



Strathmore University

Law School

**UNDERSTANDING THE PROHIBITION ON WEARING OF HIJABS BY MUSLIM
STUDENTS IN SECONDARY SCHOOLS: A CASE STUDY OF OUR LADY OF
MERCY SECONDARY SCHOOL**

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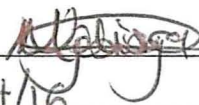
DISSERTATION DECLARATION FORM

I, **THAMBU TIMOTHY MUTAI**, hereby confirm that this dissertation is my original work and has not been submitted for a degree in any other university or any other award.

Signature 
Date 15/04/2016

Thambu Timothy Mutai

This dissertation has been submitted for examination with my approval as a university supervisor.

Signature 
Date 15/4/16

Melissa Muindi

ABSTRACT

This dissertation sought to discuss and analyze the issue of wearing of hijabs by girls in learning institutions as an exercise of their constitutional right and freedom of religion by analyzing the instances, reasons and principles guiding the prohibition on wearing of hijabs in schools and whether they are reasonable and justifiable by law. This would take into account the freedom of religion in Kenya and the limitations to this freedom paying special attention to constitutional provisions, statutes and judicial precedence. Finally, this dissertation sought to provide recommendations on the wearing of hijabs by female Muslim students guided by the law and legal principles.

The project included a study that was carried out on 35 respondents comprising of twenty nine (29) female Muslim students and six (6) representative teachers at Our Lady of Mercy Secondary School in Nairobi, Kenya. Secondary sources of information such as internet resources and books were also used in this project. It was evident that there was a disparity in the views held by female Muslim students and school administrators on the legality of wearing of hijabs by the Muslim students in school. This project recommended that The Ministry of Education formulates guidelines regarding the extent to which religions may be manifested in public learning institutions by students bearing in mind Article 8 of the Constitution that demands equal treatment of all faiths.

LIST OF ABBREVIATIONS

CoK	Constitution of Kenya.
ECHR	European Convention on Human Rights
HC	High Court

LIST OF CASES

Demanche Sharon & 2 Others v Makerere University, Constitutional Appeal No.2 of 2004

Republic v Head Teacher, Kenya High School Ex-parte SMY (a minor suing through her mother and next friend A B) [2012]eKLR

*Seventh Day Adventist Church (East Africa) Limited v Minister for Education and 3 others
Petition 431 of 2012 [2014]eKLR*

CHAPTER 1: INTRODUCTION

1.1 Background of the Study

The freedom of religion or freedom of belief is a principle that supports the freedom and rights of an individual or community to manifest religion or belief in teaching, practice, worship, and observance whether in public or in private. This principle is also generally recognized to include the freedom not to follow any religion or to change religion.¹ Many nations consider the freedom of religion as a basic human right. In countries with a state religion, freedom of religion is considered to mean that the government permits religious practices of other sects besides the state religion.²

Freedom of religion has been used to refer to the tolerance of different theological systems of belief allowing persons to publicly display, advocate for and evangelize their beliefs.³ On the other hand, freedom of worship has been defined as freedom of individual action allowing persons to gather and pray in private and only within worship contexts. Recently, due to various reasons among them secularism, there has been a great shift in emphasis from the freedom of religion to the hyper-restricted freedom of worship.⁴

As a result of this distinction and shift, there has been continued debate and legal discourse world over on the legality of wearing of religious attire such as hijabs in both public areas as well as private institutions such as learning institutions. From the Islamic scarf controversy in France dating back to 1989 to the very recent news reports of women and girls being forced to take off their hijabs to work and in schools, the issue of donning religious attire in certain fora is one that has raised controversy and has led to the examination of legal principles with the aim of finding answers to these questions.⁵

¹ Article 18, Universal Declaration of Human Rights, 10 December 1948.

² Davis, Derek H. "The Evolution of Religious Liberty as a Universal Human Right", University of Mary Hardin-Baylor, April 8, 2007.

³ Michelle Boorstein: Freedom of religion vs. freedom of worship, <http://www.faithstreet.com/onfaith/2010/02/09/whats-the-difference-between-freedom-of-religion-and-freedom-of-worship/2326> on March 4, 2015.

⁴ Michelle Boorstein: Freedom of religion vs. freedom of worship, <http://www.faithstreet.com/onfaith/2010/02/09/whats-the-difference-between-freedom-of-religion-and-freedom-of-worship/2326> on March 4, 2015.

⁵ Nicky Jones, "Beneath the Veil: Muslim Girls and Islamic Headscarves in Secular France" Macquarie Law Journal, 2009

In the Islamic scarf controversy referred to as *l'affaire du voile* (the veil affair), numerous girls were suspended from primary and high schools for wearing hijabs in school. It was generally argued that this contravened the principle of secularism (*laïcité*) in France which motivated the adoption of the 1905 law on separation of church and state in France.⁶ In March 2004, 'the veil law' was passed forbidding the wearing of any ostentatious religious articles, including the Islamic veil. The law does, however, permit discreet signs of faith. The European Court of Human Rights (ECHR) affirmed on 4 December 2008 the legality of the ban.⁷ Civil rights groups, however, have interpreted this ban as an attempt by the government to impose anti-religious views upon its citizens further calling the law a form of segregation and discrimination.

In Russia, the Supreme Court upheld a controversial prohibition of religious headwear in schools in the republic of Mordovia after religious activists raised complaints regarding this prohibition arguing that it violated the Russian Constitution and infringed on the freedom of religion. The court found no legal basis to lift the ban.⁸

Women in the United States of America (U.S.A.) are allowed to wear hijabs in school. It is protected under the constitutional right to freedom of religion. Any school that violates this right can come under a federal lawsuit. However, schools can make certain requirements about a student's hijab. For example, schools that require uniforms can require that a hijab be a specific color. This matter seems settled and laid to rest in the U.S.A.⁹

In Ghana, following news reports of women and girls being forced to take off their hijabs at work and in school, the Minister of Communications, Dr. Edward Omana Boamah, gave the government's position on the issue. He stated that girls must be allowed to wear hijabs, as the right to religion is guaranteed in Article 21(1) (c) of the 1992 Constitution of the Republic of Ghana.¹⁰

⁶ Nicky Jones, "Beneath the Veil: Muslim Girls and Islamic Headscarves in Secular France" Macquarie Law Journal, 2009

⁷ "ECHR Press release on decisions *Dogru v France* and *Kervanci v France*". Cmiskp.echr.coe.int. on February 7, 2015

⁸ The Moscow Times, 'Russian Supreme Court Upholds Ban on Hijabs in Schools.' <http://www.themoscowtimes.com/article/515789.html> on February 23, 2015.

⁹ Cassandra Strand, Are American Muslim girls allowed to wear hijab to school?

<http://www.quora.com/Are-American-Muslim-girls-allowed-to-wear-hijab-to-school>, on February 11, 2015

¹⁰ Article 21(1) (c), Constitution of the Republic of Ghana, 1992.

Finally, in Kenya certain school rules and regulations prohibit the wearing of hijabs by female Muslim students, with some of these schools being church sponsored. This has raised many questions about the freedom of religion in Kenya and the individual's right to manifest such freedom in public. This subject was greatly highlighted in the case of *Republic v Head Teacher, Kenya High School Ex-parte SMY (a minor suing through her mother and next friend A B)*.¹¹ In this case, Kenya High School was being sued for interfering with the rights of Muslim students to wear a hijab as a form of expression and manifestation of their religious right as is provided for under Article 32 of the CoK. While holding for the respondents, Kenya High School, the court among other things, first, ruled that while it recognized that every person has a constitutional right to the freedom of religion and the right to manifest his religious beliefs through worship and practicing what is required by his religious faith, the said rights are not absolute and can be qualified under Article 24.¹² Therefore, in the case of a learning institution, these rights may be limited by rules and regulations made by various organs of management to ensure order and smooth running of the institutions.

This decision raised much controversy with conflicting views from religious leaders and legal experts. It is against this backdrop that this research study is being carried out.

1.2 Statement of the Problem

The freedom of religion is protected and guaranteed to all Kenyans both under the CoK 2010 and under international law.¹³ This freedom protects the right of the person either individually or in a group with others to manifest any religion or belief.¹⁴ It also protects them against discrimination on the basis of such religion or belief by any institution or facility.¹⁵ The wearing of hijabs by girls and women in high schools may be reasonably considered as an exercise of this right to individually and in public manifest their Islamic religion.

¹¹ *Republic v Head Teacher, Kenya High School Ex-parte SMY (a minor suing through her mother and next friend A B)* [2012]eKLR

¹² Cornelius WekesaLupao: Why court declined to grant girl's wish to wear hijab in school, <http://kenyalaw.org/newsletter/20120924.html> on 5th March 2015.

