

FROM THE STASI COMMISSION TO THE EUROPEAN COURT OF HUMAN RIGHTS: *L'AFFAIRE DU FOULARD* AND THE CHALLENGE OF PROTECTING THE RIGHTS OF MUSLIM GIRLS

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

-French national law, signed into law March 15, 2004¹

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¹ Projet de 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, Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190, *available at* <http://www.assemblee-nat.fr/12/pdf/ta/ta0253.pdf> [hereinafter Law on *Laïcité*] (“Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestant ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en oeuvre d’une procédure disciplinaire est précédée d’un dialogue avec l’élève.”). All translations have been made by the author unless otherwise specified.

"Wearing a veil, whether we want it or not, is a sort of aggression that is difficult for us to accept."

-President Jacques Chirac²

"It is more than time that French feminists and officials hold up their own practices to the same critical scrutiny they use to examine and judge foreign cultures. For no matter what one thinks about the veil, forcing women to take it off is no better than forcing them to wear it, both ways are discriminatory and undemocratic."

-Raja El Habti, KARAMAH: Muslim Women Lawyers for Human Rights³

On March 15, 2004, President Jacques Chirac signed a law that prohibited "the wearing of symbols or clothing by which students conspicuously manifest a religious appearance" in French public primary and secondary schools.⁴ The Minister of Education of France issued a circular, which the Conseil d'État quickly upheld,⁵ clarifying that "[t]he prohibited signs and dress are those by which the wearer is immediately recognizable with regard to his or her religion, such as the islamic [sic] veil, whatever its name, the kippah or a crucifix of manifestly exaggerated dimensions."⁶ This ban marked the latest development in a fifteen-year, ongoing controversy known as "*l'affaire du foulard*"—the Headscarf

² Jon Henley, *Something Aggressive About Veils*, THE GUARDIAN, Dec. 6, 2003, http://www.guardian.co.uk/france/story/0,11882,1101321,00.html#article_continue.

³ RAJA EL HABTI, KARAMAH: MUSLIM WOMEN LAWYERS FOR HUMAN RIGHTS, LAÏCITÉ, WOMEN'S RIGHTS, AND THE HEADSCARF ISSUE IN FRANCE 7 (2004), available at <http://www.karamah.org/docs/veilpaper.pdf>.

⁴ Law on *Laïcité*, *supra* note 1.

⁵ Conseil d'État [CE] [highest administrative court], Oct. 8, 2004, Union française pour la cohésion nationale, nr. 2690777, 368 (upholding the circular "since it is motivated by an objective of public interest, i.e., respect for the principle of *laïcité* in public schools").

⁶ Circular Nr. 2004-084 of May, 18, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 22, 2004, reprinted in Eva Brems, *Above Children's Heads: The Headscarf Controversy in European Schools from the Perspective of Children's Rights*, 14 INT'L J. CHILD. RTS. 119, 120 (2006).

Affair.⁷ The affair has proved to be an impassioned debate about the integration of Muslims in France, the influence of political Islam on French soil, gender equality in Muslim communities, and the perceived threat posed by Muslim girls wearing headscarves in school to *laïcité*, a complex and contested term loosely translated as the French principle of state secularism.⁸ While the French ban is phrased generally so as to apply not only to Islamic headscarves but also to Sikh turbans, Jewish yarmulkes, and large Christian crosses, it has had a disproportionate impact on one group of students: Muslim girls. Forty-five of the forty-eight students expelled in the four months following the implementation of the ban were Muslim girls who refused to remove their headscarves when entering public school.⁹

⁷ The garments at issue in Creil and subsequent controversies in *l’affaire du foulard* are most accurately described in English as headscarves—rectangular pieces of cloth wrapped around the head to cover the hair, ears, neck and shoulders. For a critique of the use of *chador* and other inaccurate terms to describe *l’affaire*, see Norma Claire Moruzzi, *A Problem with Headscarves: Contemporary Complexities of Political and Social Identity*, 22 POL. THEORY 653, 653-72 (1994).

⁸ See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 B.Y.U. L. REV. 419, 420-22, 428-29. Gunn notes that while “*laïcité*” evokes the concepts of secularism and separation of religion and the state, like the term “democracy,” it has had widely different meanings and applications in both polemical debates and legal texts. *Id.* at 420 n.2. While a complex and changing concept, *laïcité*, as it has been understood in France, requires citizens to leave their linguistic, cultural, ethnic, or religious differences in the private sphere as a means of generating equality through sameness in the public sphere. See Jane Freedman, *Secularism as a Barrier to Integration? The French Dilemma*, 42 INT’L MIGRATION 5 (2004) [hereinafter Freedman, *Secularism*]. See *infra* Part II(A).

⁹ Minister of Education François Fillon reported that 639 students attempted to “conspicuously” display their religious faith in public school between September and December 2004. 550 of these situations were resolved in dialogue. Sixty students switched from public to either private or home schooling. Forty-eight students were expelled from public school. *France: 48 Expelled On Religious Symbol Ban*, IAFRICA.COM, Jan. 20, 2005, <http://iafrica.com/news/worldnews/405104.htm>. The other three expelled students were Sikh boys who were ordered out of a classroom for wearing turbans. Their concession to wear a “*keski*,” a smaller version of the full turban, was rejected by a disciplinary panel. *Sikh students expelled for wearing turbans*, BREAKINGNEWS.IE, Nov. 5, 2004, <http://www.breakingnews.ie/2004/11/05/story174598.html>. The expulsion was confirmed by the educational authority in charge of the case in December 2004. *Sikh Schoolboys Lose French Case*, BBC NEWS ONLINE, Apr. 19, 2005, <http://news.bbc.co.uk/2/hi/europe/4461905.stm>. France’s small Sikh community, numbering 5000-7000 individuals, was largely left out of the debate surrounding the passage of the ban and was surprised at the application of the law to Sikh boys. *French ‘Quietly’ Expel Pupils*, NEWS24.COM, Oct. 21, 2004, http://www.news24.com/News24/World/News/0,,2-10-1462_1608449,00.html.

This disparate impact on Muslim girls should come as no surprise. The debates preceding the passage of the 2004 ban witnessed two central justifications for such a law: the need to protect *laïcité* and the fight to end the oppression of Muslim girls. The “Stasi Commission,” a group of prominent scholars, government officials, and educators commissioned by President Chirac to study *laïcité* in France, set forth the most articulate expression of both arguments in its 2003 report.¹⁰ The Commission found that the mere presence of Islamic headscarves in public schools threatened *laïcité* and its concomitant values of state neutrality towards religion, equality between citizens, and tolerance of religious difference.¹¹ It also deplored the coerced covering of Muslim girls by their fathers, brothers, communities, and political Islamists, proclaiming that “[t]he Republic cannot remain deaf to the cries of distress from these young women.”¹² Deploying the rhetoric of protecting students from proselytism and saving Muslim girls from their families and other members of the Muslim community, the Commission called upon the Republic and its public schoolteachers to safeguard human rights—those of students in general and Muslim girls in particular.

In contrast to the Stasi Commission’s certainty, feminists and women’s groups in France sharply disagree over whether the ban is a

¹⁰ One member of the Stasi Commission, Jean Bauberot, abstained from supporting the Commission’s recommendation to ban conspicuous religious and political symbols from French schools. COMMISSION DE RÉFLEXION SUR L’APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA RÉPUBLIQUE, RAPPORT AU PRÉSIDENT DE LA RÉPUBLIQUE 4.2.2.1, Conclusion, *translated in* ROBERT O’BRIEN, THE STASI REPORT: THE REPORT OF THE COMMITTEE OF REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC (2005) [hereinafter Stasi Commission Report].

The Stasi Commission Report does not indicate the presence of dissent within the group as to its analysis of *laïcité*, reasoning, or proposals, apart from Jean Bauberot’s abstention from the Commission’s recommendation for a ban on conspicuous religious symbols from public schools. Bauberot did not issue a dissenting opinion outlining the reasons for his abstention, and the report does not suggest that his abstention extended to a disagreement with the Commission’s analysis of the impact of Islamic headscarves in public school. This Article therefore assumes that the opinions expressed in the report reflect the position of the entire Stasi Commission. *See also* John Litchfield, *Chirac Panel Calls for School Ban on Muslim Headscarves*, INDEP., Dec. 12, 2003, at 20.

¹¹ Stasi Commission Report, *supra* note 10, at 3.2.1.4 (wearing a headscarf or yarmulke is “contrary to the principle of neutrality”); *Id.* at 3.2.3. (women who wear the headscarf may engage in “self-discrimination” by “confin[ing] themselves [to] subordinate positions”); *Id.* at 4.2.2.1 (headscarf is “a blow against the principles and values which the school should develop, especially equality between men and women”).

¹² *Id.* at 4.2.2.1.

vindication or a violation of Muslim girls' human rights. French secular feminist Elisabeth Badinter claimed:

The veil, it is the symbol of the oppression of a sex. Putting on torn jeans, wearing yellow, green, or blue hair, this is an act of freedom with regard to the social conventions. Putting a veil on the head, this is an act of submission. It burdens a woman's whole life.¹³

The members of Ni Putes Ni Soumises (Neither Whores nor Downtrodden),¹⁴ an organization combating violence against immigrant women in France, agree.¹⁵ In 2003, the group staged a nationwide march for gender equality that highlighted the need for a ban on Islamic headscarves and greater protection of the rights of young Muslim girls to counter the pressures of their families and communities.¹⁶

¹³ Moruzzi, *supra* note 7, at 662.

¹⁴ Ni Putes Ni Soumises formed after a young teenage girl was burnt alive in the garbage cell of her building in suburban Paris. Marieme Helie-Lucas, *France: Women's Voices Silenced Again*, WOMEN LIVING UNDER MUSLIM LAWS, Feb. 4, 2004, [http://www.wluml.org/english/newsfulltxt.shtml?cmd\[157\]=x-157-35505](http://www.wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-35505).

¹⁵ AVIVA & Macite Femmes, *France: Action Against Ghetto Rapists*, WOMEN LIVING UNDER MUSLIM LAWS, July 10, 2003, [http://www.wluml.org/english/newsfulltxt.shtml?cmd\[157\]=x-157-16444](http://www.wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-16444). See also NiPutesNiSoumises.com, Le Mouvement, <http://www.niputesnisoumises.com/mouvement.php?section=accueil> (last visited Oct. 9, 2006) [hereinafter Le Mouvement].

¹⁶ Association for Women in Development, *France: Issues Related to the Headscarf Ban*, WOMEN LIVING UNDER MUSLIM LAWS, [http://www.wluml.org/english/newsfulltxt.shtml?cmd\[157\]=x-157-44910](http://www.wluml.org/english/newsfulltxt.shtml?cmd[157]=x-157-44910) (last visited Nov. 18, 2005). In March 2003, after meeting with Prime Minister Raffarin, Ni Putes Ni Soumises organized a rally of 30,000 people in Paris to advocate for the rights of young women from immigrant communities in France's suburban housing projects. Le Mouvement, *supra* note 15; AVIVA & Macite Femmes, *supra* note 15.

Other women in France vehemently disagree.¹⁷ On January 17, 2004, over 20,000 French Muslim women protested in Paris, Lille, Marseille, Mulhouse, and other cities with chants of “Chirac, Sarkozy, we chose the headscarf” and “[n]ot our fathers, not our husbands, we chose the headscarf.”¹⁸ Many protesters wore “various forms of *hijab*” and embraced their simultaneous identity as Muslims and French citizens by singing the *Marseillaise*, wearing headscarves featuring the French tricolor, and waving their national identity cards.¹⁹ Other Muslim women, intellectuals, and politicians joined together in 2004 to create Une École pour Toutes et Tous (One School for All), a group protesting the expulsion of Muslim girls and Sikh boys from school under the ban.²⁰ Supported by local and national politicians, the group argues in part that the law hurts young Muslim girls by forcing them to drop out of school when faced with choosing between their education and religious beliefs, further isolating them from education,

¹⁷ In 1989, some groups, such as Expressions Maghrébiennes au Féminin, found themselves caught in the middle as they protested the expulsion of a student from the Creil school while also viewing headscarves as oppressive and planning to tear one up in public. Jane Freedman, “*L’affaire des Foulards*”: *Problems of Defining a Feminist Antiracist Strategy in French Schools*, in FEMINISM & ANTIRACISM: INTERNATIONAL STRUGGLES FOR JUSTICE 295, 307 (France Winddance Twine & Kathleen M. Blee eds., 2001) [hereinafter Freedman, *Problems Defining a Feminist Antiracist Strategy*]. Hayette Boudjeme of SOS-Racisme organized a petition stating this position. Zahia Ramani and Nadia Amioni of France Plus emphasized that “school is a space of liberty for children brought up in the North African community.” *Id.* Demonstrating the complexity of *l’affaire du foulard*, SOS-Racisme has since changed its position. *Id.*

¹⁸ Protesters chanted “Chirac, Sarkozy, le foulard on l’a choisi” and “[n]i père, ni mari, le foulard on l’a choisi.” Lara Marlowe, *Thousands Protest at Ban on Headscarves*, THE IRISH TIMES, Jan. 14, 2004, at 9; Paul Silverstein, *Headscarves the French Tricolor*, MIDDLE E. REP. ONLINE, Jan. 31, 2004, <http://www.merip.org/mero/mero013004.html>.

¹⁹ Marlowe, *supra* note 18.

²⁰ Eric Vadorpe, *Loi Antivoile: Le Collectif “Une École Pour Tous-tes” Dénonce le «Harcèlement» Subi par les Jeunes Filles Voilées* [Anti-Veil Law: The Group “A School for All” Denounces the Harassment Suffered by Veiled Young Girls], OUMMA.COM, Oct. 7, 2004, http://www.oumma.com/spip.php?article1200&var_recherche=une%20ecole%20pour%20tous. Its charter may be found at *Charte des Collectives: Une École pour Toute-s/Contre les Lois d’Exclusion* [Charter of Groups: A School for All Against the Exclusion Laws], COLLECTIF LES MOTS SONT IMPORTANTS, July 2004, http://lmsi.net/article.php?id_article=268. Une École Pour Toutes et Tous issued a Call for Support and Signatures on January 20, 2004 for their work against the 2004 ban on conspicuous religious symbols in French public schools. Press Release, Une École Pour Tous-tes Contre les Lois d’Exclusion, Appel pour Soutien et à Signatures [A School for All Against the Exclusion Laws, Call for Support and Signatures] (Jan. 4, 2006), available at http://noelmamere.org/imprimer.php?id_article=202.

employment, and integration in French society. Outside observers, including Human Rights Watch, the Islamic Human Rights Commission, and the U.S.-based KARAMAH: Muslim Women Lawyers for Human Rights, have also claimed that the ban violates Muslim girls’ human rights to education, freedom of religion, freedom of religious expression, and freedom from discrimination.²¹ They further argue that these violations contravene France’s ratification of all major human rights instruments and its position as the host country of the European Court of Human Rights (ECHR).²² Recently, the U.N. Special Rapporteur on Freedom of Religion

²¹ ISLAMIC HUMAN RIGHTS COMMISSION, *MUSLIM WOMEN, HUMAN RIGHTS AND RELIGIOUS FREEDOM: EUROPE UNDER THE SPOTLIGHT OF NATIONAL AND INTERNATIONAL LAW* para. 4 (2004), available at <http://www.ihrc.org.uk/show.php?id=1025>; EL HABTI, *supra* note 3, at 7; Press Release, Human Rights Watch, *Headscarf Ban Violates Religious Freedom* (Feb. 27, 2004), available at <http://hrw.org/english/docs/2004/02/26/france7666.htm>. The Islamic Human Rights Commission is a London-based NGO conducting research and advocacy to promote human rights throughout the world. It focuses on war crimes, the rights of prisoners of faith and other prisoners held for their beliefs, and religious discrimination and persecution. ISLAMIC HUMAN RIGHTS COMMISSION, *supra*. KARAMAH: Muslim Women Lawyers for Human Rights is a U.S.-based organization that conducts research, education, and advocacy on issues pertaining to Muslim women in Muslim communities. It seeks to bring an Islamic perspective to human rights issues. KARAMAH: Muslim Women Lawyers for Human Rights, <http://www.karamah.org/about.htm> (last visited Oct. 20, 2006). The group wrote a letter to President Chirac that discusses the negative effects of banning headscarves in French schools. Letter from KARAMAH: Muslim Women Lawyers for Human Rights to Jacques Chirac, President of France (Oct. 17, 2000), http://www.karamah.org/press_letterto_french.htm. Other human rights organizations, including the International Helsinki Federation for Human Rights and the Commission on International Religious Freedom, a U.S.-based advisory group, have criticized the ban. *French MPs Back Headscarf Ban*, ONASA NEWS AGENCY, Feb. 10, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3474673.stm>. Some argue that the ban serves “as a pretext for voicing anti-immigrant and anti-Muslim sentiments.” Press Release, Human Rights Watch, *supra*. Others contend that France hypocritically invokes international human rights law to condemn alleged violations that take place in the Muslim world, but refuses to apply the same precepts to protect religious and ethnic minorities at home. ISLAMIC HUMAN RIGHTS COMMISSION, *supra*, at paras. 24-25.

²² France has acceded to all of the major human rights conventions including the International Covenant of Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR]; the Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC]; the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/134/46 (Dec. 18, 1979) [hereinafter CEDAW]; and the Convention for the Protection of Human Rights and Fundamental

or Belief reported to the U.N. Commission on Human Rights that the law denies the rights of minors who have freely chosen to wear a religious symbol to school as part of their religious belief. This situation has led both to instances of intimidation of these girls and young women and to acts of religious intolerance against those who wear headscarves in places where the law does not apply, such as universities and workplaces.²³

Recent debates over *foulards* in France have thus focused prominently on the headscarf as a symbol of women's subordination to men in Islam and its impact on Muslim women and girls' human rights. While proponents of the ban decry the headscarf as a tool to oppress women and girls, opponents contest the ban itself as an act of discrimination against a marginalized minority and as a law that hurts the very people it claims to protect. *L'affaire du foulard* thus highlights a central issue at the juncture of feminism and human rights: the perceived tension between secular, liberal, and universal norms of gender equality and practices grounded in religion or culture.²⁴

Susan Moller Okin has suggested that this tension exists and poses a dilemma: "[W]hat should be done when claims of minority cultures or religions clash with the norm of gender equality that is at least formally endorsed by secular, liberal states?"²⁵ Some agree with Okin's response that female members of a "more patriarchal minority culture . . . might be much better off if the culture into which they were born were either to become extinct . . . or, preferably, [if the culture were] encouraged to alter itself so

Freedoms, Nov. 4, 1950, Eur. T.S. No. 5, available at <http://www.echr.coe.int/Convention/webConvenEng.pdf> [hereinafter EHRC].

²³ U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Hum. Rts., Report of the Special Rapporteur on Freedom of Religion or Belief, *Civil and Political Rights, Including the Question of Religious Intolerance: Addendum 2, Mission to France*, ¶ 63, U.N. Doc. E/CN.4/2006/5/Add.4 (Mar. 8, 2006) (prepared by Asma Jahangir). The U.N. Special Rapporteur issued this report after studying the situation in France in September 2005. *Id.* ¶ 1. She reports, for example, that women in France have been refused access to shops, insulted in the street, and dismissed from employment for wearing the headscarf. *Id.* ¶ 67. Jahangir also reports that, "[e]ven in cases where young girls were obliged to wear headscarves by their families, the law is said to have provoked particularly painful situations within the families." *Id.* ¶ 63.

²⁴ For various positions in this debate, see *IS MULTICULTURALISM BAD FOR WOMEN? SUSAN MOLLER OKIN WITH RESPONDENTS* (Joshua Cohen et al. eds., 1999).

²⁵ Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN? SUSAN MOLLER OKIN WITH RESPONDENTS*, *supra* note 24, at 9.

as to reinforce the equality of women.”²⁶ This position conceives of the removal of the Islamic headscarf from public schools as an emancipatory move for women, one that forces change in a patriarchal, religious minority through its integration into a mainstream, secular French majority.

Others have challenged both Okin’s question and her answer for unfairly constructing a binary opposition between culture and religion, on one hand, and human rights and gender equality, on the other. Leti Volpp has pointed out that this construction positions “‘other’ women as perennial victims,” thereby denying “their potential to be understood as emancipatory subjects.”²⁷ Catherine Powell recently demonstrated that this false binary also obscures the ways in which “women have often challenged the validity of . . . cultural claims or have provided alternative interpretations of their local culture or religion.”²⁸ Similarly, Frances Raday has shed light on the efforts of a group of orthodox Jewish women to provide such an alternative interpretation through their demand for equal participation in the ceremonial worship of Judaism.²⁹

This Article joins these scholars in challenging the false binary between culture and religion as opposed to gender equality and human rights. It seeks to clarify the misconceptions and assumptions about Muslim women and girls’ agency made by two key bodies that have recently considered the issue of headscarves and women’s rights: the Stasi Commission and the ECHR. In recommending a ban on conspicuous religious symbols in French public schools, the Stasi Commission posited the Islamic headscarf as a uniformly oppressive symbol. The ECHR did the same in upholding a similar ban in Turkish public universities. In putting forth this interpretation of the headscarf, both bodies created and promoted a troubling isomorphism, one that this Article seeks to deconstruct, that

²⁶ *Id.*

²⁷ Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1205 (2001).

²⁸ Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women’s Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 335 (2005). See also Mahdavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399 (2003) (arguing that women have often challenged the validity of cultural claims or have offered different interpretations of cultural practice and that the law fails to recognize religion and culture as contested and subject to change).

²⁹ Frances Raday, *The Fight Against Being Silenced*, in WOMEN OF THE WALL: CLAIMING SACRED GROUND AT JUDAISM’S HOLY SITE 115, 115-17 (Phyllis Chesler & Rivka Haut eds., 2003) [hereinafter Raday, *The Fight*].

neatly maps secularism onto gender equality and religious expression onto gender inequality.³⁰

The concept of an isomorphism is useful to describe the Stasi Commission and the ECHR's justifications for banning Islamic headscarves in French public schools. An isomorphism refers to a mapping that conveys an exact correspondence between items in two sets: the first items in each set are linked to each other, as are the second, third, and so forth. Both the Stasi Commission and ECHR premise their arguments on the notion that Islamic headscarves profoundly threaten secularism by announcing religious affiliation and by giving the appearance of proselytism in the public sphere. This understanding of the headscarf pits secularism and religious expression against each other as oppositional concepts. The Stasi Commission and ECHR map this dichotomy onto another one, the dichotomy between gender equality and gender inequality, creating an isomorphic relationship. Thus, each item in these two oppositional sets—secularism/religious expression and gender equality/gender inequality—are connected to each other: secularism is directly and neatly linked to the existence or promotion of gender equality, and religious expression is directly and neatly linked to the existence or promotion of gender inequality. This isomorphism emerges from the Stasi Commission's 2003 report recommending a ban on conspicuous religious symbols (including headscarves) in primary and secondary schools, as well as the decision of the Grand Chamber of the ECHR in *Leyla Sahin v. Turkey*, upholding a similar ban in Turkish universities.

By promoting this isomorphism, both the Stasi Commission and the *Sahin* Grand Chamber seek to justify a restriction on the civil and human rights of Muslim women and girls using claims grounded in rights discourse itself. This Article seeks to deconstruct this isomorphism, as well as its attendant claims, by highlighting the pluralism and diversity that underlie Muslim girls' acts of wearing headscarves. It also underscores how the Commission's report and the ECHR's decision ignore the possibility that Muslims may wear headscarves as an expression of sincere religious belief warranting protection under international human rights norms.

Part I of this Article lays the groundwork for *l'affaire du foulard* by highlighting the emergence of a Muslim presence in France and exploring

³⁰ An "isomorphism" is a concept that exists in several areas of mathematics, physics, and chemistry. In mathematics, the term refers to a mapping that conveys an exact correspondence between items in two sets that each host the same number of items. *Isomorphism*, second definition, in 8 THE OXFORD ENGLISH DICTIONARY 126-27 (2d ed. 1989).

Muslim women and girls’ decisions to wear headscarves and other forms of covering. This section concludes by detailing the initial case-by-case approach of the French government towards headscarves in public schools, established by the Conseil d’État and Minister of Education Lionel Jospin. This policy recognized that Muslim girls have rights to religious expression under French and international law that include the freedom to wear headscarves in school as long as the rationale for doing so is not expressly “proselytizing.” This approach also did not consider the headscarf an inherent threat to gender equality.

Part II traces the emergence of an isomorphism mapping secularism onto gender equality and religious expression onto gender inequality with the shift in policy from the Conseil d’État/Jospin case-by-case approach to a blanket ban on religious symbols. This change of course was accomplished through the mobilization of two central claims: preserving *laïcité* and promoting gender equality. The 2003 Report of the Stasi Commission presented both claims to justify the Commission’s recommendation for a ban that would remove headscarves from public schools. The first part of this section discusses the Stasi Commission’s contention that a ban on religious symbols in general, and headscarves in particular, is required to protect *laïcité*. It explores the contours of *laïcité* and the French assimilationist ideal. The second part of this section examines the claim that the headscarf in and of itself threatens gender equality.

Part III highlights the ways in which international law not only tolerates but also fosters this isomorphism. It first explores the various international human rights that may be affected by the ban on conspicuous religious symbols in French public schools. These rights are difficult to balance without clear guidance from the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) or its monitoring committee. The second part of this section investigates the jurisprudence of the ECHR to demonstrate that the Court’s recent decisions in *Leyla Sahin v. Turkey* do not just permit but actively construct this isomorphism.³¹ By upholding the prohibition on Islamic headscarves in Turkish public universities, the ECHR mimics the Stasi Commission by grounding its decision in the claim that the garment is hostile to secularism and inimical to women’s rights. While the ECHR has indicated that it will grant a large

³¹ Sahin v. Turkey, App. No. 44774/98 (June 29, 2004), available at <http://echr.coe.int> (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search Application Number “44774/98”) [hereinafter 2004 Chamber decision], *aff’d* Sahin v. Turkey, App. No. 44774/98 (Nov. 10, 2005), available at <http://echr.coe.int> (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search Application Number “44774/98”) [hereinafter 2005 Grand Chamber decision].

degree of deference to national authorities' estimation that Islamic headscarves endanger such values, this Article questions the justice of extending this deference without inquiry into the representation of Muslim women in the national bodies that make such estimations. The ECHR is the court of last resort for the protection of rights promised by the European Convention for the Protection of Human Rights and Fundamental Freedoms; as such it should consider potential deficiencies in representation before dispensing such a high degree of deference to national authorities that restrict the rights of Muslim girls and young women based on interpretations of the headscarf that deny the pluralism and complexity of their experiences.³²

The French government's negotiation of *l'affaire du foulard* and the ECHR's effort to grapple with the issue of headscarves in Turkey provide rich material for exploring the challenges confronting religious women and girls who seek the help of secular liberal authorities to protect their rights. In the name of *laïcité* and the liberation of Muslim girls, the French government has prohibited conspicuous religious symbols from French schools, and the ECHR has twice upheld a similar ban in Turkish universities. Yet, the decisions of these entities reveal a resistance to understanding the practice of wearing headscarves as complex, variable, and highly plural. As such, they fail to acknowledge the possibility that Muslim women and girls may wear the headscarf as an act of sincere religious devotion or as a means of seeking equality within their religious communities by actively redefining symbols and changing norms—without challenging state secularism or gender equality. This Article urges secular liberal authorities, both national and international, to acknowledge this pluralism and break the isomorphism mapping secularism onto gender equality and religious expression onto gender inequality that underlies headscarf bans. By listening to the voices of Muslim girls and young women, these actors will enable the international human rights regime to remain a relevant tool for all women, whether their calls for equality issue in secular or religious tones.

