

# THE VEIL THAT COVERED FRANCE'S EYE: THE RIGHT TO FREEDOM OF RELIGION AND EQUAL TREATMENT IN IMMIGRATION AND NATURALIZATION PROCEEDINGS

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Discrimination based upon religious beliefs and expressions forms the basis for some of the most serious deprivations of civil and political rights. The religious beliefs and expressions that are commonly the ground for discrimination include all of the traditional faiths and justifications from which norms of responsible conduct—that is, judgments about right and wrong—are derived.<sup>1</sup>

[I]f not all, the greater part of the history of humanitarian intervention is the history of intervention on behalf of persecuted religious minorities.<sup>2</sup>

## I. INTRODUCTION

In June 2008, France's highest administrative court upheld a decision to deny citizenship to a Muslim woman because, essentially, she was 'not French enough.'<sup>3</sup> This decision incited both praise and outrage in the international human rights arena regarding considerations such as the right to freedom of religion, gender equality, and citizenship.

In 2000, Faiza Silmi married Karim, a French national of Moroccan descent, and they moved to France, where the couple had four children.<sup>4</sup> Silmi chose to wear the niqab, a burqa that covers all her body except her eyes, which

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<sup>1</sup> Nathan A. Adams, IV, *A Human Rights Imperative: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT'L L.J. 1, 2 (2000) (quoting M.S. McDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 653 (1980)).

<sup>2</sup> *Id.* at 22-23 (quoting MANUCHEHR GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 17 (1962)).

<sup>3</sup> Katrin Bennhold, *A Veil Closes France's Door to Citizenship*, N.Y. TIMES, July 19, 2008, at A1, available at [http://www.nytimes.com/2008/07/19/world/europe/19france.html?\\_r=1](http://www.nytimes.com/2008/07/19/world/europe/19france.html?_r=1) (discussing the Council of State's June 27 ruling that Silmi's "radical" practice of Islam was incompatible with French values like equality of the sexes").

<sup>4</sup> *Id.*

are visible through a narrow slit.<sup>5</sup> She wears the niqab because she doesn't "like to draw men's looks" and wants to "belong to [her] husband and [her] husband only."<sup>6</sup> In 2004, Silmi applied for French citizenship, but France denied her request a year later because of "insufficient assimilation" into France.<sup>7</sup> A report from a government commissioner to the Council of State reflected this opinion, it explained that "she leads a life almost of a recluse, cut off from French society" and "leav[es] the house only to walk with her children or visit relatives."<sup>8</sup> In her statements to immigration officials, Silmi objected to the decision, arguing that other immigrants granted French citizenship maintain "ties with their culture of origin."<sup>9</sup>

Specifically, France denied Silmi citizenship because she "has adopted a radical practice of her religion incompatible with the essential values of the French community, notably with the principle of equality of the sexes, and therefore she does not fulfill the conditions of assimilation" which France's Civil Code requires for gaining citizenship.<sup>10</sup> In an interview following the ruling, Silmi refuted the notion that she only wears the niqab because she is following an order from her husband.<sup>11</sup> Specifically, Silmi said she "want[s] to tell them: It is my choice. I take care of my children, and I leave the house when I please. I have my own car. I do the shopping on my own. Yes, I am a practicing Muslim, I am orthodox. But is that not my right?"<sup>12</sup>

Until this decision, France only denied citizenship on the basis of religion when the government believed applicants were close to fundamental groups.<sup>13</sup> The *Silmi* decision<sup>14</sup> received "almost unequivocal support" from political leaders, such as Fadela Amara, French Minister for Urban Affairs, who called the niqab "a prison" and "straitjacket."<sup>15</sup> A practicing Muslim, Amara insists the niqab "is not a religious insignia but the insignia of a totalitarian political project that promotes inequality between the sexes and is totally lacking in democracy . . . ."<sup>16</sup>

This ruling presents potential for problems beyond the headscarf. As Mohammed Bechari, President of the National Federation of French Muslims points out, it is difficult to isolate a beginning or end to labeling radical behavior.<sup>17</sup> For example, he questions whether the length of a man's beard or a man dressed as a rabbi or a priest could be deemed radical behavior.<sup>18</sup> Furthermore,

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *France Denies Citizenship to Muslim Woman in Body Veil*, USA TODAY, July 16, 2008, [http://www.usatoday.com/news/world/2008-07-16-France-Muslim\\_N.htm](http://www.usatoday.com/news/world/2008-07-16-France-Muslim_N.htm).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (citing the Council of State's June 27 ruling).

<sup>11</sup> Bennhold, *supra* note 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Conseil d'État [CE] [highest administrative court], June 27, 2008, decision no. 286798, Section du contentieux, *available at* <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000019081211>.

<sup>15</sup> Bennhold, *supra* note 3.

<sup>16</sup> *Id.*

<sup>17</sup> *France Denies Citizenship to Muslim Woman in Body Veil*, *supra* note 8.

<sup>18</sup> *Id.*

M'hammed Henniche, of the Union of Muslim Associations in the Seine-St.-Denis district north of Paris, fears that the *Silmi* decision could lead to arbitrary interpretations of what constitutes “radical” Islam, such as the annual pilgrimage to Mecca or daily prayer.<sup>19</sup>

Certainly, the *Silmi* decision fueled the already-controversial French headscarf affair. The decision prompts further questions about the separation of church and state in France, particularly to what lengths the French government will go to secure its desired interpretation of such separation. *Silmi*'s legal battle is not over. She is taking her case to the European Court of Human Rights (“ECHR”).<sup>20</sup>

This Note examines relevant French domestic law and international human rights instruments, and argues that while immigration and naturalization decisions remain an exercise of broad sovereign powers, the emerging human rights norm to be free from discrimination should apply in naturalization proceedings. Furthermore, despite judicial deference and flexibility to party-states, the Conseil d'État's *Silmi* decision violated this norm.

Part II provides a legal framework for analyzing the *Silmi* decision in light of the emerging human rights norm to be free from discrimination in matters of immigration and naturalization. This section examines French constitutional law, including the significant absence of the plenary power in immigration law in French jurisprudence. Part III reviews the historical background of religion in France, including the country's history of separation of church and state, Islam in France, and the recent controversy surrounding women wearing the headscarf in schools. Part IV discusses freedom of religion generally, including the difficulty of defining religion itself. Parts V and VI examine freedom of religion and freedom to manifest religion under international law, respectively, including relevant ECHR precedent. Part VII discusses relevant non-binding international instruments. Finally, Part VIII analyzes the *Silmi* decision, concluding that it violates the emerging human rights norm to be free from discrimination, including on religious grounds, in matters of immigration and naturalization.

## II. LEGAL FRAMEWORK FOR ANALYSIS

The legal framework for analysis of the *Silmi* decision includes the French Constitution, the French judicial system, French legal treatment of immigration legislation, and France's international legal obligations.

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<sup>19</sup> Bennhold, *supra* note 3.

<sup>20</sup> See Lizzie Davies, *The Young French Women Fighting to Defend the Full-Face Veil*, THE OBSERVER, Jan. 31, 2010, at 40, available at <http://www.guardian.co.uk/world/2010/jan/31/french-muslim-burqa-veil-niqab>.

In order to submit an application to the ECHR, petitioners must first exhaust all domestic remedies as required by European Convention Article 35. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 35, May 11, 1994, 2061 U.N.T.S. Annex A(7) [hereinafter European Convention]. Thus, the disposition of this case by the *Conseil d'État*, France's highest administrative court, likely satisfies the Article 35 requirement.

a. *French Constitution*

The French Constitution provides a foundation for analyzing the *Silmi* decision as to the country's domestic treatment of its citizens and its legal hierarchical treatment of international obligations. Notably, its constitution states, "France shall be an indivisible, secular, democratic and social Republic. It shall ensure equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs."<sup>21</sup>

Regarding France's international obligations, the constitution could more explicitly detail the treatment of treaties and international instruments in French domestic legality.<sup>22</sup> Article 55 of the Constitution makes the obligations of international human rights instruments self-executing in France.<sup>23</sup> Moreover, Article 55 establishes such international treaties as superior to French domestic laws, when conflict exists.<sup>24</sup> However, Article 55 explicitly limits the supremacy of any such instrument "to its publication and to its application by the other party."<sup>25</sup>

Accordingly, this Note considers France's domestic laws and international legal obligations as one legal body, rather than two distinct sets of obligations. France's constitutional treatment of immigration legislation, which pertains to both domestic and international obligations, is particularly important.

b. *French Court System*

This analysis considers the roles of two French judicial bodies—the *Conseil d'État* and the *Conseil Constitutionnel*. The *Conseil d'État* operates as the "supreme court of the [French] administrative court system."<sup>26</sup> The court is both the highest administrative court and performs governmental advisory and consultative functions.<sup>27</sup> The *Conseil d'État* hears cases brought by private citizens, whereas the *Conseil Constitutionnel* hears questions brought by gov-

<sup>21</sup> 1958 CONST. art. 1 (Fr.) translated at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/la-constitution-du-4-octobre-1958.5071.html> (follow hyperlink for "version anglaise" for .pdf of English translation).

<sup>22</sup> Martin A. Rogoff, *Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 406, 435 (2006).

<sup>23</sup> 1958 Const. art. 55. See also Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 373-74 (1991).

<sup>24</sup> Fr. Const. art. 55. See also van der Vyver, *supra* note 23 at 374.

<sup>25</sup> Rogoff, *supra* note 22, at 435 (citation omitted). Fr. Const. art. 55 ("Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.").

<sup>26</sup> ANDREW WEST ET AL., *THE FRENCH LEGAL SYSTEM* 88 (2d ed. Oxford Univ. Press 2005) (1998).

<sup>27</sup> *Id.* There are six sections of the *Conseil d'État Constitutionnel*—five administrative and one judicial; each section also has its own president. *Id.* at 92. The Prime Minister is the President of the *Conseil d'État*, but in practice, it is under the Vice President's control. *Id.* RAYMOND YOUNGS, *ENGLISH, FRENCH AND GERMAN COMPARATIVE LAW* 78 (2d ed. Routledge Cavendish 2006) (1998). Approximately 250 *conseillers*, *maitres des requites*, and *auditeurs* serve in both the administrative and judicial divisions. *Id.* Generally, five judges hear cases; however, important cases are heard by either thirteen senior *conseillers* or seventeen less senior judges. *Id.*

ernment officials.<sup>28</sup> While the *Conseil d'État* does not have explicit constitutional powers of judicial review, governments generally defer to its advisory opinions as authoritative, even in the area of immigration policy.<sup>29</sup>

The primary purpose of the *Conseil Constitutionnel* is to rule on the constitutionality of legislation proposed by Parliament or the Government.<sup>30</sup> In its primary judicial function, the *Conseil d'État* operates as a court of cassation by adjudicating the legality of decisions by lower administrative courts and certain special administrative jurisdictions.<sup>31</sup> Notably, although the *Conseil Constitutionnel's* decisions are not legally binding on the *Conseil d'État*, which issued the *Silmi* ruling, the *Conseil d'État* recognizes such constitutional interpretations as binding.<sup>32</sup> Thus, both of these courts play a role in judicial review of French immigration law.

