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## L'Affaire des Foulards–Discrimination, or the Price of a Secular Public Education System?

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# NOTES

## ***L’Affaire des Foulards—Discrimination, or the Price of a Secular Public Education System?***

### *Abstract*

*This Note examines the recent controversy over France’s ban against “ostentatious” religious symbols in public schools. The only ostentatious symbol targeted by the French government, however, has been the head scarves worn by Muslim schoolgirls. The author explores the roots of the current ban by examining France’s tradition of assimilation of immigrants and its constitutionally mandated secular public education system. The author also compares France’s interests in prohibiting head scarves with the Muslim students’ interests in practicing their religion. Finally, the author concludes that the French policy of banning head scarves from school is not only impractical, but likely a violation of both French and international law.*

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## I. INTRODUCTION

*L'Affaire des Foulards* refers to the national controversy in France<sup>1</sup> over a ban against wearing the Muslim *hijab*<sup>2</sup> in public schools.<sup>3</sup> The controversy began in 1989 when the headmaster of a junior high school in Creil, a suburb north of Paris, expelled three Muslim girls for wearing Islamic scarves in school.<sup>4</sup> The French government took notice when more schools followed suit,

1. A similar debate has arisen in Canada. John Lejins, *Muslim Females' Head-Scarves Controversial*, OTTAWA CITIZEN, Sept. 17, 1994, at C6.

2. Also called the *hijab*, meaning veil, the head scarves cover the hair, forehead, and neck of Muslim females.

3. James O. Goldsborough, *Girls' Scarves in France Cloak Immigration Truths*, SAN DIEGO UNION-TRIB., Sept. 19, 1994, at B5.

4. *France and Islam: Veil of Tears*, NEWSWEEK, Nov. 6, 1989, at 54, 54 [hereinafter *Veil of Tears*].

but eventually backed away from an outright ban.<sup>5</sup> However, each case involving the Muslim scarf was handled on an individual basis between the girl and the school, and many cases were resolved by mutual compromise.

Once the Conservatives defeated the Socialists in the 1993 parliamentary elections,<sup>6</sup> Francois Bayrou, France's newly appointed Education Minister, renewed the controversy by issuing an order prohibiting "ostentatious" signs that "divide our youth" in public schools.<sup>7</sup> In practice, the only "ostentatious" symbol targeted has been the *hijab*; no one has been, or is likely to be, suspended for wearing a Christian crucifix or Jewish yarmulke.<sup>8</sup> While former President Francois Mitterand, a Socialist, called for a "threshold of tolerance,"<sup>9</sup> France's new conservative President, Jacques Chirac, wholeheartedly supports Bayrou. Apparently, Chirac sees immigrants, especially Muslims, as a threat to the "non-religious" character of French schools.<sup>10</sup> Bayrou and his supporters insist that the ban is necessary to promote France's secular public school tradition<sup>11</sup> and the assimilation of students

5. Education Minister Lionel Jospin told French television: "The fact that a child arrives at school wearing a scarf is not a reason for expulsion." *Id.*

6. Elections to the French National Assembly were held in two rounds on March 21 and 28, 1993. The Socialist Party (*Parti socialiste*) suffered a terrible defeat, its representation falling from 252 to 54. The conservative Gaullist Party (*Rassemblement pour la République* (RPR)) emerged as the strongest party in the Assembly with 247 representatives, almost doubling its pre-election strength of only 126. Additionally, a right-wing party, the Union for French Democracy (*Union pour la démocratie française* (UDF)), increased its representation from 131 to 213. *France*, VII Constitutions of the Countries of the World (Oceana Publications), France Supp., Sept. 1994, at vii-viii (June 1988) [hereinafter *Constitutions of the World*].

7. *France Human Rights Practices, 1994*, DEP'T ST. DISPATCH, Mar. 1995, available in LEXIS, News Library, Curnws File [hereinafter *France Human Rights, 1994*]. The National Union of Secondary School Teachers expressed its dismay that Bayrou did not consult with school personnel before announcing the ban. The main union of school principals also questioned Bayrou's ban, saying its members preferred to deal with the controversy on a case-by-case basis through negotiation and compromise. *Ban on Islamic Scarves Renews Debate*, TENNESSEAN, Sept. 15, 1994, at 3A [hereinafter *Ban on Islamic Scarves*].

8. Adam Sage, *Chador Wear Spurs Battle in France; Muslim Schoolgirls Defy Ban on Traditional Islamic Garment*, ROCKY MTN. NEWS, Dec. 1, 1994, at 48A.

9. Scott Draft, *National Agenda, France's Culture War Gets Cooking in Classroom*, L.A. TIMES, July 11, 1995, World Report, at 3.

10. *Id.*

11. The French Constitution specifically guarantees the right to free and secular public education: "The nation guarantees the equal access of children and adults to instruction, to professional training, and to culture. The organization of free and secular public education at all levels is a duty of the State." FR. CONST. (1946) pmbl., para. 13. For a discussion of French constitutional law, see *infra* Part III.A. For a historical overview of the

of foreign origin.<sup>12</sup> Critics<sup>13</sup> respond that the ban violates religious freedom;<sup>14</sup> others claim its basis is racism.<sup>15</sup> At the same time, some women's groups<sup>16</sup> welcome the ban because they see the Islamic scarf as a symbol of the oppression and confinement of women.<sup>17</sup> Whether Islam mandates that females wear the *hijab* (as many fundamentalists insist),<sup>18</sup> or merely provides the option of doing so, is a subject of lively debate among Muslim adherents and scholars.<sup>19</sup> Regardless of Islamic law, the

development of France's tradition of secularity, see generally RELIGION, SOCIETY AND POLITICS IN FRANCE SINCE 1789 (Frank Tallett & Nicholas Atkin eds., 1991) [hereinafter RELIGION, SOCIETY AND POLITICS IN FRANCE]; PHYLLIS STOCK-MARTIN, MORAL EDUCATION FOR A SECULAR SOCIETY: THE DEVELOPMENT OF MORALE LAIQUE IN NINETEENTH CENTURY FRANCE (1988).

