
SHARIA LAW IN AMERICAN COURTS

VEILED MEANING: TOLERANCE AND PROHIBITION OF THE HIJAB IN THE U.S. AND FRANCE

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INTRODUCTION

France and the U.S. have much in common. Both nations share a commitment to liberty, equality, and freedom, most particularly freedom of religion and freedom of expression. Yet their divergent approaches to the common problem of religious accommodation reveals some striking differences. This article will focus on how each has addressed the issue of religious dress—specifically, the hijab, or head scarf, worn by many Muslim women.

France has twice recently adopted highly controversial legislation to regulate the wearing of the hijab in public. In 2004, France outlawed the wearing of all outward forms of religious attire in schools, and in 2010 prohibited attire that concealed the face in public spaces. In both instances, the legislation was justified in the name of maintaining public order and the secular state. Though both laws were couched in neutral language, they were widely perceived as targeting Islam.

With the exception of a few scattered municipal attempts to ban baggy pants,¹ the U.S. has not attempted to impose any sort of dress code by legislation on a national scale. However, the Equal Employment Opportunity Commission (EEOC), a federal civil rights enforcement agency, has filed lawsuits on behalf of female employees who desire to wear headscarves at work for religious reasons. Although the issue has yet to be addressed by the Supreme Court, two such cases have been decided by circuit courts of appeal, and the EEOC was defeated both times. In each case, the court held that the employer's prohibition of the hijab in its workplace was based on legitimate, nondiscriminatory reasons and did not violate Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace because of sex, color, race, ethnicity, national origin, disability, or religion.

In both France and the U.S., a Muslim woman's ability to wear the hijab in public or at work has been curtailed through legal action. However, France has used legislation to impose a society-wide prohibition, whereas in the U.S., restrictions have been authorized only upon a showing of compelling need in a specific and narrowly-defined, work-related context. The difference in approach reflects profound differences in the relationship between the government and the governed in what otherwise are two very similar countries.

THE HIJAB

Islam's holy text, the Koran (or Qur'an) does not explicitly instruct Muslim women to cover themselves in public, but rather directs both Muslim men and women to dress in a modest way.² Muslim men are enjoined to instruct their wives and daughters to cover themselves when they go out as a means of

identifying themselves as believers so they will not be harassed or harmed.³

Head-covering as a matter of custom was prevalent in the Arab world, and indeed among Jews and Christians, long before the Prophet, and is still practiced today, to a greater and lesser degree, by a multitude of sects, from Muslims to orthodox Jews, Mennonites, Russian Orthodox, pre-Vatican II Roman Catholics, and even Anglicans. The Muslim headscarf is variously referred to as *hijab* or *khimar*, among other names which are derived from the various countries where it is practiced.

Some Muslim-majority countries require various degrees of covering by law—the Kingdom of Saudi Arabia, the Arab Emirates, Sudan, and Taliban-era Afghanistan are notable examples. Severe penalties may be exacted for infractions. In contrast, Turkey and Tunisia are Muslim-majority countries where the hijab is prohibited in government buildings and schools. In Tunisia, women were banned from wearing hijab in state offices in 1981, and in the 1980s and 1990s more restrictions were put in place.⁴ In 2008 the Turkish government attempted to lift a ban on Muslim headscarves at universities, but the repeal was overturned by the country's Constitutional Court.⁵

FRANCE

In 1989, a French middle school principal in the Paris suburb of Creil suspended three girls for wearing the hijab in the classroom. The issue immediately drew media attention, and provoked strong and polarizing reactions because it pitted two time-honored principles against each other: individual freedom of conscience or expression versus the secular state. Legal challenges followed. Between 1989 and 2003, parents of aggrieved students brought a multitude of lawsuits challenging such prohibitions. The Conseil d'Etat, France's high court, generally upheld the students' right to wear their religious garb. In fact, between 1992 and 1999, the Conseil d'Etat ruled in favor of the headscarf-wearing students in forty-one of forty-nine cases.

Responding to this controversy, in 2003 then-French President Jacques Chirac appointed a commission charged to identify ways to reinforce the principle of secularity (*laïcité*). Following the Commission's recommendations, in 2004 France adopted legislation which amended its education code to prohibit the wearing in schools of attire or articles that are explicit outward expressions of religious affiliation.⁶ The French National Assembly voted 494 to 36 in favor of the legislation, which, though non-specific and secular in its language, effectively banned the wearing of an Islamic headscarf, or any other conspicuous religious symbol, within French public schools. The bill passed the French Senate by a similar margin, 276 to 20. The text of the law stipulates that "[i]n

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public schools, the wearing of symbols or clothing by which students conspicuously (“*ostensiblement*”) manifest a religious appearance is forbidden. Internal regulations state that the initiation of disciplinary proceedings must be preceded by a dialogue with the student.”