*c. Absence of Plenary Power Doctrine of Immigration Law*

In United States jurisprudence, the plenary power doctrine of immigration law grants Congress and the Executive Branch authority to regulate immigration without judicial review.<sup>33</sup> Specifically, the United States Supreme Court has exempted the federal government's absolute immigration power from constitutional restraints, including judicial review.<sup>34</sup> The Supreme Court secured this absolute power by establishing the doctrine in the foreign affairs power, rather than the constitutionally enumerated powers.<sup>35</sup> For example, in *Chae Chan Ping v. United States*,<sup>36</sup> the Supreme Court "held Congress's power to pass legislation regulating immigration to be inherent in U.S. sovereignty . . . ."<sup>37</sup> There, the Court essentially removed itself from reviewing immigration legislation<sup>38</sup> by stating that "[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . . [I]ts determination is conclusive upon

<sup>28</sup> Elisa T. 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, 602 (2004).

<sup>29</sup> Meredith K. Olafson, Note, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 448 (1999).

<sup>30</sup> Susan Soltesz, Note, *Implications of the Conseil Constitutionnel's Immigration and Asylum Decision of August 1993*, 18 B.C. INT'L & COMP. L. REV. 265, 269 (1995). In August 1993, the Conseil Constitutionnel held unconstitutional eight articles of the French Parliament's 1993 immigration and asylum laws. *Id.* at 265.

<sup>31</sup> WEST, *supra* note 26, at 91.

<sup>32</sup> Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265, 310, 313-14 (1988). Although likewise not legally bound by the *Conseil Constitutionnel's* decisions, the *Cour de Cassation*, France's highest court, also recognizes the *Conseil Constitutionnel's* decisions as binding. *Id.* at 310-11.

<sup>33</sup> Olafson, *supra* note 29, at 433. In a series of cases throughout the last century, the United States Supreme Court developed this doctrine "as a largely extraconstitutional theory of federal legislative authority over immigration." Anne E. Pettit, Note, "One Manner of Law": *The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165, 173 (1996).

<sup>34</sup> Olafson, *supra* note 29, at 438 (citation omitted).

<sup>35</sup> *Id.* (citation omitted).

<sup>36</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>37</sup> Pettit, *supra* note 33, at 185 (citing *Chae Chan Ping*, 130 U.S. at 604.).

<sup>38</sup> *Id.* at 173.

the judiciary.”<sup>39</sup> Despite the court’s extension of certain constitutional protections to noncitizens, immigration law in the United States remains largely unreviewable by the judiciary.<sup>40</sup>

Other nations view the plenary power doctrine as both contradictory to present-day international law and in need of adjustment to abide by such law. Significantly, French constitutional law, unlike the United States’, does not include a plenary power doctrine of immigration law. Indeed, the *Conseil Constitutionnel* regularly reviews the constitutionality of immigration legislation.<sup>41</sup> Thus unrestricted by the plenary power doctrine or *stare decisis*,<sup>42</sup> the French judiciary uses this flexibility to integrate international human rights norms into its immigration law jurisprudence.<sup>43</sup> For example, after extensive judicial review of immigration legislation, the *Conseil Constitutionnel* recently increased the rights of aliens when it invalidated eight provisions of the “Pasqua Bill,” policy aimed at zero illegal immigration.<sup>44</sup> The *Conseil Constitutionnel* refused to allow the Parliament unregulated legislative power in determining alien rights.<sup>45</sup> The absence of the plenary power doctrine allows France to incorporate its international obligations, discussed next, into its immigration law jurisprudence.

#### *d. France’s International Obligations*

France is a party to multiple international accords. Principally, France is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”)<sup>46</sup> and the International Covenant

<sup>39</sup> *Chae Chan Ping*, 130 U.S. at 606.

<sup>40</sup> See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-going Abuses of Human Rights*, 10 ASIAN L.J. 13, 14 (2003); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1091 (1995).

<sup>41</sup> Soltesz, *supra* note 30, at 265, 269. In August 1993, the *Conseil Constitutionnel* held unconstitutional eight articles of the French Parliament’s 1993 immigration and asylum laws. *Id.* at 265.

<sup>42</sup> Although the *Conseil Constitutionnel* is not bound by its prior decisions, it refers to them “in order to establish continuity and maintain authority.” *Id.* at 270.

<sup>43</sup> Olafson, *supra* note 29, at 446.

<sup>44</sup> Soltesz, *supra* note 30, at 265, 285. The Pasqua Laws forbade foreign graduates from working in France, denied residency to foreign spouses in France who lived in France illegally prior to marriage, and increased police power to deport illegal immigrants. Jennifer Kolstee, Comment, *Time for Tough Love: How France’s Lenient Illegal Immigration Policies Have Caused Economic Problems Abroad and Social Turmoil Within*, 25 PENN ST. INT’L L. REV. 317, 326 (2006). The laws also required children of foreign parents born in France to declare voluntarily their wish to become French citizens, thereby weakening the family unit. *Id.* at 326-27. The *Conseil Constitutionnel* invalidated the legislation specifically on French constitutional principles, holding that the eight invalidated articles violated basic rights guaranteed by the French Constitution, which apply to both foreigners and French nationals. Soltesz, *supra* note 30, at 265, 285-86.

<sup>45</sup> See Soltesz, *supra* note 30, at 310-11.

<sup>46</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

on Civil and Political Rights (“ICCPR”).<sup>47</sup> The European Convention declares that the rights and freedoms therein “shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>48</sup> Likewise, the ICCPR imposes upon each party to it the obligation “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>49</sup> Additionally, France is a state party to the Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”), and thereby “condemn[s] discrimination against women in all its forms.”<sup>50</sup> Article 55 of the French Constitution makes these documents binding.<sup>51</sup>

Furthermore, although they are non-binding resolutions of the United Nations General Assembly, France is subject to the Universal Declaration on Human Rights (“Universal Declaration”)<sup>52</sup> and the Declaration on the Elimination of All Forms of Intolerance and Discrimination on the Basis of Religion or Belief (“1981 Declaration”).<sup>53</sup> The Universal Declaration “recogni[zes] . . . the inherent dignity and . . . equal and inalienable rights of all members of the human family.”<sup>54</sup> These rights, pursuant to the Universal Declaration itself, apply “without distinction of any kind, such as race, colour, . . . national or social origin, . . . birth or other status.”<sup>55</sup>

The broad language of these prohibitions of distinction as to race or national origin, one would reason, apply to immigrants as well as natural citizens of the state parties to these international accords. This legal framework, in conjunction with an understanding of religion in France, provides the backdrop against which this note analyzes the *Silmi* decision.

### III. A HISTORICAL BACKGROUND OF RELIGION IN FRANCE

France’s treatment of religious issues, specifically pertaining to the Muslim headscarf, finds its base in the French principle of *laïcité*. This principle, embedded in the French idea of the proper role of religion, influences both individual French citizens’ perceptions and the government’s treatment of the wearing of the Muslim headscarf.

<sup>47</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>48</sup> European Convention, *supra* note 46, art. 14.

<sup>49</sup> ICCPR, *supra* note 47, art. 2(1).

<sup>50</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>51</sup> 1958 CONST. art. 55.

<sup>52</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration].

<sup>53</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter 1981 Declaration].

<sup>54</sup> Universal Declaration, *supra* note 52, preamble.

<sup>55</sup> *Id.* art. 2.

a. *Laïcité*

The French term “*laïcité*” summarizes the widely accepted French belief about the “proper relationship between religion and the French state.”<sup>56</sup> While the English translation of the term is “secular,” “[t]here is no firm definition of *laïcité*: neither officially established nor generally accepted.”<sup>57</sup> In a December 2003 speech, then-President Jacques Chirac declared,

*laïcité* is inscribed in our traditions. It is at the heart of our republican identity. . . . It is in fidelity to the principle of *laïcité*, the cornerstone of the Republic, the bundle of our common values of respect, tolerance, and dialogue, to which I call all of the French to rally.<sup>58</sup>

*Laïcité* “protects the freedom to believe” by assuring that everyone can express and practice their faith without intrusion by others, so long as such actions do not threaten others.<sup>59</sup> Perhaps most importantly, as Chirac emphasized, *laïcité* is imperative to social peace and national unity.<sup>60</sup>

Although modern descriptions of *laïcité* imply a tolerance and equality deserving of celebration, history cautions against such a romanticized depiction of the doctrine. Scholars such as T. Jeremy Gunn suggest that although the French may consider *laïcité* to be the essence French values, *laïcité*'s portrayal as an embodiment of equality, neutrality, and tolerance, is actually a myth.<sup>61</sup> In reality, *laïcité* “emerged from periods of hostility, antagonism, discrimination, and often violence.”<sup>62</sup> Accordingly, in examining *laïcité* in modern context, the doctrine's background cautions against an unrealistic vision of these values as perfect foundations of France's republic. Rather, France has sometimes resorted to using the doctrine of *laïcité* to suppress religious beliefs, such as those of the Roman Catholic Church, Protestants, Jews, and the Society of Jesus (Jesuits).<sup>63</sup> France's treatment of its Muslim population is arguably one such example of this use of *laïcité*. Thus, a decision like *Silmi* is not entirely inconsistent with France's experience, although this is not to say that these values do not hold a central place in the country's tradition.

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<sup>56</sup> T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420 (2004).

<sup>57</sup> *Id.* at 420 n.2 (quoting EMILE POULAT, NOTRE LAÏCITÉ PUBLIQUE 116 (2003)).

