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Britton D. Davis

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Abstract: France is home to the largest Muslim population in Europe, comprising six percent of the French population, making Islam the second most practiced religion in France. With an influx of Muslim immigrants, France struggles with concerns over its national identity and culture. In 2009, the French government began to consider a ban on the face veil, or burqa, in public. Critics accused France of discrimination and Islamophobia, while officials calling for such a ban defended it on constitutional grounds: secularism and a belief that the burqa represents gender discrimination. On September 14, 2010, the French Senate approved the bill to ban women from wearing the veil in public and with the approval of the Constitutional Council, the law will go into effect in the Spring of 2011. This Note calls on the European Court of Human Rights to depart from its history of deference to Member State governments regarding issues of religious expression; instead, the court should ensure that any decision to restrict religious expression in France through a burqa ban does not violate the European Convention on Human Rights.

[A]s long as women are in shrouds[,] . . . [h]alf the nation is not alive.

—Farzaneh Milani[1]

Introduction

On June 22, 2009, French President Nicolas Sarkozy sparked controversy when he became the first French President in a century to address Parliament, delivering "a US-style state of the union address" to both houses at the Chateau of Versailles, which received mixed reviews from the various political factions in the French Parliament.[2] Overturn-

* Britton D. Davis is the Executive Note Editor for the *Boston College International & Comparative Law Review*. He would like to thank John Gordon, Dave Fox, Emily Kanstroom, Megan Ritter, Steven Zane, and Carol Cleary for their editorial assistance with this Note.

[1] Farzaneh Milani, Veils and Words: the Emerging Voices of Iranian Women Writers 29 (1992) (quoting Mirzade-ye 'Eshqi, Koliyat-e Mosavar-e 'Eshqi [Illustrated Works of 'Eshqi] 218 ('Ali Akbar Moshir-Salimi ed., 1978)).

[2] Angelique Chrisafis, *Sarkozy to Break Century-Old French Tradition with 'State of the Union' Address*, Guardian (London) (June 22, 2009), http://www.guardian.co.uk/world/2009/jun/22/nicolas-sarkozy-parliament-address-versailles (noting that Green and Communist Parliament members planned to boycott Sarkozy's speech and Socialists would attend, but

ing a century of precedent was not the only controversial aspect of this address, as President Sarkozy took the opportunity to express his distaste for the burqa,[3] describing it as unwelcome on French soil and a violation of "the French [R]epublic's idea of women's dignity."[4] President Sarkozy's remarks arrived on the heels of a call by cross-party members of Parliament, led by Communist André Gérin, to establish a parliamentary commission to investigate an increasing trend of Muslim women in France wearing the burqa.[5] The purpose of this parliamentary commission was to determine whether the burqa was compatible with "French secularism."[6]

Following a five month study, a parliamentary commission created by the French National Assembly—which included thirty-two members of Parliament from various political parties—issued a report stating that "[t]he wearing of the full veil is a challenge to our [R]epublic. . . . We must condemn this excess."[7] The commission did not call for legislation to outlaw the burqa in public spaces out of constitutional concerns, but did request that Parliament adopt a resolution calling the burqa "contrary to the values of the Republic."[8] Rather than a complete ban, the proposal would instead require women to show their faces when entering any public building and while on public transportation; specifically, the proposal would require women to keep their faces uncovered in order to receive the public services.[9]

As a resolution, the recommendations by the commission were not legally binding—Parliament was still required to enact a law, which many anticipated would be focused on a burqa ban in public buildings and on transportation.[10] Nevertheless, on July 13, 2010, the French lower house of Parliament passed a full ban on veils that cover the face in any public location—by a vote of 335 to 1, with most members of the

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planned to walk out early believing Sarkozy's move to address Parliament, particularly at Versailles, was a sign of "narcissism").

[3] In this Note, the use and meaning of the term burqa mirrors that of the French, which references not the traditional burqa found in Afghanistan, but the niqab, a head-to-toe covering that leaves only a slit open for the eyes.

[4] Emma Jane Kirby, *Sarkozy Stirs French Burka Debate*, BBC News (June 22, 2009), http://news.bbc.co.uk/2/hi/europe/8113778.stm.

[5] *Id.*

[6] *Id.*

[7] Charles Bremner, *French Set to Ban Niqab on Public Transport*, TimesOnline (London) (Jan. 27, 2010), http://www.timesonline.co.uk/tol/comment/faith/article7003246.ece.

[8] *Id.*

[9] *Id.*

[10] Tom Heneghan, *French MPs to Denounce Muslim Veils, Ban Later*, Reuters, Jan. 21, 2010, *available at* http://www.reuters.com/article/idUSTRE60K4KQ20100121.

Socialist and Communist parties abstaining from the vote.[11] On September 14, 2010, the French Senate also passed the full ban on the burqa in public spaces—by a vote of 246 to 1.[12] Proposed restrictions on the veil did not just have widespread political support in Parliament, but were also supported by many mainstream Muslim organizations.[13] In fact, discussion of the proposed ban prompted relatively little controversy inside France leading up to its passage in the Parliament.[14] This is not surprising considering France's century-long history of *laïcité* (French for "secularism")[15] and egalitarian values as a foundation of French society.[16] The proposed ban had received criticism from the "intellectual world," including the United States.[17] In becoming law, the ban faced one final hurdle—surviving constitutional council approval by the highest judicial authority in France,[18] which was granted on October 7, 2010.[19] The ban, however, is likely to face a challenge in the European Court of Human Rights (ECtHR), the body established "to interpret, articulate, and enforce the norms of the European Human Rights Convention."[20]

Part I of this Note provides background for the French concept of *laïcité* and its origins and manifestations in French culture and law, particularly in the modern era as a response to a surge in the Muslim migrant population in France. Part II of this Note lays the legal framework regarding jurisprudence on the freedom of religious manifestation—both inside France as well as under the European Convention on Hu-

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[11] *Burqa Ban Passes French Lower House Overwhelmingly*, CNN (July 13, 2010), http://www.cnn.com/2010/WORLD/europe/07/13/france.burqa.ban/index.html.

[12] *Parliament Approves Ban on Full Veil in Public*, France24 (Sept. 15, 2010), http://www.france24.com/en/20100914-french-parliament-approves-ban-full-veil-public-senate-law-fine-sarkozy- islam.

[13] Bremner, *supra* note 7.

[14] *Id.*

[15] *See* Nusrat Choudhury, *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*, 16 Colum. J. Gender & L. 199, 236 (2007).

[16] *See* Bremner, *supra* note 7.

[17] *U.S. Reiterates Disappointment over French Burqa Ban*, France24 (July 15, 2010), http://www.france24.com/en/20100715-usa-tells-france-not-ban-burqa-senate-bill-washington.

[18] *See* Gaëlle Le Roux, *Anti-Veil Law Risks Being Shot Down by Constitutional Council*, France 24 (July 8, 2010), http://www.france24.com/en/20100708-anti-veil-law-risks-being-shot-down-france-constitutional-council-burqa-ump-party-government.

[19] Steven Erlanger, *France: Full-Face Veil Ban Approved*, N.Y. Times, Oct. 8, 2010, at A8 (noting that the Constitutional Council ordered the law not to be applied in public places of worship because of the freedom of religion).

[20] Choudhury, *supra* note 15, at 254; Bremner, *supra* note 7; *France Moves Closer to Ban on Burqas*, CNN (Jan. 25, 2010), http://www.cnn.com/2010/WORLD/europe/01/25/france.burqa/index.html?hpt=Sbin.

man Rights (Convention)—focusing on the promulgation of laws centering on religious or cultural expression, particularly in relation to non-European minorities and the societal functions these laws purport to achieve. This Part also discusses the ECtHR's jurisprudence under Article 9 of the Convention, determining the legal standard applied when hearing cases on the restriction of religious expression. Part III analyzes the proposed ban on the burqa in the public sphere in France to determine if proposed societal advantages to such a law comport with French and European law, focusing on whether such a ban is appropriate under the French Constitution and the Convention. In addition, this Part evaluates various critiques of the French approach to assimilating the growing migrant population inside its borders and addresses whether the proposed ban furthers French goals of a secular society or whether such laws only serve to exacerbate the problems that such laws attempt to rectify in the first place. This Note concludes with an explanation of how France might better ameliorate concerns over fundamentalist expressions of religion in the Republic, while also calling on the ECtHR to restrict the margin of appreciation given to Member States in restricting religious expression.

