

A GLIMPSE INTO THE FUTURE: WHAT *ŞAHİN V. TURKEY* MEANS TO FRANCE'S BAN ON OSTENSIBLY RELIGIOUS SYMBOLS IN PUBLIC SCHOOLS

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I. INTRODUCTION

In October, 2004, two girls in Mulhouse, France, were suspended from school for wearing traditional Muslim headscarves to class.¹ This was the first time France's ban on overtly religious clothing in public schools, passed in March of that same year, had been enforced.² The applicable law simply states that "in State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited."³ By January, 2005, forty-one Muslim girls had been expelled for violating the ban.⁴ Should any student challenge her suspension, she would have two options. First, she could challenge the "overtly religious" classification of her clothing through the French administrative courts. However, an attempt to invalidate the law itself would have to go through the European Court of Human Rights (ECHR). The ECHR hears cases brought by signatories to the European Convention on Human Rights ("the Convention"), or their citizens, for alleged violations of the Convention.⁵

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¹ *France: First Students Expelled over Head Scarves*, N.Y. TIMES, Oct. 20, 2004, at A14.

² *See id.*; *see also* Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.], Mar. 17, 2004, p. 5190; Keith B. Richburg, *French Senate Approves Ban on Religious Attire*, WASH. POST, Mar. 4, 2004, at A14.

³ Law No. 2004-228 of Mar. 15, 2004.

⁴ Elizabeth Bryant, *Headscarf Ban Played Down After the Holidays*, UNITED PRESS INT'L, Jan. 3, 2005, available at <http://www.washtimes.com/upi-breaking/20050103-115159-4607r.htm>.

⁵ *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, 213 U.N.T.S. 222.

Four months after France's ban went into effect, the ECHR Chamber handed down its decision in *Şahin v. Turkey*, a case in which a Muslim woman alleged that Turkey's law preventing women from wearing headscarves in public universities violated Article 9 of the Convention, which guarantees freedom of thought, conscience, and religion.⁶ The court found that the ban was not a violation of Article 9 and thus upheld the Turkish law.⁷ On November 10, 2005, the ECHR's Grand Chamber upheld the Chamber's ruling.⁸ Observers may look to this decision to predict the outcome of a challenge to France's law because of the factual similarities; in both instances there is a restriction on the right to wear religious attire in public schools. Furthermore, much of the legal framework would also apply to a challenge to France's law.

So what precedential value does *Şahin* have in a challenge to France's ban? To answer this question, it is essential to understand how the ECHR Grand Chamber reached its decision, and then compare the facts of that case to the facts surrounding France's law and the suspension of the two girls in Mulhouse. Part II of this Comment details the facts the Grand Chamber considered in *Şahin*. Part III examines how the Grand Chamber applied the Convention to the facts presented in reaching its decision, and it questions whether *Şahin* establishes a new precedent concerning regulation of religion in school. Part IV applies the legal framework used in *Şahin* to the facts in France and points out noteworthy distinctions that may limit the significance of that case in a challenge to France's law. Part V concludes by

⁶ *Şahin v. Turkey*, (Eur. Ct. H.R., June 29, 2004), <http://www.echr.coe.int/echr>. Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms states:

(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 community with others and 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 freedom of others.

Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 5, art. 9.

⁷ *Şahin*, ¶ 115 (Eur. Ct. H.R., June 29, 2004).

⁸ *Şahin v. Turkey*, (Eur. Ct. H.R. Nov. 10, 2005), <http://www.echr.coe.int/echr>.

suggesting that *Şahin*'s precedential value in such a challenge depends on the level of deference the ECHR lends to the French government's decision-making process in enacting the law in the first place, but that it will not ultimately prove to be the controlling case in determining an outcome.

II. TURKEY'S BAN ON MUSLIM HEADSCARVES IN PUBLIC UNIVERSITIES

Leyla Şahin, a Muslim Turkish woman, enrolled at the University of Istanbul's medical school in 1997.⁹ Six months after she enrolled, the vice chancellor of the university issued a circular stating that "students whose 'heads are covered' (who wear the Islamic headscarf) . . . must not be admitted to lectures, courses, or tutorials."¹⁰ That semester, Şahin was refused admission to two exams and a lecture for wearing a headscarf.¹¹ She filed an application with the ECHR, alleging that the Turkish government had violated her rights and freedoms under Article 9 of the Convention by preventing her from wearing the headscarf in school.¹²

To examine why Turkey banned headscarves in universities in the first place, the ECHR first looked at the history of the relationship between religion and the state. During the time of the Ottoman Empire, citizens were required to dress "in accordance with their religious affiliations."¹³ When the empire fell in 1923, the new republic embarked on a series of reforms to remove religion's influence from the public, the most important of

⁹ *Id.* ¶ 15.

¹⁰ *Id.* ¶ 16.

¹¹ *Id.* ¶ 17.

¹² *Id.* ¶¶ 1-3. The application was made in July 1998 to the European Commission on Human Rights, but was transferred to the ECHR in November upon passage of Protocol No. 11, which replaced the Commission and part-time ECHR with a full time ECHR, to which parties can apply directly. Prior to passage of Protocol No. 11, parties had to apply to the Commission, which would examine the merits of the case to determine if the ECHR would hear it.

¹³ Şahin, ¶ 29 (Eur. Ct. H.R., June 29, 2004).

which was a constitutional amendment which “accord[ed] constitutional status to the principle of secularism.”¹⁴ As a reaction to the influence that Islam had exerted in politics under the Ottoman Empire, the reforms sought to create a “religious-free” environment that ensured equal rights, regardless of religious affiliation.¹⁵ In that vein, the Republic shut down all religious schools and took control of education throughout Turkey.¹⁶ Further restrictions were placed on individuals wearing religious attire in public.¹⁷

Turkey’s fierce protection of secularism can be traced to a rejection of Islamic influence in government under the Ottoman Empire and the fact that over 99 percent of the country’s population is Muslim.¹⁸ This combination of a secular society and predominantly Muslim majority has led to a great deal of debate regarding headscarves in public. Opponents see it as an expression of the political Islam, which they view as a threat to women’s rights, whereas proponents see it as a religious duty.¹⁹ In 1996, Islamist *Refah Partisi* and the “centre-right *Doğru Yol Partisi*” formed a coalition government.²⁰ Several members of this coalition believed that Muslim women not only could, but in fact

¹⁴ Şahin, ¶ 30 (Eur. Ct. H.R., Nov. 10, 2005); see THE CONST. OF THE REPUBLIC OF TURK. art. 2, translated in Şahin, ¶ 299 (Eur. Ct. H.R., Nov. 10, 2005) (“The Republic of Turkey is a democratic, secular (*laik*) and social State based on the rule of law, that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble.”).

¹⁵ Şahin, ¶¶ 30-32 (Eur. Ct. H.R., Nov. 10, 2005).

¹⁶ *Id.* ¶ 34.

¹⁷ *Id.* ¶ 33.

¹⁸ CENT. INTELLIGENCE AGENCY, THE WORLD FACT BOOK 2005, at 554 (2005); cf. Şahin, ¶¶ 27-28, 36 (Eur. Ct. H.R., June 29, 2004).

¹⁹ Şahin, ¶ 35 (Eur. Ct. H.R., Nov. 10, 2005). Women were afforded equal civil and political rights early on in the Republic. Equal civil rights were established in 1926, while equal political rights came in 1934 with the passage of Article 10 of the Constitution, which states that “[a]ll individuals shall be equal before the law without any distinction based on language, race, color, sex, political opinion, philosophical belief, religion, membership of a religious sect or other similar grounds.” THE CONST. OF THE REPUBLIC OF TURK. art. 10; see Şahin, ¶ 32 (Eur. Ct. H.R., Nov. 10, 2005).

²⁰ Şahin, ¶ 35 (Eur. Ct. H.R., Nov. 10, 2005).

should, wear the headscarf in school.²¹ Such a stance only added more pressure to the already contentious issue.

The debate can be traced back to 1981, when the Turkish cabinet issued regulations “requir[ing] . . . female students at State institutions to wear ordinary, sober, modern dress.”²² The regulations specifically addressed headscarves, stating that “female members of staff and students should not wear [them] in educational institutions”²³ The following year the Higher-Education Authority specifically banned them in lecture halls.²⁴

The Turkish government reversed course in 1988 by enacting transitional section 16 of the Higher-Education Act, which stated:

Modern dress or appearance shall be compulsory in the rooms and corridors of institutions of higher education, preparatory schools, laboratories, clinics and multidisciplinary clinics. A veil or headscarf covering the neck and hair may be worn out of religious conviction.²⁵

However, the Constitutional Court struck down the act as a violation of Articles 2, 10, and 24 of the Constitution.²⁶ The government went back to the drawing board and enacted transitional section 17 of the Higher-Education Act, stating that the

²¹ See *Refah Partisi (The Welfare Party) et al. v. Turkey*, 2003-II Eur. Ct. H.R. 267, 276.

²² Şahin, ¶ 36 (Eur. Ct. H.R., Nov. 10, 2005).

²³ *Id.*

²⁴ *Id.* ¶ 37. The regulation was upheld by the Supreme Administrative Court in December 1984. In its decision, the court stated that “wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.” *Id.*

²⁵ Higher-Education Act, Law No. 2547, transitional sec. 16 (1988), *translated in* Şahin, ¶ 38 (Eur. Ct. H.R., Nov. 10, 2005).