I. LAYING THE GROUNDWORK FOR *L'AFFAIRE DU FOULARD*

A. Muslims in France

France today hosts the largest Muslim population in Europe as a result of both its colonial past and longstanding policies to address the labor

³² EHRC, *supra* note 22, at art. 9.

shortage caused by two world wars and a low national birthrate.³³ While the country does not collect census data on religious affiliation,³⁴ conservative estimates maintain that Muslims constitute 7.1% of the French population.³⁵ Contrary to popular conception, approximately one-half to three-fifths of all Muslims in France are French citizens.³⁶ While the great majority are from the Maghreb³⁷ or are of Maghrébin origin, France's Muslims also hail from Turkey, the Middle East, and Sub-Saharan Africa.³⁸ Thus, the group is characterized by diversity in origin and in levels of religious observance.³⁹ One scholar comments: "We may without risk of injury think of Islam in

³³ Kimberly Hamilton et al., *The Challenge of French Diversity*, MIGRATION INFORMATION SOURCE, Nov. 2004, <http://www.migrationinformation.org/feature/print.cfm?ID=266>. North African Muslim men were first recruited as foreign workers to temporarily fill the labor shortage in post-World War II France. Freedman, *Problems of Defining a Feminist Antiracist Strategy*, *supra* note 17, at 297. Some men stayed and were joined by their families with the help of French family reunification policies established in the late 1960s. Stéphanie Giry, *France and Its Muslims*, 85 FOREIGN AFF. 87, 90 (2006).

³⁴ "[T]he last census to record religious affiliation in France was taken in 1872." Giry, *supra* note 33, at 89.

³⁵ In 2002, it was estimated that approximately 4,155,000 Muslims (defined as a "person of Muslim culture") lived in France. THE OPEN SOCIETY INSTITUTE, *THE SITUATION OF MUSLIMS IN FRANCE* 74 (2002).

³⁶ Giry, *supra* note 33, at 88.

³⁷ The Oxford English Dictionary defines Maghreb as

[a] region of North and North-West Africa (formerly known in Europe as Africa Minor or Barbary) between the Atlantic Ocean and Egypt, comprising the coastal plain and Atlas Mountains of Morocco, together with Algeria, Tunisia, and sometimes also Tripolitania (in present-day Libya). In recent use: *spec.* Morocco, Algeria, and Tunisia regarded collectively as a social, political, or economic grouping.

Maghreb, second definition, in THE ONLINE OXFORD ENGLISH DICTIONARY (2000), <http://www.oed.com>.

³⁸ The estimated geographic origin of France's 4.155 million Muslims is as follows: Algeria (1,550,000), Morocco (1,000,000), Tunisia (350,000), other parts of the Middle East (100,000), Turkey (315,000), sub-Saharan Africa (250,000), Asia (100,000), and various other origins (100,000). Estimates of French converts to Islam range from 10,000 to 100,000. HAUT CONSEIL À L'INTÉGRATION, *L'ISLAM DANS LA RÉPUBLIQUE* 26 (2000) [hereinafter *L'ISLAM DANS LA RÉPUBLIQUE*]. See also THE OPEN SOCIETY INSTITUTE, *supra* note 35, at 74.

³⁹ Freedman, *Problems Defining a Feminist Antiracist Strategy*, *supra* note 17, at 298.

France, often even more than in the countries of origin, as constituting something of a spectrum, a continuum of diverse practices and levels of commitment extending from religious to even their very rejection or mere absence.”⁴⁰

The controversy over the presence of Muslim girls wearing headscarves in French public schools should be understood in the context of Muslims emerging as a distinct and sizable minority, one that is predominantly working class or poor and is concentrated in suburban ghettos surrounding the country’s major urban centers.⁴¹ This reality stands in stark contrast to the high ideals of *laïcité* and the role of public education in promoting not only cultural assimilation but also social and professional advancement for children.⁴² Despite the presence of Muslims on French soil for over five decades, very few Muslims have been elected to political office in France.⁴³

L’affaire du foulard must also be understood in the context of a backlash against immigration and limited tolerance by the majority of French society for Muslims. This limited tolerance extends even to

⁴⁰ Chouki El Hamel, *Muslim Diaspora in Western Europe: The Islamic Headscarf (Hijab), the Media and Muslims’ Integration in France*, 6 CITIZENSHIP STUD. 293, 295 (2002).

⁴¹ *Id.* at 294-95. See also Véronique de Rudder, *Immigrant Housing and Integration in French Cities*, in IMMIGRANTS IN TWO DEMOCRACIES: FRENCH AND AMERICAN EXPERIENCE 247, 258 (Donald Horowitz & Gérard Noiriel eds., 1992) [hereinafter IMMIGRANTS IN TWO DEMOCRACIES].

⁴² Based on data from the Bureau of Statistics of the National Ministry of Education, Danielle Boyzon-Fradet concludes that French public schools have failed to reduce social inequalities between immigrants and non-immigrants and have reinforced social hierarchies. Danielle Boyzon-Fradet, *The French Education System: Springboard or Obstacle to Integration?*, in IMMIGRANTS IN TWO DEMOCRACIES, *supra* note 41, at 148, 161-63.

⁴³ THE OPEN SOCIETY INSTITUTE, *supra* note 35, at 126-27. The French government’s refusal to gather statistics on religion renders it difficult to ascertain the precise number of Muslim members in executive, legislative, and judicial bodies. L’ISLAM DANS LA RÉPUBLIQUE, *supra* note 38, at 25 (“[L]a France n’autorise pas la production de statistiques sur les groupes religieux. . . . Les évaluations de démographes, sociologues et historiens, qui rencontrent de nombreuses difficultés méthodologiques et éthiques, permettent seules d’approcher une connaissance des phénomènes religieux.” [“France does not authorize the collection of statistics on religious groups. . . . The evaluations of demographers, sociologists, and historians, who encounter numerous methodological and ethical challenges, are the only means of estimating religious phenomena.”]). However, the press recently reported that two Muslims were elected to the French Parliament for the first time in 2004. Giry, *supra* note 33, at 97.

integrationist public schools, despite the efforts of most of France's Muslims to integrate.⁴⁴ In the fall of 1989, months before the Creil incident, at least two mayors, one in suburban Paris, the other in southern France, refused to permit North African students to register for the new school year. Their stated purpose was to get the "attention" of national authorities and to protest the influx of North Africans into their towns.⁴⁵ Later that year, the inspector-general of national education pushed back. He issued a report affirming that "the mission of the schools is thus, from now on, to welcome and integrate foreign children. . . . This is what will ultimately condition their integration into French society."⁴⁶

Muslims have also faced hostility and intolerance in other areas of French society. In September 1989, French demonstrators protested plans to build a mosque in Lyon. The mayor of the city refused to retract the building permit, but he did say that no call to prayer would be allowed from the minaret.⁴⁷ While such incidents have been justified in the name of *laïcité*'s prohibition of difference in the public square, they also indicate that *laïcité* may entail limited tolerance for practices integral to minority religions, practices that are considered "public" when measured against the baseline of dominant practices.⁴⁸ The end result is the marginalization of

⁴⁴ According to Stéphanie Giry, "social scientists agree on the basic picture: by and large, Muslims in France have displayed remarkable willingness and capacity to assimilate." *Id.* at 93. For example, polls indicate that Muslims in France attend religious services no more frequently than do Catholics, Jews, or Protestants. *Id.*

⁴⁵ See Sophie Body-Gendrot & Martin A. Schain, *National and Local Politics and the Development of Immigration Policy in the United States and France: A Comparative Analysis*, in IMMIGRANTS IN TWO DEMOCRACIES, *supra* note 41, at 411, 433.

⁴⁶ Boyzon-Fradet, *supra* note 42, at 153 (citing HAUT CONSEIL À L'INTÉGRATION, POUR UN MODÈLE FRANÇAIS D'INTÉGRATION: PREMIER RAPPORT ANNUEL (1991)).

⁴⁷ Donald Horowitz, *Immigration and Group Relations in France and America*, in IMMIGRANTS IN TWO DEMOCRACIES, *supra* note 41, at 3, 28.

⁴⁸ Judith Resnik, *Living Their Legal Commitments*, 17 YALE J. L. & HUM. 17, 19 (2005) (noting that when religious commitments require "public" activity, "the capacity to separate one's communal obligations from one's role as a member of a nation-state diminishes."). See also Ayelet Schachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 25 HARV. C.R.-C.L. L. REV. 385, 390 (2000) ("[B]lindness-to-difference policies . . . are often implicitly tilted towards the needs, interests, and inherited particularities of the majority, thus creating a range of burdens, barriers, and exclusions applying to members of nondominant cultural communities.").

those who refuse to relegate religious expression to an acceptable “private” sphere.⁴⁹

The post-colonial and global contexts present further obstacles to the acceptance of Muslims in France. The Iranian Revolution, the first Gulf War, and the ascendance of the Islamic Salvation Front (FIS) to power in Algeria, France’s former prized colony, have stimulated fears about the dangers of Islam in general, and Islamic fundamentalism, or “*intégrisme*,” in particular. These fears have powerfully shaped popular French understanding of Muslims.⁵⁰ Instances of Algerian terrorism on French soil, the recent increase of anti-Semitic incidents, typically assumed to have been committed by Muslims, and the terrorist attacks of September 11 have given further support to those who see Islam as a threat to French society, promoting the link between Islam, terrorism, and the headscarf.⁵¹ This conflation has had a detrimental impact on Muslims living in France, fueling the increasing popularity of Jean-Marie Le Pen’s extreme right party, the National Front, since the early 1990s.⁵²

This conflation also fuels discrimination.⁵³ Jean-François Amadieu, a Sorbonne professor who runs a think tank studying workplace discrimination, found that of two French job applicants with identical credentials, the one whose name sounded Moroccan was six times less likely to be contacted for an interview than the one whose name sounded Franco-French.⁵⁴ “Unemployment is believed to affect 30 percent of French citizens of Algerian and Moroccan descent [most of whom are Muslim] compared with ten percent of the population at large, and the jobs that [naturalized immigrants and their descendants] do get are more often

⁴⁹ Resnik, *supra* note 48, at 18-19.

⁵⁰ Freedman, *Secularism*, *supra* note 8, at 6.

⁵¹ Giry, *supra* note 33, at 92.

⁵² Advocating the expulsion of immigrants from France, the Front National witnessed a steady increase in its share of the French vote throughout the 1980s and 1990s, growing from 0.3% of the electorate in 1981 to 9.9% in 1988, and almost fifteen percent in 1997. El Hamel, *supra* note 40, at 300.

⁵³ Le Mouvement Contre le Racisme et pour l’Amitié entre les Peuples (MRAP), a major anti-racism organization, documented an incident in which a leading French company issued a confidential internal memo stating that it would not recruit employees of Arab or Muslim origin in order to contribute to the fight against terrorism. Mouloud Aounit, *Les Acquis de l’Islamophobie*, LIBÉRATION, Oct. 30, 2003.

⁵⁴ Giry, *supra* note 33, at 94.

temporary or beneath their qualifications.”⁵⁵ The resulting desperation of many Muslim youth contributed to the November 2005 eruption of riots in France’s depressed suburban ghettos, which were sparked when two adolescents, who had apparently done nothing wrong, fled from police officers upon seeing them, hid next to a power transformer, and were electrocuted.⁵⁶ While racially mixed groups of teenagers torched cars and vandalized schools in poor French suburbs, Interior Minister Nicolas Sarkozy called on imams to restore quiet, reinforcing the mistaken impression that Islam, rather than discrimination, poverty, and dismal prospects, had something to do with the problem.⁵⁷

Within the context of this backlash against immigrants, the limited tolerance towards Muslims, discrimination, and the conflation of Islam with Islamism, the headscarf has been singled out as a potent symbol of the inability and refusal of French Muslims to assimilate. However, to view the headscarf solely as a refusal to assimilate or a rejection of *laïcité* is overly simplistic. The next section explores the complex, evolving, and contextual meanings of the headscarf as interpreted by the women and girls who seek to wear them.

B. Veils, Headscarves, and *Hijab*: The Complex Terrain of Covering by Muslim Women and Girls

“Pressures exert themselves on young girls, forcing them to wear religious symbols. The familial and social environment sometimes imposes on them a choice that is not theirs. The Republic cannot remain deaf to the cries of distress from these young women.”

-Stasi Commission Report, 4.2.2.1⁵⁸

“[My parents] told me the most important thing was that I integrate into French society, but I stuck my ground, because the veil symbolises my relationship to God.”

⁵⁵ *Id.*

⁵⁶ *Id.* at 95.

⁵⁷ *Id.*

⁵⁸ Stasi Commission Report, *supra* note 10, at 4.2.2.1.

-Yasmina, a Muslim girl, on her decision to wear an Islamic headscarf to school.⁵⁹

Recent debates about headscarves in France have focused on their potency as a symbol of gender inequality and the coercion involved in the practice of women's covering in Islam. This section argues that female covering in Islam is a diverse, contested, and evolving set of practices both in the larger Muslim world and in France. It provides a brief description of the Islamic basis for covering, and argues that women and girls seek to communicate multiple meanings through the practice. These meanings are too often reduced to singular and uniformly negative interpretations that pit the headscarf against secularism and gender equality.

1. The Islamic Basis of Covering

There is a general consensus among scholars that the practice of women's covering already existed in the Mesopotamian/Mediterranean region prior to the arrival of Islam.⁶⁰ The roots of *hijab*, the modern Arabic word referring to the practice of modest covering for men and women, in Islam derive from four principal *ayat* (verses) from the Qur'an (24:30-31, 24:60, 33:59, and 33:53). The most cited reference is *Surah An-Nur* (24), verses 30 and 31.⁶¹ These verses enjoin modesty for both men and women,

⁵⁹ *Schools' Bid for Headscarf Ban Widens French Divide*, THE OBSERVER, June 15, 2003, <http://education.guardian.co.uk/higher/worldwide/story/0,,978399,00.html> [hereinafter *Schools' Bid for Headscarf*].

⁶⁰ Leila Ahmed, *Women and the Advent of Islam*, 11 SIGNS 665, 683 (1986). See also Ian C. Dengler, *Turkish Women in the Ottoman Empire: The Classical Age*, in WOMEN IN THE MUSLIM WORLD 229, 229-44 (Lois Beck & Nikkik Keddire eds., 1978); Fadwa El Guindi, *Veiled Activism: Egyptian Women in the Contemporary Islamic Movement*, 22-23 PEUPLES MÉDITERRANÉANS (FEMMES DE LA MÉDITERRANÉE) 79-89 (1983); Afaf L. al-Sayyid Marsot, *The Revolutionary Gentlewoman in Egypt*, in WOMEN IN THE MUSLIM WORLD, *supra* at 261-76.

⁶¹ *Surah An-Nur* verses 30-31 reads:

Say to the believing men that they should lower their gaze and guard their modesty: that will make for greater purity for them: And Allah is well acquainted with all that they do. 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 veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their husband's sons, their brothers or their brothers' sons, or their sisters' sons or their women or

while providing more textual space and direction as to how women may accomplish this goal. While both men and women are generally directed to "lower their gaze and guard their modesty," women are instructed to guard their beauty against men who may express a sexual interest in them.⁶² This asymmetry points towards an interpretation by many Islamic scholars that women's covering in Islam is intended to accomplish two main goals: to distinguish women from men and to control male sexual desire by moderating women's behavior.⁶³ Although Muslim men are also urged to be modest and to cover themselves between the waist and the knees, responsibilities and consequences fall unequally on women in a variety of cultures and contexts.⁶⁴

Neither *Surah An-Nur* nor other verses in the Qur'an mandate a specific practice of dress for either sex. Similarly, other important sources of Islamic law do not mandate specific forms of covering. While various *hadith* (statements attributed to the Prophet Mohammad) refer to his wives' covering, it is debatable whether these references are meant to apply only to the Prophet's wives or to all Muslim women.⁶⁵ Moreover, the area women

the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments.

Surah An-Nur, THE QUR'AN 24:30-31 (Sayed A. A. Razwy ed., Abdullah Yusuf Ali trans., 1999).

⁶² *Id.*

⁶³ Caitlin Killian, *The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair*, 17 GENDER & SOC'Y 567, 570 (2003). Moroccan sociologist Fatima Mernissi contends that "the hijab is a response to sexual aggression" and "a method of controlling sexuality." FATIMA MERNISSI, WOMEN AND ISLAM: AN HISTORICAL AND THEOLOGICAL INQUIRY 182 (1994).

⁶⁴ Killian, *supra* note 63, at 570.

⁶⁵ The leading *hadith* on this issue is from the scholar Abu-Dawud:

Aisha said: Asma, daughter of Abu Bakr, entered upon the Apostle of Allah (peace be upon him) wearing thin clothes. The Apostle of Allah (peace be upon him) turned his attention from her. He said: O Asma', when a woman reaches the age of menstruation, it does not suit her that she displays her parts of body except this and this, and he pointed to her face and hands.

Sunan Abu-Dawud, Book XXXII, no. 4092, available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/032.sat.html> (last visited Oct. 10, 2006).

must cover depends on the source of the *hadith* and ranges from “the bosom” to the whole body, except for the face and hands.⁶⁶ While three of the four principle schools of Sunni Islam conclude that women should cover their heads, Islamic scholars and feminists continue to debate whether *hijab* is compulsory and, if so, what practices of dress constitute valid observance.⁶⁷

2. Foulards in France

In practice, Muslim women’s covering has varied with time, geographic locale, and socio-economic class.⁶⁸ Very few Muslim women in France actually wear headscarves or engage in any practice of *hijab*. Estimates range from 1,200 to “a few thousand,” with the highest estimates representing only one percent of the Muslim students in France.⁶⁹ A number of Muslim women practice modesty not by donning traditional dress (e.g., the North African *djellaba*), but by wearing long-sleeved shirts and skirts that reach the ankles. Some of these women cover their heads; others do not. Those who do cover engage in a wide variety of practices, which

⁶⁶ Killian, *supra* note 63, at 570 (citing NADINE B. WEIBEL, PAR-DELÀ LE VOILE: FEMMES D’ISLAM EN EUROPE (2000)).

⁶⁷ For a discussion of various Muslim scholars’ perspectives on *hijab*, see Ibrahim B. Syed, Islamic Research Foundation, *Women in Islam: Hijab*, IRFI.ORG, Nov. 3, 1998, http://www.irfi.org/articles/women_in_islam/women_in_islam_hijab.htm. Islamists and members of the orthodox, conservative majority of Muslims believe that the hair and the entire female form must be covered. Dunya Maumoon, *Islamism and Gender Activism*, 19 J. MUSLIM MINORITY AFF. 269, 272 (1999) (referencing JAMAL A. BADAWI, THE MUSLIM WOMAN’S DRESS ACCORDING TO THE QUR’AN AND SUNNAH 5 (1982)). However, there is disagreement amongst conservative Islamic scholars as to whether the face should be covered. *Id.* Others, like Sherifa Zuhur, argue that women are not obligated to cover because the Qur’an does not contain such a requirement. SHERIFA ZUHUR, REVEALING REVEILING: ISLAMIST GENDER IDEOLOGY IN CONTEMPORARY EGYPT 4, 4 n.13 (1992).

⁶⁸ In many Muslim societies, only wealthy women could afford to cover their bodies completely, while poor women who had to work were forced to either modify their covering or not wear any covering at all. Killian, *supra* note 63, at 570.

⁶⁹ Elaine R. Thomas, *Keeping Identity at a Distance: Explaining France’s New Legal Restrictions on the Islamic Headscarf*, 29 ETHNIC & RACIAL STUD. 237, 239 (2006) (“According to official French sources, a total of 1,256 foulards were reported in Frances’ public schools at the start of the 2003-2004 school year.”); N.M. Thomas, *On Headscarves and Heterogeneity: Reflections on the French Foulard Affair*, 29 DIALECTICAL ANTHROPOLOGY 373, 381 (2005) (citing Jane Kramer, *Taking the Veil: How France’s Public Schools Became the Battleground in a Culture War*, THE NEW YORKER, Nov. 22, 2004, at 58).

reflect, in part, their diverse national origins. While some women wear brightly colored scarves and allow some hair to show, others pin sober colored scarves tightly around their faces. Still others adopt long, flowing dress and occasionally cover their entire faces except for the eyes, although very few women in France cover any part of their faces.⁷⁰ Muslim women and girls often mix old and new practices and assert generational differences. In a study of young female students of Turkish descent in Germany, Yasemin Karakasoglu-Aydin found that young women from working class, non-practicing Muslim families often chose to wear the *türban* rather than the loose headscarves of their mothers.⁷¹ In 1999, it was estimated that more than thirty percent of France's Muslims were second generation,⁷² and these young women and girls often choose to cover themselves in ways that are deliberately different from inherited practices—at times more strict and at times more lenient.

Most of the girls and young women at the center of *l'affaire du foulard* wear Western clothing, such as long-sleeved shirts with pants or long skirts, with headscarves pinned around the face to cover their hair.⁷³ This was true of the three girls expelled from school in Creil in 1989,⁷⁴ and of girls like Alma and Lila Levy who were involved in more recent confrontations with school authorities.⁷⁵ Moreover, most media images depicting the expelled girls show them wearing Western clothes or long-

⁷⁰ Killian, *supra* note 63, at 589 n.1.

⁷¹ Mark Terkessidis, *Global Culture in Germany or: How Repressed Women and Criminals Rescue Hybridity*, 8 COMMUNAL/PLURAL 231 (2000) (citing Yasemin Karakasoglu-Ayadin, *Kopttuch-Sudentinnen türkischer Herkunft an deutschen Universitäten—Impliziter Islamismus-Vorwurf und Diskriminierungserfahrungen*, in POLITISIERTE RELIGION 446 (H. Bielefeldt & W. Heitmeyer eds., 1998)). The *türban* has no special significance in Turkey, and is thought to have its roots in Saudi practice. *Id.*

⁷² Freedman, *Secularism*, *supra* note 8.

⁷³ Killian, *supra* note 63, at 570. Many commentators have mischaracterized the garments worn by young women and girls in public schools as the *chador*. However, the *chador*, a black, tent-like garment worn by women in Iran and associated with the 1979 Iranian Revolution, is largely absent from France. See Moruzzi, *supra* note 7. The conflation of headscarves with *chador* or the Middle Eastern *niqab* (face covering) reveals anxiety over the rise of political Islam, as well as a misunderstanding of Muslim women's practices.

⁷⁴ Moruzzi, *supra* note 7, at 655.

⁷⁵ Lila and Alma Levy were expelled from Henri-Wallon Lycée in October 2003 for refusing to show their "ears, necks and roots of hair" from underneath their headscarves. Hugh Schofield, *Jewish Dad Backs Headscarf Daughters*, BBC NEWS ONLINE, Jan. 10, 2003, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/3149588.stm>.

sleeved *djellabas*.⁷⁶ While acknowledging diversity, this Article will refer to the general practice of Muslim girls in France as wearing headscarves (*foulards*) since it is the most accurate descriptor of the practice contested in *l'affaire du foulard*.

3. The Plural Meanings of Covering: Challenging the Equation of the Headscarf with Gender Inequality

Muslim women and girls who wear headscarves visually assert the notion of gender difference. Many Muslim women in France have fathers, brothers, and husbands who dress in jeans and shave their beards, eschewing any distinctive signs that would identify them as Muslim men.⁷⁷ However, the conclusion that women and girls' assertion of gender difference should be equated with gender subordination is a simplistic, if common, mistake. Indeed, French colonial authorities, scholars, and observers have long associated the "Islamic veil" with the oppression of women, an association that has been intimately tied to France's colonization of North Africa and its participation in the creation of Orientalist discourse.⁷⁸ For example, colonial administrators and French secular feminists joined together on May 16, 1958 to stage a public event by which French women removed veils worn by Algerian women to demonstrate that Algerian women were on their way to becoming modern and liberated.⁷⁹ Prominent Arab feminists like Nawal al Saadawi also embraced the conclusion that headscarves are linked to women's oppression.⁸⁰ As Nilüfer Göle notes, the headscarf has been "perceived as a symbol of backwardness, ignorance, and subservience not only in the Western context,

⁷⁶ *Id.*; *French Girls Expelled Over Veils*, BBC NEWS ONLINE, Oct. 20, 2004, <http://news.bbc.co.uk/2/hi/europe/3761490.stm>.

⁷⁷ Killian, *supra* note 63, at 570 (internal citation omitted).

⁷⁸ Malek Alloula has insightfully documented French colonists' construction of Algerian women as "veiled" and "oppressed" through the fabrication and use of postcards during the period of high colonialism, 1900-1930. These postcards depict Algerian "veiled" women walking through public spaces and sitting behind windows fitted with prison-like bars. MALEK ALLOULA, *THE COLONIAL HAREM* (1986). For the seminal discussion of "Orientalism," see EDWARD SAID, *ORIENTALISM* (1979).

⁷⁹ EL HABTI, *supra* note 3, at 6.

⁸⁰ El Hamel, *supra* note 40, at 302.

but also by many of the publics in Muslim countries engaging with the values of secularism and gender liberty.”⁸¹

These interpretations have gained support as political Islamists have placed women's covering at the core of their agenda.⁸² Since the Iranian Revolution of 1979,⁸³ the rise of political Islam in Algeria in the 1980s,⁸⁴ and the war led by the United States against the Taliban regime in Afghanistan, the French media has featured images of Muslim women forced to wear *hijab* and penalized for refusing to do so by oppressive and reactionary Islamist regimes.⁸⁵ These images have resonated in the popular French consciousness.

Yet to conclude that covering is uniformly oppressive is to lose sight of how Muslim women and girls have actively redefined covering at various times and places to import new and evolving meanings upon the practice. The Algerian women of the National Liberation Front did just this when they used the *haik* as a cover to transport explosives used in their

⁸¹ Nilüfer Göle, *The Voluntary Adoption of Islamic Stigma Symbols*, 70 SOC. RES. 809, 817-18 (2003).

⁸² In Algeria, the Islamic Salvation Front has been linked to the murders of two women who did nothing but stand unveiled in public. AMNESTY INT'L, ALGERIA (2005), available at <http://www.amnestyusa.org> (follow “Countries” hyperlink; then follow “Algeria” hyperlink; then follow “Annual Report Entries: 2005” hyperlink).

⁸³ See Homa Hoodfar, *The Veil in Their Minds and On Our Heads: The Persistence of Colonial Images of Muslim Women*, 22 RESOURCES FOR FEMINIST RES. 5 (1993) [hereinafter Hoodfar, *The Veil*].

⁸⁴ See Cherifa Bouatta & Dora Cherifati-Merabtine, *The Social Representation of Women in Algeria's Islamist Movement*, in IDENTITY POLITICS & WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE 183, 186 (Valentine Moghadem ed., 1994) (describing the rise of the political Islamist groups in opposition to Algeria's reigning socialist government headed by the National Liberation Front).