¹³ Article 18, Universal Declaration of Human Rights, 10 December 1948.

¹⁴ Article 32(2) of the CoK, 2010.

¹⁵ Article 32(3) of the CoK, 2010.

However, this right and freedom is not absolute and may be limited by law where such limitation is reasonable and justifiable in a democratic society.¹⁶ Various principles such as human dignity and freedom should be considered when limiting these freedoms. Furthermore, relevant factors must also be taken into account such as the purpose, nature and extent of the limitation.¹⁷

The problem then is whether in the context of the Kenyan high school, the prohibition on the wearing of hijabs is reasonable, lawful and justifiable falling within the constitutional provisions on the limitation of rights and fundamental freedoms.

1.3.1 General Objective

The general objective of this study is to discuss the and analyze the issue of wearing of hijabs by girls in high schools as an exercise of their constitutional right and freedom of religion.

1.3.2 Specific Objectives

The specific objectives of this study are:

1. To analyze the instances, reasons and principles guiding the prohibition on wearing of hijabs in certain high schools and whether they are reasonable and justifiable by law.
2. To recommend solutions to students and high schools on the wearing of hijabs guided by the law and by legal principles such as freedom of religion.

1.4 Research Questions

1. Is the wearing of hijab by girls in high school a valid and justifiable exercise of their freedom of religion?
2. Is the prohibition on the wearing of hijabs in certain high schools a reasonable, justifiable and lawful limitation to the right and freedom of religion?

1.5 Hypothesis

The limitation on wearing of hijabs imposed by learning institutions, that is, high schools through prohibitions and rules is unconstitutional and violates the legislation and principles of freedom of religion.

¹⁶ Article 24(1), CoK, 2010.

¹⁷ Article 24(1) (b) and (c), CoK, 2010.

1.6 Justification of the Study

There is the need for guidance on the constitutionality and legality of wearing hijabs in high schools and clarification on whether this practice and its manifestation are protected under the freedom of religion. This is because many girls and women in these high schools may feel discriminated against and feel that their constitutional rights are curtailed. This may lead to contempt and ill feeling among students from different faiths. Furthermore, high schools also need to know the view of the law on such matters so as to make school rules and policies that are in line with the law of the land with regard to school attire. This research project is, therefore, essential to provide guidance and elaborate on the law to both girls and women in these schools as well as the policy and rule makers of the schools.

1.7 Scope and Limitations of the Study

The research will be limited to a single high school (secondary learning institutions) in Nairobi, Kenya which admits students professing different faiths among them female Muslim students. The researcher could not cover all secondary schools in Kenya because it would be expensive.

1.8 Chapter Summary

CHAPTER ONE: INTRODUCTION

This is the introductory chapter and it includes the background to the study, statement of the problem, research objectives, and justification of the study and limitations of the research.

CHAPTER TWO: THEORETICAL FRAMEWORK AND RESEARCH METHODOLOGY

This chapter will explain the theories upon which this research is grounded. It will also describe how the research will be carried out.

CHAPTER THREE: THE HIJAB AND FREEDOM OF RELIGION IN KENYA

Chapter Three will look into the freedom of religion in Kenya and its limitations. This freedom will be examined with regards to learning institutions and the wearing of hijabs.

CHAPTER FOUR: RESEARCH FINDINGS: OUR LADY OF MERCY SECONDARY SCHOOL

This chapter will present and analyze the findings of a study carried out on a total of 35 respondents comprising of twenty nine (29) female Muslim students and six (6) representative teachers at Our Lady of Mercy Secondary School in Nairobi, Kenya.

CHAPTER FIVE: DISCUSSION ON RESEARCH FINDINGS

This chapter will include a discussion on the findings of the study. The findings will be examined in the context of freedom of religion in Kenya paying special attention to constitutional provisions, statutes and judicial precedence.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

This will have the conclusion of the study. It will also include recommendations, which shall be for further research and from this study.

CHAPTER 2: THEORETICAL FRAMEWORK AND RESEARCH METHODOLOGY

2.1 Theoretical Framework

This study will be based on human rights theory. This theory posits that every person has rights inherent to all human beings regardless of their nationality, sex, national or ethnic origin, colour, religion, or any other status.¹⁸ Every human being is equally entitled to their human rights without discrimination. These rights are interdependent and indivisible. The human rights theory draws heavily from natural law and natural law thinkers.

Human rights are a product of a philosophical debate that has focused on a search for moral standards of political organization and behaviour that is independent of the contemporary society.¹⁹ This theory was developed by classical Greek philosophers, such as Aristotle, through their notions of 'natural right'. Moreover, Thomas Aquinas theorized that what was right was naturally right and could be ascertained by human beings through 'right reason.'²⁰ This was expounded upon by Hugo Grotius who affirmed that the law of nature was unalterable, 'not even by God.'²¹ Human rights thus have been argued to fall within these natural truths and rights that are unalterable.

One of the approaches to human rights theory holds that human rights exist in order to protect the basic dignity of human life and invokes the notion of striving for the dignity that makes human life worth living. This is affirmed in the United Nations Declaration on Human Rights and the writings of Jack Donnelly.²² However, the inherent weakness of this approach lies in trying to identify the nature of this dignity. Dignity is a very elastic concept and if human rights are meant to be universal standards then the inherent dignity that is supposed to be protected

¹⁸United Nations Human Rights, Office of the High Commissioner: What are human rights?
<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

¹⁹ Andrew Heard, HUMAN RIGHTS: CHIMERAS IN SHEEP'S CLOTHING, 1997
<http://www.sfu.ca/~aheard/intro.html> on 5th March 2015.

²⁰ Andrew Heard, HUMAN RIGHTS: CHIMERAS IN SHEEP'S CLOTHING, 1997
<http://www.sfu.ca/~aheard/intro.html> on 5th March 2015.

²¹ Hugo Grotius, *The Law of War and Peace*, 1625, p.22

²² Jack Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press, 1989, p.17.

should be common to all. Without this commonality, dignity cannot suffice as the ultimate goal of human rights.²³

Another approach gives a basis for human rights on the needs of subsistence.²⁴ Human rights may be limited to providing all humans with the needs for their physical subsistence. Nevertheless, this subsistence would involve a certain degree of comfort because human subsistence also consists of being able to function.²⁵ Critics of this approach say there is still some concern with variations that will result from different societies' views of the specific ways in which needs should be satisfied thus these rights would not be universal. Consequently human rights must be examined more closely, because they are at once so important and yet so vulnerable to probing questions about their origin, foundation, substance, and operation.²⁶

The will theory on the other hand, attempts to establish the philosophical validity of human rights upon a single human attribute: the capacity for freedom. Human rights are viewed as originating in a single, constitutive right, or alternatively, a highly limited set of purportedly fundamental attributes. H.L.A. Hart, for example, inferentially argues that all rights are reducible to a single, fundamental right. He refers to this as 'equal right of all men to be free.'²⁷

The moral philosopher Alan Gewirth²⁸ further argues that the justification of our claims to the possession of basic human rights is grounded in what he presents as the distinguishing characteristic of human beings generally: the capacity for rationally purposive agency and that freedom and well-being are the necessary means to acting in a rationally purposive manner. Gewirth echoes Dworkin's concept of rights as trumps. He states that a 'right is absolute when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions.'²⁹

²³ Andrew Heard, HUMAN RIGHTS: CHIMERAS IN SHEEP'S CLOTHING, 1997
<http://www.sfu.ca/~aheard/intro.html> on 5th March 2015.

²⁴ Johan Galtung, Human Rights in Another Key, A recent needs-based approach to human rights is found in: Cambridge, Mass: Polity Press, 1994.

²⁵ Johan Galtung, Human Rights in Another Key, A recent needs-based approach to human rights is found in: Cambridge, Mass: Polity Press, 1994.

²⁶ Andrew Heard, HUMAN RIGHTS: CHIMERAS IN SHEEP'S CLOTHING, 1997
<http://www.sfu.ca/~aheard/intro.html> on 5th March 2015.

²⁷ H.L.A Hart, 'Are there Any Natural Rights?' <http://www.iep.utm.edu/hum-rts/> on 7th March 2015

²⁸ Gewirth Alan, 'Reason and Morality', 1978, and 'Human Rights: Essays on Justification and Applications', 1982.

