French Muslim Headscarf Ban
Under the Context of International Law

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ABSTRACT

In 2004, France passed a ban that prohibited any religious symbols in public schools. The ban incurred considerable criticism, such as infringing Muslim women’s freedom of religious manifestation. However, Article 18(3) of the ICCPR provides that freedom to manifest one’s religion may be subject to limitations based on several legitimate bases such as public order or the fundamental rights and freedoms of others. This article will examine the possible bases in the context of article 18(3) of ICCPR. This article will discuss the meaning of public order to find out whether the principle of secularism is covered by its scope. Then, this article will try to identify gender discrimination and consider whether gender equality could be used as a justification by French government. To resolve the tension between the state’s aim and religious freedom, the ban is a good faith attempt, but may be not effective or even ultimately justifiable. The resort to law is not always successful. Dialogue and improvement of Muslims’ status are ultimately critical and more effective to achieve both religious freedom and gender equality.

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I. Introduction

In 2004, France passed a ban prohibiting all kinds of religious symbols in public schools, including Muslim headscarf. Public opinion polls showed that about 70 percent of the French supported the measure, and 49 percent of Muslim women in the French Muslim community favored such a ban.¹ At the same time, the ban incurred considerable criticism. The opponents claimed that the ban, though worded in a generally applicable way, targets the Islamic headscarf because compared with the other religious symbols, only Muslim women are obliged to wear the headscarf due to their religious belief.² In July of 2010, France passed another bill forbidding the wearing of face-concealing clothing in public spaces.³ This bill, though worded in a neutral way, was known to primarily target at the Muslim full body- and face-concealing clothing, the “niqab” and the “burqa.”⁴ From the 2004 headscarf ban to the 2010 full face-cover ban, the French government changed its legal basis from liberal democratic values to public order to seek a less controversial justification.⁵

This is not the first time that the Islamic headscarf has become an issue in Europe. Many European countries limit or have considered limiting the use of headscarf in some public spheres.⁶ The European Court of Human Rights (“ECtHR”) also has approved the legitimacy of restrictions on the Islamic headscarf under the European Convention of Human Rights based on the principle of secularism and gender equality in several cases.⁷ But this issue has not been discussed in the interna-

⁴ Id. at 47.
⁵ Id. at 49.
tional context. This article will examine whether the French headscarf ban can be justified under international human rights laws, especially under article 18(3) of the International Convention on Civil and Political Rights (“ICCPR”). Although the French 2010 ban on full-face covering is mainly based on public order and not gender equality, this article will still examine all the possible bases in the context of article 18(3) of ICCPR.

Article 18(3) of the ICCPR provides that “[f]reedom 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.” 8 Under the European Convention of Human Rights, the ECtHR interpreted the principle of secularism as within the scope of public order considering the state’s discretion in internal affairs. Part II of this article will discuss the meaning of public order under international human rights laws. The discussion will focus on a state’s discretion in defining public order and seek to construct international guidance on the definition.

Gender equality is frequently referred to by the ECtHR in several cases to justify a restriction on the wearing of Islamic headscarves. 9 But the court does not discuss in detail why gender equality is implicated in such situations. Moreover, to sanction the French ban by referring to gender equality is problematic because the French ban generally applies to all religious symbols, while gender equality is used specifically to justify the restrictions on Islamic headscarf. In Part III, this article will first discuss how to identify discrimination against woman and whether the Muslim woman’s religious obligation of wearing headscarf is discriminatory. Then the article will suggest a balance between Muslim women’s

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freedom of religious manifestation and the state’s positive obligation to eliminate discrimination against women.

Article 18(3) of ICCPR also requires that any restriction on freedom of religious manifestation must be necessary. Namely, that the restriction must directly relate to specific aims, be proportionate and not to be applied in a discriminatory manner. However, there is no unified standard about what is meant by proportionality. The ECtHR, assuming a supervisory role, largely relies on each state’s decision and keeps itself from replacing a state’s policy with its own assessment. Accordingly, the state may in fact enjoy too much discretion. Although there is no unified standard, “not in a discriminatory manner” is implicitly incorporated in the proportionality criteria. After the adoption, the French ban has been criticized, then, mainly because it especially burdens the Muslim’s religious manifestation. Part IV of this article will also discuss whether the French ban satisfies the ICCPR’s proportionality requirements.

Although the French ban has caused considerable disapproval, the aims it pursues, such as public order and gender equality, are accepted widely. But the measure specifically designed for this objective interferes with significant other interests, such as the right to manifest one’s religion freely and the parental right to exercise control of children’s upbringing. Moreover, a ban is not sufficient to realize gender equality or eliminate discrimination, because the obligation of wearing a headscarf and the discrimination against woman are based as well on other complicated economic, social or cultural reasons, such as the marginalization of Muslim immigrants in France and women’s status in Islamic culture. To resolve the tension between the state’s aim and religious belief, the ban is a good faith attempt, but may not be effective or even ultimately justifiable; it may in fact be counterproductive to this goal. The resort to law is not always successful. Dialogue and improvement of Muslims’ status are ultimately critical and more effective in achieving both religious freedom and gender equality.

II. Definition of Public Order in the International Context
On March 15, 2004, the French Parliament enacted Law No. 2004-228 regulating the wearing or demonstration of religious symbols in public schools. Accordingly, Article L. 141-51 of the French Education Code provides that “In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited.”\(^{10}\) The main concerns of this legislation are “... signs ..., such as the Islamic headscarf, however named, the kippa or a cross that is manifestly oversized, which make the wearer’s religious affiliation immediately identifiable.”\(^{11}\)

The UN Human Rights Committee (“HRC”) has pointed out that the “wearing of distinctive clothing or head coverings” is a recognized practice of religion.\(^ {12}\) While freedom of religion may not be subjected to any derogation\(^ {13}\), freedom of religious manifestation can nonetheless be restricted in limited circumstances. Article 18(3) of the ICCPR thus provides that “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.” Similarly, Article 9(2) of the European Convention of Human Rights (“European Convention”) provides that “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 for the protection of the rights and freedoms of others.”\(^ {14}\)

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\(^{10}\) Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 concerning, as an Application of Secularism, the Wearing of Symbols or Clothing That Indicate Religious Affiliation in Public Primary and Secondary Schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, at 5190.


\(^{13}\) See ICCPR, supra note 8, art. 4, ¶ 2.

1. Public Order

Although the French ban on religious symbols is very controversial in both France and, more broadly, international society, the European Court of Human Rights (“ECtHR”) in the decision in Dogru v. France\textsuperscript{15} recognized its legitimacy, mainly based on the principle of secularism.\textsuperscript{16} In Leyla Sahin v. Turkey,\textsuperscript{17} therefore, the ECtHR noted that the restrictions on religious symbols, particularly the Islamic headscarf, were necessary to maintain public order and the principle of secularism.\textsuperscript{18} As prescribed then by both the ICCPR and the European Convention, public order is a legitimate basis to restrict religious manifestation. However, there is little guidance in the international society about the definition and scope of “public order.” The UN document provides:

\textsuperscript{15} In Dogru, the applicant, a Muslim aged eleven was enrolled in the first year of a state secondary school during 1998-1999. From January 1999 onwards she wore a headscarf to school. On seven occasions in January 1999 the applicant went to physical education and sports classes wearing her headscarf and refused to take it off despite repeated requests to do so by her teacher, who explained that wearing a headscarf was incompatible with physical education classes. At a meeting on 11 February 1999, the school’s pupil discipline committee decided to expel the applicant from the school for breaching the duty of assiduity by failing to participate actively in physical education and sports classes. The ECtHR said that “that pupils wearing signs in schools by which they manifest their affiliation to a particular religion is not in itself incompatible with the principle of secularism in so far as it constitutes the exercise of the freedom of expression and manifestation of religious beliefs, but that this freedom should not allow pupils to display signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of the public service.” 49 Eur. H.R. Rep. ¶ 26.

