Rights to Education and Religious Manifestation Of Muslim Girls Under Challenge- Critique of The Ban On Religious Symbols In French Public Schools

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Abstract: This paper attempts to extrapolate the multi-faceted implications of the French governmental ban on religious symbols in the public school setting, with an emphasis on its potential impacts upon the rights to education and religious freedoms of veiled Muslim schoolgirls. The analysis below is a juxtaposition of socio-legal and gender discourses within the framework of international human rights jurisprudence. The French government has been relying on its Constitution to back up secularism in education, a practice which is endorsed by the European Court of Human Rights in similar cases. Yet, it is argued by the author that, the French government's interpretation of "laïcité" (i.e. secularism and neutrality of the State in education) would not be found legitimate as against the yardsticks of the United Kingdom legal precedents, American constitutional requirements of equality in education, as well as the Convention on the Rights of the Child.
Keywords: France, Secularism (Laïcité), Islam, Headscarves, Rights to education and religious manifestation.

Introduction

Following the ban on displaying religious symbols by all parties in French public schools, doubts have been raised as to the potential violation of the rights to education and religious manifestation of Muslim girls who are residing and receiving public education in France. The rights concerned are enshrined in Article 28 of the Convention on the Rights of the Child (hereafter as the "CRC") (Office of the High Commissioner for Human Rights, 2003) and Article 9 of the European Convention on Human Rights 1950 (hereafter as the "ECHR") (Council of Europe, 1994).

The analysis below would extrapolate into the issues of (i) whether wearing symbols of religious faith in schools violates the constitutional guarantee of secular public education in France; (ii) whether the French policy has challenged the right to education within the framework of international human rights law, and, (iii) to what extent and in what forms should religious manifestation be tolerated in the arena of public schooling, if a margin of appreciation is present.

Part I of the essay would lay down the backdrop for discussion; Part II would deal with the legislative motives behind the ban; Part III attempts to analyze the interpretation of the European Court of Human Rights with regard to secular education; Part IV targets at evaluating the use of fundamentalism as an element of "necessity" for limiting the personal rights concerned; Part V would bring into light the sociological dimension of veiling in relation to Muslim schoolgirls; Part VI would delineate the limit of tolerance for religious manifestation by drawing reference to the American cases and Part VII would discuss the jurisprudential aspect of the ban as coupled with an international human rights framework. The paper adjourns with a conclusion which

outlines the suggestions to better advocate minority children's rights to education and religious manifestations.

Part I – The Issue in Focus

A) Legislative Ban on Religious Symbols in Public Schools

The law in dispute is known officially as Article 141-5-1 of Law No.2004-228 of the French National Code d'Éducation –

> « Art. L. 141-5-1. - Dans les écoles, les collèges et les lycées publics, le port de signes et tenues qui manifestent ostensiblement l'appartenance religieuse des élèves est interdit.» (République Francaise, Ministère de l'éducation, 2004)
>
> "In public elementary schools, middle schools, and high schools, it is forbidden to wear ostentatious symbols or clothes through which students conspicuously display their religious affiliation." (translation from Gey, 2005)

The law in effect has put a ban on all Muslim headscarves or hijab (for females) in particular, because, according to the French President Jacques Chirac, "if we are talking about a star of David, the hand of Fatima or a small cross, those are acceptable, but when it's very obvious, in other words, when if they are worn people can immediately see what religious faith they belong to, that should not be accepted." (CNN.com, 17 December 2003) By the same logic, other religious symbols like Jewish skullcaps (for males) and big crosses (for both genders) are banned outright too.

B) Direct Impacts on French Muslim Girls – Marginalization of Schooling and Restriction on Religious Manifestation

Is there any alternative for Muslim girls who insist on wearing headscarves? France allows the running of private religious schools and subsidizes them partly if they meet state standards, however, nine French Muslim associations including the Union des organizations Islamiques and the Federation Nationale des Musulmans de France said in their statement that, "if the minister of education's declarations were put into effect, what alternative would France's Muslim have but to withdraw their children from public schools?" (Le Monde, 1994:12, cited in El Hamel, 2002:298) This was said so because the Muslim population in France is usually struck in poverty and they cannot afford the tuition fees of private schooling. An evidence would be that most schools educating Muslim children are located at the "priority education areas" (Z.E.P.s, Zones d'Education Prioritaire) to where additional government funds are directed, and which are intended for assisting pupils in these disadvantaged social and cultural environments (Ministère de l'éducation (France), 2001)

In defense, Hanifa Cherifi, the ministry's inspector general, said only 48 pupils had been expelled from public schools for wearing headscarves so far while almost 600 more had agreed to uncover their hair in the academic year of 2004-05 (Heneghen, 2005). Nonetheless, one cannot rule out the possibility that those 600 students chose to comply with the restriction, but for the fact that they could not afford private Muslim schooling. Then the logical question to ask would be whether the access to religious education a fundamental freedom for the Muslim

schoolgirls in France. The next section would depict the public policy concerns and Part III would analyze the two educational rights mentioned above.