⁸⁵ See Sujata Moorti & Karen Ross, *The Power of the Veil: Reviews Editors' Introduction*, 2 FEMINIST MEDIA STUD. 1 (2002) (noting media footage surrounding war in Afghanistan was “replete with images of women shedding or at least lifting the veil and through this act, conferring the status of liberator on the US”); Axel Frhr. Von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665 (discussing controversy surrounding headscarf worn by public schoolteacher in German state of Baden-Württemberg); *Judge: Woman Can't Cover Face on Driver's License*, CNN.COM, Jun. 10, 2003, <http://www.cnn.com/2003/LAW/06/06/florida.license.veil/> (describing Sultaana Freeman's failed challenge to a Florida highway department decision to revoke her driver's license when she refused to take an unveiled photograph).

resistance against French colonial authorities.⁸⁶ Similarly, scholars have documented the ways in which contemporary Muslim women transform covering from a symbol of social stigma into one of prestige, using the practice to enter public spaces, gain professional status, and assert independence. As Nilüfer Göle has written, these women “turn veiling, an attribute of potential public discredit, into a subaltern advantage.”⁸⁷

One prime example is Merve Kavakçı, the first woman who covers to be elected to the Turkish Parliament in 1999.⁸⁸ A University of Texas trained computer engineer, mother, divorcée, and member of the pro-Islamist party, *Fazilet Partisi*, Kavakçı defied the traditional conception of “veiled” women as confined to the home.⁸⁹ Oddly enough, it was the secular state—not political Islamists—that forced Kavakçı out of her parliamentary position and banned her from political activity on the grounds that her headscarf violated Turkey’s commitment to state secularism.⁹⁰ Kavakçı is currently contesting her exclusion from government and politics before the ECHR.⁹¹ Her story illustrates the complexity of labeling headscarves, veils, and *hijab* as singularly oppressive or empowering.

⁸⁶ Barbara Harlow, *Introduction* to THE COLONIAL HAREM, in THE COLONIAL HAREM, *supra* note 78, at x. See also FRANZ FANON, A DYING COLONIALISM 63 (1965) (commenting on “dynamism of the veil” in context of Algerian resistance).

⁸⁷ Göle, *supra* note 81, at 817. Fadwa el Gundi, who is cited for her recognition that the veil does not solely serve to subjugate women, similarly observed that “a new Egyptian woman is emerging—educated, professional, non-elitist and veiled. The veil is part of an assertive movement with a powerful message symbolizing the beginning of a synthesis between modernity and authenticity.” Laura Nadar, *Orientalism, Occidentalism and the Control of Women*, 2 CULTURAL DYNAMICS 323, 334 (1989).

⁸⁸ Göle, *supra* note 81, at 823. Elected as a member of the pro-Islamist party, *Fazilet Partisi*, “[Kavakçı] had access therefore to powerful symbols of modernity and was simultaneously engaged in Islamic politics.” *Id.* See also Chris Morris, *Headscarf Deputy Stands Ground*, BBC NEWS ONLINE, May 3, 1999, <http://news.bbc.co.uk/1/hi/world/europe/334435.stm>.

⁸⁹ Göle, *supra* note 81, at 823.

⁹⁰ In 2001, the Turkish Constitutional Court banned Kavakçı from becoming a founding or ordinary member, leader, or auditor of any political party for five years. Press Release, CHAMBER HEARING: KAVAKÇI V. TURKEY, FAZILET PARTISI AND KUTAN V. TURKEY, SILAY V. TURKEY AND ILICAK V. TURKEY (OCT. 13, 2005), *available at* <http://www.echr.coe.int/ENG/PRESS/2005/OCT/HEARINGKAVAKCI-FAZILETPARTISANDKUTAN-SILAY-ILICAKVTURKEY131005.HTM>. Kavakçı also lost her Turkish citizenship. MERVE KAVAKÇI, *Headscarf Heresy*, 142 FOREIGN POLICY 66 (2004).

⁹¹ *Id.*

Similarly, in countries where Muslim women are members of a religious minority group, women may choose the headscarf to assert the identity and existence of a "confident Muslim community in the West and to demand fuller social and political recognition."⁹² This decision to seek equality and empowerment within Islam and the Muslim community may be criticized as a limited agenda; yet, the decision must still be viewed as what it is claimed to be, a conscious choice.

The public debate surrounding *l'affaire du foulard* has largely been dominated by male voices, ignoring the voices of the girls and young women at the heart of the debate.⁹³ Similarly problematic is the lack of statistical studies of Muslim girls' reasons for donning headscarves or for refusing to do so. For this reason, it is difficult to generalize about why girls cover, whether force is an issue, and what types of messages they convey in wearing headscarves.⁹⁴ The limited newspaper accounts and scholarly

⁹² Hoodfar, *The Veil*, *supra* note 83, at 15. See generally Homa Hoodfar, *More than Clothing: The Veil as an Adaptive Strategy*, in *THE MUSLIM VEIL IN NORTH AMERICA: ISSUES AND DEBATES* 3, 32 (Sajida Alvi et al. eds., 2003). Sheida Shirvani's study of Muslim women who choose to wear *hijab* in central Ohio is illustrative, demonstrating that women use *hijab* to elevate their status within their communities "as a coping strategy to gain or maintain social esteem." Sheida Shirvani, *Voice from Behind the Veil*, 2 *FEMINIST MEDIA STUD.* 268, 269 (2002).

⁹³ One scholar characterizes the 1989 debate surrounding *l'affaire du foulard* as follows:

The sense of colonial, patriarchal mastery of Muslim women recurs partially in the public debate about the veil. Here the outspoken young women are denied a voice and their choice is instead vicariously defended or opposed by the patriarchs; their father, male religious leaders (such as the imam of the Paris mosque, a Catholic archbishop, and a rabbi), politicians and school principals.

Michela Ardizzoni, *Unveiling the Veil: Gendered Discourses and the (In)Visibility of the Female Body in France*, 33 *WOMEN'S STUD.* 629, 639 (2004). Scholars including Françoise Gaspard, Farhad Khosrokhavar, and Caitlin Killian have sought to remedy this problem by interviewing young Muslim women. FRANÇOISE GASPARD & FARHAD KHOSROKHAVAR, *LE FOULARD ET LA RÉPUBLIQUE* 22 (1995); Killian, *supra* note 63.

⁹⁴ In Part II of this paper, I fault the Stasi Commission for failing to study the reasons why Muslim girls wear headscarves in France in order to estimate the percentage of cases in which coercion is an issue. It is reasonable to hold a commission staffed by experts in sociology and funded by the French government to such a standard. This oversight is particularly alarming because the Commission collapses the diversity of Muslim girls' practices of wearing headscarves into a practice conveying a singular meaning—the sexism of the Islamic headscarf. Unfortunately, since statistical studies do not currently exist, this Article must also rely on anecdotal evidence and reports of psychological studies.

works that highlight the voices of the girls and young women at the heart of the debate reveal that they often wear headscarves for a variety of complex, cross-cutting reasons. These reasons include the expression of personal religious conviction, the assertion of ethno-cultural identity, political protest, and rebellion against parents.⁹⁵ While anecdotal evidence cannot prove that the headscarf conveys any one meaning, it can effectively challenge the assignment of a singular meaning to a complex and diverse practice.

For example, Lila and Alma Levy's decision to don headscarves highlights the role personal choice may play in many young women's practice of wearing headscarves. The daughters of an atheist father of Jewish descent and a non-practicing Muslim mother, the girls decided on their own to convert to Islam as teenagers. In a public interview, their father expressed his disapproval of their decision to wear headscarves: "It annoys me a little—the choice they have made. I think it is a mistake. . . . I worry that the life of a woman in Islam may not lead to self-fulfillment." Alma responded, "If it didn't allow us to fulfill ourselves, we would not have chosen it."⁹⁶ Her statement reveals her desire to highlight the deliberateness and independence of her decision to wear a headscarf. Similarly, Hanifa Cherifi, a member of the Stasi Commission who supported the recent ban on conspicuous religious symbols, has admitted that in her nine years working with "headscarf militants," she found that most girls wear headscarves against their parents' wishes, rather than as a result of parental pressure.⁹⁷

Other girls demonstrate a desire to wear headscarves to express a sense of ethno-cultural identity or to protest what they view as the racism and exclusion that Muslims experience in France. One girl, Nadia, left school when staff insisted she refrain from wearing her headscarf. She stated, "Being a Muslim has led me to break away from society. From now on I will only work for structures run by other Muslims."⁹⁸ While one may not be happy with Nadia's decision, it is clear that it is just that: her decision.

⁹⁵ Jane Freedman argues that religious conviction does not solely explain girls' decision to wear headscarves: "The creation of these new identities by young French Muslims are clearly highly influenced by their experiences of economic and social exclusion" Freedman, *Secularism*, *supra* note 8, at 9.

⁹⁶ Schofield, *supra* note 75, at 5.

⁹⁷ *Schools' Bid for Headscarf*, *supra* note 59.

⁹⁸ *Id.*

In contrast to Alma Levy and Nadia, other girls may wear Islamic headscarves due to pressure from their parents. In their book, *La Foulard et la République*, Françoise Gaspard and Farhad Khosrokhavar document the story of Nacira, a thirteen year-old girl from a Moroccan family who takes her headscarf off when she leaves her home, unbeknownst to her parents.⁹⁹ Nacira's story was not uncommon.¹⁰⁰ However, one scholar argues that, even when faced with parental pressure to don headscarves, other girls may use the headscarf as an integrative strategy,

a means of soothing parental anxieties, demonstrating to them that their daughter is a good Muslim who knows the traditional way and how to follow it. So when they leave home wearing a traditional dress or scarf, they often gain more freedom while simultaneously giving satisfaction and reassurance to their parents.¹⁰¹

Young women and girls may thus use the headscarf as a tool to negotiate the boundaries between their families and French majority culture and public space.

The voices of Muslim women and girls demonstrate that the problem of reconciling the headscarf with gender equality is not one intrinsic to the headscarf itself but one of preserving the headscarf as an object of free choice. Caitlin Killian's study of Muslim women's opinions on *l'affaire du foulard* demonstrates that they harbor diverse views about the legitimacy of a ban on Islamic headscarves in school.¹⁰² While one-third of the women she surveyed defended girls' right to wear headscarves, a little less than one-third supported a ban on the practice. Among those who opposed a ban, several defended the right of girls to express themselves and

⁹⁹ GASPARD & KHOSROKHAVAR, *supra* note 93, at 93-94.

¹⁰⁰ Unlike Cherifi, Gaspard and Khosrokhavar found that the majority of adolescents and preadolescents who wore headscarves did so because of family pressure. Of this group, a large number indicated that if they do not wear headscarves, their parents will not allow them to attend public school. In contrast, older women, between the ages of eighteen and twenty-two, were more likely to wear headscarves out of personal religious conviction or as a symbol of difference and pride in their ethno-cultural identity. *Id.*

¹⁰¹ Catherine Wihtol de Wenden, *Young Muslim Women in France: Cultural and Psychological Adjustments*, 19 POL. PSYCHOL. 133, 142 (1998).

¹⁰² Killian conducted one-on-one interviews with forty-one North African Muslim women aged twenty-five through fifty-eight who were living in France about their attitudes towards *l'affaire du foulard*. Many respondents referred to their own experiences with resisting *hijab* or deciding to cover. Killian, *supra* note 63.

phrased the question as one of “liberty,” even as they rejected the headscarf as a personal choice. Killian’s study and the voices of the girls at the center of *l’affaire du foulard* suggest that at least some women and girls conceive of the ability to wear headscarves in schools in terms of individual rights to religious belief and expression and as a practice compatible with gender equality.

C. The Conseil d’État/Jospin Approach: The Compatibility of Headscarves with *Laïcité*

In October 1989, the principal of Gabriel-Havez College, a Muslim-majority middle school in the Parisian suburb of Creil, suspended three Muslim girls for wearing headscarves in a public school classroom. While similar cases had occurred previously, the Creil incident gained national attention. The daily newspaper *Libération* reported the story with the headline: “The secularism of Creil’s school comes up against the Islamic headscarf.”¹⁰³ Five prominent left-wing intellectuals likened the acceptance of Muslim girls wearing headscarves in schools to the appeasement of Hitler in the 1930s.¹⁰⁴

Yet, in response to such forceful claims positing the headscarf as inimical to *laïcité*, the Conseil d’État resolved the issue by concluding that the two could indeed be compatible. It ruled that the wearing of religious garb, including the headscarf, in school “is not in itself incompatible with the principle of *laïcité*.”¹⁰⁵ The opinion forcefully began with a declaration that “freedom of conscience” (“*la liberté de conscience*”) is “one of the fundamental principles recognized by the laws of the Republic [and] is operative in the domain of education.”¹⁰⁶ The Conseil d’État held that students were permitted to wear religious symbols to school as long as those

¹⁰³ Freedman, *Problems Defining a Feminist Antiracist Strategy*, *supra* note 17 (citing *Le Port du Voile Heurte la Laïcité de Collège du Creil* [The secularism of Creil’s school comes up against the Islamic headscarf], *LIBÉRATION*, Oct. 4, 1989).

¹⁰⁴ Three well-known French feminists, Elisabeth Badinter, Elizabeth de Fontenay, and Catherine Kintzler, and two men, Régis Debray and Alain Finkielkraut, issued a highly publicized open letter in *Le Monde* stating, “The future will tell whether the bicentenary of the Revolution will have seen the Munich of the Republican school.” Elisabeth Badinter et al., *Profs, ne Capitulons Pas* (Teachers, Don’t Give In), *LE NOUVEL OBSERVATEUR*, Nov. 30, 1989.

¹⁰⁵ CE Ass., Nov. 27, 1989, http://www.conseil-etat.fr/ce/missio/index_mi_cg03_01.shtml [hereinafter CE Ass., Nov. 27, 1989].

¹⁰⁶ *Id.*

symbols were not so “conspicuous” (“*ostentatoire*”) as to “constitute an act of intimidation, provocation, proselytizing, or propaganda; threaten the dignity and freedom of students or other members of the educational community;” or disrupt the school’s normal functioning.¹⁰⁷ Thus, while students have a right to religious expression in school, this right is not absolute; schools are permitted to withhold admission from students whose expression threatens public health, security, or order; the liberties of others; or the mission of the educational system.¹⁰⁸ The Conseil d’État left the precise boundaries of these categories vague, allowing room for interpretation. The court declared that the mission of the education system includes preparing students for the responsibilities of being a professional and a citizen, fostering respect for individual differences, promoting acquisition of “a culture,” and supporting equality of the sexes, but left each of these categories undefined.¹⁰⁹ However, the opinion did emphasize that a refusal of admission “will not be justified except by the risk of a menace to the order of the establishment or to the normal functioning of the service of education,” and offending students will only be withheld from school “to the degree and for the duration necessary to re-establish” normalcy and order.¹¹⁰

The Conseil d’État thus resolved the first controversy in *l’affaire du foulard* by applying a balancing test. This test framed the act at issue—Muslim girls’ refusal to remove their headscarves in public school—as a demonstration of agency, a voluntary practice motivated by sincere religious belief and deserving of protection as a right. Moreover, the Conseil supported deference to this right by highlighting the French government’s obligation to support related rights and duties, including the right of equal access to education for all people living within French borders, regardless of religion, the freedom of religious belief and expression, parents’ right to ensure that their children receive an education

¹⁰⁷ *Id.*

¹⁰⁸ See Elisa Beller, *The Headscarf Affair: The Conseil d’État on the Role of Religion and Culture in French Society*, 39 TEX. INT’L L. J. 581, 609 (2004) (discussing the Jospin directive and its relationship to the Conseil d’État decision).

¹⁰⁹ CE Ass., Nov. 27, 1989, *supra* note 105.

¹¹⁰ *Id.*

compatible with their religious beliefs, and the duty of the state to promote understanding and tolerance among “all racial and religious groups.”¹¹¹

Moreover, the Conseil d’État also explicitly stated that its understanding of *laïcité* was drawn from “constitutional and legislative texts and from France’s *international engagements*.”¹¹² In affirming that the Muslim girls in Creil had “the right to express and to manifest religious beliefs inside the schools,” the Conseil d’État cited twenty-three legal documents, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹³ Thus, the Conseil d’État’s opinion acknowledged that both national and international law shaped the contours of *laïcité*, requiring a balance between state neutrality and students’ liberty interests.

While the Conseil d’État’s ruling was binding only on the Minister of Education, the Conseil d’État granted Jospin the jurisdiction to provide guidance as to how local school administrators should apply the criteria laid out in its decision.¹¹⁴ The resulting Jospin circular constituted a legally binding directive to all those under the Ministry of Education’s authority.¹¹⁵ Jospin’s directive both supported and diluted the Conseil’s articulation of students’ right to religious expression within public schools. On the one hand, Jospin suggested that school officials consider the attitudes and intentions of both students and their parents to assess whether the wearing of the headscarf was intended as an act of religious expression rather than provocation or proselytism. By permitting school authorities to include parental attitudes in their assessment, his directive diminished the degree of deference to be shown towards girls’ rights to religious expression. Yet, Jospin also directed educational authorities to engage in dialogue with the girls and their parents in cases that conformed to the exceptions laid out by the Conseil d’État decision (cases that presented a threat to public health,

¹¹¹ *Id.* While the rights of students to religious expression may conflict with parents’ rights to frame their children’s education, the Conseil d’État did not address this issue.

¹¹² *Id.* (emphasis added).

¹¹³ *Id.* (citing EHRC, *supra* note 22, at art. 9).

¹¹⁴ *Id.*

¹¹⁵ Lionel Jospin, Circulaire du 12 Decembre du Ministre d’État, Ministre de l’Education Nationale, de la Jeunesse et des Sports, Dec. 12, 1989, *Journal Officiel de la République Française* [J.O.][Official Gazette of France], Dec. 15, 1989, p. 15577, *reprinted in* Claude Durand-Prinborgne, *La “Circulaire Jospin” due 12 Decembre 1989*, 6 *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 10 (1990) [hereinafter Jospin Circulaire].

security, or order; the liberties of others; or the mission of the educational system), providing space for girls to voice their own understandings of the messages conveyed by their decisions to wear headscarves.¹¹⁶

The Conseil d’État enforced the formulation of *laïcité* as a principle that acknowledged students’ right to religious expression in schools. Between 1992 and 1999, the Conseil d’État ruled in favor of students seeking to wear headscarves in forty-one of the forty-nine cases that it heard on the issue.¹¹⁷ In 1992, for example, it struck down a school’s blanket ban on the headscarf due to “the generality of its terms.”¹¹⁸ It overturned the lower administrative court ruling in the case, and permitted the expelled girls to return to school wearing their headscarves. Yet, several years later, in a 1995 case concerning Muslim girls who refused to remove their headscarves as required during a physical education class, the Conseil d’État ruled that the school’s regulation was not unduly restrictive because it did not have the effect of outlawing headscarves altogether.¹¹⁹ The court’s record in these cases demonstrates that it continued to interpret conflicts over the presence of Muslim school girls wearing headscarves in public schools as implicating girls’ rights to religious expression, rights that warranted deference unless the specific exceptions outlined in the 1989 decision applied.

The Conseil d’État also blocked a highly publicized effort by Minister of Education François Bayrou to instate a policy more hostile to the rights of Muslim girls. In 1994, Bayrou published a circular stating that some symbols are “so ostentatious that their meaning is precisely to

¹¹⁶ *Id.* at 20.

¹¹⁷ THE OPEN SOCIETY INSTITUTE, *supra* note 35, at 93.

¹¹⁸ In this case, a secondary school in suburban Paris adopted a rule that specifically prohibited the wearing of the headscarf. While the school later revised the ban to include all distinctive religious, philosophical, and political symbols and clothing, parents of students who sought to wear headscarves to school brought a case in regional administrative court. The court found in favor of the school, and parents appealed to the judicial branch of the Conseil d’État. Quoting directly from its 1989 opinion, the Conseil d’État overturned the lower administrative ruling and permitted the girls to return to school wearing their headscarves. Avis du Conseil d’État, Nov. 2, 1992, Recueil des Décisions du Conseil d’État, Lebon 389, <http://jurisguide.univ-paris1.fr/Incontournables/Incountfiches/recdeconsetat.htm>. See also Beller, *supra* note 108, at 618.

¹¹⁹ The Lyon school expelled two sisters who refused to remove their headscarves in physical education class. The Conseil d’État upheld the expulsion, finding that the students’ refusal to remove their headscarves interfered with the normal functioning of their education and disrupted the school’s order. CE Ass., Nov. 27, 1989, *supra* note 105.

separate certain students from the rules of the communal life of the school. Such symbols are, in and of themselves, elements of proselytism"¹²⁰ While Bayrou did not explicitly ban Islamic headscarves, his circular unambiguously excluded the wearing of a crucifix or Jewish yarmulke as symbols that were permissible and discreet. To justify his new stance on headscarves, Bayrou stated: "[In 1989,] I thought that wearing a headscarf was simply a personal form of religious expression. But since then the evidence has multiplied such that we can no longer afford to ignore the real meaning of the headscarf *for fundamentalists*"¹²¹ Bayrou's statement demonstrates a concern for the garment as conceptualized by political Islamists and a decided lack of attention to the meaning of the garment for the girls who sought to wear them.

The Conseil d'État rejected the Bayrou circular. In 1995, it ruled that the circular did not have the force of law, and it confirmed that each individual head teacher must consider the particular circumstances of the case before excluding from school a girl who refused to remove her headscarf.¹²² The court thus reaffirmed its support for a contextualized understanding of whether a girl's decision to wear the headscarf constituted religious expression, propaganda, proselytism, or intimidation. In support of this decision, the vice president of the Conseil d'État stated that, if the Islamic headscarf was accorded a "symbolic charge," that same "charge" must be accorded to the Jewish yarmulke or Christian cross.¹²³

After the controversy surrounding the Bayrou circular, conflicts related to headscarves in schools declined in frequency and intensity. Between 1995 and 2003, *l'affaire du foulard* was characterized by localized

¹²⁰ Press Release, François Bayrou, Neutralité de l'Enseignement Public: Port de Signes Ostentatoires dans les Établissements Scolaires (Sept. 20, 1994), *available at* <http://www.assemblee-nat.fr/12/dossiers/documents-laicite/document-3.pdf>. Bayrou used the same word employed in the Conseil d'État's 1989 decision, "*ostentatoire*."

¹²¹ Carole Barjon & Elisabeth Schemla, *Foulard Islamique: Bayrou se Fâche* [Islamic Veil: Bayrou Gets Angry], LE NOUVEL OBSERVATEUR, Nov. 3, 1994 (emphasis added).

¹²² Freedman, *Secularism*, *supra* note 8, at 16.

¹²³ R. Denoix de Saint Marc stated that, if an Islamic headscarf had a "symbolic charge," then the same charge would have to be attributed to a yarmulke or a cross. Beller, *supra* note 108, at 585 n.28 (citing Dominique Le Tourneau, *La Laïcité à l'Épreuve de l'Islam: le Cas du Port du "Foulard Islamique" dans l'École Publique en France*, 28 REVUE GÉNÉRALE DU DROIT 275, 294 (1997) (quoting Interview with Renaud Denoix de Saint Marc, Vice President of the Conseil d'État, with La Croix (Nov. 7, 1996))).

disputes and debates.¹²⁴ The relative calm prompted *Le Monde* to state in 2001: “Twelve years after headscarves first appeared in public schools, Islam and the republican schools lived together almost peacefully.”¹²⁵

D. The Stasi Commission

The calm did not last. Almost a decade after the issue first came to the forefront, *l’affaire du foulard* gained renewed attention, this time the result of political maneuverings rather than a local showdown between a girl and public school officials. In April 2003, just weeks after the first elections of the French Council for the Muslim Faith (CFCM), the first officially recognized national body to provide a voice for the nation’s Muslims, key politicians in France’s conservative ruling party, the Union for Popular Movement (UMP), raised the call for a ban on Islamic headscarves.¹²⁶ By June 2003, several prominent members of the National Assembly from both the left (Socialist) and right (UMP) parties had proposed a ban and launched a parliamentary investigation into the issue.¹²⁷

President Chirac quickly followed suit by announcing the creation of an executive commission led by Bernard Stasi to conduct “an inquiry on the application of the principle of *laïcité* in the Republic and to make suitable proposals” by December 2003.¹²⁸ The Stasi Commission was composed of twenty members—six women and fourteen men—most of whom were distinguished intellectuals, politicians, and political

¹²⁴ One scholar noted that, by 2003, “the Haut Conseil à l’Intégration [High Council for Integration] had found that the guidance offered by the Conseil d’État appeared to be working, a conclusion that was reaffirmed by the *Traité de droit de religion français*, and the Education Ministry’s mediator had reported a fifty percent reduction in problematic cases.” Gunn, *supra* note 8, at 475.

¹²⁵ *Id.* at 458 (quoting *L’École en Première Ligne*, LE MONDE DE L’ÉDUCATION, Dec. 2001, at 23).

¹²⁶ The CFCM was created to provide official representation of Muslims to the French government and to promote integration. Yet, before the council was on its feet, politicians confronted it with a proposed ban affecting the Islamic headscarf, an extremely divisive political issue. Freedman, *Secularism*, *supra* note 8, at 17.

¹²⁷ *On ne Modifiera pas la Loi de 1905* [We will not change the 1905 law], LIBÉRATION, Feb. 21, 2003.

¹²⁸ Décret No. 2003-607 of July 3, 2003, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 4, 2003, p. 11319.

appointees.¹²⁹ Chirac took care to appoint individuals with academic or professional experience with *laïcité*, Islam, or immigration,¹³⁰ and included renowned social scientists,¹³¹ former government officials,¹³² and members of the Haut Conseil à l'Intégration (High Council for Integration).¹³³ Chirac also took care to ensure that several members of the Commission were themselves members of religious minority groups.¹³⁴

Over the course of four months, the Stasi Commission held several hundred interviews, some closed and some open to the public, in an effort to entertain the full range of opinions about *laïcité* in the Republic.¹³⁵ The Commission reached out to policymakers, administrative officials, union leaders, local elected officials, business owners, intellectuals, teachers, and directors of hospitals and prisons.¹³⁶ They met with leaders of France's

¹²⁹ The members of the Stasi Commission included Mohammed Arkoun, Jean Bauberot, Hanifa Cherifi, Jacqueline Cost-Lascoux, Régis Debray, Michel Delebarre, Nicole Guedj, Ghislaine Hudson, Gilles Kepel, Marceau Long, Nelly Olin, Henri Pena-Ruiz, Gaye Petek, Maurice Quenet, René Remond, Raymond Soubie, Alain Touraine, and Patrick Weil. Rémy Schwartz served as rapporteur. Rémy Schwartz, *Le Rapport de la Commission Stasi Sur La Laïcité*, LE MONDE DOCUMENT, Dec. 12, 2003, at 17-24.

¹³⁰ Two members of the Commission had extensive experience with the French public education: Ghislaine Hudson, a principal at a vocational high school in Paris, and Hanifa Cherifi, an education specialist who had worked as a government mediator to settle disputes between girls seeking to wear headscarves and public schools in the years following the 1989 Creil incident. *Id.*

¹³¹ Scholars include well-known historian of *laïcité* Jean Bauberot, sociologist Alain Touraine, immigration expert Patrick Weil, Islamic Studies scholar Mohammed Arkoun, legal scholar Maurice Quenet, and expert in *laïcité* Henri Pena-Ruiz. *Id.* at 18-24.

¹³² Michel Delebarre was a mayor and former nation-level minister, Nicole Guedj served as Secretary of State under Chirac, and Raymond Soubie was an advisor to Chirac. *Id.* at 20, 23.