\textsuperscript{16} Id. ¶ 72.

\textsuperscript{17} In Leyla Sahin, the applicant came from a traditional family of practicing Muslims and considers it her religious duty to wear the Islamic headscarf. In1997 the applicant enrolled at Istanbul University for medical studies. She wore the Islamic headscarf during the four years until February 1998 when the university banned students from wearing clothes that symbolize or manifest any religion, faith, race, or political or ideological persuasion in any institution or department of the university, or on any of its premises. ECtHR found that “the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety.” 2005-XI Eur. Ct. H.R. ¶ 111.

\textsuperscript{18} See id. ¶¶ 113–15.
“The expression ‘public order (ordre public)’ as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.”

As indicated by the quoted excerpt, public order refers only to the fundamental principles based on which a society is founded and operated. It may therefore vary in different societies unless there are universal fundamental principles transcending nations in the international society. “Ordre public”, the French translation of public order, is also found in the English version of ICCPR. This translation is not perfectly faithful to the English version because “ordre public” in French can be translated closely to “public policy” in English. Compared with the restrictive interpretation of public order, public policy is a much more vague and easily-abused concept. Absent a requirement to be “fundamental,” public policy may vary widely depending on different undefined circumstances.

Without a consensus on the definition of public order, then, the ECtHR necessarily gives discretion to each member state to interpret as it chooses. This is known as “margin of appreciation” under the framework of the European Union. The “margin of appreciation” is referred to as the “room of manoeuvre” given by the Strasbourg institutions to the member states while fulfilling their obligations under the European Convention.

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21 Steven Greer, The Margin of Appreciation: Interpretation and Discre
The term does not exist in the European Convention. It is a product of the Strasbourg institutions and was only first discussed in *Handyside v. The United Kingdom* in 1976. Considering that under the European Convention, the member state bears the obligation to fulfill the convention, the ECtHR carries the duty of review and will not substitute its decision in place of the member state’s domestic measures. Thus, in practice, each member state enjoys almost unlimited discretion in its domestic affairs under the European supervision. The scope of the discretion on any specific issue therefore depends on the spectrum of a European consensus. When there is similar practice among member states, the scope of discretion is narrower, while the member state generally enjoys a broad scope of margin of appreciation absent a European consensus. Specifically in the enforcement of European Convention, the member states always possess a broad margin of appreciation considering the restrictions imposed on the rights protected by the convention in the absence of a European consensus.

As discussed, public order, or ordre public, has no unified meaning in the ECtHR’s cases. In other words, the ECtHR does not even attempt to give a single clear meaning to this term. The decision in *Sahin* indicates that meaning of public order may reasonably vary among states due to the different traditions. However, at least a consensus on the broad principle of democracy, rule of law and respect of human rights does exist, even if there is no consensus on the detailed meaning and content of democracy. The ECtHR then takes this broad concept of democracy

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23 *Id.* at 639–40.


as a starting point and interprets public order as a necessary guarantee of a democratic country.\textsuperscript{28} Pluralism, tolerance and broadmindedness have each been considered as a “hallmark” of a democratic country.\textsuperscript{29} Compared with the definition of public order in the UN guidance in Siracusa principle, ECtHR’s practice is consistent with the international standard.

In the \textit{Sahin} case, secularism, the fundamental principle written into the Turkish Constitution, the “guarantor of democratic values” and “the meeting point of liberty and equality” is thus considered as being contained in public order.\textsuperscript{30} Moreover, ECtHR also pointed out that restrictions imposed based on secularism would meet a pressing social need.\textsuperscript{31} This pressing social need should be considered and interpreted in the special context where a particular human right is restricted. However, does secularism, a public order in the Turkish context, constitute public order in French context or even in the international context? Namely, does France have similarly pressing social needs as Turkey?

2. Social Context in Turkey

Turkey is a Muslim country, as over 99 percent of the population is Muslim.\textsuperscript{32} Secularization began in 1839 when Turkey was under the rule of Ottoman Empire.\textsuperscript{33} In 1923, the Republic of Turkey was established based on the principle of secularization.\textsuperscript{34} During the process, many western codes were introduced and thereby replaced prior religious laws based on Islam. Some laws were enacted to promote secularization, such as the Law on Compulsory Civil Marriage and the Law on Prohibition of Wearing of Certain Some Garments.\textsuperscript{35} In 1937, the principle of secular-
is was formally written into the Constitution.\textsuperscript{36} The Preamble of the Constitution explains the principle of secularism as ensuring “no interference whatsoever by sacred religious feelings in state affairs and politics.”\textsuperscript{37}

Popular resistance against the principle of secularism rose and has continuously existed since the foundation of the secular Republic. “Islamic fundamentalism” is an example of such radical movements with the primary purpose of establishing a religious Turkey.\textsuperscript{38} Nowadays, one of the manifestations of an active “Islamic Fundamentalism” movement in Turkey is the Islamic parties’ active participation in politics. Against Turkish laws regulating the wearing of religious clothing in public school, Islamic parties favor wearing Islamic scarves in the public spheres, such as universities, public buildings and courts in order to fulfill religious duty.\textsuperscript{39} Islamic parties have broad supporters, including financial support from some Islamic corporations, associations and foundations,\textsuperscript{40} and even ideological support from some fundamentalist Islamic countries such as Iran, Libya and Saudi Arabia.\textsuperscript{41} In the general election in 2003, one Islamic party won 34.28% votes and obtained an “overwhelming majority” in the Turkish Grand National Assembly.\textsuperscript{42} But considering their threat to secularism, some Islamic parties were dissolved.

Dissolution of the Welfare Party (Refah Partisi) is one such typical example of Turkey’s defense of the principle of secularism. In 1997, the Principal State Counsel at the Court of Cassation made an application to the Turkish Constitutional Court to dissolve Refah Partisi based on the grounds that it was a “centre” of activities contrary to the principles of secularism.\textsuperscript{43} Although this appeared to be a clear interference of free-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{36} Id. at 1089.
\item \textsuperscript{37} The Constitution of the Republic of Turkey Nov. 7, 1982 preamble (as amended October 17, 2001).
\item \textsuperscript{38} Faik Bulut, İslamcı Örgütler [Islamic Organizations] 789 (2d ed. 1994).
\item \textsuperscript{39} Özsunay, supra note 32, at 1105.
\item \textsuperscript{40} Id. at 1110.
\item \textsuperscript{41} Id. at 1111–12.
\item \textsuperscript{42} Id. at 1105.
\item \textsuperscript{43} Refah Partisi (the Welfare Party) and Others v. Turkey, 2003-II Eur. Ct. H.R. ¶ 12.
\end{itemize}
\end{footnotesize}
dom of association, the ECtHR recognized the legitimacy of dissolution based on the principle of secularism which is “certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy.” Moreover, the ECtHR noted that there was a pressing social need that the Welfare Party has a “real opportunity” to restore the religious rule in Turkey even with recourse to force which might make “danger to democracy more tangible and more immediate.”

