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Reuven (Ruvi) Ziegler

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THE FRENCH “HEADSCARVES BAN”: INTOLERANCE OR NECESSITY?

REUVEN (RUVI) ZIEGLER*

I. PROLOGUE

The interplay between state and religion stands at the core of the public discourse in many Western democracies. One of the important institutions where this interplay faces a daily legal and practical challenge is in public schools,¹ where the future generation’s character is highly influenced, values and culture are taught and absorbed, and long-term personal relations with colleagues begin their journey.

In the past few years, ethnic tension in French public schools has risen, following the National Assembly’s decision to adopt legislation prohibiting the wearing of “ostentatious religious symbols” by students, which went into effect on September 1, 2004.² The aim of this article is to examine the French legislation in a broader context. The article contends that in Western liberal democracies, fundamental social and legal norms influence the interpretation and the protection granted to human rights in general, and to the right to freedom of religion and culture in particular.

However, the article does not intend to advocate a certain position regarding the French legislation’s constitutionality, but rather, endeavors to question the justifications, as well as the legal and social background of the legislation. As a result, the analysis

* LL.M. *magna cum laude*, Hebrew University of Jerusalem, Israel, 2005. LL.B. *cum laude*, B.A. (Economics), University of Haifa, Israel, 2001. I wish to thank Chaim Gans, Sylviane Colombo, Guy E. Carmi, Shai Otzri, Zvi Ziegler and the editorial board of The John Marshal Law Review for their helpful comments on earlier drafts of this article. All errors and omissions remain mine alone.

1. In Europe, most students study at state-funded, public schools; private schools are quite rare, and usually have a religious affiliation. *See generally*, J. Dronkers, *More Parental Choice in Europe? Overview of Effectiveness Differences between Religious Schools and Public Schools in Several European Societies* (Apr. 14, 2001) (paper presented at the Annual Meeting of the American Educational Research Association), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/0d/92/ac.pdf.

2. Law of March 4, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], May 18, 2004, at 9033.

will not only deal with the particular rights at stake, but also with the way liberal democracies deal with the wearing of ostentatious religious, yet also cultural, symbols in the public sphere. It appears from the analysis that a state's chosen course of action is primarily determined by the legal model of the interplay between state and religion it has chosen to follow, and by the relations in society between the majority and minority groups.

The first part of the article examines the French system generally as far as the relations between state and religion are concerned. It examines the legislation through the prism of human rights law, particularly the right to freedom of religion and conscience, the right to culture, the right to equality and the right to education. Following is an examination of common models of the interplay between state and religion prevalent throughout the Western world, namely the secular-state model, the separation between church and state model, and the state official religion model. Lastly, the article takes a closer look at the underlying themes of French society: the concepts of secularity, neutrality and the "melting pot."

The question of state intervention (or guidance rather) in the way the future generation is educated has long been debated. Through this prism, it appears that the dilemma concerning whether the state has a right to cast away from the public sphere "non-state actors" — religions, minority cultures, or other supposedly "divisive" factors — has never been starker. I hope this article will shed some light on, and offer a critique of, the rationales that led France to adopt, by an overwhelming majority, an act that allows the state to limit basic human rights.

II. THE FIFTH REPUBLIC: FACING THE CHALLENGES OF THE THIRD MILLENNIUM — CONSTITUTIONAL NORMS AND THEIR IMPLEMENTATION IN FRENCH PUBLIC SCHOOLS

A. *The Interplay between Church and State in France*

The roots of the right to freedom of religion and conscience in France can be traced back to the 1789 Revolution and the Declaration of the Rights of Citizen and Man. Article 10 of the Declaration states:

No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.³

3. Présidence de la République, *The Declaration of Human Rights (1789)*, http://www.elysee.fr/elysee/anglais/the_institutions/founding_texts/the_declaration_of_the_human_rights/the_declaration_of_the_human_rights.20240.html (last visited Feb. 14, 2007) (discussing the history of The Declaration of Human Rights in France. The declaration was approved by the French

France is a self-declared *secular* state, dating back to the Law on Secularity (*loi sur la laïcité*) of 1905.⁴ The law was promulgated as a consequence of the Dreyfus affair,⁵ which undermined the stability of the Third Republic, and highlighted the discord between the religious bodies and the secular elites.

Section 1 of the Law on Secularity reiterates the right to freedom of religion and conscience.⁶ On the other hand, section 2 focuses on the principle of secularity, including the prohibition on the state recognizing a religion and aiding it financially.⁷ Thus, alongside the recognition of freedom of religion and conscience in France, protection is granted to the freedom from religion.⁸ Further reiterating the fact that France is a secular state by its definition, Article 1 of the Fifth Republic's constitution prohibits discrimination based on ethnic origin, gender, or religion, and establishes the duty to respect all religious beliefs.⁹

National Assembly on Aug. 26, 1789); cf Michel Troper, *French Secularism, or Laïcité*, 21 CARDOZO L. REV. 1267, 1268 (2000) (discussing the distinctiveness of French secularism).

4. Law Concerning the Separation of Church and State of December 9, 1905, Journal Officiel de la République Française [J.O.][Official Gazette of France], December 11, 1905 [hereinafter Law on Secularity].

5. The Dreyfus Affair was a political controversy that divided France during the 1890s and early 1900s involving the wrongful conviction of Jewish military officer Alfred Dreyfus for treason, and a subsequent political and judicial scandal. Frederic P. Mott, *A Century Late, The Truth Arrives: The French Army Concedes That Alfred Dreyfus Was Innocent*, TIME, Sept. 25, 1995, at 48.

6. "La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public." Law on Secularity, § 1. As translated by the author, the section reads: "The republic ensures freedom of conscience. It guarantees the free exercise of religion subject to the sole restrictions established in the interest of public policy."

7. "La République ne reconnaît, ne subventionne aucun culte. En conséquence, sont supprimées des budgets de l'État, des départements et des communes, toutes dépenses relatives à l'exercice des cultes Les établissements publics du culte sont supprimés, sous réserve des dispositions énoncées à l'article 3." Law on Secularity, § 2. As translated by the author, the section reads: "The republic does not recognize, remunerate, or subsidize any religion. In consequence . . . all expenses concerning the practice of religions shall be abolished from the budgets of the State, departments, and townships The publicly formed or financed establishments of religion are abolished subject to the conditions stipulated in Article 3." Cf. Hannah Clayson-Smith, *Liberty, Egalité, et Fraternité at Risk for New Religious Movements in France*, 2000 BYU L. REV. 1099, 1116-17 (2000) (discussing the "chilling effect" on religion as a result of France's anti-sect policy).

8. See Niyazi Oktom, *Religion in Turkey*, 2002 BYU L. REV. 371, 386 (2002) (discussing similar principles to the French principles of religious freedom specified in the Turkish Constitution).

9. Article 1 reads: "France shall be an indivisible, secular, 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." 1958

A secular state model, similar to the French model, exists in only four other democracies: Turkey, India, Mexico, and Japan.¹⁰ The French consider religion to be a private matter, not to be expressed in public.¹¹ The basic premise is that the protection granted to other rights is better served when the state retains its secular identity.¹²

France further cements its secular character in the state's assumption of the duty to provide universal education. Since 1882, the state has been entrusted with the role of providing free public education for all.¹³ The preamble of the French Constitution of 1958 affirms the right to *free* and *secular* education by invoking the preamble to the Constitution of 1946: "The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State."¹⁴ France, therefore, is indeed a self-declared secular state, which protects the right to freedom of religion and conscience as long as exercising it does not undermine it's the state's secular character.¹⁵

B. The "Headscarves Ban" in Historic Context

For various reasons, discussed below, the ongoing wearing of "ostentatious religious symbols" in public schools by Christians and Jews had not initially caused public controversy.¹⁶ The controversy began with a decision made on September 18, 1989, by a secondary school headmaster in Creil, a northern suburb of Paris, to expel from school three veiled female Muslim students of North African descent.¹⁷ The headmaster's decision was overturned within a week, but the Education Minister, Lionel Jospin, approached the *Conseil d'Etat* requesting a legal advisory

CONST art. 1, available at <http://www.assemblee-nationale.fr/english/8ab.asp> (last visited Feb. 14, 2007).

10. Cynthia Baines, *L'Affaire des Foulards-Discrimination, or the Price of a Secular Education System?*, 29 VAND. J. TRANSNAT'L L. 303, 311 n.50 (1996).

11. Elisa T. Beller, *The Headscarves Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 591-92 (2004).

12. See Troper, *supra* note 3, at 1272-73 (analyzing the history of the relations between church and state in France).

13. Law of March 28, 1882, available at <http://www.assemblee-nationale.fr/histoire/loiferry/sommaire.asp> (last visited Feb. 14, 2007).

14. 1946 CONST. Preamble.