²⁹ Gewirth Alan, 'Human Rights: Essays on Justification and Applications' (1982)

The freedom of religion is widely accepted as a human right. James Madison, a great contributor in the Federalist papers which helped in the forming of the U.S Constitution termed the freedom of religion as an unalienable right. Building on natural law and human rights theory he affirmed that there is a duty human beings owe to the Creator that can only be guided by reason and conviction.³⁰ His reason as to why this right is unalienable was because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men.³¹ Furthermore, on the freedom of religion he argued that what is here a right towards men, is a duty towards the Creator. He concluded by maintaining that in matters of religion, no man's right is abridged by the institution of civil society and that religion is wholly exempt from its cognizance.³²

Human rights are typically understood to be of equal value and each right is conceived to be as important as every other. However, a conflict between rights can and does occur and treating all human rights as of equal importance prohibits any attempts to address or resolve such conflict when it arises. It can only be addressed if one allows for the possibility that some human rights are more fundamental than others and that the morally correct action for the government to take would be to prioritize these rights. This reality is what gives importance to the limitation clause found in the Bill of Rights of the CoK 2010.

Positive laws have been put in place recognizing this freedom. In Kenya, the supreme law, the CoK 2010 provides for this freedom and is backed up by international law.³³ This freedom protects the right of the person either individually or in a group with others to manifest any religion or belief³⁴ and protects them against discrimination on the basis of such religion or belief by any institution or facility.³⁵ However, where natural law and human rights thinkers see this right as unalienable, positive law does not consider this freedom absolute and provides for its limitation in as far as it is reasonable and justifiable in a democratic society.³⁶ Various principles such as human dignity and freedom should be considered when limiting these freedoms.

³⁰ James Madison, Memorial and Remonstrance against Religious Assessments, 1785, http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html on 5th March 2015.

³¹ James Madison, Memorial and Remonstrance against Religious Assessments, 1785.

³² James Madison, Memorial and Remonstrance against Religious Assessments, 1785.

³³ Article 18, Universal Declaration of Human Rights, 10 December 1948.

³⁴ Article 32(2), CoK, 2010.

³⁵ Article 32(3), CoK, 2010.

³⁶ Article 24(1), CoK, 2010.

Furthermore, relevant factors must also be taken into account such as the purpose, nature and extent of the limitation.³⁷

³⁷ Article 24(1) (b) and (c), CoK, 2010.

2.2 Research Methodology

The research made use of both primary and secondary sources of data.

2.2.1 Secondary Sources

This study will in part include the use of qualitative research that will entail a comprehensive desk-based analysis of secondary sources of information. The major source of secondary data included electronic journals and scholarly articles on the internet on the law, freedom of religion and the application of these with regards to the wearing of hijabs in secondary learning institutions. Another key secondary source was any published books, dissertations and theses on the subject of hijabs in high schools and its relation to the law and freedom of religion. Further, the published school rules and regulations on uniforms and permitted school attire were also used as an important data source to provide information on whether or not schools permit the wearing of hijabs and for what reasons.

2.2.2 Primary Sources

Primary sources were used to obtain first-hand information of the research subject and to gain valuable insight on the general practice and rules that guide the wearing of hijabs in the secondary school. The method used in the study was the descriptive survey design which seeks to obtain information that describes existing phenomena. Descriptive survey design is ideal for gathering information regarding people's behaviour, feelings and opinions about educational issues.³⁸ It is argued that the survey method is widely used to obtain data useful in evaluating present practices and providing basis for decisions.³⁹ The descriptive survey method was suitable for this study because this study sought to find out the present practices and rules that guide the wearing of hijabs in secondary school in Nairobi as well as the opinions of the parties concerned.

2.2.3 Study Location

The study area for this research could be any area under the jurisdiction of Kenyan law and the CoK. However this study is focused and limited to Our Lady of Mercy Secondary School, Nairobi, Kenya. Nairobi was selected as the location because a secondary school in Nairobi provides a setting which comprises of students from different cultures, communities and

³⁸Kombo, D.K. & Tromp, D.L.A., *Proposal and Thesis Writing*. Nairobi: Paulines Publications Africa, 2006

³⁹Engelhart, M.D., *Methods in Educational Research*. USA: Rand and McNally Co Ltd., 1972

religions. In this case, the secondary school selected admits students from various faiths among them, Muslim girls.

2.2.4 Target Population

The study targeted female Muslim students who had been admitted to Our Lady of Mercy Secondary School. To avoid any biases that may have been caused as a result of sampling or any sampling strategies, all female Muslim students at the secondary school were involved in the study so as to provide clear and unaltered findings for the case study.

In addition, teachers were included in the study as they spend a lot of time with students and would give insight on the research subject. For the selection of teachers, purposive sampling was used to pick a sample with the required characteristics most beneficial to the study. Purposive sampling enables the researcher to select information rich cases for in-depth study. Such cases enable the researcher to learn a great deal about issues of central importance to the purpose of the research which in this case would be the rules and policies guiding the wearing of hijabs in the secondary school.⁴⁰

2.2.5 Research Instruments

To address the research objectives and research questions, data was collected by use of questionnaires and discussions.

Data from the teachers and students was collected using questionnaires. Questionnaires were suitable to collect data from these groups because questionnaires have the ability to collect large amounts of information in a reasonably quick space of time.⁴¹ They are standardized; therefore everyone gets the same questions. These reasons were considered appropriate given the number of students and teachers involved in the study.

2.2.6 Pilot Study

The research instruments were piloted to establish their validity and reliability and some changes were effected. These instruments were administered to five secondary school students and three teachers.

⁴⁰Patton, M.Q, *Qualitative Evaluation and Research Methods. Second Edition.* Newbury Park: Sage Publications, 1990

⁴¹Orodho, J.A, *Elements of Educational and Social Sciences Research Method.* Nairobi: Masola Publishers. 2005

2.2.7 Data Analysis

The information collected was then be analyzed in the context of the Kenyan law, the CoK 2010 and the principles and legislation on freedom of religion.

The data is was analyzed using both quantitative and qualitative techniques. Questionnaires werechecked for completeness and those that are less than 50% complete were to be disregarded.

Quantitative data from questionnaires was analyzed using descriptive statistics. Quantitative data was analyzed descriptively since this allows for data to be presented in an organised and meaningful fashion, and data can be simplified so that the general trend can be seen.⁴² SPSS was of great assistance in this analysis.

Qualitative data was obtained from reading responses to open-ended questions from the questionnaires. The qualitative data collected was organized in a manner that facilitated analysis. Data from the interviews wascarefully read paying attention to comments, ideas and concerns from the participants. Qualitative data was arranged into themes and discussed in narrative form.

Interviewees and respondents have been granted anonymity throughout the research and findings so as not to prejudice them in any way.

⁴²Orodho,J.A, *Elements of Educational and Social Sciences Research Method*. 2005

CHAPTER 3: THE HIJAB AND FREEDOM OF RELIGION IN KENYA

3.1 Hijab: Meaning and Relevance

The hijab may be defined as “any type of head-covering of Muslim women worn for religious reasons”⁴³ In a broader sense hijab may be defined as the Islamic concept of modesty and privacy, usually expressed by women's clothing.⁴⁴

It is clear from the Qur'an and the Hadiths that hijab is a religious obligation, which a woman has to undertake. Therefore, when a Muslim woman wears hijab she is obeying and submitting to Allah. Verses of the holy Quran guide ‘believing women’ not to expose their adornment except to their husbands, their fathers and other close relatives and persons provided for.⁴⁵ Moreover, a woman who wears hijab liberates herself from the vain and selfish desire to show off her beauty and to compete with other women around her.⁴⁶

Another school of thought holds that although firmly rooted in Islamic tradition, hijab is not strictly defined in the Muslim holy book, the Quran and thus not all Muslim women wear them. Further, it holds that hijab is often a personal and cultural concept, not a religious one whose expression varies within the Muslim world and beyond.⁴⁷ While some women claim that their freedom and emancipation come from being a *muhajjabeh*, or veiled woman, numerous others find wearing the veil to be onerous and unnecessary.⁴⁸

3.2 Freedom of Religion in Kenya

3.2.1 Constitutional provisions

Article 8 of the CoK 2010 declares that there shall be no state religion. The freedom of religion is protected and guaranteed to all Kenyans both under the CoK 2010 and under international law.⁴⁹ This freedom protects the right of the person either individually or in a group with others

⁴³ Saied R. Ameli and ArzuMerali, *Hijab, Meaning, Identity, Otherization and Politics: British Muslim Women*, Great Britain: Islamic Human Rights Commission, 2006, 7.

⁴⁴ Caryl-Sue, *Hijab: Veiled in Controversy*, National Geographic Society, <http://education.nationalgeographic.org/media/hijab/> on 12December 2015.