12. See discussion *infra* Part II.A.

13. The Catholic archbishop of Paris immediately denounced the ban, calling the schoolgirls innocent bystanders in a political fight. Moreover, he said that the scarves "represent no more a threat to public order than Jewish yarmulkes or Christian crucifixes." *Veil of Ignorance, France Teaches a Lesson in Narrow-Mindedness*, ASIaweek, Nov. 23, 1994, at 24, available in LEXIS, News Library, Curnws File [hereinafter *Veil of Ignorance*].

14. See *Iranian Women Protest French Ban on Headscarves*, AGENCY FRANCE PRESSE, Oct. 31, 1994, available in LEXIS, News Library, AFP file.

The French Constitution also provides for religious freedom: "[France] ensures equality before the law for all citizens, without distinction as to origin, race, or religion. It respects all beliefs." FR. CONST. art. 2.

15. "Decisions like this portray Islam once again as evil. . . . It also deepens animosities and excites racist attitudes." Angeline Oyog, *France—Women: Battle Against Islamic Extremists Shifts to School*, INTER PRESS SERVICE, Sept. 15, 1994 (quoting Mouloud Aounit, Secretary-General of the Anti-Racism Movement (MRAP)).

16. "I cannot but be satisfied. I have been opposed to the wearing of the veil which in its symbolism, reduces women to sexual objects that must be hidden." *Id.* (quoting Khelidja Bereczl of the International Solidarity Network with Algerian Women).

17. For an Arab feminist's thoughts on the *hijab*, in which the *hijab* is described both as a symbol of oppression, and as an immediate remedy for sexism in Arab society, see generally Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527 (1992). Abu-Odeh herself has rejected the veil, but explains that it does have an "empowering and seductive effect on Arab women." *Id.* at 1527. A debate on the pros and cons of the *hijab* is beyond the scope of this Note.

18. Fundamentalist Islamic countries such as Iran, Egypt, and Saudi Arabia force women to wear the veil. *Democratizes Lift Vells of Ignorance*, TORONTO STAR, Oct. 16, 1994, at C2 [hereinafter *Democratizes Lift Vells*]. For a tragic example of the extreme lengths to which Muslim fundamentalists may go in "enforcing" their views on the *hijab*, see Youssef M. Ibrahim, *Bareheaded, Women Slain in Algeria*, N.Y. TIMES, Mar. 31, 1994, at A3.

19. See generally FATIMA MERNISSI, THE VEIL AND THE MALE ELITE: A FEMINIST INTERPRETATION OF WOMEN'S RIGHTS IN ISLAM (Mary Jo Lakeland trans., 1991); Abdullahi An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987) (arguing that women's rights, including the right to choose or reject the *hijab*, are Islamic notions, which have been subverted in the interest of the male elite).

issue in France<sup>20</sup> centers on whether a Muslim girl *may* wear the *hijab* as a matter of state law.<sup>21</sup>

In September of 1994, when Bayrou first announced the ban, approximately 2,000 girls challenged the prohibition and continued to wear the *hijab* to school.<sup>22</sup> By January 1995, that number had decreased, but approximately 374<sup>23</sup> still defied the ban. Schools were given until the end of the school year in June to achieve total compliance.<sup>24</sup> By the end of the 1995 school year, only 115 girls had been expelled for refusing to observe the mandate.<sup>25</sup> The controversy thus appeared to have died down and the tide had turned in favor of the Muslim girls. In one suit contesting expulsion for wearing the *hijab*, a court awarded a Moroccan-born girl from Nancy, France, approximately \$10,000.<sup>26</sup>

This Note attempts to explain the origins of *L'Affaire des Foulards* and focuses on the legality and practicality of the ban on the Muslim *hijab*. Part II of this Note presents the historical and contemporary background giving rise to the ban on the head scarves, including a brief outline of traditional Islamic law, in contrast to the law of the state. Part II also includes a discussion of France's secular tradition and an explanation for the timing of the new prohibition on the *hijab*. Part III analyzes the legal traditions of France and of public international law in relation to the *hijab* ban. Part IV explains why the ban is not only contrary to French law, but to public international law as well. This Note concludes that from a pragmatic standpoint, the ban conflicts with current French legal and social policy and is simply not worth the tension that it has generated in French society.

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20. The same issue is a controversy in Canada.

21. See discussion *infra* Part II.

22. *Almost 400 Girls Defy French Headscarf Ban*, REUTERS WORLD SERVICE, Jan. 24, 1995, available in LEXIS, News Library, Curnws File.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Around the World*, DALLAS MORNING NEWS, Sept. 13, 1995, at 10A.

## II. BACKGROUND

A. *Islamic Law and the Hijab*<sup>27</sup>

A proper understanding of the nature of the *hijab* debate requires, to some extent, a basic comprehension of the traditions and tenets of Islamic law and Muslim peoples. Islam encompasses approximately 837 million<sup>28</sup> followers found across the globe, who represent many diverse cultures,<sup>29</sup> economic groups, languages, and political institutions.<sup>30</sup> Islam, like Christianity and other major religions, reaches throughout the world.

