

**THE CONSTITUTIONALITY OF FRANCE’S BAN ON THE  
BURQA IN LIGHT OF THE EUROPEAN CONVENTION’S  
ARSLAN V. TURKEY DECISION ON RELIGIOUS  
FREEDOM**

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**ABSTRACT**

On April 11, 2011, France implemented a law that placed a ban on persons wearing any form of face coverings in public, which includes the face veil that some Muslim women wear to cover their faces.<sup>+</sup> France implemented this law on the basis of promoting public order and secularism. However, in implementing this law many Muslim women’s rights to freedom of religion have been restricted. This paper argues that France’s new law banning the face veil violates the European Convention on Human Rights.

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<sup>+</sup> The full face veil worn by some Muslim women is many times interchangeably referred to as *niqab*, *burqa*, and *hijab* in various sources. For the sake of simplicity, I have tried to use the term “face veil” to describe this form of dress unless I am quoting a source which uses a different term.

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## INTRODUCTION

In 2004, France banned the wearing of overt religious symbols in public schools, which included the headscarf worn by some Muslim women.<sup>1</sup> Since then, several other European countries have followed suit.<sup>2</sup> France originally banned the headscarf in public schools on the pretext that, because France was a secular society, religious symbols in public schools and in public institutions worn by public officials offended French secularism.<sup>3</sup> The French government emphasized that this law applied to *all* overt religious symbols, and thus this legislation

<sup>1</sup> Loi 2004-228 du 15 mars 2004 [Law 2004-228 of March 15, 2004], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977&dateTexte> (“Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.” [In schools, colleges and public high schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited.])

<sup>2</sup> Adrien Katherine Wing & Monica Nigh Smith, *The Future of Critical Race Feminism: Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 746 (2006); France, Belgium, Denmark, the Netherlands, Italy, Turkey, and Germany have some form of headscarf ban in place. *The Islamic Veil Across Europe*, BBC News (Sept. 22, 2011, 5:20 AM), <http://www.bbc.co.uk/news/world-europe-13038095>.

<sup>3</sup> Wing & Smith, *supra* note 2, at 745.

was not an attack on Muslim immigrant communities in France.<sup>4</sup> Rather, the French government argued that the headscarf ban was justified in order to promote the country's secular mission and rationalized that religious symbols were distractions in the educational and political realms.<sup>5</sup> The European Court of Human Rights has upheld attacks against these laws, holding that they do not violate the European Convention on Human Rights.<sup>6</sup>

However, France's 2011 law forbidding women from wearing a face veil in any public setting is a stark move that sheds light on whether France's law has a legitimate basis in promoting "secularism," or whether it is in actuality a violation of religious freedom. This new law places restrictions on what a person may wear in the "public space,"<sup>7</sup> as opposed to the 2004 ban whose restrictions were limited to government-regulated establishments, such as public schools and institutions.<sup>8</sup> The French legislature defines public space as "public roads and places open to the public or used for a public service,"<sup>9</sup> and thus the law prohibits a person from wearing a face veil, not only in public schools and buildings, but also on buses, in museums, cafes, and even while walking down the street.<sup>10</sup> While the ban on the headscarf may have straddled the line of restricting religious freedom for some, there is no doubt that this new law has crossed it. It is this implementation of a complete ban on what a person may wear in the public sphere that makes the new law a violation under the European Convention on Human Rights.

This paper analyzes the legitimacy of banning the face veil in the public space in light of the European Court of Human Rights' 2010

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

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

<sup>6</sup> Press Release, European Court of Human Rights, Factsheet - Freedom of Religion (Feb. 2013), available at [http://www.echr.coe.int/NR/rdonlyres/80119CA2-3425-43D9-9FEB-524829C637B1/0/FICHES\\_Libert%C3%A9\\_religion\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/80119CA2-3425-43D9-9FEB-524829C637B1/0/FICHES_Libert%C3%A9_religion_EN.pdf).

<sup>7</sup> Loi 2010-1192 du 11 octobre 2010 [Law 2010-1192 of October 11, 2010], OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&fastPos=1&fastReqId=1433419319&categorieLien=id&navigator=naturetextenavigateur&modifier=LOI&fastPos=1&fastReqId=1433419319&oldAction=rechTexte> ("*L'espace public est constitué des voies publiques ainsi que des lieux ouverts au public ou affectés à un service public.*") [The public space consists of public roads and places open to the public or used for a public service.].

<sup>8</sup> Law 2004-228 of Mar. 15, 2004 (Fr.), *supra* note 1.

<sup>9</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.), *supra* note 7.

<sup>10</sup> SÉNAT, PROJET DE LOI INTERDISANT LA DISSIMULATION DU VISAGE DANS L'ESPACE PUBLIC [BILL PROHIBITING THE CONCEALMENT OF THE FACE IN PUBLIC], available at <http://www.senat.fr/rap/109-699/109-6995.html>.

decision striking down a restrictive law that forbade persons from wearing religious garb in the “public sphere.”<sup>11</sup> France’s new law is particularly significant because this is the first time a European country has banned persons from wearing the face veil in the general public space. This paper explores whether, under the European Convention on Human Rights, this legal maneuver has any legitimacy, or if it is an outright and overt attack on the religious freedom of Muslim women in France.<sup>12</sup> As of this writing, the new law has not yet been challenged in the European Court of Human Rights; however, two French women were officially cited and fined for violating the ban on September 22, 2011 and plan to appeal these citations to the European Court of Human Rights if necessary.<sup>13</sup> If and when this case comes before the European Court of Human Rights, the decision could have far-reaching effects for other European countries that currently have similar laws pending in their legislatures.<sup>14</sup>

Part I of this article explores the origins of the modern headscarf debate from a limited school ban in 1989 to a total ban on wearing the face veil in the public sphere. Part II provides an overview of the European Court of Human Rights and reviews recent decisions on the legality of banning religious symbols from public schools and the public sphere. This Part also explores the legal requirements of the European Convention on Human Rights. Part III argues that the French ban violates the European Convention on Human Rights, especially in light of the recent European Court of Human Rights decision, *Ahmet Arslan and Others v. Turkey*. Part IV examines the citations of two women in 2011 for wearing the face veil in public and considers the potential effects if these women appeal these citations to the European Court of Human Rights. Part V concludes that France’s ban on face coverings in the public sphere violates the provisions of religious freedom under the European Convention on Human Rights.

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<sup>11</sup> See *Ahmet Arslan and Others v. Turkey*, App. No. 41135/98 (Sect. 2), Eur. H.R. Rep. (2010).

<sup>12</sup> This seems to be the case, since Muslim women are part of the only religion that has members who sometimes choose to cover their faces with a face veil.

<sup>13</sup> Angelique Chrisafis, *Niqab Women Fined by French Court*, THE GUARDIAN, Sept. 22, 2011, <http://www.guardian.co.uk/world/2011/sep/22/niqab-women-fined-french-court>.

<sup>14</sup> Several countries have implemented a face veil ban in the public sphere or a face veil ban in some circumstances, have passed an initial bill on such a ban, or are currently considering a ban, including Belgium, Spain, the Netherlands, Italy, and Switzerland. *The Islamic Veil Across Europe*, *supra* note 2.

## PART I: THE HISTORY OF THE BAN: FROM 1989 TO 2011

### A. FRENCH SECULARISM: *LAÏCITÉ*

France's current legislative amendments and statutory law banning religious symbols can be traced back to the "headscarf affair" (as it was dubbed) of 1989 in Creil, France.<sup>15</sup> The affair occurred when a public school principal expelled three junior high school Muslim girls for wearing headscarves to class.<sup>16</sup> This new controversy erupted into a heated national debate soon after.<sup>17</sup>

It is appropriate here to provide some political context to this national debate. France adheres to the principle of secularism known as *laïcité*, and the country has held itself out as a secular republic since the French Revolution in 1789.<sup>18</sup> This uniquely French concept of *laïcité*<sup>19</sup> was considerably strengthened when France declared an official separation of church and state in 1905.<sup>20</sup> What France refers to as *laïcité* resembles a form of secularism that prohibits all religion from the public sphere and works in conjunction with France's policy of total assimilation to a certain French mold.<sup>21</sup> *Laïcité* has been embraced as a foundational principle of French Republicanism<sup>22</sup> and seeks to generate equality through sameness in the public sphere by relegating linguistic,

<sup>15</sup> Wing & Smith, *supra* note 2, at 754.