⁴⁵ The Holy Qur'an, Chapter 24, verses 30 and 31; Chapter 33, verses 32 and 33; and Chapter 33, verses 53 and 54.

⁴⁶ Arab News, *Why hijab is important in Islam*, 23 November 2012 <http://www.arabnews.com/islam-perspective/why-hijab-important-islam> on 12 December 2015.

⁴⁷ Caryl-Sue, *Hijab: Veiled in Controversy*, National Geographic Society, <http://education.nationalgeographic.org/media/hijab/> on 12December 2015.

⁴⁸ Shirazi, F *Velvet jhbab: Muslim women's quiet resistance to Islamic fundamentalism*. Gainesville, FL: University Press of Florida, 2009, 189

⁴⁹ Article 18, Universal Declaration of Human Rights, 10 December 1948.

to manifest any religion or belief.⁵⁰ It also protects them against discrimination on the basis of such religion or belief by any institution or facility.⁵¹ The wearing of hijabs by girls and women in high schools may be reasonably considered as an exercise of this right to individually and in public manifest their Islamic religion.

These articles along with the relevant provisions mark a new era of religious freedom in Kenya. They create an unprecedented freedom space for worshippers to exercise to the maximum their fundamental legal right to freedom of religion and the right to manifest one's religion without let or hindrance.

3.2.2 Meaning and significance of religion, conscience, thought, belief and opinion.

The court in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education and others* held that religion is a matter of faith with individuals or communities and that a religion might prescribe rituals and modes of worship which are regarded as integral parts of religion and might extend even to matters of food and dress.⁵² Furthermore, every person has the right not only to entertain such religious belief and ideas as may be approved by his judgment or conscience but also to exhibit his belief and ideas by such overt acts by his religion.⁵³

3.2.3 Free exercise of religion

It is internationally understood that freedom of religion includes two closely related but nevertheless clearly distinguishable entitlements: freedom to adopt a religion or belief of one's choice and freedom to manifest that religion or belief in worship, observance, practice and teaching. To "hold religious belief" has been said to relate to the inner act of believing and "to manifest" has been said to relate to the external acts of giving expression of one's faith.⁵⁴ The entitlement to hold a belief is absolute in nature and cannot be subjected to limitations or suspensions.⁵⁵ The HC acknowledged that neither Articles 8, 32 nor 260 of the Constitution define religion and the enjoyment of that right. The Court went on to adopt the Human Rights

⁵⁰ Article 32(2), CoK, 2010.

⁵¹ Article 32(3), CoK, 2010.

⁵² Petition 431 of 2012 [2014]eKLR

⁵³ Dr, Pandey J.N., *the Constitution of India*, Central Law Agency, 2014, 197.

⁵⁴ Van Der Vyver J. D., *Limitations of Freedom of Religion or belief: International Law Perspectives* Emory International Law Review, Vol 19, 449-538.

⁵⁵ Petition 431 of 2012 [2014]eKLR

Review 2012 analysis of Article 9 of the ECHR.⁵⁶ Article 9 (1) is word for word the same as Article 32 (2) of the CoK while Article 9 (2) is similar to Article 24(1) of the CoK.⁵⁷

In this adopted analysis it was determined that the right to hold, is distinct from the right to manifest, religious and other beliefs and is an absolute right. However, the right to manifest a belief is a qualified right and its limitation is permissible if it is prescribed by law and can be justified as necessary in a democratic society in the interests of public safety.⁵⁸

3.2.4 Limitations on the freedom of religion

Limitations on the right to freedom of religion are usually in relation to the manifestation of a religion or belief. Like many other fundamental rights in Kenya, the freedom of religion is not an absolute right and may be limited by law where such limitation is reasonable and justifiable in a democratic society.⁵⁹ Various principles such as human dignity and freedom should be considered when limiting these freedoms. Furthermore, relevant factors must also be taken into account which include the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.⁶⁰

It is the reality of our lives that the holding and manifestation of beliefs may be intrinsically bound up with each other. When questions of manifestation arise, a belief must satisfy some modest, objective minimum requirements. For example the belief must be consistent with basic standards of human dignity or integrity, it must possess an adequate degree of seriousness and importance and it must be a belief on a fundamental problem.⁶¹ Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the law.⁶²

⁵⁶ Petition 431 of 2012 [2014]eKLR

⁵⁷ Article 9, ECHR. 3 September 1953.

⁵⁸ Muema M. M. The scope of the right to freedom of Religion in Kenya Unpublished LL.B Dissertation, University of Nairobi., June 2014

⁵⁹ Article 24(1), CoK, 2010.

⁶⁰ Article 24(1) (b) and (c), CoK, 2010.

⁶¹ Petition 431 of 2012 [2014]eKLR

⁶² Petition 431 of 2012 [2014]eKLR

3.3 Freedom of religion in learning institutions

Kenyan Courts have adopted the position of the Ugandan Supreme Court case of *Demanche Sharon & 2 Others v Makerere University*, where the court held that the freedom of religion in learning institutions is guaranteed but must be enjoyed alongside secular goals for which the educational institutions are established.⁶³

In the case of *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, the Seventh Day Church took issue with public school programmes among them Alliance High School that had Friday evening and Saturday morning classes for its students.⁶⁴ The Church, after proving that laws regarding the Sabbath were a core part of their religious teachings, tenets and mandatory observances, asked the court to make an order exempting Adventist students from any kind of work in any school from Friday sunset to Saturday sunset so as to enable them to observe the Sabbath day in accordance with their beliefs.⁶⁵ Alliance High School on the other hand proved the necessity of the classes in light of the fact that tuition over school holidays has been banned. Furthermore, the school had made reasonable accommodations for the SDA students by allowing them to observe Sabbath from around midday every Saturday. The court ruled in favour of the school, stating that the failure to accommodate the SDA students' religious manifestations by means of exemption from Saturday classes, examinations and cleaning, is acceptable as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality. Consideration was given to the fact that schools are likely to face hardships in trying to accomplish their curriculum within the set school days while trying to accommodate all the religious groupings that generally exist in public schools.⁶⁶

The court agreed that where students had voluntarily accepted to be admitted to a public secondary school, they submit to rules which may make their freedom to manifest religion subject to restriction as to the place and manner in order to ensure the harmonious co-existence of students of different faiths.⁶⁷ Moreover, the right to education under Article 34(1) (f) and 53(1) (b) of the CoK does not in any way mean the right to attend certain public schools or the at

⁶³*Demanche Sharon & 2 Others v Makerere University*, Constitutional Appeal No.2 of 2004

⁶⁴ Petition 431 of 2012 [2014]eKLR

⁶⁵ Petition 431 of 2012 [2014]eKLR

⁶⁶ Muema M. M. The scope of the right to freedom of Religion in Kenya, Unpublished LL.B Dissertation, University of Nairobi, June 2014

⁶⁷ Petition 431 of 2012 [2014]eKLR

the students' own terms as that would be tantamount to affecting the autonomy and academic freedom of the schools.⁶⁸

The leading authority on this issue of wearing hijabs in public high schools is *Republic v Head Teacher, Kenya High School Ex parte SMY (a minor suing through her mother and next friend A B)*.⁶⁹ In this case the applicant, SMY (a minor) sought on her own behalf and on behalf of other Muslim students at the Kenya High School an order compelling the Board of Governors as well as the Head teacher to allow her as well as other Muslim students to wear the hijab at the school as well as further orders prohibiting the respondents from interfering with her right to wear a hijab as a form of expression and manifestation of her religious right as is provided for under section 32 of the CoK.⁷⁰ This was to be done in compliance to a ministerial directive in a letter dated 14th July 2009 requiring them to allow their Muslim students to wear a hijab while in school.