At its most basic level, Islam entails following the path of God or submission to *shari'a*,<sup>31</sup>—the Arabic word describing Islamic law.<sup>32</sup> According to Islam, *shari'a* originates from the word of the Prophet Mohammed, the Qur'an,<sup>33</sup> and the traditions of the faith. *Shari'a* incorporates the social customs and institutions of the diverse peoples who have converted to Islam. Thus, the development of *shari'a* has been "a dynamic process of interaction between Islamic principles and endogenous norms and practices."<sup>34</sup> As there is no "one people" of Islam, there is no "one law" of Islam; *shari'a* is not a uniform code of law, in part because of the varying interpretations arising out of the diverse and geographically divided Islamic world.<sup>35</sup>

While *shari'a* may not provide a completely uniform system or precise code of law, some fundamental principles exist that are relevant to this discussion. Under *shari'a*, secularism does not exist; thus the majority of Muslims cannot accept complete

27. For the purposes of this Note, the discussion of Islamic law is limited to the basic tenets necessary for understanding the analysis. For a good general overview of the law of Islam, see JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* (1964); N.J. COULSON, *A HISTORY OF ISLAMIC LAW* (1964).

28. MUSLIM PEOPLES, *A WORLD ETHNOGRAPHIC SURVEY* xxd (Richard V. Weeks ed., 1984) [hereinafter *MUSLIM PEOPLES*]; see also CLIFFORD GEERTZ, *ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA* (1968).

29. See generally *MUSLIM PEOPLES*, *supra* note 28, at xxd.

30. See generally Shahnaz Khan, *Canadian Muslim Women and Shari'a Law: A Feminist Response to "Oh! Canada!"*, 6 *CAN. J. WOMEN & L.* 52 (1993).

31. David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 *VA. J. INT'L L.* 819, 823 (1993).

32. An-Na'im, *supra* note 19, at 491.

33. Analogous to the Christian Bible or Jewish Torah, the Qur'an is the Arabic text of the literal and final word of God as revealed to the Prophet Muhammad between 610 and 632 A.D. *Id.* at 491 n.1.

34. *Id.* at 494.

35. Khan, *supra* note 30, at 56-57.

secularism.<sup>36</sup> Followers of Islam believe that they have a clear and definite obligation to conduct every aspect of their public, as well as their private lives, in accordance with the principles of *shari'a*, as outlined in the Qur'an.<sup>37</sup> Furthermore, since *shari'a* provides for a code of ethics and a positive legal system, it regulates the full range of human activities in both the public and private spheres, including religious rituals, social manners, political institutions, personal relationships, as well as civil, commercial, criminal, and family law matters.<sup>38</sup>

While Islam would appear to directly contrast with any notion of a secular society, the legal standards of many predominantly Muslim countries seem to be based, at least in part, on secular legal ideas. Many constitutions of Muslim countries specifically provide that *shari'a* is the source of law.<sup>39</sup> In reality, however, *shari'a* may only survive intact in the area of personal affairs, family law, and inheritance. The rise of the Islamic fundamentalist movement,<sup>40</sup> however, challenges any secularization of public life.<sup>41</sup> This rise in fundamentalism in the international community evidences itself, in part, in the strict Iranian and Saudi Arabian laws mandating the *hijab* or the *chador*.<sup>42</sup> Even in more moderate Islamic countries, family and inheritance laws, which touch issues of larger concern in the female population, are still governed strictly by *shari'a* and appear to support the *hijab* tradition.<sup>43</sup> Nevertheless, until this resurgence of the Muslim fundamentalist movement, wearing the

36. An-Na'im, *supra* note 19, at 492.

37. See, e.g., Qur'an 5:44-47, 24:51.

38. An-Na'im, *supra* note 19, at 494 n.12.

39. *Kingdom of Saudi Arabia*, XVI Constitutions of the Countries of the World, Saudi Arabia, at 41 (May 1995).

40. The fundamentalists blame Western influence for the secularization of Muslim law. Programs for eliminating Western influence are embodied in the treatises of influential fundamentalists such as IMAN KHOMEINI, *ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI* 223-73 (Hamid Algar trans., 1981).

41. See generally VOICES OF RESURGENT ISLAM (John L. Esposito ed., 1983); ISLAMIC RESURGENCE IN THE ARAB WORLD (Ali E. Hillal Dessouri ed., 1982). For a discussion of the causes of the Islamic resurgence, see Khurshid Ahmad, *The Nature of Islamic Resurgence*, in VOICES OF RESURGENT ISLAM, *supra*, at 218, 218-29.

42. *Democracies Lift Veils*, *supra* note 18, at C2. The *chador* refers to the covering of the entire body from head to wrist to floor in a loose-fitting, robe-type garment.

43. Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1028 (1991). The Canadian Society of Muslims recently proposed that consenting Muslims be subjected to Muslim Personal Status Laws in Canada. One author says that this attempt to attack racism in Canada simply feeds sexism within the Muslim society. Khan, *supra* note 30, at 54; SCHACHT, *supra* note 27, at 76.

veil was for the most part a matter of choice<sup>44</sup> for Muslim women.<sup>45</sup>

This Note does not attempt to solve the religious debate over the origins or necessity of the *hijab*. This Note presumes that in France,<sup>46</sup> Muslim schoolgirls wear the *hijab* because of individual religious convictions, not outside pressures<sup>47</sup> or state mandates.