Part II – Legislative Intents Behind the Ban

A) The Concept of "Laïcité"

Laïcité officially means the "secularization and neutrality of state" (Ministère des Affaires étrangères, 2005) and its application in public schooling aims to achieve two goals – (i) freedom of thoughts and (ii) giving all children the same chance in life regardless of their cultural backgrounds. The overall objective of this policy directive is to assimilate the out-groups into an ideal French society of liberty, equality and fraternity (Lawday, 2003). By historical account, the "rigorously secular character of the state is a hard-won victory against the dark forces of obscurantism, anti-Semitism and authoritarian Catholicism which previously held sway and can be traced back to the roots of French Revolution" (Astier, 2004).

In terms of construing French citizenship, the Republic has always recognized individuals, rather than groups – a French citizen owes allegiance to the nation, and has no officially sanctioned ethnic or religious identity (Ministère des Affaires étrangères, 2005). President Jacques Chirac once said, "it all begins with school…that 'France' is an idea of citizenship, an identity forged in the neutral space of its public schools" — the concept of which is termed as "école sanctuaire" by Jules Ferry, the 19th century father of French secular education (Kramer, 2004:60). Given the embracing character of French citizenship law, which allows for generous naturalization of ethnic minorities, citizenship per se is framed in the label of equality (Caruso, 2003:370).

Nonetheless, the French ideas of secular citizenship and secular schooling are in conflict with the idea of "Islamization" which portrays "a system of ritual and beliefs…not merely a religion but a complete and comprehensive way of life" (Geertz, 1971:14, cited in Talbani, 1996:66). To a Muslim woman, being a convert means one should lead a holistic and Islamic way of living that guides every single action in her life, which is at odds with the ideology of laïcité in essence.

If individuals are guaranteed with the freedom to get educated at the institutions of their choosing, then what kind of public policy concerns may trump over that personal freedom?

B) The Preemption of Islamic Fundamentalism

Professor Gilles Kepel, co-author of the new law said, "French schools have been taken hostage by a rising tide of Islamic fundamentalism, pressuring ordinary students to join in the 'jihad…(and have) become 'hunting fields' — recruiting centers for radical Islamic students who want to impose extremist views on others" (NBC News, 9 February 2004). Supporters of the bill believe that the real threat to French identity and nationhood will come about if nothing is done to eliminate the religious and political pressures at state schools after the 911 terrorist attacks took place.

Fundamentalist threats are not unfounded. France views the Islamic militant movement in Algeria as a serious threat to its own national security (Baines, 1996). On the Algerian front, fundamental Muslim revolutionaries have killed at least four thousand people since 1992. Of those killed, the revolutionaries have targeted women associated with secular causes who were seen bare-headed in public (Ibrahim, 1994).

Causation may sound remote, yet it is probable in the eyes of the French government that neighbouring Muslim extremism in Algeria may translate into a fear of Muslim extremism at home in France (Asiaweek, 23 Nov 1994). By first sight, the prohibition on the headscarves may align with France's traditions of secularism and assimilation. However, at the very least, the ban may present problems from both the practical and legal standpoints.

Part III – Evaluating The Laïcité Argument & The Constitutional Discourse In the European Court of Human Rights

Up till now Muslim schoolgirls in France have not yet litigated against the French government for the potential infringement of the right to religious manifestation by relying on Article 9 of the ECHR. The following two cases reveal the position undertaken by the European Court of Human Rights and the Court of Appeal of the United Kingdom. I would argue for a more tolerant approach with regard to Muslim veiling by judging the French ban against the dual lens of ECHR and CRC.

A) The Case of Sahin v Turkey (2005) 41 E.H.R.R.8 and its Analogy with the French Scenario – Constitutional Requirement of Laïcité

France is one of the only five countries in the world that legally separates church and state. The other four are Turkey, India, Mexico and Japan (Baines, 1996). Thus the first case here is relevant since it involves the ban on veiling in a Turkish university.