I. Background

A. Laïcité *as Syntax*

Laïcité is a word that, while "difficult to define," has come to represent a philosophy, or concept, which describes the appropriate relationship that should exist between Church and State in France.[21] For the French, it is a concept that has come to represent what it means to be French and is used by "politicians, scholars, and citizens"[22] to describe a conceptual foundation of French politics and culture and the modern French politic. It is a word that embodies a concept revered in France[23] in a manner similar to the way the word *democracy* is revered in the United States. In 2003, then-Prime Minister Jean-Pierre Raffarin referred to *laïcité* as "the syntax, the code by which all religions can live and peacefully enter into a dialogue within our Republican State."[24]

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[21] T. Jeremy Gunn, *Religious Freedom and* Laïcité: *A Comparison of the United States and France*, 2004 B.Y.U. L. Rev. 419, 420 n.2 (describing *laïcité* as much more than a word and as a concept not easily defined).

[22] *See id.* at 428.

[23] *See id.*

[24] Jean-Pierre Raffarin, Prime Minister of Fr., Speech to the Conseil représentatif des institutions juives de France [Representative Council of Jewish Institutions of France] (Jan.

Stressing the importance of *laïcité* to the Republic, Raffarin stated that the "secularism" it represents "cannot be called into question," and that it "is a freedom."[25]

Although the modern notion of *laïcité* is seen by some as promoting tolerance, *laïcité* originated in a period of French history that was rife with conflict and hostility towards religion.[26] After the storming of the Bastille during the French Revolution in 1789, the new government seized property of the Catholic Church and shortly after, completely reorganized the structure of the Catholic Church in France, severing ties with the Pope altogether.[27] For several years, the French Republic essentially controlled the Catholic Church in France.[28] Soon after, the revolutionaries turned on Protestants and Jews, beginning a movement to secularize the nation.[29] On February 21, 1795, a new law passed that formally separated Church and State, and it included a prohibition on the wearing of "'religious ornaments or clothing' in public."[30] This time period was characterized by a "recurring demand that citizens choose between their religion and the state."[31] Although early notions of separation of Church and State in France were rooted in a proactive effort by the "State" to rid the "Church" of any power at all, the *laïcité* Raffarin referenced in 2004 represents the reformation of this concept more than two centuries later.[32]

In 1901, France adopted the Law on Associations which, despite including progressive provisions on the freedom of association, also required parliamentary recognition and approval of "religious congregations."[33] Four years later, the National Assembly adopted the Law on the Separation of Churches and the State (Act of 1905), designed by the Socialist party in a negotiation with the right wing minority of Parliament, which did not vote, but did not disapprove the law.[34] According to legal scholars, this liberal legal framework was built on three overriding

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31, 2004) (translation *available at* http://www.ambafrance-uk.org/Speech-by-M-Jean-Pierre-Raffarin. html).

[25] *Id.*

[26] *See* Gunn, *supra* note 21, at 428, 432–33.

[27] *See id.* at 433–34.

[28] *See id.* at 433–37.

[29] *See id.* at 437.

[30] *Id.* at 438 (quoting 156 Le Moniteur Universel 640 (Feb. 24, 1795), *available at* http://www.archive.org/stream/gazettenationale17951panc#page/640/mode/2up).

[31] *Id.* at 438.

[32] *See* Gunn, *supra* note 21, at 429, 433–42.

[33] *See id.* at 439 n.75, 440–41 (citing Law of Associations of July 1, 1901, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 2, 1901, p. 4025).

[34] Patrick Weil, *Why the French* Laïcité *Is Liberal*, 30 Cardozo L. Rev. 2699, 2704 (2009).

principles: "freedom of conscience, separation of State and Churches and the equal respect of all faiths and beliefs."[35] The law was viewed as a reaction to the growing power of the Catholic Church in public affairs,[36] and represented a far more peaceful response to a perceived threat to the Republic than revolutionary ancestors took a century earlier. Public subsidization of religious institutions ended and the State was to remain neutral toward religious beliefs in the public sphere, making no endorsements of any religious beliefs, and, as "'[m]anager of the temporal world . . . [was to] refuse[] to envisage what is beyond this management.'"[37]

B. Laïcité *in Modern France*

In the modern era, *laïcité* arguably defines the "collective, public identity" of the French people, the cornerstone of a national personality, defining what it means to "be French."[38] French citizens from all political backgrounds view *laïcité* as a reflection of "national identity" in the public sphere and the majority seeks to protect this collective French identity from minority differences.[39] *Laïcité* protects the French citizen from the pressure of any minority group that threatens the secular French identity, particularly when that group is religious in nature.[40] For centuries, this protection focused on reducing the influence of the Catholic Church.[41] *Laïcité* is now seen as a concept that requires an individual in the "public space" to "abstract her/him self from those traditions" and histories, from his or her roots, as part of a "social contract" moving the collective citizenry "from pluralism to unity through consent."[42] From this French perspective, the individual joins other individuals to live together in society as opposed to the Anglo-Saxon view of freedom *of* religion that promotes pluralism and a society as

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[35] *Id.*

[36] *See id.*

[37] *Id.* at 2705 (quoting Jean Rivéro, *De l'idéologie à la règle de droit: la notion de laïcité dans la jurisprudence administrative*, La Laïcité 266 (1960)).

[38] Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 Yale J. Int'l L. 1, 21–22 (2008).

[39] *Id.* at 22.

[40] *Id.*; Weil, *supra* note 34, at 2704–05.

[41] *See* Gunn, *supra* note 21, at 433–42.

[42] John R. Bowen, Why the French Don't Like Headscarves: Islam, the State, and Public Space 13–14 (2007) (quoting political philosopher Blandine Kriegel, former advisor to President Jacques Chirac and chairperson of the High Council on Integration).

"isolated rights-bearing individuals or . . . as communities defined by religion, race, or ethnicity."[43] In France, religion is seen as:

> [O]rganized, bounded, orderly, contained in its buildings and defined by worship practices in those buildings. If it strays into the street, selling tracts or proselytizing, it is out of bounds, and even when it is tolerated it is no longer protected by the French constitution and can easily be quashed in the name of protecting public order.[44]

In the last few decades however, *laïcité* has centered on a fear of Europe "sliding lazily towards a Muslim-dominated 'Eurabia.'"[45] As France is home to the largest Muslim population in Western Europe—roughly 3.5 million, representing six percent of the population and making Islam the second most practiced faith in France—the influx of Muslim immigrants in the last few decades has brought tension over *laïcité* into the public discourse and into the halls of Parliament.[46] In 1989, then-Minister of Education Lionel Jospin requested from the Conseil d'Etat, France's highest administrative court, a statement on the legal rights of female Muslim students to wear veils in public schools.[47] The request came as a reaction to what has come to be known as *l'affaire du foulard* ("the affair of the headscarves"), where three female Muslim students were suspended from a public secondary school for wearing the Muslim hijab, or headscarf.[48] The Conseil d'Etat concluded:

> [The display] by students, in the schools, of signs whereby they believe to be manifesting their adherence to one religion is itself not incompatible with . . . *laïcité*, since it constitutes the exercise of their liberty of expression and manifestation of their religious beliefs; but this liberty does not permit students to exhibit . . . signs of religious belonging which, by their na-

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[43] *Id.* at 14–15.

[44] *Id.* at 18.