<sup>58</sup> *Id.* at 428 (quoting Jacques Chirac, President, Republic of France, Speech from the Elysée Palace (Dec. 17, 2003), speech excerpts available at [http://www.elysee.fr/elysee/elysee.fr/anglais\\_archives/speeches\\_and\\_documents/2003/speech\\_by\\_jacques\\_chirac\\_president\\_of\\_the\\_republic\\_on\\_respecting\\_the\\_principle\\_of\\_secularism\\_in\\_the\\_republic-excerpts.2675.html](http://www.elysee.fr/elysee/elysee.fr/anglais_archives/speeches_and_documents/2003/speech_by_jacques_chirac_president_of_the_republic_on_respecting_the_principle_of_secularism_in_the_republic-excerpts.2675.html)) [hereinafter “Chirac, Elysée Palace Speech”].

<sup>59</sup> Chirac, Elysée Palace Speech, *supra* note 58.

<sup>60</sup> *Id.*

<sup>61</sup> Gunn, *supra* note 56, at 442, 452.

<sup>62</sup> *Id.* at 452.

<sup>63</sup> *See id.* at 433-42 (describing two periods of French history during which the modern French conception of *laïcité* developed).

*b. Islam in France and the European Union*

France's Muslim population is the largest in Europe, and in France, Islam is the second largest religion after Catholicism.<sup>64</sup> Estimates from 2002 found approximately 4,155,000 Muslims in France, which account for an estimated 7.1% of the French population.<sup>65</sup> Specifically, this population comes from the Maghreb region of North and North-West Africa, including Morocco, Algeria, and Tunisia, as well as Turkey, the Middle East, and Sub-Saharan Africa.<sup>66</sup> These immigrants, who congregate in suburban areas outside France's major cities, are mostly working class or poor.<sup>67</sup>

Unquestionably, an informed study of the intersection of France and Islam requires an understanding, if brief, of the headscarf itself. Fundamentally, the Koran makes the Islamic practice of women's covering religiously significant.<sup>68</sup> This practice varies in validity and degree of covering both in different countries and among the Muslim women therein.<sup>69</sup> Many Islamic scholars interpret this practice as serving two aims: to distinguish the genders and "to control male sexual desire by moderating women's behavior."<sup>70</sup> However, these two purposes are subject to many interpretations, such as the view held by many parties, including non-Muslims, Muslims, secularists, and gender rights activists, who regard the headscarf as a symbol of gender subordination and oppression.<sup>71</sup> On the other hand, Muslim females in favor of wearing headscarves view the headscarf as a sign of prestige, identity, and confidence, despite societal disfavor.<sup>72</sup> For the purposes of this Note it is not necessary to fully resolve the meaning and implications of the headscarf; it is sufficient to glean that in Islam the headscarf is "a diverse, contested, and evolving set of practices both in the larger Muslim world and in France. . . . [and it is more than a fight against] secularism and gender equality."<sup>73</sup>

As a result of the growth of Islam in France, and the increased "appearance of Muslim women wearing the headscarf in public[.]" a suspicion developed that women who wear the headscarf are "not really French," preferring

<sup>64</sup> Stefanie Walterick, *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, 254 (2006).

<sup>65</sup> 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, 211 (2007) (citing OPEN SOC'Y INST., *THE SITUATION OF MUSLIMS IN FRANCE* 74 (2002) (defining Muslim as a "person of Muslim culture")). Currently, French law prohibits identifying citizens based on religious affiliation and the French Census has not collected data on religious affiliation since 1872. *Id.* (citing Stéphanie Giry, *France and Its Muslims*, FOREIGN AFF., Sept./Oct. 2006, at 87, 89 (2006)).

<sup>66</sup> *Id.* at 211.

<sup>67</sup> Chouki El Hamel, *Muslim Diaspora in Western Europe: The Islamic Headscarf (Hijab), the Media and Muslims' Integration in France*, 6 CITIZENSHIP STUD. 293, 294 (2002).

<sup>68</sup> Adrienne Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 750 (2006).

<sup>69</sup> *Id.*

<sup>70</sup> Choudhury, *supra* note 65, at 217.

<sup>71</sup> *Id.* at 220-21.

<sup>72</sup> *Id.* at 222. For a discussion of the views of Muslim females in favor of wearing, and in favor of banning, headscarves, see generally Wing & Smith, *supra* note 68.

<sup>73</sup> Choudhury, *supra* note 65, at 216.

their Muslim identity to their French identity.<sup>74</sup> As the number of Muslims grew quickly in France, the headscarf often became a “symbol of a foreign people—with a foreign religion—who have come to France, but who do not wish to integrate themselves fully into French life or accept French values.”<sup>75</sup> Thus, the French regard the headscarf as a symbol of not only religious, but also cultural identification. This French suspicion of organized Islam leads some French to regard these outward manifestations of religion by students as “effort[s] to subvert republican values.”<sup>76</sup> Even Chirac stated that the French find it difficult to accept the sort of aggression manifest in wearing a veil and that secularism excludes such blatant “religious proselytism.”<sup>77</sup> The headscarf controversy underscores this “particularly French sensibility to Islam,” which other major European countries express to a lesser degree.<sup>78</sup>

One interpretation of the French suspicion of Muslims considers it a result of the French ideal of citizenship as one of cultural assimilation, in which public life takes precedent over private life.<sup>79</sup> Many non-Muslim French disdain the headscarf as an affront to French cultural homogeneity and an infringement on the French separation of church and state, questioning “how French” headscarf-wearing Muslim women are.<sup>80</sup> During the period beginning with the French Revolution through the late twentieth century, a French model of citizenship emerged that requires citizens actively to don the nation’s culture, including French language.<sup>81</sup> However, a more recent model of French citizenship would welcome as a French citizen anyone willing to take on the French culture.<sup>82</sup> Under this later view, a woman who wears the headscarf could arguably take on the French culture, yet not to the point of complete cultural assimilation.

The current controversy may be a result of these varying views. Specifically, rather than seeking a sustainable way for Muslims and other French citizens to live together, “mainstream French political intervention, represented by the reports and the legislation that has been passed—together with the increas-

<sup>74</sup> Gunn, *supra* note 56, at 456.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 457 (quoting *TRAITE DE DROIT FRANCAIS DES RELIGIONS* 265 (Francis Messner et al. eds., 2003)).

<sup>77</sup> John Henley, *Something Aggressive About Veils, Says Chirac*, *THE GUARDIAN*, Dec. 6, 2003, available at <http://www.guardian.co.uk/world/2003/dec/06/france.jonhenley> (last visited Mar. 10, 2010).

<sup>78</sup> Gunn, *supra* note 56, at 457 (quoting *TRAITE DE DROIT FRANCAIS DES RELIGIONS supra* note 76, at 265). Several other major European countries appear uninhibited by the same degree of suspicion of Islam found in France, although this is not to say that these countries are free from prejudice against Islam. For example, Germany grants Muslims, the country’s largest migrant group, many religious freedoms; the German government also assisted in building mosques. John D. Snethen, *The Crescent and the Union: Islam Returns to Western Europe*, 8 *IND. J. GLOBAL LEGAL STUD.* 251, 260-61, 264 (2000). In Austria, where approximately 2.05% of the population is Muslim, the Muslim community has free airtime on government-owned television, rights of religious education, and an Islamic cemetery. *Id.* at 261, 264. Additionally, the United Kingdom allowed Saudi Arabia to build an Islamic school, available to the country’s one million Muslims. *Id.* at 260, 265-66.

<sup>79</sup> Beller, *supra* note 28, at 588.

<sup>80</sup> Wing & Smith, *supra* note 68, at 772-73.

<sup>81</sup> Beller, *supra* note 28, at 586.

<sup>82</sup> *Id.*

ing public and media hostility towards Islam in France—has simply blown the problem up into one of exaggerated and dangerously unstable proportions.”<sup>83</sup> This model of French citizenship adds another dimension to the events leading up to the headscarf controversy.

*i. Gender and the Headscarf*<sup>84</sup>

The headscarf affair presents not only a religious or cultural issue, but a gender issue as well. Although this Note examines the headscarf specifically in the context of freedom of religion, it is necessary to glance briefly at the headscarf’s gender implications to fully understand how this religious cloth became the subject of such controversy in France.

Many observers simply equate the gender difference exhibited by Muslim women and girls’ wearing the headscarf with gender subordination.<sup>85</sup> However, there are certainly various motivations for women to wear the headscarf; among them are personal religious conviction, freedom of religion and expression, acceptance within the religious community, compliance with family values, protection from harassment, individual choice, and religious/cultural identity.<sup>86</sup> There are also many reasons to oppose wearing the headscarf, including that it is sexist, a symbol of oppression, that it fosters extremism, and creates dissension among Muslim women.<sup>87</sup>

Speaking for Muslim Women Lawyers for Human Rights, Raja El Wabti called for France to scrutinize its own practices as critically it does those of foreign cultures.<sup>88</sup> Specifically, El Wabti argued that regardless of one’s opinion about the veil, forcing women to remove it is no better than forcing them to wear it, “both ways are discriminatory and undemocratic.”<sup>89</sup> Regardless of which view of the headscarf one adopts, understanding both perspectives is beneficial to this analysis of France’s headscarf controversy, which emerged against this backdrop of *laïcité* and tensions regarding Muslim women wearing the headscarf.

*c. L’Affaire du Foulard (The Headscarf Controversy)*

Certainly, there is a great deal more to the headscarf controversy than described below. Although this Note specifically addresses religious discrimination, the headscarf ban clearly has additional racial and ethnic implications.

<sup>83</sup> *Id.* at 599 (citing ADRIAN FAVELL, *PHILOSOPHIES OF INTEGRATION: IMMIGRATION AND THE IDEA OF CITIZENSHIP IN FRANCE AND BRITAIN* 154 (1998)).

<sup>84</sup> For more discussion on the headscarf and gender equality, see generally 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 (2007); Leora Bilsky, *Uniforms and Veils: What Difference Does a Difference Make?*, 30 CARDOZO L. REV. 2715 (2009); and Anastasia Vakulenko, *Gender Equality as an Essential French Value: The Case of Mme M*, 9 HUM. RTS. L. REV. 143 (2009).

<sup>85</sup> Choudhury, *supra* note 65, at 220.

<sup>86</sup> For an explanation of each reason, see Wing & Smith, *supra* note 68, at 758-66.

<sup>87</sup> For an explanation of each reason, see *id.* at 766-70.

<sup>88</sup> Choudhury, *supra* note 65, at 200 (quoting 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>).

<sup>89</sup> *Id.* (quoting RAJA EL HABTI, KARAMAH, *supra* note 88, at 7).

Nusrat Choudhury<sup>90</sup> encapsulates the various implications of the ban in her description of the headscarf affair as “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*.”<sup>91</sup> While the following summary is by no means exhaustive, it is sufficient for an informed discussion of the issue as it relates to international human rights.