²⁶ Şahin, ¶ 39 (Eur. Ct. H.R., Nov. 10, 2005); see THE CONST. OF THE REPUBLIC OF TURK. arts. 2, 10 & 24, *translated in* Şahin, ¶ 29 (Eur. Ct. H.R., Nov. 10, 2005). Article 24, sections (1) & (4), state:

[Section (1)] Everyone has the right to freedom of conscience, belief and religious conviction. Prayers, worship and religious services shall be conducted freely, provided that they do not violate the provisions of Article 14. No one shall be compelled to participate in prayers, worship or religious services or to reveal his religious beliefs and convictions; nor shall he be censured or prosecuted because of his religious beliefs or convictions.

. . .

“[c]hoice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force.”²⁷ This time, since the Constitutional Court interpreted the law to prevent female students from wearing the headscarf in school, it was upheld.²⁸

This new law, however, did not put the issue to rest. In response to increasing tension regarding headscarves in classes at Istanbul University in 1994, the university drafted a resolution regarding dress in school.²⁹ It stated:

The rules governing dress in universities are set out in the laws and regulations. The Constitutional Court has delivered a judgment which prevents religious attire being worn in universities.

This judgment applies to all students of our University and the academic staff, both administrative and otherwise, at all levels. In particular, nurses, midwives, doctors and vets are required to comply with the regulations on dress, as dictated by scientific considerations and the legislation, during health and applied science tutorials (on nursing, laboratory work, surgery and microbiology). Anyone not complying with the rules on dress will be refused access to tutorials.³⁰

The university adopted another resolution regarding religious attire in 1998, stating that students should comply with the rules on dress as set forth by the Constitutional Court, and that students could not wear clothing that “symbolise[d] or manifest[ed] any religion, faith, race, or political or ideological persuasion in any institution or department of the [University of

[Section (4)] No one may exploit or abuse religion, religious feelings or things held sacred by religion in any manner whatsoever with a view to causing the social, economic, political or legal order of the State to be based on religious precepts, even if only in part, or for the purpose of securing political or personal interest or influence thereby.

²⁷ Higher-Education Act, Law No. 2547, transitional sec. 17 (1990) (Turk.), *translated in* Şahin, ¶ 40 (Eur. Ct. H.R., Nov. 10, 2005).

²⁸ Şahin, ¶ 41 (Eur. Ct. H.R., Nov. 10, 2005).

²⁹ *Id.* ¶ 45.

³⁰ *Id.*

Istanbul], or on any of its premises.”³¹ Şahin had enrolled at Istanbul University after the 1994 resolution, but before the 1998 resolution. With what it considered to be the relevant facts in hand, the ECHR then turned its attention to synthesizing these facts with the Convention to reach its verdict.

III. THE ECHR’S ANALYSIS OF ARTICLE 9 OF THE CONVENTION

In reaching its decision, the Grand Chamber held that, when examining an alleged violation of Article 9, it must first determine whether there has been an interference with the individual’s Article 9 rights.³² If so, the Grand Chamber must then determine whether the “interference was ‘prescribed by law’, pursued a legitimate aim, and was ‘necessary in a democratic society’ within the meaning of Article 9 § 2 of the Convention.”³³

In examining the first prong of this four-pronged test, the Grand Chamber limited its examination to the February 1998 circular distributed by the vice chancellor.³⁴ It accepted Şahin’s argument that she wore the headscarf as an expression of her religious beliefs, thereby “manifesting her desire to comply . . . with the duties . . . [of her] Islamic faith.”³⁵ As such, the Grand Chamber proceeded with its examination on the assumption that the vice chancellor’s circulation interfered with her “right to manifest her religion.”³⁶

Turning to the question of whether the interference was prescribed by law, the Grand Chamber rejected Şahin’s argument that the vice chancellor’s circular violated transitional section 17 of the Higher-Education Act, which, according to Şahin, did not impose a ban on wearing the Islamic headscarf.³⁷ To reach this conclusion, the Grand Chamber looked to Turkish case law to find an appropriate interpretation.³⁸ The Constitutional Court

³¹ *Id.* ¶ 47.

³² *E.g., id.* ¶ 75.

³³ *Id.*

³⁴ *See id.* ¶ 76.

³⁵ *Id.* ¶ 78 (quoting Şahin, ¶ 71 (Eur. Ct. H.R., June 29, 2004)).

³⁶ *Id.* (quoting Şahin, ¶ 71 (Eur. Ct. H.R., June 29, 2004)).

³⁷ *Id.* ¶ 86.

³⁸ *Id.* ¶¶ 89-93.

made it clear in its April 1991 review of transitional section 17 that:

In institutions of higher education, it is contrary to the principles of secularism and equality for the neck and hair to be covered with a veil or headscarf on grounds of religious conviction. . . . The judgment [of 7 March 1989] of the Constitutional Court establishes that covering one's neck and hair with the headscarf is first and foremost contrary to the Constitution.³⁹

The Grand Chamber, therefore, found that there was a basis for the interference in Turkish law.⁴⁰

Şahin stipulated that the aims of maintaining public order in the universities, “protecting the rights and freedoms of others and of protecting public order,”⁴¹ were “compatible with the legitimate aims set out in the second paragraph of Article 9 of the Convention,”⁴² which left the Grand Chamber to decide whether the laws restricting religious dress in universities were “necessary in a democratic society.” It first examined the relevant principles involved by turning to case law. The first case the Grand Chamber cited was *Kokkinakis v. Greece*, which the court interpreted to state that “[i]n democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.”⁴³ However, the government's power to place restrictions on religious expression does not permit it “to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed. . . . Accordingly, the role of the authorities . . . is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”⁴⁴ Where rights enumerated in the Convention conflict with each other, governments must weigh

³⁹ *Id.* ¶ 41.

⁴⁰ *Id.* ¶ 98.

⁴¹ *Id.* ¶ 99.

⁴² Şahin, ¶ 83 (Eur. Ct. H.R., June 29, 2004).

⁴³ Şahin, ¶ 106 (Eur. Ct. H.R., Nov. 10, 2005) (citing *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) at 18 (1994) (¶ 33)).

⁴⁴ *Id.* ¶ 107 (citations omitted).

the importance of these rights and seek a proper balance.⁴⁵ This balancing act, according to the Grand Chamber, “constitutes the foundation of a ‘democratic society.’”⁴⁶

The Grand Chamber then cited *Karaduman v. Turkey* and *Dahlab v. Switzerland*, two cases in which the ECHR upheld laws restricting religious expression in public schools.⁴⁷ In each of these cases, the relevant judicial bodies found “that in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety.”⁴⁸ In *Dahlab*, the ECHR upheld a ban on teachers wearing headscarves in school,⁴⁹ whereas in *Karaduman*, it sustained the authority of “institutions of higher education” to take “measures . . . in universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practise their religion or who belonged to another religion.”⁵⁰

In its discussion of the standard of review, the Grand Chamber stated that national authorities are better positioned than the ECHR to evaluate local necessities.⁵¹ With respect to regulating the “relationship between State and religion[,] . . . the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned.”⁵² Nonetheless, although national authorities are afforded a level of deference, the ECHR may review decisions to ensure that the regulations are “justified in principle and proportionate.”⁵³

⁴⁵ *Id.* ¶ 108.

⁴⁶ *Id.* (citation omitted).

⁴⁷ *Id.* ¶ 111; see *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447; *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec. & Rep. 93 (1993).

⁴⁸ *Şahin*, ¶ 111 (Eur. Ct. H.R., Nov. 10, 2005).

⁴⁹ *Id.*; *Dahlab*, 2001-V Eur. Ct. H.R. 447.

⁵⁰ *Şahin*, ¶ 111 (Eur. Ct. H.R., Nov. 10, 2005) (discussing *Karaduman*, 74 Eur. Comm’n H.R. Dec. & Rep. 93).

⁵¹ *Id.* ¶ 109.

⁵² *Id.*

⁵³ *Id.* ¶ 110.

It is interesting to note that, in its discussion of the standard of review, the Grand Chamber made an unprecedented statement regarding the level of deference given to local authorities concerning religious symbols in public schools. According to the decision:

Where questions concerning the relationship between State and religions are at stake . . . the role of the national decision-making body must be given special importance. *This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions*, especially . . . in view of the diversity of the approaches taken by national authorities on the issue.⁵⁴

The Grand Chamber cited several cases to support its view that signatory states lack uniformity concerning the significance of religion in society.⁵⁵ However, it failed to establish why this diversity in society among the states in general meant that the ECHR has to give particular deference in the context of education. It would have been sufficient for the Grand Chamber to reiterate that, in accordance with the cases cited, national authorities are given a level of deference regarding “the relationship between State and religion.” By carving out a special consideration “when it comes to regulating the wearing of religious symbols in educational institutions” without citing any relevant authority, the Grand Chamber arguably establishes a new, and more relaxed, standard of review in that narrowly defined area.

Applying the relevant case law addressing the necessity of the ban in a democratic society, the Grand Chamber first observed that the interference was based on the principles of “secularism and equality.”⁵⁶ It then discussed the Turkish Constitutional Court’s decision striking down transitional section 16 of the Higher Education Act. Summarizing the Court’s position, the Grand Chamber stated that “[Secularism in Turkey is] the guarantor of democratic values. . . . [It] prevent[s] the State

⁵⁴ *Id.* ¶ 109 (emphasis added and citations omitted).

⁵⁵ *Id.* (citing *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H. R. (ser. A) (1994); *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447; *Wingrove v. the United Kingdom*, 1996-V Eur. Ct. H.R. 1958).