[45] *The Return of the Nativists*, The Economist, Dec. 3, 2009, *available at* http://www.economist.com/world/international/displaystory.cfm?story_id=15017128.

[46] Weil, *supra* note 34, at 2699; *France Moves Closer to Ban on Burqas*, *supra* note 20.

[47] Weil, *supra* note 34, at 2699. The Conseil's statement is available at http://www.conseil-etat.fr/cde/media/document//avis/346893.pdf.

[48] Oriana Mazza, Note, *The Right to Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith*, 48 J. Cath. Legal Stud. 303, 314 (2009).

> ture . . . would constitute an act of pressure, provocation, proselytizing or propaganda.[49]

Although this ambiguous conclusion left the legal status of the headscarf in public schools up for interpretation, the three girls in question were eventually readmitted by Jospin.[50] The Conseil's decision, despite finding a complete ban on the display of religious symbols illegitimate, attempted to balance the constitutional principles of *laïcité* and freedom of conscience.[51] Although forty-nine legal disputes over headscarves were heard by the Conseil between 1992 and 1994, all but eight ended in favor of the student.[52] On a few occasions, however the Conseil did rule in favor of the school administrators if they were able to demonstrate that the student "was frequently absent from school, engaged in proselytism, or refused to remove the scarf" during physical education or chemistry class.[53]

Fourteen years later, on May 27, 2003, the National Assembly created a Committee of Inquiry to investigate the wearing of religious symbols in schools.[54] On July 3, 2003, then-French President Jacques Chirac established an Independent Commission to investigate a wider issue: how to incorporate principles of *laïcité* within the political and demographic makeup of the French Republic, which had changed dramatically since the Act of 1905.[55] On December 11, 2003, the Presidential commission recommended twenty-six measures, two of which would require legislation and only one of which was ultimately and easily passed in the Act of March 15, 2004 (Act of 2004) by Parliament—a ban on "the wearing of signs or clothing which conspicuously manifests students' religious affiliations . . . ."[56] The ECtHR has not heard a case involving the Act of 2004, although in *Sahin v. Turkey*, the court did rule that a similar ban in Turkey did not violate Article 9 of the Convention, which protects the right of a person to manifest his or her religion.[57] In fact, the Act of 2004 was drafted only to ban conspicuous manifesta-

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[49] Weil, *supra* note 34, at 2700 (quoting Seyla Benhabib, Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations 54–55 (2006)).

[50] *See* Mazza, *supra* note 48, at 314.

[51] Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 Cardozo L. Rev. 2629, 2644 (2009).

[52] Bowen, *supra* note 42, at 87.

[53] *Id.*

[54] Weil, *supra* note 34, at 2700.

[55] *See id.* at 2699.

[56] *Id.* at 2699, 2701 (adding that the Act of 2004 became known as "loi sur le voile," or "the law of the veil").

[57] *See* Sahin v. Turkey, App. No. 44774/98, 41 Eur. H.R. Rep. 109, 124–35 (2005).

tions of religious affiliation because the drafters feared that the ECtHR would find a law banning all visible signs of religious affiliation as a move too disproportionate to the goal of preserving *laïcité* and unnecessarily restrictive to religious freedom.[58] Although the Act of 2004 disparately impacts Muslim students, its prohibition seemed more likely to survive legal challenges than an all-out ban.[59]

The less than equitable origins of *laïcité* is a reason to be skeptical of its importance in shaping modern French law. Nevertheless, scholars who believe that *laïcité* is worthy of reverence argue that the concept will and should influence French society in the modern age.[60] Still others note the invocation of *laïcité* is a useful political tool precisely because it is an undefined concept invoked in the references to a fictionalized history over the Republic's struggle in defining the roles of Church and State: this is in spite of the fact that there has never been agreement as to what *laïcité* is or what it requires of the Republic.[61] Whether one believes that *laïcité* should influence modern law and, if so, to what degree, shapes one's view regarding the Act of 2004, as well as the burqa ban. Without understanding the historical context in which this concept has developed, it is impossible to understand the motivations behind the burqa ban in 2010.

II. Discussion

A. *French Constitutional Structure*

Article I of the French Constitution of 1958 begins as follows: "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."[62] Although the Constitution of 1958 replaced the Constitution of 1946, in 1971, the Constitutional Council (Council)—a body created by the Constitution of 1958 as the ultimate constitutional authority in France (much like the Supreme Court of the United States)—determined that the Preamble of the Constitution of 1946 was incorporated into the new Con-

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[58] *See* Bowen, *supra* note 42, at 139–40.

[59] *Id.*

[60] *See* Weil, *supra* note 34, at 2703–04.

[61] *See* Bowen, *supra* note 42, at 32–33.

[62] 1958 Const. art. 1 (Fr.), *available at* http://www.assemblee-nationale.fr/english/8ab.asp.

stitution and had the full force of law.[63] This was an important decision because the Preamble of the Constitution of 1946 proclaimed that the law guarantees women equal rights to those of men in all spheres.[64]

Prior to July 23, 2008, the Council's power of review was limited by Article 61 of the Constitution of 1958 to "a mandatory constitutional review of institutional acts and rules of procedure of parliamentary assemblies and an optional constitutional review of ordinary statutes."[65] After this date, Article 61 was revised (now Article 61–1) to allow appeal to the Council from the Conseil d'Etat or from the Cour de Cassation by a party who claims an infringement of rights and freedoms guaranteed by the Constitution.[66] Statutes and Institutional Acts are necessary to implement Article 61–1 and this process is currently ongoing.[67] This represents an important change, because prior to the 2008 revision, only the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate or sixty deputies or sixty senators could refer an ordinary statute to the Council for review.[68]

From a Constitutional perspective, this means that ordinary laws or statutes passed by the French Parliament are not automatically reviewable by the Council, and prior to 2008, the only parties with the power to request such a review were high-ranking members of the French government, as opposed to citizens of the Republic.[69] The Act of 2004 implementing the headscarf ban in public schools was not referred to the Council to determine its constitutionality because no government officials with access to this body acted to trigger such review[70]—not surprising considering the overwhelming support the legislation received in Parliament. What is even more striking is that without having been reviewed by the Council, the law is deemed constitutional, effectively leaving the interpretation of constitutionality to those who themselves pre-

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[63] *Id.* arts 56–63; Conseil constitutionnel [CC] [Constitutional Court] decision No. 71–44DC, July 16, 1971, J.O. 7114 (Fr.).

[64] 1946 Const. pmbl. § 3 (Fr.), *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst3.pdf.

[65] Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 Am. J. Comp. L. 337, 377 n.223 (2006).

[66] 1958 Const. arts. 61, 61–1 (Fr.), *available at* http://www.assemblee-nationale.fr/english/8ab.asp.

[67] *Id.*; *see also* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009–595DC, Dec. 3, 2009, J.O. 21381 (Fr.), *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2009_595dc_ccc.pdf.

[68] *See* Custos, *supra* note 65, at 377–78, 377 n.223.

[69] *See id.* at 377 n.223.

[70] *See id.* at 377.

sented and promulgated the law.[71] Whether an *a posteriori* review of the Act of 2004 by the Council under Article 61–1 will occur is as yet unknown.[72] With the implementation of Article 61–1, the constitutional viability of future laws relating to *laïcité* could potentially reach the Council for review.[73]

The Council has, on one occasion, reviewed the principle of *laïcité* in France.[74] In November 2004, the Council was asked to determine whether ratification of the Treaty establishing a Constitution for Europe would require France to amend the Constitution of 1958.[75] In that decision, the Council determined that Article I of the Constitution of 1958, which declared France to be "a secular republic" was compatible with the Constitution of Europe.[76] The Council determined that because Article II-70 of the Constitution of Europe—recognizing an individual right to manifest religion in public—mirrored a similar right guaranteed by Article 9 of the Convention, it was subject to the same limitations as those recognized by the ECtHR in order to reconcile the principle of religious freedom with that of secularism.[77] Such limitations involve concerns over "public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others . . . ."[78] Although the Council has yet to hear a citizen-based challenge relying on the freedom to manifest one's religious beliefs, it has declared limitations on such freedoms constitutionally acceptable to maintain *laïcité*.[79]

On October 7, 2010, the Council approved the burqa ban (known as the law banning the concealment of the face in public) after the President of the National Assembly and the President of the Senate referred the law to the Council.[80] The law itself makes no mention of the

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[71] *See id.* at 377–78.

