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THE FRENCH HEADSCARF LAW AND THE RIGHT TO MANIFEST RELIGIOUS BELIEF

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INTRODUCTION

French society is currently embroiled in a debate about its own understanding of Laïcité and its international obligations to respect the right to manifest religious belief, as a result of the government’s decision to ban religious symbols worn by public schoolchildren, most notably the hijab1 or Islamic scarf that Muslim girls and women wear on their heads to comply with their religious obligation to dress modestly.

The debate over the ban against wearing the Muslim hijab is not recent; it first began in 1989 when the headmaster of a junior high school in Creil, a suburb north of Paris, expelled three Muslim girls for wearing Islamic scarves in school.2 This incident raised questions as to whether the wearing of religious clothing in schools could be reconciled with the important French doctrine of Laïcité. When the matter was referred to the Conseil d’Etat, the Conseil, in deciding to allow students to wear headscarves, referred in its opinion not only to the international human right to manifest religious belief, but also to French State obligations to guarantee the right to education. Recognizing education as one of State’s primary responsibilities, the Conseil ruled that la liberté de conscience (freedom of conscience) is “one of the fundamental principles recognized by the laws of the Republic, shared equally in the domain of education.” Asserting the doctrine of Laïcité,

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the Conseil d’Etat recognized the freedom of conscience of students, including the right to express their beliefs in schools by wearing religious clothing and it held that such an expression is not by itself incompatible with the principle of Laïcité.\(^3\)

Even as late as 2003, the Traite de droit Francais de religion concluded that “the jurisprudence of the Conseil d’Etat on the question of headscarves has not varied since 1989 and the first judgment of 1992 and the law seems well established by now.”\(^4\) Further strengthening the 1989 ruling, Hanifa Cherifi, the Ministry of Education official responsible for mediating the headscarf dispute in the nation’s schools, reported in 2003 that between 1994 (when she began her work) and 2003, the average number of controversial cases on this issue per year had dropped from three hundred to one hundred-fifty.\(^5\) Given such clear and consistent legal decisions of the judiciary and the executive over the years, the question arises as to why Law 2004-228 of March 15, 2004\(^6\) which drastically changes French policy on wearing religious symbols in schools was enacted.

The most obvious explanation for this reversal of policy is that Law 2004-228 serves a political dimension, attempting to find ways to balance France’s secular identity with the integration of the five million-strong population of Muslims in France in the light of three trends: the new wave of anti-Semitism in Western Europe,\(^7\) the strong Islamophobia in those cultures post-September 11, 2001, and the expansion of the European Union with its greater religious, ethnic, linguistic, and cultural diversity. Although lawmakers attempted to give a secular flavor to the law by including a prohibition against wearing large Christian crosses,

\(^3\) Avis du Conseil d’Etat no. 346893 (Nov. 27, 1989) (reprinted in Bernard Jeuffroy, Francois Tricard & Jean-Paul Durand, Liberte religieuse et regimes des cultes en droit francais 1031-1034 (Editions du Cerf 1996)).

\(^4\) Alain Garay & Emmanuel Tawil, Tumulte autour de la laïcité, Recueil Dalloz, Chronique, Jan. 29, 2004 at 225 (stating that the rules imposed by the Conseil d’Etat were “simple and clear”).


\(^6\) The full title of the bill is “Loi encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.” This could translate as “Law, as part of the implementation of the principle of Laïcité, on wearing symbols or clothing that indicate religious adherence in publicly-operated schools, colleges (11-15 years) and lycées, (16-18 years).” [hereinafter, The Headscarf Law or The Law].

the inclusion of this ban also serves the purpose of avoiding the revival of the age-old conflict with the Catholic Church, which has been the central feature of French revolutions in the past. This was largely a symbolic gesture, in that the average French Christian rarely wears such large crosses as part of his or her attire anyway; and the law still permits small, not so conspicuous religious signs such as typical cross necklaces.

On the other hand, Law 2004-28 in effect creates conditions in which minority groups are required to surrender their distinctive characteristics for the sake of assimilation, a surrender dressed in the garb of the constitutional requirement of Laïcité. As such, the Headscarf Law prohibits the most basic and recognized manifestation of Muslim beliefs under international human rights law. This law is problematical in light of the fact that France has acceded to the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which recognize the right to manifest religious belief, without any reservations on either Article 18 or Article 9 respectively. Under Article 55 of the French Constitution, the norms of international human rights instruments are self-executing, so these Articles are clearly binding on the French government. Thus, the French rhetoric of Laïcité, and the Stasi Commission’s conclusion that the headscarf ban is no longer a question of one’s freedom of conscience but rather of public order, cannot silence international concern over France’s violation of its international human rights obligations.

Attempting to answer why was the law enacted, Part I of this article briefly examines the reasons which possibly led to the overwhelming response from the French people to support this law.

because of their understanding of Laïcité and religious liberty. Part II examines the provisions of the Headscarf Law, highlighting the dilemmas the Headscarf Law raises for both Muslim and non-Muslim French citizens alike. Part III examines the law in light of France’s international human rights obligations; and particularly addresses the right to manifest religious belief, and issues of minority rights, the State’s duty of non-discrimination and the rights of the child. Specifically, this Part explores the scope of the right to manifest religious belief, and thereafter examines the propriety of limiting such manifestations of religious belief by States. Minority rights are discussed in relation to the French declaration to Article 27 of the ICCPR and its compatibility with the object and purposes of the Treaty. This Part also examines State obligations of non-discrimination, delineating distinctions that justifiably obligate States to take affirmative action on behalf of minority populations. The article will also examine the rights of the child to manifest his or her own religious belief and its relationship to his/her international and national right to education. Part IV briefly discusses whether the French limitations on the manifestation of religious belief imposed through the Headscarf Law can be compared to the limitations imposed because of the situation in Turkey, where the European Court of Human Rights (ECtHR) has allowed such limitations.

I. LAÏCITÉ: RELIGIOUS FREEDOM AND THE CONCEPT OF FRENCH SECULARITY

A. The Meaning of Laïcité

The French concept of Laïcité is critical to the understanding of the headscarf controversy. Yet, there is no firm definition of Laïcité, either officially established or generally accepted. The Le Grand Robert dictionary defines Laïcité as “a political notion involving the separation of civil society and religious society, the State exercising no religious power and the churches (Eglises) exercising no political power.” Because it attempts to highlight the divide between the church and the State, Laïcité could more appropriately be understood as the free exercise of religion where the State neither recognizes nor subsidizes

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14. See Emile Poulat, Notre laïcité publique 116 (Berg Intl. 2003); see 115-1124.
any religion. Secularism thus constitutes an essential component of Laïcité. In the exercise of its concept of Laïcité, the State espouses a policy on religious conduct, and then grants the freedom of religion by permitting or commanding a certain set of rules specifying what religious conduct is prohibited (or required) by the State ideology. Thus, a State can construe this term in a number of ways, from being very restrictive upon religious conduct as in France, or demonstrating greater religious liberty as in the United States.

B. The History of French Laïcité and Religious Liberty

The French concept of Laïcité has developed over a long period of time, with two distinct periods marking the modern concept of Laïcité: the five years following the French revolution of 1789 and the period of the Third Republic (1879-1905). Marked by conflict and hostility, both these periods mostly targeted the Roman Catholic Church, and observers witnessed France’s attempts to prohibit religious manifestations in public while at the same time separating the Church and the State.

The high point of the first period was marked by a strong wave of anti-clericalism. The adoption of the Civil Constitution of the Clergy in 1790 gave greater control over the Church to the State. The clergy were elected by popular vote, churches were organized by the laity, and titles were eliminated or renamed to provide greater uniformity among clerical offices. The new bishops were required to take an oath of loyalty to the State and their salaries were to be paid by the State. Relevant to the present context and the ban on headscarves was the law on the separation of the Church and the State promulgated in 1795. The new law affirmed the principle of free worship but permitted State control over the display of religious symbols by making a “decision in principle” during the 1792 constituent assembly that priests must not wear religious attire in public.

The second period in the development of Laïcité was more

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18. Id.
19. Id.
distinctively separationist, because building a sense of national citizenry and instantiating republican values in the governance of the State were all-important concerns. This period also led to the enactment of the law of 1905 which “restricted religion to the private sphere.”21 Education was seen as the single most important point of contact between the State and the citizen, the prime vehicle by which French culture and active citizenship were to be inculcated.22 The drive to utilize education to create French national identity included the institution of mandatory primary education in 1882;23 and the education laws formulated between the periods of 1882-86 imposed an even greater duty upon the State to foster republican values and forge national feelings24 through public education. Although the law of 1905 made no explicit mention of the separation of Church and State or the word Laïcité, the principle that the State should refuse to recognize any religion and must extend the freedom of conscience to all is clearly defined in the first two Articles of the Law of 1905.25

The affaire des voiles, or the headscarf affair, as it came to be known, has crystallized many of these historical conflicts in the present period. Like the period of the third Republic which was intensely focused on inculcating republican values and national identity among citizens who had identified with regional or local communities in France, the contemporary period has focused on the absorption and national identity of immigrants from the former colonies of Algeria and Morocco. After the independence of Algeria in 1962, ‘Algeria was declared an extension of the French soil, so its residents became French citizens,26 and many of the new Algerian arrivals to the “mainland” were in fact not technically foreigners at all’,27 so they were expected to

21 Michel Troper, French Secularism, or laïcité, 21 Cardozo L. Rev. 1267 (2000).
23 . Id. at 309.
24 . Id. at ch. 18.
assume French identity automatically. Indeed, most of the Muslim students who were involved in the cases of 1989 and subsequent years were either second-generation immigrants from Algeria or Morocco, or they had arrived in France at a very young age. In the contemporary period, education is once again seen as the primary tool of inculcating republican values and public schools as the fundamental institution of the Republic, the one that is most critical for teaching the notion of “Frenchness.” The Jacobin ethos of “la Republique une et indivisible” has been resurrected, along with its assimilationist assumptions that a national, republican identity must take precedence over other aspects of an individual’s persona, whether they are religious, linguistic or ethnic.

However, particularly in light of an emerging consensus on the right to manifest belief, France cannot justify such a restrictive interpretation of Laïcité that conflicts with other democratic values like the freedom of expression, right to manifest one’s own religious belief, child’s right to education and his/her right not to be discriminated in the present context, given that secularism, non-discrimination and freedom of religion form the core content of rights in any democratic State. The poverty of the French understanding of secularism is illustrated by the response of States similar to France which have shown greater understanding in promoting cultural pluralism.

II. RELIGIOUS LIBERTY AND OTHER DEMOCRATIC COUNTRIES

Whether one examines the situation of other nation-states in Europe or the response of the United States, which has had a strong tradition of church-state separation, one can see that the French response to the problems of assimilation and pluralism is overblown and unnecessary.

The most appropriate State to compare with France, in terms of its approach to the issues of religious minority freedom to manifest

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29. See supra n. 13, at 23. The school prepares the citizens of tomorrow brought to live together within the Republic.
30. Id.
religious belief, is the United Kingdom. Both countries have witnessed a wave of immigration and accommodated a sizable number of migrants, France from predominantly Muslim countries in the Maghreb and Sub-Saharan Africa and the U.K. from south Asia. In regard to this debate on religious clothing in public settings, both countries have roughly the same history. We could easily draw a parallel between the French incident of 1989, the court decision in 1992 allowing religious clothing in public schools and the pre-1993 decisions of some U.K. schools to allow the salwar Kameez (including the Muslim headscarf) as part of their school uniform policies. Since that time, however, these States’ approaches have diverged significantly. When the specific question of whether the headscarf would be permitted religious clothing for a Muslim student in Luton, north of London, in September 2000, the girl was allowed to wear a shalwar kameez. In 2004, France enacted the Headscarf Law, prohibiting the wearing of hijab, while in the United Kingdom, the courts have allowed girls to wear an even more restrictive garment, the jilbab, which effectively conceals the shape of their arms.


34. Salwar Kameez. ‘Salwars are loose pajama-like trousers. The legs are wide at the top, and narrow at the bottom. The legs are pleated or gathered into a waistband with a drawstring. The pants can be wide and baggy, or they can be cut quite narrow, on the bias. In the latter case, they are known as churidar. The kameez is a long shirt or tunic. The side seams (known as the chaak) are left open below the navel, which gives the wearer greater freedom of movement. The kameez is usually cut straight and flat; older kameez use traditional cuts, as shown in the illustration; modern kameez are more likely to have European-inspired set-in sleeves. The tailor’s taste and skill are usually displayed not in the overall cut, but in the shape of the neckline and the decoration of the kameez. When women wear the salwar kameez, they usually wear a long scarf or shawl called a dupatta around the head or neck.’ See Salwar Kameez, http://en.wikipedia.org/wiki/Shalwar_kameez (accessed Sept. 20, 2006).


37. More rarely, girls may also wear a complete dress covering their body. The full or Afghan Burka, which covers the entire body except for a slit or grille to see through, occurs more commonly as the dress of an adult woman than that of a schoolgirl. See Bruqa at
and legs, according to a stricter interpretation of the Islamic code. Muslims are not the only religious minority that the U.K. has accommodated: another example is the special exemption granted to Sikh motorcyclists from wearing crash helmets if they wear turbans, under Section 1 of the Motor-Cycle Crash Helmets (Religious Exemption) Act 1976.

Sweden is another example of a European State which, despite established church, has had an unyielding commitment to egalitarianism, as shown by its recognition of the needs of non-Christian migrants. While previously the church tax was levied on all citizens, “the special Church of Sweden Act completely relieves non-members of the burden of paying any Church taxes,” reflecting the State’s commitment to accommodating religious and cultural diversity as a social phenomenon not restricted to the private sphere.