15. Troper, *supra* note 3, at 1276 (noting the foundations laid by the law on secularity).

16. Baines, *supra* note 10, 305 (describing the types of religious symbols considered to be controversial in France).

17. *Id.* at 304 (introducing the event which ignited the hijab controversy). In this paper, the terms headscarf, veil, and hijab are used alternately.

opinion on the issue.¹⁸ The *Conseil d'Etat's* opinion reaffirmed France's secular state status, noting two main principles: neutrality regarding religion in public services, and the nondiscriminatory nature of the public school system.¹⁹ According to the opinion, students in public schools have a right to religious self-expression as long as exercising it does not hurt their peers' right to freedom *from* religion.²⁰

According to the opinion, the right to freedom of religion and conscience, is not absolute, and can be limited when there is just cause, based on the need to maintain French public education's respect for religious tolerance and gender equality.²¹ "Thus, 'ostentatious' religious signs" should be banned²² when:

By their character, by the circumstances in which they were worn, individually or collectively, or by their ostentatious or campaigning nature, constituted an act of pressure, provocation, proselytism or propaganda, or which were aimed at the dignity or freedom of other pupils or members of the school community, or compromised their health or distributed good order and the peaceful running of the school.²³

The council based its ruling on the claim that the relevant international covenants related to these matters allow reservations for "the protection of public order, health or morals, or for the protection of the rights and freedoms of others."²⁴ The *Conseil d'Etat's* ruling stands for the proposition that there need not necessarily be a direct conflict between the principle of

18. Sebastian Poulter, *Muslim Headscarves in School: Contrasting Legal Approaches in England and France*, 17 OXFORD J. LEGAL STUDIES. 43, 58 (1997) (describing the history of the headscarf controversy in France).

19. Beller, *supra* note 11, at 611 (reaffirming the fact that there are two main beliefs regarding the role religion ought to play in the French public schools).

20. Poulter, *supra* note 18, at 58-9 (discussing the Conseil's opinion concerning students' rights to religious expression).

21. Beller, *supra* note 11, at 611 (noting that the freedom of belief is balanced by the government's need to protect other sects of society).

22. *All Over an Inch of Flesh*, THE ECONOMIST, Oct. 23, 2003, Europe, at 45.

23. The French reads:

[P]ar leur nature, par les conditions dans lesquelles ils seraient portés individuellement ou collectivement, ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d'enseignement et le rôle éducatif des enseignants, enfin troubleraient l'ordre dans l'établissement ou le fonctionnement normal du service public.

24. Beller, *supra* note 11, at 621 (citing Article 9 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms).

secularity and the protection of the freedom of religion and conscience in France.²⁵

In 1997, following the rise to power of the Socialist Party, the Education Minister issued a prohibition on wearing ostentatious religious symbols in public schools. Some argue the prohibition was deliberately intended to prevent the wearing of headscarves rather than religious symbols in general.²⁶ Two thousand Muslim girls refused to follow the order; forty-nine of these cases were taken to the *Conseil d'Etat*, and forty-one of the decisions were held in favor of the petitioners.²⁷

The public controversy remained intense, and was re-ignited when the Stasi Committee, appointed by President Chirac to examine the "issue of secularity," recommended on December 11, 2003, that the wearing of ostentatious religious symbols, including skullcaps, headscarves, and crosses in public buildings and public schools should be prohibited.²⁸ In response, President Chirac, defining headscarf wearing as "an act of aggression" called for a ban on wearing the Muslim headscarf among other "ostentatious" display[s] of religious faith.²⁹ On December 17, 2003, President Chirac proclaimed that "[t]he Islamic veil, regardless of the name you give it . . . ha[s] no place in State schools."³⁰ He concluded: "Secularity is one of the Republic's great triumphs. It is a crucial component of social peace and national cohesion. We cannot let it weaken."³¹

On February 10, 2004, the bill passed the French lower house of Parliament by a landslide majority of 494 to 36. On March 3, 2004, the bill was approved by the French Senate 276 to 20,³² and was signed into law by President Chirac on March 15, 2004. The act, which became enforceable on September 1, 2004,³³ prohibits

25. *Id.* at 608.

26. Poulter, *supra* note 18, at 65.

27. Beller, *supra* note 11, at 584.

28. Henri Peña-Ruiz, *Laïcité et égalité, leviers de l'émancipation*, LE MONDE DIPLOMATIQUE, Feb. 10, 2004, at 9.

29. The Stanford Daily Staff, *Chirac Shouldn't Seek Headscarf Ban*, <http://daily.stanford.edu/article/2004/1/16/chiracShouldntSeekHeadscarfBan> (last visited Feb. 14, 2007).

30. President Jacques Chirac, Speech on Respecting the Principle of Secularism in the Republic (Excerpts) (Dec. 17, 2003), *available at* http://www.elysee.fr/elysee.fr/anglais/speech_by_jacques_chirac_president_of_the_republic_on_respecting_the_principle_of_secularism_in_the_republic-excerpts.2675.html.

31. *Id.*

32. CBS News, *France Bans Head Scarves in School: Senate Adopts Controversial Law Forbidding Religious Apparel*, <http://www.cbsnews.com/stories/2004/02/02/world/main597565.shtml> (last visited Feb. 14, 2007).

33. Denis Simonneau, The Ninth Annual Frankel Lecture: Position Letter: Free Will, Religious Liberty, and the French Prohibition of Religious Paraphernalia in Public Schools, 42 HOUS. L. REV. 121, 123 (2005).

the wearing of "ostentatious religious symbols" in elementary, secondary and high schools funded by the state.³⁴ The French public expressed strong support for the Act in opinion polls (about seventy percent in favor).³⁵ It is noteworthy that almost half the Muslim population supported the law, and about half of these Muslim supporters were women.³⁶

According to Denis Simonneau, *Consul General de France* on the day the ban became enforceable, among the twelve million French students, "240 girls attempted to come to school with a headscarf; 170 agreed to take it off and 70 conciliation procedures were started."³⁷ On October 20, 2004, two junior high school female students, aged twelve and thirteen were the first to be expelled under this law for refusing to take off their headscarves.³⁸

III. THE "HEADSCARVES BAN" IN LIGHT OF HUMAN RIGHTS LAW

A. *International Human Rights Law in a Global Age*

International Human Rights Law has been gradually evolving since the 1960s, with the establishment of multilateral treaties, the formation of international organizations whose main task is to supervise the implementation of states' obligations to respect human rights, and the convening of periodic international conventions aimed at promoting some of these rights. Most liberal Western democracies, including France, are signatories to these treaties, members of these international bodies, and participants in the various conventions. However, when the time comes to enforce these treaties in domestic law, either by legislation or by court decisions, a wide gap divides the various states' interpretations of their obligations under the treaties. These differences in interpretation lie at the core of this paper. This section presents an overview of the protection granted to the right to freedom of religion and conscience and to the right to culture under International Human Rights Law, and questions whether the new French legislation infringes upon these rights.

34. Law of March 4, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], May 18, 2004, p. 9033; see also *Integrating Minorities — The War of the Headscarves*, THE ECONOMIST, Feb. 5, 2004, Special Report, at 1 [hereinafter *The War of the Headscarves*] (discussing the public reaction to the proposal to ban "the wearing of the Islamic headscarf and other 'conspicuous' religious symbols in state schools" in France).

35. *The War of the Headscarves*, *supra* note 34.

36. *Id.*

37. Simonneau, *supra* note 33, at 123.

38. *France Expels Students over Hijab*, NEWS GLOBAL, <http://english.aljazeera.net/NEWS/archive/archive?Archiveld=7187> (last visited Jan. 4, 2007).

This section will further aid in determining how different countries implement the same obligation to protect rights based on the state-religion relationship model they have chosen to adopt. It will thereby facilitate the understanding of the rationales behind the new legislation in France.

It should be noted at the outset that the interrelation between the right to freedom of religion and the right to equality comes into play on two counts. The first regards Muslim women's right to be free from discrimination at the hands of other social groups. The second arises with regard to the right to gender equality, which may be indirectly infringed through the wearing of the veil, and not by the prohibition thereof. The interrelation between the right to culture and the right to education, based on the beliefs of the parent and the social context, may be fully understood only after gaining a proper understanding of this complex interrelation between freedom of religion and the right to equality.

B. The Right to Freedom of Religion and Conscience in International Law

The foundations of the right to freedom of religion and conscience rest in several fundamental documents of human rights law. Section 18 of the Universal Declaration of Human Rights states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with other and in public or private to manifest his religion or belief in teaching, practice, worship and observance.³⁹

Section 18(1) of the International Covenant on Civil and Political Rights (ICCPR),⁴⁰ and Section 1, article 9(1) of the European Convention on Human Rights (ECHR) provide the same framework for protecting the freedom of religion and conscience.⁴¹ Section 1, article 9(2) of the ECHR defines a *closed list* of cases in which this right may be limited:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection

39. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR 217A, 3d Sess., U.N. Doc. A/810, art. 18 (Dec. 12, 1948).

40. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 21, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, art. 18(1) (Mar. 23, 1976) [hereinafter ICCPR] ("No one shall be subject to coercion which would impair his freedom to have . . . a religion or belief of his choice.")

41. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, § 1, art. 9(1), 213 U.N.T.S. 222 [hereinafter ECHR].

of public order, health or morals, or the protection of the rights and freedoms of others.⁴²

It can be further argued, that the protection of the freedom of speech under section 1, article 10 of the ECHR⁴³ and article 19 of the ICCPR⁴⁴ encompasses a similar protection of the wearing of religious symbols. Therefore, it appears that the right to freedom of religion and conscience enjoys wide international recognition and protection. These conventions allow the exercise of that right on both a personal and group level, subject only to the closed list of limitations provided in the conventions.

C. The Headscarf as a Religious Symbol

Some religious scholars contend that Islamic law requires that women wear headscarves covering their ears, hair, and neck.⁴⁵ According to this view, headscarves are required by modesty restrictions in the Qur'an,⁴⁶ and thus it is plausible that a significant number of Muslim women may wear the veil based on their belief that it is a commandment of the Qur'an.⁴⁷ A claim could therefore be made that the prohibition on the wearing of ostentatious religious symbols in French public schools infringes Muslim women's right to freedom of religion, because it prohibits them from following a religious dictate.

42. *Id.* at § 1, art. 9(2).

43. *See id.* at § 1, art. 10(1) ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.")

44. *See* ICCPR, *supra* note 40, art. 19 ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.")

45. *See, e.g.,* Wikipedia, http://en.wikipedia.org/wiki/Hijab#_note-dict ("Detailed scholarly attention has been focused on prescribing female dress. . . . Some scholars go so far as to specify exactly which areas of the body must be covered. In many cases, this is everything save the face and hands but others require everything save the eyes to be covered.") (last visited Jan. 4, 2007).

46. Often cited as the basis for such restriction, Surrah 33:59 provides: "O Prophet! Tell thy wives and thy daughters, as well as all [other] believing women, that they should draw over themselves some of their outer garments [when in public]: this will be more conducive to their being recognized [as decent women] and not annoyed." The Holy Qur'an 33:59.

47. *See* Samiri Ali Gutoc, *Me and My hijab: Reflections on the Veil* (2003), available at <http://www.whrnet.org/docs/perspective-gutoc-0309.html> (presenting the perspective of one woman who chooses to wear the headscarf based on personal belief).

A position paper published by Human Rights Watch,⁴⁸ in the context of a discussion of Turkish legislation banning headscarves, argues that women should be free to choose how to follow their religious dictates and that their right of choice must be protected.⁴⁹ According to this position paper, wearing a veil does not endanger the public health, public security, public order or moral values of a society, and does not infringe other people's rights.⁵⁰ As noted above, according to the ECHR, these conditions are the only ones that allow a government to pose limitations on the right to freedom of religion.⁵¹

The Quebec Human Rights Committee made a similar determination: "One should presume that hijab-wearers are expressing their religious convictions and the hijab should only be banned when it is demonstrated — and not just presumed — that public order or sexual equality is in danger."⁵² Contrary to the above-mentioned view, some religious scholars claim that the *Qur'an* does not explicitly set a veil-wearing rule, but rather refers to the general need for modesty. Because modesty is a relative term, these scholars claim that one can interpret it as requiring the believer to find a suitable way to keep her privacy in order to prevent harassment from men.⁵³ They maintain that using headscarves as a "litmus test" of a woman's belief is inappropriate.⁵⁴

However, it is commonly believed that the determination whether an action constitutes a religious dictate rests with the individual. Thus, if a Muslim woman believes that her religion

48. HUMAN RIGHTS WATCH, MEMORANDUM TO THE TURKISH GOVERNMENT OF HUMAN RIGHTS WATCH'S CONCERNS WITH REGARD TO ACADEMIC FREEDOM IN HIGHER EDUCATION, AND ACCESS TO HIGHER EDUCATION FOR WOMEN WHO WEAR THE HEADSCARF (2004), available at http://hrw.org/backgrounder/eca/turkey/2004/headscarf_memo.pdf [hereinafter HUMAN RIGHTS WATCH].

49. See *id.* at 44, 46 (arguing that the Turkish government should adopt legislation that recognizes the right to wear headscarves and "allows women to make their own free choice whether to wear the headscarf or not" and presenting recommendations concerning the removal of the Turkish headscarf ban); see also Bahia Tahzib-Lie, *International Law and Religion and Religion Symposium Article: Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief*, 2000 BYU L. REV. 967, 970 (2000) (arguing that "women should be free, at any time, to explore other beliefs and to make their own choices as to religious commitment and membership").

50. HUMAN RIGHTS WATCH, *supra* note 48, at 4.

51. See *supra*, note 44 and accompanying text.

52. Baines, *supra* note 10, at 324.

53. See Elene G. Mountis, *Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context*, 15 DICK. J. INT'L L. 113, 143 (1996) (explaining that veils worn by Muslim women are intended to shield them from male advances as well as to keep maintain their modesty).

54. See HUMAN RIGHTS WATCH, *supra* note 48, at 40 (reporting the view of Professor Beyaz, dean of the Theology Faculty of Marmara University in Istanbul, that the *Qur'an* does not require women to wear a veil).

requires her to wear a headscarf, prohibiting her from doing so infringes on her right to freedom of religion and conscience.

D. The Interface of the Right to Freedom of Religion and Conscience and the Right to Equality

The interface of the right to freedom of religion and conscience and the right to equality involves two areas of debate: the first may be regarded as the group equality issue; the second as the gender equality issue. Here, the first issue revolves around the rights that Muslims in general, and Muslim women in particular, enjoy with respect to their ability to exercise their beliefs and customs in comparison to other social and religious groups. The second issue focuses primarily on the need to ensure that women are not discriminated against, based on a supposed need to maintain their freedom of religion and conscience.

The group equality issue: the United Nations Human Rights Commission claims, with regard to limitations placed on the exercise of the freedom of religion and conscience, based on section 18(3) of the ICCPR,⁵⁵ that "restrictions *may not* be imposed for discriminatory purposes, or applied in a discriminatory manner."⁵⁶ Moreover, section 1 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (United Nations Declaration) states the following regarding the freedom of religion and conscience:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his [or her] choice, and freedom, either individually or in community with others and in public or private, to manifest his [or her] religion or belief in worship, observance, practice and teaching.⁵⁷

Arguably, the objective of the French "headscarves ban" is only to prohibit the wearing of headscarves, while other religious symbols will still be allowed. The basis for this claim is the fact that the legislation solely applies to *ostentatious* symbols: whereas a cross can be covered with a shirt or a blouse, and a skullcap covered by a hat or a cap, a headscarf is by nature visible, and

55. See ICCPR, *supra* note 40, art. 18(3) ("Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.")

56. See HUMAN RIGHTS WATCH, *supra* note 48, at 33 (internal quotation marks omitted).

57. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR 36th Sess., 73d plen. mtg., Supp. No. 51, at 171, U.N. Doc A/RES/36/51 (1981) [hereinafter United Nations Declaration].

thus by nature ostentatious.⁵⁸ Accordingly, based on the effects-test adopted in the United Nations Declaration,⁵⁹ one could assert that the new legislation discriminates against Muslim women based on religious affiliation⁶⁰ even if the legislators' intent may have been different, because the only group detrimentally affected by the legislation is the Muslim women group.⁶¹ In contrast, Professor Brian Barry argues, that if an institution can substantiate a legitimate interest in requiring people to wear a cap rather than a turban, for example, then doing so does not constitute discrimination, even if the decision affects one group more than it affects other groups.⁶²

Another problematic aspect of the ban involves the validity of basing a prohibition on the motive for wearing an ostentatious symbol. For example, would the wearing of the Star of David be banned if considered to be a religious symbol, but allowed if considered to be a national symbol (of the State of Israel)? In the United States, claims of discrimination have been raised by students who were prohibited from wearing symbols that carry a religious meaning, while other students were allowed to wear symbols that possess non-religious connotations. In 1995, President Bill Clinton asked then Secretary of Education Richard Riley "to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in [American] public schools."⁶³ After the Supreme Court's decision in *Boerne v.*

58. See Thomas Giegerich, *Freedom of Religion as a Source of Claims to Equality and Problems for Equality*, 34 ISR. L. REV. 211, 235-36 (2000) (arguing that provisions which prohibit certain activities should not be religiously motivated).

59. See United Nations Declaration, *supra* note 57, at art. 2(2) (adopting "[f]or purposes of the [United Nations Declaration]" a definition for the expression "intolerance and discrimination based on religion or belief" mean[ing] any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis" (emphasis added)).

60. Poulter, *supra* note 18, at 61. A more direct discriminatory effect may be observed in Singapore, where wearing veils in public schools is prohibited, while wearing turbans (by Sikhs) is allowed. *Veiled Threats*, THE ECONOMIST, Feb 9, 2002, § Asia.

61. See Richard Abel, *Fighting Words*, 1 MARGINS 199, 205 (2001) (noting how "western nations steadfastly refuse to accord equality to Islam," as in France where Muslim girls are not permitted to wear headscarves, but Jewish boys are allowed to wear yarmulkes).