¹³³ The Haut Conseil à l'Intégration, which was established in 1990, issued its first report that year offering recommendations to promote integration in France. HAUT CONSEIL À L'INTÉGRATION, POUR UNE MODÈLE FRANÇAIS D'INTÉGRATION (1991). Hanifa Cherifi, Marceau Long, Nelly Olin and Gaye Petek served or were serving on the Haut Conseil d'Intégration at the time. *Id.*

¹³⁴ Both Hanifa Cherifi and Mohammed Arkoun are of Algerian Muslim origin, and Nicole Guedj is a prominent member of the French Jewish community and a representative in the French Council on the Jewish Faith. Schwartz, *supra* note 129.

¹³⁵ Stasi Commission Report, *supra* note 10, at 4.2.2.1 (discussing the breadth of people the Commission interviewed and viewpoints it encountered).

¹³⁶ *Id.* For the full list of those consulted in public interviews by the Commission, see Schwartz, *supra* note 129, at 18-20.

largest religious organizations, including the French Council for the Muslim Faith, the French Union of Islamic Organizations, the French Protestant Federation, the Catholic Church, the Union of French Buddhists, the Episcopal Conference, and the chief rabbi of France, as well as national officials like former Minister Bayrou and Minister Sarkozy.¹³⁷ The group also spoke with representatives from civil society organizations including Ni Putes Ni Soumises and SOS-Racisme, and conducted a public debate involving 220 students from French secondary schools in France and abroad. Finally, the Commission conducted over forty closed interviews, entertained written contributions, and visited neighboring European countries to gain a sense of alternative European experiences with *laïcité*.¹³⁸ As noted in the following discussion, conspicuously absent from these interviews were significant discussions with Muslim girls who would be impacted by the ban.

In December 2003, the Stasi Commission issued its final report, which was published in *Le Monde* along with a list of all public interviews conducted by the Commission.¹³⁹ While the Stasi Commission issued thirty recommendations to strengthen *laïcité*, ranging from the symbolic (posting a “charter of secularism” in public places), to the concrete (recruiting Muslim chaplains in the army and prisons),¹⁴⁰ the single most publicized proposal issued by the Commission was its recommendation to ban “clothing and symbols demonstrating a religious or political affiliation” from public schools.¹⁴¹ This was the only proposal adopted by President Chirac, and he only adopted half of it, supporting a ban solely on

¹³⁷ *Id.*

¹³⁸ One author has claimed that the Commission’s interviews did not reflect the true breadth of public opinions. See LOUISA LARABI HENDAZ, *LE VOILE HUMILIÉ OU LES AUDITIONS MANQUÉES DE LA COMMISSION STASI* (2005).

¹³⁹ Schwartz, *supra* note 129. The Commission did not reveal information about private interviews it conducted or the written materials it received.

¹⁴⁰ Stasi Commission Report, *supra* note 10. Other recommendations included the accommodation of religious dietary restrictions in public canteens, the inclusion of Yom Kippur and Eid-al-Adha as public school holidays, the establishment of a National School of Islamic Studies, and the addition of Islam to the list of religious courses available to school children in Alsace-Moselle, where rules regarding *laïcité* differ from the rest of France. The Commission also identified long-term structural changes including the need for national offices to fight discrimination, address the problem of urban ghettos, and improve education about religion and *laïcité*. *Id.*

¹⁴¹ Stasi Commission Report, *supra* note 10, at 4.2.2.1.

conspicuous *religious* (not *political*) symbols. With only a handful of detractors in each of the major parties, it sailed through the National Assembly, with 494 votes in favor of the ban (only twenty-six against), and the Senate, with 321 votes in favor (only twenty against). The President and Prime Minister signed the bill into law on March 15, 2004.

II. THE STASI COMMISSION REPORT: THE CONSTRUCTION OF AN ISOMORPHISM

The Stasi Commission framed its recommendation for a ban on all conspicuous religious and political symbols in primary and secondary schools as a restriction of civil liberties required to establish public order in France. Citing the French Constitution, the Commission claimed: “[L]ike all civil liberties, the manifestations of freedom of conscience can be restricted in the case of threats to public order.”¹⁴² It then concluded “after having listened to both sides[,] . . . today it is not a question of *freedom of conscience but of public order*.”¹⁴³ In doing so, the Commission report marked a decisive shift away from the Conseil d’État/Jospin approach.

This new approach shuns students’ “right to express and to manifest religious beliefs inside schools,”¹⁴⁴ a right grounded in both French and international law. Moreover, its reasoning contravenes the recent observation of the U.N. Special Rapporteur on Freedom of Religion or Belief after her visit to France that the 2004 ban “denies the rights of those minors who have freely chosen to wear a religious symbol to school as part of their religious belief.”¹⁴⁵

While the Stasi Commission’s final recommendation to ban conspicuous religious symbols explicitly prohibits not only Islamic headscarves, but also large crosses and yarmulkes, its discussion of the disruptive effects of religious symbols in schools focuses almost entirely on the impact of Islamic headscarves (with the exception of one paragraph

¹⁴² *Id.* at 2.2.2.

¹⁴³ *Id.* at 4.2.2.1 (emphasis added).

¹⁴⁴ Avis du Conseil d’État No. 346893 (Nov. 27, 1989), available at http://www.conseil-etat.fr/ce/rapport/index_ra_cg03_01.shtml.

¹⁴⁵ U.N. Special Rapporteur on Freedom of Religion or Belief, *Civil and Political Rights, Including the Question of Religious Intolerance: Addendum 2, Mission to France*, 2, E/CN.4/2006/5/Add.4 (Mar. 8, 2006) (prepared by Asma Jahangir).

devoted to the yarmulke).¹⁴⁶ In American free exercise and equal protection jurisprudence, the virtually exclusive focus on a specific symbol of one religion (Islam) could be taken as evidence that there is discriminatory intent underlying the law’s passage, despite its textual neutrality and general applicability.¹⁴⁷ This shift raises questions of how the Stasi Commission could assert that public order required a complete ban on headscarves in schools, and how it could justify departing so strongly from its earlier policy. The Stasi Commission used two arguments to counter any potential freedom of religion claim against their proposed ban: first, the Islamic headscarf threatens *laïcité*, and second, the Islamic headscarf is, in and of itself, inimical to women’s rights. This section examines the ways in which the Stasi Commission wielded each of these arguments and deconstructs the assumptions underlying them.

A. The Headscarf Threatens *Laïcité*

*“Laïcité is inscribed in our traditions.
It is at the heart of our republican identity.”*

-President Jacques Chirac, 2003¹⁴⁸

¹⁴⁶ The Stasi Commission Report noted that Jewish boys who wear yarmulkes fall victim to threats and hostility. As a solution, it recommended that they remove their yarmulkes when in school. Stasi Commission Report, *supra* note 10, at 3.3.2.3. However, aside from this paragraph, the report addresses the adverse impact of conspicuous religious symbols solely with respect to Islamic headscarves worn by Muslim girls. *See id.*

¹⁴⁷ Under the United States Supreme Court’s free exercise and equal protection jurisprudence, laws targeting religious beliefs are never permissible, *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and is invalid unless it is justified by a compelling interest and narrowly tailored to advance that interest. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990). A facially neutral law like the French ban on conspicuous religious symbols in primary and secondary schools may nevertheless be found to intentionally target a religious minority group based on heightened scrutiny of the direct and circumstantial evidence regarding the passage of the law. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 538, 540 (1993) (citations omitted). For a discussion of the French ban and related American constitutional law governing restrictions on religious dress, see Stefanie Walterick, Note, *The Prohibition of Muslim Headscarves from French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 TEMP INT’L & COMP. L.J. 251, 263-29 (2006).

¹⁴⁸ Gunn, *supra* note 8, at 428 (citing Jaques Chirac, President, Speech from the Elysée Palace (Dec. 17, 2003), available at <http://www.elysee.fr> (follow “A L’Elysée” hyperlink; then follow “2003” hyperlink; then follow “Discours sur le principe de laïcité dans la République” hyperlink) [hereinafter Jaques Chirac]).

*“[S]chool . . . is not just one among many places,
but is the place where we mold little citizens. . . .
[L]aïcité, Republic, school, these are the three legs on which we stand.”*

-Laurent Fabius, former Socialist Prime Minister, 2003¹⁴⁹

The Stasi Commission began its report with a forceful affirmation of the central place of *laïcité* as a “fundamental principle” and “cornerstone of the republican compact.”¹⁵⁰ *Laïcité* is a uniquely French concept of state secularism.¹⁵¹ Beginning in 1880, the founding laws of *laïcité* decreed the secular nature of French schools, which were strengthened with the official separation of church and state in 1905.¹⁵² *Laïcité* has since been firmly embraced as a foundational principle of French Republicanism and is enshrined in Article I of the 1958 French Constitution: “France is a Republic, indivisible, *laïque*, democratic and social. She assures equality of all citizens before the law without distinctions as to origin, race, or religion. She respects all beliefs.”¹⁵³ The French Constitution links *laïcité* to concepts of state neutrality, equality, and tolerance of difference. *Laïcité* seeks to generate equality through sameness in the public sphere by relegating linguistic, cultural, ethnic, or religious differences to the private sphere.¹⁵⁴ This sameness allows public citizens to meet simultaneously as members of the French nation and polity. *Laïcité* thus supports the unification of

¹⁴⁹ Laurent Fabius, Seine-Maritime Deputy to the Dijon Congress, Address at the Congrès de Dijon (May 17, 2003), available at <http://www.psinfo.net> (follow “entretiens” hyperlink; then follow “Laurent Fabius” hyperlink; then follow “Le principe émancipateur et unificateur de la laïcité” hyperlink).

¹⁵⁰ Conseil d’État, *supra* note 5, at 7.

¹⁵¹ *Laïcité* first emerged after the founding of the First French Republic, and was consolidated during the battles of the Third Republic against the Catholic Church in the late nineteenth century. See Gunn, *supra* note 8, at 432-42.

¹⁵² The law of 1905, which separated church and state, declares: “The Republic neither recognizes, pays the salaries of, nor subsidizes any religion [or act of worship].” Law on the Separation of Churches and State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, art. 2, available at <http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm> (providing the current version of the 1905 law).

¹⁵³ 1958 CONST. 1.

¹⁵⁴ Freedman, *Secularism*, *supra* note 8, at 10.

national and political citizenship in France, a unification that necessitates cultural assimilation as an ideal.¹⁵⁵ This model of *laïcité* and immigrant integration through cultural assimilation differs from the relative cultural and religious pluralism in countries like the United States.¹⁵⁶

Public schools have played a pivotal role in furthering *laïcité* and the assimilationist project, which partially explains why the presence of headscarves in public schools has excited such controversy. Established during the Third Republic—concurrently with the principle of *laïcité*—the modern French public school system was intended to strengthen the foundation of the state by creating a unified citizenry through a common civic and cultural education: “The Republic created the school, school will create the Republic.”¹⁵⁷ To accomplish this mission, “[p]rimary education, under Jules Ferry, was made free, compulsory, secular, and intensely nationalistic, and primary schools became great engines of assimilation, welding France for the first time into a unified nation.”¹⁵⁸ French schoolteachers played a particularly important role in this endeavor. In the late nineteenth century, the “*mission civilisatrice*” was carried out by the Third Republic’s army of “*instituteurs*,” who set out to “institute” the nation.¹⁵⁹ More recently, the Commission de la Nationalité wrote, “There is no more integrating factor than schooling, especially primary and secondary

¹⁵⁵ Rogers Brubaker observes: “Political inclusion has entailed cultural assimilation for regional cultural minorities and immigrants alike.” ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY I* (1992). In the French citizenship regime, “the foreigner who acquires French nationality is stripped of memories or roots.” André-Clément Decouflé, *Historic Elements of the Politics of Nationality in France*, in *IMMIGRANTS IN TWO DEMOCRACIES*, *supra* note 41, at 357, 362.

¹⁵⁶ Donald Horowitz notes, “It is possible to be an Italian in France, but it is not possible to be an Italian Frenchman in the same easy way as it is possible to be an Italian-American.” Horowitz, *supra* note 47, at 7. While the ideal of assimilation may be more visible in France, it is nevertheless present in American society. As Kenji Yoshino has observed, “[a]ssimilation is the magic in the American Dream.” Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 771 (2002) [hereinafter Yoshino, *Covering*]. Yoshino argues that the assumption that minorities who can assimilate ought to do so has not only been revived at various points in American history but is also embedded within American antidiscrimination law. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L. J. 485, 560 (1998); Yoshino, *Covering*, *supra* at 771.

¹⁵⁷ Boyzon-Fradet, *supra* note 42, at 149.

¹⁵⁸ BRUBAKER, *supra* note 155, at 15.

¹⁵⁹ *Id.* at 11.

schooling.”¹⁶⁰ Rejecting pluralism as a public good, public schools serve to purge students’ particularistic commitments from the public sphere, thereby instilling mutual respect for public equals.¹⁶¹ As a result, on the curricular level, anything that suggests religious affiliation or identity is banned.

Both *laïcité* and the French assimilationist ideal deserve credit for their potential to open the doors of political and national citizenship to immigrants. Unlike other European states, France has been a country of high immigration.¹⁶² Through cultural assimilation, the children of immigrants born on French soil may become French nationals and political citizens; the assimilationist ideal therefore rejects the notion of a purely ethnocultural imagined community.¹⁶³

Yet, the French assimilationist model of citizenship sometimes forces ethnic and religious minorities to incur the high costs associated with eliminating cultural and religious differences or, at a minimum, to relegate such differences to a “private” sphere where they cannot interfere with or dilute French national culture. In the words of French Deputy Pierre Lellouche, “[m]ulticulturalism would be the end of France. You can be what you want to be here—Christian, Jewish, or Muslim—but we’re all Gauls.”¹⁶⁴

¹⁶⁰ Boyzon-Fradet, *supra* note 42, at 148.

¹⁶¹ Freedman, *Secularism*, *supra* note 8, at 10-11. However, since the early 1980s, the failure of French schools to accomplish its integrationist mission has been a topic of discussion. Miriam Feldblum, *Paradoxes of Ethnic Politics: The Case of Franco-Maghrebis in France*, 16 *ETHNIC AND RACIAL STUD.* 52, 64 n.16 (1993).

¹⁶² Approximately eight percent of the current French population, the highest figure in Europe, was born in foreign countries. Perhaps as much as one-third of the population of France can trace its origins to the immigration of a grandparent. Horowitz, *supra* note 47, at 5 (citing Alain Girard, *Attitudes des Français à l'Égard de l'Immigration Étrangère*, 26 *POPULATION* 826, 826-76 (1971)).

¹⁶³ See generally Decouflé, *supra* note 155.

¹⁶⁴ Robert Carle, *Hijab and the Limits of French Secular Republicanism*, 41 *SOC'Y ABROAD* 63, 66 (2004). Kenji Yoshino's work on “covering” suggests how the French assimilationist ideal may exert high costs on minorities. Yoshino defines “covering” as a form of assimilation in which an individual's underlying identity is neither altered nor hidden, but downplayed. Yoshino, *Covering*, *supra* note 156, at 772. While Muslims in France may not be forced to give up their religious identity (the demand of “conversion”), they are asked to play up their “Gaul” identity and to hide (the demand of “passing”) or, at the very least, to cover their religious identity. Covering may place an enormous burden on individuals by leading to demands that people hide aspects of their identity or by forcing individuals to compromise these assets of their identity, even as they may acknowledge them. *Id.* at 837.

The Stasi Commission dealt directly with this tension between accommodating the increasing religious diversity of France while maintaining national unity. It noted:

In a century, under the effect of immigration, French society has become diverse, especially in the spiritual or religious realm. It is necessary to find a place for new religions while carrying out integration. The challenges have changed in nature and the stakes have without doubt become at the same time more difficult to put up: how can unity and respect for diversity be reconciled?¹⁶⁵

The answer provided by the Commission is simple: strengthen *laïcité*. The Stasi Report emphasized that *laïcité* holds the potential to promote the creation of a “conception of the common good” and shared values.¹⁶⁶ *Laïcité* can unify a society marked by increasing pluralism and “communitarian logic,” which threatens to lead citizens to lend “primary allegiance to a particular group over belonging to the Republic.”¹⁶⁷ The document sought to promote tolerance of immigration by strengthening forces for integration: “It is necessary to combat the ignorance and the prejudice against various components of French history and against the fact of migration.”¹⁶⁸

The Stasi Commission Report thus conveyed an important, positive message: religious minorities, and Muslims in particular, do have a place within French society. “Muslim culture is able to find in its history resources which permit it to adapt to the secular framework, just as secularity [*laïcité*] is able to permit the complete intellectual blossoming of Islamic thought in the shelter of constraints on power.”¹⁶⁹ The Report therefore strove to reconcile *laïcité* with the changing face of French society. The Report also argued that this reconciliation would occur when *laïcité* and the three inseparable values upon which it rests—liberty of conscience, equality of rights to spiritual and religious beliefs,¹⁷⁰ and state

¹⁶⁵ Stasi Commission Report, *supra* note 10, at 2.3.

¹⁶⁶ *Id.* at intro.

¹⁶⁷ *Id.* at 3.3.1.

¹⁶⁸ *Id.* at 4.1.2.3.

¹⁶⁹ *Id.* at 1.2.3.

¹⁷⁰ *Id.* at intro. These two aspects of *laïcité*—liberty of conscience and equality of rights to spiritual and religious beliefs—can be compared to the Free Exercise Clause of the First Amendment of the United States Constitution. See Gunn, *supra* note 8.

neutrality with respect to religion¹⁷¹—were properly “clarified and invigorated.”¹⁷²

Moreover, in its list of thirty recommendations to promote *laïcité*, the Stasi Commission urged the French government to provide greater religious and cultural accommodation to religious minorities. The Commission recommended the inclusion of Yom Kippur and Eid-al-Adha as public school holidays, the addition of Muslim chaplains in prisons and the army, the accommodation of dietary restrictions specific to Islam and other minority religions in public canteens, and the establishment of a National School of Islamic Studies. These suggestions again illustrate the Stasi Commission’s belief that not only are Muslims capable of being integrated into France, but also that integration is a goal worth pursuing, one that the state must take positive steps to achieve.

Yet, the Stasi Commission’s conception of *laïcité* differed profoundly from the one articulated by the Conseil d’État in 1989. One of the most notable contrasts was the reticence of the Stasi Commission to acknowledge the impact of international law on the nature of *laïcité*. In arguing for a blanket ban on religious symbols, the Stasi Commission framed *laïcité* as a concept fundamentally grounded in French law. The Commission rightly acknowledged that the “question . . . of liberty of conscience” is expressed in the Universal Declaration of Human Rights, the Convention Against Discrimination in Education, the International Covenant on Civil and Politics Rights, and the International Covenant on Economic, Social, and Cultural Rights.¹⁷³ As Article 55 of the French Constitution provides, “Treaties or agreements duly ratified or approved shall, upon publication, prevail over domestic law, subject, in regard to each agreement or treaty, to its application by the other party.”¹⁷⁴ Yet, the Commission minimized the impact of international law on the contours of *laïcité* by characterizing the Universal Declaration as lacking “constraining legal value” and emphasizing, instead, that religious liberty is founded, first and foremost, in the law of 1905 separating church and state.¹⁷⁵ The Commission claimed that the law only provides for a liberty of conscience conditioned upon the reciprocal obligations between the state and its

¹⁷¹ Stasi Commission Report, *supra* note 10, at intro.

¹⁷² *Id.* at 2.3.

¹⁷³ *Id.* at 2.1.

¹⁷⁴ 1958 CONST. 55.

¹⁷⁵ *Id.*

citizens: “The citizen receives from secularity [*laïcité*] the protection of freedom of conscience; on the other hand, he must respect public space which everyone shares.”¹⁷⁶

While it did acknowledge that Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention) supports the rights of individuals to freedom of religious belief and expression,¹⁷⁷ the Stasi Commission argued that the need for public order trumps these liberties. After briefly citing several decisions of the ECHR, the Commission claimed that the European Human Rights Convention’s guarantee of rights to religious belief and expression is “not incompatible” with *laïcité*, but may be limited by the “the imperatives of secularity [*laïcité*].”¹⁷⁸ Although it briefly acknowledged the need for balance, the Commission only cited cases in which religious liberty was restricted in the name of protecting state secularism.¹⁷⁹

The Stasi Commission presented three main explanations for a blanket ban of religious symbols from public schools. These reasons centered on the threat posed by Islamic headscarves to *laïcité* as well as on administrative difficulties under the Conseil d’État/Jospin system.

First, it claimed that “wearing an ostensibly religious symbol . . . suffices to disrupt the tranquility of the studious life.”¹⁸⁰ While phrased

¹⁷⁶ Stasi Commission Report, *supra* note 10, at 1.2.3.

¹⁷⁷ EHRC, *supra* note 22, at art. 9.

¹⁷⁸ Stasi Commission Report, *supra* note 10, at 2.1.

¹⁷⁹ *Id.* (citing *Refah Partisi v. Turkey* (No. 1), 35 Eur. Ct. H.R. 3 (2002), *aff’d*, *Refah Partisi v. Turkey* (No. 2), 37 Eur. Ct. H.R. 1, 48 (2003) (upholding the Turkish state’s suppression of an Islamist political party as a threat to state secularism); *Dahlab v. Switzerland*, 2001 Eur. Ct. H.R. 1 (2001) (upholding a Geneva school district’s decision to impose disciplinary sanctions on a teacher who refused to remove her headscarf in her public school classroom); *Kalaç v. Turkey*, 41 Eur. Ct. H.R. 1199 (1997) (upholding sanction ordering the compulsory retirement of a military judge for adopting “unlawful fundamentalist opinions”); *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec. & Rep. 93 (1993) (upholding the Turkish state’s regulation forbidding the headscarf in public higher education in Turkey “because of the necessity to protect women from pressure”); *Valsamis v. Greece*, App. No. 21787/93, 24 Eur. H.R. Rep. 294 (1996) (Eur. Ct. H.R.) (dismissing student’s Article 9 claim that religiously-based pacifist convictions required exemption from state requirements to attend school parade allegedly glorifying the military on national holiday)). These cases may be distinguished from the situation confronting girls seeking to wear Islamic headscarves to school in France. *See infra* Part III.

¹⁸⁰ Stasi Commission Report, *supra* note 10, at 3.2.1.1.

generally so as to leave open the possibility that the criticism may refer to adherents of any religion, the Commission highlighted examples associated with practices often linked to Islam such as “course and examination interruptions to pray or fast.”¹⁸¹ The Commission also referred to students who object to “entire sections of courses in history or earth science.”¹⁸²

This explanation is premised on a slippery slope argument: the demand to wear the Islamic headscarf is part and parcel of a larger group of excessive demands by which students seek exemption from school one day each week, seek permission to pray or fast during courses and exams, and object to material covered in history and science courses.¹⁸³ In this sense, the Commission identified a serious dilemma. How much accommodation is too much? Where does the state draw the line?

Yet, the Commission failed to question whether the demands it highlighted are excessive because they are judged against what is perceived to be a “*normal* course of study,”¹⁸⁴ where “normal” has been determined according to the practices of the dominant Catholic community. For example, is it too much to absent oneself from public school to attend the Friday prayer at the mosque in observance of Islam, or to respect the Saturday sabbath in observance of Judaism, when Catholic schoolchildren who wish to attend Sunday mass are automatically accommodated by the closure of public schools on Sunday?¹⁸⁵

Second, the Stasi Commission suggested that Islamic headscarves help those espousing “communitarian” logic to convince individuals living in France’s destitute suburbs to “giv[e] primary allegiance to a particular group over belonging to the Republic.”¹⁸⁶ The Commission highlighted the segregation of minorities into France’s suburbs where unemployment reaches forty percent, school attendance is poor, and social problems are

¹⁸¹ *Id.* These concerns referred to the Muslim tenets of prayer five times a day and fasting during daylight hours for the month of Ramadan.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* (emphasis added).

¹⁸⁵ The Stasi Commission did, however, recommend that the French government accept Yom Kippur and Eid-al-Adha as public school holidays, which reveals a degree of acknowledgement that the current baseline of French public schools is set according to the norms of the Catholic and Protestant Christian communities. See Resnik, *supra* note 48 and accompanying text.

¹⁸⁶ Stasi Commission Report, *supra* note 10, at 3.3.1.

three times more prevalent than in the rest of the country.¹⁸⁷ However, the Commission failed to explain how the headscarf contributes to the problems of segregation, poverty, and social dislocation of France's minority populations.

Third, the Stasi Commission asserted that the presence of Islamic headscarves in public schools disturbs public order because they unduly burden local officials and teachers charged with maintaining a learning environment that is neutral towards religion. According to this critique, the administration of *laïcité* requires a "firm bright line" rule.¹⁸⁸ The Commission painted the picture of beleaguered local educators, futilely attempting to defend the Republic from "politico-religious activists."¹⁸⁹ The Commission framed the requirements of the case-by-case approach as overly onerous, placing too much responsibility on local officials and teachers who "often find themselves isolated, in a difficult environment."¹⁹⁰ It found these educators to be "insufficiently equipped" for the task and "alone in confusion"¹⁹¹ because they are faced with the "impossibility of finding the line between the illicit ostentatious symbol and the licit non-ostentatious symbol."¹⁹² Therefore, Islamic headscarves disrupt order because they force local administrators to apply a confusing and misunderstood legal ruling. While this argument highlighted the practical challenges that may have confronted teachers and officials implementing the contextualized Conseil d'État/Jospin approach, the Commission failed to show the true nature and scope of the problem.¹⁹³

In addition to the weaknesses found in the Stasi Commission's justifications, its arguments that Islamic headscarves threaten *laïcité* fall prey to criticisms based on the rights of the girls wearing these headscarves.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 3.2.2.

¹⁸⁹ *Id.* at 1.2.2.

¹⁹⁰ *Id.* at 2.2.3.

¹⁹¹ *Id.* at 4.2.2.1.

¹⁹² *Id.* at 2.2.3 (emphasis added).

¹⁹³ Gunn, *supra* note 8, at 474-75. Gunn notes that "[w]e would have expected that a Commission whose members included some leading French social scientists would have begun its work by identifying with specificity the nature and scope of the problem faced by public schools in France." *Id.*

First, the Stasi Commission failed to justify why the line between permissible public religious expression and unreasonable communitarian demands should be drawn to prohibit the wearing of Islamic headscarves, rather than to allow girls to wear them. A strong case could be made to draw the line so that students are permitted to wear headscarves while requests for the interruption of courses or exams for prayer or fasting, absence from school for religious holidays, or “object[ion] to the teaching of entire sections of courses of history or earth science” are refused.¹⁹⁴ While the latter three appeals all involve requests to *remove* students from specific courses or general schooling during certain times of the day, days of the week, or periods of the year, allowing girls to wear headscarves to schools serves as an *enabling* activity, permitting them to take part in the public school rather than extricating them from it. Prohibiting headscarves may do more to undermine public order, integration, and national unity by promoting the expulsion and separation of girls who wear headscarves, regardless of whether they do so to express sincere religious conviction, cultural affiliation, personal empowerment, or to accede to pressure from their parents.

