern with “any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent *religious minorities that may be the subject of hostility on the part of a predominant religious community*.”²⁷⁷ The Committee also stated that the fact that a religion is recognised as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the ICCPR nor in any discrimination against adherents to other religions or non-believers.²⁷⁸

2.3 Right to Education

Article 26.2 of the Universal Declaration states that education “shall promote *understanding, tolerance and friendship* among all nations, racial or *religious groups*.”²⁷⁹ Similarly, Article 13 of the ICESCR provides that “education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or *religious groups*.”²⁸⁰ It should be noted that the

²⁷⁵ Similar requirements are found in Article 14 of the CRC, Article 1.3 of the Declaration on Religious Intolerance, Article 9 of the ECHR, Article 12.3 of the ACHR as well as Article 4 of the Arab Charter.

²⁷⁶ *General Comment No. 22*, para. 5 (emphasis added).

²⁷⁷ *Ibidem*, para. 2 (emphasis added).

²⁷⁸ *Ibidem*, para. 9.

²⁷⁹ Emphasis added.

²⁸⁰ Emphasis added.

right to education is also enshrined in Article 2 of Protocol 1 of the ECHR, Article 17 of the African Charter, as well as Article 34 of the Arab Charter.

The Committee on Economic, Social and Cultural Rights, which monitors the implementation of ICESCR, noted in its General Comment on Article 13 that education, apart from being a human right in itself, is also an indispensable means of realising other human rights, since education “is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”²⁸¹ Among other things, it emphasised that education has a vital role in empowering women as well as promoting human rights and democracy. The Committee emphasised furthermore that education “must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.”²⁸² It stated that this prohibition against discrimination “is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.”²⁸³

2.4 Women's Rights

Under Article 10 of CEDAW, “[s]tates parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them *equal rights with men in the field of education*.”²⁸⁴ Paragraph (a) of said article further specifies that states parties shall ensure “the *same conditions* for career and vocational guidance, *for access to studies* and for the achievement of diplomas in educational establishments of all categories.”²⁸⁵ In regard to employment, Article 11 provides that “[s]tates parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same

²⁸¹ Committee on Economic, Social and Cultural Rights, *General Comment: The right to education* (Art. 13), E/C.12/1999/10, 8 December 1999, para. 1.

²⁸² *Ibidem*, para. 6(b).

²⁸³ *Ibidem*, para. 31.

²⁸⁴ Emphasis added.

²⁸⁵ Emphasis added.

rights, in particular: ... (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment.”

The Human Rights Committee stressed in its General Comment No. 28 on the equality of rights between men and women (Article 3 of the ICCPR) that specific regulations of clothing to be worn by women in public may, *inter alia*, involve a violation of Articles 18 (Freedom of Religion) and 19 (Freedom of Expression), “when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression”, as well as a violation of Article 27 (Rights of Minorities) “when the clothing requirements conflict with the culture to which the woman can lay a claim.”²⁸⁶

In its comment, the Committee also emphasised that states parties “must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice - including the freedom to change religion or belief and to express one's religion or belief - will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination.”²⁸⁷ The Committee also pointed out that discrimination against women is often intertwined with discrimination on other grounds, such as *religion*, and that, therefore, states parties must address “the ways in which any instances of discrimination on other grounds affect women in a particular way.”²⁸⁸

2.5 Children's Rights

Article 3.1 of CRC states that “in all actions concerning children... the best interests of the child shall be a primary consideration.” Article 28 outlines the child's right to education, while Article 29.c mandates that the education of the child shall among other things be directed to “the development of respect for the child's parents, his or her own cultural identity, language and values.” Article 30 states that a child belonging to an ethnic, religious or linguistic minority “shall not be denied the right, in community with

²⁸⁶ Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 13.

²⁸⁷ *Ibidem*, para. 21.

²⁸⁸ *Ibidem*, para. 30 (emphasis added).

other members of his or her group, to enjoy his or her own culture, *to profess and practice his or her own religion*.”²⁸⁹

Article 5.3 of the Declaration on Religious Intolerance is also particularly relevant to the headscarf debate. It provides that the child “shall be protected from any form of discrimination on the ground of religion or belief” and “shall be brought up in a spirit of understanding, tolerance, friendship among peoples, [... and] respect for freedom of religion or belief of others.”