Although couched in neutral language, this prohibition was widely—and accurately—perceived as directed against Islam and the hijab, although by its terms it prohibited all types of external displays of religious insignia and attire in public schools. Subsequently, invoking the authority of the Universal Declaration of the Rights of Man and the French Constitution of 1958, on October 7, 2010, France’s Constitutional Court approved a law prohibiting covering the face in public places.⁷ Though again presented in terms that were not specific to any particular religion, this law was plainly perceived as directed against the burqa, a head-to-toe covering identified with Islam that conceals the entire form, with only a rectangle of netting to allow navigation. Public security was particularly invoked in support of this legislation, since the comprehensive covering could easily conceal bombs or other weapons as well as inhibiting the ability of the authorities to identify an alleged perpetrator.

Critics of both laws point out that they contain an internal contradiction. In effect, both laws restrict the exercise of the fundamental right of freedom of conscience—the French principle of *liberté*, which in the U.S. we would describe as free exercise⁸—which erodes the notion of a secular state that is committed to a position of neutrality as regards all religious expression.

France’s highest constitutional court gave the anti-burqa law its seal of approval on October 7, 2010.⁹ The Conseil Constitutionnel reasoned that the state’s obligation to maintain public order and security justified this limitation on a form of free exercise. Invoking Article 10 of the Declaration of the Rights of Man (1789), restated in the Preamble to France’s 1946 Constitution, and Article 1 of France’s current Constitution of October 4, 1958, the Conseil reasoned that free exercise is guaranteed by maintaining the secularity of the state. The limits of free exercise can be determined by judges in specific instances, but in a democratic society, a national law, universal in application, designed to promote public safety, is justified even if it imposes some limitations on free exercise.

UNITED STATES

Title VII of the Civil Rights Act of 1964 is the principal federal law that prohibits discrimination of all types in the workplace. It reads, in relevant part:

- (a) It shall be an unlawful employment practice for an employer—
 - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
 - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,

because of such individual’s race, color, religion, sex, or national origin.¹⁰

“Religion” is defined to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that it is unable to reasonably accommodate to an employee’s . . . religious observance or practice without undue hardship on the conduct of the employer’s business.”¹¹ Read in conjunction with the Free Exercise Clause of the First Amendment to the U.S. Constitution,¹² Title VII prohibits an employer from treating an actual (or prospective) employee differently on the basis of the enumerated, prohibited factors, and requires employers to make reasonable allowances to accommodate an employee’s religious convictions. “Reasonable accommodation” is the key phrase, and its inherent subjectivity paradoxically ensures both flexibility for both employer and employee and opportunities for litigation when one or the other is dissatisfied.

The Equal Employment Opportunity Commission (EEOC) is the federal agency created by Congress to enforce Title VII. No individual may sue an employer for discrimination or harassment prohibited by Title VII unless he or she first files a charge with the EEOC. The agency investigates all charges, and is authorized to sue on behalf of aggrieved individuals. Individuals also may sue, but only after the EEOC has issued a “notice of right to sue,” generally upon concluding its investigation.

In FY 2010 the EEOC reported receiving 3790 charges from individuals alleging religious discrimination or harassment. Of these, the EEOC reported that 3782 were resolved. Following an investigation, the EEOC issued “no cause” determinations—a finding by the agency that there was no evidence from which they could conclude that discrimination or harassment had occurred—in 2309 cases. Seventy-three cases were successfully resolved through conciliation; there were 847 “merit resolutions,” which means that the case was probably resolved through litigation, and more than \$10 million in monetary benefits were paid to employees by employers.¹³

An unscientific review of reported cases in which plaintiffs have completed the EEOC process and filed lawsuits suggests that the vast majority of religious discrimination or harassment cases in recent years have been brought by, or on behalf of, Muslims: this is perhaps not too surprising when one considers that Muslims are a distinct religious minority in the United States, and Muslim religious practices do not enjoy the cultural pervasiveness of Christian or Jewish practices. Most of the recent religious discrimination in employment lawsuits brought by Muslims allege that the employer failed to reasonably accommodate their daily and weekly prayer requirements, or—in the case of Muslim women—the wearing of the headscarf or hijab; or a Muslim man’s wearing of a beard.

In two cases the EEOC filed suit on behalf of female Muslim employees who claimed that their employers failed to accommodate their need to wear the hijab at work. One was in a prison; the other concerned a commercial printing company. In both cases, the court ruled against the EEOC, and for the employer, concluding that employer’s refusal to allow those employees to wear Islamic headscarves at work did not violate Title VII.

the nonconforming minority invoking religious freedom. It is also revealing that U.S. employers are required to present specific, legitimate, non-discriminatory reasons when they wish to impose limits on an individual's freedom. Both countries tolerate individual preferences, up to a point: both also recognize that individual rights sometimes must bow to safety and security concerns.