Turkey’s situation is quite different from the other member states of the European Convention. Even without considering the fact that the majority of the Turkish population is Muslim, which is much more relevant to the proportionate issue discussed in Part IV, other member states may not face the same pressing social need as Turkey. In Turkey, as discussed above, there is a genuine possibility that a secular regime would be turned over by a religious party. By contrast, the social need in most of the other EU member states is related to helping the Muslims merge into the local society and the western culture. It is quite possible that Turkey’s restriction on some human rights based on secularism is an exceptional example and would not be consistent with the constitutional principles of some or even many of the member states of the European Convention.

3. Social Context in France

The principle of secularism in France dates back to the French Revolution in 1789. Article 10 of the Declaration of the Rights of Man and of the Citizen of 1789 provides that “[n]o one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.” This

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44 Id. ¶ 93.
45 Id. ¶ 132.
complete secularism remained the rule until 1905 when the Law on the Separation between Church and State was passed, providing that “the Republic may not recognize, pay stipends to or subsidies any religious denomination.” This principle of secularism was then enshrined in the Preamble to the Constitution of 27 October 1946.

Issues around the practice of Islam gradually emerged after the Muslims migrated into France from the French former colonies, such as Algeria, Morocco and Tunisia. There are currently about 62.3 million Muslims and they constitute nearly eight to ten percent of the French population. These immigrants experience many difficulties in merging into the French society even if they are documentarily accepted as citizens. The isolation, discrimination or hostility may be based on appearance, dress, or fear of an unknown culture. As a result of this social exclusion, the Muslims suffer discrimination in employment and are not able to freely involve themselves in French cultural and political life.

Different from the United States’ melting-pot attitude toward immigrants, France upholds a unified cultural assimilation style, namely that each minority should give up its identifiable features and behave as real French. The tension between Muslims and the non-Muslim French thus became fiercer when the Muslims tried to keep their own identity. Both the Muslims’ marginalized situation and the European Society’s Islamophobia have historically aggravated the tension. Especially after the inception of the war against terrorism, many people falsely mix and confuse the figures of terrorist, fundamentalist, Muslim and veiled woman. Meanwhile, undoubted, some young Muslim people become rad-

50 See id.
54 Karima Bennoune, Secularism and Human Rights: A Contextual Analysis of
ical and are recruited by the groups of terrorists due to the culture shock and isolation they encountered in Europe.\textsuperscript{55} Headscarves, a religious obligation for Muslim women, as a visible external symbol of Islam were involved in this tension and wearing them became considerably controversial.

In 1989, the French secularism principle confronted the Muslim headscarf for the first time. That year three pupils were suspended because they refused to remove headscarves at school. Upon the request of the Minister of Education, the Conseil d’Etat gave an advisory opinion which noted that the principle of secularism required that the students’ freedom of religion should be respected and thereby prohibited any discrimination in education based on a pupil’s religious belief.\textsuperscript{56} However, the opinion nonetheless concluded that state should prohibit the pupils from displaying “signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community…interfere with the order in the school.”\textsuperscript{57} Finally, in 2004, as more similar cases involving wearing the headscarf in school arose, the general headscarf ban was enacted based on the report from “Stasi commission” established under the instruction of the President of the Republic.\textsuperscript{58}

The French government claims as justification that the wearing of visible religious symbol in public school is contrary to the principle of secularism which is aimed to ensure that every pupil’s freedom of religion will be respected and to maintain order of the school. According to the government’s perspective, neutrality of religion in school is an essential part of public order. However, the social need in France is nowhere as


\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.} ¶ 21.
pressing as in Turkey where the Islamic Party has a genuine opportunity to undermine the principle of secularism once they seize power. In France, even assuming that the Islamic Fundamentalists may undermine the principle of secularism, the number of Muslims who will actually support them is unclear. More importantly, Muslims in France are a distinct minority and do not impose a danger to the French regime as serious as in Turkey. As the prior discussion shows, the question is not whether public order contains the principle of secularism but rather to what extent will the principle of secularism be necessary so as to restrict freedom of religious manifestation.


The principle of secularism is not universally recognized by every nation. To nations which incorporate the principle into their constitutions as a fundamental principle, it falls within the definition of public order because, as described in the Siracusa Principles, public order contains the fundamental principle based on which a society is founded. The problem is then regarding what the scope of secularism is and to what extent a country could invoke it as a basis of restriction. Are there any international standards to limit a country’s discretion of interpretation of public order when it serves as a pretext for discrimination?

As previously noted, member states of the Council of Europe enjoy discretion to govern their domestic affairs under the Council’s supervision. In Sahin, the ECtHR explicitly remarked that “having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution’s ‘internal rules’ devoid of purpose.” In the international context, a sovereign state also enjoys full political independence to deal

60 Savage, supra note 55.
with its internal affairs. As indicated by the UN document, people belonging to a religious group enjoy the right to practice their religion and states shall take measures to ensure such rights. However, states are not obligated to ensure these rights when the “specific practices are in violation of national law and contrary to international standards.” The scope of national law and international standards are left undefined.

ICCPR offers some guidance about how a restriction could be laid down by stating that the restrictions on the freedom to manifest one’s religion can be justified provided the restrictions are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” HRC’s general comment indicates that the restrictions are necessary if they are dictated by the ICCPR, “directly related to the specific needs”, and “proportionate and not for discriminatory purposes or in discriminatory manners.” A state may be in the best position to decide for itself what kind of restriction, if any, is necessary, but still it must be consistent with the international standard, even if the criteria are somewhat unclear. The details of the international standard on the definition of “necessary” will be discussed in Part IV.

III. Gender Equality

Although the French ban is a general ban applied to all religions, it is claimed to be applied as a discriminatory measure against Muslims because only their religious manifestation is obligatory and thus affected by the ban. Before discussing whether the French ban has a discriminatory effect against the Muslims, a preliminary question should be asked

64 Id. art. 4, ¶ 2.
65 ICCPR, supra note 8.
66 General Comment 22, supra note 12, ¶ 8.
as to whether the proscription represents an inherent discrimination against women because only women are under the obligation to wear headscarves. ECtHR in its decisions has also expressed the concern that a religious obligation imposed specifically against Muslim women is hard to square with gender equality. As one of the fundamental rights, gender equality is a justifiable ground for restrictions on the freedom of religious manifestation. HRC’s general comment to ICCPR also notes that “Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion.”

Although gender equality has a much clearer boundary than the notion of public order, how to identify discrimination against woman still raises serious problems of construction and application.

1. The Headscarf in the Islamic Context

The wearing of a headscarf is a religious obligation laid down in the Koran, the word of Allah. There are some verses in the Koran describing the significance of dressing in a modest way which apply to both men and women: for example, “O children of Adam! We have indeed sent down to you clothing to cover your shame, and (clothing) for beauty and clothing that guards (against evil), that is the best. This is of the communications of Allah that they may be mindful.” Specifically to woman, some verses show the special significance in mandating a female to cover

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67 Leyla Şahin v. Turkey, 2005-XI Eur. Ct. H.R. ¶ 111 (stressing that “powerful external symbol which her wearing a headscarf represented and questioned whether it might have some kind of proselytizing effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality”); See also Dogru v. France, App. No. 27058/05, 49 Eur. H.R. Rep. ¶ 64 (2008); Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. at 13 (“In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality.”).