In the first case of *Sahin v Turkey*, the applicant, a former medical student at the University of Istanbul complained that a ban on the wearing of the Islamic headscarf in higher education institutions constituted a breach of her rights under the ECHR, with an emphasis on Article 9, which reads –

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief, and freedom…in public or private to manifest his religion or belief…
> (2) 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 of public order, health or morals or the protection of the rights and freedoms of others.

It was held by the European Court of Human Rights that the Turkish government is legitimate to rely on the laïcité argument to rule out the right to wear headscarves – "interference was based, in particular, on two principles – secularism and (gender) equality – which reinforce and complement each other…the (Turkish) Constitutional Court stated that secularism in Turkey was, among other things, the guarantor of democratic values, the principles that freedom of religion is inviolable – to the extent that it stems from individual conscience – and the principle that citizens are equal before the law…secularism also protected the individual from external pressure. It added that restrictions could be placed on freedom to manifest one's religion in order to defend those values and principles. This notion of secularism appears to the Court to be consistent with the values underpinning the Convention and it accepts that upholding that principle may be regarded as necessary for the protection of the democratic system in Turkey (at paras 104-6)."

It is further noted that gender equality was "recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe." (Gey, 2005) With regard to this rationale, the European Court had highlighted "the emphasis placed in the Turkish constitutional system on the protection of the rights of women".

If the reasoning of this Turkish case of *Sahin* is applied to the French scenario in hand, then the French Muslim schoolgirls would not be able to rely on the ECHR to claim their right to religious manifestation, since in both Turkey and France, secularism is clearly stated as their common state ideologies.

> <Turkey's Constitution Article 2>
>
> "The Republic of Turkey is a democratic, secular ("*laik*") and social state based on the rule of law, respectful of human rights in a spirit of social peace, national solidarity and justice adhering to the nationalism of Ataturk and resting on the fundamental principles set out in the Preamble." (National Assembly of Turkey, 17 October 2001)
>
> <French Republic's Constitution, Article 1>
>
> "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. It shall be organized on a decentralized basis." (French National Assembly, 17 March 2003)

In sum, the European Court of Human Rights agreed that the Turkish government had met the standard of "necessity" under article 9(2) for two reasons, (i) the need to limit coercive proselytizing and (ii) the need to protect the state endorsed value of equality for women. Practically speaking, secular universities may regulate manifestation of religious symbols by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others. Thus, the European Court of Human Rights seems to "envision a rough balancing of constitutional interests, under a system which one value, such as gender equality, can trump another, such as religious liberty." (Gey, 2005)

Even if the *Sahin* argument stands, it may only justify a ban on religious symbols at the university level, but not in public schools from high schools and below. On top of that, Muslim schoolgirls being affected are all children under 18, who are given special protection under the CRC. The analysis below would argue against the ban with reliance on the special positioning of children in general.

B) Critique of the Arguments Underlying the Turkish *Sahin* Case

It can be observed that the issues of (i) vulnerability of children and (ii) liberty of parents in exercising of their rights to education and religious manifestation have never been addressed in

the judgment of *Sahin*. In my opinion, the ban on religious symbols has defeated the purpose of education for children per se because it denies them the fundamental right to education with a religious focus at the very first place. According to Article 2 of the First Protocol to the ECHR –

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions." (Council of Europe, 1994)

The duty owed to parents by the French government, even in its passive form, would entail a respect for the liberty of parents in choosing religious and moral education in conformity with their own convictions (veiling inclusive), thus forming a limitation on State authority (Lonbay, 1989). Article 5(1)(b) of the UNESCO Convention against Discrimination in Education (UNESCO, 1996) reads –

> "1. The States Parties to this Convention agree that: (b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction."

Also, for those financial disadvantaged Muslim schoolgirls in France who cannot afford private schooling if they go unveiled, their right of access to education is being denied in de facto. The right of access to education is laid down in Article 28(1) of the CRC, a convention of which France has ratified –

> (a) Make primary education compulsory and available free to all;
> (e) Take measures to encourage regular attendance at schools and reduction of dropout rate." (Office of the High Commissioner for Human Rights, 2003)

Besides, the French government has overlooked the need for promoting diversity of cultures in the school setting, given the Muslim population in France is either first- or second-generation immigrants. At the policy level, this outright ban has revealed how little understanding is drawn to the values of the countries that the Muslim children originated from. The issues of immigration and its impacts on education are implicitly tackled in Article 29(1) of the CRC –

"Article 29 (1) State parties agree that the education of the child should be directed to…(c) the development of respect for –

- the child's parents,
- his/ her *own cultural identity*,
- language and values,

- for the *national values of the country in which the child is living*,
- *the country from which he or she may originate*, AND
- for civilizations different from his or her own" (Ibid, 2003)

In 2004, Muslims account for 10% of the total French population and the great majority of Muslim immigrants to France is from the Maghreb – the region of northwest Africa comprising the coastlands and the Atlas Mountains of Morocco, Algeria, and Tunisia (Daily Telegraph, 26 Jan 2004).