<sup>16</sup> Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 582–83 (2004).

<sup>17</sup> RICHARD L. DERDERIAN, NORTH AFRICANS IN CONTEMPORARY FRANCE: BECOMING VISIBLE 11 (2004).

<sup>18</sup> Wing & Smith, *supra* note 2, at 754.

<sup>19</sup> T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 B.Y.U.L. REV. 419, 432–42 (2004).

<sup>20</sup> The law of 1905, which separated church and state, declares: "The Republic neither recognizes, pays the salaries of, nor subsidizes any religion [or act of worship]." Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État [Law on the Separation of Churches and State of December 9, 1905], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 9, 1905, art. 2, available at <http://www.assemblee-nationale.fr/histoire/eglise-etat/loi-scan.asp>; *State Secularism and Religious Freedom*, CRIM. L. JUST. WKLY. (Oct. 8, 2010), <http://criminallawandjustice.co.uk/features/State-Secularism-and-Religious-Freedom>.

<sup>21</sup> *State Secularism and Religious Freedom*, *supra* note 20.

<sup>22</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, 236 (2007); 1958 CONST. 1 ("France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.").

cultural, ethnic, and religious differences to the private sphere.<sup>23</sup> *Laïcité* supports the unification of national and political citizenship in France—a unification that necessitates cultural assimilation as an ideal.<sup>24</sup> This model of secularism and immigrant integration through cultural assimilation differs from the relative cultural and religious pluralism in countries like the United States.<sup>25</sup>

Former French President Jacques Chirac has described *laïcité* as one of the pillars of France's new Republic.<sup>26</sup> This has led to recent cases of French national identity often prevailing over individual religious and cultural diversity.<sup>27</sup> For instance, under the principle of *laïcité*, Islam is a religion that threatens secular France, and many have argued that Islam has no place in the French legal structure.<sup>28</sup> In this argument, Islam is not simply a personal religion that can be practiced by citizens within the legal boundaries of a secular state, but rather it is a visible religion that threatens that secular state.<sup>29</sup> Since France has the largest Muslim population in Western Europe,<sup>30</sup> there is a strong feeling in France that the issue of Islam cannot easily be ignored.<sup>31</sup>

After the three Muslim girls were expelled from school in Creil in 1989, public debates concerning the presence of religious symbols in schools became commonplace in France.<sup>32</sup> This issue greatly divided the country and raised questions such as whether Muslim women who

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<sup>23</sup> Jane Freedman, *Secularism as a Barrier to Integration? The French Dilemma*, 42 INT'L MIGRATION, Aug 2004, at 5, 10 (Aug. 2004).

<sup>24</sup> Choudury, *supra* note 22, at 237.

<sup>25</sup> *Id.* Originally the United States also attempted assimilation as an ideal. The First Amendment to the United States Constitution has over time dampened the attempt to enforce a "melting pot" style of assimilation. The United States' separation of church and state model now allows for individual expression, rather than an absence of all religious expression whatsoever. For a more in-depth discussion of how the Establishment Clause model differs from *laïcité*, see T. Jeremy Gunn, *Religion and Law In France: Secularism, Separation, and State Intervention*, 57 DRAKE L. REV. 949 (2009); see also T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 B.Y.U.L. REV. 419, 432–42 (2004).

<sup>26</sup> *State Secularism and Religious Freedom*, *supra* note 20.

<sup>27</sup> *Id.*

<sup>28</sup> See generally Hera Hashmi, *Too Much To Bare? A Comparative Analysis of The Headscarf in France, Turkey, and the United States*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 409, 418 (2010).

<sup>29</sup> MAXIM SILVERMAN, *DECONSTRUCTING THE NATION: IMMIGRATION, RACISM AND CITIZENSHIP IN MODERN FRANCE* 112 (1992).

<sup>30</sup> Hashmi, *supra* note 28, at 418.

<sup>31</sup> *Id.*

<sup>32</sup> Wing & Smith, *supra* note 2, at 754.

choose to wear a headscarf or veil have a place in the French Republic.<sup>33</sup> The outcry and heated public discussion that sprung up after this headscarf affair paralleled the tensions associated with immigration issues and the politics promoting assimilation.<sup>34</sup> Not surprisingly, the headscarf affair appeared at the forefront of this national political debate.<sup>35</sup>

Political parties ran on platforms that included preserving French identity, and the Muslim headscarf was seen as an impediment to this idea.<sup>36</sup> The headscarf affair revealed anxieties over France's Muslim community, comprised mostly of North Africans, and remained one of the nation's most central concerns.<sup>37</sup> The fear was that, as former French President Jacques Chirac had once stated, France "would lose her soul" if she succumbed to Anglo-American multiculturalism.<sup>38</sup> In sum, France's theory of secularism, *laïcité*, is one of a "proverbial melting pot" rather than an American style salad bowl where multiple religions and other identities can be preserved as individual ingredients of the whole.<sup>39</sup>

## B. GENERAL FRAMEWORK OF THE FRENCH LEGISLATURE

The French legislature officially adopted a ban prohibiting the wearing of headscarves in public schools in 2004.<sup>40</sup> France's legislative system is a bicameral parliament.<sup>41</sup> The parliament is comprised of the National Assembly and the Senate.<sup>42</sup> A bill becomes an act only after being successively considered by each assembly and passed by both in

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<sup>33</sup> *Id.*

<sup>34</sup> DERDERIAN, *supra* note 17, at 11.

<sup>35</sup> Wing & Smith, *supra* note 2, at 754.

<sup>36</sup> DERDERIAN, *supra* note 17, at 12.

<sup>37</sup> *Id.*

<sup>38</sup> Mayanthi L. Fernando, *The Avowal and Disavowal of Difference France*, 77 ANTHROPOLOGICAL Q. 835, 837 (2004).

<sup>39</sup> Wing & Smith, *supra* note 2, at 755. Even America has recognized that France's new law is in sharp contrast to American ideals and that this law would not be tolerated in the United States due to the U.S. Constitution's First Amendment's adherence to freedom of expression. "In fact, to our American sensibilities, it strikes us, frankly, as a little shocking." Ashby Jones, *No First Amendment Here! France Bans Burquas, Niqabs*, WALL ST. J. L. BLOG (Sept. 15, 2010, 9:03 AM), <http://blogs.wsj.com/law/2010/09/15/no-first-amendment-here-france-bans-burquas-niqabs/>.

<sup>40</sup> Law 2004-228 of Mar. 15, 2004 (Fr.), *supra* note 1

<sup>41</sup> ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], GENERAL FRAMEWORK, <http://www.assemblee-nationale.fr/english/framework.asp> (last visited Mar. 14, 2012).

<sup>42</sup> *Id.*

the same term.<sup>43</sup> New acts can be referred to the Constitutional Council (*Conseil Constitutionnel*) by a petition just prior to being signed into law by the President of the Republic.<sup>44</sup> The Constitutional Council is the highest constitutional authority in France and reviews the constitutionality of acts passed by Parliament.<sup>45</sup> Once the Council declares that an act conforms to the French Constitution, the act can then be promulgated.<sup>46</sup> The final step in the process is the President of the Republic's signature, which makes the act legally binding.<sup>47</sup>

As an additional constitutional check on the legislative process, the Council of State (*Conseil d'Etat*), a body of the French government, provides advice to the executive branch on the preparation of bills, ordinances, and certain decrees.<sup>48</sup> It also answers the government's queries on legal affairs and conducts studies upon the request of the government or through its own initiative regarding administrative or public policy issues.<sup>49</sup> The Council of State is the highest administrative jurisdiction, and it is the final arbiter of cases relating to executive power, local authorities, independent public authorities, public administration agencies, or any other agency invested with public authority.<sup>50</sup> In discharging the dual functions of judging as well as advising the government, the Council of State ensures that the French administration operates in compliance with the law.<sup>51</sup> It is therefore one of the principal guarantees of the rule of law in the country.<sup>52</sup>

### C. THE LEGISLATIVE HISTORY OF THE HEADSCARF BAN

In 2004, the ban against headscarves and all overt religious symbols in public institutions passed both branches of parliament and