[72] *See* CC decision No. 2009–595DC at 21381 (providing analysis by Constitutional Council regarding constitutionality of Institutional Act pertaining to application of art. 61–1).

[73] *See id.*

[74] *See* Conseil constitutionnel [CC] [Constitutional Court] decision no. 2004–505DC, Nov. 19, 2004, J.O. 19885, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2004_505dc.pdf.

[75] *See* Custos, *supra* note 65, at 378.

[76] *See* CC decision no. 2004–505DC at 19885; Custos, *supra* note 65, at 378 n.226 (noting that Article I "forbids anyone from freeing oneself from the common rules governing the relationships between public authorities and individuals").

[77] *See* CC decision no. 2004–505DC at 19885.

[78] *Id.*

[79] *See id.*

[80] *See* Conseil constitutionnel [CC] [Constitutional Court] decision no. 2010–613DC, Oct. 7, 2010, J.O. 18345 (Fr.), *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2010_613dc.pdf.

burqa or the Muslim faith specifically, but imposes a fine and potential imprisonment on any person who, in public, conceals their face or forces another to conceal their face.[81] The Council noted the intent of Parliament—concealment of the face is "dangerous for public safety and security and fail[s] to comply with the minimum requirements of life in society" and "women who conceal their face, voluntarily or otherwise, are placed in a situation of exclusion and inferiority incompatible with constitutional principles of liberty and equality"—and found that because the penalty for non-compliance was low, the law represented a proportional balance between "safeguarding public order and guaranteeing constitutionally protected rights."[82] The Council continued on to make clear that so long as the law does not prohibit the concealment of the face in public places of worship, it does not violate the French Constitution.[83]

B. *Conseil d'Etat Standard of Review*

Although jurisprudence regarding the interplay between the freedom of religion and *laïcité* under the Constitutional Council is limited, and the Council's decision with regard to the burqa ban is highly deferential to Parliament's own balancing of the competing interests at play, the Conseil d'Etat provides more insight into how restrictions on religious expression have been treated under French law.[84] When questions of religious expression came before the Conseil d'Etat after the 1989 suspension of three Muslim girls for wearing headscarves in a public classroom, the Conseil spoke to the compatibility of the headscarf with the concept of *laïcité*.[85] The Conseil announced that freedom of conscience is a "fundamental principle[]" of the Republic and operates inside the "domain of education."[86] As such, students were permitted to wear religious symbols provided that such symbols were not so ostentatious as to intimidate, provoke, or proselytize, thereby threatening "the dignity and freedom of students or other members of the edu-

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[81] Law No. 2010-1192 of Oct. 11, 2010, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Oct. 12, 2010, *available at* http://www.assemblee-nationale.fr/13/dossiers/dissimulation_visage_espace_public.asp [hereinafter Burqa Ban].

[82] CC decision no. 2010-613DC at 18345.

[83] *Id.*

[84] *See* Choudhury, *supra* note 15, at 226–31; *see also* Custos, *supra* note 65, at 377–78 (discussing the limited jurisprudence of the Council in this area).

[85] Choudhury, *supra* note 15, at 226.

[86] *Id.* (quoting the Conseil d'Etat).

cational community."[87] Displays of religious expression could not result in the following: "offend the dignity or freedom" of others; "threaten health or safety; disturb school activities; or jeopardize the pedagogic role of teachers," school order, or the functioning of the education system.[88] The right to religious expression exists, but is not absolute and the Conseil employed a balancing test to resolve the initial debate.[89]

The Conseil d'Etat's response is particularly interesting because it acknowledged that its understanding of *laïcité* not only originated from constitutional and legislative texts, but also from international engagements to which France was a party, citing twenty-three such engagements including the Convention.[90] Recognizing that there must be a balance between a student's individual right to manifest a religious belief and the need to secure the principle of *laïcité* for all students, the Conseil ultimately took a "soft" approach—deferring to the schools to determine the policies necessary to secure a balance of rights.[91] Then-Minister of Education Jospin, in a ministerial circular, allowed the local schools to determine whether to allow headscarves on a case-by-case basis.[92]

Five years later, on September 20, 1994, Jospin's replacement, François Bayrou, declared that "'ostentatious' signs of religious affiliation" were banned in all schools, thereby revoking the authority of local educational officials to make such determinations.[93] Shortly after, sixty-nine girls were expelled for wearing the veil.[94] Upon challenge of the decree, the Conseil reaffirmed its ruling of 1989 that the headscarf was not per se incompatible with *laïcité*, reasserting the discretion of local educational authorities to make such determinations.[95] The Conseil declared that Bayrou's decree was not binding on educators.[96] For the next five years, the Conseil ruled in favor of students seeking to wear the headscarf in almost every case it heard on this issue.[97] In these cases, the Conseil implicated the right of a student's religious expression, which "warranted deference unless the specific exceptions outlined in

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[87] *Id.* at 226–27.
[88] Mancini, *supra* note 51, at 2644.
[89] *See* Choudhury, *supra* note 15, at 227.
[90] *Id.* at 228.
[91] *See* Mancini, *supra* note 51, at 2644; Mazza, *supra* note 48, at 315.
[92] Joan Wallach Scott, The Politics of the Veil 25 (2007).
[93] *Id.* at 27; Mancini, *supra* note 51, at 2645.
[94] Scott, *supra* note 92, at 27.
[95] *Id.* at 28.
[96] *Id.*
[97] Choudhury, *supra* note 15, at 229.

the 1989 decision applied."[98] This approach by the Conseil has been referred to as the "contextual approach," requiring a case-by-case analysis of the facts to determine if a student's right of religious expression unduly burdens other students' rights to a public education free of religious proselytizing—as guaranteed by *laïcité*.[99]

Public schools are not the only arena in which the Conseil has balanced religious expression through veiling with another constitutionally guaranteed right—that of gender equality.[100] In the case of *Mme M*, a Moroccan woman who married a French national applied for French nationality in 2004.[101] Her application was opposed by the French government on the grounds that she had failed to sufficiently assimilate in accordance with French law and "'preserved very strong ties with [her] culture of origin.'"[102] As such, her conduct was "incompatible" with the French value of gender equality.[103] In its decision, the Conseil concluded that Mme M had adopted a "radical practice of her religion" and, basing its decision on the government's findings, ruled that the denial of French nationality was a legitimate reaction by the French government.[104] Although the Conseil's decision was not solely based on Mme M's choice to veil—and such a choice would not alone amount to insufficient assimilation per se—her admitted choice to veil out of obedience to her husband and not as a personal expression of her faith contributed to the finding that veiling in this circumstance was incompatible with the French value of gender equality.[105] Mme M also admitted to leaving her home very rarely and always veiling when she did, which led the government to find that she lived in "total submission" to male members of her family.[106]

The fact that the Conseil relied so heavily on the government's findings in its decision emphasizes the high level of deference given to Parliament in determining the outcome of a balancing test between a right to manifest one's religious beliefs (through veiling) with another

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[98] *Id.*

[99] *See id.* at 230; *see also* Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 Colum. J. Transnat'l L. 367, 396, 410 (2007).

[100] *See* Anastasia Vakulenko, *Gender Equality as an Essential French Value: The Case of* Mme M, 9 Hum. Rts. L. Rev. 143, 144 (2009).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 145.

[105] *Id.* at 145–46.

[106] Vakulenko, *supra* note 100, at 146, 148.

inherent constitutional value, such as gender equality.[107] With that historical deference to Parliament in mind, the Council's decision to uphold the ban on veiling is less surprising.