69 Qur’an 7:26.
her beauty before strange men:

“And say to the believing women that they cast down their looks and guard their private parts and do not display their ornaments except what appears thereof, and let them wear their head-coverings over their bosoms, and not display their ornaments except to their husbands or their fathers, or the fathers of their husbands, or their sons, or the sons of their husbands, or their brothers, or their brothers' sons, or their sisters' sons, or their women, or those whom their right hands possess, or the male servants not having need (of women), or the children who have not attained knowledge of what is hidden of women; and let them not strike their feet so that what they hide of their ornaments may be known; and turn to Allah all of you, O believers! So that you may be successful.  

Moreover, men are instructed to ensure that their female family members to dress appropriately: “O Prophet! Say to your wives and your daughters and the women of the believers that they let down upon them their over-garments; this will be more proper, that they may be known, and thus they will not be given trouble; and Allah is Forgiving, Merciful.”

There are various coverings from a simple headscarf to an entire covering with only a mesh screen for a woman to see through. Hijab, a simple headscarf, is specifically involved in the debate about French ban. There may be various reasons for this wearing of a covering. Generally, women wear coverings to fulfill their religious obligation consistent with the teachings quoted above. They may also wear coverings for political

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70 Qur’an 24:31.
71 Qur’an 33:59.
conviction, cultural practice or as a way to avoid criticism or harassment from men.\textsuperscript{74}

Historically, by the late 1960’s, the hijab was removed by most Muslim women due to the conviction then spreading across the colonies that veils were symbolic of oppression against women.\textsuperscript{75} However, in the late 1970s, a “re-veiling” movement arose when women wanted to use veil as a symbol of their resistance against colonialism.\textsuperscript{76} Still, undeniably, many Muslim women wear coverings due to external pressure, such as the force of state law in Iran and Afghanistan or the threat of resulting physical violence in Algeria or other Muslim countries.\textsuperscript{77} Today, Muslim women’s views on the wearing of headscarfs reflect large divergence.\textsuperscript{78} Without considering women’s potentially different views about wearing of headscarves, both the ECtHR and the French ban presume that the headscarf is an oppression and discrimination against woman. Due to actual divergent views, to identify discriminatory treatment is very important.

\textbf{2. Approaches to Identify Gender Discrimination}

The French ban has been criticized as a pursuit of “formal equality” in disregard of the substantive outcome.\textsuperscript{79} Formal equality is the application of a universal measure to everyone without considering possible disparities.\textsuperscript{80} Formal equality thus does not take social, economic, cultural or religious points of view or differences into decision-making. The French ban is a general ban against all religious manifestations. It does not differentiate among the significance and meanings of religious practice among different religions or between man and woman. Formal

\textsuperscript{74} Id. at 2.
\textsuperscript{75} Katherine Bullock, Rethinking Muslim Women and the Veil: Challenging Historical and Modern Stereotypes 85 (2002).
\textsuperscript{76} Id. at 88.
\textsuperscript{77} Id. at 85.
\textsuperscript{78} See Wing & Smith, supra note 52, at 759–71.
\textsuperscript{79} See Wiles, supra note 53, at 714–15.
\textsuperscript{80} Martha Albertson Fineman, Equality Across Legal Cultures: The Role for International Human Rights, 27 T. JEFFERSON L. REV. 1, 3 (2004).
equality cannot guarantee equal outcome, and may even aggravate unequal outcomes in a situation where some groups have traditionally suffered significant discriminatory treatment.\footnote{Id.} Affirmative action is motivated by an aim of equal outcome and is used to compensate for historical unequal treatment. It is a manifestation of “substantial equality” which focuses on the substance of the ultimate goal instead of the procedure to achieve the goal.\footnote{Id. at 4.}

Specific to Islamic religious manifestation, France uses gender equality as a justification for the ban because Muslim women should not be forced to wear headscarves while Muslim men do not face any such obligation. To treat woman and man equally sounds in this instance like “formal equality.” Will then the French ban be helpful to achieve gender equality or lead to unequal outcome because of the limitation to Muslim women’s freedom of religious manifestation? To answer this question, one must first clarify the nature of the Muslim woman’s religious obligation. If the religious practice is discriminatory against woman, France is obligated to eliminate it in a proper way. If it is not discriminatory, French “formal equality” is not true equality and will result in unequal outcomes.

**A. International View on Gender Discrimination**

The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) provides guidance on definition of gender discrimination based on the enjoyment of rights between woman and man. Article 1 provides that:

“For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human
rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”83

CEDAW’s approach is consistent with “substantial equality.” It does not try to single out the similarity or difference between man and woman, but rather emphasizes the outcome: the equal enjoyment of human rights, should in actuality be equal. Article 1 not only eliminates intentional discrimination but also discriminatory effect even in the absence of a discriminatory purpose. CEDAW guarantees that women enjoy all equal human rights and fundamental freedoms with men in the political, economical, social, culture, civil or any other field. From article 7 to article 16, CEDAW lists many areas where women should be ensured enjoyment of the same rights or opportunities as men.84 Moreover, both the ICCPR and the International Covenant on Economic, Social and Culture Rights (“ICESCR”) also include detailed descriptions about these rights and forbid any discrimination based on sex.85

Specifically as to the religious obligation of wearing a headscarf, the requirement may directly constitute a “distinction, exclusion or restriction” which thus “impair[s] or nullif[ies]” the woman’s right to choose an “adequate standard of living…including adequate clothing.”86 By practicing such obligation, it may also impede women from equal enjoyment of other rights that men enjoy, such as the right of work. Many Muslim women confront more challenges than men in world.87 The difficulties of finding a job tolerant of the Muslim headscarf were not directly imposed

84 Id. arts. 7–16.
85 See ICCPR, supra note 8, art. 2, ¶ 1; see also International Covenant on Economic, Social and Culture Rights art. 2, ¶¶ 2–3, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].
86 ICESCR, supra note 84, art. 11, ¶ 1.
87 See Muslim Employee: Disney Banned Her Head Scarf, CBSNEWS (Aug. 19, 2010), http://www.cbsnews.com/stories/2010/08/19/national/main6786918.shtml (reporting that Disney will not allow a Muslim employee appear before the customers while wearing a headscarf); See Sharmin Pirbhai, Legal Corner: Muslim Employee Wins Religious Discrimination Against Muslim Employer, THE MUSLIM NEWS (Mar. 25, 2011), http://www.muslimnews.co.uk/paper/index.php?article=5169 (reporting that a Muslim woman who refused to wear headscarf was dismissed by her Muslim employer).
by the religious obligation but caused by the third party’s preference. However, CEDAW’s definition of discrimination not only considers purpose but also effect. Even if the religious obligation itself has no discriminatory purpose, it still results in a discriminatory outcome.

**B. American Approach**

When deciding whether existence of gender-based discrimination exists, CEDAW focuses on the ultimate position of men and women; in comparison, U.S. law considers the starting point of a policy, namely whether a gender classification is “based on clear differences between the sexes.”