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<sup>43</sup> *Id.*

<sup>44</sup> ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], LEGISLATIVE PROCEDURE AND STEPS, [http://www.assemblee-nationale.fr/english/legislative\\_procedure.asp](http://www.assemblee-nationale.fr/english/legislative_procedure.asp) (last visited Mar. 14, 2012).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> CONSEIL D'ÉTAT [THE COUNSEL OF STATE], <http://www.conseil-etat.fr/en> (last visited Mar. 14, 2012).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

was enacted into law.<sup>53</sup> The text of the legislation reads: “In the schools, public secondary schools and high schools, wearing symbols or dress by which the students conspicuously manifest a religious affiliation is prohibited.”<sup>54</sup> On February 10, 2004, the French National Assembly voted 494 to 36 in favor of legislation banning conspicuous religious symbols, which included the headscarf worn by some Muslim women, from public schools.<sup>55</sup> The legislation then passed in the French Senate by a vote of 276 to 20 on March 3, 2004.<sup>56</sup> Seventy percent of the French public supported this legislative ban,<sup>57</sup> and on March 15, 2004, the president signed the legislation into law.<sup>58</sup>

#### D. THE LEGISLATIVE HISTORY OF THE FACE VEIL BAN

Six years later, the French legislature considered a more restrictive law which states that in a public space, it is prohibited to wear clothing that covers the face.<sup>59</sup> The law indicates that the public space “consists of public roads and places open to the public or used for a public service.”<sup>60</sup> On July 13, 2010, the National Assembly branch of the French parliament approved this ban by a vote of 336 to 1.<sup>61</sup> On September 14, 2010, the Senate branch of the French parliament also passed the ban on face coverings in public.<sup>62</sup> The Constitutional Council

<sup>53</sup> Law 2004-228 of Mar. 15, 2004 (Fr.), *supra* note 1; *see generally* Wing & Smith, *supra* note 2, at 756–57.

<sup>54</sup> Law 2004-228 of Mar. 15, 2004 (Fr.), *supra* note 1.

<sup>55</sup> Elaine Sciolino, *French Assembly Votes to Ban Religious Symbols in Schools*, N.Y. TIMES, Feb. 11, 2004, at A3, available at <http://www.nytimes.com/2004/02/11/world/french-assembly-votes-to-ban-religious-symbols-in-schools.html>.

<sup>56</sup> *Le Sénat Français Adopte le Projet de Loi sur les Signes Religieux à l'École*, LE MONDE (Fr.), Mar. 3, 2004.

<sup>57</sup> Marie Brenner, *Daughter of France, Daughters of Allah*, VANITY FAIR, Apr. 2004, at 196.

<sup>58</sup> Law 2004-228 of Mar. 15, 2004 (Fr.), *supra* note 1.

<sup>59</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.), *supra* note 7 (“Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage.”

[No one, in the public space, may wear clothing intended to conceal his face.]

<sup>60</sup> *Id.* at art. 2 (“Pour l'application de l'article 1er, l'espace public est constitué des voies publiques ainsi que des lieux ouverts au public ou affectés à un service public.” [For the purposes of Article 1, the public space consists of public roads and places open to the public or used for a public service.]

<sup>61</sup> Willy Fautré, *Is the Burqa Compatible with Women's Rights? The “Burqa Issue” in the EU*, Paper Presented at the Conference “Burqa and Women's Rights” at the European Parliament in Brussels (June 10, 2010), <http://strasbourgconsortium.org/document.php?DocumentID=5170>.

<sup>62</sup> Elaine Ganley, *French Senate Passes Full Islamic Veils Ban*, HUFF POST WORLD (Sept. 14, 2010), available at [http://www.huffingtonpost.com/2010/09/14/france-passes-full-islami\\_n\\_716449.html](http://www.huffingtonpost.com/2010/09/14/france-passes-full-islami_n_716449.html).

of France declared the ban constitutional on October 7, 2010,<sup>63</sup> and the ban was signed into law on October 11, 2010.<sup>64</sup> On April 11, 2011, the law went into effect.<sup>65</sup>

The parliament rationalized that the law was necessary because face coverings prevent clear identification of a person, which can be both a security risk and a social hindrance.<sup>66</sup> The law does, however, allow for several exceptions, such as motorcycle helmets, masks for health reasons, fencing, skiing, carnivals and festivals.<sup>67</sup> Because the text of the law does not refer to Islam, or the face veil worn by some Muslim women,<sup>68</sup> the French Constitutional Council said the law did not impose disproportionate punishments or prevent the free exercise of religion in a place of worship, finding therefore that the law conforms to the French Constitution.<sup>69</sup>

However, the history of the legislation seems to tell a different story. The events and facts leading up to the enactment of the face veil ban indicate the extent of the tensions surfacing in the French community. In mid-June 2009, a group of sixty-five French members of parliament called for a parliamentary commission to examine whether fully covered Muslim women undermine France's secularism.<sup>70</sup> On June 22, 2009, President Nicolas Sarkozy addressed the parliament at the Palace of Versailles and stated that the face veil "will not be welcome on the territory of the French Republic."<sup>71</sup> Sarkozy stated that the purpose of the law "is to protect women from being forced to cover their faces and to uphold France's secular values."<sup>72</sup> In addition to stating that face veils

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<sup>63</sup> CNN Wire Staff, *French Burqa Ban Clears Last Legal Obstacle*, CNN (Oct. 7, 2010), <http://www.cnn.com/2010/WORLD/europe/10/07/france.burqa.ban/index.html>.

<sup>64</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.), *supra* note 7, at 18344.

<sup>65</sup> Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES, Apr. 11, 2011, available at <http://www.nytimes.com/2011/04/12/world/europe/12france.html>.

<sup>66</sup> CNN Wire Staff, *supra* note 63.

<sup>67</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.), *supra* note 7, at 18344; Angela Doland, *France Burqa Ban: French Parliament Approves Ban on Face Veils*, HUFFINGTON POST (July 13, 2010), available at [http://www.huffingtonpost.com/2010/07/13/france-burqa-ban-french-p\\_n\\_644433.html](http://www.huffingtonpost.com/2010/07/13/france-burqa-ban-french-p_n_644433.html).

<sup>68</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.), *supra* note 7.

<sup>69</sup> CNN Wire Staff, *supra* note 63.

<sup>70</sup> *Nicolas Sarkozy: Burqa Not Welcome in France*, TELEGRAPH (June 22, 2009), available at <http://www.telegraph.co.uk/news/worldnews/europe/france/5603070/Nicolas-Sarkozy-burqa-not-welcome-in-France.html>.

<sup>71</sup> *Id.*

<sup>72</sup> Aliyah Shahid, *French Senate, Agreeing with President Nicolas Sarkozy, Bans Women from Wearing Burkhas in Public*, N.Y. DAILY NEWS, (Sept. 14, 2010), available at

were “not welcome” in France,<sup>73</sup> Sarkozy, in his first state of the nation address, attacked the veil as being a “sign of subservience and debasement.”<sup>74</sup>

Additionally, on December 16, 2009, France’s immigration minister, Eric Besson, participated in a hearing in front of the parliamentary commission inquiring into veils in France.<sup>75</sup> Besson stated that he wanted “the wearing of the full veil to be systematically considered as proof of insufficient integration into French society, creating an obstacle to gaining nationality.”<sup>76</sup> Finally, on January 26, 2010, a parliamentary commission recommended that the face veil be outlawed in public buildings.<sup>77</sup> While the commission did not go so far as to recommend a full ban in the public space,<sup>78</sup> only a few months later the legislation for a face veil ban in the public sphere passed in the parliament.<sup>79</sup> While it is true that the legislation makes no reference to Islam, it is no secret that the law was promulgated in light of Sarkozy’s statements that targeted Muslim women.<sup>80</sup>

## PART II: THE STANCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A member country of the European Union does not have free license to implement laws banning religious freedom.<sup>81</sup> Although a ban on religious symbols from public places may not violate the French

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<http://www.nydailynews.com/news/world/french-senate-agreeing-president-nicolas-sarkozy-bans-women-wearing-burkas-public-article-1.189505>.

<sup>73</sup> *French Senate Bans Burka*, CBC NEWS (Sept. 14, 2010), available at <http://www.cbc.ca/news/canada/montreal/story/2010/09/14/france-burka-ban.html>.

<sup>74</sup> *State Secularism and Religious Freedom*, *supra* note 20.

<sup>75</sup> Elaine Ganley, Minister Says Burqa-Style Veils Impede Citizenship, *Seattle Times* (Dec. 16, 2009 1:00 PM), [http://seattletimes.nwsourc.com/html/nationworld/2010522907\\_apeufrancemuslimveil.html?syndication=rss](http://seattletimes.nwsourc.com/html/nationworld/2010522907_apeufrancemuslimveil.html?syndication=rss).