C. *International Law and the Margin of Appreciation*

To date, the ECtHR has not heard a challenge to the Act of 2004.[108] Three ECtHR decisions, however, illuminate the legal standards in religious expression jurisprudence under Article 9 of the Convention: *Dahlab v. Switzerland*, *Sahin v. Turkey*, and *Dogru v. France*.

1. *Dahlab v. Switzerland*: Enunciating a Standard

The ECtHR heard *Dahlab v. Switzerland* in 2001, which involved a Swiss schoolteacher who, after converting to Islam, began to wear the headscarf.[109] Four years after her conversion, she was told by the director of her school that it interfered with the religious neutrality of a public education.[110] Although the ECtHR ultimately dismissed her claim as inadmissible under Article 9 of the Convention, the court did explain its rejection of her claim, enunciating a standard that would evolve in later cases.[111]

The court rejected claims by Dahlab that the restriction had been imposed because she was a woman, finding that the ban pursued the "legitimate aim" of ensuring religious neutrality in the Swiss primary education system, citing other restrictions that had been placed in Swiss schools for similar purposes, such as the removal of crucifixes from the classrooms.[112] The court reasoned that preserving secularism in the classroom was a legitimate aim and the headscarf represented a powerful external symbol that could negatively impact the freedom of conscience and religion of young children.[113] To further support the "legitimate aim" standard, the court noted that the headscarf was difficult to reconcile with the right to gender equality and that a ban on the gar-

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[107] *See id.* at 145–47.

[108] Choudhury, *supra* note 15, at 265.

[109] *See* Dahlab v. Switzerland, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001), www.echr.coe.int/echr/en/hudoc/ (follow "HUDOC database" hyperlink; then check "Decision" box on left side; then type "42393" in "Application Number Field"; then click "Search" hyperlink; then click hyperlink to only result).

[110] *Id.*; Choudhury, *supra* note 15, at 270–71.

[111] *See* Choudhury, *supra* note 15, at 270–73.

[112] *Dahlab*, App. No. 42393/98.

[113] *See* Clare Ovey & Robin C. A. White, Jacobs & White: The European Convention on Human Rights 310 (4th ed. 2006).

ment would ensure the protection of such equality.[114] The court would later develop the "legitimate aim" analysis into one prong of a four-part test when evaluating claims under Article 9.[115]

2. *Sahin v. Turkey*: Applying the Standard

In 1998, Istanbul University implemented a ban on female students wearing headscarves and male students with beards from attending the university.[116] Shortly after, Leyla Sahin, a medical student, was not allowed to take an exam because she wore a headscarf and was ultimately "barred from enrollment and attendance for refusing to remove the headscarf."[117] Sahin subsequently brought a complaint to the ECtHR, arguing that the ban violated Article 9 of the Convention, among other provisions.[118] A seven-judge chamber of the court—and upon petition for a rehearing, the Grand Chamber—upheld the ban on the headscarf in Turkish public universities, while also holding that the ban "was a justified restriction of Sahin's Article 9 rights."[119] Article 9, however, stipulates circumstances under which this right can be restricted.[120] This "clawback" provision states that restrictions will be deemed legitimate if they 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."[121] *Sahin* was the first case the ECtHR decided dealing with a state-instituted ban on the headscarf as worn by a student.[122]

In its analysis of the *Sahin* case, the ECtHR focused on two grounds to justify its decision to uphold the Turkish ban: the threat to secularism as a constitutionally guaranteed right and the promotion of gender inequality by allowing the headscarf.[123] The ECtHR applied a four-part inquiry in determining if Sahin's Article 9 claims had merit, requiring a showing of the following: (1) that there was a demonstrated interference with a protected freedom; (2) that limitation of such freedom is prescribed by law; (3) that limitation of such freedom pursues a legiti-

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[114] *See* Choudhury, *supra* note 15, at 272.

[115] *Id.* at 267, 272–73.

[116] *Id.* at 276.

[117] *Id.*

[118] *Id.* at 276–77.

[119] *Id.* at 277.

[120] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221, 230.

[121] *Id.*

[122] *See* Choudhury, *supra* note 15, at 265.

[123] *Id.*

mate aim (as in the *Dahlab* analysis); and (4) that limitation of such freedom is necessary in a democratic society.[124]

Regarding the first inquiry, the ECtHR found that the Turkish ban on the headscarf in public universities interfered with Sahin's "right to manifest her religion," regarding her decision to wear the headscarf as "motivated or inspired by a religion or belief."[125] The court was not willing to dive further into the question of whether it was in fact a duty mandated by her religion—the court found that the mere influence of her beliefs on her decision to wear the headscarf were sufficient to find an interference.[126] On the second inquiry, the ECtHR determined that the limitation of her freedom to manifest her religious beliefs was prescribed by law.[127] Specifically, the court found that the measure had a "basis in domestic law" and was accessible, such that it was "foreseeable" to Sahin that a refusal to comply would result in her being in violation of that restriction.[128] The court introduced a point it recalled in later cases, such as *Dogru v. France*,[129] regarding the view that "prescribed by law" does not require a formal law, but focuses on the substantive nature of the law, which would include judge-made (if applicable) and statutory law.[130]

The ECtHR's analysis regarding the third inquiry—requiring that state limitation on the freedom of religion be made in pursuit of a legitimate aim, as set forth in Article 9—mirrors the analysis it conducted in the *Dahlab* case.[131] As in *Dahlab*, the court found that the restriction on the ability to wear a headscarf served to protect the rights and freedoms of others and to protect the public order in universities, findings that were not disputed by the parties.[132]

Finally, the court addressed the fourth inquiry under the Article 9 analysis: whether the regulation in question was "necessary in a democratic society."[133] The court found the following:

> [F]reedom of thought, conscience and religion is one of the foundations of a "democratic society" . . . one of the most vital

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[124] *Id.* at 267.

[125] Sahin v. Turkey, App. No. 44774/98, 41 Eur. H.R. Rep. 109, 125–26 (2005).

[126] *Id.*

[127] *Id.* at 126–28.

[128] *Id.*

[129] Dogru v. France, App. No. 27058/05, 49 Eur. H.R. Rep. 179, 194–96 (2009).

[130] *Sahin*, App. No. 44774/98, 41 Eur. H.R. Rep. at 126–27.

[131] *Id.* at 128; Choudhury, *supra* note 15, at 270–71 (discussing the legitimate aim analysis in *Dahlab*).

[132] *Sahin*, App. No. 44774/98, 41 Eur. H.R. Rep. at 128.

[133] *Id.* at 124–25.

> elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not practise a religion.[134]

The court found that the ability to secure to everyone the rights protected by the Convention for everyone requires some ability of the State to restrict a person's outward manifestation of his or her religious beliefs, to ensure mutual tolerance between opposing groups.[135] The court reasoned that individual interest in this right must be subordinated at times, although such subordination comes with a duty by the state to ensure fair and proper treatment.[136] Because differing religious demographics within individual nations will require a contextual approach to ensure the preservation of such tolerance, the court held that a certain "margin of appreciation" would be granted to an individual state to determine the existence and extent of such a necessity for a regulation, as well as the proportionality of the limitation.[137] Given that the sanctions imposed were "mild and ultimately revoked,"[138] the university in question sought to ameliorate the situation in a manner that allows access to the universities for students wishing to wear the veil.[139] The court acknowledged that national courts retained greater competency to interpret various manifestations of religious beliefs within specific contexts and that on matters concerning the relationship between the State and religions—where opinions vary widely—the ECtHR will give great deference to the national decision-making body.[140]

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[134] *Id.*

[135] *Id.* at 131.

[136] *See id.*

[137] *See id.* at 131–32, 134; *see also* Choudhury, *supra* note 15, at 273–74 (discussing "legal pluralism within Europe," as well as acknowledging national courts as competent to interpret religious symbols within "their specific contexts").