### B. A Secular Tradition in France

For the past two centuries, the French have struggled with the conflict between church and state.<sup>48</sup> Secularism, for many French people, has represented a triumph for tolerance,

44. According to Moncef Barbouch of the Canadian Muslim Forum, wearing the *hijab* is a "divine obligation," however, women are free to chose to disregard the obligation and should likewise be respected. Eve McBride, *The Hijab's Contradictions: A Form of Freedom Without Choice*, GAZETTE (Montreal), Oct. 6, 1994, at A2.

45. Abu-Odeh, *supra* note 17, at 1527. For a historical and scholarly look at the origins of the *hijab* from a Muslim feminist perspective, see MERNISSI, *supra* note 19, at 85-180.

46. The same applies in Canada. See *Hijab Report Is Right on the Mark; Schools Should Heed Advice and Stop Discrimination*, GAZETTE (Montreal), Feb. 16, 1995, at B2 [hereinafter *Hijab Report Is Right on the Mark*].

47. Of course family pressure can at times be just as coercive as a state mandate. See Abu-Odeh, *supra* note 17, at 1529 (describing a "crime of honor" where a brother kills his sister for her immodest public behavior and may be imprisoned for only one year); see also McBride, *supra* note 44, at A2. On the Canadian struggle over the *hijab* McBride states:

That's my problem with the whole hijab issue: not that it symbolizes for Muslim women freedom from physical (sexual) judgment and objectification, not that it offers them dignity, security and uniform egalitarianism, but that wearing it might not be a real choice for them. If it isn't, then its presence contradicts its very purpose. It is not a freedom at all, but an imposition.

*Id.*

William Drozdiak, *In Lyon, A Mosque of Reconciliation; Protested Building Viewed as Symbol of Islam's Slow Assimilation into French Culture*, WASH. POST, Mar. 5, 1995, at A31. "The head scarf is a sign of modesty and not aggression. I think the kids should be allowed to follow their own consciences in this matter," states Abdelhamid Chirane, the Algerian-born grand mufti (cleric) of Lyon's Muslim community. He has two daughters, each with a different view on the ban: one insists on wearing the scarf, while the other does not wear the scarf. *Id.*

Compare the sentiments of Arezki Dahmani, the president of the pro-minority, state-funded group France Plus: "[E]verywhere they tell me, 'you have to ban these veils' otherwise they will be forced to wear them by their families." Sharon Waxman, *War of Nerves; France Walks a Tightrope Between Curbing Radical Muslims and Abusing Rights; Paris Struggles to Strike Balance of Freedom, Security*, CHI. TRIB., Feb. 3, 1995, at 1. See also discussion *infra* Part IV.

48. See generally RELIGION, SOCIETY AND POLITICS IN FRANCE, *supra* note 11; see also STOCK-MARTIN, *supra* note 11, at 2-5.

universalism, and reason.<sup>49</sup> Today, France is the only country in Europe, and one of only five countries in the world, that legally separates church and state.<sup>50</sup> In fact, secularity is enshrined in the French Constitution.<sup>51</sup> For Islamic immigrants, however, this secular tradition is difficult, perhaps impossible, to understand or adopt because Islam increasingly does not recognize the truly secular society.<sup>52</sup> Since Islamic law permeates every aspect of Muslim life,<sup>53</sup> France has experienced assimilation problems with many of its Muslim immigrants.

While the Muslim immigrants have had trouble adapting to a secular society, France has experienced difficulty in dealing with the influx of a new minority culture. France's universalism, rooted in its secular tradition, encourages the French to accept as French anyone from anywhere, as long as the newcomer becomes "French."<sup>54</sup> For the typical Muslim immigrants, who differ from the typical French citizens in almost every way—from language, to race, to geographic backgrounds, to the more obvious religious and cultural differences—becoming "French" is a daunting prospect. Thus, a simple *hijab*, when worn by Muslim girls, signifies to many French a refusal to become French.<sup>55</sup>

### C. Traditional Assimilation—Becoming French

The assimilation of Muslim minorities is a new twist on an old French problem. Centuries ago, France itself arose from the amalgamation of Franks, Normans, Bretons, Basques, Germans, Provençals, and other Europeans.<sup>56</sup> Ever since, French policy has encouraged, perhaps coerced, new immigrants to assimilate

49. *French Enlightenment?*, BOSTON GLOBE, Dec. 2, 1994, at 20; *Secularity Defied*, ECONOMIST, Oct. 8, 1994, at 53, 53.

50. The other four are: Turkey, India, Mexico, and Japan. Matthew Fraser, *Religious Revival; Secular Values in Many Nations Are Facing Growing Challenges*, GAZETTE (Montreal), Jan. 16, 1994, at B1.

51. See FR. CONST. (1946) pmbl., para. 13; see also *id.* art. 2 ("France is a Republic, indivisible, secular, democratic and social . . .") (emphasis added).

52. See *supra* Part II.A.

53. *Id.*

54. *French Enlightenment?*, *supra* note 49, at 20.