<sup>76</sup> *Id.*

<sup>77</sup> Eleanor Beardsley, *French Panel: Ban Burqas in Public Buildings*, NPR (Jan. 26, 2010), <http://www.npr.org/templates/story/story.php?storyId=122970914>.

<sup>78</sup> *Id.*

<sup>79</sup> Fautré, *supra* note 61.

<sup>80</sup> See, e.g., Nathan Koppel, *French Court Fines Women for Wearing Face Veils*, WALL ST. J. L. BLOG (Sept. 23, 2011), <http://blogs.wsj.com/law/2011/09/23/french-court-fines-women-for-wearing-face-veils/>.

<sup>81</sup> See European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

Constitution, a European Union member country is also subject to the minimum standards of equality and human rights as outlined in the European Convention on Human Rights. Now that France has implemented this newest ban on face veils in public places, the question is whether this law violates the European Convention.

### A. MINIMUM REQUIREMENTS OF THE CONVENTION

The European Court of Human Rights, located in Strasbourg, France, is an international court founded in 1959.<sup>82</sup> The European Court of Human Rights was adopted under the auspices of the Council of Europe,<sup>83</sup> and member countries must abide by the terms of the Convention and agree to the jurisdiction of the Court to review the state's laws as conditions of entry into the European Union.<sup>84</sup> The Court reviews cases alleging violations of the civil and political rights set out in the European Convention on Human Rights,<sup>85</sup> an international treaty whereby each member state promises to secure fundamental civil and political rights.<sup>86</sup> These fundamental rights include the right to freedom of thought, conscience, and religion.<sup>87</sup> The Convention is applicable at the national level and has been incorporated into the legislation of the member states, which have undertaken to protect the rights defined in the Convention.<sup>88</sup> There are currently forty-seven member states to the Convention and a corresponding forty-seven judges, one from each member country.<sup>89</sup>

A Court decision is binding on the countries involved and may lead to governments being forced to amend their legislation and administrative practices.<sup>90</sup> When the Court delivers a judgment finding a

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<sup>82</sup> *The Court in Brief*, EUR. CT. H.R., [http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure\\_en\\_bref\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf) (last visited Mar. 14, 2012).

<sup>83</sup> See Parliamentary Assembly, *The Accession of the European Union/European Community to the European Convention on Human Rights*, No. 11533 (2008), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1610.htm#1>.

<sup>84</sup> *See id.*

<sup>85</sup> *The Court in Brief*, *supra* note 82.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *The ECHR in 50 Questions*, Eur. Ct. H.R., at 5, [http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ\\_ENG\\_A4.pdf](http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf) (last visited Mar. 14, 2012).

<sup>89</sup> *Id.* at 4.

<sup>90</sup> *The Court in Brief*, *supra* note 82.

violation, the Court transmits the file to the Committee of Ministers of the Council of Europe,<sup>91</sup> and the Committee of Ministers of the Council of Europe monitors the execution of judgments, decides how the judgment should be executed, and determines how to prevent similar violations in the future.<sup>92</sup>

The pertinent parts of the European Convention on Human Rights are as follows:

Section 1, Article 9: Rights and Freedoms:

1. 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 the community with others in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>93</sup>

Section 1, Article 14: Prohibition of Discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with the national minority, property, birth or other status.<sup>94</sup>

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1: General Prohibition of Discrimination:

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, natural or social origin, association with a national minority, property, birth or other status.

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<sup>91</sup> *The ECHR in 50 Questions*, *supra* note 88, at 10.

<sup>92</sup> *Id.* at 3, 9–10.

<sup>93</sup> European Convention, *supra* note 81, at art. 9.

<sup>94</sup> *Id.* at art. 14.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.<sup>95</sup>

## B. FOUR-PRONG ANALYSIS FOR RELIGIOUS RIGHTS VIOLATIONS

The European Court of Human Rights uses a four-prong test to determine whether a person's right to manifest his religious belief has been violated.<sup>96</sup> The text of Article 9, ¶ 2 sets out three of these prongs, namely that any limitations on religious freedom must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society.<sup>97</sup> The European Court of Human Rights has added a prong to this initial analysis.<sup>98</sup> The European Court of Human Rights will not find a violation of Article 9's protection of religious expression unless the applicant demonstrates state interference with his freedom of religious expression.<sup>99</sup> Thus, the four-prong test is as follows: (1) an applicant must demonstrate an interference with the freedom, but the interference is justified if the limitation (2) is prescribed by law, (3) pursues a legitimate aim, and (4) is necessary in a democratic society.<sup>100</sup>

First, the Court must find the existence of an interference with the applicant's freedom. The European Court of Human Rights relies on an objective standard to determine whether a given practice warrants Article 9 protection.<sup>101</sup> The Court emphasizes that an unlawful restriction of religious expression must adversely impact an individual's "worship, teaching, practice, [or] observance" of religion.<sup>102</sup> While the European Court of Human Rights has generally shown limited deference to the individual applicant's characterization of an act when determining whether it constitutes an Article 9 violation,<sup>103</sup> it held that "the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs

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<sup>95</sup> *Id.* at protocol no. 12.

<sup>96</sup> Choudhury, *supra* note 22, at 267.

<sup>97</sup> *Id.*; European Convention, *supra* note 81, art.9(2).

<sup>98</sup> Choudhury, *supra* note 22, at 267.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 267–68.

<sup>102</sup> *See* Kalac v. Turkey, App. No. 20704/92, 27 Eur. H.R. Rep. 552, 564 (1997).

<sup>103</sup> Choudhury, *supra* note 22, at 268–69; *see also* Valsamis v. Greece, App. No. 21787/93, 24 Eur. H.R. Rep. 294, 307 (1996).

or the means used to express such beliefs are legitimate.”<sup>104</sup> This means that the European Court of Human Rights may not question the legitimacy of the religious importance of headscarves and face veils worn by Muslim women as a religious practice.<sup>105</sup> Stated another way, the Court may not analyze whether the headscarf or face veil is required as part of Islam; rather, the Court may only determine whether there is state interference with the practice.<sup>106</sup>

Second, the Court determines if the interference with the person’s religious freedom is “prescribed by law.”<sup>107</sup> The Court defined this term to mean a permissible state limitation of religious expression that is expressed in domestic law and must be “adequately accessible and foreseeable, that is to say, formulated with sufficient precision to enable an individual . . . to regulate his conduct.”<sup>108</sup>

Third, state limitations on freedom of religion must be made in pursuit of one of the legitimate aims set forth in Article 9, ¶ 2 of the European Convention on Human Rights.<sup>109</sup> These legitimate aims include “interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”<sup>110</sup> The Court has added that the protection of state secularism constitutes a legitimate aim.<sup>111</sup>

Lastly, the European Court of Human Rights must judge whether state interference with the freedom of religion qualifies as “necessary in a democratic society” under Article 9, ¶ 2 of the European Convention on Human Rights.<sup>112</sup> The Court must “inquire into whether the measures taken at the national level are justified in principle and are proportionate,” giving weight to measures that meet “a pressing social

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<sup>104</sup> Hasan v. Bulgaria, App. No. 30985/96, 34 Eur. Ct. H.R. 1339, 1341 (2000), available at <http://www.strasbourgconsortium.org/document.php?DocumentID=5313>; see also Valsamis v. Greece, App. No. 21787/93, 24 Eur. H.R. Rep. 294, 307 (1996).

<sup>105</sup> Choudhury, *supra* note 22, at 269.

<sup>106</sup> *Id.*

<sup>107</sup> European Convention, *supra* note 81, art. 9(2).

<sup>108</sup> See, e.g., Metropolitan Church of Bessarabia v. Moldova, App. No. 45701/99, 35 Eur. H.R. Rep. 13, 333 (2001).

<sup>109</sup> European Convention, *supra* note 81, art. 9(2).

<sup>110</sup> *Id.*

<sup>111</sup> See Refah Partisi v. Turkey, App. Nos. 41340/98, 41342/98, 41344/98, 37 Eur. Ct. H.R. 1 (2003). Refah Partisi alleged that the Turkish Constitutional Court’s dissolution of the party violated its members’ rights to freedom of religion under Article 9 of the European Human Rights Convention. The European Court of Human Rights emphasized that state secularism was a legitimate aim justifying state restriction.