⁵⁶ *Id.* ¶ 112.

from manifesting a preference for a particular religion or belief . . . and necessarily entail[s] freedom of religion and conscience.”⁵⁷ Furthermore, secularism protects the individual from “external pressure from extremist movements.”⁵⁸ Nonetheless, “freedom to manifest one’s religion could be restricted in order to defend [secularism and equality].”⁵⁹ The Grand Chamber found that this view of secularism was consistent with the Convention, and that restrictions such as the headscarf ban, that aim to protect secular principles, “may be considered necessary to protect the democratic system in Turkey.”⁶⁰

The Grand Chamber then turned away from religious considerations and focused on the gender issues involved. According to the Grand Chamber, gender equality is a “key principle . . . underlying the Convention,” and is also a “principle implicit in the values underlying the [Turkish] Constitution.”⁶¹ It considered the impact that wearing the headscarf has on women in Turkey who choose not to wear it.⁶² This consideration was important to the Grand Chamber because Turkey is a society that professes a strong attachment to gender equality and the secular way of life, while also adhering to the Islamic faith.⁶³ Recognizing that the Turkish Constitutional Court had stated that wearing headscarves had “taken on political significance in Turkey in recent years,”⁶⁴ the ECHR found that imposing limitations on freedom in this way may be “regarded as meeting a pressing social need:” “the protection of the ‘rights and freedoms of others’ and the ‘maintenance of public order.’”⁶⁵

Finally, the Grand Chamber considered the proportionality of the restriction in light of the legitimate aim of “protect[ing] . . .

⁵⁷ *Id.* ¶ 113 (discussing Const. Ct. Judgment of Mar. 7, 1989).

⁵⁸ *Id.* (discussing Const. Ct. Judgment of Mar. 7, 1989).

⁵⁹ *Id.* (discussing Const. Ct. Judgment of Mar. 7, 1989).

⁶⁰ *Id.* ¶ 114.

⁶¹ *Id.* ¶ 115 (quoting *Şahin v. Turkey*, ¶ 107 (Eur. Ct. H.R., June 29, 2004)).

⁶² *Id.*

⁶³ *Id.* (quoting *Şahin v. Turkey*, ¶ 108 (Eur. Ct. H.R., June 29, 2004)).

⁶⁴ *Id.*

⁶⁵ *Id.* (quoting *Şahin v. Turkey*, ¶ 108 (Eur. Ct. H.R., June 29, 2004)).

the ‘rights and freedoms of others’ and the ‘maintenance of public order.’”⁶⁶ It noted two important considerations. First, the law does not restrict Muslim women from manifesting their religion outside the narrowly confined limits of the regulation, and the law is not applicable only to Muslims.⁶⁷ More importantly, the Grand Chamber observed that the regulation in question was the result of years of debate, both on a national level and within the academic community.⁶⁸

It is quite clear that throughout that decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned, while at the same time ensuring that order was maintained and in particular that the requirements imposed by the nature of the course in question were complied with.⁶⁹

Because there was a record of deliberation by the university authorities, the Grand Chamber once again deferred to their discretion as to the proportionality of the regulation.⁷⁰ Thus, it held that the ban on headscarves in universities was necessary in a democratic Turkey to ensure the principles of secularism and gender equality embedded in the Turkish Constitution. As such, it found no violation of Article 9 of the Convention.⁷¹

IV. APPLYING *ŞAHİN*’S ANALYSIS TO FRANCE’S BAN ON OVERTLY RELIGIOUS DRESS IN PUBLIC SCHOOLS

Should France’s ban on overtly religious symbols in public school be adjudicated before the ECHR, it would have to survive the four-pronged approach the Grand Chamber applied in *Şahin*. The crux of the issue is the last prong: whether the law was “necessary in a democratic society.” The following discussion is an

⁶⁶ *Id.* ¶¶ 115, 117 (quoting *Şahin v. Turkey*, ¶ 108 (Eur. Ct. H.R., June 29, 2004)).

⁶⁷ *Id.* ¶ 118.

⁶⁸ *Id.* ¶ 120.

⁶⁹ *Id.*

⁷⁰ *Id.* ¶ 121.

⁷¹ *Id.* ¶ 123.

attempt, not to predict the outcome, but to examine the issues the ECHR would have to consider in making its ruling.

A. THE FIRST THREE PRONGS: INTERFERENCE,
PRESCRIBED BY LAW, IN PURSUIT OF A LEGITIMATE AIM

As discussed in *Şahin*, the first prong is to determine whether interference with an individual's Article 9 rights has occurred. Assuming, *arguendo*, that the petitioner wore the headscarf as an expression of her religious beliefs, the ECHR would have to proceed, as it did in *Şahin*,⁷² on the assumption that France's ban interfered with her right to manifest her religion. Such interference is clearly a violation of Article 9, paragraph 1 of the Convention. Thus, the first prong would be met, and the court would have to focus on section 2 to apply the other three prongs of the test.

The court would have little problem finding that the interference was prescribed by law under the second prong. It would have to look no further than Law No. 2004-228 of March 15, 2004, which states clearly that "in State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited."⁷³ The examination of case law that the Grand Chamber conducted in *Şahin* is not necessary here. *Şahin* relied on a Turkish law that, on its face, did not appear to prevent her from wearing her headscarf to school.⁷⁴ Thus, the Grand Chamber had to examine how that law was interpreted by the Turkish Constitutional Court in order to fully understand its meaning.⁷⁵ Any examination of France's ban would not require further inquiry into case law, as the language of the ban is clear on its face.

Furthermore, an examination of case law would prove fruitless because it has no authority in France. Whereas Turkey is a common law jurisdiction, France operates under a civil code. It was appropriate for the Grand Chamber to look to case law in Turkey to interpret the meaning of the law in question because in a common law jurisdiction, principles of constitutional review

⁷² See *id.* ¶ 78.

⁷³ Law No. 2004-228 of Mar. 15, 2004.

⁷⁴ See *Şahin*, ¶¶ 84-98 (Eur. Ct. H.R., Nov. 10, 2005).

⁷⁵ *Id.*

and *stare decisis* give case law its authority. However, under a civil code, such as France's, there is no constitutional review or *stare decisis*.⁷⁶ The ECHR can review French court decisions for violations of the Convention by the court, but it cannot look to case law to interpret French statutory law. Nonetheless, as stated above, the language of the statute is unambiguous, which makes a discussion of the authority of case law in France moot. Thus, the ban appears to meet the second prong of the Article 9 test.

Turning to the third prong, the ECHR would have to determine whether the interference pursued a legitimate aim. Şahin stipulated that the aims of maintaining public order in the universities, upholding the principle of secularism and protecting the rights and freedoms of others, were compatible with the legitimate aims set forth in Article 9, paragraph 2.⁷⁷ In a challenge to France's ban, the state would have the burden of demonstrating compatibility. This is where the ECHR would have to begin an in-depth analysis of why France enacted the law in the first place.

According to France's public order doctrine, "in certain circumstances freedom [may be] curtailed in order to safeguard public order."⁷⁸ The government's authority under the public order doctrine includes the "traditional function of government, permitting restrictions on individual liberty to be imposed so as

⁷⁶ The Court of Cassation, the highest appellate court in France, has no constitutional review power. The Constitutional Council, upon referral from legislators, examines legislation to ensure that it does not violate the Constitution, but they can only review prospective legislation – once legislation is passed the Constitutional Council has no jurisdiction. The Conseil d'État can review complaints by citizens that government officials have acted in violation of the law, but they do not have the power to declare laws illegal. Furthermore, decisions by higher courts are not binding on lower courts, which further strips case law of any authority. For a general discussion on constitutional review in France see 2 *LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA* 551-53 (Herbert M. Kritzer ed., 2002).

⁷⁷ Şahin v. Turkey, ¶¶ 82-84 (Eur. Ct. H.R., June 29, 2004); Şahin, ¶ 99 (Eur. Ct. H.R., Nov. 10, 2005).

⁷⁸ T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 *BYU L. REV.* 419, 466 (2004). For a discussion of the public order doctrine, see Conseil Constitutionnel, Human Rights and Public Order, Eighth Seminar of Constitutional Courts, (Oct. 2-5, 2003), available at <http://www.conseil-constitutionnel.fr/dossier/quarante/notes/libpuben.htm>.

to ‘maintain public security, tranquility, and health.’”⁷⁹ This doctrine played an integral role in the decision-making process that led to the enactment of France’s ban.

In July, 2003, President Jacques Chirac created the Stasi Commission, which was “charged with conducting an analysis of the application of the principle of *laïcité* in the Republic.”⁸⁰ The commission released its report in December 2003, and although it addressed several issues, the most important one for purposes of this Comment was its recommendation to ban “clothing and signs manifesting religious or political affiliation” from public schools.⁸¹ One of the commission’s justifications for its recommendation was its perception that Muslim girls were being coerced by “families and communities . . . to wear headscarves against their will, which in turn aggravated religious polarization and sexual discrimination.”⁸² The commission concluded that “the question . . . is no longer liberty of conscience, but the maintenance of public order.”⁸³

Based on this public-order doctrine recommendation and overwhelming public support, the French government acted swiftly.⁸⁴ On February 10, 2004, the National Assembly passed Law No. 2004-228 by a 494 to 36 vote,⁸⁵ followed on March 3 by a

⁷⁹ Gunn, *supra* note 78, at 466-67 (citing JOHN BELL, FRENCH CONSTITUTIONAL LAW 83 (1998)).

⁸⁰ Decree No. 2003-607 of July 3, 2003, J.O., July 4, 2003, p. 11319 (“Il est créé une commission chargée de mener une réflexion sur l’application du principe de laïcité dans la République.”) (*translated in* Gunn, *supra* note 78, at 462). The term “*laïcité*” is similar to secularism, though the two are not exact synonyms. For a discussion on “the principle of *laïcité*,” see *infra* Part IV.B.1.