55. *Id.*; see also *Democracies Lift Veils*, *supra* note 18, at C2. France is not the first country to view the *hijab* as irreconcilable with a truly secular society. Both the Turkish despot, Kamal Atatürk, in the 1920s, and the pro-Nazi Reza Khan, the first Shah of Iran, in the 1930s, banned the *hijab* in what the *Toronto Star* labelled "anti-religious zealotry in the name of secularism." *Id.*

56. This is not to say that the assimilation of France's other minorities occurred hassle-free. See JAMES E. JACOB, *HILLS OF CONFLICT: BASQUE NATIONALISM IN FRANCE* (1994).

by adopting French traditions, laws, and language.<sup>57</sup> Thus, anything that emphasizes cultural or religious differences, such as the Muslim *hijab*, is seen as opposition to the French model for integration and cultural homogeneity.<sup>58</sup> France's focus on complete assimilation obviously leaves no room for a multiculturalist philosophy, such as that of the United States or Canada.<sup>59</sup>

France has also rejected the other extreme represented by the German and English separatist concept, by which immigrants are kept apart from the domestic population. While accepting their presence, the native community never lets the immigrants forget their origins.<sup>60</sup> Jean-Claude Barreau, the former head of the French Office of International Immigration and now advisor to Charles Pasqua, Minister of the Interior, explained France's unique policy on immigration as follows: "When someone immigrates, he does not simply change country, he also changes history. . . . Foreigners arriving in France must understand that henceforth their ancestors are the Gauls. They have a new fatherland."<sup>61</sup>

Because the new Muslim immigrants, unlike their earlier European counterparts,<sup>62</sup> may differ racially, culturally, linguistically, and religiously from the French population, complete assimilation is even more problematic. Perhaps recognizing the unique difficulty of absorbing the Muslim population, the French government created the Council for the Reflection of Islam in 1990 to help integrate Muslims into French society.<sup>63</sup> Additionally, some parts of France have adopted a new ten-week, state-sponsored course in *le gout*, or "taste," in an effort to use a cultural force for the assimilation of (Muslim) minorities many of whom are Muslim.<sup>64</sup> By exposing school children to

57. *France Human Rights Practices, 1993*, DEP'T ST. DISPATCH, Feb. 1994, available in LEXIS, News Library, Arcnws File [hereinafter *France Human Rights, 1993*].

58. *Id.*

59. "MC [multiculturalism] would be the end of France. . . . You can be what you want to be here—Christian, Jewish, Muslim—but we're all Gauls," says Pierre Lellouche, government deputy from a suburb of Paris. *French Bar MC, Want Own Culture Taught*, PR SERVICES, Jan. 1994, at 15, available in LEXIS, News Library, Arcnws File.

60. Goldsborough, *supra* note 3, at B5.

61. *Secularity Defied*, *supra* note 49, at 53.

62. Mostly, French Muslim immigrants hail from former French colonies and territories, such as Algeria, Tunisia, Morocco, and black Africa. Waxman, *supra* note 47, at 1; Don MacPherson, *Quebec Cannot Copy Solutions from France*, CALGARY HERALD, Feb. 17, 1995, at A5; see also MUSLIM PEOPLES, *supra* note 28, at xxi.

63. *France Human Rights, 1993*, *supra* note 57.

64. Draft, *supra* note 9, at 3.

traditional French foods, such as Brie and quiche Lorraine, the government hopes to encourage minorities to become truly "French."<sup>65</sup>

### C. The Current Political Atmosphere in France

At least one commentator has suggested that the end of the Cold War leaves Islam to serve as the new "enemy" of Western democracies.<sup>66</sup> Predominantly practiced in Third World countries, Islam differs vastly from traditional Western religions. Also, Muslim fundamentalists have wreaked havoc on Western security with terrorist attacks and declarations of *jihad*.<sup>67</sup> However, France, as the European country with the largest Muslim population,<sup>68</sup> cannot afford to make Islam its enemy; France must learn to live in peace with its new citizens.

#### 1. Rising Fundamentalism in France's Muslim Population

Various estimates put France's Muslim population at three, four,<sup>69</sup> or even five<sup>70</sup> million people out of a total French population of fifty-six million. Even using the most conservative estimate, France has the largest Muslim population in Europe.<sup>71</sup> In fact, in January of 1995, the French government officially recognized Islam as the country's second largest religion, behind Catholicism.<sup>72</sup> Nonetheless, Islam does not lend itself to easy assimilation.

In fact, ghettoization of Muslim immigrants in public housing projects is increasing,<sup>73</sup> and unemployment among Muslim immigrants remains high.<sup>74</sup> Some Muslim commentators opine that religion acts as a "stabilizing force," easing some of the discontent among this politically disadvantaged group of immigrants.<sup>75</sup> Others feel that Muslim anger over France's involvement in the Gulf War—against the Islamic fundamentalist country of Iraq—may have helped the fundamentalists gain a

65. *Id.*

66. "Islam is substituted for communism or fascism as the ideology of the barbarians." Westbrook, *supra* note 31, at 821.

67. *Jihad* means holy war.

68. See *infra* notes 71-75 and accompanying text.

69. Waxman, *supra* note 47, at 1; *Veil of Ignorance*, *supra* note 13, at 24.

70. MacPherson, *supra* note 62, at A5.

71. Waxman, *supra* note 47, at 1.

72. Drozdziak, *supra* note 47, at A31.

73. Waxman, *supra* note 47, at 1.

74. *Secularity Defied*, *supra* note 49, at 53.

75. Waxman, *supra* note 47, at 1.

"foothold" in what was once a rather "unassertive" community.<sup>76</sup> The French government, however inaccurately, perceived a rise in the number of radical Muslim fundamentalists, and reacted against the Muslim community as a whole. One result of this volatile situation was the ban on the Islamic *hijab* in public schools.