<sup>112</sup> European Convention, *supra* note 81, art. 9(2).

need.”<sup>113</sup> In analyzing whether a state interference is necessary in a democratic society, the European Court of Human Rights held that a certain “margin of appreciation” must be granted to the state’s assessment of the existence and extent of the necessity and proportionality of the limitation.<sup>114</sup> The Court rationalized that a certain degree of state discretion is necessary because the states are in a better position than the European Court of Human Rights judges to evaluate the need for state action.<sup>115</sup> Therefore, because of this rationale, the European Court of Human Rights generally adheres to this deferential “margin of appreciation” doctrine as a measure to accommodate a degree of level pluralism within Europe and to defer to the national courts for their greater competency and expertise over the interpretations of religious symbols within their specific contexts.<sup>116</sup>

### C. EUROPEAN COURT OF HUMAN RIGHTS’ APPROVAL OF THE HEADSCARF BAN

The question of religious freedom and the extent to which a person may wear religious clothing in public has come before the European Court of Human Rights several times.<sup>117</sup> The European Court of Human Rights has repeatedly ruled that banning a person from wearing the Islamic headscarf in public institutions is both legitimate and legal, and is not a violation of Article 9.<sup>118</sup> The seminal case is *Leyla*

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<sup>113</sup> Metropolitan Church of Bessarabia v. Moldova, App. No. 45701/99, 35 Eur. H.R. Rep. 13, 336 (2001).

<sup>114</sup> *Id.* at 337–41.

<sup>115</sup> Gorzelik v. Poland, App. No. 44158/98, Eur. Ct. H.R. 107 (2001).

<sup>116</sup> Choudhury, *supra* note 22, at 273–74; *see, e.g.*, Refah Partisi v. Turkey, App. Nos. 41340/98, 41342/98, 41344/98, 37 Eur. Ct. H.R. 1 (2003).

<sup>117</sup> *Freedom of Religion, supra* note 6.

<sup>118</sup> *See, e.g.*, Sahin v. Turkey, App. No. 44774/98 (2004), *aff’d*, Sahin v. Turkey [Grand Chamber], 2005-XI Eur. Ct. H.R. (prohibiting a student from wearing the Islamic headscarf at the university was not a violation of Article 9); Dahlab v. Switzerland, App. No. 42393/98 (2001) (court declared that a primary-school teacher could not wear a headscarf while teaching); El Morsli v. France, App. No. 15585/06 (2008) (a Moroccan national married to a French man was denied an entry visa because she refused to remove her headscarf for an identity check by male personnel at the French consulate in Marrakech); Dogru v. France, App. No. 27058/05, 49 Eur. Ct. H.R. Rep. (2008); Kervanci v. France, App. No. 31645/04, Eur. Ct. H.R. Rep. (2008) (Ms. Dogru and Ms. Kervanci, both first year students of a state secondary school, refused to remove their headscarves during physical education classes and were both expelled from school); Aktas v. France, App. No. 43563/08, Eur. Ct. H.R. Rep. (2009); Bayrak v. France, App. No. 14308/08, Eur. Ct. H.R. Rep. (2009); Gamaleddyn v. France, App. No. 18527/08, Eur. Ct. H.R. Rep.; Ghazal v. France, App. No. 29134/08, Eur. Ct. H.R. Rep.; J. Singh v. France, App. No.

*Sahin v. Turkey*.<sup>119</sup> In *Sahin*, a medical student at Istanbul University was denied access to the university because she wore a headscarf.<sup>120</sup> The Court analyzed the claim under the European Court of Human Rights' four-prong Article 9 test.<sup>121</sup> The Court first found that the regulation interfered with Ms. Sahin's right to religious expression.<sup>122</sup> However, it then found that the regulation "primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order,"<sup>123</sup> and also that the regulation was "prescribed by law."<sup>124</sup> The final decision rested on the last prong of whether the ban was necessary in a democratic society.<sup>125</sup> The Court ultimately allowed for a wide "margin of appreciation" toward state policy seeking to achieve a balance between safeguarding secularism and protecting individual rights to religious expression.<sup>126</sup>

Most recently, in 2008, the European Court of Human Rights made a ruling on the headscarf issue in France in *Dogru v. France*.<sup>127</sup> In *Dogru*, a woman was expelled from school for refusing to remove her headscarf in a physical education class.<sup>128</sup> The European Court of Human Rights conducted the analysis as set forth in Article 9 in reaching its decision.<sup>129</sup> After determining that an interference existed, the Court conducted an analysis to resolve whether the interference was "prescribed by law," directed toward "legitimate aims," and was "necessary in a democratic society" to achieve the aims concerned.<sup>130</sup> First, the Court found that Ms. Dogru's expulsion was suitably founded in domestic law.<sup>131</sup> Second, the Court found that the interference was based on legitimate aims of protecting the rights and freedoms of others and protecting public order.<sup>132</sup> Finally, the Court found that the

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25463/08, Eur. Ct. H.R. Rep.; R. Singh v. France, App. No. 27561/08, Eur. Ct. H.R. Rep. (2009) (six pupils were expelled from various state schools for refusing to remove their headwear).

<sup>119</sup> *Sahin v. Turkey* [Grand Chamber], 2005-XI Eur. Ct. H.R.

<sup>120</sup> *Id.* ¶ 17.

<sup>121</sup> Choudhury, *supra* note 22, at 277.

<sup>122</sup> *Sahin v. Turkey* [Grand Chamber], 2005-XI Eur. Ct. H.R., ¶ 78.

<sup>123</sup> *Id.* ¶ 99.

<sup>124</sup> *Id.* ¶ 98.

<sup>125</sup> Choudhury, *supra* note 22, at 278.

<sup>126</sup> *Sahin v. Turkey* [Grand Chamber], 2005-XI Eur. Ct. H.R., ¶¶ 109–10.

<sup>127</sup> Hashmi, *supra* note 28, at 423.

<sup>128</sup> *Dogru v. France*, App. No. 27058/05, Eur. Ct. H.R. Rep., ¶¶ 7–8 (2008).

<sup>129</sup> *Id.* ¶¶ 49, 60–62.

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

<sup>131</sup> *Id.* ¶ 56.

<sup>132</sup> *Id.* ¶ 60.

interference was “necessary in a democratic society” because the authorities feared that the student’s behavior would interfere with order in the school.<sup>133</sup> The Court held that there was no Article 9 violation of the European Convention on Human Rights<sup>134</sup> and ultimately reaffirmed *Sahin v. Turkey*.<sup>135</sup>

However, while the European Court of Human Rights has consistently allowed bans against the headscarf, the Court has not been consistent in its rulings on whether all religious symbols should be prohibited in public schools.<sup>136</sup> For instance, in *Lautsi v. Italy* the European Court of Human Rights ruled that state schools displaying a crucifix on the wall did not violate Article 9.<sup>137</sup> The Court held that the question of religious symbols in classrooms was a matter falling within the margin of appreciation of the State—provided that decisions did not lead to a form of indoctrination.<sup>138</sup> The crucifixes, which conferred the country’s majority religion, were not in themselves sufficient to denote a process of indoctrination.<sup>139</sup> The Court held that the presence of crucifixes was not associated with compulsory teaching about Christianity and there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions.<sup>140</sup> It appears that the Court is implying that the headscarf worn by Muslim women carries more weight in terms of “compulsory teaching” than a crucifix, or perhaps that because Islam is not the majority religion it does not have special privilege—implications the Court made without further explanation.<sup>141</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* ¶¶ 65,72.

<sup>135</sup> *Id.*

<sup>136</sup> *See, e.g., Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. Rep. (2011).

<sup>137</sup> *Id.*

<sup>138</sup> *Freedom of Religion, supra* note 6, at 6.

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

<sup>140</sup> *Id.*

<sup>141</sup> Under this logic it appears that the Court is making more than a legal decision in deciding whether wearing a headscarf leads to “indoctrination” of Islam, and whether the presence of a headscarf can co-exist without leading to proselytizing or “compulsory teaching” about a minority religion.