The Equal Protection Clause in the U.S. Constitution does not require the physiological differences between men and women must be disregarded. However, the classification must be related to actual differences, not stereotypical or archaic classifications. The judicial decisions from the U.S. Supreme Court show that legislations or practice based on gender classification is not per se suspicious provided that the gender difference plays a role and relates to the objectives.

These U.S. decisions all deal with the gender discrimination resulting from legislation or official administrative practice, while in the headscarf situation, women’s religious duty of wearing headscarf is imposed by a private religion group. Article 5 of CEDAW provides that,

“States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and cus-

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88 Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 479 (1981) (holding that California “statutory rape” law defining unlawful sexual intercourse as “an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years” did not unlawfully discriminate on the basis of gender because women and men are physiologically different and men alone could be held criminally liable); See also Craig v. Boren, 429 U.S. 190 (1976) (holding that statute setting different age limits for buying beer by men and women is a gender discrimination because no sufficient evidence supporting such a difference between men and women).

89 Michael, 450 U.S. at 481.

90 Id. at 469.
tomary and all other 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.”

This article does not differentiate as to the cause of gender discrimination and it implies that discrimination could result from a private party’s practice, especially those customary views or practices with broad social influence. Applying the U.S. approach in the headscarf situation, if there is no evidence showing that the differential treatment between Muslim women and men is based on gender difference and related to its objectives, this religious practice is very suspect as a constitutional matter. Moreover, the gender difference must be not just on the surface, it must in practice be critical. Perhaps only the physiological difference could then excuse a gender classification in U.S. law.

C. Contextual Approach

As Article 5 of CEDAW provides, discrimination against woman is based on “the idea of the inferiority or the superiority of either of the sexes.” In other words, if in the society or a group, women are deemed inferior compared with men, any distinct treatment, let alone a compulsory obligation specifically referred to one gender, will be suspicious. The inferiority may be hard to identify directly from one practice. But all the circumstances taken together may lead to a sound inference that women are regarded as subordinated to men.

In many Muslim countries, woman’s rights are largely restricted. One extreme example is in Afghanistan. Under the control of Taliban, Muslim women are forbidden from working and girls beyond 8 years old are prohibited from attending school. They even cannot appear in pub-

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91 CEDAW, supra note 83, art. 5(a).
92 Michael, 450 U.S. at 481.
93 CEDAW, supra note 83, art. 5(a).
A woman in violation of the dress code will suffer public beating or lashing by the Religious Police. In Saudi Arabia and Sudan, women’s political rights and the specific rights to work, drive and obtain an education are also denied. In Kuwait, Nigeria and Syria, women suffer much discrimination and experience without recourse in the law violence in marriage, domestic and other private affairs.

Moreover, the obligation to wear religious dress in public has been specifically criticized by the Special Rapporteur of the UN Commission of Human Rights who is appointed for one year to examine incidents and governmental action in all parts of the world inconsistent with the provisions of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and to recommend remedial measures for such situations. In certain countries, the Special Rapporteur has found that “women are among those who suffer most because of severe restrictions on their education and employment, and the obligation to wear what is described as Islamic dress.” One report, for example, documents that a Muslim woman who does not obey the obligation of Islamic dress code will be punished by whipping and/or a fine. In Algeria, women are “attacked in the streets, threatened with death if they went out at night or because they were living alone, were divorced or were not wearing the hijab, and were kidnapped, raped and murdered in the most atrocious fashion.” There are a growing number

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95 *Id.*
96 *Id.*
98 *Id.* at 109–13.
100 *Id.* ¶ 60.
of women killed due to failure of following the religious dress code.\textsuperscript{103} All the violence against women associated with the obligatory religious dress code demonstrates that women’s rights and life are brutally disregarded. The other violations against women, such as forced marriage, early marriage or crime of honor also confirm women’s inferior status in a society or group.\textsuperscript{104}

However, this violence against woman exists in certain countries and can only be used at best as circumstantial evidence from which to infer the existence of gender discrimination in France. When dealing with the Muslim immigrants in France, all the aforementioned violence and attitudes may not exist, since no reports describe its prevalence there. In addition to the aforementioned context in Islamic countries, it is therefore still necessary to consider the deep implication of Islamic headscarf. But it should be noticed that it is hard for an outsider to appreciate and conclusions may vary based on time and place.

**D. Implication of Islamic Headscarf**

The implication of the Islamic headscarf has shifted as time and places change. Returning to the religious origin, the Koran contains clues for the reason for such a religious duty. Significantly, its teachings and directives have been interpreted by male scholars and theologians because women only receive little education or none at all.\textsuperscript{105} This exclusive power of interpretation puts women at a distinct disadvantage. As the interpretation shows, although women and men are created equal, the Koran preaches that “due to their sexual, biological, physical and mental differences and limitations, a man is a degree superior in the areas of

\textsuperscript{103} Special Rapporteur, *Implementation of Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, at 10, U.N. Doc. E/CN.4/1995/91 (Dec. 22 1994) (reporting that “Katia Benghana, a 17-year-old high school student, is said to have been shot to death at Blida on 28 February 1994 after being threatened for failing to wear the hijab”) (by Abdelfattah Amor).


domestic, economic and political affairs.’’ Upon marriage, the wife shall obey her husband, be prohibited from going out or appearing in public and subject to her husband’s power of correction or even physical punishment. One verse of the Koran directs women not to display themselves except to their husband or other male relatives. This verse, together with the interpretation and practice in marriage, indicate that a woman may be deemed subordinated to her husband, like private property which should be concealed to keep its value.

As the notion of Islamic headscarf may change with the social development, the meaning associated with the ancient interpretation and practice may not be true today, or at least not universally so. As reviewed above, especially since the 1970’s, the wearing of the Islamic headscarf manifests various meanings. In the Algeria fight for independence in the 1950’s and Iran’s fight in the 1970’s, women recovered themselves as a “symbol of resistance during anti-colonial and revolutionary struggle.” The hijab has also been used as a symbol of political protest, as during the Egyptian Islamic movement, to declare an effort of seeking for Islamic identity and a rejection of the Western values. Women chose to veil or re-veil believed that veiling is an “expression of adhering to true Islam.” In addition to religious reason, many women chose veiling solely based on consideration of social and economic reality. By wearing headscarves, women have access to the public sphere because

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106 Id.
107 Abdul Kadir v. Salima and And Anr., I.L.R. 8 (All). 149, ¶ 8 (1886) (India) (quoting Baillie’s Digest of the Muhammadan law: “[t]he legal effects of the marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner in which this matter is permitted by the law; and it subjects the wife to the power of his restraint, that is, he becomes prohibited from going out and appearing in public; it renders her dower, maintenance, and [remain] obligatory on him and establishes on both sides the prohibition of affinity of and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her it imposes submission to him when summoned to the couch; and confers on him the power of correction, physical punishment, when she is disobedient or rebellious….’’).
109 BULLOCK, supra note 75, at 85.
110 BULLOCK, supra note 75, at 87–88.
111 Id. at 91–95.
112 Id. at 96–98.
they can seek employment, gain respect and combat male harassment more easily.\textsuperscript{113} Moreover, in the West, Muslim women may use the headscarf as a way to show their special personal identity and unique culture.\textsuperscript{114}