## 2. Civil War in the Former French Colony of Algeria

The ban on the *hijab* may also stem from the tension in both the immigrant and native French communities over the civil war in Algeria. France views the Islamic militant movement in Algeria as a serious threat to its own national security.<sup>77</sup> Its fears are in no way unfounded, as evidenced in a recent hijacking attempt by radicals who planned to blow up a plane and its passengers over Paris.<sup>78</sup> Additionally, the radical fundamentalists have found supporters closer to home. Authorities recently arrested four Muslim French men for gunning down two Spanish tourists in Morocco. The four men had been recruited and trained by militants in France.<sup>79</sup>

On the Algerian front, fundamental Muslim revolutionaries have killed at least four thousand people since 1992. Of those killed, the revolutionaries have targeted women associated with secular causes who were seen bare-headed in public.<sup>80</sup> While the *hijab* symbolizes religious devotion to the Muslims, it may connote sympathy with the cause of dangerous militant Algerian fundamentalists to the French.<sup>81</sup>

The war in predominately Muslim Algeria bolstered the xenophobia of the French people.<sup>82</sup> Muslim extremism in Algeria translated into an unreasoned<sup>83</sup> fear of Muslim extremism at home in France.<sup>84</sup> Consequently, the ban on the *hijab* resulted

76. *Secularity Defied*, *supra* note 49, at 53.

77. The December 1994 hijack crisis in Marseilles ended in a shoot-out between French commandos and the Algerian hijackers. Chris Hedges, *The World: Breaking with the U.S.; France Wages a Lonely Battle with Radical Islam*, N.Y. TIMES, Jan. 1, 1995, § 4, at 5.

78. *Id.*

79. Waxman, *supra* note 47, at 1.

80. Ibrahim, *supra* note 18, at A3.

81. MacPherson, *supra* note 62, at A5.

82. *Veil of Ignorance*, *supra* note 13, at 24.

83. The fear may be unreasoned, but as exhibited by the terrorist attacks, it is not completely unfounded.

84. *Veil of Ignorance*, *supra* note 13, at 24. Conservative politicians, such as Jean-Marie Le Pen, the ultranationalist leader of the National Front, played on the xenophobia of French citizens in the last election with favorable results. William Drozdiak, *TV Debate Boosts Chirac in French President's Race*, WASH. POST, May 4, 1995, at A32.

from a fear of Muslim immigrants due to their perceived connection to Islamic fundamentalism and the bloody civil war raging in Algeria.

The prohibition on the *hijab* may seem reasonable at first glance (or at least reasonable from a reactionary standpoint), in view of France's traditions of secularity and assimilation, and its current dilemma with its immigrant Muslim population. However, at the very least, the ban may present problems from both a practical and a legal standpoint.

### III. FRENCH LAW AND INTERNATIONAL LAW

#### A. *Constitutional Law of France*<sup>85</sup>

Individual rights are guaranteed in the Preamble to the French Constitution<sup>86</sup> and are rooted in the following: the body of the Constitution of 1958,<sup>87</sup> the Declaration of the Rights of Man and of the Citizen of 1789,<sup>88</sup> the Preamble to the 1946 Constitution of the Fourth Republic,<sup>89</sup> and the "fundamental principles recognized by the laws of the Republic."<sup>90</sup>

Article II of the Constitution of 1958 states: "France . . . ensure[s] the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."<sup>91</sup> Paragraph 11 of the Preamble to the 1946 Constitution guarantees the "equal access of the child and the adult to education, professional training and culture. The establishment

85. For an overview of French constitutional law, see generally JOHN BELL, *FRENCH CONSTITUTIONAL LAW* (1992); Denis Tallon, *The Constitution and the Courts in France*, 27 AM. J. COMP. L. 567 (1979); Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57 (1994).

86. *Constitutions of the World*, *supra* note 6, at 21.

87. *Id.*, at 21-51. France has had five constitutions since the 1789 revolution, each corresponding with the formation of a new Republic (*Republique*). The first was in effect from 1789-1804; the second, 1848-1852; the third, 1870-1940; the fourth, 1944-1958; and the present Constitution came into effect in 1958.

88. *Declaration of the Rights of Man and of the Citizen of August, 26, 1789*, Fr. Law: Const. & Selective Leg. (Transnat'l Juris. Publications) 2-3 (Dec. 1994).

89. *Preamble of the Constitution of October 27, 1946*, Fr. Law: Const. & Selective Leg. (Transnat'l Juris. Publications) 2-6 (Dec. 1994) [hereinafter *Preamble of the Constitution*].

90. BELL, *supra* note 85, at 57. Bell has described this final tenet as the "in case we haven't forgotten anything" principle. *Id.* at 68.

91. *Constitutions of the World*, *supra* note 6, at 22.

of free, secular, public education on all levels is a duty of the State."<sup>92</sup> Thus, the present Constitution provides for both secular education and freedom of religion. According to Education Minister Bayrou, the Muslim schoolgirls' practice of wearing the *hijab* (which Bayrou apparently does not recognize as the practice of religion under the Constitution) conflicts with the guaranteed right of secular public education.<sup>93</sup>

## B. International Law

### 1. The U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief<sup>94</sup>

The U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the Declaration) was adopted in 1981.<sup>95</sup> The Declaration is "regarded throughout the world [and most certainly in France] as articulating the fundamental rights of freedom of religion and belief."<sup>96</sup> Similar to the First Amendment to the U.S. Constitution, the Declaration guarantees both freedom to practice one's religion or belief,<sup>97</sup> and freedom from discrimination based on religion or belief.<sup>98</sup>

Article 1 of the Declaration provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his [or her] choice, and freedom, either individually or in community with others and in public or private, to manifest his [or her] religion or belief in worship, observance, practice or teaching.