Attention should be drawn to the fact that both national values (i.e. laïcité in France, the recipient country) and cultural values of veiling as a religious practice (i.e. Islamic doctrines and practices prevailing in the Maghreb) are given equal status in Article 29(1)(c) of the CRC. Regrettably, the French ban on religious symbols has empowered the national values to champion over cultural identities of the Muslim school girls.

When multiple constitutional rights are in conflict, as in the French case, do the schools have a positive duty to assert religious education and in what ways should peaceful co-existence of religions be upheld? The Court of Appeal of the UK has provided some guidelines to these questions.

C) The Positioning of the UK's Court of Appeal – Championing Religious Freedoms

In the case of *R. (on the application of SB) v Denbigh High School Governors* [2005] 2 All E.R. 39, a student appealed against her school's refusal to allow her to attend the school if she was not willing to comply with school uniform requirements. The student was a Muslim and wished to wear a hijab to school, rather than a salwar kameez as dictated by the school's uniform policy (at para 5). She maintained that the salwar kameez did not comply with the strict requirements of her religion and as a result she lost 2 years of schooling before she was accepted by a different school (at para 16). It was held that the freedom to manifest her religion as guaranteed in Article 9(1) the ECHR was violated and, as a matter of Convention law, it is not up to the schools to limit on one's religious freedom by creating and enforcing a school uniform policy that denies ones right to religious manifestation in the school setting.

In the judgment, it is said that "schools were under a duty to secure that religious education was given to pupils and that each pupil should take part in an act of collective worship everyday, unless withdrawn by their parents (per Lord Justice Brooke at para 73)."

Also, the freedom to manifest one's religion is the cornerstone of democracy and this is well recognized in the European communities. The court has cited the decision laid down by the ECHR in *Kokkinakis v Greece* (1994) 17 E.H.R.R. 397, which reads –

> "As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism is dissociable from a democratic society…While religious freedom is primarily a matter of

> individual conscience, it also implies, inter alia, freedom to 'manifest religion' (at paras 31 and 32)."

The UK positioning is preferable because it prioritizes access to education, democracy and respect for religious differences over the use of education as a socializing institution for instilling a standardized image of childhood. It is well understood that the inherent values of religious differences are regarded as a positive asset for a democratic society, and I gather that mutual understanding would facilitate the integration of societal differences between European locals and the Muslim immigrants better than the ban on religious symbols does – as a matter of fact, UK has also a significant influx of immigrants from the Meghreb like France does, which amounts to 2.5% of its total population (Daily Telegraph, 26 Jan 2004).

The current case should be distinguished from than the *Sahin* case in the sense that this case (i) deals with children in secondary schools, not at the tertiary level; (ii) implies a positive duty for the state and schools to allow the public display of religious symbols at schools; (iii) incorporates the element of parental choice over religious education, which in turn upholding a higher human rights standards than the European Court of Human Rights does; (iv) recognizes religious manifestation as a practice done within the private / personal domain, which ought not be subjugated to any interference for educational sake.

Assuming the laïcité argument fails to defeat the human rights doctrine of parental choice and religious manifestation as a *jus cogen* norm, meaning "a bare minimum of acceptable behavior that *no* Nation State may derogate from" (Atkins v Virginia, 122 S.C. T.2242 (2002), at fn.21), one may wonder if the limitation clause (Article 9(2) of the ECHR) may still back up the French ban.

Part IV – Evaluation of the "Preemption of Islamic Fundamentalism" Argument & The Assessment of "Necessity"

A) Fundamentalism as a Limitation to Religious Freedoms

Recalling Article 9(2) of the ECHR, the freedom to manifest one's religion or beliefs shall be subject only to such limitations which would only survive "in the interests of public safety, for the protection of public order, health or morals or the protection of the rights and freedoms of others" (Council of Europe, 1994). And children in particular would have their freedom of thought, conscience and religion be subjugated to the same limitations (c.f. Article 14(3) of the CRC).