⁸¹ COMM. DE REFLEXION SUR L’APPLICATION DU PRINCIPE DE LAÏCITE DANS LA REPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE 68 (2003), *available at* <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf> [hereinafter STASI REPORT]; Gunn, *supra* note 78, at 462.

⁸² STASI REPORT, *supra* note 81, at 30; Gunn, *supra* note 78, at 467.

⁸³ STASI REPORT, *supra* note 81, at 58 (quoted text translated in Gunn, *supra* note 78, at 467).

⁸⁴ Gunn, *supra* note 78, at 463.

⁸⁵ Elaine B. Sciolino, *French Assembly Votes to Ban Religious Symbols in Schools*, N.Y. TIMES, Feb. 11, 2004, at A3.

Senate vote of 276 to 20.⁸⁶ The law was signed by the President and Prime Minister on March 15, 2004.⁸⁷

Returning to the third prong of Şahin's Article 9 analysis, France would presumably invoke the public order doctrine, arguing that the ban on overtly religious symbols in school was enacted, based on the recommendation of the Stasi Report, in pursuit of "safeguard[ing] public order,"⁸⁸ which is compatible with "the protection of public order" as prescribed in Article 9, paragraph 2 of the Convention.⁸⁹ The ECHR looks at only the compatibility of the articulated purpose with the aims expressed in Article 9, paragraph 2, leaving an examination of the means to achieve those aims to the fourth prong.⁹⁰ It would be difficult to argue that "safeguard[ing] public order" is incompatible with "the protection of public order." As such, the court's focus would shift to the heart of the issue: whether, under the fourth prong, France's ban is "'necessary in a democratic society' within the meaning of Article 9 section 2 of the Convention."⁹¹

B. THE FOURTH PRONG: NECESSARY IN A DEMOCRATIC SOCIETY

Before examining the facts in France relating to the ban on overtly religious attire in schools, it is important to take a closer look at the standard of review the ECHR applies in considering whether a challenged interference is "necessary in a democratic society," because Şahin provided a somewhat cursory explanation of that standard.

In *Kokkinakis*, the ECHR stated:

[A] certain margin of appreciation is to be left the Contracting States in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision. . . . The Court's task is to determine

⁸⁶ Richburg, *supra* note 2, at A14.

⁸⁷ Law No. 2004-228 of Mar. 15, 2004, J.O., Mar. 17, 2004, p. 5190.

⁸⁸ Gunn, *supra* note 78, at 466.

⁸⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 5, art. 9 para. 2.

⁹⁰ See, e.g., Şahin v. Turkey, ¶¶ 99-123 (Eur. Ct. H.R. Nov. 10, 2005); Kokkinakis v. Greece, 260-A Eur. Ct. H.R. 20 (ser. A) (1994) (¶¶ 42-44).

⁹¹ Şahin v. Turkey, ¶ 67 (Eur. Ct. H.R., June 29, 2004).

whether the measures taken at national level were justified in principle and proportionate.⁹²

According to *Metropolitan Church of Bessarabia v. Moldova*, “the need to maintain true religious pluralism . . . is inherent in the concept of a democratic society.”⁹³ As such, the ECHR must take that need into consideration “[i]n order to determine the scope of the margin of appreciation.”⁹⁴ The court also stated that “[s]imilarly, a good deal of weight must be given to that need when determining, as paragraph 2 of Article 9 requires, whether the interference corresponds to a ‘pressing social need’ and is ‘proportionate to the legitimate aim pursued.’”⁹⁵ Thus, while the ECHR affords a certain level of deference to state action, it will examine that action to ensure that it is “justified in principle,” “correspond[s] to a pressing social need,” and is “proportionate to the legitimate aim pursued,” as required by Article 9, paragraph 2 of the Convention.

1. Justified in Principle

For a challenged law to be justified in principle, its goal must be the furtherance of one of the principles set forth in Article 9, paragraph 2 of the Convention.⁹⁶ It is not enough to state what the principle is; the state has the burden of demonstrating how the law addresses that principle.⁹⁷ This is what separates the third prong, which focuses on the goal, from the fourth prong, which focuses on the means to achieve it. Thus, France would have the burden to demonstrate how the ban on overtly religious symbols in school addresses the goal of protecting public order. This brings the discussion back to the Stasi Report.

As stated above, the Stasi Commission was “charged with conducting an analysis of the application of the principle of *laïcité*

⁹² Kokkinakis, 260-A Eur. Ct. H.R. 21 (ser. A) (¶ 47). The court has consistently applied this standard of review in subsequent cases. *See, e.g.,* Larissis v. Greece, 1998-I Eur. Ct. H.R. 362, 379; *Metro. Church of Bessarabia et al. v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 114.

⁹³ *Metro. Church of Bessarabia*, 2001-XII Eur. Ct. H.R. at 114.

⁹⁴ *Id.*

⁹⁵ *Id.* (citation omitted).

⁹⁶ *See, e.g.,* Larissis, 1998-I Eur. Ct. H.R. 362, 379.

⁹⁷ *See, e.g., id.*

in the Republic.”⁹⁸ But what is *laïcité*, and what does it have to do with headscarves in school and the maintenance of public order? In a speech delivered in December 2003, President Jacques Chirac stated:

[*Laïcité*] is a principle to which citizens should be faithful: 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. . . . *Laïcité* guarantees freedom of conscience. It protects the freedom to believe or not to believe. It assures everyone of the possibility to express and practice their faith peaceably, freely, though without threatening others with one’s own convictions or beliefs. . . . *Laïcité* is one of the great accomplishments of the Republic.⁹⁹

How did *laïcité* become “the cornerstone of the Republic,” as Chirac claimed? To answer this question, as it did in *Şahin*, the ECHR would have to look at the history of the relationship between religion and the state in France. This examination must begin with the French Revolution of 1789.

Prior to the French Revolution, the Catholic Church and the French state relied upon each other for their authority.¹⁰⁰ The revolution drastically altered that relationship, as the Revolutionary Republicans aimed to remove the Catholic Church’s influence from civil society.¹⁰¹ One of the most important reforms during this period was the proposed Civil Constitution, which, to a large extent, placed control of the Church in the hands of the government.¹⁰² King Louis XVI presented the proposal to the Pope for approval, but when the Pope stalled, the Assembly

⁹⁸ Decree No. 2003-607 of July 3, 2003, J.O., July 4, 2003, p. 11319.

⁹⁹ Jacques Chirac, President of the Republic of Fr., Discours Relatif au Respect du Principe de Laïcité dans la LA Republique [Speech on Respecting the Principle of Laïcité in the Republic] (Dec. 17, 2003), available at http://elysee.fr/elysee/francais/interventions/discours_et_declarations/2003/decembre/discours_prononce_par_m_jacques_chirac_president_de_la_republique_relatif_au_respect_du_principe_de_laicite_dans_la_republique-palais_de_l_elysee.2829.html. The quoted material is translated in Gunn, *supra* note 78, at 428.

¹⁰⁰ J. SALWYN SCHAPIRO, ANTICLERICALISM: CONFLICT BETWEEN CHURCH AND STATE IN FRANCE, ITALY, AND SPAIN 17-18 (1967).

¹⁰¹ GINO RAYMOND, HISTORICAL DICTIONARY OF FRANCE 23 (1998).

¹⁰² JOHN McMANNERS, THE FRENCH REVOLUTION AND THE CHURCH 39 (1969).

passed a decree requiring all Catholic clergy to swear an oath to the Civil Constitution of the Clergy.¹⁰³ The oath became a “test of patriotism,” and clergy became the focal point of riots.¹⁰⁴ Rather than take the oath, thousands of priests went into exile, while those who remained faced intense persecution, including imprisonment and execution.¹⁰⁵

Between 1790 and 1795, France saw an explosion of violence and destruction stemming from the transition from a government largely influenced by the Catholic Church to one that vehemently opposed any such influence. For example, in 1792, France went to war with Austria-Hungary; when news of a particular French defeat reached Paris, citizens were in an uproar.¹⁰⁶ Because patriotism had been tied to the oath, priests who refused to take it were considered enemies of the state.¹⁰⁷ In what became known as the September Massacres, over a thousand purported enemies of the state were dragged from prisons and murdered; many of the victims were priests who had refused to take the oath.¹⁰⁸

To be clear, not all priests were innocent victims; many of the government’s policies were reactions to significant threats to its authority by insurrectionists. For example, in northern France, priests assisted in an uprising of some three hundred thousand locals.¹⁰⁹ While the impetus of the revolt was locals’ reluctance to leave their homes for military service, it did not help that they referred to themselves as “Royal and Catholic armies.”¹¹⁰ In response, the government announced the death penalty for all priests involved.¹¹¹ Going a step further, later that year, the government declared that any priest (not just those involved in the uprising) could be put to death for “communication with the enemies of the fatherland,” and that even if a priest had

¹⁰³ *Id.* at 43-46.

¹⁰⁴ *Id.* at 61-62.

¹⁰⁵ *Id.* at 106.

¹⁰⁶ *Id.* at 63; THE DESPACHES OF EARL GOWER 1790-1792, at 223 (Oscar Browning ed., 1885) (Earl Gower was the British Ambassador to France at the time).

¹⁰⁷ McMANNERS, *supra* note 102, at 64.

¹⁰⁸ THE DESPACHES OF EARL GOWER, *supra* note 106, at 223.