Specifically as to the situation in France, the reasons and implications of the Islamic headscarf vary as well. A poll taken by Elle magazine shows that “fifty-three percent of women of North African background living in France are hostile to headscarves in schools, and eighty-one percent claim never to wear a veil.”\textsuperscript{115} A survey of French Muslim women’s perspectives of headscarf, collecting various views from both the pro-headscarf and the anti-headscarf, shows that Muslim women choosing a headscarf considered wearing headscarf as a religious obligation which they should enjoy the freedom to practice.\textsuperscript{116} They believe that wearing a headscarf can demonstrate that a female is pure and therefore protect her from harassment from Muslim males or even violence or murder.\textsuperscript{117} Some wear a headscarf due to family pressure because they are not allowed to attend school or cannot gain the respect of their father and brother without being covered.\textsuperscript{118} Some choose to wear based on individual choice because they believe wearing headscarf is an affirmation of Islamic identity and gives them the sense of “belonging to something reassuring.”\textsuperscript{119}

To the contrary, many French Muslim women in support of the ban on the headscarf consider it as a symbol of oppression imposed by the family, community and religion because women not veiling will be deemed rebels and whores.\textsuperscript{120} They also believe that the headscarf is a sign of sexism because women are under the obligation to protect them-

\textsuperscript{113} Id. at 99.
\textsuperscript{114} Id. at 105–07.
\textsuperscript{115} Janice Valls-Russell, \textit{A Community Divided: Growing Up Muslim in France}, 87 NEW LEADER 6, 7 (2004).
\textsuperscript{116} Wing & Smith, \textit{supra} note 52, at 759–61.
\textsuperscript{117} Id. at 761–63.
\textsuperscript{118} Id. at 762.
\textsuperscript{119} Id. at 765.
\textsuperscript{120} Id. at 768.
selves from harassment from men while there is no limitation on men’s behavior. The obligation of wearing the headscarf thus leads to division among Muslim women because the headscarf is a highly visible symbol and unveiled women are scolded by the veiled. Moreover, due to the emergence of Islamic extremism and its combination with the headscarf, it has been deemed “a symbol of extremist Islam-terrorism, extermination of apostates, suicide bombers.”

None of the aforementioned reasons of wearing headscarf relates to a critical or biological difference between men and women. If there is no significant difference requiring different treatment, why is it that Muslim women must obey a compulsory religious duty which even impairs their equal enjoyment of the right to work and education as men? Even if this distinctive treatment caters to religious obligation, religious belief does not mean it is per se right or just. However, this conclusion is based on an outsider’s inference. As the opponents of the French headscarf ban claim, those not part of Islamic culture do not truly understand the meaning of headscarf. Accordingly, they should bear the burden of proof of whether the religious obligation of wearing headscarf constitutes a discrimination against women.

3. Conflict between Freedom and Equality

Despite the question as to whether the obligatory wearing of headscarf is a product of discrimination or not, some Muslim women nonetheless choose to wear headscarves motivated by their individual belief and choice. If this practice cannot be reconciled with gender equality, can a Muslim woman voluntarily choose to accept this discrimination? This question in fact raises two issues. One is whether a woman in that situation has genuine freedom to make a free choice of discriminatory treatment. The other is whether discriminatory treatment may be solely a personal matter.

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121 Id. at 769–70.
122 Id. at 771.
123 Id. at 770.
First, free choice must be based on a free and independent mind. A person must make a choice solely based on individual decision without being directly or indirectly influenced by the others. A Muslim woman, who does not live in a vacuum, is easily influenced by her family or community’s values. Due to her family’s values, she is exposed to an environment with a specific preferred value, and she may be easily and firmly convinced that the value shared by her community is also her own value. In the absence of a genuine independent mind, it is hard to claim a woman’s choice of discriminatory treatment is “voluntary.”

Secondly, even supposing that a woman has independently and voluntarily choosing to be treated in a discriminatory way, this choice is not just a personal affair in some circumstances. In the private sphere, a woman is free to wear a headscarf provided she will not interfere with others. However, in the public sphere, the state is obligated to maintain public order when a person’s behavior will affect others. Article 4 of ICCPR provides that freedom of religion shall not be derogated in any circumstance. The freedom of religion is primarily a matter of individual conscience which is not visible as long as not being manifested. However, the freedom or religious manifestation subject to restrictions as provided in article 18(3) of the ICCPR. A state possesses a positive obligation to eliminate discrimination and maintain a tolerant environment. Article 2 of CEDAW provides that:

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake…(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”

Moreover, Article 5(a) of CEDAW provides that a state has a general

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124 See Alison Stuart, Freedom of Religion and Gender Equality: Inclusive or Exclusive?, 10 HUM. RTS. L. REV. 429, 443 (2010) (arguing that the “free” choice of a Muslim woman is problematic because she may “value and respect the wishes of her parents, husband, children or others to conform to the cultural norms”).


126 CEDAW, supra note 83, art 2(e).
obligation to eliminate any customary conception with the idea of female inferiority.\textsuperscript{127} If the obligation of wearing the Islamic headscarf is discrimination against woman, a woman’s wearing, even if based on her own choice, supports such discrimination. The state’s silence on this conduct may be perceived as a tacit consent which is contrary to the state’s obligation and a tolerance of the discriminatory custom.\textsuperscript{128}

Moreover, two kinds of freedom of religious manifestation are involved. One is the positive freedom, namely that a person should have the freedom to manifest her religion. The other is the negative one, which refers to the freedom of not being forced to wear some religious symbols.\textsuperscript{129} The ECtHR considers the headscarf as a powerful external symbol which may affect others, especially young children.\textsuperscript{130} Women not wearing a headscarf may feel that they are under the obligation to conform to women choosing to wear it.\textsuperscript{131} A state has a positive obligation to protect the free exercise of religion from coercion, fear and interference of non-state actors.\textsuperscript{132} A person’s freedom from being forced to wear a religious symbol should be protected as well as a person’s freedom to voluntarily wear it. To respect the public arena shared by all citizens is within the meaning of secularism.\textsuperscript{133} However, although article 18(3) of the ICCPR authorizes a state to restrict the freedom of religious manifestation based on the “fundamental rights and freedoms of others,” how to tailor the restrictions within a necessary scope is also related to its

\textsuperscript{127} CEDAW, supra note 83, art 5(a).
\textsuperscript{131} Bennoune, supra note 54, at 418.
\textsuperscript{133} Dogru, 49 Eur. H.R. Rep. ¶ 18.
legitimacy.\textsuperscript{134}

IV. Restriction in a Necessary Manner

Even if the principle of secularism and gender equality are justifiable bases under article 18(3) of the ICCPR, the French ban still must meet some procedural requirements. Article 18(3) of the ICCPR requires that the “limitations are prescribed by law and are necessary to protect” the legitimate aims.\textsuperscript{135} HRC, in the general comment, notes that:

“In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant...Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted...Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”\textsuperscript{136}

The main requirements of a permissible restriction are “directly related to the legitimate aims”, “proportionate” and “not in a discriminatory manner.”