Girls wearing headscarves in French schools, although certainly not a new issue, caused a particular “national media frenzy” in late 2003.<sup>92</sup> The frenzy began with Prime Minister Raffarin’s comments encouraging headscarf bans in public schools, as well as then-Minister of the Interior Nicolas Sarkozy’s proposal to require women to remove their headscarves in official identification photographs.<sup>93</sup> Additionally, public opinion polling revealed that seventy-two percent of the French population supported a public school ban on all signs of religious and political adherence, and fifty-six percent supported a similar ban in private religious schools.<sup>94</sup>

In July 2003, then-President Chirac announced the creation of a commission, which became known as the Stasi Commission, to examine the applicability of *laïcité* in France and make suitable recommendations.<sup>95</sup> Notably, although the Commission’s mandate mentioned religious insignia, it did not specify headscarves or religious clothing.<sup>96</sup> The Commission’s Report recommended a public school ban on all “clothing and signs manifesting religious or political affiliation.”<sup>97</sup> According to the Commission, public order justified the ban:

(1) to respond to the coercion suffered by Muslim girls whose families and communities force them to wear headscarves against their will (. . . [which] exacerbates sexual discrimination and religious polarization within France); and (2) to respond to administrative difficulties suffered by school officials who are forced to implement confusing directives in situations to intense pressure.<sup>98</sup>

Chirac extolled the report:

In all conscience, I consider that the wearing of clothes or signs which conspicuously denote a religious affiliation must be prohibited at school.

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<sup>90</sup> Nusrat Choudhury is a Staff Attorney in the American Civil Liberties Union (ACLU) National Security Project, where her work focuses on litigation challenging national security policies that violate civil rights and civil liberties. The Paul & Daisy Soros Fellowships for New Americans, Spring 2004 Fellow, [http://www.pdsoros.org/current\\_fellows/index.cfm/yr/2004#choudhury](http://www.pdsoros.org/current_fellows/index.cfm/yr/2004#choudhury) (last visited Mar. 10, 2010).

<sup>91</sup> Choudhury, *supra* note 65, at 201.

<sup>92</sup> Gunn, *supra* note 56, at 458.

<sup>93</sup> *Id.* at 459.

<sup>94</sup> *Id.* at 422-23 n.6.

<sup>95</sup> Choudhury, *supra* note 65, at 232. The commission became known as the Stasi Commission because it was led by Bernard Stasi. *Id.*

<sup>96</sup> Mukul Saxena, *The French Headscarf Law and the Right to Manifest Religious Belief*, 84 U. DET. MERCY L. REV. 765, 776-77 (2007).

<sup>97</sup> Gunn, *supra* note 56, at 462 (quoting RAPPORT AU PRESIDENT DE LA REPUBLIQUE, at 68 (2003) [hereinafter Stasi Report]).

<sup>98</sup> Stasi Report, *supra* note 97, at 31.

Discreet signs, for example a Cross, a Star of David or Hand of Fatima will of course remain allowed. On the other hand, . . . the Islamic veil, . . . the Kippa<sup>99</sup>] or a Cross of a clearly excessive size, have no place in State schools. State schools will remain secular.<sup>100</sup>

On March 15, 2004, Chirac signed the “Headscarf Law” which states that “[i]n public schools, the wearing of symbols or clothing by which students conspicuously manifest a religious appearance is forbidden.”<sup>101</sup> Subsequently, the French National Assembly passed the law with 494 votes to 36, and the French Senate with 276 votes to 20.<sup>102</sup> Following the law’s enactment, French schools expelled forty-eight students who refused to remove their conspicuous religious insignia.<sup>103</sup> Significantly, Chirac never identified the link between *laïcité* and the religious clothing ban, as though it was so apparent that it needed no explanation.<sup>104</sup> The law essentially forces Muslim girls to choose between wearing the headscarf and receiving a public education.<sup>105</sup>

Recent political changes in France indicate that Muslim girls will likely continue to face this decision. In the January 2007 presidential election, French voters elected Nicolas Sarkozy, “an advocate of cultural integration.”<sup>106</sup> When Sarkozy accepted his party’s presidential nomination, he declared that it is “unacceptable to ‘want to live in France without respecting and loving France and learning the French language. . . . If you live in France then you respect the laws and the values of the Republic.’”<sup>107</sup> Sarkozy’s election represents the unlikelihood that French voters will seek to overturn the Headscarf Law.<sup>108</sup>

There is, arguably, an emerging human rights norm to be free from discrimination, particularly on religious grounds, in immigration and naturalization decisions. However, making this norm a reality is by no means an easy feat. The difficulty of making this norm a reality can be understood through a consideration of the history of religion in France, the recent headscarf affair, and a brief description of the intricacies of freedom of religion.

<sup>99</sup> “Kippa” is another term for the yarmulke, “a skullcap worn in public by Orthodox Jewish men or during prayer by other Jewish men.” THE NEW OXFORD AMERICAN DICTIONARY 932, 1946 (2d ed. 2005).

<sup>100</sup> Chirac, Elysee Palace Speech, *supra* note, 58.

<sup>101</sup> Choudhury, *supra* note 65, at 199 (quoting Law No. 2004-228 of Mar. 15, 2004, Journal Official de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190).

<sup>102</sup> Beller, *supra* note 28, at 581.

<sup>103</sup> *French Schools Expel 48 Over Headscarf Ban*, EXPATICA, Jan. 20, 2005, [http://www.expatica.com/fr/news/local\\_news/french-schools-expel-48-over-headscarf-ban-15996\\_16501.html](http://www.expatica.com/fr/news/local_news/french-schools-expel-48-over-headscarf-ban-15996_16501.html). Expatica is a web site that prints articles from the Agence France-Presse in English.

<sup>104</sup> Gunn, *supra* note 56, at 462-63.

<sup>105</sup> *Id.* at 504.

<sup>106</sup> Kathryn Boustead, *The French Headscarf Law Before the European Court of Human Rights*, 16 J. TRANSNAT’L L. & POL’Y 167, 169 (2007) (citing *Sarkozy Takes French Presidency*, BBC NEWS, May 6, 2007, <http://news.bbc.co.uk/2/hi/europe/6630797.stm>).

<sup>107</sup> *Id.* at 169-70 (quoting Elaine Sciolino, *French Governing Party Endorses Sarkozy for President*, INT’L HERALD TRIB., Jan. 14, 2007, available at <http://www.iht.com/articles/2007/01/14/news/france.php> (last visited Apr. 6, 2010)).

<sup>108</sup> *Id.* at 169.

## IV. FREEDOM OF RELIGION GENERALLY

Although freedom of religion is a seemingly simple ideal, translating the ideal into a guaranteed fulfillment of the freedom is not so simple. After considering relevant provisions bearing on the freedom of religion in France, this section discusses components to the freedom of religion, the difficulty in defining religion specifically, and the moral argument for this freedom.

*a. Freedom of Religion Provisions Under France's International Obligations*

France is a party to several international human rights agreements that explicitly guarantee an individual's right to freedom of religion.<sup>109</sup> Most notably, both Article 9(1) of the European Convention on Human Rights and Article 18 of the Universal Declaration use similar language; the ECHR states that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."<sup>110</sup> Confirming the extent of these rights, the ECHR held that Article 9 protects "the sphere of personal beliefs and religious creeds [and] . . . acts which are intimately linked to those attitudes, such as acts of worship or devotion."<sup>111</sup>

Using near-verbatim language, both Article 18 of the ICCPR,<sup>112</sup> and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Declaration on Religious Discrimination) likewise affirm these rights of thought, conscience, and belief.<sup>113</sup> Accordingly,

<sup>109</sup> Saxena, *supra* note 90, at 782. France is a state party to a number of other treaty obligations that might have an impact upon the freedom of religion and belief in the context of this Note, including the International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention against Discrimination in Education, and Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at 782-84. However, for brevity's sake, this Note does not address these obligations.

<sup>110</sup> European Convention, *supra* note 20, art.9(1). Article 18 of the Universal Declaration states: "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Universal Declaration, *supra* note 52, art. 18.

<sup>111</sup> Keturah A. Dunne, Comment, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms*, 30 CAL. W. INT'L L.J. 117, 130-31 (1999) (quoting Simeon J. Ling, Forty Years of European Jurisprudence on Religious Freedom: The European Court of Human Rights Precedent 1 (Oct. 1998) (unpublished manuscript, on file with the Rutherford Institute) (alteration in original)).

<sup>112</sup> Article 18 states that "[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion in worship, observance, practice and teaching." ICCPR, *supra* note 47, art.18(1).

<sup>113</sup> Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 1(1), U.N. Doc A/36/684 (Nov. 25, 1981) [hereinafter Declaration on Religious Discrimination]. This Declaration also prohibits discrimination on the basis of religion or belief. *Id.* art. 2(1).

France has both binding and non-binding obligations to ensure the individual right to freedom of religion.

*b. Two Components to Freedom of Religion*

Freedom of religion is much more than an individual's right to worship according to the dictates of their own conscience. Specifically, freedom of religion consists of freedom in two components: the *forum internum* and the *forum externum*.<sup>114</sup> Firstly, the *forum internum* represents "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."<sup>115</sup> The *forum internum* relates to an individual's inner faith and conscience.<sup>116</sup> Both the ICCPR and the Declaration on Religious Discrimination define this freedom as the "freedom to have or adopt a religion or belief of his choice."<sup>117</sup> Secondly, and distinct from the *internum*, the *forum externum* is the freedom to "manifest . . . religion or belief, in worship, teaching, practice and observance."<sup>118</sup> The European Convention includes this freedom of the *forum externum*, with similar clauses in the Universal Declaration, ICCPR, and Declaration on Religious Discrimination.<sup>119</sup>

*c. Defining Religion*

Fundamentally, a problem inherent in establishing any freedom of religion or belief is the problem of defining religion itself. For example, the United Nations Human Rights Committee adopts a broad definition of religion, "protect[ing] theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief . . . not limited . . . to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions."<sup>120</sup> However, scholars such as Johan van der Vyver note the difficulties of defining religion and determining the associated legal rights or obligations.<sup>121</sup> Specifically, making a distinction between freedom of religion and freedom of belief limits which beliefs the law protects.<sup>122</sup>

<sup>114</sup> Choudhury, *supra* note 65, at 255 (citing 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)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 266.