[138] Jilan Kamal, *Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine Under Article 9(2)*, 46 Colum. J. Transnat'l L. 667, 692 (2008).

[139] *Sahin*, App. No. 44774/98, 41 Eur. H.R. Rep. at 134.

[140] *See* Choudhury, *supra* note 15, at 273–74.

3. *Dogru v. France*: Refining the Balancing Test

Dogru is another example of the ECtHR applying the balancing test formulated in the *Sahin* case. Although *Sahin* involved a state implemented ban on wearing a veil, the ECtHR has since used similar reasoning to uphold a restriction on the headscarf using a more contextual approach. In *Dogru*, decided in 2009, the ECtHR decided a case involving a French student who, in 1999, was expelled from school for failing to remove her headscarf during physical education classes.[141] The student claimed her expulsion was an infringement of her right to manifest her religion as guaranteed by Article 9 of the Convention.[142] The court began its analysis by stating that the ban on wearing the headscarf during a physical education class and Dogru's subsequent expulsion for refusing to remove it represented a restriction on her right to manifest her religious beliefs.[143]

In determining that the restriction in question was "prescribed by law," the court noted that the events serving as the basis for Dogru's claim occurred prior to the enactment of the Act of 2004.[144] The court held that, although banning headscarves in physical education classes was not mandated by any particular law, the measures were justified based on three factors that existed in statutory and regulatory provisions, as well as in decisions of the Conseil d'Etat: "the duty to attend classes regularly, the requirements of safety and the necessity of dressing appropriately for sports practice."[145] Finding that "law" equates to substance, not formality, the court found the restriction had "a sufficient legal basis in domestic law."[146] The next requirement the court focused on was that the restriction had a "legitimate aim."[147] The court rather succinctly—in one sentence—found that the interference "pursued the legitimate aims of protecting the rights and freedom of others and protecting public order," thereby satisfying that requirement.[148] In fact, to date, the ECtHR has not considered a single case under Article 9 where the decision was based on a finding that the State in question had failed to pursue a "legitimate aim."[149]

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[141] *Dogru*, App. No. 27058/05, 49 Eur. H.R. Rep. at 182.
[142] *Id.* at 190.
[143] *Id.* at 193.
[144] *Id.* at 194.
[145] *Id.*
[146] *Id.* at 196.
[147] *Dogru*, App. No. 27058/05, 49 Eur. H.R. Rep. at 196.
[148] *Id.*
[149] Kamal, *supra* note 138, at 680.

Finally, the court turned its attention to the requirement that an infringement be "necessary in a democratic society."[150] The court, recognizing that freedom of religion has an external component—the "freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares"—recognized that it may be necessary to place restrictions on this freedom in a pluralistic society.[151] The court listed numerous and varied ways different states in Europe balance freedom and restriction, finding that legitimate limitations on the freedom of religion are sometimes required to protect "the rights . . . of others, public order and public safety."[152] As such, a headscarf ban imposed during physical education classes was reasonable because it was necessary to comply with school rules on health and safety.[153] The court recognized that a "margin of appreciation" must be afforded Member States in regards to establishing "delicate relations between the Churches and the State."[154] This "margin of appreciation" analysis has also been used by the ECtHR in jurisprudence dealing with alleged Article 10 violations (freedom of expression), most notably in areas dealing with obscenity and blasphemy.[155] Ultimately, the ECtHR found that the interference—a requirement to remove the headscarf or face expulsion—was proportionate to the pursued aim of ensuring health and safety during physical education classes, summarily finding no violation of Article 9 of the Convention.[156]

III. Analysis

For Sarkozy and Parliament, an outright burqa ban in France represented an unworkable option in 2008.[157] In an attempt to find middle ground, Sarkozy argued for Parliament to vote on a non-binding resolution that would affirm that the full face-covering burqa violates the French Republic's fundamental principles of secularism and gender

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[150] *Dogru*, App. No. 27058/05, 49 Eur. H.R. Rep. at 196.

[151] *Id.* at 196–97.

[152] *Id.* at 197, 198.

[153] *Id.*

[154] *Id.* at 199.

[155] Ovey & White, *supra* note 113, at 332–33 (discussing how a margin of appreciation is given to States dealing with the regulation of freedom of expression under Article 10 in matters involving offense to personal convictions, or religious matters).

[156] *Dogru*, App. No. 27058/05, 49 Eur. H.R. Rep. at 200.

[157] *See* Charles Bremner, *Sarkozy Aims to Outlaw Niqab on Public Transport but Outright Ban Is 'Unworkable,'* TimesOnline (London) (Jan. 15, 2010), http://www.timesonline.co.uk/tol/news/world/europe/article6988737.ece.

equality.[158] The newfound call for a full burqa ban is thought to have reemerged in light of the defeat of Sarkozy's Union for a Popular Movement (UMP) against the Front National party in regional elections in March 2010.[159] Even Sarkozy, in light of his party's recent defeats, pushed for a stronger burqa ban in an effort to seem more conservative regarding immigration.[160] During a debate on the text of the burqa ban, Jean-Francois Cope, head of the ruling UMP party in Parliament, agreed to send the proposed ban to the Constitutional Council for approval, indicating a compromise over the ban.[161] As the Council has upheld the burqa ban based on the reasons discussed above, the responsibility for further review lies with the ECtHR.

To understand how the ECtHR may react to a challenge of the burqa ban, a prediction of the legal arguments by the French government in support of the law is necessary. Two overarching constitutional principles have been invoked by the French government when it has attempted to pass restrictions on religious expression relating to dress: protection of secularism in France and the protection of gender equality.[162] Whether a judicial body hearing a claim involving a restriction on an individual's right to religious expression will adequately protect that individual's rights will depend on the severity of the restrictions passed in Parliament. Although the jurisprudence in this area lends itself to the conclusion that a ban would be upheld, this Note makes two requests to the judicial bodies eligible to hear challenges to the ban: first, to require the French government to show greater justification for such a ban; and second, to provide less deference to the decisions of the French Parliament in the absence of greater justification compared to the deference shown to other similar restrictions in the past.

A. *Constitutional Failure of the French Legal System*

When first comparing French and U.S. constitutional protections, particularly regarding the freedoms of religion and expression, the two systems seem similar, having established the "world's two oldest, extant

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158 *Id.*

159 *See* Jim Wolfreys, *Did Sarkozy Boost the Front National?*, GUARDIAN (London) (Mar. 24, 2010), http://www.guardian.co.uk/commentisfree/2010/mar/24/nicolas-sarkozy-front-national.

160 *See id.*

161 *See* Le Roux, *supra* note 18.

162 *See, e.g.*, Mancini, *supra* note 51, at 2644; Bremner, *supra* note 7; Chrisafis, *supra* note 2; Heneghan, *supra* note 10 (demonstrating that when restrictions on dress as a manifestation of religious belief are argued for (or against), the two principles of secularism and gender equality are at the root of those arguments).

national constitutional texts guaranteeing freedom of religion" at roughly the same time.[163] From there, however, the approach to constitutional issues diverges tremendously, with the United States vesting constitutional authority in the judicial branch,[164] and France vesting authority in its legislature.[165] In the United States, Supreme Court Justices interpret the Constitution, whereas in France judges presume the constitutionality of acts of Parliament.[166] Admittedly, legislative changes in France are seeking to give greater constitutional oversight to a body other than Parliament.[167] Nevertheless, the long history of presumptive correctness of Parliamentary decisions plays a role in how proposed restrictions on religious dress in public play out.