3. Relevant International Jurisprudence

3.1 The Human Rights Committee: *Hudoyberganova v. Uzbekistan*

It should be noted that under the ICCPR optional Protocol’s individual complaints procedure the Human Rights Committee has dealt with one complaint that is particularly relevant to our discussion, namely in the case of *Hudoyberganova v. Uzbekistan*. Raihon Hudoyberganova argued that she was unlawfully excluded from her university because of wearing a headscarf, and thus claimed that her rights under Articles 18 (Freedom of Religion) and 19 (Freedom of Expression) of the ICCPR were violated.

Hudoyberganova, a devout Muslim, joined the Islamic Affairs Department of the Tashkent State Institute for Eastern Languages in 1996 and alleged that starting in September 1997, the Institute administration began to seriously limit the right to freedom of religion of practising Muslims by, for example, closing the existing prayer room and asking students wearing a headscarf (Hudoyberganova was one of them) to leave the courses of the Institute and study at the Tashkent Islamic Institute instead. According to Hudoyberganova, although the students complained about this treatment, nothing was done by the school’s administration.

Hudoyberganova continued to wear the headscarf and alleged that she was threatened and that attempts were made to prevent her from attending lectures. On 17 January 1998, she was informed that the Institute adopted new regulations outlawing

²⁸⁹ Emphasis added.

religious dress on campus. She signed these new regulations, yet wrote that she disagreed with the provisions that prohibited students from covering their faces. On 25 March 1998 she was officially excluded from the Institute on the basis of her alleged negative attitude towards the professors and her violation of the Institute regulations.

A further development was that on 15 May 1998, a new law "On the Liberty of Conscience and Religious Organisations" entered into force in Uzbekistan. According to Article 14 of this new law, Uzbek nationals cannot wear religious dress in public places. The Institute informed all students that those wearing the headscarf would be expelled. On 20 May 1998 Hudoyberganova filed a complaint with the Mirabad District Court (Tashkent), requesting to have her student rights restored. However, on 30 June 1998 the Court dismissed her complaint.

In response to Hudoyberganova's complaint filed with the Human Rights Committee, the Uzbek government emphasised that the order to exclude her from the Institute was grounded on "rough immoral attitude toward a teacher and infringement of the internal regulations of the Institute, after numerous warnings."²⁹⁰

The Human Rights Committee found that Hudoyberganova's claim under Article 19 of the ICCPR was unsubstantiated, and therefore only considered her claim under Article 18. In its views the Committee reiterated several statements it made in its General Comment No. 22, in particular that policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with Article 18.2. It recalled that the freedom to manifest one's religion is not an absolute right and that it may be subject to limitations. In this case, the Committee noted that Uzbekistan did not invoke any specific ground for which the restriction imposed on Hudoyberganova would be necessary. Instead, Uzbekistan sought to justify her expulsion from the University because of her refusal to comply with the ban of religious clothing. The Committee pointed out that neither Hudoyberganova nor Uzbekistan specified what kind of headscarf she was wearing (thus not clarifying whether her face was covered or not). However, the Committee nonetheless found that in the particular circumstances, in the absence of any justification provided by Uzbekistan, there had been a violation of

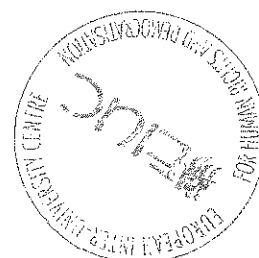
²⁹⁰ *Communication No. 931/2000: Uzbekistan*, 18 January 2005, CCPR/C/82/D/931/2000 (Jurisprudence), para. 4.3.