2. No one shall be subject to coercion which would impair his [or her] freedom to have a religion or belief of his [or her] choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others.<sup>99</sup>

Thus, a state may not limit a person's freedom of thought or the freedom to have a religious belief, but it may limit the freedom

92. Preamble of the Constitution of October 27, 1946, *supra* note 89, at 2-6.

93. See *Ban on Islamic Scarves*, *supra* note 7, at 3A.

94. G.A. Res. 36/55, U.N. GAOR, 36th Sess., 73d plen. mtg., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981) [hereinafter *Declaration*].

95. *Id.*

96. U.N. Doc. E/CN.4/1988/44/Add.2, at 1 (statement by the United States Government); see also U.N. Doc. E/CN.4/Sub.2/1987/26, at 48-49.

97. See *infra* note 102 and accompanying text.

98. See *infra* note 109 and accompanying text.

99. *Declaration*, *supra* note 94, art. 1.

to manifest one's religion or belief (the crucial issue in the *hijab* debate) in order to protect other important state interests.<sup>100</sup> Article 1(3) provides the state with some authority to limit religious expression,<sup>101</sup> as long as the proscription is necessary for the protection of "public safety, order, health, morals, or the fundamental rights and freedoms of others."<sup>102</sup> Apparently, Bayrou believes that it is necessary to limit Muslim girls' individual rights to wear the *hijab* in order to protect the state's interest in secular education. The Muslims argue that a balancing of interests should weigh more heavily in favor of individual rights.

This sort of conflict is similar to U.S. experiences. First Amendment jurisprudence in the United States provides a few examples of cases in which the state's interest in health and public safety outweigh the individual's interest in practicing his or her religion.<sup>103</sup> Many of these cases have involved Jehovah's Witnesses and their right to refuse blood transfusions and medical treatment for their children and themselves,<sup>104</sup> or their right to bring children into the public streets to preach.<sup>105</sup>

Article 2 of the Declaration provides for the right to be free from discrimination on the grounds of religion or belief:

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.

2. For the purposes of the present Declaration, the expression, "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or effect

100. See generally Alexandra C. Kiss, *Permissible Limitations on Rights*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290 (Louis Henkin ed., 1981).

101. *Declaration*, *supra* note 94.

102. *Id.* But see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding governmental interests did not outweigh plaintiffs' rights to practice religion through the ritual slaughter of animals); *Doe v. Irwin*, 428 F. Supp. 1198 (W.D. Mich. 1977) (holding that the state failed to demonstrate a compelling interest in the distribution of contraceptives to minors sufficient to overcome the parents' right to free exercise of religion in the education of their children).

103. See *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 1595 (1990) (upholding state's right to prohibit drug use, even as to ceremonial ingestion of peyote).

104. See *Jehovah's Witnesses v. King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967) (state may intervene in parents' religiously motivated decision to refuse blood transfusions for children), *aff'd* 390 U.S. 598 (1968) (per curiam).

105. See *Prince v. Massachusetts*, 321 U.S. 158 (1944) (finding that the state interest in the safety of children outweighs the parental right to teach and train in certain religious practices).

nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.<sup>106</sup>

The Declaration refers not just to discrimination, but to "intolerance" as well.<sup>107</sup> At least one commentator has concluded that intolerance implies not only a "particular type of violation of religious freedom or of discrimination, but rather includes the attitudes that may motivate such violations."<sup>108</sup> It follows then, that since the xenophobic attitudes of the French people and government may have considerably influenced the implementation of France's ban on the Muslim *hijab* in public schools, the ban may contravene the basic principles of the Declaration.

Article 2(2) also permits the inference of purpose from effect. Thus, specifically proving intent is unnecessary—one need only show the discriminatory effect of the practice at issue to invoke the protections of Article 2(2). In this way, Article 2(2)'s protection is more expansive, thereby expanding its protection.<sup>109</sup> Because religious discrimination may be ingrained in socioeconomic and cultural institutions,<sup>110</sup> protection against acts having a discriminatory effect in addition to those with a discriminatory purpose is considered by some to be essential to eliminating certain forms of discrimination.<sup>111</sup> Therefore, when "ostentatious" symbols are banned from public schools, but the only individuals affected by the ban are Muslims and the only symbol affected by the ban is the *hijab*, there arguably is a violation of the Declaration on the basis of those discriminatory effects, even in the absence of a clear discriminatory purpose.

Finally, Article 5 of the Declaration provides that children retain similar rights against religious discrimination and that parents have "the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up."<sup>112</sup> Thus, according to the Declaration, Muslim parents in France have the affirmative right to raise their daughters in the Islamic tradition, which may include wearing the *hijab* while in

106. Declaration, *supra* note 94, art. 2.

107. Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 504 (1988).

108. *Id.* at 505.

109. THEODORE MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 11-16 (1986).

110. See *infra* note 127 and accompanying text.

111. On the nexus between other forms of discrimination and discrimination on the basis of religion, see *infra* part IV.

112. Declaration, *supra* note 94, art. 5(1).

school. In addition, the Declaration also purports to protect a Muslim girl's individual right to express her religion by wearing the *hijab*.