The hesitation over whether to enact a complete burqa ban in public or to limit the ban to state premises stemmed from concerns of political backlash, rather than constitutional concerns.[168] Nevertheless, it seems apparent that even those political leaders who see the burqa as anathema to French values, such as Sarkozy, feared that a complete ban would not pass constitutional muster.[169] The possibility that a law invoking constitutional principles such as secularism or gender equality would be challenged by an adversely impacted French citizen, and likely reach the Constitutional Council, contributed to these concerns.[170] These concerns explain the response by UMP leader Cope to submit the law for approval by the Constitutional Council before it would go into effect: submitting the law for approval would prevent the law from being overturned later by a burqa-clad woman challenging such a law, and were she successful, exposing the party as weak, or inept.[171]

Until reviewing the ban on the veil in public, the Council had never reviewed a case concerning whether a statute passed by Parliament

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[163] T. Jeremy Gunn, *Religion and Law in France: Secularism, Separation, and State Intervention*, 57 Drake L. Rev. 949, 949 (2009).

[164] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing that judicial review is vested in the Supreme Court to hear constitutional issues).

[165] *See, e.g.*, Gunn, *supra* note 163, at 974 (noting that acts of Parliament are assumed to be constitutional).

[166] *See id.*

[167] *See* Custos, *supra* note 65, at 377–78.

[168] *See* Bremner, *supra* note 157. The lack of concern over constitutional challenges to the ban is not particularly surprising when one considers that Parliamentary statutes have traditionally been given constitutional validity by their mere passage. *See* Gunn, *supra* note 163, at 974.

[169] *See* Bremner, *supra* note 157.

[170] *See id.*; Custos, *supra* note 65, at 377–78.

[171] *See* Le Roux, *supra* note 18.

violated the secularism requirement of the French Constitution.[172] Although leading up to the decision there was vast speculation as to how the Council might approach a challenge to a restriction on a woman's right to veil as a manifestation of her religious beliefs, the actual decision holding the ban constitutional ultimately followed the reasoning in prior jursiprudence by the Conseil d'Etat and the ECtHR: as a balancing act between the right to manifest one's religious beliefs with the right to gender equality or secularism.[173]

The invocation of constitutional principles by Sarkozy and members of Parliament as a basis for the promulgation of the burqa ban[174] makes it unlikely that the concerns over the burqa will be left to local authorities to manage. As such, the Council had an opportunity—and arguably an obligation—to require the government to defend this restriction with powerful and well-reasoned explanations as to how the law preserves the constitutional principles invoked, rather than presuming the constitutionality of the law based on its passage in Parliament.[175] Simply invoking secularism or gender equality without a determination that the law is necessary to preserve those principles—or that such principles are at all threatened by the burqa—is inadequate.[176]

As in the Conseil d'Etat's advisory opinion on headscarves in public schools prior to the promulgation of the Act of 2004, the Council should have required evidence that the burqa's presence in public violates the principles of secularism through some proselytizing effect on others, thus endangering secularism.[177] It was insufficient to apply the same reasoning presented by the government in the debate over proposed headscarf restrictions, as the proselytizing effect of headscarves in secondary schools invoked the malleability of young students' be-

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[172] *See* Gunn, *supra* note 163, at 969 n.117 (noting that the Council did speak to secularism in its finding that the European Constitution was not incompatible with the secularism requirements in the French Constitution, as previously discussed).

[173] Frances Raday, *Secular Constitutionalism Vindicated*, 30 Cardozo L. Rev. 2769, 2792 (2009). Raday discusses restriction on dress in the context of dress representing the expression of one's religious views. *Id.* at 2790–95.

[174] *See* Bremner, *supra* note 7; Chrisafis, *supra* note 2.

[175] *See* Gunn, *supra* note 163, at 974; *see also* Lucas Swaine, The Liberal Conscience: Politics and Principle in a World of Religious Pluralism 18–19 (2006) (arguing that it is morally problematic for liberal governments to institute laws and policies, particularly in the context of legal restrictions on polygamy, without well-reasoned explanations to justify the regulations of theocrats).

[176] *See generally* Swaine, *supra* note 175, at 17–20 (discussing the fact that liberal governments owe an explanation for "coercing theocrats where they break the law" and should justify such laws with "explanations . . . that are powerful and well reasoned").

[177] *See* Choudhury, *supra* note 15, at 230.

liefs[178]—a factor that seems far less plausible when applied to adult women who are in public and who may have little interaction with other citizens.

Likewise, to show that the restriction of religious dress is proportional to the harm alleged to gender equality, the Council should have required evidence by the government supporting a claim that the burqa contradicts the constitutional principle of gender equality.[179] Had Parliament limited the ban to state premises—rather than a complete ban—it would have opened the government to criticism that gender equality could not warrant such a restriction, as a partial ban would fail to protect gender equality under the assumption that the burqa threatens this constitutional principle.[180] Logically, however, if the burqa truly violates the constitutional principle of gender equality, then the government has a positive obligation to ban the burqa entirely.[181] Applying this logic, limiting the ban to public spaces undermines this constitutional argument: certainly, if the burqa is a threat to gender equality in public, it is a threat to such equality in private as well.[182] One might envision the need for such a law for various logistical reasons—such as for ease of providing identification or out of security concerns—but lawmakers who denounce the burqa on constitutional principles should have been required by the Council to defend the ban on those principles as well. Without such a defense, a moral dilemma arises wherever the government violates an individual's right to manifest her religious beliefs—excessively burdening her and making religious observation difficult, or impossible—without adequate justification for doing so.[183]

B. *Less Appreciation for the Margin of Appreciation*

In reviewing Article 9 claims, particularly those involving the manifestation or expression of religious beliefs, the ECtHR had not heard a

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[178] *See id.* at 229–30; *see also* Dahlab v. Switzerland, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001), www.echr.coe.int/echr/en/hudoc/ (follow "HUDOC database" hyperlink; then check "Decision" box on left side; then type "42393" in "Application Number Field"; then click "Search" hyperlink; then click hyperlink to only result) (discussing the impact the presence of the headscarf in public schools would have on students).

[179] *See, e.g.*, Dogru v. France, App. No. 27058/05, 49 Eur. H.R. Rep. 179, 194–96 (2009) (finding that a showing that a particular restriction of religious dress is proportionate to a legitimate aim by the state is a justifiable restriction under art. 9(2)).

[180] *See* Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 Cardozo L. Rev. 2669, 2684 (2009).

[181] *Id.*

[182] *See id.*

[183] *See* Swaine, *supra* note 175, at 16.

case under Article 9(2) until 1993.[184] Nevertheless, the jurisprudence in this area has grown alongside the growth of the Muslim population in Europe.[185] Among the cases heard under Article 9(2), almost all decisions of the ECtHR "have hinged . . . [on the] necessary in a democratic society" requirement developed in the legal standard discussed above.[186] The "necessary in a democratic society" inquiry is not just used for freedom of religion claims, but also in Articles 8, 10 and 11 of the Convention protecting privacy, expression and assembly.[187] Establishing that an implemented restriction is necessary in a democratic society requires a showing that the action taken is in response to a pressing social need and that the interference "is no greater than necessary to address that pressing social need."[188] As discussed above, however, the ECtHR has found that States enjoy a certain—although not unlimited—margin of appreciation when imposing restrictions on protected freedoms under the Convention.[189] It is in applying this "margin of appreciation" doctrine, particularly in dealing with Article 9(2) challenges, where the ECtHR has failed to adequately delineate a standard by which domestic governments can legitimately exercise a restriction on an individual's right to express his or her religious beliefs.[190]

Although caselaw before the ECtHR relating to Article 9(2) challenges is fairly limited, a trend has emerged in the factual background of the cases that fall into three categories: (1) government recognition of religious organizations or leadership within those organizations; (2) proselytism; and (3) ostensible religious dress or symbols in schools.[191] To date, the ECtHR has only heard cases involving restrictions on religious dress in the context of public schools, as discussed in the *Dahlab*, *Sahin*, and *Dogru* cases.[192] Ultimately, those decisions have rested on

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[184] *See* Kamal, *supra* note 138, at 672.

[185] *See id.*

[186] *Id.* at 681.

[187] European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 120, arts. 8–11; Ovey & White, *supra* note 113, at 232 (discussing application of this inquiry into restrictions on the freedoms protected in Articles 8 through 11 generally).