On the other hand, the respondents opposed the application arguing among other grounds, that there was need for all students to wear similar uniform which serves a critical role of creating harmony, cohesion and unity among students.⁷¹ Section 11 of the Education Act gives powers to public schools to make rules and regulations for the proper administration, discipline and functioning of the school community.⁷² The rules, which cover the standard dress code, once made apply to all students across the board and have been unreservedly accepted and issued to parents prior to admission of the students who wish to be enrolled in the school. The respondents further expounded the position that the freedom of religion enshrined in our constitution and other international instruments to which Kenya subscribes is not absolute. That in the peculiar circumstance of this case and quite apart from the fact that the applicant had freely and knowingly consented to its limitation, it is necessary, legitimate and proportionate to limit the said freedom for the sake of equality, equity, harmony, cohesion, discipline, tolerance,

⁶⁸ Muema M. M. The scope of the right to freedom of Religion in Kenya, Unpublished LL.B Dissertation, University of Nairobi, June 2014

⁶⁹ *Republic v Head Teacher, Kenya High School Ex-parte SMY (a minor suing through her mother and next friend A B)* [2012]eKLR

⁷⁰ [2012]eKLR

⁷¹ [2012]eKLR

⁷² Section 11, Education Act Cap 211 Laws of Kenya.

inclusivity and the overriding educational need for multi religious, multi-cultural, and multi-racial student community integrating all social classes.⁷³

The respondents also claimed that they had properly exercised their statutory discretion to come up with an acceptable and reasonable dress code for students and the court ought not to interfere with such informed and objective exercise use of discretion⁷⁴. They also argued that the standard dress code identifies and associates students to a particular school and helps to maintain uniformity, order and discipline in schools and added that the school had never denied any of its students the right to education and had never expelled or prevented the Muslim students from attending school based on religious considerations.⁷⁵ Their case was that they had allowed the applicant and other students the freedom to manifest and practice their religion through worship and observance of other religious practices by deliberately putting in place facilities to make it possible for the Muslim students to enjoy their religious freedom, for example equipping the school's washrooms with water bottles for the convenience of the Muslim faithful and setting aside of prayer rooms in each dormitory.⁷⁶ In addition, Islamic Religious Education is taught in the school and examined as part of the education curriculum and an Islamic preacher is allowed to the school once a week to attend to the applicant's spiritual needs.⁷⁷

The court ruled for the respondents and stated that the right to manifest religious beliefs under Article 32 is not absolute and can be qualified under Article 24 of the CoK. In a scenario such as this where the matter involved a learning institution, these rights may be limited by rules and regulations made by various organs of management to ensure order and smooth running of the institutions.⁷⁸ The court also emphasized the importance of uniformity in learning institutions observing that school uniforms assist in the identification of students and

⁷³ Republic v Head Teacher, Kenya High School Ex-parte SMY (a minor suing through her mother and next friend A B) [2012]eKLR

⁷⁴ [2012]eKLR

⁷⁵ [2012]eKLR

⁷⁶ [2012]eKLR

⁷⁷ [2012]eKLR

⁷⁸ Muema M. M. The scope of the right to freedom of Religion in Kenya, Unpublished LL.B Dissertation, University of Nairobi, June 2014

gives them a sense of belonging to one community of students and promotes discipline, unity and harmonious co-existence among students.⁷⁹

⁷⁹ Republic v Head Teacher, Kenya High School Ex-parte SMY (a minor suing through her mother and next friend A B) [2012]eKLR

CHAPTER 4: RESEARCH FINDINGS: OUR LADY OF MERCY SECONDARY SCHOOL

4.1 Introduction

This chapter presents and analyses the findings of a study that were carried out on a total of 35 respondents, twenty nine (29) female Muslim students and six (6) representative teachers at Our Lady of Mercy Secondary School in Nairobi, Kenya. The response rate was good with all of the respondents completing their respective questionnaires.

4.2 Demographic Data

This section of the questionnaire required the students to fill in their age, gender and their home province from which they come. The results of this are summarized in Table 1.

		Number of respondents	Percent
Age in years	14	1	3.5
	15	7	24.1
	16	10	34.5
	17	5	17.2
	18	6	20.7
Gender	Female	29	100
Home Province	North Eastern	11	37.9
	Nairobi	10	34.5
	Coast	3	10.3
	Rift Valley	2	6.9
	Eastern	2	6.9
	Central	1	3.5

Table 1: Demographic data of the student respondents.

The average age of the female Muslim students captured in the questionnaire was 16.3 with a standard deviation of 1.1618.

As for the sample teacher respondents they were required to fill in their age, gender and home province as well. The results of this are summarized in Table 2.

		Number of respondents	Percent
Age in years	27	1	16.7
	33	2	33.3
	36	1	16.7
	37	1	16.7
	41	1	16.7
Gender	Female	3	50
	Male	3	50
Home Province	Nairobi	2	33.3
	Rift Valley	2	33.3
	Eastern	1	16.7
	Central	1	16.7

Table 2: Demographic data of the teacher respondents.

The average age of the teachers captured in the questionnaire was 34.5 with a standard deviation of 4.72229.

4.3 Students' Section

This section focuses with the responses obtained from the student respondents. Therefore the respondents under this Section are the twenty nine (29) students who completed the questionnaires.

4.3.1Hijab: Right exercise of freedom of religion

This section of the questionnaire required respondents to give their opinions on whether or not the wearing of the hijab in school is a right exercise of the freedom of religion.96.55% of the students felt that wearing of the hijab in school is a right exercise of their freedom while 3.45% were of the view that this did not constitute a right exercise of the freedom of religion. The responses of the student respondents are illustrated inTable 3.

Responses	Number of respondents	Percent
Yes	28	96.6
No	1	3.4
Total	29	100.0

Table 3. Respondents' responses on whether or not the wearing of hijabs in school is a right exercise of the freedom of religion.

4.3.2Hijab: Religious obligation v. Personal Choice

This Section required the respondents to answer whether the wearing of the hijab is a religious obligation for all female Muslims or a personal choice based on one's faith and culture. 86.2% of the students were of the view that wearing the hijab is a religious obligation for all Muslim women while 13.8% felt that it was a personal choice. The respondents' views are illustrated in Table 4.

Responses	Number of respondents	Percent
Religious Obligation	25	86.2
Personal Choice	4	13.8
Total	29	100.0

Table 4. Respondents' responses on whether wearing the hijab is a religious obligation or a personal choice.

4.3.3 Permission to wear hijabs in school

In this section, the respondents were required to answer whether or not the wearing of hijabs by female Muslim students was permitted in school. All twenty nine respondents, 100% answered that the wearing of hijabs was prohibited in the school premises.

4.3.4Reasons for the prohibition on wearing hijabs in school

The respondents were asked to give the reasons given as to why the wearing of hijabs was not allowed in the school. 34.48% of the students felt that hijabs were prohibited by the school so as to ensure equality among all students through a standard school uniform. 27.59% of the students said the prohibition was merely provided for in the school uniform regulations. Another 27.59% felt that hijabs were prohibited since the school was Catholic while 10.34% of the students were of the view that since they already knew the school rules while joining the school, they had accepted the prohibition and should thus adhere to the rules. These responses are summarized in Figure 1.

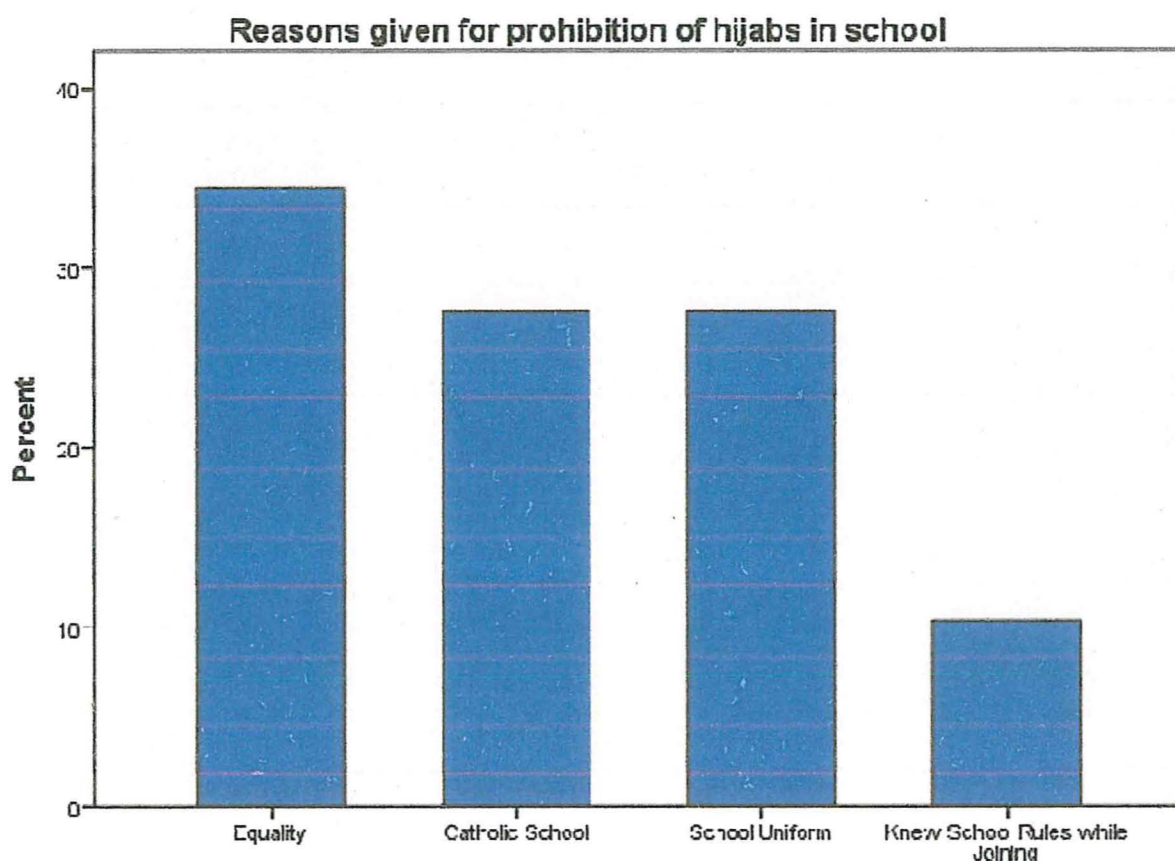


Figure 1. Respondents' responses on the reasons given for the prohibition on wearing hijabs in school.