1. Proportionate

Considering that social need and social circumstance vary among different countries, a universal standard of proportion is not possible. It should therefore be examined on a case-by-case basis. The ECtHR’s decision of Sahin provides some guidance about the appropriate elements contained in proportionality. In Sahin, ECtHR examined proportionality mainly from two aspects: one is the balance of competing rights and in-

\textsuperscript{134} ICCPR, \textit{supra} note 8, art. 18, ¶ 3.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} General Comment 22, \textit{supra} note 12, ¶ 8.
terests involved, and the other is the decision-making process in a state. When balancing the competing interests, the court examined the meaning of a democratic society, recognized the significance of freedom to practice one’s religion and discussed the circumstances when the freedom of religious manifestation has to be limited. Then the court turned to discuss the appropriate procedures a state may take to limit the freedom of religious manifestation, namely that there must be “a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference.” The court emphasized that the limitation was generally applied, the reason of limitation was noticed in advance and subjected to wide debates. Moreover, the court clarified that the state was at the best position to decide the proper measure while the court “is not open to apply the criterion of proportionality in a way that would make the notion of an institution’s ‘internal rules’ devoid of purpose.”

The ECtHR’s review of proportionality to a large extent relies on the state’s decision. On one hand, this approach does consider each state’s specific situation. On the other hand, it gives each state too much discretion which may make the court’s supervision devoid of purpose. There is no unified international standard of proportionality either. However, the Special Rapporteur of the UN Commission on Human Rights in the report of 2006 provided some criteria to balance competing human rights involved in the restriction of freedom to manifest one’s religion. In review of a state’s restrictions, the following questions were identified as needing an affirmative answer:

“− Was the interference, which must be capable of protecting the legitimate interest that has been put at risk, appropriate?

− Is the chosen measure the least restrictive of the right or freedom

139 Id. ¶ 117.
140 Id. ¶¶ 118–20.
141 Id. ¶ 121.
concerned?

− Was the measure proportionate, i.e. balancing of the competing interests?

− Would the chosen measure be likely to promote religious tolerance?

− Does the outcome of the measure avoid stigmatizing any particular religious community?"\(^{142}\)

Similar to the factors enumerated in ECtHR’s decision, the criteria in the report also include the balance of competing interests. When public order, gender equality and the freedom of religious manifestation are at stake, it is reasonable and justifiable to restrict the freedom of religious manifestation, especially when the HRC has explicitly said that “Article 18 [of ICCPR] may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion.”\(^{143}\) Moreover, this report also lists the “least restrictive measure” as one indicator of proportionality. This criterion in theory limits the state’s discretion. However, similar to the broader discussion, it still does not clearly resolve the problem as to who should decide the meaning of “least restrictive measure.” It only emphasizes that the state’s discretion must be based on the international consensus that “all human rights are universal.”\(^{144}\)

\(^{142}\) Religious Intolerance 2006, \textit{supra} note 129, ¶ 58.

\(^{143}\) General Comment 28, \textit{supra} note 68, ¶ 21.

\(^{144}\) Religious Intolerance 2006, \textit{supra} note 129, ¶ 59 ("When dealing with the prohibition of religious symbols, two general questions should always be borne in mind: What is the significance of wearing a religious symbol and its relationship with competing public interests, and especially with the principles of secularism and equality? Who is to decide ultimately on these issues, e.g. should it be up to the individuals themselves, religious authorities, the national administration and courts, or international human rights mechanisms? While acknowledging that the doctrine of ‘margin of appreciation’ may accommodate ethnic, cultural or religious peculiarities, this approach should not lead to questioning the international consensus that ‘[a]ll human rights are universal, indivisible and interdependent and interrelated’, as proclaimed in the Vienna Declara-
One criticism of the French ban on headscarf is that it protects a group of women’s right of not wearing headscarf at the cost of another group of women’s right of religious manifestation. There could be alternatives which may protect both of the two groups of women’s freedom, such as creating a report mechanism to deal with coercive religious practices contrary to a woman’s will in a case by case manner or passing a ban prohibiting any family member or religious leader from forcing a woman to comply with religious obligation against her will. However, due to the consideration that a state is at the best position to lay down its own domestic rules, the aforementioned alternatives may be less restrictive, but may nonetheless not achieve the objectives.

In the absence of any unified international standard, the democratic process may be the second best choice to give legitimacy to a restriction. Moreover, the restriction passed by a majority should not cause a discrimination against the minority group. Turkey’s headscarf ban does not result in as much debate as the French ban because 99 percent of the Turkey’s population is Muslim. The restriction on the Islamic headscarf is hard to be claimed as discrimination against the Muslim if it is passed based on the Muslim’s choice. However, in France “while ninety-two percent of French are registered to vote, only thirty-seven percent of Muslim citizens have registered to vote.” Turkey’s headscarf ban does not result in as much debate as the French ban because 99 percent of the Turkey’s population is Muslim. The restriction on the Islamic headscarf is hard to be claimed as discrimination against the Muslim if it is passed based on the Muslim’s choice. However, in France “while ninety-two percent of French are registered to vote, only thirty-seven percent of Muslim citizens have registered to vote.” There is only one Muslim representative in the French National Parliament, but he has stated publicly that tries to not mix religion with his political life. It is probable that many Muslim women whose rights are interfered with do not take part in the debate and vote. France must therefore prove that
its ban is not in a discriminatory manner because the democratic process itself cannot naturally give the ban legitimacy.

2. Not in a Discriminatory Manner

The requirement of “not in a discriminatory manner” is significant to the justification of a restriction. The Special Rapporteur’s report also includes some criteria helping to examine whether a restriction is compatible to the international human rights laws or not. Those criteria indicating an incompatibility are called “aggravating indicators”, which include the following:

“− In practice, State agencies apply an imposed restriction in a discriminatory manner or with a discriminatory purpose, e.g. by arbitrarily targeting certain communities or groups, such as women;

− No due account is taken of specific features of religions or beliefs, e.g. a religion which prescribes wearing religious dress seems to be more deeply affected by a wholesale ban than a different religion or belief which places no particular emphasis on this issue;”

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In the Special Rapporteur’s report, there are also “neutral indicators” which do not by themselves constitute a violation of the international human rights laws, such as:

“− The language of the restriction or prohibition clause is worded in a neutral and all-embracing way;

− The application of the ban does not reveal inconsistencies or biases vis-à-vis certain religious or other minorities or vulnerable groups;

− The interference is crucial to protect the rights of women, reli-

hardly ever allowed to voice their reasoning for choosing to wear the headscarf.”

gressive minorities or vulnerable groups;”151

Accordingly, a state’s restriction on the freedom of religious manifestation cannot be designed to target one religion or merely affect one religion. The French ban is worded in a generally-applied way. Additionally, the French government uses the protection of women’s rights as a legitimate basis. Although the French ban satisfies two of those “neutral indicators”, it is still problematic under this standard. As examined above, one criticism of the French ban is that although it is worded in a generally-applied way, only the Muslim headscarf is affected because it is obligatory while the other religion’s symbols are not. Considering Islamophobia in history and the fear of Islamic Fundamentalism, this ban may also be claimed as having been enacted due to some political concerns related to the Islam. However, if the religious obligation of wearing a headscarf is proved to be discrimination against woman, then the claim that only the Muslim are affected cannot be sustained because the state has a positive obligation to eliminate such discrimination.