While the United States Supreme Court has not decided any headscarf cases, federal courts faced with rising religious diversity have indicated a much more permissive attitude toward religious minority practices than France has. For example, during roughly the same period as the headscarf affair in France, the lower federal courts decided the Newdow case. In March 2000, Michael Newdow, a medical doctor and the father of a public school student in California filed a lawsuit in Federal court in California alleging that the California law requiring teachers to lead a recitation of the Pledge of Allegiance, which includes the words “under God,” violates the Establishment Clause of the U.S. Constitution. Newdow’s suit asserted that his daughter’s rights were violated because she was required to “watch and listen as her State-


38. Id. at ¶ 8.
39. As per the Act, Sikhs who wear turbans need not wear crash helmets when they ride motorcycles or scooters. They have been allowed to wear the turban as their only headgear. In accordance with the Motor-Cycle Crash Helmets (Religious Exemption) Act 1976 passed by the British Parliament in 1976, Section 2A “exempts any follower of the Sikh religion while he is wearing a turban” from having to wear a crash helmet. See UK Legislation connected with Turban, http://www.sikhiwiki.org/index.php?title=UK_Legislation_connected_with_turban (accessed Sept. 20, 2006).
40. See Sweden Separates Church, State,
41. Id.
44. Id.
employed teacher in her State-run school led her classmates in a ritual proclaiming that there is a God, and that ours is 'one nation under God.'

Although, a divided panel of the United States Court of Appeals for the Ninth Circuit ruled that the words “under God” in the American Pledge of Allegiance violated the Establishment Clause of the Constitution, the Supreme Court eventually held that the words “under God” were not unconstitutional, but that the California statutory requirement for teachers to lead the Pledge was constitutional, thus illustrating the U.S. commitment to separation of church and state and a respect for religious diversity.

It is important to remember that both France and the U.S. emphasize the separation of church and state (or in France, Laïcité) and religious freedom in effusive language as core founding principles of these republics, consistent with their respective constitutional doctrines of equality, neutrality and tolerance. National legislatures in both States have relied on their respective doctrines of church/state separation or Laïcité and religious freedom to decide that the State should be responsible for determining which forms of religious expression should (or should not) be permitted in public schools. Despite the striking similarities in the decisions of the national courts of these countries holding that their respective constitutions require State neutrality with regard to religion and emphasizing that equality is the governing norm on matters of religion and law, France’s reaction in the new law seems to be a focus on prohibiting religious expression while the United States appears to promote diversity of such expression.

III. THE FRENCH HEADSCARF LAW: A STEP FORWARD OR A LEAP BACKWARD

The legal history of the headscarf controversy has evidenced a much more expansive view of religious liberty for minority religions

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45. Id.
46. Id.
47. Id. The decision was subsequently revised and amended to eliminate the holding that the words “under God” in the federal statute are unconstitutional, the Court held only that the California statutory requirement for teachers to lead the Pledge remains unconstitutional.
48. See supra n. 16, at 424.
49. See supra n. 17. In the case of the United States, see e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (holding that the Establishment Clause “forbids subtle departures from neutrality” (internal quotes omitted)).
than the current law. As the Conseil d’État suggested in its opinion, the headscarf incident of 1989 primarily raised three important questions: first, whether wearing religious symbols was compatible with the principle of Laïcité; second, whether public school bans on wearing such symbols were legally permissible; and finally, whether public schools could expel students who refused to follow such regulations. As discussed in the Introduction, the Conseil d’État ruled that the wearing of headscarves was not by itself incompatible with the principle of Laïcité. Addressing the other two issues, the Conseil allowed these manifestations of religious expression so long as the expression was done with respect for pluralism. That is, the manifestation of religious beliefs in public schools, as an aspect of the public sphere, should not be provocative or reflect proselytism or propaganda that would infringe upon the freedom of other students or impede the school’s educational mission. In the years after 1992, the Conseil d’État further clarified the constitutional principle in the case of Kherouaa, where it held that the principle of Laïcité required no general prohibition on the display of religious symbols, and that each case was to be judged on its merits. This case adjudicated the validity of a general regulation prohibiting the wearing of headscarves in college, which had been previously upheld by the administrative tribunal of Paris. The Conseil ruled that the regulation in place at the school was illegal due to “the generality of its terms.” The decision underscored that the real issue of concern to the State, the creation of disorder or infringement of the rights of other

51. See supra n. 4 and accompanying text at 225 (stating that the rules imposed by the Conseil d’État were “simple and clear”).
53. See 1993, Public Law 198; Revue du Droit Public (RDDP) 220. In 1992, the Conseil d’État issued a ruling in Kherouaa et autres, a case in which three girls were excluded first from the gym classes and then from the entire school for their refusal to remove their headscarves. Reaffirming its 1989 avis in a courtroom setting, the Conseil also looked to the breadth of the school rule that prohibited headscarves. As this particular rule called for an absolute prohibition on the wearing of religious symbols, the Conseil determined that the rule was invalid due to excess de pouvoir—the girl’s freedom to wear their headscarves was withheld. See Freedom of Religion and Religious Symbols in the Public Sphere, http://www.parl.gc.ca/information/library/PRBpubs/prb0441-e.htm (accessed Dec. 15, 2006).
55. Id.
students, could not be decided in the abstract but was dependent on the particular facts and therefore no general prohibition of the headscarf was permissible.\textsuperscript{56} Again insisting that each case involving a headscarf controversy needed to be dealt with on a case-by-case basis, the Conseil in 1995 upheld a Muslim girl’s expulsion from school in Lyons.\textsuperscript{57} The school insisted that two Muslim sisters must remove headscarves because they prevented the girls from fully participating in physical education.\textsuperscript{58} The Conseil ruled that the school’s regulation was not unduly restrictive and the students’ refusal to remove their scarves constituted an interference with the normal functioning of their education, a disruptive violation of the school’s order.\textsuperscript{59}

Although they did not directly suggest future study, the continuing public debate over these highly visible cases resulted in the naming of the Stasi Commission to investigate principle of \textit{Laïcité} in the Republic. While the Commission was given the “responsibility of conducting an inquiry on the application of the principle of \textit{Laïcité} in the Republic and to make suitable proposals to carry out the principle,”\textsuperscript{60} its mandate made no mention of the issue of headscarves or religious clothing.\textsuperscript{61} Attempting to give more clarity to the Commission’s envisaged role and in response to the public outcry, the French government gave the

\begin{enumerate}
\item[56.] In the case of \textit{Yilmaz} (1995 RDDP 249, and Le Monde (Sept. 21, 1994)) as well, the Conseil struck down a college regulation in Angers banning any student from coming to class with her head covered.
\item[57.] C.E., Mar. 10, 1995, Rec. Lebon 123. The decision also mentions that the father of the two girls in question had participated in a demonstration outside the school. The Conseil takes a dim view of this behavior, which it says aggravated the girls’ original offense in refusing to remove their scarves. \textit{See} Elisa T. Beller, \textit{The Headscarf Affair: The Conseil D’état on the Role of Religion and Culture in French Society}, 39 Tex. Intl. L.J. 581 (2004).
\item[58.] \textit{Id}.
\item[59.] \textit{Id}.
\item[61.] In a July 3, 2003, letter to the Commission’s chairman, President Chirac provided some additional guidance regarding his expectations by reaffirming the importance of the doctrine of \textit{laïcité} to France and reiterating that French society respects the particularities of every religion. Without referring to Islam directly, he made an unveiled reference to “communitarian” problems, and, without mentioning headscarves specifically, the President stated that “incidents” connected with the wearing of “religious insignia” (\textit{insignes religieux}) had raised difficulties for employers and teachers. The President asked that the Commission provide him with an analysis of the issues, and he offered to make available state offices and resources for the Commission’s use. The official decree was thus drafted in very general terms, and the presidential letter was only somewhat more specific. \textit{See supra} n. 17 and accompanying text.
Commission further guidelines to investigate the “communitarian” problems in the school, without mentioning headscarves specifically. The letter founding the Commission recognized the difficulties faced by teachers in related “incidents” surrounding students wearing “religious insignia” (insignes religieux). 62

Concluding that the permissibility of wearing headscarves was no longer a question of Muslims’ freedom of conscience but rather of public order, 63 the Report affirmed Laïcité as a republican value which found its expression in three inseparable principles: freedom of conscience, equality in exercising the right to spiritual and religious choices, and religious neutrality of the political power. 64 The Report identified the neutrality of the State as the primary requirement of Laïcité, 65 with neutrality and equality acting in tandem to preserve that principle. 66 Finally, the Commission recognized the “liberty of conscience” as the “judicial pillar” of Laïcité, especially focusing on the freedom of worship. 67 Although these expressions of concern for the freedom of conscience and religion echo throughout the report, unfortunately, the Commission made no mention of them when it set out its recommendation that the National Assembly pass a headscarf ban.

Following the Stasi Commission report, the National Assembly enacted Law 2004-228 of March 15, 2004 as an amendment to the existing Education Code. 68 Besides its technical aspects, the law is very brief. The relevant excerpt of the law reads as:

Article 1. In public elementary schools, junior high schools and high schools, students are prohibited from wearing signs or attire through which they exhibit conspicuously a religious affiliation.

“Note that the internal regulations [of the schools] require disciplinary procedures to be preceded by a dialogue with the student.” 69

62. Id.
63. See supra n. 13, at 4.2.2.1.
64. Id. at 9.
65. Id. at 22. Neutrality is identified as a value of laïcité. Id.
66. Id. at passim. Equality is identified as a value of laïcité.
67. Id. at passim. Freedom of conscience is identified as a value of laïcité.
69. See supra n. 8 and accompanying text.
Article 4. The provisions of this law are the subject of an evaluation one year after its entry into force.

The display of one’s religious affiliation mentioned in the Headscarf Law primarily violates the school uniform dress code and triggers a statutory disciplinary proceedings which can result in exclusion of the child from school. As it has been interpreted, the Headscarf Law specifically refers to headscarves for Muslims, yarmulkes for Jews, turbans for Sikhs, and large Christian crosses, but it allows for the wearing of discrete symbols of faith such as small crosses, Stars of David or Fatima’s hands on a necklace. The law raises two interpretive questions quite clearly i.e., what is a symbol, and what constitutes a religious sign or attire? Pursuing the first question, interpreters of the law will need to ask whether an alleged religious sign/symbol is a supplement to one’s identity in the form of dress, ornaments, etc. or whether it is inherent part of one’s visible self. For example, if a Sikh is not allowed to wear his turban, will his long hair also constitute a religious symbol because it is mandated by religion and would be conspicuous in a dominant Christian majority? Similarly, if an orthodox Jew comes to school without his yarmulke and lets his hair hang over his temples in curls as mandated by his religion, will that constitute a religious symbol and warrant a prohibition?

Even if it is argued that prohibited signs/symbols are only what is added on to the natural display of one’s body, the law’s ban on the headscarf is problematical in that it “focuses on” the display of affiliation with a particular religion. It is beyond doubt that, with the exception of the Islamic veil, all other symbols mentioned are religious symbols. However, since the Islamic veil is not explicitly mandated by religion, Muslims who wish to don the veil could argue that it is a cultural symbol rather than a specifically religious manifestation and thus is not prohibited by the law. The evidence seems clear that the custom of veiling and associated practice was originally copied by upper class Muslim women from the traditions of the conquered peoples of

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Persia and Syria during the early years of Islam.\textsuperscript{72} Subsequently, wide variations in the practice have developed, not only in different parts of the world, but also between rural and urban women.\textsuperscript{73} The question whether Islam requires the \textit{hijab} to be worn by women and girls beyond puberty is highly debatable; but it is clear that the Qur’an obligates women to dress modestly and does not explicitly mandate the wearing of the hijab. The well-known verse of the Qur’an reads as follows:

\begin{quote}
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 veil over
Their bosoms and not display
Their beauty except
Their husbands, their fathers . . .
Their sons . . . their brothers . . . or their women.\textsuperscript{74}
\end{quote}

This text, of course, raises the question of what modesty means and how should it be interpreted from a sacred text. Modesty is a relative term and clearly, the injunction to women not to display their beauty, save what must ordinarily appear for women to function in public, requires interpretation\textsuperscript{75} relative to the culture in which Muslims find themselves. Muslim women in the West may only wear headscarves and may believe that their hands are not a part of their beauty, while in States deeply entrenched in Islamic culture, the culture may require that the veil extend as a screen over a women’s body, barely displaying her lips and eyes through a net (the \textit{burqa}). There is no pronouncement that is authoritative for all cultures and schools of Islam as to what constitutes modest dressing. Views vary even among Muslims scholars in the same country. For example, in the United Kingdom, the two chairs of the Muslim Council of Britain have given strikingly different

\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Surah XXIV}, verse 31; see Abdullah Yusuf Ali, \textit{The Holy Qur’an: Translation and Commentary} 905 (Muhammed Ashraf 1975).
views on their interpretation of a modest dress code for Muslim girls going to school. The chair of the Muslim Council’s Social Affairs Committee has offered a more liberal approach by recognizing the shalwar kameez as modest dressing, while the chair of its Mosque Community Affairs has said that in order to fulfill the obligations prescribed by the Holy Qur’an, a Muslim woman must wear an outer garment, such as a jilbab, that is loose-fitting and does not show her body or shape in public. Another strict view is that Muslim girls may not wear clothes showing the outline of their bosom, since it is specifically mentioned in the Qur’anic text, which can also be interpreted as modest dressing.

In attempting to interpret the 1994 law, French Minister of Education François Bayrou introduced the concept of “ostentatious symbols” as a synonym for “conspicuous” symbols in a September 1994 memo. Unfortunately, the law and Bayrou’s interpretation fail to recognize a fundamental reality about the differences among religions affected by the law: for example, for the Sikh, a turban is a religious necessity, while wearing a conspicuous cross is not an imperative religious need even for a Catholic Christian who feels compelled to wear the cross. By the very nature of clothing and the manner in which these symbols are worn, a Sikh turban, an Islamic veil, and a Jewish yarmulke would always be conspicuous/ostentatious as defined by the Minister and the law.

As mentioned, the statutory clause requiring dialogue between the school system and the religious child has not been affected by subsequent interpretation, but the extent to which such a dialogue will achieve its aim if it merely intends to address the ostentatious/conspicuous religious affiliation without explicitly addressing the issue of religious tolerance remains unclear. In fact, when the issue first came up in 1989, Lionel Jospin, then Education Minister, supported the wearing of headscarf and, as suggested, the Conseil d’Etat also imposed positive obligations upon schools to facilitate tolerance and respect for freedom of religion. In elaborating

76. Id. at 41.
77. See supra n. 74 (“. . . Draw their veil over Their bosoms and not display Their beauty except.”).
79. France and Islam: Veil of Tears, Newsweek 54 (Nov. 6, 1989).
the decision of the Conseil d’État, an instructional directive issued by Jospin stressed that if it intends to claim that headscarves constitute provocation or proselytism, a school must engage in a dialogue and focus its attention to the intention of the student to proselytize or provoke, and not upon an inadvertent outcome not meant by the student. That narrowing instruction underscored the obligation upon schools to respect the religious expression of pupils and demonstrate greater tolerance towards religious beliefs.