62. Brian Barry, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 319-20 (2002).

63. Letter from Richard Riley, Sec'y of Educ., to American Educators (May 1998), available at: <http://www.ed.gov/Speeches/08-1995/religion.html>.

Flores,⁶⁴ Secretary Riley updated the letter to reflect the decision, making the following determination regarding student attire:

Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages.⁶⁵

Based on this logic, one could claim that the new legislative scheme in France discriminates against religious groups because wearing ostentatious symbols that do not carry religious meaning are still allowed. Thus, a valid claim can be made as to the discriminatory effect the legislation has on both Muslim women specifically, and religious groups generally.

The gender equality issue: some claim, that non-Western societies that adopt Shari'a law as their state law are predominantly patriarchal, whereas secular societies tend to be more gender-equal.⁶⁶ According to these scholars, wearing a headscarf would be the first step toward oppression of women by symbolizing their inferiority. The claim is that a woman does not make a *real* choice to wear a veil, but rather is forced to wear it by her social environment, which includes her immediate family, friends, and socio-religious organizations.⁶⁷

Article Five of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEADAW") requires signatories to the convention (France included) to take proactive measures to eliminate prejudice and discriminatory practices against women.⁶⁸ While the Convention

64. 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act of 1993 unconstitutional, exceeding the authority granted Congress).

65. Memorandum from Richard Riley, Sec'y of Educ., on Principles Regarding Religious Expression in Public Schools, Revised (May 1998), available at <http://www.ed.gov/Speeches/08-1995/religion.html>.

66. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 9, 11-12 (Joshua Cohen, Matthew Howard & Martha Nussbaum eds., 1999) [hereinafter *MULTICULTURALISM*].

67. See Katha Pollitt, *Whose Culture*, in *MULTICULTURALISM* 27, at 29-30 (stating that without the ban a Muslim girl would be forced to wear a scarf). *But see Incense, silk and jihad*, *THE ECONOMIST*, May 31, 2003, at 37 (wearing a veil by young Muslim women is described as a "fad" in South-East Asia).

68. The Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, U.N. DOC. A/Res/34/180 (Dec. 18, 1979) [hereinafter *CEADAW*] (the treaty came into effect on Sep. 3, 1981). Article 5 reads:

Parties shall take all appropriate measures . . . [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other

illustrates the need for states to protect women in their societies, the question arises as to states' moral duty towards other societies. Some scholars maintain that Western societies should fight for women's rights in other societies with the same conviction they apply to fights within their own societies.⁶⁹ Others contend that a deep tension exists between feminism and multiculturalism.⁷⁰ While multiculturalism enhances differences between cultures, insomuch as these include different roles played by the sexes, predominantly meaning in effect male domination,⁷¹ feminism devotes efforts to restrain these differences in order to promote gender equality.⁷²

On the other hand, the multicultural demand for recognition of the special needs and interests of minority groups resembles the similar claim made by feminists, since both desire to promote their own interpretation of equality.⁷³ Further, some women who pride themselves on their social and cultural heritage aspire to continue living according to that heritage, even if it greatly contradicts the Western perception of gender equality.⁷⁴ The supposed "protection" of women in the Western world is considered by some writers to be cultural imperialism.⁷⁵ Thus, it is claimed by some writers that Professor Susan Okin, one of the leading scholars in feminist legal writing, *is, in effect*, encouraging discrimination against various groups based on religion, race, ethnicity, or language by her support of a headscarves ban as a means to achieve gender equality.⁷⁶

Others might wonder why the assumption that wearing a headscarf carries a suppressing and humiliating effect is not

practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Id. at art. 5(a).

69. See Joseph Raz, *How Perfect Should One Be?*, in *MULTICULTURALISM*, *supra* note 66, at 95-97 (explaining that the an examination as to the protection granted by a certain culture to human rights ought to be made prior to making a decision as to the need for its protection).

70. See Bonnie Honig, *My Culture Made Me Do It*, in *MULTICULTURALISM*, *supra* note 66, at 35.

71. Okin, *supra* note 66, at 13. *But see* Honig, *supra* note 70, at 36 (arguing that religions do not attempt to control female sexuality).

72. Robert Post, *Between Norms and Choices*, in *MULTICULTURALISM*, *supra* note 66, at 65.

73. Will Kimlicka, *Liberal Complacencies*, in *MULTICULTURALISM*, *supra* note 66, at 31, 33.

74. Catherine Hardee, *Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Martial Law*, 79 N.Y.U. L. REV. 712, 720 (2004).

75. Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L. L. REV. 483, 487 (2002).

76. See Abdullai An-Na'im, *Promises We Should all Keep*, in *MULTICULTURALISM*, *supra* note 66, at 59-60; Bhikhu Parekh, *A Varied Moral World*, in *MULTICULTURALISM*, *supra* note 66, at 69, 70.

contested, while wearing a mini-skirt is considered to be a fashionable, feminist, and liberating act. As one scholar maintains, women are often covered in Western societies by "invisible, transparent veils" which take the form of financial or social limitations, and which have a harsher effect on their liberty and happiness than the freely worn veil.⁷⁷

As for gender-equal oriented education, article 10 of the CEADAW requires signatory countries to take "all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education."⁷⁸ The claim is made that because education is the most important factor determining women's uninterrupted path to an equal stance in society, minority groups should not be allowed to limit women's right to a proper education.⁷⁹

But another claim is that prohibiting minority groups from providing women with allegedly discriminatory education is in effect even more discriminatory if it would lead to these women receiving no education at all, because, as reality proves, the supposed alternative for these women — attending private schools — is too expensive to be a feasible option for most of them.⁸⁰

In summary, the headscarf ban allegedly hurts Muslims' freedom of religion in general, and in particular the freedom of religion of Muslim women insomuch as it carries a discriminatory effect unique to them. As for gender equality, those who perceive the veil to be a symbol of oppression support its prohibition as a means to promote gender equality. Others fear the opposite result, i.e., that if such a prohibition prevails, Muslim women will be denied access to proper education.

E. *The Right to Culture in International Law*

Article 27 of the ICCPR defines the protection granted to the right to culture in International Law: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own

77. Aziza Al- Hibri, *Western Patriarchal Feminism*, in OKIN, *supra* note 66, at 4541, 4546.

78. CEADAW, *supra* note 68, at art. 5.

79. *See generally id.* (providing that parties to the CEADAW shall take appropriate measures to eliminate discrimination against women in order to ensure equal rights in education).

80. *Cf.* Les établissements d'enseignement privés, <http://www.education.gouv.fr/cid251/les-etablissements-d-enseignement-prives.html> (last visited Feb. 14, 2007) (stating that in France, seventeen percent of all students attend a private school; only thirteen percent of grade school students attend a private school; and most private schools have a religious affiliation).

language.⁸¹ While the line that separates the personal and group right to culture may not be clearly demarcated, one can define the *group* right to culture as one which is not granted on a general, universal basis but is rather granted to a particular group.⁸²

Some scholars resent the entire notion of group rights, while others claim these rights exist to protect minorities that may otherwise be exposed to possible extinction.⁸³ In the latter's view, group rights serve as a means to equalize the minority and majority groups' stance in society.⁸⁴

In *Mandla v. Dowell Lee*, The British House of Lords ruled that two preconditions need to be met in order for a group to be recognized as an *ethnic group* for purposes of receiving the protection under UK law: first, there must be a common history that differentiates the group from other groups; and second, social heritage, including social and religious customs, must be identified. Alongside these two preconditions, a number of aiding factors exist for determining whether a group is an ethnic group.⁸⁵ According to the House of Lords criteria, French Muslims would probably constitute an ethnic group that enjoys the right to culture.

Professor Will Kymlicka argues that the protection to the right to culture has three main components: the first and most basic is the right to maintain an uninterrupted lifestyle within the general society; the second adds the right to have this unique lifestyle recognized by the general society; the third includes the right to receive state support (financial and other) to keep the culture alive.⁸⁶ Opponents of the headscarves ban claim that the legislation undermines the first component of protection identified.

Professor Kymlicka distinguishes between internal restrictions that limit individuals' rights within a social group, and external restrictions, which enable the group to protect itself from outside pressure. He maintains, that internal restrictions need to be prohibited in order to protect the various group members who

81. ICCPR, *supra* note 40, art. 27.

82. Patrick Thornberry, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 252 (1991).

83. Will Kimlicka, Liberal Complacencies, in MULTICULTURALISM, *supra* note 73, at 31-34.

84. *Id.* at 20.

85. *Mandla v. Dowell Lee*, [1983] 2 A.C. 548, 562 (Eng.). The House of Lords held that nonessential, but relevant factors include:

[E]ither a common geographical origin, or descent from a small number of common ancestors; a common language, not necessarily peculiar to the group; a common literature peculiar to the group; a common religion different from that of the neighbouring [sic] groups or from the general community surrounding it; being a minority or being an oppressed or a dominant group within a larger community.

Id.