The preemption of Islamic fundamentalism is regarded as one of the legitimate limitations. In the case of *Sahin*, the ECHR said, "in a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to *prevent certain fundamentalist religious movements* from exerting pressure on students who do not practise that religion or on those who belong to another religion *may be justified* under Article 9(2) of the (European) Convention. (at para 101)"

In *Sahin*, the European Court of Human Rights ruled that –

> "where questions concerning that relationship between State and religion were at stake, on which opinion in a democratic society might reasonably differ widely, the *role of the national decision-making body had to be given special importance*. In such cases it was necessary to have regard to the *fair balance that must be struck* between the various balance at stake: the rights and freedoms of others, avoiding civil unrest, the demands of public order, and pluralism.(at para 101)"

B) The Proportionality Test in Practice & Its Deficiency

The matter now becomes where to draw the line. In what circumstances can public interests override personal liberties, or vice versa? In *Hatton v United Kingdom* (2002) 34 E.H.R.R. 1 (at para 101), the applicants alleged that the UK Government's policy on night flights at Heathrow airport gave rise to a violation of their individual rights to respect private and family life contrary to Article 8 of the ECHR. The Court ruled that the role for the national authorities is "to make the *initial assessment of the 'necessity' for an interference*, as regards both the legislative framework and the particular measure of implementation. Although a margin of appreciation is thereby left to the national authorities, their decision remains *subject to review by the Court* for conformity with the requirements of the Convention."

At the present stage, in addressing the competing claims of individuals against the wider public interest, it seems the national authorities are left with pretty wide discretion to restrain individual rights and the European Court of Human Rights is aware of that. Although the ruling is in favor of the UK government, the dissenting judges felt that "the general reference to the economic well-being of the country is not sufficient to justify the failure of the State to safeguard an applicant's rights under Article 8." (Ibid, at para. 16) That said, it implies that the rights of minorities need to be protected as well. The scope of discretion of the State ought to be narrowed down because of the fundamental nature of the right to sleep, which may be outweighed only by the real pressing, if not urgent, needs of the State (Grekos, 2002). The fact is, in France, such urgent needs are not found. The concern is "not that fundamentalist or radical Muslims would begin to pressure the national government, but rather that they would displace local governments in the administration of isolated communities (like the ZEPs), essentially halting efforts to integrate immigrant populations (Turner, 2005:341-2).

It is significant that the court recognize that the proportionality test may in effect facilitate the "tyranny of the majority". At paragraph 14 of the dissenting opinion, the dissenting judges said, "we do not find it persuasive to engage in the balancing exercise employing the proportionality doctrine in order to show that the abstract majority's interest outweighs the concrete subjective element of the small minority of people…Indeed, one of the important functions of human rights' protection is to protect 'small minorities' whose 'subjective element' makes them different from the majority.

Again, Muslim schoolgirls in France are minorities, even more so, they are children who stand against greater risks in losing their basic rights to political bargains. The respect for the free choice of parents has been discussed in earlier sections and it can be realized by using the state-parent partnership framework.

C) Assessment of "Necessity" in light of the Vulnerability of Children's Rights – A State-Parent Partnership

What should be qualified as a "necessity" in legitimizing a ban on religious symbols? The cases being discussed above have stated the need for an assessment by the executive branch of the government, subject to judicial challenges. Muslim schoolgirls in France as the minorities are guaranteed the right to religious manifestation (at school setting) as a jus cogen per se. Article 30 of the CRC reads –

> "In those States which *ethnic, religious* or linguistics *minorities* or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right…*to enjoy his or her own culture, to profess and practice his or her own religion*…" (Office of High Commissioners for Human Rights, 2003)

The State should be extra cautious in exercising any restraint over personal rights and it is under the duty to promote the rights in relation to children in particular, given children may not be capable of exercising their own rights when they are still young.

In assessing the 'necessity' for an interference of children's right to religious manifestations, supposed there is such an imminent threat posed by fundamentalism (rather than for the cause of preemption in my opinion), the parent-state consultative mechanism should be invoked because parents and legal guardians are responsible for the children, "to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights…" (Article 5 of the CRC) This unique parenthood concept is echoed in Article 14(1) and (2) of the CRC and that is absent in Article 9 of the ECHR. Article 14(1) and (2) reads –

> (1) States Parties shall respect the right of the child to freedom of thought, conscience and religion.
> (2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to *provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child*." (Office of the High Commissioner for Human Rights, 2003)

Children at their young age may not be able to exercise their own rights and both the state parties and parents are presumed to provide guidance over time with accordance to the varying physical, mental and psychological capacities of the formers. The next question then becomes – what serves the best for Muslim schoolgirls in French public education, and to veil or unveil?

Part V – The Sociological Discourse

In assessing whether veiling is a signal of threat as suggested by the French law drafters and whether secularism is the common denominator for all cultures in interpreting equality in education, one should take into account of the "best interest of the child" argument which runs through the CRC.