Second, and perhaps most fundamentally, the Stasi Commission casually dismissed students’ rights to religious belief and expression on the basis of disturbances felt by public officials at the sight of women and girls wearing headscarves. The Commission presented public fears about the Islamic headscarf as evidence that headscarves are inherently destabilizing. However, it is questionable whether these fears demonstrate the threat to public order posed by Islamic headscarves or whether they merely document the discomfort of the French majority with garments associated with a marginalized minority population. At one point, the Commission stated that public school teachers are disturbed not just by students, but also by students’ mothers who wear Islamic headscarves: “[T]eachers have protested against the presence, in school or as part of a student outing, of mothers of pupils with [sic] the sole reason that they wear the veil.”¹⁹⁵ The Commission concluded that such protests are evidence of the inherently destabilizing effect of headscarves. Yet, this statement also revealed the cultural chasm between many public school teachers and the Muslim populations they serve, as well as the Commission’s sympathy for teachers’ discomfort with that cultural distance. The Stasi Commission failed to demonstrate why students’ rights to religious belief or expression should give way to this discomfort.

¹⁹⁴ Stasi Commission Report, *supra* note 10, at 3.2.1.1.

¹⁹⁵ *Id.*

B. The Headscarf Threatens Gender Equality

Laïcité is not the only ground upon which the Stasi Commission based its advocacy for a ban on conspicuous religious symbols in public schools. In justifying a move away from the Conseil d’État/Jospin approach, the Stasi Commission report noted that the

context [in 1989] was clearly different from what it is today. . . . [I]t is relevant to note that the charge of the Council of State [Conseil d’État] did not mention the question of discrimination between men and women. The evolution of the terms of the debate in fifteen years provides a measure of the mounting force of the problem.¹⁹⁶

The Stasi Commission wielded two main arguments to justify the claim that a ban on religious symbols in public school is warranted to counter the negative impact of the Islamic headscarf on gender equality.

First, the Commission maintained that permitting Islamic headscarves in public schools enables families and communities to coerce Muslim girls to wear headscarves against their will. The Commission wrote, “Young girls are pressured into wearing religious symbols. The familial and social environment sometimes forces on them a choice that is not theirs.”¹⁹⁷ It also claimed, “Young men force them to wear clothes that are concealing and asexual, to lower their eyes on seeing a man; with failure to conform, they are stigmatized as ‘whores.’”¹⁹⁸ Moreover,

[t]his also goes for pre-adolescent girls who are sometimes forced to wear the veil through violence. Young girls, once veiled, are able to climb stairways of buildings and go out in public way [sic] without fear of being taunted, indeed badly treated, as they had been previously with head uncovered.¹⁹⁹

These instances of coercion and violence are indeed deplorable and troubling. However, the Commission failed to offer any systematic data to show the pervasiveness and gravity of the problem.²⁰⁰ Yet, without this hard

¹⁹⁶ *Id.* at 2.2.3.

¹⁹⁷ *Id.* at 4.2.2.1.

¹⁹⁸ *Id.* at 3.3.2.1.

¹⁹⁹ *Id.*

²⁰⁰ See Gunn, *supra* note 8, at 474.

data, the Stasi Commission concluded that “[t]he Republic cannot remain deaf to the cries of distress from these young women”²⁰¹ and that an appropriate solution is to ban religious symbols from public schools.

Second, the Commission argued that Islamic headscarves disrupt public order by supporting larger systems of gender discrimination and violence against women that exacerbate women and girls’ oppression within Islam and undermine the gender equality enshrined in French Republicanism. As evidence, the Commission pointed towards Muslim girls’ refusal to receive instruction from male instructors, and reported that “[s]ome teachers and administrators, merely because they are women, find their authority challenged by pupils and their parents.”²⁰² Such developments threaten gender equality, one of the core “principles and values which the school should develop.”²⁰³ Moreover, the Commission linked Islamic headscarves to forms of violence and coercion acted upon women and girls within minority communities:

Some young women are also victims of other forms of violence: mutilation, polygamy, repudiation. The physical size of women does not always permit them to oppose this; on the basis of bilateral conventions, the laws of the country of origin can apply to them, including clauses that are directly in conflict with the [sic] equality between the sexes and with fundamental rights.²⁰⁴

This second gender equality-based argument raises more questions than the Stasi Commission sought to answer. How does the school (and the state) negotiate differences between conceptions of socially acceptable behavior towards women held by minority communities with those of the majority population? What should the state do if its laws provide women with greater rights than the laws of the minority community? The Commission dismissed these questions by simply assuming that the laws of the minority community uniformly afford less protection of women’s rights. Must this be the case?²⁰⁵

²⁰¹ Stasi Commission Report, *supra* note 10, at 4.2.2.1.

²⁰² *Id.* at 3.2.1.1.

²⁰³ *Id.* at 4.2.2.1.

²⁰⁴ *Id.* at 3.3.2.1.

²⁰⁵ For arguments contesting the conclusion that minority cultural or religious communities are necessarily more oppressive towards women than majority, secular communities, see Powell, *supra* note 28; Sunder, *supra* note 28; Volpp, *supra* note 27; Raday, *The Fight*, *supra* note 29.

The Stasi Commission’s arguments that a ban on religious symbols is warranted due to the threat Islamic headscarves pose to gender equality fall prey to the following criticisms.

1. The Stasi Commission presented a simplistic and inaccurate dichotomy between the inherent gender equality embedded in French Republicanism and the gender oppression involved in wearing an Islamic headscarf.

This dichotomy is unfounded for three reasons. First, it characterizes gender equality as a singularly French value. The Stasi Commission argued that, “equality between men and women . . . is an element of the republican pact”²⁰⁶ and one of the “common values which form the social bond of our country.”²⁰⁷ It also asserted that “[t]oday, secularity cannot be understood without a direct connection to the principle of equality between the sexes.”²⁰⁸ While the Commission did not explicitly define the contours of this French conception of gender equality, it provided hints by condemning “a resurgence of sexism which is produced by various pressures and by verbal, psychological, or physical violence.”²⁰⁹

The Commission’s insistence that gender equality is today embedded in French Republicanism is an exaggeration. If political participation is one measure of this value, the fact that as recently as 2000, French women had the lowest rate of participation in government in the European Union (except for Greece) demonstrates that French women’s experience of gender equality may fall short of the ideal.²¹⁰ While France has sought to remedy this specific source of inequality through the passage of a Law on *Parité*,²¹¹ the Stasi Commission’s simplistic characterization of

²⁰⁶ Stasi Commission Report, *supra* note 10, at 1.2.2.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 4.1.1.2.

²⁰⁹ *Id.* at 3.3.2.1.

²¹⁰ *France: Parité Law Implemented*, LE MONDE, Apr. 25, 2001, available at http://www.findarticles.com/p/articles/mi_m2872/is_3_27/ai_77417202/pg_2. Prior to France’s passage of the parity law and the municipal elections of March 2001, French women constituted only 5.9% of Senators, 6.6% of Councillors, 8% of Mayors, 10.9% of Representatives, 21.8% of Municipal Counsellors, and 25% of Regional Counsellors. *Id.*

²¹¹ Passed on June 6, 2000, the Law on *Parité* requires political parties to put forth an equal number of male and female candidates in elections. Law No. 2000-493 of June 6,

gender equality as a French value engages in a binary discourse pitting the West versus the Rest.²¹²

Second, the Stasi Commission presented the Islamic headscarf as a static, singular symbol, one that connotes the oppression of women. The Commission claimed to present “the different positions taken by the witnesses” on *l’affaire du foulard* and acknowledges that “for those who wear it, the veil carries different significances.”²¹³ Yet, its analysis of the meaning of Islamic headscarves focused on the “reductive and stigmatizing tendencies of this behavior”²¹⁴ and the way in which the headscarf “is also a blow against the principles and values which the school should develop, especially equality between men and women.”²¹⁵ The Commission ignored

2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 7, 2000, p. 8560, available at http://www.senat.fr/uip/loi_parite_elections.htm. See generally Françoise Gaspard, *The French Parite Movement*, in HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 55 (Jytte Klausen & Charles S. Maier eds., 2001).

²¹² Following a discussion of headscarves, female genital cutting, and forced marriage within France’s Turkish, North African, African, and Pakistani communities, the Stasi Commission declared: “The elementary rights of women are scoffed at everyday in our country. Such a situation is unacceptable.” Stasi Commission Report, *supra* note 10, at 3.3.2.1. While violations against women’s rights in all communities—majority and minority—should be deplored, the Stasi Commission’s construction of violence against women as a problem endemic to minority religious and cultural communities in contrast to the gender equality enshrined “in the republican pact” falls into the trap of presuming (at worst) or suggesting (at best) that the West is free of the cultural/religious violence against women that plagues minority communities. Leti Volpp has criticized this construction of a culture clash:

Part of the reason many believe the cultures of the Third World or immigrant communities are so much more sexist than Western ones is that incidents of sexual violence in the West are frequently thought to reflect the behavior of a few deviants—rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the cultures of entire nations.

Volpp, *supra* note 27, at 1186-87. See also Powell, *supra* note 28.

²¹³ Stasi Commission Report, *supra* note 10, at 4.2.2.1.

²¹⁴ *Id.* at 4.2.

²¹⁵ *Id.* at 4.2.2.1.

the prospect that Muslim girls may voluntarily wear headscarves, save for two occasions where it mentions this possibility in passing.²¹⁶

This casual treatment denies the agency of Muslim girls who wear headscarves out of sincere religious conviction, an agency that the Conseil d'État had acknowledged in 1989. It also ignores the potential dynamism of girls' decisions to wear the Islamic headscarf, collapsing the multiple and evolving meanings of the garment into a singular interpretation of the headscarf as an oppressive tool. Furthermore, while Islamic headscarves may communicate the notion of gender difference, the Commission failed to explain why this notion is inherently incompatible with French conceptions of gender equality.²¹⁷ As a national policy, French public schools do not support school uniforms; students can, in general, wear what they want. If markers of gender difference are inherently unequal, why not ban the miniskirt, high heels, or lip gloss—all visual symbols of gender difference, and, some might argue, even gender oppression?²¹⁸ The key difference is that the Commission conceived of the Islamic headscarf not just as a symbol of gender difference or gender oppression, but also as an outgrowth of “radico-politico religious movements.”²¹⁹ The headscarf then carries a power to elicit communitarian loyalties at the expense of national ones. The Commission believes, presumably, that miniskirts, high heels, and lip gloss do not hold such power.

Third, the Commission also failed to explain how headscarves are linked to larger instances of violence and oppression against women. While the Stasi Commission connected the Islamic headscarf to the specter of polygamy, female genital mutilation, or forced marriage, it did not address the causal link by which the presence of Muslim girls wearing headscarves in public schools leads to the tolerance or promotion of women and girls'

²¹⁶ Some “young girls and women voluntarily wear the veil, but others resort to it under constraint or pressure.” *Id.* at 3.3.2.1. Wearing the headscarf “can be a personal choice, or on the other hand a constraint, particularly intolerable to the younger women.” *Id.* at 4.2.2.1.

²¹⁷ Feminists throughout the world have engaged in a long-standing debate regarding gender difference and sameness. See generally NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* (1987) (exploring the roots of the debate within American feminism); KUMARI JAYAWARDENA, *FEMINISM AND NATIONALISM IN THE THIRD WORLD* (1986) (focusing on the debate between feminists in the developing world as opposed to the one between them and feminists in the developed world).

²¹⁸ Naomi Wolf has claimed that gender-differentiated clothing has played a role in reinforcing male supremacy. See generally NAOMI WOLF, *THE BEAUTY MYTH* (1990).

²¹⁹ Stasi Commission Report, *supra* note 10, at 4.2.1.1.

oppression in these other areas. While feminist groups like Ni Putes Ni Soumises and scholars such as Nawa al Sadaawi have argued that the Islamic headscarf is a part of a larger system of oppression against women, others have disagreed.²²⁰ The Commission should have supported its claim that such a link exists rather than sloppily assuming that is the case.

2. The Stasi Commission failed to articulate why it is more able than local administrative judges to interpret the complex and multiple meanings of a religious symbol like the Islamic headscarf.

In its call for a revision of the 1989 Conseil d'État/Jospin approach, the Commission asserted that it is impossible for local educators to find "the line between the illicit ostentatious symbol and the licit non-ostentatious symbol."²²¹ The Commission also contended that administrative judges confronted with appeals of local decisions were unable to satisfactorily rule on these cases because of their inability to "embark on an interpretation of religious symbols," noting that²²²

it seemed impossible for him to intervene in the interpretation of symbols given by one religion of [sic] such and such a symbol. Consequently, *he is not able to accept [the veil as] discrimination between men and women* contrary to fundamental principles of the republic [created] through the burden of [wearing] the veil by certain young women.²²³

In other words, the Stasi Commission claimed that local school administrators were often unable to "see" the gender discrimination embedded in and conveyed through a girls' practice of wearing a headscarf. The Commission failed to explain why administrative judges were less able than the members of the Commission to discern the meaning of a religious symbol like the Islamic headscarf, especially since these garments carry complex and multiple meanings. A case-by-case determination may

²²⁰ See Hoodfar, *The Veil*, *supra* note 83, at 5 ("Veiling is a lived experience full of contradictions and multiple meanings. While it has clearly been a mechanism in the service of patriarchy, a means of regulating and controlling women's lives, women have used the same social institution to free themselves from the bonds of patriarchy."); Nadar, *supra* note 87.

²²¹ Stasi Commission Report, *supra* note 10, at 2.2.3.

²²² *Id.* at 2.2.3.

²²³ *Id.* (emphasis added).

actually protect girls’ rights better than a blanket ban by allowing for investigation into evidence of voluntary decision-making or coercion in particular cases. Yet, the Stasi Commission eschewed this possibility, and instead opted for a uniform definition of the headscarf as oppressive and unequal, rendering it “illegal” in public schools.

C. Secularism is to Gender Equality as Religious Expression is to Gender Inequality

The Stasi Commission Report thus mobilized two main arguments in favor of its recommendation for a ban on conspicuous religious symbols in French public schools: Islamic headscarves present a menace to *laïcité* and an inherent threat to gender equality. In doing so, it created an isomorphism that maps secularism onto gender equality and the religious expression of the headscarf onto gender inequality.

Both of these justifications for the ban and the isomorphism warrant serious critique. As detailed earlier in this section, the Commission failed to provide empirical support for its claim that Islamic headscarves do in fact threaten *laïcité* by promoting ethnic segregation and the marginalization of minority communities. Its claim that headscarves are divisive because of their alienating impact on public school teachers inherently accepts the possibility that such alienation is the result of xenophobia and racism, rather than any message conveyed by the wearer.

Moreover, the Commission’s characterization of the Islamic headscarf as a uniform, unchanging signifier of gender inequality is problematic on five levels. First, it demonstrated an ignorance of the potential dynamism of Islam and Muslim girls, which is especially troubling given the Commission’s acknowledgement of the diverse and evolving strands of thought within Islam in other sections of the report. Second, the Commission dismissed girls’ agency by assuming that all girls are coerced into wearing the scarf, and by focusing on extremists who pressure Muslim girls to hold certain attitudes and respect religious precepts as these groups interpret them “under threat of being denied a social life or associations.”²²⁴ Third, although the Commission sought to improve conditions for religious minorities by promoting assimilation, it casually dismissed the costs that this model may put on individuals—in this instance, the Muslim girls whose religious convictions require expression deemed “public” by the baseline of majority French society. Fourth, the Stasi Commission failed to recognize these girls’ rights to religious belief and

²²⁴ *Id.* at 3.3.1.

expression grounded in both French and international law, rights that the Conseil d'État has firmly proclaimed and protected for over fifteen years. Finally, the Commission cast gender equality in universal and singular terms, rejecting the possibility that gender equality may look different from its conceptualization within French secular liberalism.

By presenting the Republic as the savior of young Muslim girls who would otherwise be forced by political Islamists, their families, or their communities to wear headscarves, the Commission turned the tables on opponents of the ban: to contest the ban is not only to oppose the founding principles of the French public (*laïcité*, liberty, equality, and fraternity), but is also to stand against gender equality. According to the Commission, there is no middle ground.

The majority of French elected officials presumably agreed with the Stasi Commission's rejection of deference for Muslim girls' rights to religious belief and expression when they passed a blanket ban on conspicuous religious symbols in 2004. Noticeably missing from both the Stasi Commission's report and this political process were the voices of Muslim women and girls. In its entire report, the Stasi Commission provided only one quotation from an unnamed Muslim girl who stated: "The Republic no longer protects its children."²²⁵ However, the protests of Muslim women throughout France in January 2004, statements by girls like Lila and Alma Levy, and the results of Caitlin Killian's inquiry into Muslim women's opinions about the headscarf, all suggest that this single quotation is not representative. These other voices raise questions about the Stasi Commission's dismissal of the possibility that deep religious convictions motivate some girls to wear the headscarf, its denial that the ban may infringe on protected rights and liberties, and its equation of the Islamic headscarf with gender oppression.²²⁶

Within France, the girls involved in *l'affaire du foulard* are largely excluded from the political processes that profoundly impact their lives. However, they do have recourse to an alternative arena for holding French policymakers accountable: the international human rights regime. Part III turns to a discussion of the human rights norms implicated by the French ban and the larger debate about the potential of the international human rights regime to promote women's rights to religious belief and expression.

²²⁵ *Id.* at 3.3.2.1.

²²⁶ See *supra* notes 96, 102 and accompanying text.

III. THE INTERNATIONAL HUMAN RIGHTS REGIME: EXPANSIVE POSSIBILITIES AND PERSISTENT LIMITS TO RECOGNIZING WOMEN AND GIRLS’ RELIGIOUS RIGHTS

*“Everywhere in the world,
France is . . . recognized as the country of human rights.”*

-Jacques Chirac, 2003²²⁷

Both sides of the debate in *l’affaire du foulard* mobilize the discourse of rights to arrive at alternative conclusions about the efficacy of the French ban as a means of promoting Muslim women’s equality with men. Secular feminists and groups like Ni Putes Ni Soumises support the law as a valiant effort by a secular state to change what they perceive to be a patriarchal religious and cultural practice. These groups presume that the presence of Islamic headscarves in public schools represents a “clash between religious or cultural autonomy and gender equality.”²²⁸ In contrast, protests by Muslim women and girls who wear the headscarf as an autonomous choice or use it as an empowering tool raise problems about this characterization. Groups like Human Rights Watch, the Islamic Human Rights Commission, and KARAMAH: Muslim Women Lawyers for Human Rights, also characterize the French ban on conspicuous religious symbols as an infringement on the human rights of Muslim girls to education, religious expression, and freedom from discrimination, rather than a means for their liberation.²²⁹ The impact of the French ban on women and girls’ international human rights is, therefore, a central question.

This section highlights the way in which international law not only tolerates but itself creates the isomorphism put forth in the Stasi Commission’s 2003 Report. The first part of this section discusses the difficulty of determining the impact of the ban on Muslim girls’ human rights. This difficulty stems in part from the current lack of direction on how to balance the various rights potentially implicated by the French ban. It is also exacerbated by the startling lack of explicit protection for women and girls’ rights to religious belief and expression in CEDAW. The absence of such a provision provides space for the construction of an isomorphism

²²⁷ Jaques Chirac, *supra* note 148.

²²⁸ Frances Raday, *Culture, Religion and Gender*, 1 INT’L J. CONST. L. 663, 663 (2003) [hereinafter Raday, *Culture*].

²²⁹ See *supra* notes 86-92 and accompanying text.

mapping secularism onto gender equality and religious expression onto gender inequality.

The second part of this section investigates the status of the French ban with respect to the human rights regime established by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Human Rights Convention")²³⁰ by analyzing the jurisprudence of the European Court of Human Rights. The ECHR is the body established to interpret, articulate, and enforce the norms of the European Human Rights Convention.²³¹ The ECHR Grand Chamber's recent decision in *Leyla Sahin v. Turkey* provides the most authoritative indication of the court's likely response to a challenge to the French ban on the grounds that it infringes upon Muslim girls' rights to religious expression.

The third section analyzes the Grand Chamber's reasoning in *Leyla Sahin* and observes that, like the Stasi Commission, the Grand Chamber posited Islamic headscarves as inimical to both secularism and women's rights, again promoting the isomorphism that equates secularism with gender equality and religious expression with gender inequality. Far from being confined to the domestic context, this isomorphism is equally prevalent in international law.

A. International Human Rights Norms: A Balancing Act

The array of human rights conventions and declarations to which France is a party presents a host of international human rights that are potentially implicated by the ban on conspicuous religious symbols in public schools.²³² Although these rights may conflict with each other, there

²³⁰ EHRC, *supra* note 22.

²³¹ *Id.* at art. 19 (establishing a permanent European Court of Human Rights "[t]o ensure the observance of the engagement undertaken by the High Contracting Parties in the Convention and the Protocols thereto."). See also *id.* at arts. 26-37 (establishing procedures for determining jurisdiction and admissibility); *id.* at arts. 38-51 (delineating guidelines for judging, court procedures, determining settlements, issuing judgments, issuing advisory opinions, and expenditures).

²³² France is a state party to the International Covenant on Civil and Political Rights, *supra* note 22, the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 22, the First Protocol to the EHRC, Mar. 20, 1952, Eur. T.S. No. 9 [hereinafter First Protocol], the Convention on Children's Rights (CRC), *supra* note 22, and the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW), *supra* note 22. These treaties constitute binding legal authority in France with the power to trump domestic legislation, as per Article 55 of the French Constitution. France is also subject to the influence of the Universal Declaration on Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter

is little guidance as to how they should be balanced, a particularly important question in light of the Stasi Commission's contention that Muslim girls' rights to religious belief and expression interfere with their right to be free from gender discrimination. The following section highlights several groups of human rights that may be adversely impacted by the French ban, briefly identifies potential conflicts between these rights, and explores the difficulty of resolving such tensions given the lack of articulation for women's specific rights to religious belief and expression.

The first group of rights impacted by the ban includes rights to religious freedom set forth in the International Covenant on Civil and Political Rights (ICCPR), the European Human Rights Convention, the Convention on Children's Rights (CRC), the Universal Declaration of Human Rights,²³³ and the Declaration on Religious Discrimination.²³⁴ Freedom of religion consists of two main components: freedom in the *forum internum* and in the *forum externum*.²³⁵ The *forum internum* involves the right to entertain a religious belief of one's choice, and emphasizes the individual's ability to profess, maintain, change, have, or adopt a religious belief.²³⁶ While some commentators have questioned whether Muslim girls

Universal Declaration], and the Declaration on the Elimination of All Forms of Intolerance and Discrimination on the Basis of Religion or Belief, G.A. Res. 36/55, U.N. GAOR, U.N. Doc. A/Res/104 (1981) [hereinafter Declaration on Religious Discrimination]. Although these declarations are technically non-binding as resolutions of the General Assembly of the United Nations, some argue that both the Universal Declaration and the Declaration on Religious Discrimination have become binding rules of customary international law. See generally Richard Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 394, 394 nn.133-38 (discussing the evolution of the status of the Universal Declaration of Human Rights as part of customary law through scholarly opinion, resolutions at international conferences, and in court decisions).

²³³ See Universal Declaration, *supra* note 232.

²³⁴ See Declaration on Religious Discrimination, *supra* note 232. One source claims that the Declaration on Religious Discrimination is regarded throughout the world as articulating the fundamental rights of freedom of religion and belief. *Addendum to Report on Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, ¶ 1, U.N. Doc E/CN.4/1988/44/Add.2 (Jan. 15, 1988) (statement by the United States government).

²³⁵ Bahia G. Tahzib-Lie, *Women's Equal Right to Freedom of Religion or Belief: An Important but Neglected Subject*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 117, 119-123 (Courtney W. Howland ed., 1999).

²³⁶ This freedom is defined in both the ICCPR and the Declaration on Religious Discrimination as the "freedom to have or adopt a religion or belief of his choice." ICCPR, *supra* note 22, at art. 18(1); Declaration on Religious Discrimination, *supra* note 232, at art. 1(1). One scholar observes that the freedom to change one's religious belief has "always

are capable of “genuine individual consent” to wear Islamic headscarves, the CRC opens up the possibility that all children may hold sincere religious beliefs, including beliefs that motivate them to wear headscarves.²³⁷ Moreover, Asma Jahangir, the U.N. Special Rapporteur on Freedom of Religion or Belief recently stated that children can hold sincere religious beliefs in a report written after the 2004 passage of the French ban. She concluded that “the law denies the rights of those minors who have freely chosen to wear a religious symbol to school as part of their religious belief.”²³⁸

The *forum externum* involves freedom to “manifest . . . religion or belief, in worship, teaching, practice and observance.”²³⁹ This freedom encompasses the right to wear religious clothing, like Islamic headscarves. The Human Rights Committee has clarified that the ICCPR’s protection of “[t]he observance and practice of religion or belief may include . . . the wearing of distinctive clothing or headcoverings.”²⁴⁰ The U.N. Special Rapporteur on Religious Intolerance has stated that “dress should not be the subject of political regulation,” and has called for “flexible and tolerant attitudes in this regard, so as to allow the variety and richness of . . .

been a bone of contention.” Tahzib-Lie, *supra* note 235, at 119-20. Freedom to change is included in the European Human Rights Convention and the Universal Declaration. EHRC, *supra* note 22, at art. 9; Universal Declaration, *supra* note 232, at art. 18. This freedom is also protected by the Convention on the Rights of the Child, which declares: “States Parties shall respect the right of the child to freedom of thought, conscience and religion.” CRC, *supra* note 22, at art. 14. It also provides that “[i]n those States in which ethnic, religious or linguistic minorities . . . exist, a child belonging to such a minority . . . shall not be denied the right . . . to enjoy his or her own culture [or] to profess and practice his or her own religion . . .”. *Id.* at art. 30.

²³⁷ In her comments on the emergence of controversies surrounding veiling in the educational system in the courts of Turkey, France, and Denmark, Frances Raday has stated, “In this case, genuine individual consent to a discriminatory practice [sic] or dissent from it may not be feasible where these girls are not yet adult [sic].” Raday, *Culture*, *supra* note 228, at 709.

²³⁸ U.N. Special Rapporteur on Freedom of Religion or Belief, *supra* note 145.

²³⁹ EHRC, *supra* note 22, at art. 9. For parallel clauses in other international human rights instruments see Universal Declaration, *supra* note 232, at art. 18; ICCPR, *supra* note 22, at art. 18; CRC, *supra* note 22, at art. 14 (1); Declaration on Religious Discrimination, *supra* note 232, at art. 1.

²⁴⁰ Hum. Rts. Comm., *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, 48th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993) [hereinafter General Comment on ICCPR article 18].

garments to manifest themselves without constraint.”²⁴¹ While not specifically addressing clothing, the CRC also articulates protection for children of minority religions “in community with other members of his or her group . . . to *profess and practice* his or her own religion.”²⁴²

A second group of rights potentially impacted by the French ban includes children’s right to education and parents’ right to structure their children’s education in accordance with their religious beliefs. The First Protocol of the European Human Rights Convention (“The First Protocol”) provides that “[n]o person shall be denied the right to education.”²⁴³ The CRC also specifically provides that state parties must “[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates.”²⁴⁴ A child’s right to education, however, does not stand alone. Not only does the CRC grant parents the right to shape their children’s exercise of religion, the First Protocol also articulates a separate but related right of parents: “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 religious and philosophical convictions*.”²⁴⁵ This right is echoed in other human

²⁴¹ U.N. GAOR, 51st Sess., Agenda Item 110(b) at para. 97, U.N. Doc. A/51/542/Add.2 (1996) (Sudan). The Special Rapporteur made this statement with respect to a Sudanese law requiring women to comply with religious dress code in public. Like the French ban, the Sudanese law was based on public order grounds. *See also* Hum. Rts. Comm., 52d Sess., Item 18 of Provisional Agenda at para. 97, U.N. Doc. E/CN.4/1996/95/Add.2 (1996) (Islamic Republic of Iran).