86. Kymlicka, *supra* note 73, at 31-34.

are badly affected by them (the minority within the minority), whereas external restrictions are legitimate and should be allowed.⁸⁷ Analyzing the headscarves ban according to this factor results in the conclusion, that requiring women to wear a veil, like the Taliban did in Afghanistan, is in effect an *internal* restriction, while allowing a Muslim woman in France to wear a veil is an *external* restriction.⁸⁸ This distinction, however, is frequently questioned based on the claim that in many instances the same rights serve as a justification for both external and internal restrictions.

The European Court of Human Rights established that a democratic society's foundation lies in its tolerance for other cultural behaviors, including non-liberal ones.⁸⁹ Despicable as another culture may seem, tolerance requires acceptance of its existence and the diversity within society. This multicultural approach gives way to a supposedly logical problem: tolerance is required with regard to intolerant societies, which often are intolerant both externally and internally.⁹⁰ Thus, protection of group rights often means infringing individual rights, and the government's need to strike a balance between respecting other cultures and granting universal protection for basic human rights.⁹¹

It appears from the discussion above, that according to international conventions, Muslims should be defined as a distinctive ethnic group eligible to exercise its group right to culture, though some fear that a limitless exercise thereof severely infringes upon individual rights of persons belonging to this group and thus should be limited.

F. The Headscarf as a Pan-Islamic Cultural Symbol

Defining the veil as an Islamic symbol is criticized by those who claim that it serves first and foremost as a cultural object.⁹² For example, the Selfs, a reformist movement that existed in the last quarter of the 19th Century, argued that Islam is Orthopraxis (where behavior and lifestyle outweigh faith) rather than Orthodoxy. Others see the veil as a political statement expressed by women who wear it, designed to create a clear definition of a minority group and to prevent assimilation, a process much feared by the elderly.⁹³ Considering the veil to be a cultural symbol for a

87. *Id.* at 32.

88. Giegerich, *supra* note 58, at 235-36.

89. Kokkinakis v. Greece, 17 EUR. CT. H.R. 397, 411 (1994).

90. Raz, *supra* note 69, at 95-96.

91. *Id.* at 98.

92. Poulter, *supra* note 18, at 45.

93. Judy Scales-Trent, *African Women in France: Immigration, Family and Work*, 24 BROOKLYN J. INT'L L. 705, 715 (1999). *But cf.* Cohen et al.,

Muslim woman means that society should refrain from restricting the wearing thereof since such restriction would infringe the woman's right to culture. However, if Professor Barry's approach, which does not recognize the existence of cultural rights, gains strength, the prohibition would then be considered, at most, an infringement on the right to religion (assuming it retains the status of a religious object alongside a cultural one).

According to Professor Okin's approach, which limits the protection granted to the right to culture to those instances in which such protection does not infringe individual rights within the minority group, wearing a veil, a symbol of oppression, need not be protected.

G. *The Interface of the Right to Culture and the Right to Education*

The right to educate a child according to the parents' beliefs is well respected by international conventions. Article 13 of the International Convention on Economic, Social and Cultural Rights ("ICESCR")⁹⁴ established the right to education, which ought to be implemented without discrimination based on religion, gender, or race.⁹⁵ Article 2 of the first protocol of the ECHR calls upon the member states to respect the right of parents to educate their children according to their beliefs.⁹⁶ A similar declaration appears in Article 5 of the CEADAW.⁹⁷

Introduction: Feminism, Multiculturalism, and Human Equality, in *MULTICULTURALISM*, *supra* note 66, at 3 (discussing the women movement generally). *Contra* Honig, *supra* note 70, at 37 (claiming that veiling actually facilitates assimilation by allowing women to "emerge socially into a sexually integrated urban world") (internal quotation marks omitted); Parekh, *supra* note 76, at 73 (claiming that wearing a hijab is a complex act intended both to "remain within the tradition and to challenge it").

94. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force on Jan. 3, 1976).

95. *Id.* art. 13.

96. Article 2 of the ECHR reads:

The right to organize the life within the family in accordance with their religion or belief, and bearing in mind the moral education in which they believe the child should be brought up. After all, parents are generally understood to act in the interests of their children, and to take on the primary responsibility of caring for them.

ECHR, *supra* note 41, art. 2. *Cf.* Shauna Van Praagh, *The Education of Religious Children: Families, Communities and Constitutions*, 47 BUFFALO L. REV. 1343, 1356 (1999) ("Th[e] liberal citizenship model allows for giving parents, and indirectly communities, some degree of control over the education of their children. After all, parents are generally understood to act in the interests of their children, and to take on the primary responsibility of caring for them.").

97. Article 5 of the CEADAW reads:

Parties shall take all appropriate measures . . . [t]o ensure that family education includes a proper understanding of maternity as a social

Professor Okin, however, contends that providing proper education requires that the child become familiar not only with the culture of his or her parents, but also with general, common values.⁹⁸ This position stems from the assertion that the interests of parents and children may greatly differ with regard to education:⁹⁹ whereas children may wish to assimilate in the general society, their parents may prefer to maintain the traditional structures and norms. According to Professor Okin, the state must step in and exercise responsibility with regard to education, based on its legitimate interest in ensuring that the next generation receives proper education.¹⁰⁰

On the one hand, the right to education according to the parents' beliefs and norms requires the state to allow minority groups to preserve their cultural and religious norms. Yet, especially in countries where the primary responsibility for education lies with the state (such as France), the state may wish to act in order to ensure that a common/general education is provided to students at the expense of full parental autonomy.

IV. COMMON MODELS OF THE INTERPLAY BETWEEN STATE AND RELIGION

A. Introduction

The following section provides an analysis of the legal framework regarding the interplay between state and religion in four countries: Turkey, the United States, the United Kingdom ("UK") and Germany. Turkey offers a model rather similar to the French model following the recent headscarf legislation. The United States, on the other hand, a nation that is perhaps home to the highest percentage of religious faithful in the Western world, strictly maintains a separation between state and religion in a model quite different than the French model, as will be illustrated below. The United Kingdom serves as a model for tolerance towards religions other than the official state religion of Christianity. Finally, Germany, a country where the right to freedom of religion and conscience is granted constitutional protection, has borne witness to a process of wearing down this protection, for reasons similar to some of those expressed in

function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

CEADAW, *supra* note 68, art. 5(b).

98. Susan Moller Okin, Reply, in *MULTICULTURALISM*, *supra* note 66, at 129-30.

99. Barry, *supra* note 62, at 202.

100. *Id.* at 303.

France. Analyzing the different models will provide the reader with a conceptual framework for analyzing the rationales behind the new legislation in France.

B. The Secular State Model: Turkey

Following World War I, Turkish leader Kemal Ataturk abolished the Caliph regime, which ruled over the Ottoman Empire, and enacted a thorough constitutional change in the state regime, making it explicitly secular.¹⁰¹ Article 2 of the Turkish Constitution defined Turkey as a secular state: "The Turkish State is republican, nationalist, statist, secular and reformist."¹⁰² Article 24 of the Turkish Constitution established the right to freedom of religion and conscience, which is restricted insofar as it infringes other people's rights.¹⁰³ The Article explicitly states that no person shall be forced to participate in religious ceremonies.¹⁰⁴

Turkish legislation prohibits the wearing of religious symbols in public institutions, including schools and universities.¹⁰⁵ The national council in charge of coordinating human rights affairs in Turkey decided several years ago that the measure is compatible with the Turkish Constitution and with human rights law, stating that:

The ban on wearing headscarves in government offices and universities is not against the basic human rights and freedoms because the headscarves are symbols of "political ideology" The regulations pertaining to headscarves, if evaluated according to the constitution, are part of the constitutional principle of secularism which warrants the objectivity of the state in religious issues. In

101. Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 67 (2002).

102. CONSTITUTION OF THE REPUBLIC OF TURKEY, art. 2, available at <http://www.tbmm.gov.tr/english/constitution.htm>.

103. CONSTITUTION OF THE REPUBLIC OF TURKEY, art. 24. Article 24 reads: Everyone has the right to freedom of conscience, religious belief and conviction. Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14. No one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions. Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives

Id.