A) The "Best Interest of the Child" Argument

Although the restrictions laid down in ECHR Article 9(2) limit the right to religious manifestation of individuals, one may wonder whether children as vulnerable individuals should be given greater protection or tolerance with regard to their rights. Being overlooked in the judgments of the European Court of Human Rights, Article 3 of the CRC provides that, "*in all action concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or *legislative bodies*, the *best interests of the child* shall be a primary *consideration*" (Office of High Commissioners for Human Rights, 2003). The best interest doctrine provides "an overall framework, or umbrella, under the shadow of which the remaining provisions of the Convention are to be applied" (Alston, 1994:193). In my opinion, the relevant provisions to be applied and guided by the best interest doctrine would definitely include those concerning the right to religious manifestation (Article 14 of CRC), right to educational access (Article 28 of CRC) and right to education, which should also caters for the developmental needs of children (Article 30 of CRC).

B) Symbolic Significance of Veiling

What does it mean to wear a veil? Is it in the best interest of the Muslim girls to wear their veils? Muslim girls' best interests cannot be evaluated without tapping into their cultural background. Islam entails following the path of God or submission to shari'a – the Arabic word describing Islamic law. Shari'a is not a uniform code of law and under the Qur'an, secularism does not exist (Baines, 1996).

As a ground rule, Muslim feminist in France maintain that wives of Prophet went veiled and in this way they were able to recognize one another and to be honoured by other women for their distinction (Kramer, 2004:59). Also, Muslim women in general wear headscarves as a mark of modesty because their hair and necks form part of feminine beauty (Poulter, 1997:46).

Muslim women would disagree with the position of the Western liberal feminists who see the hijab as a symbol of male domination and female subservience, instead the hijab is regarded as a symbol for struggle against encroaching materialism and imperialism and more importantly a symbol for their identity that is rooted in their own tradition – the notions of family and extended family (El Hamel, 2002:302-303). What Western liberal feminists and secular feminists value as fundamental, like individuality, self-reliance and personal independence may not be valued as that important by Muslim women.

In the eyes of Western civilizations, unveiling is equivalent to the liberation of Muslim women from fundamentalism. Veiling has long been categorized as "the symbol of both the oppression of women and the backwardness of Islam" (Ahmed, 1992:151-152). Veiled Muslim women are assumed to be the victims of fundamentalism, which upholds the Muslim woman's body as the instigator of all chaos (*fitna*) and argue for the need to cover it and regulate its movements. Muslim fundamentalists support traditional notions of morality with emphasis on separate gender spheres and that requires the segregation of sexes and the confinement of women at home (Howland, 1997:308). Rights denied as a result include education, despite the fact that no single evidence of support is made to this end in the *Qur'an* or the *Sunna* (prophet's saying and deeds) (Skalli, 2004:55).

The "best interest of the child" argument is indeed a subjective test which is subjugated to political maneuvers and administrative constraints, since obligations under the CRC are defined only as the "progressive obligations", that is each State Party undertakes to take steps "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights concerned." (Nowak, 2001: 255-56) Nonetheless, the American cases may shed light on the possible objective test to be employed on deciding the extent to which religious manifestation should be tolerated.

Part VI – The American Approach to Religious Manifestation in Public Settings

A) The Establishment Clause & The "Lemon Test"

Disputes over religious freedom and manifestation are not single-out cases in the USA. Separation of church and state is the ostensible constitutional norm in both United States and France. In the U.S., this approach is codified in the Establishment Clause of the First Amendment. In practice, the U.S. Supreme Court has interpreted that as a requirement for all to compile with, which means, all government actions should reflect both a secular purpose and a secular effect (Gey, 2005). In France, this principle is codified in the constitution as mentioned at the beginning of this essay, whilst the U.S. First Amendment mandates that –

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (United States House of Representatives, 2006).

The rationale behind the First Amendment is dealt with in the case of *Engle v. Vitale* 370 U.S. 421 (1962). The Supreme Court has consistently ruled that the Founding Fathers of the American constitution intended that no act of government (including public schools) should favor any one religion over others. In this case, the State of New York, in its official capacity, had directed the school principals to implement the practice of daily classroom invocation of God's blessings as prescribed in the Regents' prayer[1] and the policy was ruled as unconstitutional.