#### D. THE CASE OF *AHMET ARSLAN*: THE COURT SETS LIMITATIONS ON RESTRICTING RELIGIOUS FREEDOM

In 2010, despite the repeated denial of violations under Article 9, the European Court of Human Rights finally found a violation under the European Convention on Human Rights in *Ahmet Arslan and Others v. Turkey*.<sup>142</sup> In *Ahmet Arslan*, the Court analyzed the permissibility of citizens wearing specific clothing in the public space, which in this case included a turban, baggy trousers, a tunic, and a stick.<sup>143</sup> *Ahmet Arslan* involved a criminal conviction against 127 members of a religious group known as *Aczimenditarikat*y for wearing this religious attire in public.<sup>144</sup>

In October 1996, the group met in Ankara, Turkey, for a religious ceremony held at the Kocatepe mosque.<sup>145</sup> The group toured the streets of the city while wearing the distinctive dress of their group (turban, “salvar” trousers, tunic and a stick) which evoked that of the leading prophets.<sup>146</sup> The members were arrested for violating a law that restricted wearing religious attire in the public space and were placed in police custody.<sup>147</sup> In 1997, the group brought action against their convictions and the law forbidding members of the public from wearing headgear and religious garments in the public sphere.<sup>148</sup> In February 2010, the European Court of Human Rights issued an opinion that found that Ahmet Arslan’s conviction violated Article 9, holding that there was no evidence that the applicants had represented a threat to the public order or that they had been involved in proselytism by exerting inappropriate pressure on passersby during their gathering.<sup>149</sup>

At the heart of the *Ahmet Arslan* decision is the limiting distinction between “public institution” and “public space.” This case differs from the previous cases examined by the European Court of Human Rights, which allowed states to regulate the wearing of religious

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<sup>142</sup> *Ahmet Arslan and Others v. Turkey*, App. No. 41135/98, Eur. Ct. H.R. Rep. (2010).

<sup>143</sup> European Court of Human Rights: Annual Report 2010, at 91 (June 2011), available at [http://www.echr.coe.int/NR/rdonlyres/F2735259-F638-4E83-82DF-AAAC7E934A1D6/0/2010\\_Rapport\\_Annuel\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/F2735259-F638-4E83-82DF-AAAC7E934A1D6/0/2010_Rapport_Annuel_EN.pdf).

<sup>144</sup> Press Release, Chamber Judgment *Ahmet Arslan and Others v. Turkey*, Strasbourg Consortium Registrar (Feb. 23, 2010), available at <http://strasbourgconsortium.org/document.php?DocumentID=4732>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Freedom of Religion*, *supra* note 6, at 5.

<sup>149</sup> *Id.*

symbols or clothing in public schools and institutions.<sup>150</sup> In cases involving the headscarf ban, the Court consistently did not find an Article 9 violation. However, in *Ahmet Arslan*, when members of the community were banned from wearing religious symbols in the public sphere—on the streets—the Court found that this conduct did not violate the public order and thus the law was a violation of Article 9.<sup>151</sup> The Court emphasized that in contrast to other cases, this case concerned punishment for the wearing of particular clothing in public areas that were open to all, and not a regulation of the wearing of religious symbols in public establishments where religious neutrality may take precedence over the right to manifest one's religion.<sup>152</sup>

The European Court of Human Rights focused on the “necessity of interference” prong of the analysis and considered whether the interference was necessary in a democratic society.<sup>153</sup> The presumption is that the state has a legitimate purpose in maintaining secularism and protecting democracy.<sup>154</sup>

The Court noted three instances where the interference could apply and stated that none of them were present in the *Ahmet Arslan* case facts.<sup>155</sup> First, the Court said that if the applicants were state officials, then the interference would be permissible to maintain trust in the neutrality of the state.<sup>156</sup> This did not apply to this case because the applicants were all private individuals.<sup>157</sup> Second, regulating religious symbols in public institutions such as schools is permissible.<sup>158</sup> In *Ahmet Arslan*, the applicants were arrested for wearing religious attire on roads and in public spaces, and thus this exception also did not apply.<sup>159</sup> Finally, the Court considered the aim of preventing the applicants from

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<sup>150</sup> Annual Report 2010, *supra* note 143, at 91.

<sup>151</sup> *Freedom of Religion*, *supra* note 6, at 5.

<sup>152</sup> *Id.*

<sup>153</sup> This is the fourth prong of the above-stated test, *see supra* Part II.B. *The UK Network on Minority Groups and Human Rights: Newsletter – Autumn-Winter 2011*, UK NETWORK ON MINORITY GROUPS AND HUMAN RIGHTS, [http://www.reading.ac.uk/web/FILES/law/Autumn-Winter\\_2011.pdf](http://www.reading.ac.uk/web/FILES/law/Autumn-Winter_2011.pdf) (last accessed Feb. 13, 2013).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*; *see, e.g.*, *Vogt v. Germany*, 323 Eur. Ct. H.R. (ser. A) at 53 (1995); *Rekvenyi v. Hungary*, App. No. 25390/94, 30 Eur. H.R. Rep. 519 (2000); *see also* *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 499.

<sup>157</sup> *Minority Groups and Human Rights*, *supra* note 153.

<sup>158</sup> *Id.*; *see, e.g.*, *Sahin v. Turkey* [Grand Chamber], 2005-XI Eur. Ct. H.R.

<sup>159</sup> *Minority Groups and Human Rights*, *supra* note 153; *see, e.g.*, *Sahin v. Turkey* [Grand Chamber], 2005-XI Eur. Ct. H.R.

proselytizing and exerting undue pressure on passersby on the streets.<sup>160</sup> This was also not the case in *Ahmet Arslan* because the applicants were merely gathered outside a mosque waiting to partake in a religious ceremony and there was no evidence to suggest they were proselytizing.<sup>161</sup>

This appears to be the first time the European Court of Human Rights has considered the right of private individuals to manifest their religion by wearing religious clothing in general public space.<sup>162</sup> As noted above, prior to this case the European Court of Human Rights consistently upheld laws that prohibited the wearing of religious garments in public schools and public establishments.<sup>163</sup> For example, in *Dahlab v. Switzerland*, a ban on a teacher wearing the headscarf was justified under Article 9, ¶ 2 on the basis of upholding religious neutrality.<sup>164</sup> Also, as mentioned earlier, in *Leyla Sahin v. Turkey*, a ban on students wearing the headscarf at Istanbul University was justified under Article 9, ¶ 2 for the “protection of others” in relation to the effect the headscarf might have on others who chose not to wear it.<sup>165</sup>

What sets *Ahmet Arslan* apart from these prior cases is that the European Court of Human Rights indicated that the reasoning developed in *Leyla Sahin v. Turkey* and *Dahlab v. Switzerland* on the wearing of the headscarf in public institutions does not apply in cases involving restrictions on the wearing of religious attire in the *public sphere*.<sup>166</sup> It appears that the precedent set by the European Court of Human Rights turns on the dispositive question of whether a law places a ban on a person’s right to wear religious symbols in public establishments (which is permissible and does not violate Article 9) or places a ban on the right to wear religious symbols in the public sphere (which is impermissible and thus violates Article 9). *Ahmet Arslan* indicates that there are limits to a state’s right to place bans on a person’s religious freedom—and the limit is when the law infringes on a person’s access to and freedom in the public sphere.

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<sup>160</sup> *Minority Groups and Human Rights*, *supra* note 153; *see, e.g.*, *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993).

<sup>161</sup> *Minority Groups and Human Rights*, *supra* note 153.

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

<sup>163</sup> *See supra* note 118.

<sup>164</sup> *Dahlab v. Switzerland*, App. No. 42393/98, Eur. Ct. H.R. (2001).

<sup>165</sup> *Sahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. Ct. H.R.

<sup>166</sup> *State Secularism and Religious Freedom*, *supra* note 20.

**PART III: WHETHER FRANCE'S BAN VIOLATES THE  
EUROPEAN COURT OF HUMAN RIGHTS IN LIGHT OF THE  
AHMET ARSLAN DECISION**

France's law states that in a public space, it is prohibited to wear clothing that covers the face.<sup>167</sup> French legislators claim that the law against fully covering one's face in public is written in general terms and applies to all persons living in France. However, even if the law is facially neutral, the European Court of Human Rights must still evaluate whether it was passed with legitimate aims and is necessary in a democratic society.<sup>168</sup> If the legislation does not pass these prongs it could run afoul of Article 9 of the European Convention on Human Rights which provides that "everyone has the right to freedom . . . of religion . . . either alone or in the community, with others and in public or private."<sup>169</sup>

**A. FRANCE'S LAW VIOLATES ARTICLE 9 OF THE EUROPEAN  
CONVENTION ON HUMAN RIGHTS**

Following the *Ahmet Arslan* reasoning, France's law banning the face veil from the public sphere violates Article 9 of the European Convention on Human Rights. According to Mr. Rabah Ghezali, a French attorney specializing in international dispute resolution,<sup>170</sup> "there is little doubt that for the European Court of Human Rights, Article 9 of the European Convention, which protects religious freedom, does not permit adopting general measures aimed at banning religious clothing."<sup>171</sup> *Ahmet Arslan* did not so much "change" the course of the law as it did merely remind the European community of the limits of imposing religious restrictions.<sup>172</sup>

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<sup>167</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.), *supra* note 7.