In international human rights laws, there is an exceptional situation where a measure targeting a certain religion may not be considered as discrimination. Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination provides that:

“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were tak-

151 Id. ¶ 55(b).
en have been achieved.”¹⁵²

Although this article is about racial discrimination, the rationale is that specific measures designed to help a certain group secure advancement is not discriminatory provided that such measure is temporary and will not maintain separate treatment among different groups. Similar reasoning can be found in article 4(1) of CEDAW which provides that:

“Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”¹⁵³

This exception shares the same consideration with affirmative action. Temporary distinctive treatment is permissible to correct the discrimination against some group in history. However, to apply this exception to the French ban is problematic. First, as discussed, whether the religious obligation of wearing headscarf is discrimination against woman is not clear. If this religious obligation is proved to be discrimination, it only justifies the ban on Muslim headscarf, but not a ban on the other religious symbols which have no implication on gender discrimination. A general ban should have a consistent aim and be justified on a same basis. A generally-applied ban targeting a specific group smaller than its originally designed scope will necessarily lead to a dilemma. In its 2010 full face-cover ban, France has given up gender equality as a basis but solely relies on public order to seek justification and lower the public debate.¹⁵⁴

V. Other Competing Interests

¹⁵³ CEDAW, supra note 83, art. 4, ¶ 1.
¹⁵⁴ Ismail, supra note 3, at 49.
In addition to public order and gender equality, several rights involved in this issue, such as the protection of children, parental rights, and the right to education. The French ban to some extent competes with the parents’ freedom of educating their daughters.

Article 18(4) of the ICCPR provides that “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”\(^\text{155}\) The Convention on the Rights of Child (“CRC”) also asks states to respect the parents’ right of providing appropriate direction to the child provided that it is “in a manner consistent with the evolving capacities of the child.”\(^\text{156}\) The French ban restricts the parents’ liberty of raising their daughter because a presumption of the ban is that Muslim girls are forced to wear headscarves under their parents’ or community’s pressure.\(^\text{157}\) Some states take a stricter measure when the parental rights and the freedom to exercise religion mix together. U.S. courts, for example, will not interfere with the parents’ liberty provided the parental decision will not “jeopardize the health or safety of the child.”\(^\text{158}\)

Article 3(1) of the CRC provides that “In all actions 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.”\(^\text{159}\) When the state’s power competes with the parents’ liberty, the critical question is what are the best interests of the child? The state’s concern is to provide

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\(^\text{155}\) ICCPR, supra note 8, art. 18, ¶ 4.


\(^\text{158}\) Id. at 361 (“When the interests of parenthood are combined with a free exercise claim, more than a mere reasonable relation to the state’s purpose is required to sustain the law’s validity under the First Amendment. The only time such a hybrid right may be subjected to limitation is when the parental decisions appear to jeopardize the health or safety of the child, or have the potential for significant social burdens.”).

\(^\text{159}\) CRC, supra note 156, art. 3, ¶ 1; Religious Intolerance 2006, supra note 129, ¶ 56.
the child a chance to shape an independent mind because, “in general schoolchildren are generally considered vulnerable in view of their age, immaturity and the compulsory nature of education.” Due to pressure from the parents, the school may be the only place where children can be protected from any coercion of religious manifestation. From the parents’ perspective, their specific way of life is not coercion but maintenance of their culture. Moreover, “children tend to naturally adopt their parents’ values and practices” which is far from “coercion.” It is therefore necessary to make a choice on the definition of “best interest of the child” between liberty and religious culture. Due to different positions, it is hard to achieve a consensus on the meaning of the “best interest of the child.” People may easily agree that physical security, such as life, health or safety which is essential to survival should be the best interest. Liberty, the born right, compared with religious culture, the result of socialization, is much closer to the core of the best interest.

Finally, children’s right to education is functionally at stake dependent upon the French ban’s implementation. By 2005, only 639 students displayed their religious symbols in public school while about 1,500 students did so in 2004. More than 550 of those cases were resolved through dialogue and girls agreed to remove the headscarves. But still another 60 students enrolled at private schools or in home schooling programs. The parent has the freedom to choose between public school and private school, and this right should not be interfered with by the state. By asking a Muslim girl to remove her headscarf in public school, the ban may cause the parents to consider sending their daughters to private school or religious school in the first place. The resulting departure from public school may lead to a de facto segregation between Muslim children and others. That result is contrary to the state’s aim to create tolerance and plurality and a diverse environment. The lack of enough private schools may also impair the children’s right to education.

\[160\] Religious Intolerance 2006, supra note 129, ¶ 56.
\[161\] Wiles, supra note 53, at 730.
\[162\] French Schools Expel 48 Over Headscarf Ban, WORLDWIDE RELIGIOUS NEWS (Jan. 20, 2005), http://wwrn.org/articles/14144/.
\[163\] Id.
Moreover, if all the Muslim girls wearing headscarf under parents’ pressure are moved to private schools, the French ban will be devoid of purpose altogether.

VI. Alternatives and Conclusion

As previous discussions show, both the principle of secularism and gender equality are legitimate under the international human rights laws. Compared with gender equality, the principle of secularism is a much more possible basis to justify French headscarf ban. Though the ban receives seventy percent support among the French population, it incurs worldwide criticism from both Muslims and non-Muslims. The main criticism is that the ban is designed in a discriminatory manner against Muslims and affects Muslim girls disproportionately. No matter what arguments each party puts forward, the debate turns out to be a struggle between two distinct cultures. Each culture wants to maintain its unique future and refuse to compromise on this point.

The conflict between French government and the Muslim community is quite like a chicken game situation in the game theory. When two drivers drive toward each other, the one swerving will lose the game and be called as a coward. If no one yields, a collision will happen. When two cultures confront with each other, perhaps no one is ready to be assimilated by the other. The cause of this stalemate is hostility generated from misunderstanding and fear. When one party insists on its position, for example, the Muslim woman’s religious obligation of wearing headscarves, the other party has to choose between surrender and a tougher countermeasure. Even if the dilemma is ended finally with one party’s victory and the other party’s failure, the result is pathetic to the whole human society.

164 Wing & Smith, supra note 52, at 757.

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Thus, this dilemma cannot be resolved by rivalry, but rather must be solved by compromise. The proposed aims of the ban, such as coexistence, tolerance, liberty and equality, are universal value of human society. But the ban in fact leads to tension instead of tolerance.\textsuperscript{167} Legal measures are a basic approach to regulate social structure and public order, but they are not one-size-fits-all. Sometimes it is arbitrary in practice, because it is always in a general-applied manner and may not be narrow-tailored to consider every individual situation. The Muslim headscarf issue cannot be easily resolved by a ban; it must be settled by a genuine dialogue, which can help each party to figure out its fears, misunderstandings and basis for co-existence.

Moreover, the legal measure may sometimes lose the point because it focuses on the behavior but fails to resolve the essential problems. The Muslim headscarf issue in France is not just an issue of secularism. It also reflects the deep social problems such as low employment and marginalization of the Muslim immigrants. Even the young Muslims who grow up in France feel rejected by the general public.\textsuperscript{168} They are afraid of losing Muslim identity in the cultural assimilation.\textsuperscript{169} The lack of acceptance cannot be resolved by a ban on the distinctive wearing.

The French ban, even if could it be justified under the international context, cannot achieve the aim of tolerance. The resort to law is not always successful. Dialogue and improvement of Muslims’ status are ultimately critical and more effective to achieving both religious freedom and gender equality.

\textsuperscript{168} Savage, \textit{supra} note 55, at 30.
\textsuperscript{169} \textit{Id.} at 31.