Article 18.2.²⁹¹

Three Committee members drafted individual opinions on this case. Hipólito Solari-Yrigoyen, the only dissenting member, argued that the Institute's regulations imposed general rules on all students, and thus did not restrict Hudoyberganova, or adherents of one religion, in particular. He also emphasised that Hudoyberganova's exclusion arose from more complex causes, and not only the religious clothing she wore. In contrast, U.S. Committee member Ruth Wedgwood wrote that she found the facts of the case too obscure to permit a finding of a violation of the Covenant. She was particularly concerned with the fact that it was unclear what type of headscarf Hudoyberganova was wearing (i.e. whether her face was covered). She argued that a state may be allowed to restrict forms of dress that directly interfere with effective pedagogy, and that the covering of a student's face would present a different set of facts.

3.2 *The European Court of Human Rights*

3.2.1 *Dahlab v. Switzerland*



This case, which the European Court of Human Rights (the "ECtHR") decided upon in 2001, concerns a teacher in the canton of Geneva who had converted from Catholicism to Islam in 1991, and consequently began to teach wearing the headscarf. Dahlab taught with the headscarf for several years without complaints from students' parents. However, in 1996 she received an official order to no longer wear the headscarf while teaching (this order was based on Article 27 of the Swiss Constitution, as well as Geneva school law). She was forbidden to wear the headscarf based on the reasoning that the public, neutral (*laïc*) school system in Switzerland requires the maintenance of strict neutrality. The argument was made that wearing the headscarf, which -it was argued- is a strong religious symbol, forces itself upon the schoolchildren (as they are not able to remove themselves from seeing it), and that this endangers the neutrality that is required in the

²⁹¹ Ibidem, para. 6.2.

public school system.²⁹²

In its decision, the ECtHR confirmed the 1998 judgment of the Swiss Federal Court which had upheld this headscarf ban. The Swiss Federal Court had referred to Article 27 (3) of the Swiss Constitution, which is the foundation for religious neutrality in the Swiss school system (the Federal Court also referred to a decision it made in 1990, where it found that a crucifix in a classroom of an elementary school is not reconcilable with the principle of neutrality). The ECtHR acknowledged that an infringement upon Dahlab's right to religious freedom had taken place, but considered this infringement to be justified by Article 9.2 of the ECHR. The Court found no violation of Article 14, arguing that the headscarf ban did not constitute a discrimination based on gender, because a man who would want to teach while wearing a headscarf would also not be allowed to do so.²⁹³ The Court stated that it cannot outright be denied that the wearing of a headscarf might have some kind of proselytising effect, "seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."²⁹⁴ Overall, it appears that the Court saw a danger in the children seeing the headscarf, and thus interpreted it as having an indoctrinating effect. It is also important to note that the Court found that Swiss authorities did not exceed their margin of appreciation by burdening Dahlab's right to religious freedom, and that therefore the measure taken was not unreasonable. The Court noted furthermore, that states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.²⁹⁵

3.2.2 Sahin v. Turkey

This case was decided by the ECtHR in 2004, and deals with Leyla Sahin, a medical

²⁹² *Dahlab v. Switzerland*, Decision of 15 February 2001 (Application no. 42393/98), p. 9.

²⁹³ *Ibidem*, p. 17.

²⁹⁴ *Ibidem*, p. 15.

²⁹⁵ *Ibidem*, p. 16.

student at the University of Istanbul, who in 1998 was denied access to written examinations and to a lecture at the University because she was wearing a headscarf.²⁹⁶ The wearing of headscarves at the University was prohibited not only by the rules of the University but also by the Constitution of Turkey, as interpreted in 1989 and 1991 by the Constitutional Court of Turkey. Disciplinary proceedings were brought against Sahin, and after participating in an unauthorised protest against the headscarf ban, she was suspended for one semester in April 1999. In September 1999 Sahin left Turkey in order to continue her medical studies at the University of Vienna, where she was allowed to wear the headscarf.

In her application to the ECtHR, Sahin argued that the ban on headscarves in higher-education institutions in Turkey unlawfully interfered with her rights under Article 9 of the ECHR, as well as with her right to education guaranteed in Article 2 of Protocol No. 1. Sahin also alleged a breach of Articles 14 (Discrimination), 8 (Respect for Private and Family Life) and 10 (Freedom of Expression).²⁹⁷ The Turkish government, however, stated that due to Turkey's history, the notion of secularism is of particular importance in the country, and legitimises the headscarf ban. It argued that allowing headscarves would lead to Islam taking over the Turkish state. Among other things, the government argued that the headscarf has become a symbol of religious fundamentalism in Turkey.