104. Oktem, *supra* note 8, at 386.

105. Ann Mayer, A "Benign" Apartheid: How Gender Apartheid Has Been Rationalized, 5 UCLA J. INT'L L. & FOREIGN AFF. 237, 314 (2000).

this context, a ban on headscarves, which are used as a symbol of political ideology, does not go against the Constitution.¹⁰⁶

In *Bulut v. Turkey*, the European Court of Human Rights accepted the Turkish Government's claim that the prohibition on wearing headscarves in universities is necessary to maintain the principle of secularity, one of the prime constitutional principles in Turkey.¹⁰⁷ The prohibition therefore helps maintain public order, one of the legitimate causes for limitations posed on the right to freedom of religion, according to article 9 of the ECHR. In a later case, regarding a claim made by a medical student who was prohibited from attending classes while wearing a veil, the court, in line with the *Bulut* ruling, stated that the prohibition met "a pressing social need by pursuing the legitimate aims of protecting the rights and freedoms of others and maintaining public order" in Turkey.¹⁰⁸

One may question whether these rulings contradict a previous ruling of the ECHR in *Manoussakis v. Greece*, where the court held that "[t]he right to freedom of religion as guaranteed under the convention excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate."¹⁰⁹ Additionally, some question the historical basis for the prohibition on wearing headscarves, mentioning that Atatürk's wife wore a veil, and that he did not view it negatively: "The religious covering of women will not cause difficulty . . . this simple style [of head-covering] is not in conflict with the morals and manners of the society."¹¹⁰

It may be that the Turks' increased fear of wearing headscarves in public places stems not from a legal basis, but rather from a cultural one — the possible establishment of an Islamic republic that would make headscarves mandatory.¹¹¹ Statistics show that ninety-seven percent of the Turkish population is Muslim, and forty-six percent thereof pray five times a day as Islam commands a Muslim to do.¹¹²

Another commonly expressed claim is that wearing a

106. Oktem, *supra* note 8, n.146.

107. App. No. 18783/91, 74 Eur. Comm'n. H.R. Dec. & Rep. 93 (1993); see also Christopher D. Bebelieu, Note, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Sahin Judgment*, 12 COLUM. J. EUR. L. 573, (2006) (discussing the *Bulut* ruling in further depth).

108. *Sahin v. Turkey*, 41 Eur. Ct. H.R. 8 (2005).

109. *Manoussakis v. Greece*, 23 Eur. Ct. H.R. 387, 389 (1996).

110. HUMAN RIGHTS WATCH, *supra* note 48, at 26 (quoting ATATÜRKISM, VOLUME 1 126 (Istanbul, Office of the Chief of General Staff, 1982)).

111. See *id.* at 37-38 (discussing the fears expressed by several scholars concerning the establishment of a theocracy).

112. Edward McBride, *Fundamental Separation*, THE ECONOMIST, June 10, 2000, at 11.

headscarf in public places in Turkey is a symptom of a power struggle: as long as women who wore headscarves remained outcasts, the headscarf did not pose a threat to central power structures; the shift occurred when these women expressed a wish to study in universities — one of the symbols of secular Turkey.¹¹³

In summary, Turkey appears to legally justify the prohibition on wearing headscarves as a means of maintaining its secular character. However, it seems that the reasons for the ban go deeper and relate to social-cultural questions similar, at least in part, to those presented in France discussed below.

C. *The Separation of Church and State Model: the United States*

The First Amendment to the United States Constitution establishes the principle of separation of church and state: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹¹⁴ In *Everson v. Board of Education of Ewing Township*,¹¹⁵ the Supreme Court quoted Thomas Jefferson, describing a “wall of separation” between religion and state in America prohibiting the federal government from intervening in religious affairs even if these concern equal funding to various religious movements.¹¹⁶ In *Wallace v. Jaffree*,¹¹⁷ Justice Rehnquist argued, in a dissenting opinion, that the First Amendment is designed to prevent the government from promoting a particular religion or sect, or declaring an official religion, rather than to prevent general state support for all religions.¹¹⁸

Some scholars believe the Supreme Court erred, at least in the years following *Everson*, in clarifying the requirements concerning the relationship between state and religion as a result of the “wall of separation.”¹¹⁹ Justice Stewart argued, for instance, that the government is obliged to create an atmosphere of

113. Editorial, *The Dreaded Headscarf*, THE ECONOMIST, Dec. 7, 2002, at 50.

114. U.S. CONST. amend. I.

115. 330 U.S. 1 (1947).

116. *Id.* at 15-16.

117. 472 U.S. 38 (1985).

118. *Id.* at 106 (Rehnquist, J., dissenting) (stating that the Establishment Clause was not created to prohibit nondiscriminatory aid to religion, but rather aimed to prevent the establishment of a national religion); see also Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1, 18-19 (1996) (discussing Rehnquist’s *Wallace* dissent).

119. Steven Brown & Cynthia Bowling, *Public Schools and Religious Expression: The Diversity of School Districts’ Policies Regarding Religious Expression*, 45 J. CHURCH & ST. 259, 261-62 (2003); see also Sophie C. van Bijsterveld, *Church and State in Western Europe and the United States: Principles and Perspectives*, 2000 BYU L. REV. 989, 989 (2000) (comparing cooperative relations between church and state in Western Europe to the “wall of separation” in the United States).

acceptance between all religious streams, a conclusion that does not on its face follow from *Everson*.¹²⁰

In the mid-1980s, the Supreme Court began a steady move towards viewing religion as an obstacle standing in the liberal state's way.¹²¹ In *Employment Division, Department of Human Resources of Oregon v. Smith*,¹²² Justice Scalia made the following statement with regard to the constitutionality of state legislation on religious actions: "Our conclusion that generally applicable, religion neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents."¹²³ After *Smith*, Congress enacted the Religious Freedom Restoration Act.¹²⁴ Section 3 required states to create conditions, which would facilitate the implementation of the right to religion unless a compelling state interest required the contrary.¹²⁵ Faced with a constitutionality test, however, the legislation was struck down by the Supreme Court based on the premise that it contradicted the First Amendment.¹²⁶

However, the Supreme Court had earlier explicitly established that a distinction must be made between government action and personal action with regard to religious affairs — whereas the state is not allowed to support or promote a certain religion, individuals enjoy freedom of expression, as well as freedom of religion:

120. See *Sherbert v. Verner*, 374 U.S. 398, 415 (1963) (Stewart, J., concurring) (explaining that the guarantee of religious liberty requires a government to "create an atmosphere of hospitality and accommodation to individual belief of disbelief").

121. Horwitz, *supra* note 118, at 36 (presenting the argument that religion presents a threat to the social order).

122. 494 U.S. 872 (1990).

123. *Id.* at 886.

124. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 2(b), 107 Stat. 1488, 1488-89 (codified as amended at 42 U.S.C. 2000bb, 2000bb-1 to 2000bb-4 (2000)), invalidated in part by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

125. Satvinder Juss, *The Constitution and Sikhs in Britain*, 1995 BYU L. REV. 481, 486-87 (1995). The section reads:

- (a) Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
- (b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
 - (1) is in furtherance of a compelling governmental interest; and
 - (2) is the least restrictive means of furthering that compelling interest.

42 U.S.C. §§ 2000bb (Supp. V 1993).

126. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

There is a crucial difference between government speech endorsing religion, which the establishment clause forbids, and private speech endorsing religion, which the free speech and free exercise clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis.¹²⁷

Based on this premise, the Court of Appeals for the Ninth Circuit struck down a California public school decision prohibiting Sikh students from wearing to school a Kirpan (a customary sword), which is an inseparable part of their religious custom.¹²⁸ On the contrary, however, a recent decision regarding a Muslim woman who was refused a driver's license because she would not take off her veil when her picture was taken, affirmed the authority's decision based on the need to protect the State against foreign and domestic terrorism.¹²⁹

In summary, there is a clear difference between the United States legal framework and the Turkish and French legal frameworks within which the interplay between state and religion takes place. While the latter are secular states, which cast away all religious expression from the public sphere, in the United States, the fear — and the cure — relate to state action alone, and limitations on private actions are seldom upheld unless other interests (such as security) arise.

D. The Official Religion State Model: The United Kingdom and Germany

1. The United Kingdom

The United Kingdom, where Christianity is the official religion (and the Anglican Church is the state's official church), does not have a written constitution.¹³⁰ As a result, until its Parliament enacted the Human Rights Act ("HRA") in 1998,¹³¹ incorporating the European Convention on Human Rights¹³² into UK law, human rights were not granted an overriding status over

127. *Bd. of Educ. of Westside Comty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

128. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

129. *Freeman v. State*, No. 02-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003).

130. Conventional wisdom holds that the reason for the United Kingdom's constitutional void is the lack of a constitutional moment and the relative stability of the regime.

131. Human Rights Act, 1998, c. 42 (Eng.).

132. Since there are no "self-executing" treaties under United Kingdom law, the fact that the United Kingdom was a signatory to the European Convention on Human Rights did not directly affect the implementation of International Human Rights Law there.

regular laws. Section 13 of the HRA, however, establishes the right to freedom of religion and conscience, and grants the right a special status, higher than other rights in the ECHR.¹³³

Until the enactment of the HRA, human rights in the United Kingdom were protected at their most basic level by the Race Relations Act ("RRA").¹³⁴ In its original form, the RRA prohibited discrimination based on race in certain public places, and established the Race Relations Board and the Community Relations Committee ("CRC").¹³⁵ Several years later, the act was amended, and a Commission for Racial Equality ("CRE") replaced the CRC.¹³⁶ However, while discrimination on the basis of nationality was added to the RRA,¹³⁷ no equivalent prohibition existed with regard to religion.¹³⁸

From the 1983 House of Lords' decision in *Mandla*, which was given before the enactment of the HRA, one could conclude that discrimination against a student based on religious affiliation was not necessarily illegal.¹³⁹ The case involved a private school's decision not to accept a Sikh student who refused to remove his Turban in school. The House of Lords did grant the petition, but used an "ethnic origin" framework by defining the Sikhs as an ethnic group¹⁴⁰ in order to bring the student under the protection of the RRA. Decisions made by other schools, which resulted in discrimination against Sikhs, were not overruled.¹⁴¹

Additionally, in *Nyazi v. Ryman's Ltd.*, a claim brought by Muslims who demanded to be treated as an ethnic group under the RRA was denied based on the assertion that Muslims are not an ethnic group but a religious one: Muslims include people of many nations and colours, who speak many languages, and whose only common denominator is religion, and religious culture.¹⁴² However, in contrast to judicial review of private school decisions, no case has arisen where *public schools* tried to prohibit students

133. Human Rights Act, 1998, c. 42, § 13 (Eng.). Section 13 reads: "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."