4.3.5 Role of school uniform regulations in ensuring equality and uniformity

This section of the questionnaire required the respondents to answer whether or not they thought the current school uniform regulations ensure uniformity and equality among the students. 86.2% of the students felt the school uniform regulations did not ensure uniformity and equality while 13.8% felt that it did. The responses by the respondents are illustrated in Table 5.

Responses	Number of respondents	Percent
Yes	4	13.8
No	25	86.2
Total	29	100.0

Table 5. Respondents' responses on whether or not the school uniform regulations ensure uniformity and equality among students.

4.3.6 Possible effects of permitting hijabs on school uniform regulations

This section of the questionnaire required respondents to say whether or not they thought an allowance given for the wearing of hijabs in school would lead to all kinds of clothing being worn by different students and thus affecting uniformity and equality in the school. 79.3% of the students felt that allowing hijabs would not lead to all kinds of clothes being worn while 20.7% felt that it would. The results of this section are illustrated in Table 6.

Responses	Number of respondents	Percent
Yes	6	20.7
No	23	79.3
Total	29	100.0

Table 6. Respondents' responses on whether or not permitting the wearing of hijabs would lead to other students wearing all kinds of different clothing.

4.3.7 Desire by female Muslim students to wear hijabs

This Section required respondents to answer whether or not the female Muslim students communicated their desire to be permitted to wear hijabs in school. All twenty nine respondents, 100%, said that the students had expressed their desire to wear hijabs in school.

4.3.8 Reasons behind the desire by female Muslim students to wear hijabs

The respondents were required to give the reasons for which they had expressed their desire to the school to be permitted to wear hijabs in school. 34.5% of the students wanted to wear hijabs since it was a religious obligation. 24.1% wanted to wear hijabs out of respect for their religion with 17.2% stating the need to preserve their auras as their reason for wanting wearing hijabs. A further 10.3% said the presence of male teachers necessitated the wearing of hijabs while 13.8% of the students gave other reasons which include: equality with their Christian counterparts who were allowed to wear rosaries; the permission of hijabs by other schools, increased comfort which would translate to better performance and that wearing hijabs made it easier to pray. The responses are summarized in Figure 2.

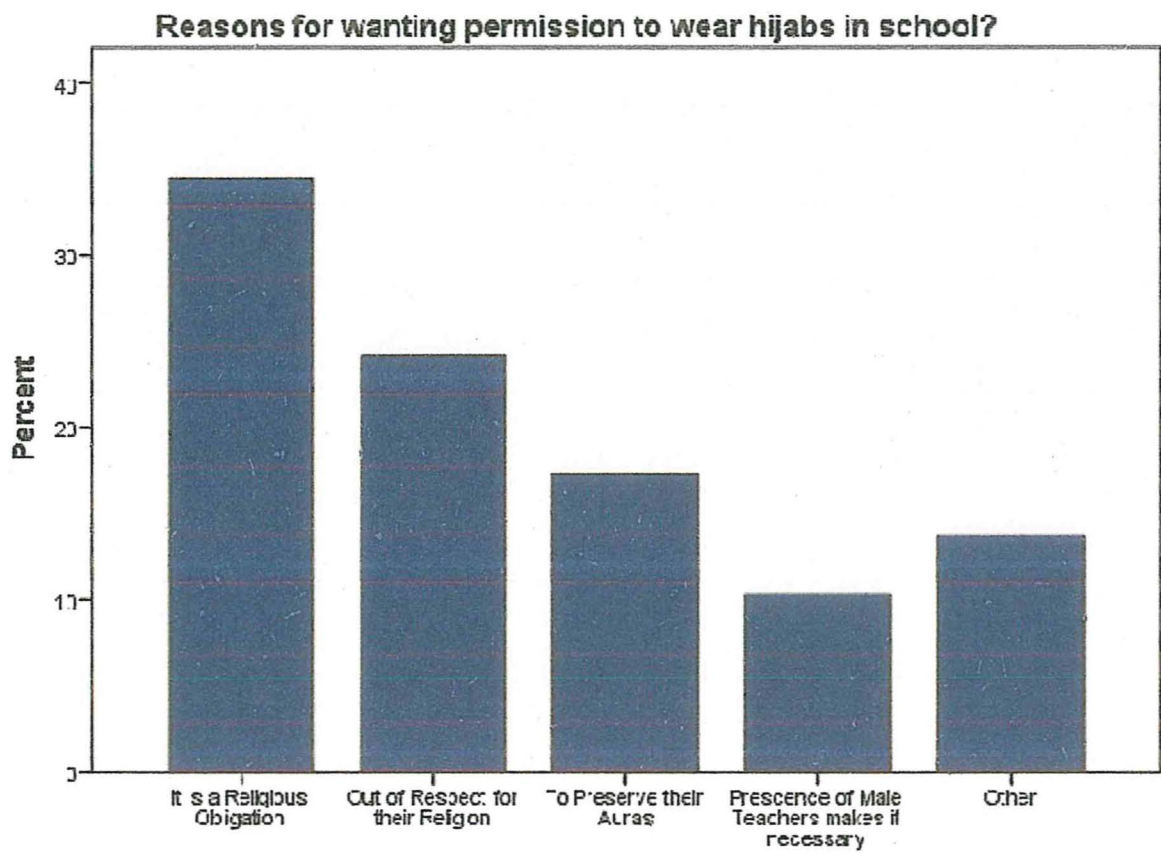


Figure 2. Respondents' responses on their reasons for wanting to be allowed to wear hijabs in school.

4.4 Teachers' Section

4.4.1 Hijab: Right exercise of freedom of religion

This section of the questionnaire required respondents to give their opinions on whether or not the wearing of the hijab in school is a right exercise of the freedom of religion. The responses of the teacher respondents are illustrated in the pie chart below. 66.7% of the teachers felt that the wearing of hijabs in school was not a right exercise of the freedom of religion while 33.3% were of the view that it was. The responses of the respondents are summarized in table 7.

Responses	Number of respondents	Percent
Yes	2	33.3
No	4	66.7
Total	6	100.0

Table 7. Respondents' responses on whether or not the wearing of hijabs in school is a right exercise of the freedom of religion

4.4.2 Hijab: Religious obligation v. Personal Choice

This Section required the respondents to answer whether they thought the wearing of the hijab by female Muslims is a religious obligation or a personal choice based on one's faith and culture. 66.7% of the teachers responded that the wearing of hijabs by female Muslim students was a matter of personal choice while 33.3% were of the view that it was a religious obligation. The responses of the respondents are summarized in Table 8.

Responses	Number of respondents	Percent
Religious Obligation	2	33.3
Personal Choice	4	66.7
Total	6	100.0

Table 8. Respondents' responses on whether wearing the hijab is a religious obligation or a personal choice.

4.4.3 Role of school uniform regulations in ensuring equality and uniformity

This section of the questionnaire required the respondents to answer whether or not they thought the current school uniform regulations ensure uniformity and equality among the students. All the six teacher respondents, 100%, were of the view that school uniform did ensure equality.

4.4.4 Possible effects of permitting hijabs on school uniform regulations

This section of the questionnaire required respondents to say whether or not they thought an allowance given for the wearing of hijabs in school would lead to all kinds of clothing being worn by different students and thus affecting uniformity and equality in the school. 66.7% of the teachers felt permitting the wearing of hijabs would open the door for students to wear all kinds of clothing while 33.3% felt no such effects would be caused by permitting wearing of hijabs. The results of this section are illustrated in Table 9.

Responses	Number of respondents	Percent
Yes	4	66.7
No	2	33.3
Total	6	100.0

Table 9. Respondents' responses on whether or not permitting the wearing of hijabs would lead to other students wearing all kinds of different clothing.