By contrast, neither the Headscarf Law nor the present circular from Minister Bayreu spells out the manner in which the dialogue between school and student must proceed. On the contrary, the statute implies that any dialogue will begin with the presumption that the clothing/symbol is conspicuous, and require the student to carry a very high burden of proving that it is not conspicuous, which will more likely than not warrant exclusion/expulsion of the student. The law similarly does not indicate what happens if the dialogue fails. If the school and student cannot come to an agreement, which is likely if the student’s symbol is “conspicuous,” and the student is expelled, the State’s action would infringe the right of the child to education and raise questions as to how the State will fulfill its obligations to educate the child. Ironically, the problem becomes worse if the student is only excluded from particular classes but not expelled from school, since in such circumstances the student cannot even seek admission in other schools. There is also a potential “due process” problem: since the school administration is solely authorized to conduct disciplinary hearing and no provision is made for an advocate for the child, it is not clear how the State can ensure that the student has effectively argued his/her case and that his/her individual right to an adequate defense is ensured. Moreover, it is not clear how the student’s right to educate will be protected if the school authorities take an arbitrarily long time to hold a disciplinary hearing and meanwhile exclude the student from classes.

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80. See supra n. 52 and accompanying text.
82. See supra n. 53 and accompanying text.
84. See French Court Orders School Disciplinary Hearing for Banned Sikhs,
Finally, it should be mentioned that, as an amendment to the uniform dress code, the Headscarf Law takes an extremely disproportionate approach to the problem of discipline. A school disciplinary proceeding involving a child’s refusal to wear secular clothing conforming to the dress code would not normally result in expulsion from school or exclusion from the educational system in violation of the student’s right to receive a public education. Therefore, exclusion from school on the basis that a child’s religious clothing violates the school dress code is an extremely disproportionate response to disobedience.

Perhaps more importantly, as I will discuss in the next section, the expulsion of a student who is required to adhere to a particular religious, cultural or ethnic code of dress because he will not conform to school rules is a violation of the right to engage in practices recognized under international law. Therefore, at the very least, before expulsion, the school must prove that a student is not simply innocently following the expectations of his culture, but is persistently and openly defying school authorities’ directives to him not to wear religiously ostentatious clothing. The law does not address the requirement that students knowingly defy the rules as a condition for sanctions. As I will argue, however, the French Headscarf Law is itself a violation of international law, such that even knowing defiance of the law because of religious compulsion should be protected as an international right.

IV. THE HEADSCARF LAW AND FRANCE’S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

A. The Scope of France’s Obligations Under International Law

French law incorporates many international treaties that would seem to impose a duty to respect the rights of religious schoolchildren who display religious symbols. Under French law, those treaties are self-executing; yet, some French declarations from these treaties and the decisions of its courts determining whether international treaties should take priority over national laws leave its willingness to meet its obligations in some doubt. This section proposes that France’s treaty

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obligations require it to protect the right of religious schoolchildren to manifest their religious belief through their display of religious symbols. France has ratified quite a number of international and regional Conventions that are relevant to its obligation to ensure the right of schoolchildren to exercise their religion without punishment in the educational system. Among those treaty Obligations are:

—International Covenant on Civil and Political Rights (ICCPR)
—International Covenant on Economic, Social and Cultural Rights (ICESCR)
—Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)
—Convention on the Rights of the Child (U.N.-CRC)
—International Convention on the Elimination of all Forms of Racial Discrimination (CERD)
—Convention against Discrimination in Education (CADE)
—Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

While France has made no declarations/reservations in the conventions on the right to education and non-discrimination in education, in the provisions on non-recognition of the status of minorities, France ratified the ICCPR with a declaration on Article 27

86 Reference to the texts of all treaties and conventions has been taken from Ian Brownlie and Goodwin-Gill, Basic Documents on Human Rights (Oxford U. Press 2002).
and Article 30 of the U.N.-CRC. That declaration provides that “in the light of Article 2 of the Constitution of the French Republic, the French Government declares that Article 27 is not applicable so far as the Republic is concerned.” France has similarly worded its declaration on Article 30 of the U.N.-CRC and has not signed the Framework Convention for the Protection of National Minorities, expressly indicating strong reservations about the recognition of minorities in the State.

Because it has accepted an integrated system of national and international law, the norms of international human rights instruments are self-executing in France and may be invoked before national courts under Article 55 of the French Constitution. However, it is for the courts to decide whether the Convention is directly applicable when an individual invokes the Convention. Thus, for the treaty commitments falling within the provision of Article 55, the Constitution provides that

96. ETS No. 157, entered into force Jan. 2, 1998). On Nov. 10, 1994 the Committee of Ministers of the Council of Europe adopted the Framework Convention for the Protection of National Minorities. Apart from the Preamble, the Framework Convention has 32 articles and is divided into five sections. Sec. I sets out some general principles including the principle that the protection of national minorities and of persons belonging to national minorities is part of the international protection of human rights. Sec. II is the main operative part of the Framework Convention, as it contains the provisions laying down more specific principles. These principles cover a wide range of issues, inter alia: non-discrimination; promotion of effective equality; promotion of the conditions regarding the preservation and development of the culture and preservation of religion, language and traditions; freedoms of assembly, association, expression, thought, conscience and religion; education including learning of and instruction in the minority language; transfrontier contacts; international and transfrontier co-operation; participation in economic, cultural and social life; participation in public life; prohibition of forced assimilation. Sec. III contains some important provisions on the interpretation of the Framework Convention while Sec. IV sets out the main features of the monitoring mechanism. The final provisions are at Sec. V of the Framework Convention. By its nature, a Framework Convention is different from a “normal” Convention. Whilst a Framework Convention is a Convention in the sense that it is a really legally binding instrument under international law, the addition of the word “Framework” indicates that the principles contained in the instrument are not directly applicable in the domestic legal orders of the member States, but will have to be implemented through national legislation and appropriate governmental policies. See Introduction to the Framework Convention for the Protection of National Minorities. See http://www.humanrights.coe.int/minorities/Eng/Presentation/FCNMintro.htm (accessed Sept. 20, 2006).
98. Id. at ¶ 95.
“treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.”

The only limitation on self-execution is the common-sense limitation that the treaties must be ratified or approved by the French government. However, as suggested by the Constitution, once ratified, these treaties not only prevail over previously enacted legislation, but also subsequent, inconsistent legislation. The French constitutional commitment to international law is even stronger than in the United Kingdom, where the treaty has no formal superior status over national law, but obtains priority only through the principle of statutory interpretation, which begins with the assumption that Parliament is presumed not to have wished to pass legislation inconsistent with the United Kingdom’s treaty obligations.

Despite the U.K.’s lack of a written Constitution, the House of Lords, recognizing the consonance of the Human Rights Act and the U.K.’s international treaty obligations, has held in Queen on the application of SB v. Headteacher and Governor of Denbigh High School that Muslim students should be permitted to wear the jilbab and has imposed an obligation upon State authorities to understand quite complex and novel considerations of human rights law, even despite the absence of authoritative written guidance.

Despite a strong legislative position for the priority of international human rights treaties, the French courts have been vague and inconsistent in their decisions where such treaties have been invoked. When the Conseil Constitutionel, the only court which can strike down the loi, was asked in 1975 to determine the constitutionality of an abortion law by reference, inter alia, to an international treaty (the ECHR), the court ruled that it did not have any jurisdiction to decide whether the statute conformed to any international treaty, though it

103. Id. at ¶ 28.
104. Id. at ¶ 82.
105. Id. at ¶ 18.
noted that the treaty should normally be applied if a statute was indeed incompatible with treaty provisions. Similarly, the Conseil d’Etat accepted the supremacy of the EEC Treaty (Article 227) over an incompatible French Statute (loi du 7.7.1977), which described constituents who could vote in elections for the European Parliament. One might presume that the courts would recognize similar inconsistencies in the interpretation of the Headscarf Law; but the prioritizing of international law may not be so simple because of the political dimension and the overwhelming public support for the law, which suggests a greater possibility that any case challenging the Headscarf Law case may be sidelined as beyond the court’s jurisdiction, as the case of the abortion challenge.

The scope of the right to manifest religious belief is set out in the International Covenant on Civil and Political Rights. Article 18, General Comment 22, paragraph 8 expressly states that limitations imposed [by State parties on these rights] must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. This provision gives rise to the principle that the State should follow the strictest interpretation of the Article with respect to limitations on these rights. Even limitations for reasons like national security which are applicable to other articles are not allowed under this Article.

Manfred Nowak, in his commentary on the ICCPR, states that the limitations on specific purposes justifying interferences with rights protected by 18(3) are narrow, and differ from the other limitations

mentioned in Article 12(3), 19(3), 21 and 22(2) of the ICCPR.\textsuperscript{110}

Similarly, the limitations on rights in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are narrowly formulated. While the original draft of the EHCR initially borrowed the general limitation clause set out in the Universal Declaration of Human Rights (UDHR),\textsuperscript{111} the United Kingdom proposed that the freedom of religion be protected subject “only to such limitations as are pursuant to law, reasonable and necessary to protect public safety, order health or morals or the fundamental rights and freedom of others.”\textsuperscript{112} As the discussion came close to the final draft, the travaux preparatoires suggests that the drafters of the limitation clause preferred a narrower and tighter approach to limitations rather than a broader one, presumably to protect the integrity of the right to freedom of religion or belief.\textsuperscript{113} The inclusion of the clause, “\textit{in a democratic society}” was primarily aimed at limiting the circumstances in which the necessity can be claimed.\textsuperscript{114} Thus, while “necessity” in the

\textsuperscript{110} Manfred Nowak, U.N. Convenant on Civil and Political Rights, CCPR Commentary (N.P. Engel 1993); see supra n. 86, at 188-189.

Article 18(3) of the ICCPR. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 19(3) of the ICCPR. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 21(2) of the ICCPR. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22(2) of the ICCPR. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

\textsuperscript{111} Travaux Preparatoires, vol. 1, at 178, First Session of the Consultative Assembly, proposal by the Consultative Assembly to the committee of Ministers.

\textsuperscript{112} Travaux Preparatoires, vol. 3, at 252-258, Preliminary Draft report to the Committee of Ministers by the Committee of Experts, Doc. CM/WP I (50) 1, A847, Feb. 24, 1950.


\textsuperscript{114} \textit{Id.}
ICCPR implied that the restrictions must be proportional in severity and intensity to the purpose being sought\textsuperscript{115} and should be the least restrictive means of achieving that aim.\textsuperscript{116} The ECHR imposed a greater responsibility on the States by imposing upon them the additional requirement that any limitations of these rights be “prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others,”\textsuperscript{117} thus making the scope of the limitations imposed through Article 9(2) the narrowest possible as compared to the other Articles in the Convention.\textsuperscript{118}

B. Other Definitional Limitations on the State’s Duty to Recognize the Right to Manifest Religion

The French debate is complicated because there is no precise guidance for several terms of the treaty, including the definitions of “religious belief,” “margin of appreciation,” a “legitimate aim” of the State in imposing a restriction, and the requirement that any such restriction be “necessary in a democratic society.” However, as I will argue, the case law that has granted states some leeway under these doctrines is not applicable to France, in part because France has not demonstrated the will to provide affirmative protections to its religious minorities under the Headscarf Law.

One issue that faced the drafters of this treaty was whether the term “religious belief” protected under the Article was clear. This question does not seem immediately pertinent to the headscarf debate but it does inform the values through which the Convention must be read. While the drafters referred to the summary of debates in the Committee on Human Rights since the Universal Declaration of Human Rights, including the debates on the ICCPR and the Declaration on the

\textsuperscript{115} Id.

\textsuperscript{116} See also Principle 11 of the Siracusa Principles, which states “In applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation.”

\textsuperscript{117} See supra n. 86, at 402. Art. 9(2) of the ECHR, “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.”

\textsuperscript{118} See supra n. 113 and accompanying text. The final draft Article 9(2) was the narrowest of all Articles in the Convention, and unlike the UDHR, it is not subject to the same limitation clause as in the other Articles.
Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,\textsuperscript{119} consensus could not be reached on how the international community should interpret the term “belief” in the ECHR. Arcot Krishnaswamy’s, \textit{Study of Discrimination in the Matter of Religious Rights}\textsuperscript{120} adopted a working definition of “religion or belief,”\textsuperscript{121} but recognized that the freedom to manifest religion or belief is also the freedom to comply with what is prescribed or authorized by a particular religion or belief. In later circulated views, the term belief came to be recognized as implying the acceptance of diversity and the emphasis shifted towards defining tolerance and respect as boundaries of religious freedom.\textsuperscript{122} Therefore, even if States impose restrictions on the right to manifest religious belief within the permissible limitations, they remain under the obligation to approach conflicts with religious minorities with a very high threshold of tolerance in order to promote respect for difference and cultural pluralism in a democratic society.

Despite these clear signals that minority religious beliefs should be highly tolerated, France has not mentioned very much in its country report regarding the right to manifest religious beliefs. The State guarantees religious freedom under Article 2 of the Constitution of 4 October 1958\textsuperscript{123} and the free practice of religion under Article 1 of the Act of 9 December 1905.\textsuperscript{124} While France has expressly recognized the wearing of headscarves or clothing displaying religious affiliation as a “practice” within the meaning of manifestation of religion or belief under Article 18 of the ICCPR,\textsuperscript{125} a recognition affirmed the Conseil d’État in its third State party report to the Human Rights Committee, France mentions that

\begin{quote}
the free practice of religion may be affected must, in accordance with case law, be based solely on the requirements of maintaining public order, the smooth functioning of public services or
\end{quote}

\begin{footnotes}
\item[121] \textit{Id.} Refer to footnote on p. 1 of the Report.
\item[123] France State Party Report ¶ 281, CCPR/C/76/Add.7. (May 15, 1997).
\item[124] \textit{Id.} at ¶ 285.
\item[125] Human Rights Committee, \textit{General Comment} 22, ¶ 8, U.N. Doc. HRI/GEN/1\textbackslash Rev.1 at 35 (1994).
\end{footnotes}
maintaining the freedom of conscience of others.\textsuperscript{126}

The French statement, read in the light that the headscarf affair simmering since 1989, is very vague and sheds no light on the particular views of France on the question of religious freedom, particularly on the issue of headscarves.