<sup>117</sup> ICCPR, *supra* note 47, art. 18(1). Likewise, the Declaration on Religious Discrimination provides that everyone shall have the "freedom to have a religion or whatever belief of his choice." Declaration on Religious Discrimination, *supra* note 113, at art. 1(1).

<sup>118</sup> Choudhury, *supra* note 66, at 256 (quoting the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Eur. T.S. No. 5).

<sup>119</sup> See European Convention, *supra* note 20, art. 9; Universal Declaration, *supra* note 52, art. 18; ICCPR, *supra* note 47, art. 18(1); Declaration on Religious Discrimination, *supra* note 113, art. 1(1).

<sup>120</sup> Johan D. van der Vyver, *Limitations on the Freedom of Religion or Belief: International Law Perspectives*, 19 EMORY INT'L L. REV. 499, 505 (2005) (quoting General Comment No. 22, U.N. GAOR, Human Rts. Comm., 48th Sess., 1247 mtg. P2, U.N. Doc. CCPR/C/21/Rev1/Add.4 (1993)).

<sup>121</sup> *Id.* at 503.

<sup>122</sup> *Id.* at 506.

This limitation results from the fact that most international human rights law regulates freedom of religion in conjunction with the freedom of belief, thereby tying the kinds of beliefs protected to religion or those beliefs that have something in common with religious belief.<sup>123</sup> Even this brief glimpse at the difficulty in defining religion provides another basis for the complexities involved in the *Silmi* decision and how countries, such as France, may determine what religious expression to limit, and to what extent.

*d. The Moral Argument*

The individual right to freedom of religion and belief is more than a right created by international instruments—it is an inherent right based in morality. In its preamble, the Universal Declaration refers to “the inherent dignity . . . of all members of the human family,” and Article 1 states that “[a]ll human beings are born free and equal in dignity and rights[ ] . . . and should act towards one another in a spirit of brotherhood.”<sup>124</sup> Michael Perry argues that these provisions make clear that “the fundamental conviction at the heart of the morality of human rights is this: Each and every (born) human being . . . has inherent dignity; therefore, no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity.”<sup>125</sup> Specifically, because of this inherent dignity, we should want the law to protect the right to freedom of religion because when a government action or policy denies this freedom, it causes suffering, which infringes on human dignity.<sup>126</sup> Therefore, international law regarding human rights should only give governments the authority to deny this freedom in situations when such discretion is justified.<sup>127</sup>

These complexities of defining a concrete right to the freedom of religion demonstrate the difficulty in applying this right despite its guarantees under instruments of international law.

## V. FREEDOM OF RELIGION UNDER INTERNATIONAL LAW

Quite unequivocally, the international instruments to which France is obliged recognize and guarantee the freedom of religion or belief. This analysis focuses primarily on the European Convention, as a binding treaty, and relevant ECHR precedent. Additionally, as many view the Universal Declaration as binding because it is customary international law, and the right to religion is arguably a customary norm, this analysis also considers the Universal Declaration. As a parallel United Nations obligation, a brief description of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief follows.

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<sup>123</sup> *Id.*

<sup>124</sup> Universal Declaration, *supra* note 52, pmbl. and art. 1.

<sup>125</sup> Michael J. Perry, *A Right to Religious Freedom? The Universality of Human Rights, the Relativity of Culture*, 10 ROGER WILLIAMS U. L. REV. 385, 388 (2005) (citation omitted).

<sup>126</sup> *Id.* at 410.

<sup>127</sup> *Id.*

*a. European Convention of Human Rights and European Court of Human Rights*

Effective in 1953, the European Convention on Human Rights and Fundamental Freedoms aimed to promote the upholding and protecting of human rights and fundamental freedoms between the Council of Europe's member states.<sup>128</sup> Specifically, each contracting member state "undertakes that its domestic law and administrative practices conform to the Convention's articles and, where any violation of human rights is held to exist . . . that it will take positive action to remedy the breach, if necessary by introducing corrective legislation in its national Parliament."<sup>129</sup> The body charged with the responsibility of enforcing the European Convention is the European Court of Human Rights (ECHR).<sup>130</sup> The ECHR has jurisdiction over "all matters concerning the interpretation and application of the Convention and the protocols thereto . . ." <sup>131</sup> Thus limited to interpreting and applying the European Convention, the ECHR can only decide whether a member state's national law is in violation or not; it cannot force the amendment or revocation of a violating law.<sup>132</sup>

Of primary importance, Article 9 of the European Convention, which the ECHR declared to be a foundation of democracy, guarantees freedom of conscience, belief, and religion.<sup>133</sup> Specifically, Article 9(1) guarantees this freedom as a right belonging to everyone.<sup>134</sup> However, Article 9(2) provides justifiable limits on the freedom of religious expression, where the restriction is prescribed by law and is necessary in a democratic society.<sup>135</sup> Nonetheless, the ECHR emphasizes the importance of the Article 9 rights:

[F]reedom of . . . religion is one of the foundations of a "democratic society" [within the meaning of the Convention] . . . It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset to atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>136</sup>

Article 9(2) applies expansively through Article 14's prohibition of discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>137</sup>

<sup>128</sup> Dunne, *supra* note 111, at 128.

<sup>129</sup> Boustead, *supra* note 106, at 171 (quoting Robert Blackburn, *The Institutions and Processes of the Convention*, in *FUNDAMENTAL RIGHTS IN EUROPE: THE ECHR AND ITS MEMBER STATES, 1950-2000*, at 3, 11 (Robert Blackburn & Jorg Polakiewicz eds., 2001)).

<sup>130</sup> *Id.*

<sup>131</sup> European Convention, *supra* note 20, art. 32(1).

<sup>132</sup> Boustead, *supra* note 106, at 173.

<sup>133</sup> Dunne, *supra* note 111, at 130 (citing *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 17 (1993)).

<sup>134</sup> European Convention, *supra* note 20, art. 9(1).

<sup>135</sup> *Id.* art. 9(2).

<sup>136</sup> Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. REV. 699, 700 (2006) (quoting *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) at 13 (1993)).

<sup>137</sup> European Convention, *supra* note 20, art. 14.

While states have leeway in placing limitations on the manifestation of religion and belief, the court has made clear that Article 9 places obligations on the State to guarantee the “peaceful enjoyment” of the Article 9 rights to those who hold such beliefs.<sup>138</sup> However, the court still recognized that those holding religious beliefs “cannot reasonably expect to be exempt from all criticism” and “must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.”<sup>139</sup>

In order to establish Article 9 interference, the petitioner must establish that the offended belief reached a “certain level of cogency, seriousness, cohesion and importance.”<sup>140</sup> In order to justify interference with religious expression, the state law in question must be both “adequately accessible” to the individual and expressed with sufficient detail to enable the petitioner to adjust his conduct accordingly.<sup>141</sup> A state must demonstrate that its action was “prescribed by law” as a form of due process notice requirement. Despite the weight the court gives to a government’s legitimate aims, it declares that freedom of religious expression is fundamental element of democracy and governments must encourage religious pluralism.<sup>142</sup>

Particularly relevant to *Silmi*, in *Dahlab v. Switzerland*, the ECHR suggested that gender equality constitutes a legitimate government aim justifying an Article 9 infringement, stating 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* . . . .<sup>143</sup>

The *Dahlab* ruling implies that a headscarf ban may “protect[ ] the rights and freedoms of others” because the headscarf communicates and perpetuates gender inequality.<sup>144</sup>

Furthermore, Protocol 12 of Article 1 states: “1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”<sup>145</sup> Thus, Protocol 12’s emphasis establishes Article 1 as a right of equality, not only a prohibition.

<sup>138</sup> Paul M. Taylor, *The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression*, 2006 BYU L. REV. 811, 826 (2006) (quoting *Otto-Preminger-Institute v. Austria*, 295 Eur. Ct. H.R. (ser. A) at ¶ 47 (1994)).

<sup>139</sup> *Id.*

<sup>140</sup> Boustead, *supra* note 106, at 175 (quoting Peter G. Danchin & Lisa Forman, *The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities*, in *PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE* 192, 197 (Peter G. Danchin & Elizabeth A. Cole eds., 2002)).

<sup>141</sup> Saxena, *supra* note 96, at 793 n.176 (citing *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, 271 (1979)).

<sup>142</sup> Boustead, *supra* note 106, at 180 (citation omitted).

<sup>143</sup> Choudhury, *supra* note 65, at 272 (citing *Dahlab v. Switzerland*, 2001 Eur. Ct. H.R. 1 (2001)).

<sup>144</sup> *Id.*

<sup>145</sup> CLARE OVEY & ROBIN WHITE, *JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 430 (4th ed. 2006) (1975).

France, as a signatory member of the European Convention, is bound to follow the conditions therein, including Article 9's religious guarantee. As the ECHR enforces the European Convention, in order to analyze properly the *Silmi* case, this Note explores relevant ECHR precedent cases regarding freedom of religion and religious clothing.

*i. ECHR Precedent*

In particular, two ECHR precedent cases dealing with religion and specific legislation provide a useful background for analysis here: *Kokkinakis v. Greece*<sup>146</sup> and *Şahin v. Turkey*.<sup>147</sup> Although these cases do not address immigration law, as discussed above, the absence of a French plenary power doctrine of immigration law means that the both French courts and the ECHR may review such legislation or related decisions.

*A. Kokkinakis v. Greece*

The first case in which the ECHR found an Article 9 violation was the seminal case of *Kokkinakis v. Greece*.<sup>148</sup> There, a Jehovah's Witness couple visited the wife of the cantor of the local Greek Orthodox church.<sup>149</sup> Greece charged the couple with violating a Greek law that made proselytizing<sup>150</sup> a criminal offense.<sup>151</sup> The ECHR unanimously held the law violated Article 9 because it interfered with Kokkinakis' freedom to manifest his beliefs.<sup>152</sup> Specifically, there was no pressing social need for the law, and the applicants had not attempted to persuade the householder by any improper means.<sup>153</sup>

Upon holding that the law constituted an Article 9(1) interference, the court determined that Article 9(2) prohibited such an interference.<sup>154</sup> Although the court deemed the criminalization "prescribed by law" and accepted the Greek government's argument that the law met the legitimate aim of protecting citizens' freedoms from "attempts to influence them by immoral and deceitful means," the court held that the law was not necessary in a democratic society.<sup>155</sup> Specifically, Greece failed to establish that a pressing social need justi-

<sup>146</sup> *Kokkinakis v. Greece*, App. No. 14307/88, Eur. Ct. H.R. (May 25, 1993), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=kokkinakis%20-%20v.%20-%20Greece&sessionid=50938253&skin=hudoc-en>.