[188] Ovey & White, *supra* note 113, at 232.

[189] *See id.* at 232–39 (discussing the "margin of appreciation" standard).

[190] *See generally* Kamal, *supra* note 138, 693–95 (arguing that the ECtHR has interpreted and applied the "margin of appreciation" standard inconsistently).

[191] *See id.* at 684–92. Kamal identifies four categories, dividing recognition of religious leadership and religious organizations into two distinct categories. This Note does not discuss those cases and because the ECtHR treats those streams of cases the same under the "margin of appreciation" standard, they are grouped together here.

[192] *See* discussion *supra* Part II.C.

what is described in the *Dogru* case as a "margin of appreciation which must be left to the Member States with regard to the establishment of the delicate relations between the churches and the state . . . ."[193] The court has failed to consider whether a pressing social need was actually addressed in these cases and whether the restrictions imposed were the least restrictive means to addressing that social need.[194] Instead, the ECtHR simply chose to take the government's word on the matter as sufficient.[195]

The court has failed to examine the facts in the restrictions in play to determine whether the state action taken addresses a pressing social need and, if so, was the least restrictive alternative to address that need.[196] Nevertheless, the court has conducted more detailed factual analyses in other cases involving state recognition of religious organizations or leadership, as well as in cases involving proselytizing concerns.[197] In these cases, the court has not applied a margin of appreciation, and has always found state-imposed restrictions in violation of Article 9(2).[198] Scholars have found the court's jurisprudence in this area inconsistent and often confusing, particularly in its apparent selectivity in whether to apply the "pressing social need" standard for determining if a restriction is "necessary in a democratic society."[199]

With Parliament moving forward with a full ban on the burqa in public spaces, the ECtHR has a unique opportunity to synthesize some of the important issues underlying such a ban by choosing to abandon its margin of appreciation standard and focus on the "pressing social need" standard.[200] In applying this rationale, the court would place the burden on France to show that there is a pressing social need that calls for a burqa ban—whether on state premises or entirely in the public sphere—requiring France to defend the position that the burqa is anathema to both secularism and gender equality, and to demonstrate that a ban is the most appropriate restriction available to address such con-

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[193] *Dogru*, App. No. 27058/05, 49 Eur. H.R. Rep. at 199.

[194] *See id.* at 200.

[195] *See, e.g.*, *id.* (finding that "whether the pupil expressed a willingness to compromise, as she maintains, or whether . . . she overstepped the limits of the right to express and manifest her religious beliefs on the school premises, as the Government maintains . . . falls squarely within the margin of appreciation of the state").

[196] *See* Kamal, *supra* note 138, at 696–99.

[197] *See id.*

[198] *Id.*

[199] *Id.* at 696, 699; *see also* Rorive, *supra* note 180, at 2676 (arguing that the use of the margin of appreciation standard "has made it difficult to develop a coherent model of State-religions relations").

[200] *See* Kamal, *supra* note 138, at 705–06.

cerns.[201] By abandoning a "margin of appreciation" default in analyzing the issue of religious dress, the court can determine whether the restriction of this particular manifestation of religion is appropriate, rather than taking France's word as truth.

The *Sahin* case shows that—although the court acknowledged that a pressing social need existed in Turkey to prevent extremist political movements from taking hold inside public universities, a threat to both the principles of secularism and gender equality—the court did not question whether the headscarf ban in this particular case was a proportional action to address those concerns.[202] The court chose not to look at the specific facts behind Leyla Sahin's circumstances, and instead allowed Turkey to impose such a restriction in defense of secularism and gender equality with no analysis showing that the restrictions meet those ends.[203] Criticism of this decision and the court's use of the margin of appreciation focuses on the court's unwillingness to consider alternative meanings surrounding the headscarf, as well as pointing out the inconsistency inherent in a State argument that the headscarf offends gender equality, but recognizes no positive obligation to prohibit it completely.[204]

Should the ECtHR choose to review a ban on the burqa in the same manner as it did in *Sahin*, it may inadvertently promote the populist imagery on the meaning of the burqa.[205] This popular imagery is deeply entrenched in the political debate, both in France and across Europe, as evidenced by the fact that nearly all cases involving restrictions on religious dress are aimed at Muslim men or women.[206] The ECtHR, in reviewing the French law, should focus great attention on the political climate driving the decision-making behind Parliament.[207] This would help the court determine if the call for a ban is truly driven by a threat to *laïcité* and gender equality, or is simply a move to gain the political support of French citizens seeking stronger immigration restrictions. Restrictions on religious dress in public schools—such as the headscarf ban in France—are legitimate state actions taken to secure *laïcité* and gender equality, as schools are tools by which the state creates

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[201] *See id.* (noting that adopting the "pressing social need" standard will require governments to demonstrate specific grounds for their decisions to restrict religious expression).

[202] *See* Bennoune, *supra* note 99, at 382; Rorive, *supra* note 180, at 2683.

[203] *See* Rorive, *supra* note 180, at 2683.

[204] *See id.* at 2683–84.

[205] *See id.* at 2683–85.

[206] *See id.*

[207] *See* Bowen, *supra* note 42, at 12.

citizens who are prepared to become part of French society and who respect the constitutional values of *laïcité* and gender equality.[208] Pluralism in such institutions threatens the role of secondary schools (similarly to universities in Turkey) in this regard.[209] This argument, however, falls short when the ban or restriction on religious dress moves out of schools and into the streets of Paris. The ECtHR must not give France a margin of appreciation, but must require France to show that allowing the burqa to be worn in other contexts equally threatens *laïcité* and gender equality and that there is a substantial need to restrict religious expression through the ban—either entirely or in particular public spaces—to preserve those values for all citizens.[210] Eliminating the margin of appreciation standard for determining what is necessary in a democratic society will protect *laïcité* and gender equality from being hijacked by politicians hoping to win elections by targeting minorities and their rights to express their religious beliefs. Additionally, eliminating the margin of appreciation will allow the ECtHR to enunciate a clearer standard when it comes to restricting such religious expression.

Conclusion

The notion of veiling is a very sensitive issue for many—from Muslim women who freely wear the veil out of respect for their faith to outspoken feminists who view the veil as an archaic patriarchal symbol that denigrates and oppresses women. Whatever the views on the issue, it is dangerous to assume that those who choose to veil do so for any particular reason and to assume that the veil is anathema to the democratic safeguards of equality and secularism. In the wake of the Constitutional Council's deference to Parliament in upholding the burqa ban, the ECtHR should require a stronger burden on the French Parliament to show that the burqa cannot coexist with its constitutional ideals, rather than blindly accept the notion that they are incompatible. Although France is on the front lines of this debate, other European nations have taken their lead and are mulling over their own burqa restrictions. Although there are undoubtedly salient arguments both for and against the burqa, by refusing to engage in the arguments, the ECtHR does injustice to the ideals upon which it was founded after World War II: to supervise the Convention and to "serve as an alarm that would bring

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[208] *See id.*

[209] *See id.*

[210] *See* Kamal, *supra* note 138, at 694–95 (noting that simply stating that a state action is justified in principle does not mean it is "entitled to deference").

such large-scale violations of human rights to the attention of the Western European states in time for action to be taken."[211] It also proves an injustice to women who view the veil as a sort of "second skin":[212]

> [The veil is] like a second skin to me. It is supple as a living membrane and moves and flows with me. There is beauty and dignity in its fall and sweep. It is my crown and my mantle, my vestments of grace. Its pleasures are known to me, if not to you.[213]

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[211] *See id.* at 701–02 (quoting D.J. Harris et al., Law of the European Convention on Human Rights 2 (1995)).

[212] Mohja Kahf, *From Her Royal Body the Robe Was Removed: The Blessings of the Veil and the Trauma of Forced Unveilings in the Middle East, in* The Veil: Women Writers on Its History, Lore and Politics 27, 27 (Jennifer Heath ed., 2008).

[213] *Id.*