However, the Stasi Commission does attempt to justify the headscarf ban in its Report. Emphasizing that the right to manifest religious belief is not an absolute right, the Stasi Commission indicates that the recommendations for the Headscarf Law fall within the permissible limitations of its international human rights obligations.\textsuperscript{127} Demanding conformance to the principle of \textit{Laïcité} as essential to France’s secular character,\textsuperscript{128} the Commission Report notes that the State has the right, under the margin of appreciation doctrine, to assess the situation and impose restrictions through national law without violating the ECHR.\textsuperscript{129} In justifying its claims that it is acting under its legitimate margin of appreciation, the Report refers to the case of \textit{Cha’are Shalom Ve Tsedek v. France}.\textsuperscript{130} In this case, the applicant’s association alleged a violation of Article 9 of the Convention because of French authorities’ refusal to grant the necessary approval to the slaughterhouses to perform ritual slaughters in accordance with Jewish ultra-Orthodox prescriptions. Therefore, it was claimed, the French authorities had infringed in a discriminatory way its right to manifest its religion through observance of the rites of the Jewish religion. The court ruled that France did not discriminate against the ultra-Orthodox or violate their right to manifest their religion by observance of this rite, noting that France had acted affirmatively to ensure effective respect for freedom of religion. By requiring that ritual animal slaughtering be carried out in exactly the same manner as secular slaughterers, the State protected against the prospect that unregulated slaughters would be carried out in conditions of doubtful hygiene. Thus, there was no violation under Article 9(2) of the Convention. Even if such a restriction was an interference with the right to freedom to manifest one’s religion, the Court held, the legally authorized actions of the State

\begin{footnotes}
\item[126] See supra n. 123 and accompanying text.
\item[127] See supra n. 13, at § 2.1.
\item[128] Id. at pt. II, § 2.1.
\item[129] Id.
\end{footnotes}
pursued a legitimate aim to protect public health and order. Therefore, France was entitled to a margin of appreciation as a contracting party in deciding how it would regulate meat slaughtering to ensure that the principle of Laïcité was carried out in church-state relations.

In interpreting the requirement that any limitations of the right to manifest religious belief be “necessary in a democratic society,” the Stasi Commission Report refers to the European Court of Human Rights decisions upholding the right of Turkey to protect secularity as the fundamental value of the State, such as *Refah Partisi (The Welfare Party) et al. v. Turkey*. The Court upheld the decision of the Turkish Constitutional Court of Turkey to ban the Refah Party against a challenge under Article 9 of the ECHR, agreeing that the decision safeguarded the principle of secularism for the democratic system in Turkey. In *Refah*, Turkey argued that its democracy was being threatened by religious incursions of an Islamic political party and claimed that it had a right to dissolve the party to protect against the party’s “activities against the principle of secularism” and out of “necessity to preserve a democratic society” in 1998. In attesting the decision, the Grand Chamber of the Court affirmed the arguments of the Turkish authorities that Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs; that Refah intended to apply Shari’a to both internal and external relations of the Muslim community within Turkey’s pluralistic culture, thus causing possible discrimination against and unrest among non-Muslims; and the claim that the Party was a danger to the State, based on the references made by Refah members to possible recourse to force as a political tool.

Finally, the Stasi Commission examined Article 9’s requirement that the State have a “legitimate aim” through the European Court of Human Rights cases of *Dahlab v. Switzerland*, *Kalaç v. Turkey*.

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131. *Id.* at ¶ 84.
132. *See supra* n. 13, at 2.3.
134. *Id.* at ¶ 65.
135. *Id.* at ¶ 116.
136. *Id.*
In the Commission’s view, these cases justify the imposition of limits by the State on religious freedom, if such expression threatens the principle of secularity. In *Dahlab v. Switzerland* involved a primary school teacher who wore an Islamic headscarf in school. The applicant asserted that the State infringed on her freedom to manifest her religion guaranteed by Article 9 by prohibiting her from wearing a headscarf in the performance of her teaching duties. The Commission ruled that the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order, and public safety. Weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, and considering the tender age of the children for whom the applicant was responsible as a representative of the State, the Commission held that the Geneva authorities did not exceed their margin of appreciation and that the measures they took were therefore not unreasonable. The Court in this case also stressed the impact that the “powerful external symbol” conveyed by the teacher’s headscarf could have and questioned whether it might have some kind of proselytizing effect.

Similar reasoning regarding the priority of the State’s legitimate aims for public order over religious freedom rights can be found in *Karaduman v. Turkey*, where the Commission noted that measures taken in secular universities to ensure that certain fundamentalist religious movements do not disturb public order or undermine the beliefs of others do not constitute violations of Article 9. Moreover, in *Valsamis v. Greece*, the court ruled that even though the scope of Article 2 of Protocol No. 1 (P1-2) was limited, the provisions of the Protocol must enable parents to obtain exemptions from religious education lessons if the religious instruction was contrary to their convictions, but

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141. See supra n. 13, at 21.
142. See supra n. 140 and accompanying text.
143. See supra n. 86, at 412. Art. 2 of Protocol I, Enforcement of certain Rights and Freedoms not included in § 1 of the Convention, “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.”
it did not require the State to guarantee that all their wishes, even those founded on religious convictions, should be acceded to in educational and related matters.

Although I will argue in more depth in the next Part that France cannot similarly justify the imposition of religious restrictions through the Headscarf Law because its arguments about “legitimate aim” and “democratic necessity,” among others, are not sound in the case of the Headscarf Law, I would just note that these cited cases cannot really justify the Stasi Commission’s recommendations. In each of these cases, the decision of the Court to recognize the State’s margin of appreciation was strongly guided by a positive undertaking by the State to guarantee the right to manifest religious beliefs. Such an undertaking is missing in the Headscarf Law. Moreover, the provision in the law to require a dialogue between the school system and religious pupils cannot be understood as a positive undertaking of like dimensions because it is too imprecise. The Headscarf Law simply does not promote pluralism and the State’s claim under necessity clause cannot be compared to Turkey’s situation where the possible incorporation of Shari’a posed a true threat to democracy and human rights.

C. Can the Headscarf Law be Justified as a Permissible Limitation on Freedom to Manifest Religion?

Because we are obliged to interpret the ECHR and the ICCPR in accordance with Article 31 of the Vienna Convention on the Law of Treaties, the limitations imposed by France through this law need to be examined within the scope of permissible limitations described in this Convention. This Part will critique the Stasi Commission conclusions, arguing that the headscarf ban cannot meet the requirements that it is justly prescribed by law, pursues a legitimate aim and is necessary.

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144. Although the Convention does not have retrospective effect, the European Court of Human Rights has taken a view that Articles 31-33 are reflective of customary international law. 
145. See supra n. 86, at 188, 402. Art. 9(2) & Art. 18(3) of the ECHR and ICCPR respectively:

Art. 9(2) of the ECHR. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Art. 18(3) of the ICCPR. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order,
in a democratic society. Although the Headscarf Law also infringes upon the enjoyment of other related rights like the freedom of expression, this Part will focus on the freedom to manifest one’s religious belief which in this case subsumes the right to freedom of expression, because it is the primary right guaranteed by Article 9 of the Convention.

So far, no Article 9 case has succeeded on the grounds that the restriction on freedom of religion or belief was not prescribed by law and is therefore void. Since the Headscarf Law is a formal enactment by the French government, the limitation “prescribed by law” may not hold much weight when we are looking at whether the Article provides sufficient notice to potential violators about the law’s restrictions and the foreseeability of consequences because of its formal enactment that trigger permissible restrictions. It is highly debatable, however, whether the law is sufficiently precise and definite as required by the language “prescribed by law: the terms “ostentatious/conspicuous” and the “involvement in a dialogue” obscure the exact intention of the legislature and make interpretation dangerously ambiguous from a due process standpoint.

First, one would have to ask whether the “conspicuous/ostentatious” nature of the prohibited symbols is merely a question of appearance, whether it is met only when the Court finds that there is an attempt at proselytism or whether it is met in either case. As

health, or morals or the fundamental rights and freedoms of others.

146. Id.
147. Id.
149. (a) See supra n. 116, at139. (b) Even in Kokkinakis v. Greece the court held that though the definition of proselytism in the Greek anti-proselytism law was general, the wording on the law was compensated for by case law which defined the offense more precisely. See supra n. 148.
150. Sunday Times v. UK, Ser. A, no. 30, 2 Eur. H. R. Rep. 245 at ¶ 49 (1979). “In the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law.” First, the law must be adequately accessible: the citizen must have an adequate indication of how the legal rule is applicable to a given case. Second, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.
151. See supra n. 145 and accompanying text.
152. See supra n. 148. Proselytism is linked to freedom of religion. Partly Concurring Opinion, Judge Pettiti.
discussed above, certain mandatory religious appearances are definitely conspicuous; and since the law only focuses on conspicuous nature of dress/symbols as a matter of religious affiliation, it imposes a very high burden upon the pupils/parents to show that the dress/symbol is not conspicuous. Further, imprecision is reflected in the manner in which the Ministry of Education circular \(^{154}\) fails to define or interpret the “conspicuous/ostentatious nature” of dresses/symbols and merely addresses the philosophical issues concerning Laïcité and secularism.

If the law was attempting to focus on the proselytizing effect of conspicuous symbols or dress, then the law is even more unclear and, thus, not “prescribed” in the sense required by the treaty. One would have to ask whether the mere act of wearing dress/symbols is proselytizing. The dictionary meaning of the word proselytize is, “to induce someone to convert to one’s faith” and “to recruit someone to join one’s party, institution.” \(^{155}\) Both of these meanings indicate that proselytization is an act, and not the passive representation of one’s faith accomplished by wearing symbols/dresses, which can be accomplished by conspicuous or inconspicuous symbols. Even if it is argued that the wearing of such symbols/dresses constitutes an act to proselytize or provoke others in a manner that infringes upon the fundamental freedom of others, the law still remains imprecise. *Kokkinakis v. Greece* establishes that State interference with proselytizing can also be an interference with the right to manifest a religion or belief \(^{156}\) unless the State distinguishes between proper and improper proselytism in the encounter. \(^{157}\) While the *Kokkinakis* court refused to define “improper proselytism” in the abstract, it is clear from *Kokkinakis* and the subsequent proselytism case of *Larissis* \(^{158}\) that the court is prepared to accept the right to proselytize as protected, at least in part. The headscarf laws fail to define the limits of proper/improper proselytizing;

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153. *Id.* at pt. III, § 3.2.


156. *See supra* n. 35, at 13.

157. *Id.* at 16.

and since the mere expression of belief involved in wearing symbols/dresses does not amount to any act of aggression in the absence of any immediate and direct consequences, it cannot be termed as improper proselytism. In fact, Paragraph 4 of the ICCPR’s Article 18, General Comment 22 specifically states that “The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including . . . the display of symbols . . . .” 159

The French Headscarf Law is also imprecise in describing the manner in which dialogue constituting improper proselytization might proceed. For example, would one determine whether expression is improper proselytization based on the viewpoint of the proselytizer or the persons being proselytized? The State’s approach to this question has to be balanced, because to judge the dialogue from the proselytizer’s point of view and the positive obligation of tolerance, the adjudicator would have to consider the intent of the proselytizer rather than the outcome of the expression. In the Malone case, 160 the Court stressed that any law that infringes on the right to religious freedom must describe the discretion of the executive with sufficient clarity so as grant an individual protection against arbitrary interference. By explicitly prohibiting conspicuous/ostentatious dresses/symbols that merely reflect religious affiliation in attempting to limit religious manifestations, the law grants the school administration a very high margin of appreciation or discretion, leaving too much room for the possible abuse of the law. 161

The French Headscarf Law also fails the requirement that the State be pursuing a legitimate aim, in this case, the concern for public order. It is difficult to see how the issue of headscarves can possibly be referred to as a concern for public order. 162 Although the claim of a legitimate aim would largely depend upon the extent to which the Court/Commission is prepared to accept State’s assertion, 163 the Headscarf Law clearly fails even the most generous application of this

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159. See supra n. 123 and accompanying text.
161. See supra n. 148, at 21-22. In a partly concurring opinion, Judge Pettiti, mentioning the Greek anti-proselytism law stated, “The vagueness of the charge and the lack of any clear definition of proselytism increase the misgivings to which the Greek law gives rise.”
162. See supra n. 13, at 4.2.2.1, at 56.
163. Id. n. 92, at 146.
test. Ever since the controversy began in 1989, there has been no situation of civil unrest, rioting or even public indignation in France as a result of Muslim headscarves. None of the groups directly affected by the prohibition has ever been involved in inciting criminal violence, antagonism or intolerance leading to inter-religious hatred and public order. As suggested, the prohibition cannot be considered legitimate if the State merely imposes a limitation because it believes that wearers of the headscarf are proselytizing others, or convincing them with propaganda or provoking them to change their religion because the State cannot arrogate to itself the right to assess a person’s weakness in the face of proselytization in order to punish the proselytizer. Finally, even if some tensions have developed in France, these tensions have not reached the threshold that would obligate the State to impose limitations on the pretext of law and order. The State has the responsibility to accept certain tensions which are inherent in a multicultural society. Serif v. Greece amply clarifies that even if possible tensions are created because the right of religious freedom is protected, these are unavoidable consequences of pluralism. Therefore, the government should not remove the causes of tension by eliminating pluralism, but by ensuring that competing religious groups tolerate each other. Thus, the imposition of limitations on the pretext of public order is unjustified.