²⁴² CRC, *supra* note 22, at art. 30 (emphasis added). The full text of Article 30 reads:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion.

Id.

²⁴³ First Protocol, *supra* note 232.

²⁴⁴ CRC, *supra* note 22, at art. 28(e).

²⁴⁵ First Protocol, *supra* note 232 (emphasis added).

rights instruments,²⁴⁶ although it is limited by the Declaration on Religious Discrimination.²⁴⁷

A third group of rights involves protections from discrimination for religious minorities.²⁴⁸ All of the major human rights declarations and conventions, except CEDAW, provide that human rights (including children's rights to religious expression and education and parents' rights to shape their education in conformity with their religious beliefs) shall apply to all without respect to any distinction in religion.²⁴⁹ This principle is most

²⁴⁶ Article 13(3) of the International Covenant on Economic, Social, and Cultural Rights delineates the relationship between this right and parents' own right to freedom of religion:

The States Parties to the present Covenant undertake to have respect for the *liberty of parents* and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and *to ensure the religious and moral education of their children in conformity with their own convictions.*

ICESCR, *supra* note 22, at art. 13(3) (emphasis added). A ban on Islamic headscarves in public schools may infringe on the rights of parents to educate their children in "conformity with their own convictions," because, while the text of the Covenant offers to ensure religious education in the context of private schools, the exercise of this right is substantially limited by the fact that there is currently only one Muslim private school in all of France. The school opened in Lille in September 2003 after eight years of negotiations. *Headscarf Row Vexes Lille Muslims*, BBC NEWS ONLINE, Dec. 19, 2003, <http://news.bbc.co.uk/1/hi/world/europe/3333047.stm>.

²⁴⁷ The Declaration on Religious Discrimination provides that "[p]ractices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development." Declaration on Religious Discrimination, *supra* note 232, at art. 5(5). Similarly, the ICESCR is limited by Article 4, which allows for states to restrict the enjoyment of rights put forth by the convention "solely for the purpose of promoting the general welfare in a democratic society." ICESCR, *supra* note 22, at art. 4.

²⁴⁸ The ICCPR protects the rights of religious minorities "in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." ICCPR, *supra* note 22, at art. 27.

²⁴⁹ Universal Declaration, *supra* note 232, at art. 1(3), art. 55(c) (declaring that "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction . . . to . . . religion" is central to the purpose of the United Nations); ICCPR, *supra* note 22, at art. 2(1) (providing that states parties undertake to respect and ensure rights recognized in the present covenant "without distinction of any kind, such as . . . religion"); ICESCR, *supra* note 22, at art. 2 para. 2 ("The States Parties . . . undertake to guarantee that the rights enunciated . . . will be exercised without discrimination of any kind as to . . . religion."); International Convention on the Elimination of All Forms of Racial

forcefully advanced by the Declaration on Religious Discrimination, which explicitly condemns “intolerance and discrimination based on religion or belief.”²⁵⁰ However, there is no consensus that the Declaration on Religious Discrimination is a binding source of customary international law, rendering it a weaker source of law than a convention.²⁵¹

Finally, the French ban may also impinge upon Muslim girls’ rights to freedom from discrimination on the basis of gender as set forth in CEDAW, the very right that the Stasi Commission presumed to protect. CEDAW Article 1 generally prohibits any form of discrimination that has the “effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . *on the basis of equality of men and women*, of human rights and fundamental freedoms.”²⁵² This provision protects women’s ability to realize rights to religious belief and expression put forth

Discrimination, G.A. Res. 2106A (XX), at art. 5(d) & 5(d)(vii), U.N. GAOR, U.N.T.S. 195, U.N. Doc. CERD/C/60/Rev.4 (Dec. 21, 1965), entered into force Jan. 4, 1969 (“States Parties undertake to . . . guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . the right to freedom of thought, conscience and religion.”) [hereinafter CERD]; CRC, *supra* note 22, at art. 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child . . . without discrimination of any kind, irrespective of the child’s or his parent’s or legal guardian’s . . . religion.”); EHRC, *supra* note 22, at art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . religion.”). In contrast, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not once mention “religion,” “belief” or “expression.” CEDAW, *supra* note 22.

²⁵⁰ “Discrimination” is defined as “any distinction, exclusion, restriction or preference *based on religion or belief* and having as its *purpose or effect* nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.” Declaration on Religious Discrimination, *supra* note 232, at art. 2 (emphasis added). The Declaration directs states to “take effective measures to prevent and eliminate discrimination on the grounds of religion or belief” and take “all appropriate measures to combat intolerance on the grounds of religion or other beliefs.” *Id.* at art. 4. It also specifically acknowledges that “[t]he child shall be protected from any form of discrimination on the ground of religion or belief.” *Id.* at art. 5. Unlike the Declaration on Religious Discrimination and the Convention on the Rights of the Child, the European Human Rights Convention does not offer provisions specifically protecting the rights of children, minorities, or children of minority groups to religious belief or religious expression. However, Article 14 includes the category of “association with a national minority,” which is not present in the antidiscrimination provisions of the Universal Declaration, ICCPR, ICESCR, CRC, and CERD. EHRC, *supra* note 22, at art. 14.

²⁵¹ See *supra* note 232 and accompanying text.

²⁵² CEDAW, *supra* note 22, at art. 1 (emphasis added).

by the ICCPR, European Human Rights Convention, and the CRC.²⁵³ Since the French ban was directed towards restricting the right to wear Islamic headscarves, it may violate this provision by disproportionately restricting the religious rights of women in comparison to men. Furthermore, CEDAW Article 10 orders state parties to “eliminate discrimination against women in order to ensure them equal rights with men in the field of education.”²⁵⁴ The fact that the ban prescribes expulsion, rather than a sanction that would not remove the offending student from school, appears to directly breach CEDAW Article 10(f), which calls for a reduction in female drop-out rates in educational institutions.²⁵⁵

This rehearsal of the various human rights implicated by the French ban on conspicuous religious symbols raises an important question: *where should one look for guidance as to how to balance the potentially conflicting rights of the girls who seek to wear headscarves, their parents, and their peers?* Given that the Stasi Commission explicitly argued that Muslim girls’ right to wear Islamic headscarves as an expression of religious belief is justifiably restricted in order to promote gender equality, CEDAW is a natural place to look for such direction. It is remarkable, then, to discover that CEDAW does not once mention the words “religion,” “belief,” or “expression.”²⁵⁶ Neither CEDAW nor any global human rights instrument has articulated women’s equal entitlement to the rights of religious belief and expression. Only one recent regional instrument explicitly acknowledges that women have these rights.²⁵⁷ While taking pains to articulate that women must be granted the same freedom of

²⁵³ Article 1, however, defines “discrimination” as “any distinction, exclusion or restriction *made on the basis of sex.*” *Id.* (emphasis added). The French ban, as a sex-neutral law, may not constitute “discrimination.”

²⁵⁴ *Id.* at art. 10. By prompting some religious girls to drop out of school and by expelling those who refuse to alter their religious expression within the space of the public school, the French law hurts Muslim girls’ ability to access the educational resources which Article 10 indicates must be made available to women on a basis equal to that afforded to men. These resources include career and vocational guidance, “diplomas in educational establishments of all categories,” and “access . . . [to] teaching staff with qualifications of the same standard.” *Id.*

²⁵⁵ *Id.* at art. 10(f).

²⁵⁶ *Id.*

²⁵⁷ See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, art. 4(i), June 9, 1994, 27 U.S.T. 3301, 33 I.L.M. 1534, 1536 (every woman has “[t]he right of freedom to profess her religion and beliefs within the law”).

movement,²⁵⁸ right to political participation,²⁵⁹ and equality before the law²⁶⁰ as is granted to men, why does CEDAW fail to articulate that women should be granted the same right to religious belief and expression as men?

One possibility is that CEDAW itself reflects a perception that secularism is associated with gender equality and religious expression is associated with gender inequality. Although CEDAW does not reinforce women and girls’ rights to religious belief and expression, it does include two provisions that condemn beliefs and practices that clash with norms of gender equality, including those beliefs and practices that are religiously based. CEDAW Article 2(f) provides that states must “take all appropriate measures . . . to modify or abolish existing . . . customs and practices which constitute discrimination against women.”²⁶¹ Similarly, Article 5(a) of CEDAW imposes a positive obligation on state parties to “modify the social and cultural practices . . . which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles.”²⁶² These provisions necessarily define religious practices that fall within their scope as prohibited discrimination.²⁶³ CEDAW does not explicitly set forth the existence of a tension between gender equality and religion. However, the lack of a specific protection for women’s rights to religious belief and expression and the inclusion of these broad provisions may reflect a belief by CEDAW’s drafters that the oppression of women within religious communities was a greater concern than the protection of women’s ability to exercise their religious rights.²⁶⁴ This asymmetry is consistent with dominant strains of feminist and human rights discourse that emphasize a

²⁵⁸ CEDAW, *supra* note 22, at art. 15(4).

²⁵⁹ *Id.* at art. 7.

²⁶⁰ *Id.* at art. 15(1).

²⁶¹ *Id.* at art. 2(f).

²⁶² *Id.* at art. 5(a).

²⁶³ Frances Raday argues that, “[i]n using the construct of culture in [article 5(a) of] CEDAW, the overarching concept under which religion is included, arguably the intention of the drafters was to give the widest possible range of protection to the human rights of women covered by the convention.” Raday, *Culture*, *supra* note 228, at 679.

²⁶⁴ For a discussion of the potential solutions provided under the international human rights regime in cases where equality rights clash with cultural practices or religious norms, see *id.*

clash between religion and culture on one hand, and gender equality and human rights on the other.²⁶⁵

Thus, while CEDAW powerfully provides for women and girls' rights to education, non-discrimination, and equality, it does not provide guidance as to how states should balance these rights with each other or with rights to religious belief and expression. Nor has the CEDAW Committee itself provided such direction. While the Optional Protocol to CEDAW permits individuals to issue a communication directly to the Committee to complain about violations of their rights under the convention,²⁶⁶ the CEDAW Committee has not evaluated the merits of any individual communication challenging specific restrictions on Islamic headscarves or general limitations on religious symbols in public schools in any country.²⁶⁷

Similarly, the CEDAW Committee's review of France's country reports documenting implementation of CEDAW has not addressed the balance between women's right to religious freedom with their right to freedom from gender discrimination in the specific context of Islamic headscarves in public schools. France issued its Combined Third and Fourth Periodic Report and its Fifth Periodic Report in 2003, prior to the passage of the ban on conspicuous religious symbols. Neither report directly addressed the impact of Islamic headscarves on girls' and young women's rights when worn by students in public schools.²⁶⁸

²⁶⁵ See Powell, *supra* note 28, at 8-9 (discussing the emergence of the culture clash view in the human rights field); Volpp, *supra* note 27, at 1183-84 (criticizing the gendered dimension of the religion/culture clash hypothesis).

²⁶⁶ Optional Protocol to the Convention on the Elimination of Discrimination Against Women: Office of the High Comm'r for Human Rights (1999), adopted by G.A. Res. A/54/4, art. 2 (1999) [hereinafter Optional Protocol].

²⁶⁷ The CEDAW Committee recently received an application from a Turkish middle school teacher fired for wearing a headscarf to class and "spoiling the peace, quiet, work, and harmony of the institution with her ideological and political objectives." The Committee declared the application inadmissible due to the applicant's failure to exhaust domestic remedies. United Nations Committee on the Elimination of Discrimination Against Women, Decision of the Committee, 34th Sess., at 7.9, U.N. Doc. CEDAW/C/34/D/8/2005 (2005). The Optional Protocol to CEDAW requires that applicants exhaust domestic remedies before filing an application to the CEDAW Committee for review of a state practice allegedly violating the convention. Optional Protocol, *supra* note 266, at art. 4 para. 1.

²⁶⁸ France's report discussed recent amendments to its constitution instituting the practice of *parité* and state action to strengthen women and girls' education. Committee on the Elimination of Discrimination Against Women, *Third Report of the States Parties: France*, CEDAW/C/FRA/3 (Oct. 18, 1999), available at <http://www.un.org/womenwatch/>

The Coordination Française pour le Lobby Européen des Femmes (CLEF)²⁶⁹ issued a shadow report on the implementation of CEDAW in France. While it did not specifically mention Islamic headscarves, CLEF echoed the Stasi Commission in its effort to “draw attention to the severe pressures in the schools that girls from migrant communities suffer from the boys of these communities, who comport themselves in a sexist manner on the pretext of traditional or religious norms.”²⁷⁰ While the CLEF report did not identify Islam as the religion or Muslim minorities as the “foreign” community at issue, it alluded to the “sexist” traditions and “religious” practices of minority communities that invade the safe space of the school, subjecting girls to inequality and coercion. CLEF requested that the Committee urge the French government to inform these communities that “equality between women and men is guaranteed by French law, that it must be respected and that it takes precedence over custom.”²⁷¹ It also urged the French government to create a “plan for eradicating discriminatory and

daw/cedaw/29sess.htm; Committee on the Elimination of Discrimination Against Women, *Third and Fourth Periodic Report of States Parties: France*, CEDAW/C/FRA/3-4/Corr.1 (Feb. 13, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/251/10/PDF/N0225110.pdf?OpenElement>; Committee on the Elimination of Discrimination Against Women, *Fifth Periodic Report of States Parties: France*, CEDAW/C/FRA/5 (Sept. 26, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/610/76/PDF/N0261076.pdf?OpenElement>.

The reports did note that “the integration of young immigrant women” will be an area of future policy focus” for the French government and that the government will strive to promote “an educational system based on mutual respect between the two sexes, including the fight against all forms of discrimination and violence.” Report of the Committee on the Elimination of Discrimination Against Women, Twenty-Ninth Session, GAREC, 58th Sess., Suppl. No. 38, A/58/38, 117 (June 18-July 30, 2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/468/20/PDF/N0346820.pdf?OpenElement> [hereinafter CEDAW Committee Report on France].

²⁶⁹ The Coordination Française pour le Lobby Européen des Femmes (CLEF) is the French arm of the European Women’s Lobby (EWL), which coordinates over 4,000 member organizations across Europe “to achieve equality of women and men in Europe and to realize women’s human rights.” Press Release, European Women’s Lobby, Election of New President and Welcoming of 7 New National Co-ordinators in the European Women’s Lobby (Oct. 17-18, 2004), available at <http://www.womenlobby.org/site/abstract.asp?DocID=422>. The EWL is the largest platform of women’s organizations in the EU.

²⁷⁰ COORDINATION FRANÇAISE POUR LE LOBBY EUROPÉEN DES FEMMES, CONVENTION SUR L’ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION À L’ÉGARD DES FEMMES, CONTRE RAPPORT SUR LA FRANCE 16 (2003) (on file with author).

²⁷¹ *Id.* at 8.

violent practices, whose origin is custom and cultural, at the grass roots level.”²⁷²

Without referring to the shadow report, the CEDAW Committee responded briefly to CLEF’s concerns by urging France “to take effective measures to eliminate discrimination against immigrant, refugee and minority women, both in society at large and in their communities,” and “to sensitize the community to combat patriarchal attitudes and stereotyping of roles.”²⁷³ The CEDAW Committee acknowledged that both French majority society *and* minority communities may act as sources of discrimination against women and girls. However, it did not explain how it would balance the desire to combat perceived gender stereotyping with girls’ rights to express their religious beliefs while at school, much less other human rights implicated by the 2004 ban.

While CEDAW has not yet taken a stand on the question of headscarves and human rights, the ECHR recently addressed the issue. In its two decisions in the case of *Leyla Sahin v. Turkey*,²⁷⁴ the ECHR suggested that it, like the Stasi Commission, perceives the Islamic headscarf as a serious threat to both secularism and gender equality.

B. The European Court of Human Rights: The Enforcement of Rights to Religious Belief and Expression

The Stasi Commission explicitly dismissed the possibility of a successful legal challenge to its proposed ban under the European Human Rights Convention.²⁷⁵ While the Commission cited several cases as support for its conclusion,²⁷⁶ its short discussion did not address the complexities of applying the ECHR’s jurisprudence to a challenge against France’s ban on conspicuous religious symbols in public schools under European human rights law.

²⁷² *Id.* at 5.

²⁷³ CEDAW Committee Report on France, *supra* note 268, at 121.

²⁷⁴ 2004 Chamber decision, *supra* note 31; 2005 Grand Chamber decision, *supra* note 31.

²⁷⁵ The Stasi Commission dismissed the possibility with a brief statement: “The European court in Strasbourg protected secularity [*laïcité*] when it is a basic value of the State. It allowed placing limits on the liberty of expression in public employment, especially when it is a matter of protecting minors against external pressures.” Stasi Commission Report, *supra* note 10, at 3.3.1.

²⁷⁶ For descriptions of cases cited in the Stasi Commission Report, see *supra* note 179.

Yet, the Stasi Commission may be correct in its conclusion. This section considers the French ban in light of Article 9 of the European Human Rights Convention, which provides for rights to religious belief and expression, and the case law interpreting acceptable state restrictions on these rights. While the ECHR has not yet entertained a direct challenge to the French ban, it recently issued its first decision on a challenge to a state restriction on female students' ability to wear Islamic headscarves in public universities. In *Leyla Sahin v. Turkey*, the ECHR considered the claim by a female medical student that a Turkish regulation prohibiting women from wearing headscarves on the campus of Istanbul University violated rights to religious expression and education set forth in the European Human Rights Convention.²⁷⁷ A chamber of the ECHR upheld the Turkish regulation in 2004. Upon Sahin's request for reconsideration, the full Grand Chamber of the European Court of Human Rights reheard the case and affirmed the judgment.²⁷⁸ The Grand Chamber's decision is critical not only because it provides the ECHR's most current understanding of the acceptability of state restrictions on Muslim female students' right to wear headscarves to public school, but also because it justifies the Turkish restriction on two central grounds: (1) the ban combats the serious threat Islamic headscarves pose to state secularism, and (2) the ban promotes gender equality.²⁷⁹ These reasons closely mirror those espoused by the Stasi Commission and suggest that the isomorphism equating secularism with gender equality and religious expression with gender inequality also pervades international law.

While Leyla Sahin alleged that the Turkish restriction on Islamic headscarves violated a number of rights set forth in the European Human

²⁷⁷ The European Commission considered a Muslim woman's challenge to a Turkish state regulation forbidding the headscarf in institutions of public education in *Karaduman v. Turkey*, but declared the application inadmissible. *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993). In contrast to the *Sahin* case, the ECHR in *Dahlab v. Switzerland* considered a challenge by a Muslim teacher to a restriction on public primary school teachers' ability to wear headscarves in school. The court denied the claims that the restriction infringed on her right to manifest her religion and that it constituted gender discrimination because a male Muslim would not be affected by the ban. *Dahlab v. Switzerland*, 2001 Eur. Ct. H.R. I (2001).

²⁷⁸ According to Article 43 of the European Human Rights Convention, a party who is dissatisfied with a judgment of the chamber may ask for a rehearing before a grand chamber within three months of the date of the judgment of the chamber if a serious issue is raised of general importance or if it concerns the interpretation of the European Human Rights Convention. EHRC, *supra* note 22, at art. 43. When it does consider a case, the grand chamber sits as a committee of seventeen judges. *Id.* at art. 27.

²⁷⁹ 2005 Grand Chamber decision, *supra* note 31, at paras. 114-115.

Rights Convention,²⁸⁰ both the Chamber and Grand Chamber decisions in the case rest on an analysis of her claim that the regulation violates Article 9 of the convention, which protects freedom of thought, conscience, and religion. This section provides a background in the ECHR jurisprudence for analyzing Article 9 claims to provide context for the Grand Chamber's decision in *Sahin*.

As discussed in Part IV, Article 9 protects freedom of thought, conscience, and religion in both the *forum internum* and the *forum externum*. The *forum internum* involves the right to entertain a religion or belief of one's choice and emphasizes the individual's ability to profess, maintain, change, have, or adopt a religion or belief. The first part of Article 9(1) guarantees the inviolability of the *forum internum* without qualification: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief"²⁸¹ The *forum internum* freedom falls primarily within the domain of the inner faith and conscience of an individual.²⁸²

Article 9(1) of the European Human Rights Convention also protects freedom of thought, conscience, and religion in the *forum externum*. The protections apply to an individual's 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." Where one draws the line between private belief and public observance is pivotal. While the text of Article 9 of the convention does not explicitly permit limitations on

²⁸⁰ Sahin challenged the Turkish regulation for violating a number of rights set forth in the European Human Rights Convention: the right to respect for private and family life (Article 8), the right to religious belief and expression (Article 9), the right to freedom of expression (Article 10), the right to freedom from discrimination on the basis of religion (Article 14), and the right to education (Article 2 of the First Protocol to the European Human Rights Convention).

²⁸¹ EHRC, *supra* note 22, at art. 9(1).

²⁸² Pieter van Dijk and Godefridus Josephus Henricus van Hoof, scholars of the European Human Rights Convention, contend that this freedom implies that states may not subject individuals to treatment intended to change their process of thinking, nor may they indoctrinate them. Van Dijk and van Hoof have looked to the *travaux préparatoire* of the European Human Rights Convention for evidence. They note that the Teitgen report indicates that the drafters of the convention intended Article 9(1) to protect individuals against heinous methods of police interrogation or judicial directives that deprive them of their intellectual freedoms and freedom of conscience. PIETER VAN DIJK & GODEFRIDUS JOSEPHUS HENRICUS VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 542, 542 n.1392 (1998) (citing 1 RECEUIL DES TRAVAUX PRÉPARATOIRES 223 (1975)).

the *forum internum* freedom, it does explicitly permit limitations on the *forum externum* freedom. The so-called “clawback” clause of the European Human Rights Convention, Article 9 (2),²⁸³ permits state infringement of the freedom to express religion under certain conditions:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are *prescribed by law* and are *necessary in a democratic society* in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.²⁸⁴

Thus, the text of Article 9(2) sets forth a three-prong inquiry for determining whether a limitation on the right to manifest religion or belief is legitimate. Any limitations on the *forum externum* must (1) be prescribed by law, (2) pursue a legitimate aim, and (3) be necessary in a democratic society. State governments warrant this degree of discretion because they are closer than the European Court of Human Rights to national problems requiring restrictions on the right to religious freedom and because of the lack of consensus in Europe on what constitutes a permissible interference with such rights.²⁸⁵

In evaluating claims based on Article 9, the ECHR has applied a four-part inquiry: (1) an applicant must demonstrate an interference with the freedom, but the interference is justified if the limitation (2) is prescribed by law, (3) pursues a legitimate aim, and (4) is necessary in a democratic society. The following section will discuss current ECHR jurisprudence as it relates to each of these steps.

1. Existence of an Interference

The ECHR will not find a violation of Article 9's protection of religious expression unless the applicant demonstrates an interference with this freedom. In *Arrowsmith v. United Kingdom*, the European Commission

²⁸³ D. Christopher Decker & Marnie Lloyd, Case Comment, *Leyla Sahin v. Turkey*, 6 EUR. HUM. RTS. L. REV. 672 (2004) (“The ‘clawback’ clause of Art. 9 . . . guarantees the right to manifest one's religion or belief, in worship, teaching, practice and observance, but allows the right to be limited.”).

²⁸⁴ EHRC, *supra* note 22, at art. 9(2) (emphasis added).

²⁸⁵ *Gorzelik v. Poland*, Eur. Ct. H.R. 107 (2001).

on Human Rights ("European Commission")²⁸⁶ devised an *objective standard* to determine whether a given practice warrants Article 9 protection. It found that Article 9(1) explicitly protects "practice[s]" that are manifestations of religion or belief, but that "the term 'practice' as employed in Article 9(1) does not cover *each act* which is motivated or influenced by a religion or belief." Rather, the European Commission determined that "when the actions of individuals do not actually express the belief concerned, they cannot be considered to be as such protected by Article 9(1), even when they are motivated by it."²⁸⁷ The panel in *Kalaç v. Turkey* clarified that an unlawful restriction of religious expression must adversely impact an individual's "worship, teaching, practice, [or] observance" of religion.²⁸⁸ The *Kalaç* court emphasized: "Article 9 does not protect every act motivated or inspired by a religion or belief."²⁸⁹

The ECHR has shown limited deference to the individual applicant's characterization of an act when determining whether it constitutes religious worship, teaching, practice, or observance protected by

²⁸⁶ Before the entry into force of Protocol 11 of the European Human Rights Convention, individuals did not have direct access to the European Court of Human Rights, but had to first apply to the European Commission on Human Rights. If the European Commission found the case to be well-founded, it would launch a case in the European Court on the individual's behalf. See FRANCIS JACOBS & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 340 (2d ed. 1996). Protocol 11's entry into force on November 1, 1998 abolished the commission, enlarged the court, and allowed individuals to take cases directly to it. EHRC, *supra* note 22, at arts. 27-29, 34. Since then, the European Court sits full-time, decides the facts and any questions of admissibility, and issues judgments. *Id.* at arts. 28-29, 35, 42, 44-46.

²⁸⁷ *Arrowsmith v. United Kingdom*, App. No. 7050/75, 3 Eur. H.R. Rep. 218, para. 71 (1978) (Eur. Comm'n on H.R.). The court developed this objective standard while ruling on a claim that Article 9 protected an individual's practice of disseminating information against military service in Northern Ireland because the acts were motivated by pacifist beliefs. *Id.*

²⁸⁸ *Kalaç v. Turkey*, 41 Eur. Ct. H.R. 1199, 564 (1997).

²⁸⁹ *Id.* (concluding that the applicant's alleged support of a political Islamist sect did not constitute a form of worship, teaching, practice, or observance of religion protected by Article 9 of the European Human Rights Convention). Similarly, in *Logan v. United Kingdom*, the ECHR rejected the applicant's claim that attendance at religious meetings constituted protected religious expression, holding that it was not "an indispensable element of the applicant's religious worship." *Logan v. United Kingdom*, App. No. 24875/94, 22 Eur. H.R. Rep. 179 (1996) (Eur. Comm'n on H.R.) (rejecting the applicant's claim that the level of child support he was required to pay under English law restricted his ability to practice his religion in contravention of the European Human Rights Convention).

Article 9 of the European Human Rights Convention.²⁹⁰ In *Valsamis v. Greece*, the ECHR rejected a student's Article 9 claim that a state requirement that she participate in Greek National Day, a holiday commemorating the outbreak of war between Greece and Italy in 1940, forced her to manifest convictions or opinions contrary to her pacifist religious beliefs.²⁹¹ Her parents also claimed the requirement violated their rights under the First Protocol to ensure their child received an education "in conformity with their own religious . . . convictions."²⁹² In rejecting the parents' claim, the *Valsamis* court stated only that "[s]uch commemorations of national events serve, in their way, both pacifist objectives and the public interest."²⁹³ It then dismissed the student's claim without further comment. While the *Valsamis* court rejected the student's claim that the parade infringed on her religious practice of not attending events associated with war or violence, it did not explain its determination that attendance could be in line with pacifist beliefs and practices despite individual testimony to the contrary. It also failed to state whether its decision was based on a balancing test, the acceptance of the state's characterization of the parade, the substitution of its own interpretation, or some combination.