134. Race Relations Act, 1968, c. 71 (Eng.).

135. *Id.*

136. Race Relations Act, 1976, c. 74, § 43 (Eng.).

137. Race Relations Act, 1976, c. 74, § 1 (Eng.).

138. See *London Borough of Ealing v. Race Relations Board*, [1972] 2 A.C. 342.

139. *Mandla v. Dowell Lee*, [1983] 2 A.C. 548, 568 (Eng.) (Lord Templeman) ("The [Race Relations] Act does not outlaw discrimination against a group of persons defined by reference to religion.")

140. *Id.* at 562 (Eng.); see also *supra* note 92.

141. *Juss*, *supra* note 125, at 530.

142. See *Poulter*, *supra* note 18.

from wearing religious symbols, and thus, the courts have not addressed this issue.

Despite the lack of legal recognition for the right not to be discriminated against based on religious affiliation, British society has expressed, and still does, great tolerance towards minority groups, religious groups notwithstanding. One could, therefore, argue that the lack of formal legal recognition for religious rights in Britain is actually a testament of tolerance. Thus, the legal approach to religious expression in the public sphere seems to indicate that the British model grants a relatively high level of protection to religious practices, despite the fact that the United Kingdom is officially a Christian state.

2. *Germany*

Section 4 of the German Basic Law (the federal constitution) protects the freedom of religion and conscience, and defines it as a non-derogatory right: (1) Freedom of faith and of conscience, and freedom of creed religious or ideological, shall be inviolable; (2) The undisturbed practice of religion is guaranteed . . .¹⁴³ Infringing upon this right is allowed only when another constitutional principle justifies such infringement.¹⁴⁴

The landmark case pertaining to the wearing of headscarves in Germany involved a Muslim teacher named Fereshta Ludin, who was fired from a public school for refusing to take off her veil in class.¹⁴⁵ In September 2003, the German Federal Constitutional Court, in a majority opinion, overturned previous rulings by lower courts and held that Ms. Ludin could not be prevented from wearing headscarves under current German law.¹⁴⁶

The court, however, left the door open for state legislation to the contrary, stating that such legislation would not necessarily be unconstitutional.¹⁴⁷ The court noted that the state's religious

143. Grundgesetz für die Bundesrepublik Deutschland, art. 4(1)-(2), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY (Gisbert H. Flanz ed., 2003).

144. See Giegerich, *supra* note 58, at 221 (“[A]ny limitation imposed by legislation on the freedom of religion must be narrowly tailored to further a textually demonstrable constitutional value.”).

145. Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] Sep. 24, 2003, 2 BvR 1436/02 (F.R.G.).

146. *Id.* at ¶ 74. The case reached the constitutional court after several earlier procedures, starting from an appeal submitted by the teacher to the Administrative Court of Stuttgart. *Id.* at ¶ 5. There was a second appeal to the Administrative Court of Baden-Württemberg. *Id.* at ¶ 8. Then a third appeal to the Federal Administrative Court. *Id.* at ¶ 12. The state's position was upheld in all of these procedures, based on the premise that the school's decision was reasonable, and that a teacher, being a state representative, cannot express affiliation to any religious group since that would infringe the students' freedom from religion. *Id.* at ¶ 11.

147. *Id.* at ¶ 65.

neutrality should not be viewed as a strict separation between church and state.¹⁴⁸ Rather, the court ruled that religion's neutrality should be seen as a system of balancing acts between four competing interests: (1) the teacher's freedom of religion; (2) the duty of neutrality of a teacher in a public school; (3) the right of parents to influence their children's education; and (4) the right of children not to be exposed to unwanted religious influences.

In two of Germany's nineteen *Länder* (States), Baden-Württemberg and Lower Saxony, laws were enacted following the *Ludin* ruling, prohibiting the wearing of headscarves.¹⁴⁹ The Baden-Württemberg Supreme Constitutional Court ruled in a subsequent decision that the new act also encompasses nuns who teach in schools because no exception can be made regarding religious attire in schools.¹⁵⁰ According to the opinion, the ruling stems from Germany's commitment to the prohibition of discrimination based on religious affiliation.¹⁵¹

It appears, therefore, that Germany, which is not a secular state, but rather has an official religion (as the United Kingdom does), grants less protection to the freedom of religion than the protection granted in the United States. The reasons for this may derive from a lack of tradition of protecting religious minorities, or from a fear, similar to the one expressed in Turkey, of a negative cultural effect on society, rather than merely a religious one.¹⁵²

E. A Final Comparison: the De-Facto Protection of the Practice of Wearing Headscarves

We have examined the legal model in Turkey and France, which allows for prohibition on Muslim women's right to wear a headscarf in public schools. In contrast, the American model, which many mistakenly identify with the French model, focuses on state rather than private action, and protects individual rights in

148. See *id.* at ¶ 43 ("Die dem Staat gebotene religiös-weltanschauliche Neutralität ist indes nicht als eine distanzierende im Sinne einer strikten Trennung von Staat und Kirche.").

149. *Second German State Bans Headscarves*, ASSOCIATED PRESS, Apr. 29, 2004, <http://www.arabnews.com/?page=4§ion=0&article=4400&d=29&m=48&y=2004>.

150. Carolyn Evans, *The "Islamic Scarf" in the European Court of Human Rights*, 7 MELB. J. INT'L L. 52, 54 (2006).

151. See Stefanie Walterick, *The Prohibition of Muslim Headscarves From French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 TEMP. INT'L & COMP. L.J. 251, 274-75 (2006) (quoting the court's decision that "the law had to apply equally to all religious symbols, including nuns' habits, and could not discriminately target Muslim religious dress"); see also Kate Connolly, *Teaching Nuns Hit by Muslim Headscarf Ban*, DAILY TELEGRAPH (U.K.), Oct. 11, 2004, at 12 (quoting the court's decision that "it would be unjust if a law passed . . . prohibiting Muslim women teachers from wearing headscarves did not also apply to Christian symbols").

152. See *supra* note 111 and accompanying text.

this regard. The United Kingdom and Germany, supposedly representing a similar model, where, on the one hand, the state has an official religion, and on the other hand, tolerance is expressed towards other religious streams, greatly differ in reality based on social practices and perspectives with regard to multiculturalism. We shall now examine the rationales leading to the adoption of the headscarves ban in France, where a legal perception regarding the proper place of religion in society lies alongside a societal overview of the proper treatment of multiculturalism.

V. FRENCH SOCIETY AND THE RATIONALES BEHIND THE HEADSCARVES BAN

*For some people, [the headscarf] is a symbol of religious devotion, for some of identity, for some of rebellion, for some of male domination, for some of immigration, multiculturalism and unFrenchness.*¹⁵³

A. Secularity and Neutrality in French Public Education

Most students in France study in public schools, where the curriculum is set by the state, according to the *Jacobin* notion¹⁵⁴ that only a centralized state can protect the public welfare and maintain equal rights for all.¹⁵⁵ As was previously described, France is a self-declared secular state,¹⁵⁶ and the way schools are run is directly influenced by that concept.

Over the years, two contradicting interpretations of the principle of secularity have developed.¹⁵⁷ The first is that secularity requires not only that the state refrain from interfering in the public sphere, but also would require religion to be a total

153. *Veil of Woes*, THE ECONOMIST, Dec. 13, 2003, § Leader.

154. In the context of the French revolution, a *Jacobin* originally meant a member of the Jacobin Club, which existed between the years 1789-1794. DAVID P. JORDAN, THE KING'S TRIAL: THE FRENCH REVOLUTION VS. LOUIS XVI 19-20, 202 (1979). However, the term *Jacobins* has been popularly applied to all promulgators of extreme revolutionary opinions. Poulter, *supra* note 18, at 54-55. In contemporary France this term refers to the concept of a centralized republic, with power concentrated in the national government at the expense of local or regional governments. *See id.* ("In French education [*Jacobin*] has come to mean . . . the study of nationally prescribed curricula, within a standardized structure . . . (citation omitted)).

155. Poulter, *supra* note 18, at 54 (stating that under Jacobin beliefs, decisions ought to be made by a central authority subject to little to no local influence).

156. *See supra*, Part I.A.