This analysis brings us to the question of whether the French law can meet the requirement that its aim is genuine, not just legitimate, because this question implies that we must consider whether the ban is necessary in pursuit of the aim. I argue that the requirement of “genuineness” broadly implies two demands. First, it asks States to recognize the primacy of their human rights obligations as primary,
when measured against any legitimate aim and necessity. Second, the requirements of necessity and the legitimacy must be guided by context. For example, I would argue that even reprehensible neo-Nazi groups should be tolerated if they are numerically insignificant in society because banning them is not “necessary” if they do not threaten a democratic society or present any grave risks. On the other hand, if they are successful in recruiting members and gaining more political power, it is easier to justify banning such groups because they are anti-democratic and threaten the State.171

With respect to the question of whether France’s Headscarf Law can meet the criterion of necessity, we should permit France its margin of appreciation.172 However, even within the ambit of State’s sovereign autonomy, the ECtHR exercises supervisory control in assessing the Headscarf Law under the doctrine of necessity and its compatibility within the Convention.173 In defining “necessary” as a context-dependent term, the ECtHR in the Handyside case noted that the adjective can neither be synonymous with indispensable nor can it have the flexibility of expressions such as admissible, ordinary, useful, reasonable or desirable.174 Rather, it is for the national authorities to initially assess whether there is a real and pressing social need implied by the notion of necessity.175 By imposing limits on the interpretation the States may give to this term, however, the court has attempted to limit subjective interpretations by States.

In Kokkinakis v. Greece, where it considered the necessity requirement, the Court articulated the importance of the values set out in Article 9(1) of the ECHR. In the court’s view, enjoyment of the right to manifest belief is the foundation of a “democratic society” and pluralism cannot be dissociated from the concept of a democratic society.176 The

171. See infra Part V, “Can the French Situation in France be Compared to Turkey?” on the question of genuineness and context in the comparison of the situation between Turkey and France.
172. Handyside v. UK, 1 Eur. H. R. Rep. 737 (1976). The court noted that, in interpreting the requirement of necessity States have the primary obligation of protecting human rights and that they are better placed to ascertain the necessity of the pressing social need implied by the notion of “necessity” in this context.
174. See supra n. 160 and accompanying text.
175. See supra n. 13 and accompanying text.
176. See supra n. 148, at ¶¶ 31-32.
Headscarf Law conflicts with the non-dissociable value of pluralism by limiting the enjoyment of a fundamental right for reasons that do not constitute a pressing social need and means that are not proportionate to any legitimate State aim. As previously stated, in the absence of any intentional aggression or immediate dire consequences, wearing such dresses/symbols is an innocent expression duly recognized by international human rights law. Second, the prohibition neither addresses, nor justifies itself based on any immediate and tangible threats to secularism. Finally, if the need to protect secularism and democracy were so pressing and threatening to the rights and fundamental freedom of others, then the prohibition cannot be selectively applied in public schools while ignoring the same expression in private schools and other public services. Finally, the law makes it impossible for a believer to manifest a religious belief, even if that manifestation is not conspicuous/ostentatious. Even if we grant a wide margin of appreciation to France in its law-making, by limiting religious freedom, the Headscarf Law fails to achieve true religious pluralism, which is an inherent feature of a democratic society. Since it is bound to practice strict neutrality in religious matters, France can neither set itself up as the arbiter of whether particular religious behavior is “proper” or “improper,” nor resort to a purportedly neutral test to decide whether or not the proselytism in question is “compatible with respect for the freedom of thought, conscience and religion of others.”

D. The Violation of France’s International Obligations to Protect Minority Rights by the Headscarf Law

France’s Headscarf Law also violates Article 27 of the ICCPR and many other international instruments by infringing on minority religious members’ rights to practice their religion in community with members of their own group. After describing how minority group rights are protected by international covenants, I will consider France’s assertion that there are no minorities in France, and thus that these Articles do not apply to the French headscarf controversy.

Article 27 of the ICCPR is of special importance in international law since it directly imposes State obligations for the protection of

177 Hasan and Chaush v. Bulgaria, App. No. 30985/96 2000-XI Eur. Ct. H. 511 at ¶ 78 (Oct. 26, 2000) (“. . . . excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”).
ethnic, linguistic and religious minorities. Other international instruments establish linkages to the protection of minority rights but they do not directly establish a comprehensive State duty to respect minority rights. For example, the International Covenant on the Elimination of Racial Discrimination (ICERD), while it attempts to guarantee the elimination of racial discrimination, also aims to protect racial minority groups\textsuperscript{178} and provides an explicit recognition of the value of affirmative action policies.\textsuperscript{179} Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)\textsuperscript{180} reflects the rights of minority groups in signatory States’ “to take part in cultural life” and in particular, education.\textsuperscript{181} Similarly, Articles 13(3) and (4) require States to recognize legitimate differences in beliefs and traditions. The Covenant on the Rights of the Child (U.N.-CRC) also refers to the rights of minority children in Article 30 and obligates States not to deny any such child “in community with other members of his or her group, to enjoy his or her own culture, . . . or to use her own language;” while the United Nations Convention against Discrimination in Education (CADE) also recognizes the rights of the members of national minorities.\textsuperscript{182} Similarly, the Vienna Declaration of the 1993 World Conference on Human Rights reaffirms the rights of minority groups in language that shows the influence of the U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and Article 27 of the ICCPR.\textsuperscript{183}

\textsuperscript{178} See supra n. 86, at 162. Art. 1(4) ICERD.
\textsuperscript{179} Id. at Art. 1(2) ICERD.
\textsuperscript{180} Id. at 177. Art. 15 ICESCR.
\textsuperscript{181} The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 173. Art. 5 (c).
\textsuperscript{183} UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. \textit{Adopted by General Assembly resolution 47/135 of 18 December 1992 and also see} International Covenant on Civil and Political Rights Adopted and opened for signature.
Although there is no direct reference to minority rights in the U.N. Charter and the Universal Declaration of Human Rights (UDHR), these documents imply an obligation upon States to protect minority rights in their explicit references to individual human rights and concern for non-self-governing territories.  

Article 73 of the U.N. Charter (chapter XI concerning non-self-governing territories) refers to territories “whose people have not yet attained a measure of self-government.” Unfortunately, this focus on territorial elements does not explicitly embrace ethnic, linguistic and religious groups who are without a territorial base. Similarly, the UDHR makes no mention of minority rights, but some of its Articles, equally affirmed in the ICCPR, have been used to support minority claims, such as the rights to equality, non-discrimination, freedom of thought, conscience and religion, freedom of opinion and expression, peaceful assembly and association, education and the right to freely participate in the cultural life of the community. The ECHR does not dedicate any specific article to minority rights, but these rights emerge through Article 14 of the ECHR. Although it is not binding, the U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, (1992) strengthens the scope of Article 27 of the ICCPR. The Declaration’s Article 1(1) calls upon


Art. 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

185. Id.
186. See supra n. 86, at 19. Art. 1 UDHR.
187. Id. at Art. 2 UDHR.
188. Id. at 21, 182. Art. 18 UDHR & the ICCPR.
189. Id. at 21. Art. 19.
190. Id. at Art. 20.
191. Id. at Art. 21.
192. Id. at Art. 27.
193. Art.14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
States to “protect the existence and the national or ethnic, cultural, religious or linguistic identity of minorities . . . .” 195 The Framework European Convention for the Protection of National Minorities is the first binding instrument that has an exclusive focus on minorities. 196 Articles 3-4 of the Framework Convention provide for equality, prohibiting discrimination against anyone who belongs to a national minority. 197

France has, however, refused to recognize the application of these covenants to its minority groups by claiming that there are no minority communities in France within the meaning of the covenants. In its third periodic report to the Human Rights Committee on its declaration against Article 27 of the ICCPR, France explained that under the terms of its Constitution, the Republic is “indivisible, secular, democratic and social.” 198 Because it grants the equality of all citizens before the law without distinction and prohibits invidious distinctions through the principles of public law, France declared that “there are no minorities in its territories, and Article 27 is not applicable as far as the Republic is concerned.” 199

The French declaration was considered in T.K. v. France 200 and M.K. v. France, 201 in which the HRC decided that it was “not competent to consider complaints directed against France concerning alleged violations of Article 27.” Although the Commission essentially treated this declaration as having the force of a treaty reservation, France has still been challenged about its obligations to take positive steps “to preserve and protect the collective qualities and values” 202 of minorities in its country. After the third periodic report submitted by France, the

195. See supra n. 86, at 190. Art 27.
196. See supra n. 120 and accompanying text.
197. Id.
198. 1958 Const. 2.
202. Summary Record of the 1599th Meeting: France, CCPR/C/SR.1599 (July 28, 1997). Statement of Mr. Yalden in relation to Art. 27 of the ICCPR on the question as to whether positive steps were taken to preserve and protect the collective qualities and values—notably their languages, but also other special aspects of their culture—that distinguished the Bretons, the Basques and the native peoples of the overseas departments and territories from other French men and women. Id. at ¶ 67.
HRC in its concluding observations expressed concern about France’s statement, noting that it effectively “denied ethnic, religious or linguistic minorities the right, in community with members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.”203 The Committee further emphasized that

the mere fact that equal rights are granted to all individuals and that all individuals are equal before the law does not preclude the existence of minorities in a country, and their entitlement to the enjoyment of their culture . . . or the use of their language.204

In 2001, the Committee on Economic, Social and Cultural Rights also expressed its “concern about the lack of recognition of minorities in France”205 and called upon France to “review its position with regard to minorities, ensuring that minority groups have the right to exist and to be protected as such.”206

Article 27 applies “in those States in which ethnic, linguistic minorities exist . . . .” A legitimate construction of this Article suggests that if a State does not recognize any such minorities, the State does not fulfill the terms of the Article. Irrespective of France’s non-recognition of minorities, this issue cannot be overlooked, because the existence of minorities is essentially a factual matter.207 The term “existence”208 as spelled out in the language of the General Comment does not depend upon the decision by a State party to recognize the existence of a minority group; and international law has recognized that the “existence” criterion is based on the fact of a community’s existence and is not a question law, at least since the Greco-Bulgarian Communities Case.209 This opinion explained that the question whether a State “recognizes” or does not recognize minorities in its internal law cannot be decisive for international law.210

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204. Id.
206. Id. at ¶ 25.
207. Sebastian Poulter, Muslim Headscarves in School: Contrasting Legal Approaches in England and France, 17 Oxford J. Leg. Stud. 53 (1997). Professor Rosalyn Higgins argues that the existence of minorities in France is essentially a factual matter and hence the Committee is free to decide whether or not such minorities exist in France.
208. Id. at ¶ 5.2.
210. Allan Phillips & Allan Rosas, Universal Minority Rights 22 (Minority Rights Group
Second, the State’s prohibition of discrimination on any grounds does not impede the recognition of minorities in a particular State.\textsuperscript{211} Even if minority groups are not recognized because of the language of Article 27, the obligation to recognize the right of minorities permeates the language of other articles and covenants to which France has made no declaration/reservation. Article 27 principally notes that “minorities shall not be denied the right [to be] in community with other members of their group, to enjoy their own culture, to profess and practice their own religion...” Though the focus of Article 27 is on the denial of the right, that focus\textsuperscript{212} implies that States have a positive obligation to protect against the denial or violation\textsuperscript{213} of the right i.e., to institute legislative and administrative measures to ensure the rights provided. Without doubt, the right to education enshrined in the ICESCR has the character of a positive obligation of the State toward all children,\textsuperscript{214} but Articles 13 to 25 of the ICESCR, relating to the right to education and the right to take part in cultural life, also clearly concern the right of minorities. Similarly, the preamble of the U.N. Declaration in the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (paragraph 3) mentions the U.N.-CRC to stress the continuity between these instruments.\textsuperscript{215}

In addition, the second phrase in Article 27, recognizing that individuals “enjoy the right [to be] in community with other members of the group”\textsuperscript{216} reflects the collective dimension of these rights: though the rights are individual rights, they are premised on the existence of a community. The term “community” has been spelled out in the Greco-Bulgarian Communities Case in respect to the protection of minorities. In its advisory opinion, the court stated that a community is a group of persons living in a given country or

\begin{itemize}
  \item International Commentary on Article 27, Human Rights Committee. General Comment 23 CCPR/C/21/Rev.1/Add. 5 at ¶ 4.
  \item Id. at ¶ 6.1.
  \item Id.
  \item See supra n. 86, at 190. Art. 27 of the ICCPR.
\end{itemize}

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
locality, having a race, religion and language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worshipping, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.\textsuperscript{217}

The prohibitions in the Headscarf Law specifically refer to Muslims, Jews and Sikh minorities who meet the definition of a minority group in the \textit{Greco-Bulgarian Communities Case}. The reference to “enjoyment of culture” in the Article indicates a collective dimension of identity and tradition implied by membership in a community or group. In the case of \textit{Minority Schools in Albania},\textsuperscript{218} the concept of “identity” referred to the possibility of living peacefully alongside others, while “traditions” referred to the aspect of preserving the characteristics of a group. These two obligations require that minority groups be placed on a footing of perfect equality with other nationals of the State and that each State meet its obligations to provide suitable means for minorities to preserve their identity. The Headscarf Law conflicts with French minority citizens’ right to enjoy their culture, because it refuses equal footing to minorities comparable to the rights of the Christian majority and it creates a situation that threatens these communities’ identity. The requirement that these groups abide by the public schools’ education codes also creates the possibility that if these children comply with the law, they will be denied membership in their own religious groups and the right to practice their own religion. Just as in the case of the right to manifest one’s religion, in \textit{Kitok v. Sweden} the HRC noted that rights of persons belonging to minority groups to enjoy their own culture can be limited, but only to the extent that these limitations are necessary in a democratic society or for the protection of the rights and freedoms of others.\textsuperscript{219}

Finally, it should certainly be noted that France’s own statement that it respects all beliefs and there is no distinction between citizens on grounds of origin, race or religion also obliges France to recognize minority rights. Its statement that there are no minorities in France appears to belie that commitment.

\textsuperscript{217} See supra n. 207.
\textsuperscript{218} Minority Schools in Albania, Advisory Opinion, P.C.I.J (Ser A/B) No. 64, at 22.
V. THE FRENCH OBLIGATION OF NON-DISCRIMINATION AND ITS APPLICATION TO THE HEADSCARF LAW

France has signed a number of treaties which provide that it should not discriminate against persons on the basis of religion, an obligation which it has violated in the case of the Headscarf Law. Among other provisions, it has adhered to the ICCPR Article 26’s non-discrimination clause under Article 26 of the ICCPR, a free-standing right that is not just limited to non-discrimination in those rights provided in the Covenant.220 Similarly, Article 2(2) of the ICESCR contains a non discrimination clause,221 and the U.N.-CRC sets out State obligations to respect and ensure the realization of the rights of the child under Article 2, along with Article 3(2) and Article 4 without discrimination. Although it is not a free standing right, Article 14 of the ECHR prohibits discrimination in the exercise of any legal right and in the actions (including the obligations) of public authorities.222

Finally, though several provisions are not legally binding, they also are the source of claims that France should not discriminate on the basis of religion. For example, Article 2 of the U.N. Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief prohibits not only discrimination but also intolerance.223 Endorsing the principle of human dignity, Article 1(3) of the U.N. Charter also refers to the non-discrimination principle as the freedom to enjoy human rights and fundamental freedoms “without

220. See supra n. 86, at 183. It should be noted that Art. 2(1) of the ICCPR imposes the obligation to ensure and respect the rights set forth in the covenant.