<sup>147</sup> *Şahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. (Nov. 10, 2005) (Grand Chamber), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=44774/98&sessionid=50938523&skin=hudoc-en>.

<sup>148</sup> Dunne, *supra* note 111, at 133.

<sup>149</sup> *Kokkinakis*, App. No. 14307/88, Eur. Ct. H.R. ¶ 7 (May 25, 1993).

<sup>150</sup> Proselytism is defined as "any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion . . . with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety." *Id.* ¶ 16.

<sup>151</sup> *Id.* ¶¶ 8, 16.

<sup>152</sup> *Id.* ¶ 50. Kokkinakis complained to the ECH after exhausting all remedies under Greek law. *Id.*

<sup>153</sup> *Id.* ¶ 49.

<sup>154</sup> *Id.* ¶¶ 49-50.

<sup>155</sup> *Kokkinakis*, App. No. 14307/88, Eur. Ct. H.R. ¶¶ 41-44, 49 (May 25, 1993).

fied the measure, and the measure was seemingly disproportionate to the legitimate aim.<sup>156</sup>

As it pertains to the rights of conscience, this decision may indicate either a more broad judicial application, or a treatment of the right of conscience as “an awkward inconvenience to be tolerated rather than as a matter of fundamental importance.”<sup>157</sup> Keturah Dunne identifies three weaknesses in the *Kokkinakis* decision.<sup>158</sup> First, the ECHR has failed to “require governments to impose less restrictive burdens on issues of conscience.”<sup>159</sup> Rather than finding the anti-proselyting law a per-se Article 9 violation, the ruling suggests that the ECHR will accept any governmental reasoning for the restriction.<sup>160</sup> Second, the decision indicates a bias against non-mainstream religions.<sup>161</sup> Third, the court’s distinction between mainstream and other religions reflects a “continued deference to state-established religions and general unwillingness to analyze laws that benefit religions favored by the State.”<sup>162</sup>

Although the *Kokkinakis* decision did not discuss religious clothing or symbols, it serves as the foundation of the ECHR’s Article 9 case law which thereafter developed to include cases dealing with religious clothing and symbols.

### B. *Şahin v. Turkey*

The most relevant ECHR case dealing with conspicuous religious symbols is *Şahin v. Turkey*.<sup>163</sup> *Şahin* considered the University of Istanbul’s policy prohibiting students in class lectures or exams from wearing head coverings or having beards.<sup>164</sup> The University excluded Leyla Şahin, a student who wore a headscarf out of a personal religious duty, from exams and lectures and prevented any additional class registration.<sup>165</sup> Şahin filed a complaint with the Turkish Administrative Court wherein she argued that the University lacked authority to enact the policy, which she also argued violated her European Convention rights.<sup>166</sup> After both the Administrative Court and the Turkish Constitutional Court rejected her complaint, Şahin argued before the ECHR that the university’s action constituted an Article 9 interference.<sup>167</sup>

The court found no Article 9 violation. In its review, the court agreed that the law interfered with Şahin’s religious freedom, but found the Headscarf Law prescribed by law.<sup>168</sup> After reviewing the “the circumstances of the case and

<sup>156</sup> *Id.* ¶ 49.

<sup>157</sup> Dunne, *supra* note 111, at 137 (quoting Gunn, *supra* note 56, at 308).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 138 (citing Gunn, *supra* note 56, at 325-27).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Boustead, *supra* note 106, at 182.

<sup>164</sup> *Şahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. ¶ 16 (Nov. 10, 2005) (Grand Chamber), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=44774/98&sessionid=50938523&skin=hudoc-en>.

<sup>165</sup> *Id.* ¶ 17.

<sup>166</sup> *Id.* ¶ 18.

<sup>167</sup> *Id.* ¶¶ 19-20.

<sup>168</sup> *Id.* ¶¶ 98.

the terms of the domestic courts' decisions," the court accepted the argument that the law "pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order . . . ." <sup>169</sup> Specifically, the circumstances and terms likely refer to the public interest of maintaining Turkey's secularism, as the court considered the history and importance of secularism in Turkey at length. <sup>170</sup> Notably, the court did not consider other possible motivations for the law, such as the suppression of traditional Muslim practices, which motivations would likely undermine Turkey's argument or arguably invalidate any case for a legitimate aim. <sup>171</sup>

In regards to whether the law was necessary in a democratic society, the Turkish government argued that in order to self-preserve, the state must be able to enforce secularism strictly. <sup>172</sup> Questioning the link between secularism and the headscarf ban, Şahin argued that headscarves did not present a threat to the university's educational atmosphere because religious discrimination is less likely among reasonable adults. <sup>173</sup> Citing "extremist political movements" <sup>174</sup> in Turkey, the ECHR agreed with the Turkish government and declared that strictly enforcing secularism is necessary to a democratic society:

[t]he Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle . . . will not enjoy the protection of Article 9 of the Convention. <sup>175</sup>

Reflecting the relationship between each element present in the French headscarf controversy—religious expression, gender equality, and infringement on others' rights—the court referred to secularism as "promoting sexual equality and avoiding confrontations between practicing and non-practicing Muslims." <sup>176</sup>

Moreover, the court recognized the need to control dangerous fundamental movements and protect public order. Specifically, because a majority of Turkey's population belongs to a specific religion, Article 9(2) provides justification for measures designed to prevent fundamentalist movements from pressuring students. <sup>177</sup> Thus, in that light, universities "may regulate manifestation of the rites and symbols of the said religion . . . with the aim of ensuring

<sup>169</sup> *Id.* ¶ 99.

<sup>170</sup> *Id.* ¶ 114. *See also id.* ¶¶104-111 (discussing secularism and government more generally).

<sup>171</sup> Boustead, *supra* note 106, at 185.

<sup>172</sup> Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. ¶¶ 71, 103 (Nov. 10, 2005) (Grand Chamber), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=44774/98&sessionid=50938523&skin=hudoc-en>.

<sup>173</sup> *Id.* ¶ 101.

<sup>174</sup> *Id.* ¶ 115 (quoting Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. ¶ 109 (June 29, 2004) (Chamber)).

<sup>175</sup> *Id.* ¶ 114.

<sup>176</sup> Boustead, *supra* note 106, at 186-87 (citing Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. ¶ 115 (Nov. 10, 2005) (Grand Chamber)).

<sup>177</sup> *Id.* at 194 (citing Şahin (Fourth Sec.) at ¶ 99).

peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others.”<sup>178</sup>

Although both *Şahin* and *Kokkinakis* involve government legislation, the cases indicate the ways in which the ECHR treats Article 9 considerations, relevant to this analysis of *Silmi*. Specifically, both cases reflect the ECHR's inclination to accept member states' arguments about what constitutes a legitimate aim, even where ulterior illegitimate motives, such as religious suppression, may also exist.

*b. The Universal Declaration of Human Rights*

The Universal Declaration of Human Rights, passed by the United Nations in 1948, is the principal basis for global human rights standards, referenced in nearly every international human rights instrument.<sup>179</sup> Certainly, the Universal Declaration is one of the four major international documents to “universalize[ ] the principle of religious freedom.”<sup>180</sup> The Declaration's preamble, which provides an explanation as to why the drafters enumerated the specific rights therein, “reflect[s] the basic human rights philosophies of our times.”<sup>181</sup> Emphasizing the Universal Declaration's correlation to the U.N. Charter, the preamble cites the Charter's preambular statement that its purpose is “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . .”<sup>182</sup> Fittingly, the Declaration's preamble reflects this purpose:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. . . [and] the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom . . . [and] Member States have pledged themselves to achieve . . . the promotion of universal respect for and observance of human rights and fundamental freedoms . . . .<sup>183</sup>

Despite the importance of the Universal Declaration in propounding a list of fundamental human rights and freedoms, including religious freedoms, the document is a General Assembly resolution, which has no binding legal force under the U.N. Charter.<sup>184</sup> Therefore, while the Universal Declaration holds itself as the “common standard of achievement for all peoples and all

<sup>178</sup> *Id.* (citing *Şahin* (Fourth Sec.) at ¶ 99).

<sup>179</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1995/1996).

<sup>180</sup> Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 217, 224 (2002).

<sup>181</sup> Johannes van Aggelen, *The Preamble of the United Nations Declaration of Human Rights*, 28 DENV. J. INT'L L. & POL'Y 129, 131-32 (2000).

<sup>182</sup> *Id.* at 133 (citing U.N. Charter, 2d preambular para.).

<sup>183</sup> Universal Declaration, *supra* note 52, pmbl.

<sup>184</sup> Carolyn Evans, *Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination*, 2007 BYU L. REV. 617, 621-22 (2007).

nations,”<sup>185</sup> it did not take steps to ensure the protection of its enumerated rights by imposing a legal obligation.<sup>186</sup>

Article 18 is the key text of the Universal Declaration: “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>187</sup> This broad category of the right to freedom of thought, conscience and religion, or the *forum internum*, includes the right to profess a religion or no religion at all.<sup>188</sup> In regards to Article 18’s use of the term “belief,” there is a strong argument to interpret strictly “belief” in connection with “religion,” which it follows twice in Article 18.<sup>189</sup> Accordingly, “belief” in the context of Article 18 excludes political, economic and other beliefs.<sup>190</sup>

Importantly, Article 2 guarantees the Universal Declaration’s rights to “[e]veryone . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>191</sup>

The rights to entertain, change, and manifest a particular religious or other belief, as well as the other rights set forth in the Universal Declaration, are now universal international law.<sup>192</sup> Accordingly, United Nations member states arguably have an obligation to recognize and protect the rights espoused in the Universal Declaration, including the right to freedom of religion or belief, having pledged to promote human rights and fundamental freedoms.<sup>193</sup>

*c. United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*

Globally considered to propound “the fundamental rights of freedom of religion and belief,”<sup>194</sup> the 1981 declaration represents “the international community’s present understanding of the minimum standard for matters of religious rights.”<sup>195</sup> Although non-binding, it implies an expectation that state’s will adhere to its proclamations, as do all U.N. General Assembly declarations.<sup>196</sup>

<sup>185</sup> Universal Declaration, *supra* note 52, pmbl.

<sup>186</sup> Evans, *supra* note 184, at 622.

<sup>187</sup> Universal Declaration, *supra* note 52, art. 18.

<sup>188</sup> Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, 2000 BYU L. REV. 905, 911 (2000).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Universal Declaration, *supra* note 52, art. 2.