Later on, the subjective judging methodology in *Engle* had been substituted by the "Lemon test". In the case of *Lemon et al. v Kurtzman, Superintendent of Public instruction of Pennsylvania* 403 U.S. 602, the Supreme Court affirmed that a 3-limb test was to be applied to matters relating to the religion clauses of the First Amendment, which indicates that (i) the government action must have a legitimate secular purpose; (ii) the government action must not have the primary effect of either advancing or inhibiting religions; and (iii) the government action must not result in excessive entanglement between government and religion. Thus, the issue that comes next would be, what kind of actions would constitute governmental endorsement of religions? The "reasonable observer test" outlined below has provided the clue to that.

[1] The prayer goes – "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

B) The "Reasonable Observer Test" & Governmental Duty of Upholding Secularism in the U.S.

As foresaid, the U.S. Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community (Ward, 2003). Displaying religious symbols per se is not a strict liability in the U.S. In determining whether the government has unconstitutionally endorsed certain religions by active or passive acts / omissions, the "objective observer" or "reasonable observer" test, a legal fiction created and championed by Justice Sandra Day O'Connor, has been put forward. This objective, reasonable observer has served the courts in Establishment Clause cases as an arbiter of a statute or policy's effect, or as a measurer of degree of endorsement (USA Today, 3 Feb 2005). Simply, the American Constitution is interpreted as prohibiting governmental actions that a reasonable observer would construe as endorsing religious beliefs (Dinh, 3 July 2005).

In effect, the Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community and *Lynch v. Donnelly* 465 US 668 (1984) is another Supreme Court decision which lays down the threshold of tolerance. In that case, the city of Pawtucket on Rhodes Island had erected a Christmas display located in the city's shopping district, which included objects like the Santa Claus house, a Christmas tree, a banner reading "Seasons Greetings," and a nativity scene. These items had been included in the display for over 40 years. Daniel Donnelly objected to the display and took action against the Mayor of Pawtucket.

In a 5-to-4 decision, the Court held that notwithstanding the religious significance of the Christmas display, the city had not violated the Establishment Clause since "The focus of the inquiry must be on the displays in the context of the Christmas season. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." (Ibid, at 679-680) The Court found that the holiday display was not a purposeful or surreptitious effort to advocate a particular religious message. The Court found that the display merely depicted the historical origins of the Holiday and had "legitimate secular purposes." (Ibid, at 680-685)

C) Threshold of Tolerance for Religious Attires in the U.S.

In regulating religious attire by applying the First Amendment, there arises the so-called "American religious garb statutes" which restrict the religious dress of government employees, especially school teachers, while on the job. Interestingly, the dress codes of public school students or other private persons are not restricted.

In the case of *United States v. Board of Education* 911 F.2d 882, 889, 894 (3d Cir. 1990), it was held that the implicit religious message communicated by the teachers' religious dress conflicts with the state's obligations under the Establishment Clause. The dispute arose when a devoted Muslim, whose religiously conviction was that Muslim women should cover their entire body, saving their faces and hands in public, was serving as a substitute teacher in a niqab at a public school. Consequently, the court ruled that state education officials have a "compelling interest in maintaining the appearance of religious neutrality in the public school classroom" (Ibid, at para 897). It should be noted that the clothing in question here is a niqab (see Figure 1), the coverage of which is much larger than the hijabs (i.e. headscarves)(see Figure 2) as worn by

Muslim schoolgirls in France. Would a less conspicuous religious symbol like the hijab be allowed in America? The following case would illustrate that the end result depends on the circumstances and the messages intended to be conveyed through the symbols.

Figure 1: *A Niqab* (BBC News, 31 Aug 2004)

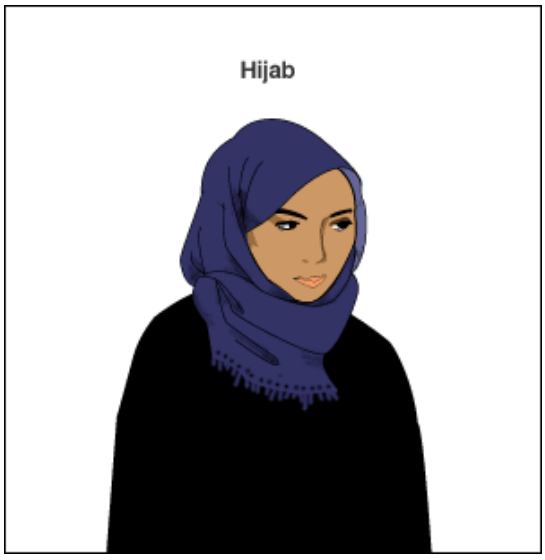

Figure 2: *A Hijab* (BBC News, 31 Aug 2004)