<sup>168</sup> European Convention, *supra* note 81, art. 9(2).

<sup>169</sup> Benjamin W. Heineman, Jr., *Is the French Veil Ban "Unconstitutional?"*, WASHINGTON POST, Apr. 13, 2011, 12:00 PM, [http://www.washingtonpost.com/blogs/on-leadership/post/is-the-french-veil-ban-unconstitutional/2011/03/03/AFZxhWWD\\_blog.html](http://www.washingtonpost.com/blogs/on-leadership/post/is-the-french-veil-ban-unconstitutional/2011/03/03/AFZxhWWD_blog.html).

<sup>170</sup> Rabah Ghezali, HUFFINGTON POST, (last visited Mar. 13, 2013) <http://www.huffingtonpost.com/rabah-ghezali>.

<sup>171</sup> Rabah Ghezali, *France's Illegal Ban of the Burqa*, ISLAMOPHOBIA TODAY (Sept. 30, 2010), <http://www.islamophobiatoday.com/2010/09/30/rabah-ghezali-frances-illegal-ban-of-the-burqa/>.

<sup>172</sup> *Id.*

**B. FRANCE'S BAN HAS NO LEGITIMATE AIMS NECESSARY TO  
PROMOTE A DEMOCRATIC SOCIETY**

The dispositive question is whether France's new legislation banning face coverings has exceeded the limitations of Article 9, ¶ 2. While the European Court of Human Rights allows for limitations on the freedom to manifest one's religion, such limitations are "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others."<sup>173</sup>

In defending the face veil ban, the French government considered the constitutionality and possible implications of such a ban. On January 29, 2010, before the ban was even considered in the French parliament, the Prime Minister asked the Council of State to study the legal solutions for implementing a ban on wearing the full veil.<sup>174</sup> On March 30, 2010, the Council of State explained that a ban in all public spaces would have serious legal challenges; however, the Council of State believed that public safety and the need to identify persons to combat fraud would likely be sufficient reasons to justify a law that required the face to be uncovered in the public space.<sup>175</sup> The Council of State warned against using secularism, principles of human dignity, and gender equality as the basis for justifying a general ban on wearing the face veil.<sup>176</sup> The Council reasoned that these justifications were not strong enough to form the legal basis of a ban on wearing the face veil because they would not apply to persons who have deliberately chosen to wear the veil.<sup>177</sup> Rather, the report emphasized that the strongest legal basis would be routed in public safety.<sup>178</sup>

In the original proposal for the ban presented to the National Assembly on April 27, 2010, the resolution presented several reasons for the implementation of a ban on face veils in the public space, focusing primarily on the need to safeguard principles of secularism and eliminate

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<sup>173</sup> European Convention, *supra* note 81, art. 9(2).

<sup>174</sup> CONSEIL D'ÉTAT [COUNSEL OF STATE], ÉTUDE RELATIVE AUX POSSIBILITÉS JURIDIQUES D'INTERDICTION DU PORT DU VOILE INTEGRAL [STUDY ON THE LEGAL POSSIBILITIES OF BANNING THE FULL VEIL] (Mar. 30, 2010), *available at* <http://www.conseil-etat.fr/node.php?articleid=2000>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

gender inequality.<sup>179</sup> Considering both the recommendations of the Council of State and this proposal, the National Assembly discussed its basis for the ban in its legislative report of July 23, 2010.<sup>180</sup> The main justification for the ban was based on the concept of public policy.<sup>181</sup> The legislative report relied heavily on the recommendations of the Council of State and primarily emphasized the need to identify persons to promote public order.<sup>182</sup> Additionally, the report stressed the strong societal heritage that runs through France and how the face veil does not promote France's fundamental principles.<sup>183</sup> Importantly, the legislative report acknowledges that neither the Constitutional Council of France nor the European Court of Human Rights has ever considered using public order as a legal justification for such a general ban in the public space.<sup>184</sup>

To determine whether France's ban violates Article 9 following the *Ahmet Arslan* decision, the analysis focuses on whether there are any "legitimate aims" and whether the ban is "necessary in a democratic society."<sup>185</sup> In various parts of its legislative history, the French government has presented as legitimate aims the need to promote public order, preserve *laïcité*, and guard against gender inequality.<sup>186</sup> None of these legislative aims are legitimate goals that are necessary in a democratic society.

First, France argues that the ban is necessary to promote public safety and order because a person in the public space must be identifiable at all times.<sup>187</sup> However, this interest infringes on the individual right of a

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<sup>179</sup> Assemblée Nationale [National Assembly], Proposition de Résolution No. 2455 [Motion for Resolution No. 2455] (Apr. 27, 2010), available at <http://www.assemblee-nationale.fr/13/propositions/pion2455.asp>.

<sup>180</sup> Assemblée Nationale [National Assembly], Rapport No. 2648 [Report No. 2648] (July 23, 2010), available at <http://www.assemblee-nationale.fr/13/rapports/r2648.asp>; see generally Assemblée Nationale [National Assembly], Rapports Législatifs [Legislative Reports], available at <http://www.assemblee-nationale.fr/13/documents/index-rapports.asp>.

<sup>181</sup> Assemblée Nationale [National Assembly], Rapport No. 2648 [Report No. 2648] (July 23, 2010), available at <http://www.assemblee-nationale.fr/13/rapports/r2648.asp>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> European Convention, *supra* note 81, art. 9(2).

<sup>186</sup> See generally Assemblée Nationale [National Assembly], Rapport No. 2648 [Report No. 2648] (July 23, 2010), available at <http://www.assemblee-nationale.fr/13/rapports/r2648.asp>; Assemblée Nationale [National Assembly], Proposition de Résolution No. 2455 [Motion for Resolution No. 2455] (Apr. 27, 2010), available at <http://www.assemblee-nationale.fr/13/propositions/pion2455.asp>; CONSEIL D'ÉTAT, *supra* note 174.

<sup>187</sup> See generally Assemblée Nationale, *supra* note 180.

person to express his religious beliefs because the limitations of the ban are disproportionate to the legitimate aims of the legislation.<sup>188</sup> The core holding of *Ahmet Arslan* is that the limitations imposed on the followers of a religious minority (wearing religious attire in the streets) were not proportionate to the legitimate aims (public safety and public order) pursued by the Turkish authorities.<sup>189</sup> Similarly, banning French women from veiling their faces in the public space is not proportionate to promoting public safety or public order.<sup>190</sup> While the argument concerning the importance of identifiability may be valid, the problem rests with the proportionality of the legislation to the infringement upon individuals.<sup>191</sup>

It is of utmost importance to balance the aims pursued and consider whether they may be disproportionately discriminatory.<sup>192</sup> In assessing the proportionality of this face veil ban, it is telling that the French legislators did not try to limit the ban to places that arguably require more of a need to identify persons, such as hearings in court, police interviews, and safety checks at airports, where accurate identification is of crucial importance.<sup>193</sup> Further, the ban allows exceptions for health reasons, professional reasons, sporting events, and festivals,<sup>194</sup> indicating that a total uncovering of the face at all times is not a necessary requirement for public order. Because the law does not distinguish between places that arguably require a need to identify persons, but rather implements an overly broad ban that applies in the public sphere, the law fails the proportionality requirement and therefore cannot be necessary in a democratic society.<sup>195</sup>

Second, France argues that the ban is necessary in its democratic society to safeguard the principle of *laïcité*. While it is true that the European Court of Human Rights has previously held that promoting

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<sup>188</sup> Lourdes Peroni, *Would a Niqab and Burqa Ban Pass the Strasbourg Test*, STRASBOURG OBSERVERS BLOG (May 4, 2010), <http://strasbourgoobservers.com/2010/05/04/burqa-and-niqab-ban/>.