157. *See Daniela Caruso, Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT'L L. J. 331, 344 (2003) (discussing the potential conflict between principles of equality and principles of proportionality in state regulation in the European Union).

outcast.¹⁵⁸ The second is that secularity obliges the authorities to refrain from promoting one religion over the others, but would not influence the way individuals behave in the public sphere, since the fact that an individual expresses his or her religion in public does not hurt the state's self-declared secularity.¹⁵⁹ Therefore, the question in France is not whether a Muslim student should be allowed to wear a veil based on her right to freedom of religion, but rather whether wearing a veil undermines the state's secular status.¹⁶⁰

Examining the legal developments over the last several years, one can note that while the *Conseil d'Etat* has balanced the right to freedom of religion and the secularity principle based on the second interpretation, the new legislation reflects the first interpretation, which grants secularity a more comprehensive meaning.¹⁶¹ The new trend may derive from an ever-growing fear in France that religious expression will undermine the neutral status of schools.¹⁶²

In the past, the number of students carrying ostentatious religious (either Muslim or other) symbols in schools was insignificant. However, as a result of the overall percentage of Muslim's in the general population, and with the increase in immigration, the number of students wishing to express their religion by wearing ostentatious symbols has risen.¹⁶³ The fear is, therefore, that a critical mass of openly expressive religious students in schools may undermine the balance and hurt the neutrality of public schools.

B. Assimilation and the "Melting Pot" in Practice

The "melting pot" theory¹⁶⁴ of the French Republic is best reflected in France's submitted reservation regarding the application of section 27 of the ICCPR,¹⁶⁵ which recognizes a right to culture. According to this theory, there are no group rights in France because the state constitution does not grant rights to

158. *Id.*

159. *Id.* at 371.

160. See Baines, *supra* note 10, at 320 (discussing why the ban on women wearing hijabs violates the principles of the French Constitution).

161. See Walterick, *supra* note 151, at 254 (discussing how France's constitutional guarantees of freedom of religion have been narrowed by the government's interest in preserving public order).

162. See *id.* (noting that it in France it is a priority to keep the "public sphere . . . free from religious influences").

163. See *id.* (stating that France's Muslim population is the largest in Europe and Islam is the second largest religion in France).

164. See *Forget Asylum-seekers: it's the People Inside who Count*, THE ECONOMIST, May 10, 2003, § Special Report, at 1 (describing the "republican values", particularly secularism, that define French society).

165. See *supra* note 81 and accompanying text.

groups, only to individuals.¹⁶⁶ The former president of the republic, Francois Mitterrand, stated that there are no minorities in France, and Muslims who define themselves as members of an ethnic minority group are victims of the process of integration.¹⁶⁷ The French government has, therefore, always viewed cultural symbols as divisive and feared that they pose a challenge to the legal and public order of the French society.¹⁶⁸ The veil, as a cultural and religious symbol, is a symbol for many French people of the supposed refusal of those who wear it to fully become French.¹⁶⁹

A possible explanation suggested by scholars for the "melting pot"'s application in practice is that one needs to differentiate between countries, such as Canada, where both the majority and the minority culture share common liberal democratic values (there, the state does not view assimilation as vital for their common existence) and countries like France, where a liberal society is faced with non-liberal minority group's values, and a "melting pot" application is crucial. However, ironically, French Muslims, who greatly differ from the majority in culture, language, race, and customs, find it harder to assimilate *for exactly these reasons*.¹⁷⁰ The fact that the Muslim population in France amounts to around ten percent of the general population (and is significantly higher in some cities, such as Marseille), and that in some public schools the majority of students are Muslim, does not contribute to successful assimilation, since the bigger a minority group is, the lesser the chance of a fruitful assimilation.

Multiculturalists, in contrast, argue that the Muslim minority group is entitled to express its customs and exercise its religion in both the private and public spheres, even though their practices may be viewed as discriminatory. According to this view, a state which forces its residents to assimilate infringes upon the rights of individuals to preserve their culture, both on a group level and on a private level, because a person's cultural identity is an inseparable part of his personality. Moreover, tolerance demands that liberal cultures tolerate the existence of non-liberal cultures

166. See Beller, *supra* note 11, at 599 (asserting that the *Conseil d'Etat* has found that "group or collective rights are incompatible with the French Constitution").

167. Poulter, *supra* note 18, at 50-51. Under this view of the principle of secularity, "religious and cultural 'distinctions'" should only be recognized in the privacy of one's home.

168. Editorial, *Europe's Muslims*, THE ECONOMIST, Aug. 10, 2002, § Leader.

169. See Nora Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 752 (1999) (discussing the French reaction to the wearing of headscarves and Muslim immigrants' use of the French courts to bring about change).

170. See Baines, *supra* note 10, at 312 ("France's focus on complete assimilation obviously leaves no room for a multiculturalist philosophy, such as that of the United States or Canada.").

alongside their own culture.

In the French context, it is claimed that granting the opportunity to Muslim students to wear a headscarf would actually *encourage assimilation and integration*, because without such opportunity their parents might not allow them to go to a public school. The parents would either send them to a private school,¹⁷¹ if they could afford one, or would not have them educated at all. Both of these alternatives are bad for integration.

That French society strongly opposes wearing headscarves in public schools, while wearing a skullcap or a cross has not raised similar objections in the past is incongruous. The reason for this phenomenon, some argue, is that the headscarf not only serves as a religious symbol, but also as a symbol of a foreign, different, non-liberal and stand-alone culture, which aims to create an alternative stronghold in society, and prevents Muslim France from becoming truly French. The headscarf serves therefore as a challenge to both underlying principles of French society — secularity and the "melting pot."

C. Enhancing Gender Equality

The Stasi committee argued that French public schools should remain a place of freedom and emancipation for women. One of the common arguments raised by those who favor the prohibition on headscarves is that the veil serves as a symbol of oppression of women and religious intolerance in Muslim society, and that in order to enhance gender equality in schools such a prohibition serves as a vaccine against these diseases.¹⁷²

Raising an interesting claim, the dissent in *Ludin* argued that while the cross symbolizes tolerance and therefore having a cross on the school gate is not an infringement on the right to freedom from religion, the veil is a symbol of oppression and therefore should be banned.¹⁷³ Yet, there is disagreement as to the question of whether the veil does indeed represent oppression. Even if the claim is proven correct in theory, one could argue that granting the gender-equality factor a major role is only meant to gain the support of the main Western feminist stream. The reason is that while the arguments regarding the need for maintaining an assimilated society without public religious symbols may not carry much weight with these streams, protecting gender equality does.

171. See Van Praagh, *supra* note 96, at 1390 (noting the willingness of Muslims in the United States and Canada to send their children to non-sectarian schools where the wearing of a hijab is permitted).

172. See generally Mountis, *supra* note 53, at 130 (explaining the traditional role the hijab plays in protecting female chastity, and the centrality of female chastity to family honor under Islamic law).

173. See Bundesverfassungsgericht [BverfGE] [Federal Constitutional Case] Sep. 24, 2003, 2 BvR 1436/02 (F.R.G.).

Nevertheless, the gender equality factor did not play a major role in the process that led up to the French legislation.

VI. EPILOGUE: THE IMPACT OF SOCIO-LEGAL CONCEPTS ON THE INTERPRETATION OF HUMAN RIGHTS AND THE PROTECTION GRANTED THEM

It seems that despite efforts to set a uniform international standard for the protection granted to human rights by liberal democracies, reality proves that a substantial difference exists between states due to contrasting socio-legal concepts that directly affect the way these states protect human rights. While in some states the right to freedom of religion and conscience is interpreted to allow an individual to practice her religious customs openly in the public sphere, in other states, the freedom may be limited to the private sphere only if it collides with the basic foundations of that given society, be that secularity, assimilation, or both.

The question of whether one should be satisfied with this non-uniform protection depends, first and foremost, on the way one views multiculturalism in general, and the required tolerance towards non-liberal societies in particular. Moreover, it is clear from the above analysis that the question of whether a particular right was infringed depends on whether one views a certain act as an exercise of that right, or rather as a symbol of intolerance or oppression, as some view the headscarves.

French society, which is based on the premise that all groups must attempt to integrate in the majority culture, leads to intolerant behavior towards minority cultures. It appears, that had France been forced to follow a universal standard for protection of the right to freedom of religion and the right to culture, it could have been forced to annul the headscarves ban.¹⁷⁴ However, this article merely aimed to place the headscarves ban within a wider framework, so as to analyze why the ban is considered a necessity in French society, while criticized as expressing intolerance in other Western democracies.

174. For a general discussion of the Margin of Appreciation doctrine in the judgments of the European Court of Human Rights, see HOWARD YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996). Cf. Guy E. Carmi, *Comparative Notions of Fairness*, 4 VA. SPORTS & ENT. L.J. 275, 304-05 (2005) (noting that “[t]he European Court of Human Rights tends to see program regulations designed to further pluralism merely as legitimate restrictions on freedom of expression” (internal quotation marks omitted)).