The ECtHR accepted that Sahin wore the headscarf for religious rather than political reasons, and that her right to religious freedom was impacted by the headscarf ban.²⁹⁸ However, the ECtHR found the headscarf ban at the University to be a lawful restriction, "because the legislative framework, which delegated power to the Vice-Chancellor of the university to draft circulars such as the ban, was legal, and the ban therefore met the standard of being 'prescribed by law' because the Supreme Administrative Court and the Constitutional Court had both upheld the ban based on

²⁹⁶ It should be noted that a similar case was considered in 1993. In *Karaduman v. Turkey* [Application No. 16278/90] the European Commission of Human Rights ruled as inadmissible the application of a university student who was asked but refused to remove her headscarf in order to obtain a degree certificate. In that case, the Commission took the view that a student joining a secular institution could be obliged to comply with the rules of the institution and also emphasised the right of the other students not to be pressured into wearing the headscarf.

²⁹⁷ *Sahin v. Turkey*, Judgment of 29 July 2004 (Application no. 44774/98) [hereinafter *Sahin*], para. 2.

²⁹⁸ *Ibidem*, para. 10.

procedural and substantive challenges.”²⁹⁹ In addition, the Court found the limitation of Sahin's right to freedom of religion to be legal because of the importance of upholding the principle of secularism in Turkey. It ruled that the interference had the legitimate aim to protect the rights and freedoms of others and to protect public order.³⁰⁰ It was the opinion of the Court that upholding secularism is necessary for the protection of Turkey's democratic system because it is a principle entrenched in its Constitution. Thus, the Court found the reasons Turkey gave for the interference both relevant and sufficient. The Court noted that the interference was all the more relevant due to “extremist political movements” in Turkey, which are bent on imposing one religion upon the state.³⁰¹ The interference was, therefore, considered necessary in a democratic society and did not give rise to a violation of Art.9. It is important to note that the Court observed that national authorities are better suited than an international court to determine local needs and conditions, particularly if they are related to issues surrounding public order, which the Court sees the regulation of the wearing of religious symbols in teaching institutions directly related. Thus, the Court found a margin of appreciation to be particularly appropriate in this respect.³⁰²

3.3 Other National Jurisprudence : The Case of Shamina Begum in the UK

It is particularly interesting to compare how the United Kingdom has approached the headscarf issue to how France has dealt with it, since the UK represents the multicultural or communitarian model of integration (while France is representative of the assimilationist model). In the UK the attempt is made to integrate immigrant populations (as a group) with cultural backgrounds different from the mainstream. The UK does not have a written Constitution, and there is no separation of the state from the Church of England, which has lead to there being special attention paid to different confessions

²⁹⁹ D. Christopher Decker, *Case Comment: Leyla Sahin v. Turkey*, in “European Human Rights Law Review”, vol. 6, 2004, p. 675.

³⁰⁰ *Sahin*, para. 84.

³⁰¹ *Ibidem*, para. 109.

³⁰² *Case Comment: Freedom of Religion: Ban on University Students Wearing Islamic Headscarves*, in “European Human Rights Law Review”, vol. 5, 2004, p. 591.

being able to express their differences. This is mirrored in the fact that Sikhs, for example, are allowed to wear a turban in lieu of a motorcycle helmet. Overall, it appears that the UK is following a policy of "pluralism within limits."³⁰³

One of the most interesting headscarf cases in the UK, and which also is most relevant to our discussion, is the case of Shabina Begum, 16, at Denbigh High School in Luton, Beds, who Appeal Court judges ruled was unlawfully excluded from school for wearing a traditional Muslim gown. Denbigh High School is a mixed school where children speak 40 different languages and 21 different ethnic groups are represented in the school population.³⁰⁴ About 79% of the pupils classify themselves as Muslim. The school has a uniform requirement for both girls and boys. Among other things, girls have the option to wear headscarves (as long as they comply with three specific requirements) and/or the *shalwar kameeze* (pants and tunic), as long as it follows the specifications laid out in the school's regulations.