<sup>192</sup> Hannum, *supra* note 179, at 327.

<sup>193</sup> *Id.* at 324-27.

<sup>194</sup> Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT’L L. 487, 488 (July 1988) (quoting U.N. Doc. E/CN.4/1988/44/Add2, at 1 (statement by the United States Government)).

<sup>195</sup> Lerner, *supra* note 188, at 921.

<sup>196</sup> *Id.* at 918.

Perhaps significantly, the 1981 Declaration does not ascribe precise meaning to the terms “discrimination” and “intolerance.”<sup>197</sup> Specifically, the document “gives both words equivalent meaning”<sup>198</sup> and omits provisions relating to religiously based intolerance or discrimination.<sup>199</sup> Thus, the 1981 Declaration’s prohibition on discrimination is arguably vague because not every preference based on religion or belief is discriminatory.<sup>200</sup>

Most significantly, Article 1 guarantees the freedom of thought, conscience, and religion, which includes the right to manifest such religion or belief in observance or practice.<sup>201</sup> Supporting this freedom, Article 2 establishes a rule that “[n]o one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief.”<sup>202</sup> Further, Article 6 establishes a thorough list of rights to freedom of thought, conscience, and religion. This list includes the rights to:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;<sup>203</sup>
- (b) To establish and maintain appropriate charitable or humanitarian institutions;<sup>204</sup>
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;<sup>205</sup>
- (d) To write, issue and disseminate relevant publications in these areas;<sup>206</sup>
- (e) To teach a religion or belief in places suitable for these purposes;<sup>207</sup>
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;<sup>208</sup>
- (g) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one’s religion or belief;<sup>209</sup>
- (h) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.<sup>210</sup>

Similarly to the ICCPR, the 1981 Declaration makes a distinction between the basic rights of the *forum internum*—thought, conscience and religion—and the *forum externum*—worship, observance, practice, and teaching.<sup>211</sup> Despite these guarantees, it is unclear exactly what constitutes the right to change one’s religion or belief, as the Declaration does not specifically address apostates and heretics.<sup>212</sup> However, for the purpose of this Note, the 1981 Declaration pro-

<sup>197</sup> *Id.* at 919.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 919-20.

<sup>201</sup> 1981 Declaration, *supra* note 53, art. 1.

<sup>202</sup> *Id.* art. 2.

<sup>203</sup> *Id.* art. 6(a).

<sup>204</sup> *Id.* art. 6(b).

<sup>205</sup> *Id.* art. 6(c).

<sup>206</sup> *Id.* art. 6(d).

<sup>207</sup> *Id.* art. 6(e).

<sup>208</sup> *Id.* art. 6(f).

<sup>209</sup> *Id.* art. 6(h).

<sup>210</sup> *Id.* art. 6(i).

<sup>211</sup> Lerner, *supra* note 188, at 920.

<sup>212</sup> Sullivan, *supra* note 194, at 495-96.

pects an individual's right to manifest a religious belief through religious clothing, subject only to limitations discussed *infra*.<sup>213</sup>

These three international instruments, to which France is a party, obligate France to ensure the realization of the right to freedom of religion or belief, not only for its own citizens, but for *everyone*, which includes immigrants by implication.

## VI. FREEDOM TO MANIFEST ONE'S RELIGION OR BELIEF

Indeed, as discussed *supra*, international instruments provide for the freedom to manifest one's religion or belief both in public and in private. This includes assurances such as the Universal Declaration's guarantee of the freedom in community with others, in public, and within the circle of those whose faith one shares.<sup>214</sup> Importantly, however, the freedom to manifest one's religion or belief is not an absolute right.<sup>215</sup>

### a. *Limitations on Freedom to Manifest Religion or Belief*

In addition to the general limitation that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible[,]"<sup>216</sup> there are specific limitations on the exercise of individual rights and freedoms.<sup>217</sup> Each of the international instruments discussed in this Note simultaneously recognize limitations and protections on the right to freedom of thought, conscience, and religion.<sup>218</sup>

Most significant, as a binding treaty on France, Article 9(2) of the European Convention permits limitation on the freedom to manifest religious beliefs in circumstances where the government can prove that the restriction is prescribed by law and considered necessary in a democratic society.<sup>219</sup> A government's aim is legitimate if the interference with religious freedom is "in the interests of public safety, for the protection of public order, health or morals, or for the protection of rights and freedoms of others."<sup>220</sup> A member state's ability to enforce such legally-sanctioned limitations is not without boundary, as the ECHR has declared that such restrictions "'call for very strict scrutiny' because [they] have a direct impact on 'the need to secure true religious pluralism, an inherent feature of the notion of a democratic society.'"<sup>221</sup>

<sup>213</sup> This uncertainty as to what constitutes the right to change one's religion or belief is discussed in the context of proselytism by Tad Stahnke in *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251 (1999).

<sup>214</sup> Universal Declaration, *supra* note 52, art. 18.

<sup>215</sup> Van der Vyver, *supra* note 120, at 501.

<sup>216</sup> Universal Declaration, *supra* note 52, art. 29(1).

<sup>217</sup> Van der Vyver, *supra* note 120, at 501-02.

<sup>218</sup> *See, e.g., id.* at 501-03.

<sup>219</sup> European Convention, *supra* note 20, art. 9(2).

<sup>220</sup> *Id.* For a discussion of legitimate aims under Article 9(2) in ECHR case law, see Javier Martinez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587, 602-05 (2005).

<sup>221</sup> Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. 249, 264 (2008) (quoting Manoussakis v. Greece, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 407 (1997)).

Furthermore, the Universal Declaration prohibits the exercise of any of the rights and freedoms that oppose the United Nations' principles and purposes, and disavows any activity or act intended to undermine the Declaration's rights and freedoms.<sup>222</sup> Article 29(2) of the Universal Declaration states that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.<sup>223</sup>

Following suit, other international human rights instruments allow restraints on the freedom to manifest one's religion or belief in order to protect other human rights and societal interests. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, using nearly verbatim language, allows for limitations for the same necessities.<sup>224</sup> Additionally, the ICCPR likewise repeats and legally sanctions these limitations.<sup>225</sup> Similarly to the ECHR, the United Nations Human Rights Committee recognized that these limitations call for strict interpretation, to prevent the destruction of the right to manifest religion or belief.<sup>226</sup>

Accordingly, the right to manifest one's religion or belief is not absolute, but restricted by sanctioned limitations where appropriate under the circumstances. This exception complicates the headscarf affair. Thus, it is not purely an issue of freedom of religion, but also of manifesting that religion.

## VII. ADDITIONAL RELEVANT INTERNATIONAL INSTRUMENTS

Several additional international human rights instruments underscore the customary international law norm to the right of freedom from religious discrimination.

### a. *Non-binding Documents*

France is also a signatory to the Concluding Document of the Vienna Meeting 1986 of the Representatives of the Participating States of the Conference on Security and Co-operation in Europe ("Concluding Document").<sup>227</sup> The Concluding Document guarantees "the freedom of the individual to profess and practice religion or belief," and it strives "to prevent and eliminate discrimination against individuals or communities, on the grounds of religion or belief

<sup>222</sup> Van der Vyver, *supra* note 120, at 501-02.

<sup>223</sup> Universal Declaration, *supra* note 52, art. 29(2).

<sup>224</sup> 1981 Declaration, *supra* note 53, art. 1(3).

<sup>225</sup> ICCPR, *supra* note 47, art. 18(3).

<sup>226</sup> Danchin, *supra* note 221, at 264 (quoting U.N. Human Rights Comm., *Gen. cmt. No. 22*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993)).

<sup>227</sup> Nathaniel Stinnett, *Defining Away Religious Freedom in Europe: How Four Democracies Get Away With Discriminating Against Minority Religions*, 28 B.C. INT'L & COMP. L. REV. 429, 443 (2005) (citing Conference on Security and Co-operation in Europe, Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-up to the Conference, 28 I.L.M. 527 (1989), available at [http://www.osce.org/documents/mcs/1989/01/16059\\_en.pdf](http://www.osce.org/documents/mcs/1989/01/16059_en.pdf) [hereinafter Concluding Document]).

. . . .”<sup>228</sup> However, the Concluding Document is not self-executing and therefore France is not legally bound to its principles.<sup>229</sup> In order for this document to be formally binding on France, France must take the steps necessary to give it legal status.<sup>230</sup>

*b. Women’s Rights*

The 1967 version of the Declaration on the Elimination of Discrimination Against Women<sup>231</sup> stated that “[d]iscrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.”<sup>232</sup> Under CEDAW, discrimination against women shall mean:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>233</sup>

The purpose of this definition of discrimination is “to empower the Convention to be effective to liberate women to maximize their individual and collective potentialities, and not merely to be brought to the same level of protection of rights that men enjoy.”<sup>234</sup> The inclusion of “all forms” in CEDAW’s title reflects the Convention’s comprehensive intent by recognizing not only specific inequalities against women, but also other forms of discrimination “woven into the social fabric.”<sup>235</sup>

Notably, CEDAW makes no reference to “religion,” “belief,” or “expression.”<sup>236</sup> Nusrat Choudhury suggests that CEDAW does not call for granting women the same right to religious belief and expression as men because of the “perception that secularism is associated with gender equality and religious expression is associated with gender inequality.”<sup>237</sup> Although CEDAW does not expressly declare the rights of females to religious belief and expression, two CEDAW provisions condemn beliefs and practices that oppose gender equality norms, including those religiously based.<sup>238</sup> Specifically, Article 2(f) requires that states “take all appropriate measures . . . to modify or abolish existing . . . customs and practices which constitute discrimination against women.”<sup>239</sup> Additionally, Article 5(a) requires that states “modify the social

<sup>228</sup> *Id.* at 442-43 (quoting Concluding Document, *supra* note 227, princs. 16, 16a).

<sup>229</sup> *Id.* at 442-43. Moreover, the Concluding Document fails to define religion or belief. Concluding Document, *supra* note 227, princs. 16, 16a.

<sup>230</sup> Davis, *supra* note 180, at 227.

<sup>231</sup> Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263 (XXII), art. 1, U.N. Doc. A/6880 (Nov. 7, 1967).

<sup>232</sup> *Id.* art. 1.

<sup>233</sup> CEDAW, *supra* note 50, art. 1.

<sup>234</sup> Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643, 670 (1990).

<sup>235</sup> *Id.*

<sup>236</sup> Choudhury, *supra* note 65, at 260.

<sup>237</sup> *Id.* at 261.