¹⁰⁹ A. AULARD, CHRISTIANITY AND THE FRENCH REVOLUTION 97 (Lady Frazer trans., 1966).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 98.

taken the oath of allegiance, he could be deported for “want of patriotism,” supported by evidence from six witnesses.¹¹²

However, by 1795, the Republic realized it could not eradicate Catholicism by violence.¹¹³ Lay Catholics began to fight back against the de-Christianization movement. In Seine-et-Marne, for example, armed Catholics successfully reopened churches.¹¹⁴ The tensions between church and state were largely eased with the passage of the law of the Third Ventose, Year III, which established freedom of worship for all religions but also did away with any government financial support for organized religion.¹¹⁵

While the law of the Third Ventose, Year III, established the separation of religion and state in France, the Catholic Church still exerted some degree of influence over the state heading into the twentieth century. In response, an anticlerical movement began gathering steam as early as 1880 and had reached full force by 1905.¹¹⁶ From this era, known as the Third Republic, France formalized its principle of *laïcité*, which underpins the decision to ban overtly religious attire in public schools.

From the start of the anticlerical movement, the French government began using creative legislation and law enforcement to wrest power away from the Church. An 1880 decree required all “unauthorized” religious congregations to register with the State within three months.¹¹⁷ French officials used the decree to shut down congregations and evict the resident clergy.¹¹⁸

The state also used less overt measures to weaken the Church’s influence. During the 1880s, France enacted a series of legislation known as the Ferry Laws, placing the state in control of primary education.¹¹⁹ While this move does not appear to fit

¹¹² *Id.* at 98-99.

¹¹³ *Id.* at 139.

¹¹⁴ *Id.* at 116.

¹¹⁵ *Id.* at 139.

¹¹⁶ See Gunn, *supra* note 78, at 439-40.

¹¹⁷ *Id.* at 440.

¹¹⁸ *Id.*

¹¹⁹ HISTORICAL DICTIONARY OF THE THIRD FRENCH REPUBLIC, 1870-1940, at 903 (Patrick H. Hutton ed., 1986).

into the church-state debate brewing between clericalists and anticlericalists during the Third Republic, it is essential to note that France has long viewed primary education as the tool for shaping the French citizen of the future.¹²⁰ The mandatory education system established was secular, public, free, and completely devoid of the Catholic Church's influence.¹²¹ In fact, since education of new citizens "was integral to the . . . continuity of a republican ideology, the schools were a venue in which secularism was particularly emphasized."¹²²

Shortly before the turn of the century, the anticlerical movement had gathered full strength. This was due largely to a controversy that garnered tremendous national attention involving the center-right government, the military, and the Catholic Church. In 1894, a military tribunal convicted a Jewish army officer, Captain Dreyfus, of spying for Germany.¹²³ There was sparse evidence against him, and the army covered up proof that they had convicted the wrong person.¹²⁴ Eventually, the truth was revealed, and a new trial was ordered.¹²⁵ Dreyfus' political supporters successfully toppled the center-right government, which had taken a position of neutrality, thereby tacitly sanctioning the cover-up.¹²⁶ The Catholic Church got caught up in the affair by taking a non-interventionist stance which deferred to the tribunal's decision.¹²⁷ The newly elected center-left government wanted to extricate itself from any Church influence and successfully used the Church's ill-fated choice of sides to argue

¹²⁰ 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, 593; Gunn, *supra* note 78, at 454.

¹²¹ RAYMOND, *supra* note 101, at 23.

¹²² Beller, *supra* note 120, at 589-90.

¹²³ HISTORICAL DICTIONARY OF THE THIRD FRENCH REPUBLIC, *supra* note 119, at 297. The ensuing events leading up to his exoneration are known as the "Dreyfus Affair." *Id.* For a detailed discussion, see LESLIE DERFLER, *THE DREYFUS AFFAIR* (2002).

¹²⁴ HISTORICAL DICTIONARY OF THE THIRD FRENCH REPUBLIC, *supra* note 119, at 298-99.

¹²⁵ *Id.*

¹²⁶ ERIC CAHM, *THE DREYFUS AFFAIR IN FRENCH SOCIETY & POLITICS*, xiii, 86, 150, 152-53 (1996); Beller, *supra* note 120, at 593.

¹²⁷ CAHM, *supra* note 126, at 89; Beller, *supra* note 120, at 593.

that the Church “had no place in the Republic of meritocracy and individual freedom of belief.”¹²⁸

To accomplish this division, the new government continued to enact legislation aimed at weakening the Church. In a move reminiscent of the earlier Ferry Laws, Parliament enacted the Law of Associations,¹²⁹ which restricted the rights of particular organizations headquartered outside of France, including the Catholic Church.¹³⁰ Parliament used this law to shut down Catholic schools and confiscate Church property.¹³¹

In 1905, the Law on the Separation of Church and State was enacted.¹³² As its name makes clear, it officially implemented the separation of church and state and formalized republican notions of *laïcité*.¹³³ While Article 1 of the Law of 1905 guaranteed freedom of conscience and public worship to all religions, Article 2 ended any recognition of an official state church, and any public financial assistance to religion.¹³⁴ These two articles, taken together, resulted in governmental neutrality towards religion, a principle still in place today.¹³⁵

While the separation of religion and state during the Revolution and the Third Republic was borne out of anticlerical sentiment, the modern notion of *laïcité* is somewhat more benign. The focus of *laïcité* began to shift from strict secularism to tolerance of all religious faiths. Article 2 of France’s Constitution, written in 1958, “[ensures] the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.”¹³⁶

¹²⁸ Beller, *supra* note 120, at 593.

¹²⁹ Law on the Contract of Association of July 1, 1901, J.O., July 2, 1901, p. 4025.

¹³⁰ HISTORICAL DICTIONARY OF THE THIRD FRENCH REPUBLIC, *supra* note 119, at 63; Gunn, *supra* note 78, at 440.

¹³¹ *Id.*; Gunn, *supra* note 78, at 440.

¹³² Law on the Separation of Churches and the State of Dec. 9, 1905, J.O., Dec. 11, 1905, p. 7205.

¹³³ *Id.*; Gunn, *supra* note 78, at 441.

¹³⁴ Law on the Separation of Churches and the State of Dec. 9, 1905; Gunn, *supra* note 78, at 441.

¹³⁵ Brigitte Basdevant-Gaudemet, *State and Church in France*, in STATE AND CHURCH IN THE EUROPEAN UNION 119, 122 (Gerhard Robbers ed., 1996).

¹³⁶ 1958 CONST. art. 2, *translated in* GEORGE A. BERMAN & PIERRE KIRCH, FRENCH BUSINESS LAW IN TRANSLATION 1-10 (2005).

While this nuanced definition of *laïcité* signified a truce between the state and the Catholic Church, it also introduced a host of problems in the second half of the twentieth century as the Muslim population began to grow. France has the largest Muslim population in Western Europe, and at an estimated four to five million practitioners, Islam is the second largest religious denomination in France behind Catholicism.¹³⁷

Because Muslims are such a significant portion of the French population, it is important to understand why they present difficulties to France's traditional notion of *laïcité*. A detailed analysis of Islam as a religion and culture is not called for here, but the subject deserves a brief contextual discussion. Islamic law, or *shari'a*, is derived from the *Qur'an*, and Muslims believe it is the direct word of God transmitted through the prophet Muhammad along with the traditions of the faith.¹³⁸ However, "just as there is no 'one people' of Islam, there is also no 'one law' of Islam."¹³⁹ Nonetheless, there are some articulable principles concerning the separation of religion and the state. Under *shari'a*, there is no concept of secularism because all law is derived from the word of God. This prevents many Muslims from accepting complete secularism.¹⁴⁰ Further, as *shari'a* provides both a legal system and a code of ethics, it regulates all aspects of a Muslim's life, from religion to politics to personal relationships and social manners.¹⁴¹ This makes integration into a secular society, such as France, particularly difficult for Muslims "because Islam increasingly does not recognize the truly secular state."¹⁴²

¹³⁷ DEPT. OF STATE, 107TH CONG., ANN. REP. ON INT'L RELIGIOUS FREEDOM 2002, at 365 (Joint Comm. Print 2002); Gunn, *supra* note 78, at 456; Cynthia DeBula Baines, Note, *L'Affaire des Foulards – Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303, 313 (1996); *see also* European Muslim Population, http://www.islamicpopulation.com/europe_islam.html (last visited Jan. 10, 2006).

¹³⁸ Abdullahi An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 n.1 (1987).

¹³⁹ Baines, *supra* note 137, at 308 (citing Shahnaz Kahn, *Canadian Muslim Women and Shari'a Law: A Feminist Response to "Oh, Canada!"*, 6 CAN. J. WOMEN & L. 52, 56 (1993)).

¹⁴⁰ An-Na'im, *supra* note 138, at 492.

¹⁴¹ *Id.* at 494 n.12; Baines, *supra* note 137, at 309; *see* Susie Steiner, *Sharia Law*, GUARDIAN UNLIMITED, Aug. 20, 2002, available at <http://www.guardian.co.uk/theissues/article/0,6512,777972,00.html>.

¹⁴² Baines, *supra* note 137, at 311.

French policy has always promoted assimilation for its immigrants by encouraging them to adopt French traditions and language.¹⁴³ Similar to the academic discussions noted above, political commentators also believe that Muslims present much tougher resistance to assimilation than do other groups.¹⁴⁴ Gaston Defferre, a former Socialist interior minister, said in an interview:

When Poles, Italians, Spanish and Portuguese live in France and decide to naturalize, it matters little whether they are Catholics, Protestants, Jews, or atheists. . . . But the rules of Islam are not simply religious rules. They are rules of living that concern . . . marriage, divorce, the care of children, the behavior of men, the behavior of women. . . . These rules are contrary to all the rules of the French law on the custody of children in case of divorce, and they are contrary to [French rules on] the rights of women with respect to their husbands. What is more, in France we don't have the same habits of living.¹⁴⁵

Regardless of this view's accuracy, Defferre is not alone in espousing it.¹⁴⁶ However, this somewhat pervasive notion that Islam is incompatible with assimilation is not held by many Muslims.¹⁴⁷ Perhaps this disagreement hinges on differing opinions of what "assimilation" means.