Shabina Begum, however, disagreed with these uniform requirements, since she believes that for a Muslim woman who has started to menstruate, the *shalwar kameeze* does not comply with the requirements of Islam. To her, the *shalwar kameeze* was not acceptable because it revealed too much of the arms and the legs. Begum therefore insisted on being able to wear the *jilbab* to school, which is a form of dress worn by Muslim women which completely conceals the shape of their arms and legs. Thus, at the start of the new school year in September 2002, Begum attended school wearing a *jilbab*, however the assistant headteacher told her to go away and change into a proper school uniform. Unfortunately, the school and Begum reached an impasse, with her refusing to attend the school unless being allowed to wear the *jilbab*, and the school refusing to allow her to attend unless she was wearing the *shalwar kameeze*. As a result, Begum lost almost two years of schooling until she was accepted in September 2004 by a different local school which permitted her to wear the *jilbab*.³⁰⁵

The Appeal Court judge, Lord Justice Brooke, found that Begum was unlawfully

³⁰³ Oestreich, p. 178.

³⁰⁴ *R (Begum) v Headteacher and Governors of Denbigh High School*, Queen's Bench Division, [2004] EWHC 1389 (Admin), [2004] ELR 374, para. 1 [hereinafter *Begum*].

³⁰⁵ *Ibidem*, para. 16.

excluded from school, and noted that British education law does not allow a pupil of school age to continue in the limbo in which she found herself. The judge in particular referred to the *Kokkinakis v. Greece* (25 May 1993) judgment by the ECtHR, where in its discussion of Article 9.1 of the ECHR, it stated among other things that: "While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions."³⁰⁶ However, in this same judgment the Court also recognised that it may be necessary to place restrictions on this freedom in order to reconcile the interests of various groups and to ensure that everyone's beliefs are respected. Based on the ECtHR's ruling in the case of *Chaush v. Bulgaria* (26 October 2000), Lord Justice Brooke found that the School has the burden to justify the limitation on Begum's religious freedom created by the School's uniform code. He furthermore pointed out that there was no suggestion that the limitation of her right to religious freedom was in some way necessary in the interests of public safety, for the protection of public morals, or for the protection of the rights and freedoms of others.³⁰⁷

The judge took the *Sahin* case (discussed above) into particular consideration, and pointed out that the United Kingdom is a country very different from Turkey. In contrast to Turkey's secular system, in England and Wales express provision is made for religious education and worship in schools, for example. What the judge pointed out in particular is that the School did not acknowledge that Begum has a right to manifest her religion, and that this right is recognised by English law, and that thus the School would have to justify why it was curtailing this right. Lord Justice Brooke was bothered by the fact that the School started from the premise that its uniform policy needed to be obeyed, and not that Begum's right to manifest her religion was being curtailed.³⁰⁸

Thus Lord Justice Brooke found that the School unlawfully excluded Begum, that it unlawfully denied her the right to manifest her religion, and that it unlawfully denied her access to suitable and appropriate education.

³⁰⁶ *Kokkinakis v. Greece*, Judgment of 25 May 1993 (Application No. 14307/88), para. 31.

³⁰⁷ *Begum*, para. 50.

³⁰⁸ *Ibidem*, para. 76.

4. Analysis

When comparing how France, Germany, and the United States have dealt with the girl child's and the woman's right to wear the headscarf, it appears that there is a real risk of these states (in particular France and Germany) violating several of their human rights obligations. As Article 18 of the ICCPR states, everyone has the right to manifest their religion, which the Human Rights Committee argues includes the display of religious symbols. This right may be limited, however only under specific circumstances. In all the headscarf ban cases discussed, it is argued that the student's (or teacher's) right to religious freedom is burdened in order to advance a compelling state interest, namely to preserve religious neutrality in public schools. However, particularly in the case of France and Germany, this is done in a discriminatory manner.