4.4.5 Desire by female Muslim students to wear hijabs

This Section required respondents to answer whether or not the female Muslim students communicated their desire to be permitted to wear hijabs in school. 66.7% of the teachers said that the female Muslim students had not communicated their desire to be allowed to wear hijabs while 33.3% responded that the students had communicated this desire. Their responses are illustrated in Table 10.

Responses	Number of respondents	Percent
Yes	2	33.3
No	4	66.7
Total	6	100.0

Table 10. Respondents' responses on whether or not female Muslim students communicated their desire to be permitted to wear hijabs in school

4.4.6 Personal thoughts on the wearing of hijab in school

The respondents were required to give their personal opinions on whether or not they think female Muslim students should be allowed to wear hijabs in school. 66.7% of the teachers supported the prohibition on wearing hijabs in school while 33.3% were of the view that the female Muslim students should be allowed to wear hijabs. Their responses are summarized in Table 11.

Responses	Number of respondents	Percent
Yes	2	33.3
No	4	66.7
Total	6	100.0

Table 11. Respondents' responses on whether they think wearing the hijab in school should be permitted or prohibited

4.4.7 Reasons behind prohibition or permission of hijabs

This section required the respondents to give reasons behind their thought on either prohibition or permission of hijabs. Two of the respondents (33.3%) who were for the permission of hijabs in school said that permitting the hijab would be respectful to the female Muslim students and their religion. The other four respondents (66.7%) were against such permission with two of them citing that it would cause inequality among the students as Muslim students would seem favoured and above school rules while the other two registered concerns that hijabs may be used to sneak in drugs and other illegal items.

CHAPTER 5: DISCUSSION ON RESEARCH FINDINGS

5.1 Hijab: Meaning and Relevance

A huge majority of the female Muslim students, 86.2% are of the view that it is a religious obligation, which a woman has to undertake. Therefore, they believe that when a Muslim woman wears hijab she is obeying and submitting to Allah. They interpret the verses of the holy Quran which guide 'believing women' not to expose their adornment except to their husbands, their fathers and other close relatives and persons provided for as creating an obligation on their part.⁸⁰

17.2% of the female Muslim students stated the need to preserve their auras as one of the reasons they would want to be allowed to wear hijabs in school as a result of the presence of male teachers. A lowly 13.8% of the student respondents were of the view that the hijab is often a personal and cultural concept, not a religious one whose expression varies within the Muslim world and beyond.⁸¹

On the contrary, of the teacher respondents, none of whom were Muslims, 66.7% felt that the wearing of the hijab by female Muslims is a personal choice with 33.3% viewing the same as a religious obligation. These findings point towards the fact that the majority of female Muslim students professing the Islam religion and given their knowledge of the holy Quran view the wearing of the hijab as a religious obligation while the majority of non-Muslim teachers with relatively less knowledge on Islam and the holy Quran view the matter of wearing the hijab as a personal choice.

5.2 Free exercise of religion

The freedom of religion includes two closely related but nevertheless clearly distinguishable entitlements: freedom to adopt a religion or belief of one's choice and freedom to manifest that religion or belief in worship, observance, practice and teaching. To "hold religious belief" has been said to relate to the inner act of believing and "to manifest" has been said to relate to the external acts of giving expression of one's faith.⁸² Considering this, 96.5% of the female Muslim students were of the view that the wearing of the hijab in school was in keeping with their right exercise of the freedom of religion. They are of the view that wearing the hijab in school is one

⁸⁰ The Holy Qur'an, Chapter 24, verses 30 and 31; Chapter 33, verses 32 and 33; and Chapter 33, verses 53 and 54.

⁸¹ Caryl-Sue, Hijab: Veiled in Controversy, National Geographic Society, <http://education.nationalgeographic.org/media/hijab/> on 12 December 2015.

⁸² Van Der Vyver J. D., 'Limitations of Freedom of Religion or belief: International Law Perspectives' Emory International Law Review, Vol 19, 449-538.

of the ways of manifesting the belief they hold in Islam and they are supported by 33.3% of the teachers.

Only 3.5% of the student respondents felt that the wearing of the hijab in school was not a right exercise of the freedom of religion. This view was shared by 66.7% of the teachers who seemed to distinguish between holding a religious belief and manifesting it. While the teachers are open to the female Muslim students professing the Islam faith they seem to believe the right to manifest a belief is a qualified right and its limitation is permissible if it is prescribed by law and can be justified as necessary in a democratic society in the interests of public safety.⁸³

The entitlement to hold a belief is absolute in nature and cannot be subjected to limitations or suspensions.⁸⁴ These findings should be viewed in the context of the adopted analysis by the HC that the right to hold religious and other beliefs and is an absolute right. However, the right to manifest a belief is a qualified right and its limitation is permissible if it is prescribed by law and can be justified as necessary in a democratic society in the interests of public safety.⁸⁵

5.3 Limitations on the freedom of religion

All respondents, 100% of all respondents, both students and teachers responded that at wearing of hijabs in the school, Our Lady of Mercy Secondary School, is prohibited and thus the freedom of religion is limited. Limitations on the right to freedom of religion are usually in relation to the manifestation of a religion or belief.⁸⁶ Relevant factors must be taken into account for the limitation of rights which include the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.⁸⁷ The school, therefore, feels that the prohibition on wearing hijabs in the school is justifiable considering these factors and that the

⁸³ Muema M. M. The scope of the right to freedom of Religion in Kenya, Unpublished LL.B Dissertation, University of Nairobi, June 2014

⁸⁴ Petition 431 of 2012 [2014]eKLR

⁸⁵ Muema M. M. The scope of the right to freedom of Religion in Kenya, Unpublished LL.B Dissertation, University of Nairobi, June 2014

⁸⁶ Article 24(1), CoK, 2010.

⁸⁷ Article 24(1) (b) and (c), CoK, 2010.

freedom of religion in the school is guaranteed but must be enjoyed alongside secular goals for which the educational institution is established.⁸⁸

5.4 Reasons for prohibition on wearing of hijabs in school

34.5% of the students felt that hijabs were prohibited by the school so as to ensure equality among all students through a standard school uniform. 27.6% of the students said the prohibition was merely provided for in the school uniform regulations. These two closely related reasons enjoy the backing of the law where Section 11 of the Education Act gives powers to public schools to make rules and regulations for the proper administration, discipline and functioning of the school community.⁸⁹ Furthermore, arguments supporting the need for these rules and regulations have been put forward claiming that there was the need for all students to wear similar uniform which serves a critical role in creating harmony, cohesion and unity among students.⁹⁰

Another 27.6% felt that hijabs were prohibited since the school was Catholic while 10.3% of the students were of the view that since they already knew the school rules while joining the school, they had accepted the prohibition and should thus adhere to the rules. These reasons are supported by the courts which ruled that where students had voluntarily accepted to be admitted to a public secondary school, they submit to rules which may make their freedom to manifest religion subject to restriction as to the place and manner in order to ensure the harmonious co-existence of students of different faiths.⁹¹ Moreover, the right to education under Article 34(1) (f) and 53(1) (b) of the CoK does not in any way mean the right to attend certain public schools or the at the students' own terms as that would be tantamount to affecting the autonomy and academic freedom of the schools.⁹²

5.5 Role of school uniforms in ensuring equality

All the teachers, 100%, felt that the school uniform ensures equality and uniformity in the school. They seem to agree that the standard dress code identifies and associates students to a

⁸⁸Demanche Sharon & 2 Others v Makerere University, Constitutional Appeal No.2 of 2004

⁸⁹ Section 11, Education Act Cap 211 Laws of Kenya.

⁹⁰[2012]eKLR

⁹¹Petition 431 of 2012 [2014]eKLR

⁹²Muema M. M. The scope of the right to freedom of Religion in Kenya Unpublished LL.B Dissertation, University of Nairobi, June 2014

particular school and helps to maintain uniformity, order and discipline in schools.⁹³ However, this view was supported by only 13.8% of the female Muslim students with 86.2% holding the view that the school uniform regulations do not ensure uniformity and equality in the school.

5.6 Desire by female Muslim students to wear hijabs in school

All the students, 100%, were in agreement that they had communicated their desire to be allowed to wear hijabs in the school as a form of expression and manifestation of their religious right as is provided for under section 32 of the CoK.⁹⁴ However, only 33.3% of the teachers were aware of this desire or its communication with 66.7% of the teachers saying the female Muslim students had not communicated any desire to be allowed to wear hijabs in school. This data points towards a lack of adequate communication channel or link between the teachers and the students. The students, for one reason or the other, might share their desire to be allowed to wear hijabs amongst themselves without sharing the same with the teachers.