<sup>238</sup> *Id.*

<sup>239</sup> CEDAW, *supra* note 50, art. 2(f).

and cultural patterns . . . which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles . . . ”<sup>240</sup> Choudhury posits that these broad provisions reflect the priority the drafters gave the prevention of oppressing women within religious communities above the protection of women’s free exercise of religious rights.<sup>241</sup>

Reporting on France’s CEDAW implementation, the *Coordination Française pour le Lobby Européen des Femmes* (CLEF), “alluded to the ‘sexist’ traditions and ‘religious’ practices of minority communities” that subject girls to both inequality and coercion in school.<sup>242</sup> CLEF specifically asked that the CEDAW Committee implore the French government to alert such communities to the gender equality ensured by French law and that such equality supersedes custom.<sup>243</sup> Although it did not refer to CLEF’s report, the CEDAW Committee asked 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.’ ”<sup>244</sup> As of 2007, CEDAW had not taken a position on the issue of headscarves and human rights.<sup>245</sup>

Based upon the foregoing explanations of the legal framework for analysis, the history of religion in France, freedom of religion, limitations on the manifestation of freedom of religion, and France’s international human rights obligations, the following section analyzes the *Silmi* decision in light of the emerging human rights norm to be free from discrimination, particularly on religious grounds, in immigration and naturalization decisions.

#### VIII. ANALYSIS: THE *SILMI* DECISION AS A VIOLATION OF THE EMERGING HUMAN RIGHTS NORM TO BE FREE FROM DISCRIMINATION, PARTICULARLY ON RELIGIOUS GROUNDS, IN MATTERS OF IMMIGRATION AND NATURALIZATION

Although there is an emerging norm in customary international human rights law to be free from discrimination in immigration and naturalization decisions, particularly on religious grounds, such decisions remains broad sovereign exercises of power. Despite judicial deference and flexibility to party-states, France’s recent decision in *Silmi* to deny citizenship to a Muslim woman, violated this norm.

This emerging norm, which finds its basis in the European Convention Article 9’s guarantee of freedom of conscience, belief, and religion, is binding

<sup>240</sup> *Id.* art. 5(a).

<sup>241</sup> Choudhury, *supra* note 65, at 261.

<sup>242</sup> *Id.* at 263.

<sup>243</sup> *Id.* at 263 (quoting *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* 8 [French Coalition for the European Women’s Lobby, Convention on the Elimination of All Forms of Discrimination Against Women, Report on France] [hereinafter CLEF’s Report] (2003)).

<sup>244</sup> *Id.* at 264 (quoting U.N. Comm. on the Elimination of Discrimination Against Women, Combined Third and Fourth Report and Fifth Periodic Report of France, 12, U.N. Doc. A/58/38 (July 3, 2003)).

<sup>245</sup> *Id.*

on France.<sup>246</sup> Article 9 applies expansively through Article 14's prohibition of discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>247</sup> Although Article 9 does not explicitly mention immigrants, Article 9(1)'s<sup>248</sup> guarantee of this freedom as a right belonging to *everyone* implies that immigrants also enjoy this right to freedom of religion.

Although the *Silmi* decision likely violates this emerging norm, the legality of the French headscarf law will likely stand. Relying on *Şahin* as precedent, Kathryn Boustead predicts that the ECHR is unlikely to find an Article 9 violation in the French Headscarf Law.<sup>249</sup> Specifically, France could justify the law as requisite to a legitimate government aim—maintaining public order and protecting others' rights.<sup>250</sup> Boustead argues that "the ECHR would almost certainly conclude that the [law] is a justifiable interference" on Article 9's religious freedoms partly due to the court's broad margin of appreciation for upholding *laïcité*.<sup>251</sup> Even if the headscarf law is an attempt to force integration, the proposed objectives nevertheless would be acceptable to the ECHR, which generally disregards a state's "less acceptable motivations."<sup>252</sup>

Despite such a prediction of the headscarf ban's legality, France's action may violate the emerging human rights because requiring France's desired extent of assimilation may take too harsh a stance. According to the ECHR, the European Convention is a "living instrument which must be interpreted in the light of present day conditions."<sup>253</sup> To determine whether an action violates the European Convention, the ECHR looks for "common European standards."<sup>254</sup> In making this determination, the ECHR relies on its own case law, domestic law, and international or European instruments, including human rights treaties.<sup>255</sup> Where there is no general agreement on a specific issue, the ECHR generally defers to the state.<sup>256</sup> The ECHR also interprets human rights treaties based on the principle of effectiveness: a method of statutory interpretation that requires the interpretation of Convention provisions "make its safeguards practical and effective."<sup>257</sup> By applying this principle, the European Convention's protections are effective; however, effectiveness cannot add to the list of protected rights or to state's obligations.<sup>258</sup>

<sup>246</sup> Dunne, *supra* note 111, at 130.

<sup>247</sup> European Convention, *supra* note 20, art. 14.

<sup>248</sup> *Id.* art. 9(1).

<sup>249</sup> Boustead, *supra* note 106, at 196.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, DUKE J. COMP. & INT'L L., Winter 2003, at 95, 126 (quoting *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep. 1, para. 31 (1978)).

<sup>254</sup> *Id.* at 126.

<sup>255</sup> *Id.* at 126, 129.

<sup>256</sup> *Id.* at 126.

<sup>257</sup> *Id.* at 127 (quoting *Loizidou v. Turkey*, 20 Eur. H.R. Rep. 99, para. 72 (1995) (Preliminary Objections)).

<sup>258</sup> *Id.* at 128.

Specifically, two ECHR methods of interpretation are most relevant to this Note's analysis. First, the ECHR considers relevant rules of international law and interprets the European Convention in accordance with international law principles, when possible.<sup>259</sup> Second, the ECHR strives to harmonize its judgments with the text of human rights bodies and their treaties.<sup>260</sup> Under such an analysis, the European Convention would not statically apply to immigration, but account for changes in circumstances.<sup>261</sup> Therefore, this analysis supports the emerging right to be free from discrimination in immigration and naturalization proceedings, and immigration as a whole, that are certainly different circumstances than existed at the drafting of the European Convention.

Importantly, the ECHR allows a "margin of appreciation," which doctrine grants party-states latitude to interpret the rights established in the European Convention.<sup>262</sup> There are two primary elements to this doctrine—judicial deference and normative flexibility.<sup>263</sup> First, the ECHR should grant party-states a "degree of deference and respect their discretion on the manner of executing their international law obligations."<sup>264</sup> Second, individual states may make different lawful decisions in applying the same international norm.<sup>265</sup> This differential exists because the international norms that are subject to the doctrine are unresolved and therefore "provide limited conduct-guidance and preserve a significant 'zone of legality' within which states are free to operate."<sup>266</sup> Although the ECHR would grant France this margin of appreciation in interpreting its application of Article 9 rights, the ECHR's regard for freedom of religion as a foundation of democratic society would likely strongly counter France's interpretation. Specifically, although this international human rights norm is unresolved, France has arguably exceeded this zone of legality, causing the ECHR to overturn *Şahin*.

Although *Kokkinakis* did not deal with immigration, in holding that the Greek law was not necessary in a democratic society, the ECHR indicated that it could invalidate Silmi's citizenship denial along similar reasoning, such as rejecting France's insistency upon assimilation. However, while *Kokkinakis* provides a basis for opposing France's action, *Şahin* provides similar reasoning for upholding the denial of citizenship. There, the ECHR found that secularism was necessary to a democratic society and thus any argument France would make on secular or *laïcité* grounds could prevail.

Moreover, as detailed *supra*, the Universal Declaration preamble recognizes "the inherent dignity and . . . equal and inalienable rights of all members of the human family . . ." <sup>267</sup> Although the Universal Declaration does not

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 129.

<sup>261</sup> *See id.* at 126 (discussing the European Convention as a living instrument that cannot remain static).

<sup>262</sup> Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 723 n.91 (2005).

<sup>263</sup> Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 909-10 (2005).

<sup>264</sup> *Id.* at 910.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> Universal Declaration, *supra* note 52, pmbl.

explicitly mention immigrants, Article 2's expansive language and the Universal Declaration's specific attention to issues that relate to immigrants' situations provide a foundation for applying the Universal Declaration to immigrants.<sup>268</sup> The *Silmi* decision is likely contradictory to France's international obligations given France's obligation to recognize and protect the right to freedom of religion or belief,<sup>269</sup> and the Universal Declaration's status as universal international law,<sup>270</sup> the rights of which arguably apply to immigrants. This contradiction stands despite France's arguable use of permissible limitations on the freedom to manifest one's religion or belief.

Accordingly, in light of France's international human rights obligations to various instruments guaranteeing the right to freedom of religion to all persons, the *Silmi* decision has violated international human rights norms. Although national security and permissible limitations weigh against the more expansive interpretation of freedom of religion or belief, insufficient assimilation, apparently rooted in French suspicion of Islam, will likely not prevail. Given France's history of separation of church and state, and what the French government may argue is a strong tension between Muslim and non-Muslim communities, this decision appears to be a blatant disregard for the international human right guarantee of freedom of religion in immigration and naturalization proceedings, in pursuit of the country's desired cultural assimilation. It does not seem necessary to protect the public order and the general welfare in a democratic society.

## IX. CONCLUSION

The international human rights documents discussed in this Note evidence an emerging human rights norm to be free from discrimination, particularly on religious grounds, which should apply in matters of immigration and naturalization. This right may best be described by repeating Article 18 of the Universal Declaration: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."<sup>271</sup>

The French government's decision, upheld by the country's highest administrative court, to deny *Silmi* citizenship likely constitutes a violation of this emerging norm by discriminating on religious grounds in immigration and naturalization proceedings. Further, this case may represent a dangerous threat to the freedom of religion and religious manifestation, if the French government applies the rationale of cultural assimilation, or not being "French enough," beyond this particular headscarf controversy.

<sup>268</sup> Monica Nigh Smith, Note, "France for the French?" *The Europeans? The Caucasians?: The Latest French Immigration Reform and the Attempts at Justifying Its Disproportionate Impact on Non-White Immigrants*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 1107, 1134 (2005). The UDHR addresses the right to an open and fair hearing, to freedom of movement, and to a nationality. Universal Declaration, *supra* note 52, arts. 10, 13, 15.

<sup>269</sup> See *supra* Part V.b (discussing Article 18 of the Universal Declaration).

<sup>270</sup> See *supra* Part V.b (discussing the Universal Declaration).

<sup>271</sup> Universal Declaration, *supra* note 52, art. 18.