The Human Rights Committee has argued that restrictions on the right to religious freedom may not be applied in a discriminatory manner. In the case of France, the new law disproportionately affects Muslim girls. The law attempts to appear neutral, in that it bans conspicuous religious symbols in general, but in reality it disproportionately affects Muslim girls. The Human Rights Committee has also stated that limitations to the right to freedom of religion may be applied only for those purposes for which they are prescribed. France runs the risk of violating this requirement because it argues that the headscarf ban is meant to empower Muslim schoolgirls who are forced to wear the headscarf, when the French government's real concern is actually to decrease the influence of fundamentalist Islam. Thus the wellbeing of these girls is not the main concern, which is reflected by the fact that in reality this law is harming these girls more than it is helping them. As the Human Rights Committee has stated, policies that have the effect of restricting access to education are inconsistent with the ICCPR. Clearly, many Muslim schoolgirls in France have been restricted in their access to education (some have gone to study abroad while others have switched to distance learning programs). Thus the law also is not in the best interest of the child.

In the case of Germany, the headscarf bans passed by the Southern, Catholic *Länder* are more obvious in specifically discriminating against Muslim women. Public school teachers of the Christian faith are not required to restrict the manifestation of their

religion, while Muslim teachers are required to do so. Thus these laws are not in conformity with Germany's obligations under international human rights law, since the Human Rights Committee has emphasized that the presence of a majority religion should not result in any impairment of the enjoyment of any of the rights under the ICCPR, nor in any discrimination against adherents to other religions.

It should be noted that the recent laws passed in France and Germany also have the potential of running counter to the goals that the Universal Declaration as well as the ICESCR outline for education. Both documents state that education should promote understanding and tolerance among all religious groups. By disallowing Muslim students and teachers to wear the headscarf, France and Germany are misrecognising the Muslim community, which does not contribute to these goals. As the Committee of the ICESCR has stated, education is a means of realizing other human rights, and also plays a vital role in empowering women. By restricting the access of Muslim girls to education (France) and keeping Muslim public school teachers from teaching (Germany), both countries are making these girls and women victims, instead of empowering them.

As discussed, in the United States the right of the student to wear the headscarf is well-protected, however the right of the teacher can be more limited, particularly in states that have "religious garb laws", such as Pennsylvania's religious garb statute. In the case of these particular laws, the United States could potentially run the risk of violating its human rights obligations, particularly if these laws are applied in a discriminatory manner. An example would be if these laws are applied inconsistently, in the sense that they are applied more frequently to Muslims or Jews, for example, rather than Christians.

As the above discussion indicates, there is divergence in relevant international jurisprudence in regard to how the right to wear a headscarf should be treated. It appears that the Human Rights Committee is more inclined to protect a woman's right to wear the headscarf than is the EctHR. In both of its headscarf cases the EctHR decided that the state's compelling interest in neutrality overrides the right to religious freedom of the student/teacher. It also has determined that there is a wide margin of appreciation for state parties to deal with this issue. The Human Rights Committee's ruling in *Hudoyberganova v. Uzbekistan* stands in contrast to these EctHR decisions. Despite several key facts being unclear in this case, the Committee decided that a violation of the

Covenant had occurred. Judging by the Human Rights Committee's decision in *Hudoyberganova v. Uzbekistan*, the Committee would probably also decide that the headscarf bans in France and Germany are in violation of the ICCPR. It appears that the Committee does not confer such wide a margin of appreciation for state parties to handle this issue as does the EctHR.

In contrast, it is likely that the EctHR would confirm France's headscarf ban, since its decision in the *Dahlab* as well as the *Sahin* case demonstrated that it believes that the maintenance of state neutrality is a valid reason to curtail the right to religious freedom of the Muslim public school teacher or student. Of course it is difficult to foresee how the EctHR might decide in the future, but it is likely that it would have more difficulties with the headscarf bans passed by the German Southern Catholic states, since these bans openly discriminate against Muslim public school teachers. For certain is however, that even if the EctHR were in the future to make an argument that the French and/or German headscarf bans are technically in accordance with the ECHR, these bans nonetheless are not good policy, since they contribute to the misrecognition of the Muslim populations in these countries, and thus do not promote integration.