Article 2:

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.
2. For the purposes of the present Declaration, the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.
distinction as to race, sex, language or religion.” Similar language linking the non-discrimination principle to human rights can be found in Article 13(1)(b), 55(c) and 76(c) of the Charter. In addition, Article 7 of the UDHR refers to non-discrimination.

More specific protection against religious discrimination is provided in Article 26 of the ICCPR. The Article instructs States to enforce equal protection before the law “without discrimination on any ground such as . . . religion.” The ECHR Protocol No. 12, Article 1 prohibits religious discrimination in “any right set forth by law.” States Parties to the ICCPR and ECHR are also prohibited from allowing people of only certain religions to exercise their right to freedom of religion. Articles 9 and 14 of the ECHR, in combination, provide this same protection. Freedom from religious discrimination is also found in the United Nations Charter and the Universal

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224. See supra n. 86, at 3. Art. 1(3) of the U.N. Charter:
To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.


226. See supra n. 86, at 190. Art. 26 of the ICCPR:
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

227. Id. at 420. Art. 1 of Protocol No. 12: General prohibition of discrimination. You cannot be discriminated against by public authorities for reasons of, for example, your skin color, sex, language, political or religious beliefs, or origins (available at http://www.takeparttoo.org/index.php?option=com_content&task=view&id=218&Itemid=141).

228. Id. at 188. This is codified in Art. 18 of the ICCPR, and Art. 2(1), which prohibits any rights in the covenant from being enforced with religious discrimination. See supra n. 86.

229. Id. at 402. Art. 9 of the ECHR. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Art. 14 of the ECHR. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
Declaration of Human Rights.\textsuperscript{230} And, since it is relevant to the question of prohibition of headscarves, which affects Muslim girls only, we should note that the right to equality based on gender is included in the common Article 3 of two international covenants, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights, and is referred to in Article 2 of the UDHR. More specifically, the Covenant on the Elimination of Discrimination Against Women (CEDAW) Article 1 defines discrimination against women as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition . . . fundamental freedoms in the political, economic, social, cultural, civic or any other field.

In spite of these multiple expressions against discrimination in the international instruments, no clear definition of discrimination exists. The Human Rights Committee, while acknowledging in General Comment 18 (Non Discrimination) on Article 18 of the ICCPR that the Covenants neither define the term discrimination nor indicate what constitutes discrimination, applies a definition similar to that given the International Covenant on the Elimination of Racial Discrimination (Article 1 of the ICERD)\textsuperscript{231} in discussing such instruments as the CEDAW. While the CADE does define discrimination,\textsuperscript{232} over the years, a composite concept of discrimination has developed in the interpretation of various instruments, characterized by four distinct elements. To constitute discrimination, a court must find “difference in treatment, which is based of the prohibited ground, has a certain purpose or effect, in selective fields.”\textsuperscript{233}

Equality in law precludes discrimination of any kind, whereas equality in fact may necessarily involve different treatment in order to establish an equilibrium among groups or individuals with different circumstances.\textsuperscript{234} The obligation to guarantee equality in fact triggers a positive duty upon the State to accommodate diversity and promote

\textsuperscript{231} See supra n. 123, at ¶ 6.
\textsuperscript{232} See supra n. 86, at 388. Art. 1 of U.N.-CADE.
\textsuperscript{233} M.C.R. Craven, The International Covenant on Economic, Social and Cultural Rights—A Perspective on its Development 163 (Clarendon 1995).
\textsuperscript{234} See supra n. 216 and accompanying text.
pluralism in society.\textsuperscript{235} The HRC also recognizes that the enjoyment of rights and freedoms on an equal footing does not mean the right to identical treatment in every instance and points out that the principle of equality sometimes requires State parties to take affirmative action to diminish or eliminate conditions which cause or help perpetuate discrimination prohibited by the Covenant.\textsuperscript{236} Interpreting Article 14 of the ECHR, the Commission also notes that the Article is violated not only when States treat persons in analogous situations differently without providing an objective and reasonable justification, but also when States, without objective and reasonable justification, fail to treat persons whose situations are different in different ways.\textsuperscript{237} The U.N.-CRC has gone beyond this interpretation and obliges States to take affirmative action for the protection of human rights for violations arising out of apparently neutral rules.\textsuperscript{238} Article 2 of the U.N.-CRC also stresses that the non-discrimination principle does not bar affirmative action i.e., legitimate differentiation in the treatment of individual children. Furthermore, in the Preamble, the U.N.-CRC recognizes that “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special protection.”\textsuperscript{239}

Other international conventions that underline similar obligations include the ICERD, CEDAW and most relevantly the ECHR. Article 2(2) of the ICERD, which refers to racial equality as a free-standing right, calls for affirmative action both allowing distinctions\textsuperscript{240} and prohibiting distinctions which have the purpose or effect of impairing the recognition, enjoyment and exercise of human rights and fundamental freedoms on equal footing (Article 1).\textsuperscript{241} Also, Article 2(1)(c) of the ICERD obligates States to take measures, including legislative measures, which have the effect of eradicating discrimination. Similarly, Article 2(f) of the CEDAW calls upon States to take appropriate measures, including legislation to modify or abolish existing

\begin{flushleft}
\textsuperscript{235} See supra n. 86, at 183.
\textsuperscript{236} See supra n. 123 at ¶ 6.
\textsuperscript{238} See supra n. 86, at 241. Art. 2 of U.N.-CRC.
\textsuperscript{239} Id. at U.N.-CRC Preamble at ¶ 11.
\textsuperscript{240} Id. at 162. Art. 1(4) ICERD.
\end{flushleft}
laws or regulations which create de facto discrimination against women.

Even without direct discrimination, certain apparently neutral laws with legitimate purposes may in fact discriminate, so the positive duty upon the States is to break through assimilationist policies and recognize the “positivity of group difference.” Therefore, States must objectively and reasonably show that their acts pursue legitimate aims and that there is a “reasonable relationship of proportionality between the means employed and the aim sought to be realized.” However, as the Headscarf Law shows, conflicts can arise when apparently neutral practices conflict with the religious, ethnic or cultural claims. The Headscarf Law also raises the question of whether France is justified in overriding the claims of minorities in favor of a universal norm in ways that impair a child’s right to education and essentially constitute religious discrimination.

We must consider to what extent France is required to differentiate between religious groups to achieve a deeper notion of equality by accommodating religious claims of such groups. Since I have already discussed how the European Court of Human Rights, elaborating on Article 14 in the Thlimmenos v. Greece case, has described the concepts of legitimate aim and proportionality, I will focus this discussion on how the Headscarf Law constitutes differential discriminatory treatment in its effect.

The Convention Against Discrimination in Education (CADE) calls on States to prevent discrimination that “has the purpose or effect of nullifying or impairing equality of treatment in education,” which is the problem raised by the Headscarf Law. Professor Fredman explains the importance of considering discriminatory effects in her comments on Mandla and another v. Dowell Lee, in which the court held that a school had unlawfully discriminated against a Sikh boy by excluding him from the school when he refused to take off his turban in order to comply with the school rule that boys come bare-headed to school. As she notes, an apparently neutral rule applying equally to all

243. See supra n. 173 and accompanying text.
245. See supra n. 8 at 388-389. Convention Against Discrimination in Education (CADE), Art. 1(1) (emphasis added).
pupils was recognized as requiring conformity in practice to a Christian way of dressing, therefore creating unacceptable barriers to those of different cultures or religions.247

Although the headscarf has discriminatory effect between different groups of boys (i.e., discriminating against Jewish boys who wear yarmulkes and Sikhs who wear turbans), the law also creates effects which challenge sexual equality by causing an adverse disparate impact on female students, who are punished for wearing the hijab. As a result, France is under greater obligation to offer “very weighty reasons” before a difference of treatment on grounds of sex can be regarded as compatible with the Convention.248 In Larkos v. Cyprus249 the Commission held that the State must not only prove what legitimate aim it is pursuing but also convincingly show the link between the legitimate aim and the differential treatment challenged by the applicant. In the Belgian Linguistic case, the Court indicated that the effects of the measure, and not its intention, are critical in weighing whether the State has a reason of paramount importance;250 and in light of the judgment in Karlheinz Schmidt,251 which established that States enjoy no margin of appreciation for differential treatment based on sex, it will be difficult to avoid the finding that the Headscarf Law constitutes gender discrimination, if not religious discrimination.

The French Headscarf Law actually implicates both discriminatory treatment and effect. The new law relies on the word “conspicuous” to weed out which religious displays in school will or will not be deemed acceptable. The 1989 Conseil d’Etat ruling that students may not wear “ostentatious” religious displays presented an obvious problem of interpretation—the term “ostentatious” is by no means an objective marker. The law provides significant opportunities for treating Muslim, Jewish and Sikh students differently from Christians who display their religious affiliations, treatment that cannot be masked by the extension of the ban to “large crosses,” which one hardly ever sees outside of a few traditional Christian groups. This is why the idea of prohibiting display of one’s religious affiliations, which inverts the derogatory

247. See supra n. 239, at 24.
248. Abdulaziz v. UK, 7 EHRR 491 at ¶ 78.
250. See supra n. 173 at § 1B, ¶ 10.
practice of imposing marks of recognition on religious groups such as the yellow star, cannot be interpreted as having an identical meaning for all religions.\textsuperscript{252}

The conspicuous nature of minority groups’ clothing results in another discriminatory effect. Since Muslims, Jews and Sikhs do not believe in idol worship (i.e., wearing an image of God on their persons) and therefore can only manifest their religious beliefs by their dress, which is absolutely prohibited by law, the law guarantees the right to manifest belief only to Christians who can use a more modest symbol. Moreover, the term ostentatious only really refers to Christian symbols, since they are the only ones that are judged to determine if there is some intent to impress or to be pretentious, as evidenced by their size.\textsuperscript{253} By contrast, a Sikh has five levels of expression of his religion, identified by the Five Ks, which remain on him until death and are never to be removed:\textsuperscript{254}

\textit{Kesh.} Uncut long hair, tied in a knot, and kept under a turban for men and often a scarf for women, which symbolizes obedience, acceptance of God’s will and humility.

\textit{Kanga.} A wooden comb to keep the hair in order, symbolizing cleanliness.

\textit{Kara.} A steel bangle worn on the right arm, symbolizing the bond with the Guru and the brotherhood of the khalsa.

\textit{Kachha or kachhedra.} A type of undergarment, symbolizing discipline, self-restraint and chastity and

\textit{Kirpan.} A sword, now usually small and ceremonial, worn as an emblem of power and dignity, symbolizing independence and fearlessness.

If the French law were to give similar latitude to the Sikh as it does to the Christian, it would have to determine that the wearing of the turban is not comparatively conspicuous/ostentatious within the religion, because this is the minimum required level of manifestation of religion for the Sikh. By contrast, one might argue, a display is only ostentatious or conspicuous for a Sikh if he openly displays his \textit{kirpan}. Similarly, the headscarf is the minimum level of manifestation for a Muslim


woman, since she can also wear the more noticeable jilbab or the hijab.

Even the statutory requirement that the school engage in a dialogue with the offending student can create a discriminatory impact, because there would be little room for compromise over “conspicuous” dress such as the Islamic veil, Sikh turban and the Jewish yarmulke, while Christian students would have the opportunity to compromise or win a discussion about whether their crosses are conspicuous. Moreover, the limitation of the law to public schools also allows private school students to freely wear dresses and symbols while public school students must suffer under the ban. In Kjeldsen, Busk and Madsen v. Denmark, Judge Verdross correctly ruled that if the government could carve out an exemption for religiously minded students in private schools without compromising its educational goals, there was no reason not to show the same measure of respect for students in the public system.\textsuperscript{255}

We might also consider here the concern that the French Headscarf Law discriminates against girls on the basis of gender. If indeed the Islamic veil is viewed as a reflection of oppression of women, then such oppression permeates into every strata of the society and is not limited only to pupils. Logically, then, it should be banned in France entirely. However, the law’s impact on girls and women is better suggested by Jean Baubérot, the only member of the Stasi Commission who gave a dissenting opinion about the Headscarf Law: The law gives a reflection that “\textit{The women are regarded as handled, incompetents consequently to make decisions by themselves and minor.}”\textsuperscript{256} Because the law creates greater possibilities that girls will be excluded from public schools, it is likely to deprive them of the right to education. For strict adherents of the Islamic faith, dressing girls without headscarves may not be considered modest and appropriate in front of boys or non-Muslims. Their parents may not allow girls to get an education, and may not be able to afford a private education, which would further alienate them from the mainstream. This effect would run contrary to France’s obligations under the CEDAW to ensure girls a right to education and religious non-discrimination.\textsuperscript{257} Although it is non-binding, Article 9 of

\begin{itemize}
\item \textsuperscript{255} I Eur. H. R. Rep. 711 (1976).
\item \textsuperscript{257} See supra n. 86, at 213-214. Art. 1 (Non Discrimination) of the CEDAW. For the
\end{itemize}
the CEDAW specifically enforces women’s right to education.

As previously suggested, this discrimination against the children of minority religions in France is not justified by an overriding interest in protecting the fundamental freedoms of other children. For example, this is not a case like Employment Division v. Smith, where discrimination on the basis of religion was justified on the basis that peyote smokers could harm themselves or others, or like the requirement that turbaned Sikhs riding motorcycles wear helmets, given the different protection they afford. Nor can it be compared to religiously based practices such as female genital mutilation which may warrant prohibition because of their clearly harmful effects. The Headscarf Law prohibits the manifestation of beliefs that are worthy of respect in a democratic society and not incompatible with human dignity, religious freedom claims that are neither “unfounded nor unreasonable.”