As Beller points out, by the 1980s "most North Africans did not wish to maintain a strict separation," preferring instead to integrate themselves into French culture.¹⁴⁸ The vast majority of Muslims in France emigrated from North Africa during the latter half of the twentieth century, which means they arrived at a time when national discussion of *laïcité* began shifting to religious tolerance rather than strict secularism. Thus, the new immigrants saw no incompatibility between what they saw as their right to

¹⁴³ *Id.* at 311-12.

¹⁴⁴ See, e.g., Interview, Gaston Defferre, former Socialist Interior Minister, *translated in* ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 149 (1992).

¹⁴⁵ *Id.*; Beller, *supra* note 120, at 595.

¹⁴⁶ See Beller, *supra* note 120, at 595.

¹⁴⁷ See *id.*, at 594.

¹⁴⁸ *Id.*

religious freedom and the French notion of *laïcité*;¹⁴⁹ exercising their right to religious freedom was an expression of their assimilation with France's ideal of individual liberty.¹⁵⁰ In 1994, Muslim demonstrators at a pro-headscarf rally held up signs proclaiming, "Yes to Laicism and to My Scarf!" and "France is My Liberty, So is My Scarf!"¹⁵¹ These demonstrators believed they were participating fully within the traditions of French culture by calling for state recognition of their individual freedoms.

This difference in understanding of what it means to assimilate partially explains the difficulty that Defferre and others see in Muslim assimilation, but this is not the only factor. Many scholars have attributed France's difficulty in assimilating North Africans to a combination of cultural differences and bitterness stemming from Algeria's War of Independence.¹⁵² Algeria fell under French Control in 1830, and, by 1947, was considered an integral part of the country.¹⁵³ As France's geographically closest colony, Algeria became its largest trading partner as well as the principal French destination for European settlers.¹⁵⁴ The war for independence thus inflicted a heavy blow that has not been forgotten by the millions of French and Algerians alike, still alive today, who either actively participated in the war or were adversely affected by it.¹⁵⁵

While this clearly exacerbated the situation, Algerians had experienced difficulty integrating into French society long before the war for independence.¹⁵⁶ This is partially explained by France's attitude towards immigration. France has always encouraged immigration when labor shortages created a demand

¹⁴⁹ Yasemin Soysal, *Changing Boundaries of Participation in European Public Spheres: Reflections on Citizenship and Civil Society*, in *EUROPEAN CITIZENSHIP BETWEEN NATIONAL LEGACIES AND POSTNATIONAL PROJECTS* 165-66 (Klaus Eder & Bernhard Giesen eds., 2001).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 166.

¹⁵² NEIL MACMASTER, *COLONIAL MIGRANTS AND RACISM: ALGERIANS IN FRANCE, 1900-62*, at 1-3 (1997).

¹⁵³ Judy Scales-Trent, *African Women in France: Immigration, Family, and Work*, 24 *BROOK. J. INT'L L.* 705, 726 (1999).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ MACMASTER, *supra* note 152, at 1-3.

for workers.¹⁵⁷ However, after the economy picks up and the demand for workers no longer exists, France has historically discouraged further immigration.¹⁵⁸

When the economy thrived during the post-World-War-II era, France invited foreign workers to its shores.¹⁵⁹ The decolonization of North Africa and the rapidly rising standard of living in other European countries meant that more of France's foreign labor was coming from Algeria and its neighbors, and less from Europe.¹⁶⁰ Whereas European workers were transient, going from country to country in search of work, many North Africans chose to stay in France—even when the economy slowed—because the standard of living was much higher than that of Africa.¹⁶¹ Thus, while France has traditionally welcomed foreign workers, it has also expected them to leave when the demand for their labor no longer existed.¹⁶² By overstaying their welcome, Algerians have found themselves at odds with French cultural expectations, a problem that began well before the war for independence and has persisted to this day.¹⁶³

Furthermore, whatever the source of the tension, something invariably arises to perpetuate it. During the first Gulf War, many citizens felt that French Muslims were angered by France's support of the coalition against Iraq. As a result, they feared that Islamic fundamentalism had asserted itself in an otherwise "unassertive" Muslim community.¹⁶⁴ Since 1992, Islamic fundamentalists in Algeria have killed a number of pro-secularism women

¹⁵⁷ See Gérard Noiriel, *Difficulties in French Historical Research on Immigration, in IMMIGRANTS IN TWO DEMOCRACIES: FRENCH AND AMERICAN EXPERIENCE* 66, 67 (Donald L. Horowitz & Gerard Noiriel eds., 1992).

¹⁵⁸ *Id.*

¹⁵⁹ See ALEC G. HARGREAVES, IMMIGRATION, 'RACE' AND ETHNICITY IN CONTEMPORARY FRANCE 10-12 (1995).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Noiriel, *supra* note 157, at 67-68.

¹⁶³ Scales-Trent, *supra* note 153, at 709.

¹⁶⁴ Baines, *supra* note 137, at 313-14; *Secularity Defied*, *ECONOMIST*, Oct. 8, 1994, at 53.

who did not wear headscarves.¹⁶⁵ Such incidences and impressions have led to mistrust of Algerian immigrants, who many French citizens associate with the fundamentalism in Algeria that makes the newspapers.¹⁶⁶

So what does all of this historical background have to do with an analysis of whether France's ban is justified in principle? First, it illustrates that the separation of religion and state has played a critical role in maintaining public order in a democratic France. It also demonstrates that the growing Muslim population presents challenges to France's traditional ideas of the proper balance between strict secularism and tolerance of all faiths. Presumably, the French government would argue that the ban on overtly religious symbols in schools is justified in principle because it attempts to strike the right balance between strict secularism and tolerance of all faiths in order to ensure public order. However, it is not enough for France to state that the ban is justified in principle; it must also prove that it is justified in fact by showing a "pressing social need."

2. *Pressing Social Need*

Did children wearing headscarves and yarmulkes in public school truly threaten public order in France? The Stasi Commission certainly believed so. As stated above, the commission based its recommendation on its perception that Muslim girls were being coerced by "families and communities . . . to wear headscarves against their will," which in turn aggravated religious polarization and sexual discrimination.¹⁶⁷ A second justification given by the commission was administrative difficulties experienced by school officials in carrying out the "confusing" policies regarding religious attire established by the Conseil d'État.¹⁶⁸ This discussion will focus first on those policies established by the Conseil d'État.

¹⁶⁵ Baines, *supra* note 137, at 314; *see, e.g.*, Youssef M. Ibrahim, *Bareheaded, Women Slain in Algeria*, N.Y. TIMES, Mar. 31, 1994, at A3.

¹⁶⁶ Baines, *supra* note 137, at 314.

¹⁶⁷ STASI REPORT, *supra* note 81, at 30; Gunn, *supra* note 78, at 467.

¹⁶⁸ STASI REPORT, *supra* note 81, at 30; Gunn, *supra* note 78, at 467.

The Conseil d'État is the court of final instance regarding administrative matters in France.¹⁶⁹ Along with its role as adjudicator, the Conseil plays a consultative function on matters of public administration.¹⁷⁰ Whereas the U.S. Supreme Court is limited to interpreting the law when contentious parties bring forth a dispute, the Conseil d'État, at the request of a state administrator, may make pronouncements regarding public policy. While not binding, these pronouncements often become law in the absence of contrary legislation. Nonetheless, pronouncements made by the Conseil can be overruled by an ordinary statute.

In 1989, the Conseil was called upon to pronounce guidelines regarding religious attire in public schools.¹⁷¹ The Conseil establish two important principles: first, it found that “*laïcité* . . . require[s] respect for the freedom of conscience of students, including the right to express their beliefs in schools by wearing religious clothing,”¹⁷² and second, it tempered that pronouncement by stating that school officials could take action if wearing religious symbols amounted to proselytizing.¹⁷³

The Conseil's pronouncement became the accepted law regarding religious symbols in school until 2004, when the new law banning such symbols went into force. Most disputes during the 1990s were resolved at the local level, with the help of an official mediator.¹⁷⁴ Nonetheless, the Conseil was called upon several times to settle disagreements. According to one report, “[forty-one of forty-nine] disputed cases arriving at the Conseil d'Etat

¹⁶⁹ Gunn, *supra* note 78, at 454-55.

¹⁷⁰ L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 64-66 (5th ed. 1998).

¹⁷¹ Gunn, *supra* note 78, at 454-55.

¹⁷² *Id.* at 455; *see also* Avis du Conseil d'État no. 346893 (Nov. 27, 1989), reprinted in BERNARD JEUFRY & FRANÇOIS TRICARD, LIBERTÉ ET RÉGIMES DES CULTES EN DROIT FRANÇAIS 1031, 1033 (1996) [hereinafter 1989 Headscarf Pronouncement].

¹⁷³ Gunn, *supra* note 78, at 455; 1989 Headscarf Pronouncement, *supra* note 172, at 1032.