However, the ECHR has held that "the right to freedom of religion as guaranteed under the Convention excludes *any discretion on the part of the State* to determine whether religious beliefs or the means used to express such beliefs are legitimate."²⁹⁴ Thus, while there is disagreement among Muslims as to whether the headscarf is required, the ECHR may not question the legitimacy of headcovering by Muslim girls as a religious practice—it should only determine whether there is an interference with the practice, and then proceed to the subsequent prongs of its Article 9 analysis.

²⁹⁰ See generally Peter W. Edge, *The European Court of Human Rights and Religious Rights*, 47 INT'L & COMP. L. Q. 680, 687 (1998) (claiming that the European Court of Human Rights privileges traditional beliefs over personal interpretation in "determining what one must believe, and how one must act, in order to meet religious duties.")

²⁹¹ *Valsamis v. Greece*, App. No. 21787/93, 24 Eur. H.R. Rep. 294 (1996) (Eur. Ct. H.R.).

²⁹² "States shall respect the rights of parents to ensure" that their children's education and teaching are "in conformity with their own religious and philosophical convictions." First Protocol, *supra* note 232, at art. 2.

²⁹³ *Valsamis*, 24 Eur. H.R. Rep. at para. 31.

²⁹⁴ *Hasan v. Bulgaria*, 511 Eur. Ct. H.R. 26 (2000) (emphasis added); *Manoussakis v. Greece*, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 389 (1997) (Eur. Ct. H.R.) (same quotation except "determine *which* religious beliefs") (emphasis added).

2. "Prescribed by law"

In *Metropolitan Church of Bessarabia v. Moldova*, the ECHR held that, in order to be "prescribed by law," a permissible state limitation of religious expression must be expressed in domestic law and must be "adequately accessible and foreseeable, that is to say, formulated with sufficient precision to enable the individual . . . to regulate his conduct."²⁹⁵ This requirement protects against arbitrary interferences by public authorities with the right to freedom of religion.²⁹⁶

3. Legitimate Aim

State limitation on freedoms in the *forum externum* must be made in pursuit of one of the following broad legitimate aims set forth in Article 9(2) of the European Human Rights Convention: the protection of public order, health, or morals; or for the protection of the rights and freedom of others.²⁹⁷

Prior to its decisions in *Layla Sahin v. Turkey*, the ECHR suggested that both the promotion of state secularism and the pursuit of gender equality could constitute legitimate aims justifying state restrictions of religious freedom. In *Dahlab v. Switzerland*, a Geneva schoolteacher challenged a regulation prohibiting her from wearing an Islamic headscarf to school.²⁹⁸ Dahlab had been working for two years as a primary school teacher when she converted to Islam and began wearing a headscarf.²⁹⁹ Four years after her decision to convert, the director of her school interfered, prohibiting the headscarf on the grounds that it would conflict with the

²⁹⁵ *Metropolitan Church of Bessarabia v. Moldova*, 35 Eur. H.R. Rep. 13, 333 (2001). The level of precision required is context dependent. *Kalaç v. Turkey*, 41 Eur. Ct. H.R. 1199 (1997).

²⁹⁶ *Metropolitan Church of Bessarabia*, 35 Eur. H.R. Rep. at 333.

²⁹⁷ EHRC, *supra* note 22, at art. 9(2).

²⁹⁸ *Dahlab v. Switzerland*, 2001 Eur. Ct. H.R. 1 (2001). See also *supra* note 277. Commentators have argued that the analysis for the wearing of headscarves by teachers and students should differ. For example, Eva Brems argues that an analysis of headscarf bans on students' rights should include a children's rights perspective and a "best interests of the child" analysis. Brems, *supra* note 6, at 130-33. Brems contends that introducing the perspective of children's rights to the analysis of headscarf bans would place greater emphasis on the protection of children's right to education, thereby rendering it more difficult to institute headscarf bans on students. *Id.* at 132-33.

²⁹⁹ Brems, *supra* note 6, at 123.

neutrality of public education, even though there had never been any complaints or remarks by parents in response to her practice.³⁰⁰ The teacher claimed violations of her Article 9 rights to religious belief and expression, as well as her Article 14 right to freedom from discrimination on the basis of sex.³⁰¹ While the ECHR declared the case inadmissible, it also issued a brief comment rejecting Dahlab’s claim on the grounds that the headscarf ban was justified because it pursued two legitimate aims and was a proportionate measure.

With respect to the legitimate aim prong of its analysis, the ECHR noted that the Swiss ban had not been imposed because Dahlab was a woman, “but [rather because it] pursued the legitimate aim of ensuring the neutrality of State primary-education system.”³⁰² The ECHR chamber pointed out that Swiss courts had pursued other means of promoting this goal, including the removal of crucifixes from classrooms,³⁰³ and hypothesized that Dahlab’s headscarf might threaten secularism because “a very powerful external symbol such as the wearing of a headscarf may have [an impact on] freedom of conscience and religion of very young children.”³⁰⁴ The ECHR recently affirmed that the protection of state secularism constitutes a legitimate aim in *Refah Partisi v. Turkey*, a 2001 case challenging the Turkish Constitutional Court’s decision to dissolve the Refah Partisi, an Islamist political party.³⁰⁵ The Grand Chamber of the ECHR found that the dissolution, although a “drastic measure,”³⁰⁶ pursued

³⁰⁰ *Id.*

³⁰¹ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex” EHRC, *supra* note 22, at art. 14.

³⁰² *Dahlab*, 2001 Eur. Ct. H.R. 1.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Refah Partisi v. Turkey*, Eur. Ct. H.R. 3 (2002) [hereinafter *Refah Partisi* Chamber decision], *aff’d*, *Refah Partisi v. Turkey*, 37 Eur. Ct. H.R. 1 (2003) [hereinafter *Refah Partisi* Grand Chamber decision]. *Refah Partisi* alleged that the Turkish Constitutional Court’s dissolution of the party violated its members’ rights to freedom of religion under Article 9 and freedom of association under Article 11 of the European Human Rights Convention. While the ECHR decided the case on Article 11 grounds, its identification of state secularism as a “legitimate aim” justifying state restriction of Article 11 rights may apply to Article 9 rights as well.

³⁰⁶ *Refah Partisi* Grand Chamber decision, 37 Eur. Ct. H.R. at para. 133 (citing *Socialist Party v. Turkey*, App. No. 21237/93, 27 Eur. H.R. Rep. 51, para. 51 (1998)).

the legitimate aims of safeguarding religious pluralism, tolerance, and secularism.³⁰⁷

In addition to its emphasis on protecting secularism, the ECHR panel in *Dahlab* also suggested that the pursuit of gender equality comprised a legitimate aim justifying a restriction on Dahlab's Article 9 rights. It noted that the headscarf

appears to be imposed on women by a precept which is laid down in the Koran and which . . . is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, *equality and non-discrimination* that all teachers in a democratic society must convey to their pupils."³⁰⁸

Without explicitly holding that the pursuit of gender equality was a legitimate aim justifying restrictions on Article 9 rights, the Dahlab chamber implies this by remarking on the gender inequality communicated and perpetuated by the Islamic headscarf and suggesting that a ban on the garment may "protect[] the rights and freedom of others."³⁰⁹

The *Dahlab* court's commentary on the practice of wearing Islamic headscarves is startlingly similar to the Stasi Commission's characterizations of the practice. Unfortunately, the ECHR panel rejected Dahlab's own characterization of her practice of wearing a headscarf, and assumed that its own understanding of the practice as intolerant and symbolic of gender inequality was dispositive.³¹⁰ Yet, Dahlab, an adult convert to Islam, decided to wear a headscarf even as she continued to work as a professional teacher rather than giving up paid employment or confining herself to the home. While her actions demonstrated agency and the desire to express deeply felt religious convictions, the ECHR commented only on the gender inequality of the headscarf.

The *Dahlab* court also ignored the fact that, even though the contested regulation may not have been passed with discriminatory intent, it disproportionately impacted Muslim women by targeting a gender-specific garment of that religion. In rejecting the Dahlab application, the ECHR left

³⁰⁷ *Id.* at para. 92 (citing *Dahlab v. Switzerland*, 2001 Eur. Ct. H.R. 1 (2001)).

³⁰⁸ *Dahlab*, 2001 Eur. Ct. H.R. 1.

³⁰⁹ *Id.*

³¹⁰ See Part I.C for a discussion of the multiple meanings of wearing headscarves.

unexplored whether the ban was a *proportionate* means of pursuing the “legitimate aim” of state secularism. This analysis is a requirement of the necessity test, as explained below.

4. “Necessary in a Democratic Society” and the Margin of Appreciation for State Interpretation

The ECHR has held that, in judging whether state interference with the freedom of religion qualifies as “necessary in a democratic society” under Article 9(2) of the European Human Rights Convention, the role of the Court is to “inquire into whether the measures taken at the national level are justified in principle and are proportionate,” giving weight to measures that meet a “pressing social need.”³¹¹ In determining whether a given state interference is “necessary in a democratic society,” the European Court has consistently held that a certain “margin of appreciation” must be granted to the state’s assessment of the existence and extent of the necessity and proportionality of the limitation.³¹² States deserve this degree of discretion, subject to ultimate European supervision, because they are often in a better position than the judges of the ECHR to determine the need for and content of state action.³¹³ Moreover, according to the ECHR, the diversity in state approaches towards the appropriate relationship between state and religion argues against a more interventionist approach:

It is not possible to discern throughout Europe a uniform conception of the significance of religion in society; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.³¹⁴

Thus, the ECHR has articulated the doctrine of margin of appreciation as a measure to accommodate a degree of legal pluralism within Europe and to

³¹¹ Metropolitan Church of Bessarabia v. Moldova, 35 Eur. H.R. Rep. 13, 336 (2001).

³¹² *Id.* at 337-41.

³¹³ Gorzelik v. Poland, Eur. Ct. H.R. 107 (2001).

³¹⁴ Otto-Preminger-Institute v. Austria, App. No. 13470/87, 19 Eur. H.R. Rep. 34, para. 50 (1995).

acknowledge that national courts retain greater competency and expertise over the interpretation of religious symbols within their specific contexts.

The ECHR granted this margin of appreciation to Turkey in *Refah Partisi v. Turkey*.³¹⁵ The ECHR Grand Chamber found the Turkish Constitutional Court's dissolution of the Refah Partisi to be "necessary in a democratic society."³¹⁶ The Court deferred to the Turkish government's assessment that the party presented a "tangible" and "immediate" threat to democracy due to the party's policy of establishing *shari'ah* law and its failure to exclude recourse to force in pursuit of this goal.³¹⁷ The dissolution of the group could reasonably be considered to meet a "pressing social need."³¹⁸ The Stasi Commission cited the ECHR Grand Chamber decision in *Refah Partisi*, among other cases, in concluding that a law banning conspicuous religious symbols would withstand challenge under the European Human Rights Convention as a similarly "necessary measure in a democratic society."³¹⁹

³¹⁵ *Refah Partisi v. Turkey*, Eur. Ct. H.R. 3 (2002), *aff'd*, *Refah Partisi v. Turkey*, 37 Eur. Ct. H.R. 1 (2003) [hereinafter *Refah Partisi* Grand Chamber decision]. The Turkish government moved to dissolve Refah in 1997, two years after it had become the largest political party in the Turkish government. *Id.* at paras. 10-11. Refah's representatives argued that the party's dissolution "had not been prompted by a pressing social need and was not necessary in a democratic society" as per Articles 9 and 11 of the European Human Rights Convention. *Id.* at paras. 12-13. The ECHR chamber found against Refah Partisi in a four-three decision. On appeal, a grand chamber of the ECHR unanimously held that there was no violation of Article 11 of the convention, and that it was not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the convention and Articles 1 and 3 of the First Protocol. *Id.* at para. 139.

³¹⁶ *Id.* at para. 132.

³¹⁷ *Id.*

³¹⁸ *Id.* at paras. 133-34. In the *Refah Partisi* Grand Chamber decision, the court noted that the party gained majority party status in Turkey only a few years before its dissolution by the Turkish Constitutional Court. *See supra* note 315.

³¹⁹ Specifically, the Stasi Commission Report stated,

The European Court of Human Rights held that secularity holds so important a place in the Constitution of the [sic] Turkey that it allowed the dissolution [of] *Refah* without which act the European Convention would be violated. The national jurisdictions were therefore able to take into consideration the risk that this party presented for democracy.

Stasi Commission Report, *supra* note 10, at 2.1. In the *Refah Partisi* Grand Chamber decision, the court found that Refah's goal of applying *shari'a* law to Turkey's Muslim majority population did not constitute a protected act of religious expression. It was "beyond the freedom of individuals to observe the precepts of their religion" and "outside the private

C. Leyla Sahin v. Turkey: The Isomorphism Returns

Leyla Sahin v. Turkey is the only case in which the ECHR ruled directly on the legality of a state ban on students' ability to wear Islamic headscarves in public educational institutions.³²⁰ In the 1993 case of *Karaduman v. Turkey*, the European Commission upheld a Turkish regulation forbidding headscarves in public institutions of higher education.³²¹ The Commission declared the application manifestly ill-founded, and did not refer it to the ECHR for a decision on the merits. Similarly, while the European Commission considered the legality of a restriction on a public primary school teacher's right to wear a headscarf in *Dahlab v. Switzerland*, the challenged restriction did not apply to students, and, in any event, the Commission did not reach a decision on the merits. The ECHR's 2004 and 2005 decisions in *Sahin* are therefore the most authoritative indication of the court's understanding of restrictions on students' rights to wear headscarves in public schools. In both decisions, the ECHR explicitly referred to the French ban, albeit without providing any indication as to its legality.³²² Moreover, the ECHR grappled with balancing secularism, democracy, and individual rights to religious expression. It would no doubt have to contend with similar questions were the French ban to come before it.

Yet, a close analysis of the ECHR's decision to uphold the Turkish ban reveals not only that the court would likely be hostile to a challenge to the French ban on Article 9 grounds, but also that the ECHR, like the Stasi Commission before it, constructed its decision on an understanding of Islamic headscarves premised on the existence of a neat isomorphism mapping secularism onto gender equality and religious expression onto

sphere to which Turkish law confines religion." *Refah Partisi* Grand Chamber decision, 37 Eur. Ct. H.R. at para. 12. Therefore, the *Refah Partisi* Grand Chamber decision may not provide controlling authority as to what is "necessary in a democratic society" under Article 9.

³²⁰ 2004 Chamber decision, *supra* note 31; 2005 Grand Chamber decision, *supra* note 31. In *Karaduman v. Turkey*, the European Commission on Human Rights upheld the Turkish state's regulation forbidding the headscarf in public higher education "because of the necessity to protect women from pressure." The Commission did not refer the case to the European Court of Human Rights. *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993).

³²¹ *Karaduman*, 74 Eur. Comm'n H.R. Dec. & Rep. 93.

³²² 2004 Chamber decision, *supra* note 31, at para. 54; 2005 Grand Chamber decision, *supra* note 31, at para. 66.

gender inequality. Far from being confined to domestic debate, the troubling isomorphism that permeated the Stasi Commission's Report, also pervaded the judgment of the ECHR.

In March 1998, Leyla Sahin, a fifth year medical student at the Cerrahpasa Faculty of Medicine at Istanbul University, was denied access to an oncology exam because she wore an Islamic headscarf.³²³ This incident occurred just one month after the University's Vice Chancellor issued a circular banning female students from wearing Islamic headscarves and male students with beards from attending lectures, courses, and tutorials.³²⁴ Sahin was barred from enrollment and attendance for refusing to remove her headscarf.³²⁵ The Istanbul Administrative Court dismissed her application, which sought to set aside the circular on the grounds that it had no basis in statutory law and violated various rights set forth in the European Human Rights Convention: the right to respect for private and family life (Article 8), the right to religious belief and expression (Article 9), the right to freedom of expression (Article 10), the right to freedom from discrimination on the basis of religion (Article 14), and the right to

³²³ 2005 Grand Chamber decision, *supra* note 31, at para. 17.

³²⁴ 2004 Chamber decision, *supra* note 31, at para. 12. The text of the circular read,

By virtue of the Constitution, the laws and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose "heads are covered" (wearing the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the islamic [sic] headscarf must not be added to the lists of registered students.

Id. By July 1998, the University broadened the ban to prohibit all forms of dress symbolizing or manifesting a religion or faith, not just those specific to Islam, and continued to bar Sahin from attending courses. *Id.* at para. 45.

³²⁵ *Id.* at paras. 17, 20.

education (Article 2 of the First Protocol).³²⁶ The Turkish Supreme Administrative Court dismissed her appeal as a matter of law.³²⁷

Sahin brought her complaint to the European Court of Human Rights. A seven-judge chamber of the court first ruled on the case in 2004, unanimously upholding the ban on Islamic headscarves in Turkish public universities. The chamber found that the ban did not violate Sahin's right to religious expression under Article 9, and that no separate issue arose under any other articles.³²⁸ The *Sahin* Chamber granted Turkey a wide margin of appreciation for determining which measures were "necessary in a democracy" to protect secularism.³²⁹ The court also indicated that it would exercise deference towards Turkey's understanding of the adverse impact of religious symbols in educational institutions on the values of secularism and gender equality.³³⁰ In 2005, after granting Sahin's petition for a rehearing, the Grand Chamber of the ECHR reaffirmed the earlier decision sixteen-to-one. The majority opinion drew substantially from the 2004 judgment and concluded that the Turkish ban on Islamic headscarves in public universities was a justified restriction of Sahin's Article 9 rights.³³¹ The court accepted Turkey's contention that the ban was "necessary in a democratic society" in order to combat the threat posed by the Islamic headscarf to secularism and to protect the gender equality espoused by the Turkish Republic.

The 2004 *Sahin* Chamber judgment and the Grand Chamber majority judgment analyzed Sahin's claim according to the ECHR's four-prong Article 9 inquiry.³³² Both panels readily found an interference with Sahin's right to religious expression because the Turkish regulation restricted her ability to express the religious belief that it was her duty to

³²⁶ 2005 Grand Chamber decision, *supra* note 31, at paras. 18-19. The Istanbul Administrative Court found that the Vice Chancellor was empowered to enact a circular regulating students' dress on the campuses of public universities by virtue of Section 13 (b)(5) of the Higher Education Act, Law No. 2547, which granted vice chancellors "primary responsibility for taking safety measures and for supervising and monitoring the administrative and scientific aspects of the functioning of the university." *Id.* at para. 52.

³²⁷ *Id.* at para. 20.

³²⁸ 2004 Chamber decision, *supra* note 31, at para. 117.

³²⁹ *Id.* at para. 71.

³³⁰ *Id.* at paras. 101-02, 114.

³³¹ 2005 Grand Chamber decision, *supra* note 31, at paras. 122-23.

³³² *See supra* Part III.B.

wear a headscarf outside of the home.³³³ They also found that the regulation “primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order,” a point that Sahin did not challenge.³³⁴ In addition, despite Sahin’s claims to the contrary, both panels also found that the contested regulation was “prescribed by law” because it was clear from the moment Sahin entered Istanbul University that the practice of wearing an Islamic headscarf was restricted.³³⁵

³³³ The 2005 Grand Chamber judgment noted that

[t]he applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil [sic] a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant’s right to manifest her religion.

2005 Grand Chamber decision, *supra* note 31, at para. 78 (citing 2004 Chamber decision, *supra* note 31, at para. 71).

³³⁴ Sahin contended that her conduct—wearing an Islamic headscarf—was compatible with protecting the rights and freedoms of others and of protecting public order. 2004 Chamber decision, *supra* note 31, at paras. 82-84; 2005 Grand Chamber decision, *supra* note 31, at para. 99.

³³⁵ 2004 Chamber decision, *supra* note 31, at para. 81; 2005 Grand Chamber decision, *supra* note 31, at para. 98. Sahin argued that the Turkish ban was not “prescribed by law” or “foreseeable” because there was no legislation in Turkey permitting restrictions on the wearing of Islamic headscarves in public educational institutions, and because she had been able to wear a headscarf for years at Busra University, prior to her arrival at Istanbul University. *Id.* at paras. 79-82. The Grand Chamber majority disagreed, finding that the Vice Chancellor’s circular derived immediate statutory authority from a section of the Higher Education Act and support from the “settled” case law of the Turkish courts. *Id.* at paras. 85, 88, 98. While there was no legislation in place explicitly permitting such a regulation, the majority emphasized that “the ‘law’ is the provision in force as the competent courts have interpreted it.” *Id.* at para. 88. In coming to this conclusion, the Grand Chamber highlighted the Turkish Constitutional Court’s 1991 judgment that “authorizing students to ‘cover the neck and hair with a veil or headscarf for reasons of religious conviction in the universities was contrary to the Constitution,” and the Supreme Administrative Court’s 1984 finding that “[b]eyond 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.” *Id.* at paras. 92-93. These judicial determinations supported the state’s argument that the Vice Chancellor’s circular restricting the wearing of Islamic headscarves in public universities was foreseeable and therefore “prescribed by law.”

The heart of both the 2004 Chamber and 2005 Grand Chamber judgments was a discussion of whether the Turkish ban was “necessary in a democratic society.” The Grand Chamber prefaced its analysis by reiterating the principles that underlie Article 9 as articulated in previous cases. Most prominently, it emphasized that “pluralism [is] indissociable from a democratic society”³³⁶ and that rights to religious expression may be legitimately restricted “to reconcile the interests of . . . various groups and ensure that everyone’s beliefs are respected.”³³⁷ As the “neutral and impartial organiser of the exercise of various religions, faiths and beliefs,” states were obligated to ensure tolerance³³⁸ and promote democracy by “constant[ly] search[ing] for a balance between the fundamental rights of each individual.”³³⁹

Noting the wide variety of approaches by European states to the issue of headscarves in public schools³⁴⁰ and the impossibility of “discern[ing] throughout Europe a uniform conception of the significance of religion in society,”³⁴¹ the Grand Chamber majority called for the application of a generous margin of appreciation towards state policy seeking to achieve a balance between safeguarding secularism and protecting individual rights to religious expression.³⁴² Seeing “no good reason to depart from the approach taken by the Chamber,” it found that the Turkish restriction on Islamic headscarves in public universities was

The Grand Chamber majority’s analysis indicates that in the case of a challenge to the French law on conspicuous religious symbols, the ECHR will likely arrive at the same conclusion. The French ban was not just an administrative regulation, but a national law passed by the French legislature after a period of widespread public debate. It is likely that the “prescribed by law” requirement would not be an issue in such a case because the passage of the ban was the subject of much public attention.

³³⁶ 2005 Grand Chamber decision, *supra* note 31, at para. 104.

³³⁷ *Id.* at para. 106 (citing *Kokkinakis v. Greece*, 17 Eur. H.R. Rep. 397, at para. 33 (1993)).

³³⁸ *Id.* at para. 107.

³³⁹ *Id.* at para. 108 (internal citations omitted).

³⁴⁰ *Id.* at paras. 55-65 (comparing and contrasting headscarf regulation in Turkey, Azerbaijan, Albania, France, Belgium, Austria, Germany, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and Finland).

³⁴¹ *Id.* at para. 109.

³⁴² *Id.* at paras. 109-10.

necessary for the protection of secularism and the pursuit of gender equality.

1. Laying the Foundation: The Secularism/Religious Expression Dichotomy

Like the 2004 Chamber, the Grand Chamber majority found the ban on headscarves to be “necessary for a democratic society” in the pursuit of state secularism in Turkey, where countering religious extremists constitutes a “pressing social need.”³⁴³ To support its conclusion, the Grand Chamber majority made three main points.

First, it emphasized that the socio-political context of Turkey made the need to protect secularism fundamentally important. The majority highlighted the importance of secularism as the “guarantor of democratic values, . . . the meeting point of liberty and equality,”³⁴⁴ and a principle “consistent with the values underpinning the Convention.”³⁴⁵ It criticized political Islamist groups like Refah Partisi for threatening secularism and democracy by “seek[ing] to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.”³⁴⁶ In the context of the rise of political Islam, the majority concluded that the headscarf “has taken on political significance.”³⁴⁷

Second, the Grand Chamber majority noted the special vulnerability of students and the importance of university regulations to protect secularism and its companion value of pluralism. It cited the European Commission’s decision in *Karaduman* for the proposition that

in a democratic society 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 “to prevent certain fundamentalist religious movements from exerting pressure on

³⁴³ *Id.* at para. 115.

³⁴⁴ *Id.* at para. 113.

³⁴⁵ *Id.* at para. 114.

³⁴⁶ *Id.* at paras. 10, 115.

³⁴⁷ *Id.* at para. 115 (citing 2004 Chamber decision, *supra* note 31, at paras. 107-09).

students who did not practice their religion or who belonged to another religion.”³⁴⁸

The goal of such regulation was “ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others.”³⁴⁹

Third, the Grand Chamber majority highlighted the “proselytism” inherent in the Islamic headscarf. It found that because the symbol “is presented or perceived as a compulsory religious duty,” it places pressure on those who choose not to wear it, thereby threatening the “‘rights and freedoms of others’ and the ‘maintenance of public order’ in a country in which the majority of the population, while professing a strong attachment to . . . a secular way of life, adhere to the Islamic faith.”³⁵⁰ The majority cited the European Commission’s finding in *Dahlab* that the headscarf was a “powerful external symbol” that “might have some kind of proselytizing effect,” one that “could not easily be reconciled with the message of tolerance [and] respect for others.”³⁵¹

In making these three arguments, the Grand Chamber majority reasoned as follows: the Turkish restriction on Islamic headscarves in public universities is “necessary in a democratic society” to combat the threat posed by political Islam to secular democracy and to promote tolerance and pluralism in public universities *because* the Islamic headscarf itself is a proselytising and fundamentalist tool. The majority’s reasoning resonates strongly with the Stasi Commission’s claim that the Islamic headscarf threatens *laïcité* by promoting the rise of political Islam and sectarian division in France. Central to this logic are two notions: first, that women who wear headscarves send the message that other women must also cover, and second, that the headscarf cannot be divorced from the goal of political Islam to transform secular democracies into theocratic states. By accepting these two contentions without providing factual support for either, the Grand Chamber majority posited the Islamic headscarf as diametrically and inimically opposed to secularism and its concomitant values of state neutrality and tolerance. It thereby constructed a dichotomy between secularism and religious expression that is the basis for the

³⁴⁸ *Id.* at para. 111 (emphasis added) (citing *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec. & Rep. 93 (1993)).

³⁴⁹ *Id.* at para. 111.

³⁵⁰ *Id.* at para. 115.

³⁵¹ *Id.* at para. 111.

isomorphism equating secularism with gender equality and religious expression with gender inequality.

Three central problems plague the majority's reasoning. First, notably absent from the Grand Chamber majority opinion is any inquiry into whether Sahin's own intentions or practice of wearing the Islamic headscarf supported the assumptions about the headscarf's meaning promoted by the Turkish government. Did Sahin wear the headscarf to send the message to other women that they too should cover, thereby infringing upon their abilities to express (or not express) religious belief? Did Sahin wear a headscarf to advocate the message that Turkish secular democracy should give way to a state founded on Islam and *shari'a* law?

Judge Françoise Tulkens of Belgium, the sole dissenter from the Grand Chamber majority, noted this deficiency. She highlighted the majority's failure to address Sahin's claim that she had no intention to show a "lack of respect for the convictions of others," to "influence fellow students and undermine their rights and freedoms,"³⁵² or to call the principle of secularism into doubt.³⁵³ The government *did not dispute* Sahin's claim. The majority's unquestioning assumption that the Turkish ban on headscarves was justified to protect secularism thus stands contrary to the facts of Sahin's personal case.