5.7 Reasons for wanting to wear hijabs by the female Muslim students

34.4% of the students wanted to wear hijabs in school because it is a religious obligation while 24.1% wanted the same out of respect for their religion. Therefore, they believe that when a Muslim woman wears hijab she is obeying and submitting to Allah. 17.2% of the students said they wanted to wear hijabs to preserve their auras while 10.3% cited the presence of male teachers as their reason for the same. This would be in keeping with the verses of the holy Quran which guide 'believing women' not to expose their adornment except to their husbands, their fathers and other close relatives and persons provided for.⁹⁵ 13.8% of the students gave other reasons which include: Equality with their Christian counterparts who were allowed to wear rosaries; the permission of hijabs by other schools, increased comfort which would translate to better performance and that wearing hijabs made it easier to pray.

⁹³ Republic v Head Teacher, Kenya High School Ex-parte SMY (a minor suing through her mother and next friend A B) [2012]eKLR

⁹⁴ [2012]eKLR

⁹⁵ The Holy Qur'an, Chapter 24, verses [30](#) and [31](#); Chapter 33, verses [32](#) and [33](#); and Chapter 33, verses [53](#) and [54](#)

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The purpose of the study was to discuss and analyze the issue of wearing of hijabs by girls in high schools as an exercise of their constitutional right and freedom of religion. The study sought to analyze the instances, reasons and principles guiding the prohibition on wearing of hijabs in certain high schools and whether they are reasonable and justifiable by law. This chapter provides the conclusion and recommendations for possible action are made and suggestions of areas for further research are also provided.

6.2 Conclusion of the study

The study concluded that a huge majority of the female Muslim students are of the view that wearing a hijab is a religious obligation, which a woman has to undertake. Therefore, they believe that when a Muslim woman wears hijab she is obeying and submitting to Allah. On the contrary, the majority of the teacher respondents, none of whom were Muslims, felt that the wearing of the hijab by female Muslims is a personal choice.

Second, nearly all of the female Muslim students were of the view that the wearing of the hijab in school was in keeping with their right exercise of the freedom of religion while a majority of the teachers felt that it was not.

Third, it was revealed that the wearing of hijabs at, Our Lady of Mercy Secondary School, is prohibited and thus the freedom of religion is limited. The school, therefore, feels that the prohibition on wearing hijabs in the school is justifiable and that the freedom of religion in the school is guaranteed but must be enjoyed alongside secular goals for which the educational institution is established.⁹⁶ The most common reasons given for this prohibition include: to ensure equality among all students through a standard school uniform, the fact that the school is founded on Catholic principles and the prior knowledge by the students of the school rules when deciding to join the school. Rightly so, Section 11 of the Education Act gives powers to public schools to make rules and regulations for the proper administration, discipline and functioning of the school community.⁹⁷ Moreover, the right to education under Article 34(1) (f) and 53(1) (b) of the CoK does not in any way mean the right to attend certain public schools or the at the students'

⁹⁶ *Demanche Sharon & 2 Others v Makerere University*, Constitutional Appeal No.2 of 2004

⁹⁷ Section 11, Education Act Cap 211 Laws of Kenya.

own terms as that would be tantamount to affecting the autonomy and academic freedom of the schools.⁹⁸

Fourth, while the teachers unanimously agreed that the school uniform ensures uniformity and equality, a great majority of female Muslim students held the view that the school uniform regulations do not ensure uniformity and equality in the school.

Fifth, the study showed that all the students were in agreement that they had communicated their desire to be allowed to wear hijabs in the school. However, only a small portion of the teachers were aware of this desire or its communication. From this data, it was concluded that there was a lack of adequate communication channel or link between the teachers and the students.

Finally, the study concluded that the most common reasons for wanting to wear hijabs by the female Muslim students are: because it is a religious obligation, out of respect for their religion, to preserve their auras and due to the presence of male teachers. Other reasons which were given include: equality with their Christian counterparts who were allowed to wear rosaries; the permission of hijabs by other schools, increased comfort which would translate to better performance and that wearing hijabs made it easier to pray.

6.3 Recommendations

Arising from the findings and conclusions of this study, based on the research objectives, the following recommendations are made:

1. The Ministry of Education should formulate guidelines regarding the extent to which religions may be manifested in public learning institutions by students, teachers and parents bearing in mind Article 8 of the Constitution that demands equal treatment of all faiths.
2. Sufficient consideration should be given to minority faiths by reviewing the current limitations especially on outward appearances such as hijabs that do not really infringe on the religious rights of others. School environments should be a reflection of Kenya's open and democratic society based on human dignity, equality and freedom. Therefore, a less restrictive way to attain uniformity and still make room for religious manifestation should

⁹⁸Muema M. M. The scope of the right to freedom of Religion in Kenya, Unpublished LL.B Dissertation, University of Nairobi, June 2014

be sought by donating powers to school boards to decide the color of the hijabs- a color that matches the uniform.

3. Communication channels and links between the students, specifically female Muslim students, and teachers should be established where non-existent and enhanced where they exist. The students should have adequate forums in which they can air their grievances and challenges, including their desire to wear hijabs, freely and openly without any fears or suffering any prejudice. Likewise, the school administration should use these channels and the relationship built through these interactions to help the students understand the school's point of view on the wearing of hijabs and to assure the female Muslim students that despite any prohibitions on hijabs, due respect is accorded to their religion.

6.4 Suggestions for Further Studies

Firstly, this study was carried out in one secondary school, Our Lady of Mercy Secondary School in Nairobi. Similar studies should be carried out in other secondary schools in the country. Secondly, this study focused on female Muslim students and a sample of teachers at one school. Further studies need to be carried out involving all the students and teachers of different faiths and religions to find out the views of non-Muslim students on this issue of wearing of hijabs in school with regards to the freedom of religion.

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APPENDICES

Appendix 1: Questionnaire for Students

Questionnaire

QUESTIONNAIRE FOR STUDENTS

Dear Student,

You have been chosen to participate in this research which seeks to get your views on the wearing of hijabs in secondary school by female Muslim students with regards to the exercise of their constitutional right and freedom of religion as well as the reasonable and acceptable limitations to this freedom. Your most sincere view is all that is required. What you write will not be shown to your teacher or any other person. Please feel free to add any other comments.

Section I: Background Information

- 1) Home district: _____
- 2) Sex: Male Female
- 3) Age _____

Section II.

- 4) Do you think wearing the hijab in school is a right exercise of the freedom of religion?
Yes No
- 5) Is wearing the hijab a religious obligation for all female Muslims or a personal choice based on one's faith and culture?
Religious obligation Personal Choice
- 6) Are female Muslim students permitted to wear hijabs in the school?
Yes No
- 7) What do the school rules and uniform regulations say about the wearing of hijabs in school?

8) Do you think that the school uniform regulations ensure uniformity and equality in the school?

Yes No

9) Do you think that if female Muslim students were allowed to wear the hijab it would lead to all kinds of clothing being worn by different students thus affecting uniformity and equality?

Yes No

10) Do female Muslim students communicate their desire to be permitted to wear hijabs in the school premises (as part of school uniform)?

Yes No

11) What reasons do they give for wanting to wear hijabs?

Appendix 2: Questionnaire for Teachers

Questionnaire.

QUESTIONNAIRE FOR TEACHERS

Dear Teacher,

You have been chosen to participate in this research which seeks to get your views on the wearing of hijabs in secondary school by female Muslim students with regards to the exercise of their constitutional right and freedom of religion as well as the reasonable and acceptable limitations to this freedom. Your most sincere view is all that is required. What you write will not be shown to any person. Please feel free to add any other comments.

Section I: Background Information

- 1) Home district: _____
- 2) Sex: Male Female
- 3) Age _____

Section II

- 4) Do you think wearing the hijab in school is a right exercise of the freedom of religion?
Yes No
- 5) Is wearing the hijab a religious obligation for all female Muslims or a personal choice based on one's faith and culture?
Religious obligation Personal Choice
- 6) Do you think that the school uniform regulations ensure uniformity and equality in the school?
Yes No
- 7) Do you think that if female Muslim students were allowed to wear the hijab it would lead to all kinds of clothing being worn by different students thus affecting uniformity and equality?
Yes No
- 8) Do female Muslim students communicate their desire to be permitted to wear hijabs in the school premises (as part of school uniform)?

Yes [] No []

9) Personally, do you think female Muslim students should be permitted to wear hijabs in the school premises?

Yes [] No []

10) Why do you think so?