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

<sup>190</sup> Eva Maria Krockow, *The Burqa Ban – Motivations, Justifications and Likely Consequences*, ATLANTIC-COMMUNITY.ORG (May 13, 2010), [http://www.atlantic-community.org/index/Open\\_Think\\_Tank\\_Article/The\\_Burqa\\_Ban\\_-\\_Motivations%2C\\_Justifications\\_and\\_Likely\\_Consequences](http://www.atlantic-community.org/index/Open_Think_Tank_Article/The_Burqa_Ban_-_Motivations%2C_Justifications_and_Likely_Consequences).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.), *supra* note 7.

<sup>195</sup> *See id.*

secularism can be a legitimate aim,<sup>196</sup> that principle is limited to public institutions on the basis that a duty of neutrality exists for public officials.<sup>197</sup>

Third, an argument set forth in the initial resolution was that because the face veil is associated with the suppression of women, the ban will enhance gender equality in society.<sup>198</sup> France's argument that the ban promotes "gender equality" is equally unconvincing and provides no legitimate interest. In *Sahin v. Turkey*, the European Court of Human Rights stated that banning headscarves would protect the freedoms of those who do not wish to wear a headscarf.<sup>199</sup> However, with a complete ban on the face veil, a woman may also equally be deprived from the possibility of exercising her personal freedom to wear what she chooses.<sup>200</sup> France's Council of State acknowledged that for that exact reason gender inequality would be a weak justification for a complete ban on face veils in public.<sup>201</sup>

### C. FRANCE'S FACE VEIL BAN VIOLATES THE *AHMET ARSLAN* STANDARD

The current French face veil ban is similar to the illegitimate law that violated Article 9 in *Ahmet Arslan*. In *Ahmet Arslan*, the European Court of Human Rights indicated that the reasoning developed in past cases regarding the permissibility of banning the headscarf was distinguishable from a ban in "the public space."<sup>202</sup> While Article 9, ¶ 1 of the European Convention on Human Rights provides that everyone has the freedom to manifest his religion or belief, Article 9, ¶ 2 has limited those freedoms.<sup>203</sup> Yet it is apparent from the previous line of cases, and particularly from the European Court of Human Rights' willingness to put its foot down in *Ahmet Arslan*, that these limitations are themselves limited. While the European Court of Human Rights has

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<sup>196</sup> See *supra* Part II.

<sup>197</sup> CONSEIL D'ÉTAT, *supra* note 174.

<sup>198</sup> Assemblée Nationale [National Assembly], Proposition de Résolution No. 2455 [Motion for Resolution No. 2455] (Apr. 27, 2010), available at <http://www.assemblee-nationale.fr/13/propositions/pion2455.asp>.

<sup>199</sup> *Sahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. (2004).

<sup>200</sup> *Id.*

<sup>201</sup> CONSEIL D'ÉTAT, *supra* note 174.

<sup>202</sup> *State Secularism and Religious Freedom*, *supra* note 20.

<sup>203</sup> *Id.*

admittedly allowed bans of religious symbols to penetrate the educational and political arenas, it refuses to allow a complete ban that restricts a person's dress in the public space.<sup>204</sup>

## PART IV: WHERE TO GO FROM HERE

### A. THE PENDING LAW SUIT

On September 22, 2011, France imposed court fines on women wearing the face veil in public for the first time.<sup>205</sup> Since France implemented its law banning face veils on April 11, 2011, police have issued several on-the-spot fines.<sup>206</sup> But the first court citations occurred on September 22, 2011 when Ms. Hind Ahmas and Ms. Najate Nait Ali became the first women to be fined under the face veil ban after having been arrested in May.<sup>207</sup> They were fined 120 and 80 Euros, respectively. Hind Ahmas announced her intention to take the case to the European Court of Human Rights.<sup>208</sup> Amnesty International's deputy director for Europe and Central Asia, John Dalhuisen, stated that "this is a travesty of justice and a day of shame for France. These women are being punished for wearing what they want."<sup>209</sup> Amnesty International has repeatedly urged France not to impose the ban, saying it violates European human rights law.<sup>210</sup> Mr. Dalhuisen emphasized that "a complete ban on the covering of the face would violate the rights to freedom of expression and religion of those women who wear the burqa or the niqab in public as an expression of their identity or beliefs."<sup>211</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> *French Court Fines Women For Wearing Veils*, SYDNEY MORNING HERALD (Sept. 23, 2011), <http://news.smh.com.au/breaking-news-world/french-court-fines-women-for-wearing-veils-20110923-1knnl.html>.

<sup>206</sup> *Id.*

<sup>207</sup> Henry Samuel, *Burka Ban: French Women Fined for Wearing Full-Face Veil*, TELEGRAPH (Sept. 22, 2011), available at [www.telegraph.co.uk/news/worldnews/europe/france/8781241/Burka-ban-French-women-fined-for-wearing-full-face-veil.html](http://www.telegraph.co.uk/news/worldnews/europe/france/8781241/Burka-ban-French-women-fined-for-wearing-full-face-veil.html).

<sup>208</sup> *Id.*

<sup>209</sup> *First French Fines for Veiled Women a "Travesty of Justice"*, AMNESTY INT'L NEWS (Sept. 22, 2011), <http://www.amnesty.org/en/news-and-updates/first-french-fines-veiled-women-%E2%80%98travesty-justice%E2%80%99-2011-09-22>.

<sup>210</sup> CNN Wire Staff, *supra* note 63.

<sup>211</sup> CNN Wire Staff, *Burqa Ban Passes French Lower House Overwhelmingly*, CNN WORLD (July 13, 2010), [http://articles.cnn.com/2010-07-13/world/france.burqa.ban\\_1\\_burqa-ban-veil?\\_s=PM:WORLD](http://articles.cnn.com/2010-07-13/world/france.burqa.ban_1_burqa-ban-veil?_s=PM:WORLD).

On December 12, 2011, Hind Ahmas was ordered to attend a fifteen-day French citizenship course by another court for having worn the full face veil at a protest outside the Élysée Palace in Paris on April 11, 2011.<sup>212</sup> However, she was not allowed into the court because she refused to remove her veil.<sup>213</sup> She again declared that the law was unconstitutional and reiterated her intention to take it to the European Court of Human Rights.<sup>214</sup> Prosecutors responded to the press that she could face two years in prison and a fine of up to 32,000 Euros.<sup>215</sup>

### B. THE APPEAL AND ITS POTENTIAL EFFECTS

If these two court-issued fines are appealed and France's law comes before the European Court of Human Rights, the decision will have far-reaching effects. Several other European countries, including Belgium, Italy, Denmark, Austria, the Netherlands, and Switzerland, currently have either enacted or are considering similar legislation.<sup>216</sup> Many of these legislatures are waiting to see the legal ramifications of France's ban before implementing the pending legislation. A future European Court of Human Rights ruling on this issue could thus have a broad effect, no matter which way it rules. If the Court declares France's law unconstitutional, then other countries may decide not to implement their pending laws. However, if the European Court of Human Rights allows the ban to stay, and somehow distinguishes *Ahmet Arslan*, other countries may follow suit and the struggle for religious freedom will continue.

### V. CONCLUSION

Under *Ahmet Arslan*, France's ban violates established notions of religious freedom under the European Convention on Human Rights. Even under France's national principles of *laïcité* and policies of social assimilation, this new ban still cannot survive judicial scrutiny under the European Convention on Human Rights. While the headscarf ban was

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<sup>212</sup> Peter Allen, *French Mother, 32, Set to Become First Woman to be Jailed for Wearing Banned Islamic Veil*, MAILONLINE.COM (Dec. 13, 2011), <http://www.dailymail.co.uk/news/article-2073579/Mother-32-set-woman-jailed-wearing-Islamic-veil.html#>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See *The Islamic Veil Across Europe*, *supra* note 2.

able to pass constitutional scrutiny (based on the idea that the veil should not be worn in public institutions), a ban against clothing in any public space—including buses, cafés, or even walking down the street—violates a person’s right to religious expression as defined in *Ahmet Arslan*.

Any European country that implements a law banning the wearing of religious symbols in the public sphere will violate the European Convention on Human Rights. France’s adherence to a secular society cannot exist when confronted with international conventions of religious freedom pursuant to the European Court of Human Rights. Promoting “secularism” and “public order” are insufficient aims for banning all signs of religion from the public sphere because religious freedom is an internationally recognized human right that cannot be trumped by popular political movements. *Ahmet Arslan* holds that these extreme laws targeting Muslim dress in public have limits. Thus, under the European Court of Human Rights’ own precedent, any law banning the wearing of religious symbols in the public sphere violates Article 9 of the European Convention on Human Rights.