Nonetheless, conflicting authorities exist whereby the American courts may allow the display of inconspicuous religious symbols at public schools. In *Nichol v. ARIN Intermediate Unit* 28, 268 F. Supp. 2d 536, 541 (W.D. Pa. 2003), a federal district court held that the Pennsylvania religious garb statute was unconstitutional as applied to a woman who was suspended for one year for refusing to remove or tuck in a small cross necklace while working as an instructional assistant at a public elementary school. The court held that the school's implementation of the

state religious garb statute violated the woman's free exercise right because it was "openly and overtly averse to religion because it singled out and punished only symbolic speech by its employees having religious content or viewpoint, while permitting its employees to wear jewelry containing secular messages or no messages at all." (Ibid, at 548) The court concluded that the policy also violated the free speech provision of the First Amendment because it was "a content driven regulation which violated the plaintiff's right to free (symbolic or expressive) speech on a matter of public concern." (Ibid) The court rejected the school board's Establishment Clause concerns, largely because of the inconspicuous nature of the employee's necklace (Ibid, at 553-54).

Stemming from the judgment above, we may realize the American and European courts approach secularism in different senses, although both the United States and France endorse the separation of the church and the state. In short, the American court has put the onus on the teachers and employees of the government to prevent the conveyance of religious messages to the students and citizens, whilst the European court perceives students as agents susceptible to fundamentalist influence. If so, which end of the provider-recipient model should the French government gear towards in maintaining secularism at home? That would depend on whether the French government should apply paternalistic means to curb religious influences in all forms.

Part VII – Jurisprudential Discourse of the International Human Rights Framework concerned

Liberals would argue against paternalistic ban by the French government. Children, albeit vulnerable to negative influences, are capable of indicating their wills and preferences, which aligns with the “best-judge of oneself” argument originated from the classics “On Liberty”, the author J.S. Mill puts forth a famous liberty limiting principle that has come to be known as "the Harm Principle". This principle is probably the most permissive of the liberty limiting principles. It says –

> “...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right...The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign (Mill, 2001:18)

A true agent of an action is one who, with respect to that action, is (i) free (i.e. not coerced); (ii) voluntary (i.e. competent to choose) and (iii) informed (i.e. has sufficient information to choose) (Myers, 1999). Recalling the “best interest of the child” argument, the Muslim schoolgirls should not be left outside the decision making process, given at the age of high schooling, they are

already grown up as individuals with free wills. As long as their manifestation of Islam (i.e. veiling) does not interfere with the practices of (different) religions by others and is done as their informed wishes, the French government should keep a clean hand on the issue.

Also Article 18 of the Universal Declaration of Human Rights protects the right to freedom of religion and its manifestations or beliefs in practices and observance in general, it reads –

> "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 others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." (United Nations, 1948)

Furthermore, it should not be overlooked that the right to non-religious beliefs is of equal status with the right to religious beliefs, and, different religious beliefs are of equal status with each other (Howland, 1997: 342). That said, permission for veiling and upholding secularism at public schools in France may not be mutually exclusive. Instead of "neutralizing" the public school arena, the French government has the alternative of adopting the American showcase of diversity, which in essence allowing all religious manifestations on part of the students to flourish. Undeniably the French government has to abide by its constitutional requirement of laïcité, nonetheless it should also respect the choices of individuals over their religious convictions and manifestations.

Part VIII – Conclusion: Unveiling = Empowerment?

The legitimacy of the French ban on religious symbols rests with the truth to what is in the "best interest" of the Muslim schoolgirls – whether unveiling takes Muslim schoolgirls in France to the highest level of empowerment (i.e. high level participation and planning of their desired livelihood) according to the UNICEF Framework for the Equality and Empowerment of Women (Mehran, 1999:204)[2]. It is important to realize the CRC doctrines, given it raises the bar of respect for different civilizations, for indigenous cultures and for the natural environment as major goals of education (Nowak, 2001: 251).

The state-parenthood model should be adopted in assessing any potential restrictions on the fundamental rights to (i) education, (ii) religious manifestation, (iii) religion and conscience, (iv) parental guidance are "universal, indivisible and interdependent and interrelated" by the standard laid down by principle 5 of the Vienna Declaration (United Nations General Assembly, 1993). If any of these rights is infringed, the action should be rendered invalid, and undeniably, the French ban on religious symbols has infringed all the foresaid rights.

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[2] The 5 levels of which each will bring about higher levels of equality and empowerment for men include welfare (meeting basic needs); access (to resources and means); consciousness raising (gaining awareness of the problem); participation (in decision making) and control (high level participation and planning).

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