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

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

The South African Constitution explicitly assumes that the State may be discriminating fairly in the first stage of its inquiry, but alleviates the burden on the complainant by including a presumption that the discrimination is unfair unless proved fair. The Canadian Supreme Court establishes the primacy of individual dignity and worth by reading the Canadian Charter to obligate Canada to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens, through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance.

An even more focused approach to affirmative action can be seen in the North Ireland Act 1998, addressing the aim of equal participation, which requires public authorities to have “due regard to the need to promote equality of opportunity” in carrying out their functions. The Act goes beyond mere exhortation: each public authority is required to draw up an equality scheme that must state the authority’s procedures for consultation and assessment on the likely impact of policies on equality of opportunity; and monitor any adverse impact of such policies on equality.

Unfortunately, the State obligation to take affirmative action to prevent discrimination has not evolved very much in the case law of the European courts, except in dissenting opinions. Most notably, in the Belgian Linguistic case, the court’s judgment indicated that unequal treatment in law may properly be designed to benefit the less privileged class by aiming to correct inequalities of situation. Similarly, in a partly dissenting opinion by Judge Repik in Buckley v. UK case, he noted that when a fundamental right of a minority is concerned, especially a minority as vulnerable as the Roma (gypsies), the court has an obligation to subject any such interference to particularly close scrutiny.

In light of the progress in the recognized State duty to take

Jambrek, said that the Court had a duty to accept the Valsamis’s perception of the parade unless it could be shown to be “unfounded and unreasonable.”

261. See supra n. 239, at 31.
263. Northern Ireland Act 1998, c. 47, § 75 (Eng.).
264. See supra n. 239, at 28.
265. See supra n. 173, § 1B, ¶ 10.
affirmative action, the Headscarf Law imposes on France the duty to scrutinize its obligations toward religious minorities. The French Constitution of 1958, which also proclaimed its attachment to the Rights of Man,\(^\text{267}\) and the Constitution of 1946 establish the State’s duty to take affirmative action to grant all of its citizens the freedom of religion, which it should accomplish by neither recognizing nor promoting any particular religion.\(^\text{268}\) In 1989, when the headscarf controversy wearing first surfaced in France, the Conseil d’Etat not only referred to the 1958 French Constitution, but also to France’s international obligations, reminding France of its obligations to respect the freedom of conscience of its students, including the right to express their beliefs in schools by wearing religious clothing.\(^\text{269}\) The Court thus established the French duty to affirmatively act to protect the rights of the Muslim minority in a country dominated by a Catholic majority. Although this obligation is strongly entrenched even within the margin of appreciation of each contracting State\(^\text{270}\) the issue is masked in the French rhetoric of Frenchness or unified citizenry.\(^\text{271}\) The only possible recourse for students seeking affirmative action by the State is in the provision for dialogue with the school system, but because, as indicated, the framework of the dialogue addresses the problem in a hostile manner, the French law reflects little interest in accommodating religious diversity.

\(^{267}\) See Indent 1 of the Preamble of the Constitution, “The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946.”

\(^{268}\) Art. 1 of the 1958 Constitution (“France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs,” http://www.elysee.fr/elysee/elysee.fr/anglais/the_institutions/founding_texts/the_1958_constitution/the_1958_constitution.20245.html (accessed Sept. 20, 2006).

\(^{269}\) See supra n. 57 and accompanying text. The decision referred to no fewer than twenty-three legal documents, statutes, decrees, and international conventions that the Conseil cites as having contributed to its pronouncement.


\(^{271}\) See supra n. 13, at ¶ 4.2.2. To defend the public services.
Finally, we should consider how the international conventions protecting the rights of the child to manifest his religious beliefs and to education are violated by the French Headscarf Law. Unlike Article 18(1) of the ICCPR, Article 14(1) of the Convention on the Rights of the Child does not explicitly continue with the provision that “this right shall include the freedom . . . to manifest his religion or belief in worship, observance, and teaching.” However, the child’s right to manifest his religious belief certainly falls within the implicit protections of this Article.272 This is amply clarified in the general guidelines for periodic reports issued by the U.N. Committee on the Rights of the Child. In the guidelines, the Committee has requested State parties to indicate the measures adopted to ensure the child’s right to manifest his or her religion or belief, including those aimed at protecting the rights of minorities or indigenous groups, as well as any limitations to which this freedom may be subject to conformity with Article 14(3).273 Since the limitation clause mentioned in Article 14(3) of the CRC is interpreted under similar guiding principles as those for Article 18(3) of the ICCPR, as already discussed in the previous section, this Part will not discuss those limitations. However, it is important to discuss the international right to education, which is a distinctive right violated by the Headscarf Law.

The international right to education is not absolute, but is rather an “empowerment: right which provides an individual with control over his life. The right overlaps with other rights and accentuates the unity and interdependence of all human rights.”274 In the case of ethnic and linguistic minorities, the right is essential to preserving and strengthening children’s cultural identity and heritage.275 Although the right need not be realized by States immediately, with the exception of the Article 13(2)(1) unconditional mandate for primary education,276 the

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272. Committee on the Rights of the Child, U.N. Doc. CRC/C/2/Rev.2, at 15 (Belgium) & 31 (Netherlands). Countries like the Netherlands have entered declaration that Art. 14 of the CRC will be interpreted in accordance with Art. 18 of the ICCPR.
275. Id.
276. See Committee on Economic, Social, and Cultural Rights, General Comment 13, The
terms used—“to recognize,” conjoined with the term “to make”—imply progressive realization of this goal, and trigger more general State obligations under Article 2(1) of the ICESCR. Similar obligations are also imposed under the U.N.-CRC, which requires that “[w]ith regard to economic, social and cultural rights . . . [states shall] undertake such measures to the maximum extent of their available resources . . . ” Article 28(1) of the CRC specifically calls on States to “recognize the right of the child to education, with a view to achieving this right progressively.” In fact, many commentators have noted that the specific obligations laid down in Article 13(2) are not progressive “obligations of conduct” but are rather “obligations of result.” These obligations also closely correspond to those elements which are not expressly provided for in Article 13(1), such as specific references to gender equality and respect for the environment. This right, therefore, strengthens the interdependence of other rights in the U.N.-CRC, such as Article 3(1) (Best Interest of the Child) and Article 2(1) (Non-discrimination), Articles 5 and 14(2) (Rights and Duties of the Parents/Legal Guardians) and Article 30 (Minority and Indigenous Groups).

The primary right guaranteed by the convention is the right of access to educational institutions existing at a given time. Thus, the State is under an obligation to make public schools accessible to all by addressing three important overlapping barriers: it must ensure economic accessibility and non-discrimination (both raised by the headscarf controversy), and physical accessibility. As a highly subsidized State benefit, the public school system provides minority

Right to Education (Art. 13) U.N. Doc. E/C.12/1999/10 (1999) at 2 (a): The right to primary education, ¶ 10. As formulated in Art. 13 (2) (a), primary education has two distinctive features: it is “compulsory” and “available free to all.” For the Committee’s observations on both terms, see Human Rights Committee, General Comment 13, Art. 14, U.N. Doc. HRI/GEN/1/Rev.1 at 14, ¶¶ 6, 7 (1994).


278. See supra n. 86, at 249.

279. Id.

280. See supra n. 275, at 186.

281. See supra n. 274, at ¶ 4.

282. See supra n. 173, at § B, ¶ 4. Interpretation adopted by the Court.

children economic accessibility to education. By contrast, the headscarf prohibition has the effect of limiting the access of students who cannot afford to attend private school, and potentially can deny their right to education. The importance of economic accessibility has been highlighted by the Committee on the Rights of the Child in its concluding observations on Zimbabwe: “If increasing school fees has a negative effect on the accessibility of education for vulnerable groups, then there is a *prima facie* violation” of the convention. The Headscarf Law also increases the likelihood of school dropouts, which contravenes State obligations under Protocol No. 1, Article 2 as amended by Protocol No. 11 of the ECHR, instructing States not to deny individuals the right to education. It also violates Article 28(1)(e) of the CRC, which directs States to “take measures to encourage regular attendance at schools and the reduction of drop-out rates.”

Accessibility for minorities and vulnerable groups is also implied in the State’s obligation to accommodate these groups by recognizing their cultural diversity and promoting tolerance for difference amongst students through education. The right to education strongly promotes tolerance of the “other.” Article 13 of the ICESCR and Article 5 of the CADE call on States to promote “understanding, tolerance and friendship among all nations, racial or religious groups.” Article 29(d) of the CRC instructs that the aim of education is to educate a child “in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.” In the same spirit, the right to freedom from discrimination in education imposes an immediate obligation on State Parties to use education as a tool for promoting tolerance and prohibiting education from being used as a tool for intolerance.

We must recognize, however, that the Contracting Parties to this convention do not recognize any requirement that they establish or subsidize any particular level of education at their own expense, as evidenced in the negative formulation of the right in Article 2 of

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285. See supra n. 86, at 390. Art. 5 (1) (a) of U.N. CADE; id. at 176. Art. 13(1) of ICESCR.
286. Id. at 251. Art. 29(d) of the U.N. CRC. “The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.”
Protocol 1 and confirmed by the convention “preparatory work.” However, the right to education would be meaningless if it did not imply positive action by the State in favor of its beneficiaries. Since the prohibition of headscarves is limited to public schools, in order to fulfill its obligations of free compulsory education for all the State would have the positive obligation to provide a similar education in private schools if it insists on enforcing the law. Such a step would guarantee the right to education for those students who wish to avail themselves of the benefits of government subsidized education, yet manifest their religious beliefs as guaranteed to them. To be sure, in Kjeldsen, Busk and Madsen v. Denmark, the court ruled that if parents wished to opt out of integrated sex education, they could educate children at home or send them to private schools. However, in Denmark, unlike France, the private schools are heavily subsidized by the State; therefore, Danish private schools are accessible to all. Moreover, in Jordebo v. Sweden, the ECHR expressed the view that Article 2 of Protocol 1 guarantees the right to open and run private schools subject to State regulation in order to ensure quality education; and the State may not use its regulatory power to make it impossible to establish private schools. Thus, in light of the Headscarf Law, France would be required not only to create the conditions for the establishment of private schools as mentioned in Article 2 of the CADE, Article 13(4) of the ICESCR, and Article 29(2) of the U.N.-CRC, but to grant them State subsidies to comply with its duty to ensure the right to education.

France may reply that the court in the Belgium Linguistic case foreclosed this argument when it ruled that the question of subsidizing education does not fall within the scope of Article 2 of Protocol 1. It might also cite the U.N. Human Rights Committee cases of Blom, Lindergren et al, and Hjord et al v. Sweden, which rejected claims that the Swedish government discriminated against private schools by giving preferential treatment to public schools. Moreover, the Committee has found no violation of Article 26 if parents freely choose not to avail

287. See supra n. 173. Doc. CM/WP VI (51) 7, at 4; AS/JA (3) 13, at 4.
288. Id. at § B, ¶ 4. Interpretation adopted by the Court.
289. The Headscarf Law refers to school children within the age 16 years where France is obliged to ensure free compulsory education.
291. Id.
292. See supra n. 173 and accompanying text.
themselves of the benefits that are generally open to all. However, the French Headscarf Law forces parents to choose between their religious beliefs and public education; and since one plausible way to ensure the enjoyment of the right of education for all is through State subsidies of private education, France is obligated to make education available through some means that does not require students to give up their rights to manifest their religious belief.

In conclusion, State education can be regulated to achieve State educational aims, but the Headscarf Law does not justify France’s educational aims because the means to achieve the State’s end must be proportionate, must not only be limited to public schools, and must not conflict with other important rights. In *Campbell & Cosans v. United Kingdom*, the court ruled that the right to education could be regulated by the State, but that conditions of access conflicting with other Convention rights are not reasonable and fall outside the State’s power to regulate access. France is also in violation of its duty to take *appropriate steps* under Article 2(1) of the ICESCR to remove obstacles in order to ensure that the right to education of minority children is immediately fulfilled. In this case, the regression in the realization of the right to education violates the right of progressive realization which French children once enjoyed. Whether or not the Headscarf Law is an intentional obstruction to the right to education, France is in violation of the minimum core obligation to ensure that primary school “is compulsory and available to all” and that secondary school is “generally available and accessible” to all. Since the term “compulsory” implies that no person or body can prevent children from receiving a basic education, the Headscarf Law is an example of legislative denial of access. In the case of France, it is worth considering the views expressed by Matthew Craven, “if retrogressive

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295. *Id.* at ¶¶ 15g & 14b.
297. *Id.*
298. *See supra* n. 86, at 176. ICESCR, Art. 13(2)(a) & (b); *id.* at 250. CRC, Art. 28(1)(a) & (b).
measures by state were a result of a deliberate policy, the Committee would do better to consider it a *prima facie* violation of the Covenant.\(^{300}\)

A. The Violation of Parental Rights Occasioned by the French Headscarf Law

Finally, the French Headscarf Law violates parents’ rights to choose their children’s education according to their own religious or philosophical convictions. Formally acknowledged first through Article 26(3) of the UDHR,\(^{301}\) this right is regulated by international human rights instruments either as a component of freedom of religion or belief or within the framework of the right to education. Under Article 14(2) of the U.N.-CRC, the child is the primary rights-holder rather than the parent, who merely exercises the right to provide guidance until the child is sufficiently mature to make his or her informed judgment. Article 14 does not explicitly include any provisions respecting parents’ right to educate their child in conformity with their convictions. Yet, Article 14(2) of the U.N.-CRC enforces parental rights to choose their children’s education in somewhat weaker terms.\(^{302}\) Article 13(3) of the ICESCR and Article 18(4) of the ICCPR strengthen the core content of parental rights. The State Parties undertake “to respect” the liberty of the parents to choose education according to their religious convictions and interpret those parental convictions with a positive and tolerant attitude.\(^{303}\) Similarly, Article 5(1)(b) of the CADE and Article 2 of Protocol 1 recognize parental rights.\(^{304}\)

With regard to parental rights, the French Headscarf Law may be challenged because it does not ensure that children can be educated in conformity with the religious convictions of their parents. Two aspects of the law seem to be particularly vulnerable: the lack of parental choice of education and the State’s insistence of inculcating values of national

\(^{300}\) See supra n. 231, at 132.