Similarly, the majority cited no evidence to show that the applicant contravened the principle of secularism through her actions. It accepted and cited the *Dahlab* court's finding that the Islamic headscarf is a "powerful external symbol" with a "proselytizing effect" that is difficult to "reconcile with the message of tolerance, respect for others . . . and non-discrimination."³⁵⁴ Yet, the majority provided no factual support for this understanding drawn either from Sahin's case or Turkish society at large. Judge Tulkens observed in her dissent that both the Turkish government and the majority failed to provide evidence that Sahin's practice of wearing a headscarf constituted "disorderly conduct" or that it disrupted "teaching or . . . everyday life at the University," facts that, if proved, may have justified a restriction on headscarves in the name of protecting public order.³⁵⁵ Sahin asserted that there was "no sign of tension in institutions of higher

³⁵² *Id.* at para. 101.

³⁵³ *Id.* at para. 7 (Tulkens, J., dissenting) [hereinafter Tulkens Dissent].

³⁵⁴ 2005 Grand Chamber decision, *supra* note 31, at para. 111.

³⁵⁵ Tulkens Dissent, *supra* note 353, at para. 8.

education” over the practice of wearing the headscarf to justify the regulation.³⁵⁶

Second, the majority problematically conflated the Islamic headscarf with political Islam. Like the Stasi Commission before it, the Grand Chamber majority alluded to the “political significance” of the headscarf and the threat of radical Islam to secular democracy. Yet, it failed to delineate the link between women who seek to wear headscarves to public university and those who seek to institute a theocratic state, a link that might justify the restriction of Sahin’s right to religious expression. In light of this absence, the question remains: how does permitting Sahin to wear a headscarf to public university support the political Islamic attack on secular democracy if she herself does not espouse political Islamist beliefs? While acknowledging the importance of combating the rise of political Islam,³⁵⁷ Judge Tulkens criticised the majority’s deployment of a slippery slope argument that simply referred to the “political significance” of the headscarf without unpacking the term:

Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and ‘extremists’ who seek to impose the headscarf as they do other religious symbols. *Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views.* She is a young adult woman and a university student and might reasonably be expected to have a heightened capacity to resist pressure, it being noted . . . that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant’s personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.³⁵⁸

In stark contrast to the Grand Chamber majority, Judge Tulkens challenged the facile assumption that headscarves must be understood solely or even primarily as tools of political Islam even in the context of Turkey, a Muslim majority country where political Islamists exercise some power. Instead, she advocated inquiring into the reasons why women themselves wear

³⁵⁶ 2005 Grand Chamber decision, *supra* note 31, at para. 100.

³⁵⁷ Tulkens Dissent, *supra* note 353, at para. 10.

³⁵⁸ *Id.* at para. 10 (emphasis added).

headscarves, thereby acknowledging their intentions and conduct rather than privileging the meanings imposed upon their practices by political Islamists or the Turkish government. The majority's unsupported allusion that the practice of wearing the headscarf somehow contributed to the rise of Islamic extremism lends support to Judge Tulkens's scepticism that "the possible effect . . . [of] wearing the headscarf . . . on those who do not wear it . . . satisf[ies] the requirement of a pressing social need" that would render the Turkish ban necessary in a democratic society.³⁵⁹

Third, the Grand Chamber majority evoked the European Commission's decision in *Dahlab*, which expressed concern about the "proselytizing effect" of the headscarf when worn by a public primary school teacher without interrogating whether the headscarf carries different meanings when worn by teachers versus students. While some may perceive no difference in impact, Judge Tulkens disagreed:

While the principle of secularism requires education to be provided without any manifestation of religion and while it has to be compulsory for teachers and all public servants, as they have voluntarily taken up posts in a neutral environment, the position of pupils and students seems to me to be different.³⁶⁰

In sum, the Grand Chamber majority opinion unquestioningly accepted the Turkish government's contention that the headscarf is inimical to the values of a secular democratic state, and that the headscarf in and of itself—apart from the intention or actions of its wearer—infringes on the rights of others. As Judge Tulkens observed, the majority "take[s] up position on an issue that has been the subject of much debate, namely the signification of wearing the headscarf and its relationship with the principle of secularism."³⁶¹ Like the Stasi Commission's 2003 Report, the Grand Chamber majority opinion plunged head-on into its own interpretation of the meaning of the Islamic headscarf without looking at the facts of Sahin's case or Turkish society at large to test its claims. In doing so, it constructed a dichotomy between headscarves and secularism, thereby constructing one side of the isomorphism.

³⁵⁹ *Id.* at para. 9.

³⁶⁰ *Id.* at para. 7.

³⁶¹ *Id.*

2. Finishing the Map: The Islamic Headscarf Threatens Gender Equality

Both the 2004 Chamber and the 2005 Grand Chamber majorities concluded that the Turkish ban on Islamic headscarves in public universities was necessary in a democratic society as a means of protecting gender equality. The ban addressed “a pressing social need” and promoted a “legitimate aim” which has been “recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe.”³⁶²

Prominent in the analyses of both opinions is language from the ECHR’s 2001 decision in *Dahlab v. Switzerland*.³⁶³ Without explicitly stating that the Islamic headscarf promotes inequality, the Grand Chamber majority accepted the *Dahlab* opinion’s link between headscarf bans and the promotion of gender equality:

In the *Dahlab* case . . . the Court stressed among other matters, the “powerful external symbol” which her wearing a headscarf represented and questioned whether it might have some kind of proselytising effect, *seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality*. It also noted that wearing the Islamic headscarf *could not easily be reconciled with the message*

³⁶² 2005 Grand Chamber decision, *supra* note 31, at para. 115 (citing 2004 Chamber decision, *supra* note 31, at para. 107).

³⁶³ *Dahlab v. Switzerland*, 2001 Eur. Ct. H.R. 1 (2001). The 2004 Sahin Chamber referenced the European Commission decision in *Dahlab* as follows:

In the *Dahlab* case . . . , in which the applicant was a schoolteacher in charge of a class of small children, [the European Commission on Human Rights] stressed . . . the impact that the “powerful external symbol” conveyed by her wearing a headscarf could have and questioned whether it might have some kind of proselytising effect, *seeing that it appeared to be imposed on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality*.

2004 Chamber decision, *supra* note 31, at para. 98 (citing *Dahlab*, *supra*). The Sahin Grand Chamber included a longer passage drawn from the European Commission’s decision. 2005 Grand Chamber decision, *supra* note 31, at para. 111.

*of . . . equality and non-discrimination that all teachers in a democratic society should convey to their pupils.*³⁶⁴

The Grand Chamber majority unquestioningly recited the *Dahlab* court's finding that the headscarf "appeared to be imposed on women." The majority adopted the earlier panel's unilateral and negative interpretation of the symbol as one that stands contrary to gender equality, later supporting this interpretation by adopting the characterizations of the garment provided by Turkish university administrators:

In such a context, where the values of pluralism, respect for the rights of others and, in particular, *equality before the law of men and women* are being taught and applied in practice, *it is understandable* that the relevant authorities should wish to preserve the secular nature of the institution concerned and *so consider it contrary to such values to allow religious attire . . . including the Islamic headscarf, to be worn.*³⁶⁵

The Grand Chamber thus accepted the *Dahlab* court's understanding that the headscarf was "hard to reconcile with the principle of gender equality," and expressed sympathy for Turkish university administrators' claim that headscarves were "contrary" to the value of "equality before the law of men and women." In doing so, it sent a clear message: restrictions on Islamic headscarves are justified as a means of promoting gender equality *because headscarves themselves symbolise and promote gender inequality*. Thus, after creating a clean dichotomy between secularism and the "proselytism" of the headscarf, the ECHR Grand Chamber mapped secularism onto gender equality and religious expression onto gender inequality by accepting the contention that headscarves undermine "equality before the law of men and women." Like the Stasi Commission, the *Sahin* Grand Chamber majority placed its seal of approval on the isomorphism.

The conclusion that the Turkish ban was justified as a means of promoting gender equality is problematic for three reasons. First, by supporting the isomorphism, the *Sahin* decisions considered only half of the issue of gender equality. Strikingly absent from the analysis of both *Sahin* decisions was a discussion of the impact of *not* wearing the headscarf on those who sought to wear it out of deep religious conviction or as an empowering tool while pursuing public higher education. This failure is

³⁶⁴ 2005 Grand Chamber decision, *supra* note 31, at para. 111 (emphasis added).

³⁶⁵ *Id.* at para. 116.

remarkable given there was no university in Turkey where Sahin could pursue her medical degree while wearing a headscarf. By blithely accepting the Turkish government’s contention that headscarf bans promote gender equality without looking at the impact of the ban on the individual applicant who challenged the regulation, the Grand Chamber majority revealed the weakness of its conflation of the Islamic headscarf with gender inequality.

Second, the Grand Chamber majority did not address Leyla Sahin’s opinion of the relationship between the headscarf and gender equality, nor did it assess the impact of the headscarf on her lived experience. The majority might have commented on the fact that Sahin’s decision to wear a headscarf was not linked to a belief in the submission of women to men or their confinement to the home; rather, Sahin wore a headscarf while pursuing a medical education, one which she was determined to follow despite her expulsion from Istanbul University under the contested regulation. Not only did Sahin leave her home in Turkey to continue her studies in Austria when her efforts to gain re-entry to Istanbul University failed, she challenged her expulsion through the Turkish administrative court system, all the way up to the European Court of Human Rights. In concluding that the Turkish ban on headscarves was “necessary” to promote women’s equality, the Grand Chamber majority failed to consider the possibility that the headscarf may have been a symbol of gender equality and empowerment for Sahin, one that enabled her to pursue her ambitions and fight for her rights in the public spaces of universities and courts while remaining true to her religious convictions.

In her dissent, Judge Tulkens criticized the Grand Chamber majority for promoting its own subjective and negative interpretation of the significance of the Islamic headscarf without factual support drawn from Sahin’s case or Turkish society at large:

It is not the Court’s role to make an appraisal of this type—in this instance a unilateral and negative one—of a religion or religious practice, just as it is not its role to determine *in a general and abstract way* the signification of wearing the headscarf or *to impose its viewpoint on the applicant*.³⁶⁶

By accepting Sahin’s claim that she freely chose to wear a headscarf, Judge Tulkens concluded that she could not equate the headscarf with gender inequality and thereby could not justify the Turkish ban on headscarves as a means of promoting gender equality:

³⁶⁶ Tulkens Dissent, *supra* note 353, at para. 12 (emphasis added).

The applicant, a young adult university student, said—and there is nothing to suggest that she was not telling the truth—that she wore the headscarf of her own free will. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. “Paternalism” of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of article 8.³⁶⁷

Judge Tulkens aptly criticized the majority for promoting its own assumption that the headscarf symbolizes gender inequality while ignoring Sahin’s claims and the facts of her case that indicated her adoption of the garment as an act of free choice. Judge Tulkens did a service to Sahin by listening to and accepting her claims about the role of the headscarf in her own life.

Third, like the Stasi Commission before it, the Grand Chamber majority failed to explain how headscarves support gender inequality or how headscarf bans in public universities sustain gender equality. Rather than investigate these links, the majority rested its equation of the headscarf with gender inequality on a recitation of the *Dahlab* court and Turkish university administrators’ characterizations. Judge Tulkens highlighted the weakness of this argument by identifying the pluralism and complexity that underlies women’s practices of wearing headscarves:

[W]hat, in fact, is the connection between the ban and sexual equality? . . . Indeed what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003, wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolize the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women.³⁶⁸

The Grand Chamber majority accepted a sloppy and vague conflation of the Islamic headscarf with gender inequality to conclude that the Turkish ban on headscarves was “necessary in a democratic society.” Yet, in doing so, it

³⁶⁷ *Id.*

³⁶⁸ *Id.* at para. 11.

supported an isomorphism mapping secularism onto gender equality and religious expression onto gender inequality that failed to reflect Layla Sahin’s personal understanding of the meaning of her headscarf or her own efforts to experience gender equality while adhering to her religious faith.

3. Deconstructing the Isomorphism: Paying Attention to Voice

The Grand Chamber majority in *Leyla Sahin v. Turkey* offered unquestioning acceptance to the Turkish state’s understanding of the headscarf as inimical to secularism and gender equality because it granted considerable deference to state authorities on this issue: “Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.”³⁶⁹ The Grand Chamber explicitly highlighted the diversity in European approaches to the regulation of students’ ability to wear headscarves in schools as a primary justification for its high degree of deference to state understandings of the issues involved:³⁷⁰

It is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . and the meaning or impact of the public expression of a religious belief will differ according to time and context. . . . Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned. . . .³⁷¹

In granting states this wide margin of appreciation, the *Sahin* Chamber and Grand Chamber recognized the importance of negotiating the difficult and divisive issue of regulating Islamic headscarves through democratic processes that give people a voice. As a doctrine of judicial deference, the margin of appreciation promotes the legitimacy of judicial

³⁶⁹ 2005 Grand Chamber decision, *supra* note 31, at para. 109; *see also* 2004 Chamber decision, *supra* note 31, at para. 100.

³⁷⁰ 2005 Grand Chamber decision, *supra* note 31, at para. 109.

³⁷¹ *Id.* at para. 109.

decisions, acknowledging that the length and depth of domestic debate should be taken into consideration before judicial intervention. Thus, the Grand Chamber majority noted that there had been years of “wide debate within Turkish society and the teaching profession” prior to the issuance of the Vice Chancellor’s circular banning headscarves in public universities in February 1998.³⁷² The *Sahin* Grand Chamber majority’s emphasis on country process suggests that the ECHR would grant a similarly wide margin of appreciation to France in light of the protracted and intense debate in that country over legal regulation of headscarves, a debate that has spanned over a decade and a half and has involved educational authorities, lower administrative courts, the Conseil d’État, the French public, an executive commission, and most recently, the legislature.

Yet, the ECHR’s decision to grant a large margin of appreciation to national authorities raises serious concerns about the representation of women at the domestic level. As the court of last resort for the protection of rights promised by the European Human Rights Convention, the ECHR should consider the composition of the national decision-making bodies to whom it defers before drawing the conclusions that Islamic headscarves inherently promote gender inequality, and that a ban on these garments constitutes a proportionate and necessary measure to combat women’s oppression. Did women—both religious and not religious—make up the university administrators, legislators, or judges who enacted measures to ban headscarves or issued statements condemning them as oppressive? If they did not participate in these decisions, were women consulted during the processes of deliberation and lawmaking? While the *Sahin* Chamber noted that the Turkish Constitutional Court consulted the male leaders of Islamist political parties about the significance of the headscarf during the Turkish debate on the issue, neither it nor the Grand Chamber majority asked whether Turkish authorities reached out to women.³⁷³ Turkish women are far from monolithic and most likely espouse diverse opinions about the relationship between the Islamic headscarf and gender equality in their country. The ECHR’s application of the margin of appreciation doctrine without inquiry into potential gaps in representation of the group most impacted by the state regulation is a notable deficiency. The need to look at representation when dispensing with deference to states is all the more important in the French case, where Muslim girls, as minors, are left out of the political process that passed the French ban.

³⁷² *Id.* at paras. 35, 120; 2004 Chamber decision, *supra* note 31, at para. 31.

³⁷³ 2005 Grand Chamber decision, *supra* note 31, at para. 35; 2004 Chamber decision, *supra* note 31, at para. 31.

Both the Chamber and Grand Chamber decisions in *Sahin* commented that debates about headscarves in schools were not unique to Turkey, but were also present in other European countries.³⁷⁴ While both panels referred to the passage of a French ban on conspicuous religious symbols and the position of *laïcité* as a “cornerstone” of French Republicanism, neither remarked on the legality of the law.³⁷⁵ Yet, the *Sahin* opinions demonstrate that the ECHR will probably be unreceptive to a challenge to the French ban. Its unquestioning acceptance that the Islamic headscarf is inimical to both secularism and gender equality, its promotion of the isomorphism, and its deference to the understanding of state authorities over that of individuals on the meaning of religious symbols all suggest that the ECHR will hesitate to intervene in the French case.

Those who seek, nonetheless, to turn to the ECHR to protect the rights of an unheard minority may reach for several tools provided by the *Sahin* decision. First, the Grand Chamber majority judgment reiterated that freedom of thought, consciousness, and religion is indissociable from a democratic society.³⁷⁶ A challenge to the French ban should highlight the status of Muslim girls as members of a minority faith, one that the Stasi Commission itself characterized as facing serious obstacles to observance. Accommodating Islamic headscarves in public schools would redress the imbalance of a government decision to restrict religious expression in schools while simultaneously ignoring every proposal offered by the Stasi Commission to improve the accommodation of religious minorities in France.

Second, a challenge should point out that the Grand Chamber majority’s vague references to the threat of political Islam simply do not render restrictions on headscarves “necessary in a democratic society” in France. Judge Tulkens criticized the majority’s contention that the need to counter political Islamists rose to the level of a “pressing social need” to justify the Turkish ban on headscarves. Such a justification would be even less convincing in the French context where Muslims are estimated to constitute a mere 7.1% of the French population,³⁷⁷ no Islamist political parties exist, and only two members of the French parliament are known to

³⁷⁴ 2005 Grand Chamber decision, *supra* note 31, at paras. 55-65; 2004 Chamber decision, *supra* note 31, at paras. 53-57.

³⁷⁵ 2005 Grand Chamber decision, *supra* note 31, at para. 56; 2004 Chamber decision, *supra* note 31, at para. 54.

³⁷⁶ 2005 Grand Chamber decision, *supra* note 31, at para. 104.

³⁷⁷ THE OPEN SOCIETY INSTITUTE, *supra* note 35, at 74.

be Muslim.³⁷⁸ Moreover, school girls are even less likely than university women to be affiliated with such groups.

Third, a human rights challenge to the French ban should warrant a more thorough analysis of the ban's adverse impact on the right to education set forth in Article 2 of the First Protocol. The *Sahin* Chamber did not address the impact of the Turkish ban on Leyla Sahin's right to education. While the Grand Chamber did separately analyze Sahin's education claim, it simply concluded that "the right to education cannot in this instance be divorced from the conclusion reached by the Court with respect to Art. 9."³⁷⁹ The Grand Chamber majority found that the Turkish ban on headscarves did not violate Sahin's right to education by reiterating its findings as to her Article 9 claim: the restriction furthered the legitimate aim of maintaining public order and protecting the rights of others,³⁸⁰ it was proportional because it did not prevent students from performing the duties imposed by "the habitual forms of religious observance,"³⁸¹ it sought to balance students' rights to religious expression with the rights of other students and interests of the education system,³⁸² and it was foreseeable.³⁸³ The impact of the French ban on Muslim girls' rights to education warrants greater scrutiny. The French ban directly targets girls in public primary and secondary schools pursuing levels of education required by the state, whereas the Turkish ban applies to young women pursuing discretionary higher education. A policy that results in the removal of observant Muslim girls from the national institutions of primary and secondary education by promoting unnecessary drop outs or expulsion impermissibly impacts their right to a basic French public education without discrimination as to their religious practices.³⁸⁴

While highly unlikely, an ECHR decision to strike the French ban on conspicuous religious symbols would almost certainly be received unfavorably by many in a country where one poll found that sixty-nine

³⁷⁸ Giry, *supra* note 33, at 97.

³⁷⁹ 2005 Grand Chamber decision, *supra* note 31, at para. 157.

³⁸⁰ *Id.* at para. 158.

³⁸¹ *Id.* at para. 159.

³⁸² *Id.*

³⁸³ *Id.* at para. 160.

³⁸⁴ See Brems, *supra* note 6, at 132-33.

percent of the general French population supports the law.³⁸⁵ Yet, the role of the courts is not to follow the majority, but to listen to the voices left unheard by political processes. As minors, as Muslims, and as women, Muslim girls in France have been left out on three counts. By paying attention to the involvement—or lack thereof—of Muslim girls in the deliberative process leading up to the passage of the 2004 ban, the ECHR may follow Judge Tulkens’s lead in demonstrating regard for the agency of these girls and their capacity to be rights holders. Even if its inquiry reveals that disagreement and dissent over the meaning and impact of headscarves—on both Muslim girls and women and society at large—supports upholding the ban, this attention to process, representation, and agency will accord Muslim girls a respect greater than the Stasi Commission’s reliance on secret meetings and unnamed witnesses.³⁸⁶

IV. CONCLUSION

The past decade and a half has witnessed the enduring political salience of *l’affaire du foulard*, the controversy over the presence of Muslim girls wearing headscarves in French public schools. While these girls may wear headscarves for complex and multifaceted reasons—including the desire to express sincere religious belief, proclaim a cultural identity, assert gender difference, gain access to public spaces, conform to familial expectations, or accede to familial pressure—domestic and global forces have sought to assign a singular meaning to their actions. Both the Stasi Commission and the European Court of Human Rights fell into this trap. By promoting the understanding that the Islamic headscarf is inimical to the values of state neutrality, tolerance, and pluralism that underlie *laïcité* and Turkish state secularism, and by unquestioningly conflating the headscarf with gender inequality, both bodies construct a dangerous isomorphism where secularism is mapped onto gender equality, while religious expression is indubitably linked to gender inequality.

The Stasi Commission Report creates this neat isomorphism. While the Commission deserves recognition for pushing the French government to

³⁸⁵ *The War of the Headscarves*, ECONOMIST, Feb. 7, 2004, at 26 (discussing the February 2004 survey in *Le Parisien*).

³⁸⁶ While the Commission noted its consultation of “the ‘silent majority’” of “victims subject to pressure within the family or the suburb [i.e., community],” it failed to bring these voices out into the public. Stasi Commission Report, *supra* note 10, at 4.2.2.1. The Commission could have shared these girls’ opinions about the headscarf without revealing their identities or endangering them. At a minimum it could have included more quotations from Muslim girls and women in its report.

promote greater accommodation of religious and cultural minorities, it mobilized two fundamentally flawed arguments to support its most important recommendation—the ban on conspicuous religious symbols in French schools. Leaving behind the Conseil d'État's contextualized, case-by-case approach, the Commission first argued that Islamic headscarves threaten *laïcité* because of their inherently proselytizing effect. Second, it claimed that Islamic headscarves are inimical to the gender equality embedded in French Republicanism because they are typically worn out of coercion and symbolize larger systems of women's oppression in minority (i.e., Muslim) communities. Through this understanding of headscarves, the Commission constructed an isomorphism that has done more disservice than good. It ignored the possibility that girls themselves, when given the opportunity, may use the headscarf not just as a symbol of religious expression, but also as a tool. It also illustrates the larger insensitivity of secular authorities to the voices of religious women and girls, voices that may call for the right to express religious beliefs within “public” spaces, even as they strive simultaneously for equality within their religious communities.³⁸⁷

The European Court of Human Rights decisions in *Leyla Sahin v. Turkey* reiterate this isomorphism. Even as it acknowledged that Leyla Sahin chose to wear a headscarf as a religious practice deserving protection under the European Human Rights Convention, the *Sahin* court deferred to the Turkish authorities' claim that the headscarf threatens secularism and perpetuates gender inequality. By upholding the national authorities' understanding of the context in which the headscarf was worn, it failed to look for potential gaps in process and representation, gaps that merited exploration before its decision to privilege the interpretation of the state over that of Leyla Sahin. The Grand Chamber's decision to highlight the diversity of European policy towards headscarves as justification for granting a wide margin of appreciation for national authorities' determinations of what is “necessary in a democratic society” sent a clear message that the ECHR will likely uphold the French ban in the face of a challenge by Muslim girls.

In the future, the international human rights regime may take a different course than that of the ECHR Chamber and Grand Chamber in

³⁸⁷ Frances Raday has documented the Israeli Supreme Court's ambivalence towards the call of the Women of the Wall (WoW) for equal participation in the full ceremonial worship of Judaism. She noted that the majority opinion on WoW's petition for right of access to pray publicly at the Kotel, Judaism's most holy site, failed to make any mention of their claim for equality. See *supra* note 29 and accompanying text.

Leyla Sahin. While Part III demonstrated that the various human rights implicated by the French ban are complex and often competing, there is hope that the CEDAW Committee may provide guidance as to how to strike a proper balance between women’s right to equality with their rights to freely choose and express religious beliefs, guidance that should be informed by listening to the voices of women and girls. There is also hope that in the future the ECHR will follow the lead of Judge Tulkens and pay greater attention to both these voices and the processes of country deliberation when dispensing its margin of appreciation to states. Moreover, unlike the Stasi Commission, the ECHR affirmed that Leyla Sahin wore her headscarf as a religious practice deserving protection under the European Human Rights Convention, leaving open the possibility that it will follow in the footsteps of the Conseil d’État in the Creil case to affirm that younger women and girls are capable of the same sincere religious devotion. Finally, while the Stasi Commission, the 2004 *Sahin* Chamber and the 2005 *Sahin* Grand Chamber accepted the characterization that the Islamic headscarf uniformly symbolizes women’s oppression, other judges and courts have found otherwise. The German Constitutional Court has accepted the idea that the headscarf may be an instrument of emancipation for women.³⁸⁸ Similarly, dissenting Judge Tulkens faulted the Grand Chamber judgment in *Sahin* for considering the headscarf as “synonymous with the alienation of women,” and noted that the practice of wearing a headscarf “has no single meaning” and is “engaged in for a variety of reasons.”³⁸⁹ Both the German Constitutional Court and Judge Tulkens demonstrate that courts may shatter the isomorphism created by other and earlier institutions. By inquiring into the lived experiences of those who come before them to challenge state practices, the courts possess the ability to look beyond assumptions and generalizations in order to better promote understandings of rights to religious belief, secularism, and gender equality.

While human rights norms and human rights courts offer expansive possibilities, they also face limits. Just as courts have exhibited limited effectiveness in their efforts to promote women’s equality when opposed by patriarchal religious or cultural communities,³⁹⁰ they are also likely to face

³⁸⁸ Brems, *supra* note 6, at 124, 124 n.12 (2006) (citing Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Sept. 24 2003, Ludin, 2 BvR 1436/02 (§ 22) (“The headscarf may rather be a freely chosen means for young Muslim women to determine their own lives without breaking with their culture of origin.”)).

³⁸⁹ Tulkens Dissent, *supra* note 353, at para. 11.

³⁹⁰ France Raday has observed that “[s]ome constitutional courts have attempted to implement gender equality in the face of religious resistance, but such efforts have usually

similar limitations in their efforts to promote women's rights to religious belief and expression when opposed by secular state authorities and public majorities. Rather than prompting despair, this realization serves as a sobering reminder to both state authorities and courts. As these institutions grounded in secular liberal traditions respond to demands to promote gender equality, they must resist the urge of those that come before them to assert the isomorphism mapping secularism onto gender equality and religious expression onto gender inequality. In doing so, they may remain attentive to the voices of women and girls whose calls for equality are issued in religious language, women and girls like those who seek to wear Islamic headscarves to public institutions, pray publicly before the Western Wall in Jerusalem, or achieve ordination within the Roman Catholic Church. Until we are able to envision a human rights regime that enables women and girls to engage in feminist resistance grounded in all traditions—both secular and religious—the human rights regime will remain impoverished, its expansive possibilities for promoting women's full equality in all areas of their lives limited by an inability to see women's agency wherever it resides.

been transient or ineffectual where the government has not supported them." Raday, *Culture*, *supra* note 228, at 710.