¹⁷⁴ Harry Judge, *The Muslim Headscarf and French Schools*, 111 AM. J. EDUCATION 1, 11-12 (2004).

between 1992 and 1999 . . . led to a reversal of the decision of the school officials against the girl.”¹⁷⁵

The issue of religious attire in public schools remained largely dormant for nearly fifteen years.¹⁷⁶ Nonetheless, permitting school officials to determine whether religious attire amounted to proselytizing, on a case-by-case basis, kept the issue alive.¹⁷⁷ The discretion given to school authorities meant that there was no definitive guidance, so the issue remained unclear until the French government took action in 2004.¹⁷⁸

Returning to the Stasi Report, as stated above, the commission supported its recommendation with the argument that school officials were experiencing administrative difficulties with the policy set forth by the Conseil d'État. However, the report offered little evidence in support of this conclusion.¹⁷⁹ In fact, no novel cases regarding headscarves in public schools had reached the Conseil in several years.¹⁸⁰ Furthermore, the Ministry of Education's designated mediator for headscarf disputes reported that during her nine-year tenure the number of mediation cases had been reduced by half.¹⁸¹ The fact that the cases before the Conseil were overwhelmingly decided in favor of the Muslim girls who were wrongly banned from wearing the headscarf suggests that the answer to the problem was better training and education for school officials, not banning girls from wearing them.

¹⁷⁵ Haut Conseil à l'Intégration, *L'Islam Dans la République* 50 (2000), available at http://www.islamlaicite.org/IMG/pdf/isl_repu_Ht_conseil.pdf (last visited Jan. 11, 2006); Gunn, *supra* note 78, at 457 n. 235.

¹⁷⁶ See Gunn, *supra* note 78, at 458; *L'Ecole en Première Ligne*, LE MONDE DE L'ÉDUCATION, Dec. 2001, at 23.

¹⁷⁷ Beller, *supra* note 120, at 620.

¹⁷⁸ *Id.*

¹⁷⁹ Gunn, *supra* note 78, at 477.

¹⁸⁰ *Id.* at 475. In 1996, the Conseil handed down three decisions which made it clear that wearing the veil, in and of itself, was not an “ostentatious” expression of one's beliefs. Claire Saas, *Muslim Headscarf and Secularism in France*, 3 EUR. J. MIGRATION & L. 453, 455 (2001). These cases also made it clear that students could not use the veil to get themselves out of required courses, such as physical education. *Id.*

¹⁸¹ *Sous le Voile Islamique, l'Oppression des Femmes*, L'HUMANITE, Apr. 30, 2003, available at <http://www.humanite.fr/journal/2003-04-30/2003-04-30-371214>; Gunn, *supra* note 78, at 458.

Thus, while some school officials may have had difficulty understanding the scope of their discretion, it can hardly be argued that addressing such increasingly rare instances amounted to a “pressing social need.” Nonetheless, if the ECHR follows *Şahin* in giving special deference to national authorities where religion and education intersect, it may choose to look no further than the face of the Stasi Report, without questioning how the commission reached its conclusions. This illustrates the significance of *Şahin*’s relaxed standard of review regarding religious attire in school.

Turning to the Stasi Commission’s other justification, that Muslim girls were being forced to wear headscarves against their will, the report stated:

There are pressures placed on these young minor girls to force them to wear religious insignia. The family and social environment imposes a choice on them that is not their own. The Republic cannot remain deaf to the cry of distress of these young girls. The schools must be for them a place of liberty and emancipation.¹⁸²

Such a strong assertion might suggest that the Stasi Commission conducted extensive independent research on why Muslim women wear headscarves, but the report cites no such research.¹⁸³ The commission also gave short shrift to issues of religious freedom, failing to address the idea that Muslim girls might wear the headscarf out of choice, in adherence to religious traditions.¹⁸⁴ Furthermore, the commission never discussed the impact its recommendation would have on other religious denominations, underlying the extent to which the focus of its recommendation was on Muslims.¹⁸⁵

¹⁸² STASI REPORT, *supra* note 81, at 58 (quoted text translated in Gunn, *supra* note 78, at 467).

¹⁸³ See Gunn, *supra* note 78, at 469.

¹⁸⁴ *Id.* at 470.

¹⁸⁵ *Id.* at 470-71; see STASI REPORT, *supra* note 81. The lack of in-depth analysis regarding other religions is apparent from remarks made by the Education Minister, Luc Ferry, shortly after the release of the Stasi Report. When questioned about bandanas, Ferry stated that they would be allowed, unless they were worn for religious purposes. Sharif Gemie, *Stasi’s Republic: The School and the “Veil”*, December 2003-March 2004, 12 MODERN & CONTEMP. FR. 387, 387 (2004). Ferry gave the same response concerning beards and turbans, but in his article, Gemie

Without any evidence supported by independent research, it is difficult to see how the French government would be able to establish in the record that a “pressing social need” existed requiring a ban on overtly religious symbols in school. This suggests not that the Stasi Commission’s conclusions are unsound,¹⁸⁶ but that they are unsubstantiated. Again, however, the question of whether the ECHR will find a “pressing social need” depends greatly on the level of deference it affords to the decision-making process of the French government in passing the law in the first place. The Stasi Report does not state how children wearing religious symbols in public school is a threat to public order; the Commission simply assumed that difficulty administering the Conseil d’État’s pronouncement and unsubstantiated coercion amounted to a threat to public order. However, in *Metropolitan Church of Bessarabia v. Moldova*, the ECHR ruled against the Moldovan government, not because the conclusions reached by the government were invalid, but because they were unsubstantiated by the record.¹⁸⁷ In *Kokkinakis*, the court examined Greek’s conviction of the appellant for improper proselytism.¹⁸⁸

[I]n their reasoning the Greek courts established the applicant’s liability by merely reproducing the wording of [the applicable law] and did not sufficiently specify in what way the accused had attempted to convince his neighbor by improper means. None of the facts they set out warrants that finding.

That being so, it has not been shown that the applicant’s conviction was justified in the circumstances of the case by a pressing social need.¹⁸⁹

retorically asks about dreadlocks (Rastafarians), piercings (pagans), and shaved heads (Buddhists). *Id.* Two obvious issues arise: 1) there is no bright-line rule for determining when someone is wearing something for religious vs. secular purposes, and 2) the report’s conclusions would prevent a Muslim student from wearing a veil to school, while permitting a Catholic student to do so, since the veil is presumably not an expression of the Catholic student’s faith. *Id.* at 393-94.

¹⁸⁶ The intent of the article is not to pass judgment on the Stasi Commission’s conclusions; right or wrong, the point is that they are largely unsubstantiated.

¹⁸⁷ *Metro. Church of Bessarabia et al. v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 117 (¶ 125).

¹⁸⁸ *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) at 8 (1994).

¹⁸⁹ *Id.* at 21 (¶ 49).

While *Kokkinakis* addressed the Greek courts' application of the proselytism law and not the law itself, it is important to note the level of scrutiny the ECHR applied in reaching its decision, particularly since the case involved a state regulation of religion in society.¹⁹⁰ If the ECHR follows this line of cases, it would presumably have to consider how the government reached its conclusion that the public order doctrine called for action. This would lead them to the Stasi Report, and due diligence would require the court to examine how the Commission reached its conclusions. However, *Şahin* may carve out an exception to that line of jurisprudence in the context of religious symbols in school, calling for the court to stop its inquiry at the Stasi Commission's recommendations without looking further into how those recommendations were reached.

3. *Proportionate to the Legitimate Aim Pursued*

It is simple enough for the ECHR to state that interferences to freedoms articulated in Article 9 of the Convention must be "proportionate to the legitimate aim pursued," but there is little uniformity in how it has interpreted and applied this standard. In *Cha'are Shalom ve Tsedek v. France*, the ECHR lent considerable deference to the state in determining how best to address the pursuit of a legitimate aim.¹⁹¹ Under this analysis, once the legitimacy of the aim is established, the court gives great deference to national authorities in deciding whether the means to achieve that end is proportionate.¹⁹² However, in other cases the ECHR has not been quite so deferential. In *Larissis et al. v. Greece*, the court examined not just the proportionality of the interference to the legitimate aim pursued but how that interference was enforced.¹⁹³ In *Metro Church of Bessarabia*, the ECHR considered

¹⁹⁰ For further cases in which the court has applied a higher degree of scrutiny to legislative decisions, see *Buscarini v. San Marino*, 1999-I Eur. Ct. H.R. 605 (holding that legislation requiring public officials to swear an oath upon inauguration by placing their hand over the bible violates Art. 9 of the Convention); *Murphy v. Ireland*, 2003-IX Eur. Ct. H.R. 1 (holding that legislation prohibiting advertisements on the radio directed towards religious ends does not violate Art. 10 of the Convention (applying the same four pronged test as Art. 9)).

¹⁹¹ See *Cha'are Shalom ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. 231, 258-59.

¹⁹² See *id.* at 259.

¹⁹³ See *Larissis et al. v. Greece*, 1998-I Eur. Ct. H.R. 362, 381 (¶ 54).

the effect that the interference had on the applicant, and examined whether the law was applied uniformly or in a discriminatory manner.¹⁹⁴

In *Şahin*, the Grand Chamber stated that the interference was not discriminatory, since it did not apply solely to Muslims.¹⁹⁵ It also noted that the interference was narrowly tailored to address religious attire in schools, and did not create a general prohibition on wearing religious attire in public.¹⁹⁶ This was consistent with the analysis applied in *Bessarabia*. Finally, the Grand Chamber considered the years of debate at the national level, as well as within the academic community regarding religious attire in school.¹⁹⁷ Because of this deliberation, the Grand Chamber was willing to lend deference to local authorities in deciding how best to pursue a legitimate aim.¹⁹⁸ The Grand Chamber did not, however, look at how the interference was enforced, as it did in *Larissis*. Such an examination would have considered whether refusing entrance to courses and exams is proportionate to Şahin's refusal to comply with the regulation in question.