The headscarf is intended as a "badge of otherness," signifying to the world that the wearer professes a particular faith. In that respect, it is not unlike a wedding band: it is symbolic attire that broadcasts that the wearer is already committed to one relationship and should not be approached as an uncommitted person might be. Wedding bands are far more common and familiar than the hijab: but both are symbolic attire that is well within the zone of tolerance that U.S. law permits, subject to reasonable practical and non-ideological limitations.

The consensus in France is that society is best served if outward signs of religious difference, such as the headscarf, are not on display in schools, and that public safety is improved if faces are unconcealed in the public square. In the U.S., prohibitions on religious attire are generally forbidden, and only permitted when there is a specific legitimate and non-discriminatory reason. This is not the simplistic duality of "everything is forbidden, except that which is permitted" versus "everything is permitted except that which is forbidden." Rather, France's policy reflects its emphasis on equality and neutrality of the State in religious matters, whereas in the U.S., the analysis begins with the liberty of the individual to express his or her beliefs. Some may view tolerance of headscarves and other Islamic practices or insignia in the workplace as early indicators of a move to impose Sharia in the U.S., but perhaps they are better understood as evidence of our commitment to religious tolerance and personal choice protected by the Constitution.

In the end, it is the Supremacy Clause of the U.S. Constitution that stands as a bulwark against Sharia displacing U.S. law. In *Reynolds v. United States*,²⁴ a conviction under a Utah territorial law prohibiting polygamy was challenged by a man who claimed his religious beliefs enjoining him to practice polygamy should have resulted in his acquittal on a bigamy charge. The Supreme Court said that "[t]o permit [a man to excuse his actions because of his religious belief] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."²⁵ While the Free Exercise Clause absolutely protects opinions on matters of religion, when thoughts become action, the State has a right to protect civil order: thus was built "a wall of separation between church and State."²⁶ "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."²⁷

Sharia admits of no such separation, but the U.S. Constitution most emphatically does. So long as U.S. courts and the federal and state legislatures adhere to the Constitution as the supreme law of the land, Sharia's proscriptions and prohibitions cannot displace constitutionally-guaranteed rights in the United States.

Endnotes

- 1 See, e.g., "Baggy pants ban to be signed into law in Georgia town," www.nationalpost.com (Sept. 7, 2010) (Dublin, Georgia).
- 2 The clearest verse on the requirement of the hijab is Surah 24:30-31, asking women to draw their khimar over their bosoms.

And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their khimar over their bosoms and not display their beauty except to [. . .]

(Qur'an 24:31) (from en.wikipedia.org).
- 3 Sura 33:59 reads: "Those who harass believing men and believing women undeservedly, bear (on themselves) a calumny and a grievous sin. O Prophet! Enjoin your wives, your daughters, and the wives of true believers that they should cast their outer garments over their persons (when abroad): That is most convenient, that they may be distinguished and not be harassed. [...]" (Qur'an 33:58-59) (from en.wikipedia.org).
- 4 See "Hijab by Country," en.wikipedia.org. Of course, in the wake of the political turmoil that has ensued from the "Arab Spring" uprisings in early 2011, this could change.
- 5 *Id.*
- 6 Law of March 15, 2004, 2004-228, article L.141-5-1 of the Education Code, prohibits the wearing of overtly religious insignia and attire in public educational institutions.
- 7 Décision n° 2010-613 DC of October 7, 2010 of the French Constitutional Court.
- 8 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U. S. Const. amend. I.
- 9 Decision of October 7, 2010 (DC 2010-613), by the Conseil Constitutionnel.
- 10 42 U.S.C. §2000e-2(a).
- 11 *Id.* § 2000e(j).
- 12 See *supra* note 6.
- 13 Source: www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
- 14 616 F.3d 265 (3d Cir. 2010).
- 15 616 F.3d at 267.
- 16 *Id.* at 270.
- 17 See *Webb v. City of Phila.*, 562 F.3d 256, 258 (3d Cir. 2009).
- 18 Hon. Dolores K. Sloviter, Circuit Judge, wrote the majority opinion, joined by Hon. Jane Roth.
- 19 616 F.3d at 275.
- 20 Senior Circuit Judge A. Wallace Tashima, visiting from the Ninth Circuit.
- 21 598 F.3d 1022 (8th Cir. 2010).
- 22 *Id.* at 1029.
- 23 *Id.* at 1033 n.9, citing *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975) and *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (upholding grant of summary judgment to employer where plaintiff alleged employer discriminated against him on the basis of his religion by requiring all employees whose duties involved potential exposure to toxic gases to shave any facial hair that prevented them from achieving gastight face seal when wearing a respirator).
- 24 8 U.S. 145, 1878 WL 18416 (1878).
- 25 *Id.* at 167.
- 26 *Id.* at 164.
- 27 *Id.*