CONCLUDING REMARKS

Much of the differences in how France, Germany, and the United States have dealt with the headscarf have to do with the role that religion plays in each respective society. As demonstrated in this thesis, in each of these countries the separation of church and state is organised differently. The French, through the principle of *laïcité*, favour a strict separation, while in Germany the separation is less strict and Christian values form the foundation of the education systems in some *Länder*. The United States also enforces secularism in a more relaxed fashion than France. In the U.S., a too strict interpretation of secularism is viewed as an interference of the state with the individual, and thus as a violation of the individual's right to religious freedom, which is considered one of the most important rights in the United States.

Comparing how France, Germany and the United States have dealt with the headscarf provides an indication of how cultural pluralism is dealt with in these countries. The comparison leads us to the conclusion that although cultural pluralism may be a societal fact in France and Germany, it is not (properly) fostered; nor is the right to religious freedom of the Muslim community adequately protected in these countries. The French ban of conspicuous religious symbols in public schools appears to be a neutral law, yet it in reality disproportionately affects the Muslims in France. The Stasi Commission argued that a law banning the headscarf in public schools is necessary in order to protect girls who are pressured into wearing it. The pressure that the Commission referred to is radical Islam, the influence of which the headscarf ban is meant to decrease. Yet I would argue that France neither promotes gender equality, nor effectively fights radical Islam through the headscarf ban. The headscarf ban is in itself a form of coercion that disallows Muslim girls to choose for themselves whether they prefer to wear the headscarf or not, which is just as disrespectful as forcing them to wear it. Furthermore, there is a risk that the schoolgirls which this law is supposedly meant to empower, will become victims of this law, since they may be forced to interrupt their education, change schools, or change to distance learning programs (as has already occurred). Furthermore, if the French government truly wishes to fight the spread of radical Islam, it must do so in other areas in order to be effective. The main causes for a lack of Muslim integration and

an increase in radical Islam in France have to do with social and economic issues. The French government should, for example, focus on the high Muslim prisoner population as well as the high level of unemployment in the Muslim community.

In Germany, although Muslim students are generally permitted to wear headscarves, Muslim public school teachers are openly discriminated against, particularly by the southern *Länder*. Some of the headscarf ban laws in the southern *Länder* clearly imply that Christian public school teachers are allowed to express their faith since this does not run counter to the educational philosophy of these states. Muslim public school teachers, on the other hand, are required to restrict themselves in the manifestation of their faith. Thus Germany, even more so than France, seems to be drawing a bright boundary that prevents the Muslim community from integrating.

To be fair, it is important to take into consideration that of the three countries discussed, the United States has the lowest percentage of Muslim population. Thus, it is probable that if the United States were to have a Muslim population closer to 8% (such as France), the headscarf would cause more controversy in the U.S. than it has. Based on how the United States has dealt with the headscarf issue thus far, one can nevertheless conclude that in contrast to France and Germany, the United States seems to foster cultural pluralism, and that consequently the right to religious freedom of the Muslim community is more protected. Apart from the "religious garb" laws that exist in some states as well as some school dress code regulations that do not provide for religious exceptions, the right of students and teachers to wear the headscarf is well-protected. I would argue that the fostering of cultural pluralism in the U.S. for decades (which is also mirrored by how it has dealt with the headscarf issue) helps explain why compared to the Muslim populations in France and Germany, American Muslims are better integrated. They tend to have higher incomes, are better educated, and their civic participation is also higher.

As mentioned earlier, the headscarf debate is an important opportunity for the human rights movement to clarify its position towards conservative religious movements. It is an opportunity for the movement to prove that it can understand the complexities involved in this debate, and that despite being based on a secular philosophy, it can be effective in protecting the right to religious freedom. Human Rights Watch, one of the

most prominent human rights organisations, has already taken several steps in this direction by defending the fundamental rights of several religious minorities throughout the world, as well as strongly criticising France's headscarf ban as well as the ECtHR's judgment in the case of *Sahin v. Turkey*. One can only hope that more human rights organisations will follow Human Rights Watch's example.

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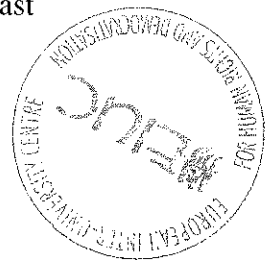
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