In light of the lack of clarity regarding the ECHR's application of this proportionality analysis, this discussion will attempt to be somewhat comprehensive. Under *Cha'are Shalom ve Tsedek's* deferential analysis, the challenger to the ban would have to demonstrate that the aim pursued by the state was not legitimate, or that there was something about the state's decision-making process that was invalid and that the ECHR should therefore not lend deference to that process. As discussed in Part IV. A, the challenger would have difficulty arguing against the legitimacy of the aim of maintaining public order. The validity of the state's decision-making process was discussed in Part IV. B. 2. What remains unclear, as discussed, is the level of deference the ECHR will give to that process. The government could argue that a national debate regarding the proper balance between religious freedom and the maintenance of public order

¹⁹⁴ See *Metro. Church of Bessarabia et al. v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 118-19.

¹⁹⁵ *Şahin v. Turkey*, ¶ 118 (Eur. Ct. H.R. Nov. 10, 2005).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* ¶ 120.

¹⁹⁸ *Id.* ¶ 121.

had been going on with respect to religious attire in public schools since the Conseil d'État's 1989 pronouncement, and that the new law is merely a manifestation of that prolonged discourse. If the ECHR follows *Şahin's* analysis, this would be a strong argument.

However, if the ECHR follows *Metro Church of Bessarabia*, in conjunction with *Larissis*, it will have to consider the effect that the interference has on the applicant, whether the enforcement of the restriction is proportionate, and whether the law is applied uniformly or in a discriminatory manner. The state would presumably argue that the law is narrowly tailored to address the issue of religious attire in schools and did not create a general prohibition on wearing religious attire in public. Furthermore, the law applies to all students, regardless of their religious affiliation. Nonetheless, the challenger could argue that while the law applies to all denominations, it disproportionately affects Muslim girls. The challenger would have to establish the factual basis for this argument. With respect to the effect that the interference has on the applicant and the proportionality of its enforcement, the challenger could argue that whether girls wear the headscarf to school by choice or out of compulsion, the result is the same if they refuse to remove it: Muslim girls are denied access to public education for manifesting their religious beliefs. The ECHR would have to consider whether the denial of access to public education is proportionate to the aim of maintaining public order.

It is unclear how the ECHR will analyze the proportionality of the interference in a challenge to France's law. Nonetheless, this Comment is not an attempt to predict the outcome of such a challenge. The intent here is to contemplate the various ways in which the ECHR would approach its analysis, and to consider what issues it would find relevant in its resolution.

C. FACTUAL DISTINCTIONS BETWEEN *ŞAHIN* AND FRANCE'S BAN ON OVERTLY RELIGIOUS SYMBOLS IN PUBLIC SCHOOLS

The ECHR would presumably follow the legal framework (the four-pronged test) applied in *Şahin* to analyze an alleged violation of Article 9 of the Convention. However, in this respect, *Şahin* is not groundbreaking precedent. The four-pronged

approach was not created in *Şahin*; the Grand Chamber merely applied an already existing legal framework to the case.¹⁹⁹ However, it is important to highlight factual distinctions between *Şahin* and France's ban on overtly religious symbols in public schools to illustrate that *Şahin* does not establish a per se rule permitting states to ban religious attire in schools.

The most important distinction is that *Şahin* involved a law banning *adults* from wearing religious attire in universities, whereas in France, the law prevents *children* from wearing overtly religious symbols in primary and secondary schools. This distinction is vital because the Grand Chamber did not have to address the precedent set in *Valsamis v. Greece*, in which the ECHR held:

“[T]he setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era.” Given that discretion, *the Court has held that the second sentence of Article 2 of Protocol No. 1 forbids the State “to pursue an aim of indoctrination that might be regarded as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded.”*²⁰⁰

This decision creates a bright line ceiling—respect for “parents’ religious and philosophical convictions—for judicial deference to national authority. Although it applies to the establishment of school “curricul[a]” that conflicts with parents’ right to raise their children in accordance with their religious convictions, it requires no stretch of the imagination to envision the ECHR applying it to areas beyond the curriculum, including

¹⁹⁹ For earlier cases applying the four pronged approach, see, for example, *Kokinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) at 18 (1994); *Larissis et al. v. Greece*, 1998-I Eur. Ct. H.R. 362, 378-82.

²⁰⁰ *Valsamis v. Greece*, 1996-VI Eur. Ct. H.R. 2312, 2324 (citations omitted) (emphasis added). Article 2 of Protocol No. 1 states: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262, 264.

regulation of religious attire in school. In basing its decision to enact the legislation on the Stasi Commission's finding that "[t]he family . . . environment imposes a choice on [children] that is not their own," the government sets itself up for failure. As *Valsamis* make clear, any attempt by the state to *indoctrinate* children without respect for the parents' role in raising them in accordance with their religious convictions is impermissible.²⁰¹ The ECHR did not have to address this issue of parents' rights in *Şahin* because the regulation in question pertained to adult students at a university, not to primary school children, like in *Valsamis* and in the present situation in France. Thus, a reliance on *Şahin* alone would be insufficient; the government would also have to argue that *Valsamis* is in some way inapplicable.

Two other factual distinctions are important to note. First is the fact that *Şahin* belonged to the overwhelming Muslim majority in Turkey, whereas in France, Muslims are in the minority. Second, although wearing headscarves in school has similarly taken on "political significance" in France, that significance is contextually different than the significance the issue acquired in Turkey.²⁰² In *Şahin*, the Grand Chamber considered the impact that wearing headscarves has on women who choose not to wear them in a society that is predominantly Muslim.²⁰³ They found that, in light of the fact that wearing headscarves had "taken on political significance in Turkey in recent years,"²⁰⁴ imposing limitations on freedom in this way may be regarded as meeting a pressing social need: the protection of gender equality.²⁰⁵ The important distinction to make is that in France, the focus of the law in question is not on the impact that wearing the scarf has on those who choose not to wear it, an issue the Stasi Commission did not address, but on the wearer herself and the alleged coercion that her family and the Muslim community exert on her to wear it. The concern that the majority of France's population will exert pressure on the minority to act in accordance with its

²⁰¹ *Valsamis*, 1996-VI Eur. Ct. H.R. at 2324.

²⁰² *Şahin*, ¶ 115 (Eur. Ct. H.R., Nov. 10, 2005) (quoting *Şahin v. Turkey*, ¶ 108 (Eur. Ct. H.R., June 29, 2004)).

²⁰³ *Id.*

²⁰⁴ *Id.* (quoting *Şahin v. Turkey*, ¶ 108 (Eur. Ct. H.R., June 29, 2004)).

²⁰⁵ *Id.*

views on religion is real, but in a completely different way than is the pressure in Turkey. The political significance of the headscarf in France stems, not from a political movement to force women to wear it, but from a movement—spurred on by the secular majority—to prevent them from doing so. As one scholar commented, “[b]y forcibly removing the [headscarf] from these young girls, does not the French measure seem as patronizing and condescending as the families that force them to don the [headscarf]? It has not only purported to give young girls freedom, but also defined it for them.”²⁰⁶

Finally, one last distinction is important to consider. In Turkey, as stated above, the law protects Muslim women who choose not to wear the headscarf from the coercion of those who do so in public universities. It forces the potential coercer to alter her behavior in order to protect the potential coercee. In France, however, the law purportedly protects Muslim girls from the coercive influence of their family and community by forcing the potential coercee to alter her behavior, thus accepting coercion from another source. As one commentator puts it, the law “targets the ostensible victims of the unwarranted pressure,” and “coerces [them] to conform to community pressure [rather than their perpetrators].”²⁰⁷

These distinctions between Turkey’s and France’s laws are significant because they provide a potential challenger to France’s ban with ample arguments to factually distinguish her case from *Şahin*. Once the two cases are factually distinguished, the challenger can proceed by structuring her arguments within the legal framework applied in *Şahin*, and can incorporate the precedent established in *Valsamis*.

V. CONCLUSION

Şahin is an important case in that it draws attention to the issue of restrictions on wearing religious attire in schools and articulates the established four-pronged analysis as it applies to such restrictions. It may prove to be of even greater significance

²⁰⁶ Dina Alsowayel, *The Elephant in the Room: A Commentary on Steven Gey’s Analysis of the French Headscarf Ban*, 42 HOUS. L. REV. 103, 113 (2005).

²⁰⁷ T. Jeremy Gunn, *French Secularism as Utopia and Myth*, 42 HOUS. L. REV. 81, 96 (2005).

if the ECHR interprets it to establish a precedent that state regulation of religious symbols in school is to be given a heightened level of deference above and beyond the previously expressed deference afforded to States regarding the regulation of religion in society. Whether this is the case remains to be seen.

In a challenge to France's ban on overtly religious symbols in school, the applicant would have to first factually distinguish her case from *Şahin* to prevent the ECHR from dismissing it without considering the merits. As discussed above, this should not be a difficult burden.²⁰⁸ Once this distinction is made, the challenger and France would have to structure their arguments to conform to the legal framework applied in *Şahin*. As discussed above, the success of the applicant's challenge within this framework depends greatly on the level of deference the ECHR gives to the government's decision-making process.²⁰⁹ Nonetheless, even if it defers completely to the state, *Şahin* may prove not to be the controlling case that determines the outcome. *Valsamis* creates a significant burden for the state to demonstrate that the prohibition on overtly religious attire in school does not interfere with parents' rights to raise their children in accordance with their religious conviction.²¹⁰ Ultimately, it will be the strength of arguments regarding this issue that will control the outcome of a challenge to France's law.

²⁰⁸ See *supra* Part IV.C.

²⁰⁹ See *supra* Part IV.B.2.

²¹⁰ See *supra* Part. IV.C.