\(^{301}\) See supra n. 86, at 22. Art. 26(3) of UDHR, “Parents have a prior right to choose the kind of education that shall be given to their children.”

\(^{302}\) Id. at 245.

\(^{303}\) Id. at 177, 188.

\(^{304}\) Though not legally binding, Art. 5(2) of the United Nations Declarations on the Elimination of all Forms of Intolerance and on Discrimination Based on Religion or Belief, and Principle 7 of the 1959 United Nations Declaration of the Rights of the Child, also echo similar State obligations to recognize these rights.
unity at the expense of diversity. Parents have been granted primary authority to make decisions for their children as against the State, subject to the requirement that they act in the best interests of the child. Principle 7 of the 1959 United Nations Declaration of the Rights of the Child states that, “the best interest shall be the guiding principle of those responsible for his education and guidance, that responsibility lies in the first place with his parents . . . .” The court in Campbell & Cosans v. United Kingdom, referring to State obligations to respect parental convictions mentioned in Article 2 of Protocol 1, recognized that the term “conviction” is more akin to the term “beliefs” (in the French text: “convictions”) appearing in Article 9 (ECHR), “which guarantees freedom of thought, conscience and religion,” suggesting protection for “views that attain a certain level of cogency, seriousness, cohesion and importance.”

Thus, the State obligation to respect parental religious convictions falls within the scope of State functions. Campbell & Cousans also recognized that the State, in implementing Protocol 1, Article 2, has the obligation to respect parents’ religious convictions. Similarly, in Kjeldsen, Busk and Madsen v. Denmark, and again in Valsamis, the Court interpreted the requirement in Protocol 1, Article 2 to mean that States must respect the rights of parents to ensure the education of their children in conformity with their own “religious and philosophical convictions.”

In the Stasi Report, the Commission identifies schools as the republic’s fundamental institution for teaching children how they should behave as French citizens. Some commentators have noted that French legal doctrine puts human rights under the rubric of public freedoms (libertés publiques) and not under the rubric of civil rights as in other countries, primarily to underscore that an individual can assert the natural right to enjoy freedom only as defined and delimited exclusively by law and that this freedom is a result of one’s exclusive submission to the law.

The French promotion of national unity/citizenry at the expense of inculcating respect for different cultures is in itself a violation of State

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305. 4 Eur. H.R. Rep. 293, 304; see supra n. 291 and accompanying text.
307. See also supra n. 173 and accompanying text.
308. See supra n. 13 and accompanying text.
309. The issues have been discussed in Part II.
310. See supra n. 4 and accompanying text.
obligations. Article 29(1)(c) reiterates that States should accord equal weight to the national value system and to that of the minority culture to which immigrant or other minority children belong. The Committee on the Rights of the Child points out that although there is potential conflict between these values:

the importance of this provision precisely lies in its recognition of the need a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference.\(^{311}\)

The word “respect” in Article 29(1)(c) implies more than just tolerance and understanding. It means acknowledging the equal worth of people of all cultures without condescension.\(^{312}\)

In the case of *Kjeldsen, Busk and Madsen v. Denmark*,\(^{313}\) the court addresses State attempts to form children in the State’s image with very little concern for the parents’ religious convictions, noting that Article 2 of Protocol 1 aims to limit State aims that directly conflict with the religious and philosophical convictions of parents. In the court’s view, the State duty to respect the rights of the parents means that governments are forbidden from trying to “indoctrinate” their people. “That,” said the Court, “is the limit that must not be exceeded.”\(^{314}\)

Therefore, the education clause of the Convention’s First Protocol does not allow the State to justify its regulations by a bona fide belief that it is acting in the public interest, if in practice, even after a dialogue, it has encroached into the religious sphere of the parents.\(^{315}\)

**VII. CAN THE FRENCH SITUATION IN FRANCE BE COMPARED TO TURKEY?**

While I have briefly implied that the French situation cannot be compared to the headscarf controversy in Turkey, we must face this question in assessing France’s possible defense of its Headscarf Law in the European Commission/Court or the Human Rights Committee (HRC). Cases like *Karaduman v. Turkey* and *Leyla Şahin v. Turkey*\(^{316}\)

\(^{311}\) Committee on the Rights of the Child, General Comment 1, U.N. Doc. HRI/GEN//1/Rev.5, ¶ 4.


\(^{313}\) See supra n. 304 and accompanying text.

\(^{314}\) Id.

\(^{315}\) See supra n. 86 and accompanying text.

paint a possible line of thought which the Commission/Court may follow if someone challenges the French law. In the case of Turkey, the Court has held that a State headscarf ban does not overstep the “limits imposed by the organizational requirements of State education,”317 that the prohibition is “amenable to judicial review in the administrative courts,”318 and it “is justified in principle and proportionate to the aims pursued and, therefore, could be regarded as “necessary in a democratic society.”319 The question of an analogy between the French and Turkish situations requires some comment on the history of the principle of secularism in Turkey.

After Turkey’s proclamation of the Republic on October 29, 1923, public and religious spheres were separated through a series of revolutionary reforms.320 Principally a Muslim-dominated country, the State sought to create a religion-free zone in which all citizens were guaranteed equality without distinction on the grounds of religion or denomination. According to republican principles, Turkey adopted the Dress Regulation Act, imposing a ban on wearing religious attire other than in places of worship or at religious ceremonies, irrespective of the religion or belief concerned.321 Similarly, it closed all religious schools, and all schools came under the Ministry of Education, enjoying constitutional protection under Article 174 of the Turkish Constitution.322

By contrast to the French law, Turkish law recognized that the issue of equality and non-discrimination is not limited to public schools,323 but extends to all public institutions and to all age groups. In France, as indicated, while dress codes are limited to public schools, private schools are flourishing with State aid and not subject to the Headscarf Law. Turkey does not ask any questions about whether religious symbols are conspicuous/ostentatious and clearly prohibits such manifestations even if they are innocent practices.324 In a judgment

317. See supra. n. 173 at ¶ 111.
318. Id. at ¶ 112.
319. Id. at ¶ 113.
320. Abolition of the Caliphate on Mar. 3, 1923; the repeal of the Constitutional provision declaring Islam the religion of the State on Apr. 10, 1928.
321. Law no. 2596, Dress (Regulations) Act of Dec. 3, 1934 (Turkey).
322. Law no. 430, Education Services (Merger) Act of Mar. 3, 1924 (Turkey).
323. See supra n. 13, at 4.2.2.2. (stating a university can have headscarves).
324. See supra n. 314 and accompanying text; see the rules on dress in higher-education institutions and the case law of the Constitutional Court at ¶ 34.
by the Supreme Administrative Court in December 1984 upholding a Higher Education Authority circular from 1982 banning headscarves in higher education institutions, the Court ruled: “Beyond being a mere innocent practice, wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.” The Constitutional Court also held that wearing headscarves is unconstitutional under Turkish Constitutional Article 2 (secularism), Article 10 (equality before the law) and Article 24 (freedom of religion). It also found that the headscarf could not be reconciled with the principle of sexual equality implicit, inter alia, in republican and revolutionary values upheld in the Preamble and Article 174 of the Constitution. By contrast, while France limits the prohibition only to public schools, and identifies the problem as religious provocation, propaganda, or proselytism, Turkey addresses the core issues of equality and non-discrimination more directly and holistically. While both Turkey and France maintain that State neutrality toward education ensures equality for all (with the French citing Article 2 of their Constitution), the French law makes no mention of how this principle of secularity is protected through the Headscarf Law. As a result, what France aims to achieve through banning the headscarf itself remains vague and imprecise in the very content of the Headscarf Law, let alone its practice.

In the case of the Turkish ban, the European court has held that “imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social” concern for secularism and tolerance. Turkey also made a plausible case that these religious symbols threatened democracy in light of the Refah party proposal to set up a parallel legal system based on Shari’a. The European Court held that the limitation on the manifestation of religious belief was necessary to ensure a democratic society in Turkey. The debate is significantly different in France, which is aggressively assimilating minority

325. Id.
326. Women were granted equality in the enjoyment of individual rights beginning with the adoption of the Civil Code 1926.
327. The judgment was issued in response to the transitional § 16 of the Law 2547, The Higher Education Act which stated that the veil or headscarf can be worn out of religious conviction.
328. See supra n. 133 and accompanying text.
329. Id.
330. Id.
communities and risking the pluralistic character of the State, goals that cannot justify the good faith intentions of the framers of the law. As Miriam Feldblum observes,

the affaire des voiles raised four issues: the role of secularism in the public school system; women’s rights; the spectre of a fundamentalist, aggressive Islam proselytising France; and the integration of North Africans and other non-European immigrants. 331

These concerns are not legitimately met with a law that restricts the right to manifest one’s religion.

VIII. RECOMMENDATIONS AND CONCLUSION

At the center of tension between assimilation on one hand and cultural pluralism on the other, Law 2004-228 of March 15, 2004 raises the most fundamental question about French secularism. Although the Headscarf Law was supported by an overwhelming seventy percent (70%) of the French public and approved in March by a parliamentary vote of four hundred ninety-four (494) to thirty-six (36), 332 the law runs contrary to France’s international and regional human rights obligations as described above. The principle that the State must be neutral does not forbid the pupils from expressing their convictions in visible ways nor does it forbid exempting pupils who request exceptions from general laws such as Law 2004-228 if they are following the convictions of their communities. 333 France has remained silent on the right of religious expression raised in this case 334 and attempted to sideline the debate by referring to this controversy as only implicating the doctrine of public order. The prohibition of religious symbols cannot be justified by the constitutional requirement of Laïcité or the claim that the law aims at democratic aspirations, because such efforts can settle the problems of a pluralistic community only by using a narrow and militant vision incompatible with human rights. 335

333. See supra n. 86, at 388.
334. France has no reservation on Art. 18 of the ICCPR and Art. 9 of the ECHR and therefore the Stasi Report rightfully maintained that there was no violation of international law.
335. Meeting of Mar. 2, 2004 (integral report of the debates of the Senate) (rough translation)
violation of its international obligations.

Morally, as well, France has a greater obligation as a developed country to advocate for, and protect the enjoyment of, human rights. France, which was among the first thirty (30) countries in the world to grant civil liberties,\textsuperscript{336} the eleventh State to guarantee a high school graduation requirement,\textsuperscript{337} and one of the leading developed countries with high aspirations for human development, is obligated to meet a higher threshold in guaranteeing the enjoyment of human rights. The anti-Semitism and Islamophobia that have cropped up in France are worrisome, and though the fight against terrorism may definitely warrant proactive and preventive measures, the State’s protective measures cannot be justified through such laws which raise concerns for freedom of religion and belief.

Six hundred children broke the law when the school year started in September 2004.\textsuperscript{338} A week later, the numbers defying the law had decreased to roughly one hundred twenty (120) Muslims girls and thirty (30) Sikh boys. Since then, faced with expulsion from school, most students have given in to the rule, though the number of total expulsions has reached about thirty.\textsuperscript{339} We may wonder where these expelled children will go. The Conseil Constitutionnel is the only authority that can strike down a \textit{loi} in France; but given the political dimensions of the law, it is unlikely that they will do so. Therefore, minority religious families have no other option but to complain to the Human Rights Committee or the European Commission on Human Rights/European Court of Human Rights.

Nevertheless, the inconsistencies in the decisions of these international monitoring bodies have shown that recourse to justice may not be available, because human rights applicants’ interests have not traditionally been taken very seriously. The international bodies’ decisions have underscored the vulnerability of individual freedoms and


\textsuperscript{339} \textit{Id.}
threats to individuals’ fundamental right to manifest their religious beliefs. Any successful applicant before the international tribunals will need to address the following problems which have been understated in previous litigation:

(1) Since developed case law so far favors the headscarf ban, the applicant would first have to argue that the situation of France cannot be compared to Turkey and therefore that the holdings in the Turkish cases should not be applied to any others.

(2) Applicants should keep in mind that when France was making a reservation to Article 5, paragraph 2(a) of the ICCPR Optional Protocol, it specified that the Human Rights Committee should not have the jurisdiction to consider a communication from an individual if the same matter is being investigated, brought for settlement, or considered in another international venue. 340

(3) Even if the applicant’s claim is recognized, the commission/court may deal with the applicant’s case by superseding his primary right under Article 9(2) and addressing it as a law and order problem as in Karaduman v. Turkey, where the commission held that the refusal to allow Ms. Karaduman’s headscarf was probably not a restriction on her right to manifest religion. 341 Such an approach is likely to defeat the essence of Article 9 of the ECHR.

The applicant will have an uphill battle against the French law since France justifies the prohibition not as a question of one’s freedom of conscience but (rather) of public order, thus gaining the respondent State a greater margin of appreciation.

IX. RECOMMENDATION

In order for applicants to win a case against the headscarf laws, the international monitoring bodies would have to substantiate that international opinion supports the enjoyment of the right to manifest religious belief. Even though France is the only country to have formally enacted the Headscarf Law, in eight more countries, headscarves have proved contentious. 342 If we do not address this issue,


341. See supra n. 140 and accompanying text.

much of the essence of human rights as it has been enriched over the years will be severely damaged.

Therefore, the following issues would have to be discussed at some important international level such as the international monitoring bodies to ensure greater empowerment for an individual to assert his or her international rights against the State. First, though no case has gone to any of the monitoring bodies as yet, we can almost guarantee that the HRC or the EHR/ECtHR will be asked to give an opinion on one of the headscarf laws, and the Court will have to raise very fundamental questions as to whether such a law pursues a legitimate aim, and whether it should be framed primarily as a question of manifestation of religious belief or as a question of public order.

Second, the international courts would have to consider whether the law essentially represents the non-recognition of minorities, and whether it can be justified in light of the French declaration to Article 27 of the ICCPR. Third, while recognizing the State’s sovereign autonomy, the monitoring bodies will have to emphasize that the enjoyment of these rights is not dependent on a State’s grant of such freedoms, but is the inherent right of every individual. In the last analysis, the Headscarf Law will require the international monitoring bodies to recognize that the headscarf issue, and those like it, fundamentally stem from the core right of the freedom of thought, conscience and religion. Gaining this recognition may be difficult, but it is necessary if the hard-fought right to manifest religious belief is going to be protected in the international community.