## 2. Customary International Law

Whether the Declaration itself constitutes customary international law is unclear.<sup>113</sup> However, since an international consensus on the human right to be free from religious discrimination can be found in the U.N. Charter,<sup>114</sup> the Declaration,<sup>115</sup> and even domestic constitutions,<sup>116</sup> a general prohibition against religious discrimination would likely qualify as a tenet of customary international law.

Section 702 of the Restatement of Foreign Relations Law of the United States, however, states that the U.N. Charter "links and places religious discrimination on the same plane with racial discrimination and to the extent that racial discrimination violates the Charter, religious discrimination does too."<sup>117</sup> Additionally, Sullivan opines that, "as the Declaration acquired concrete material content through its implementation, it will contribute to the acceptance of the customary law status of [the prohibition of religious discrimination]."<sup>118</sup>

Certainly, a state-wide ban on one form of religious symbol, to the exclusion of all others, in public schools constitutes a state policy furthering religious discrimination. Assuming that systemic religious discrimination as a matter of state policy does violate customary international law,<sup>119</sup> it should be condemned by the international community.<sup>120</sup>

113. See *supra* note 108 and accompanying text; see also Sullivan, *supra* note 107, at 488.

114. The United Nations was created in part to promote and encourage "respect for human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion." U.N. CHARTER art. 1(3) (emphasis added).

115. See discussion *supra* Part III.B.1.

116. Specifically, the French Constitution guarantees freedom of religion. See *supra* note 94 and accompanying text.

117. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 cmt. j (1987); see also Sullivan, *supra* note 107, at 488-89 n.7.

118. Sullivan, *supra* note 107, at 489-89.

119. See *id.* at 488-89, n.7 (discussing whether a relevant norm exists as customary law).

120. A discussion on the problems and processes involved in the enforcement of international human rights is beyond the scope of this Note. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note to Part VII (1987) ("Special international 'machinery' has been created to monitor compliance with international human rights law, but the effectiveness of those bodies and procedures in helping induce compliance has

## IV. ANALYSIS

A. *Why the Ban Violates the Tenets of the French Constitution*

In his book, Bell describes the "notorious battleground" in France over freedom of education.<sup>121</sup> The current battle is between the Conservatives, who favor private religious education, and the Socialists and Communists, who oppose state funding for private religious schools.<sup>122</sup> The *hijab* debate arises out of this controversial battleground. The Conservatives point to the *hijab* as an affront to secular public education. At the same time, they are unwilling to commit public funds to private Islamic schools as they have done with Catholic schools. The Socialists and Communists are unwilling to commit public funds to any private schools, but believe that the *hijab* should be a matter of individual, not state, choice.

The real question, then, is not whether a woman has the right to wear the *hijab* as a practice of her religion—undoubtedly, under the French Constitution, she does. The true issue is whether wearing symbols of religious faith in schools violates the guarantee of secular public education also embodied in the Constitution. Since symbols of Christianity or Judaism have not been similarly targeted, and according to Bayrou and his supporters, do not seem to violate the same constitutional guarantee, the *hijab* should not violate the Constitution either simply because Bayrou has arbitrarily labelled it "ostentatious."<sup>123</sup>

In its choice to selectively regulate against Islam and not Christianity or Judaism, the French government has brought the fight over Islamic fundamentalism into the schools.<sup>124</sup> For France, this is really a political matter, not a constitutional issue. Unfortunately, Bayrou and his supporters, in using one part of the Constitution to discriminate against Muslim girls, have conveniently ignored another constitutional guarantee, that of

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been variable."). See also *Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms*, May 27, 1970, ECOSOC Res. 1503 (XLVIII), 48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. E/4832/Add.1 (1970); Hurst Hannum, *Implementing Human Rights: An Overview of Strategies and Procedures*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 19 (Hurst Hannum ed., 1992).

121. BELL, *supra* note 85, at 151.

122. In fact, in 1904 the French government banned religious orders from teaching at all in France. *Id.* While the Constitution guarantees secular public education, France readily offers public funding for private Catholic schools.

123. See *supra* note 8 and accompanying text.

124. See Hedges, *supra* note 77, at 5; Waxman, *supra* note 47, at 1.

freedom of religion. Taken as a whole, the French Constitution supports the girls' rights to express their religious freedom by wearing the *hijab* in school.

### B. *Why the Ban Violates International Law*<sup>125</sup>

Religion and ethnicity are often "inextricably enmeshed in the political, cultural and socioeconomic life of the community."<sup>126</sup> In France, the Muslim schoolgirls' Islamic beliefs are evidenced by their manner of dress. They are readily distinguishable from the rest of the population,<sup>127</sup> just as Jews who keep kosher would be distinguished by their dietary practices.<sup>128</sup> Like race, the visible characteristics of religion may facilitate discrimination.<sup>129</sup> Additionally, all too often the boundary between religion and politics blurs and perceived political exigencies may facilitate religious discrimination.<sup>130</sup> As Sullivan explains in her article, "all too frequently a state seeking to suppress religious freedoms characterizes the activities of religious groups and leaders as impermissible political action or subversion."<sup>131</sup> Sullivan continues by explaining that while

governments [like France] do have a legitimate interest in controlling violence against the state or disruption of public order, . . . violations of religious freedoms and the persecution of religious leaders and groups under the pretense of restraining impermissible political activity are far more prevalent than is the use of a religious identity to camouflage actions motivated by purely partisan political concerns.<sup>132</sup>

Thus, where the state activity is merely a pretext for religious discrimination, relying on false political concerns and targeting an easily identifiable group, that activity should not be tolerated by the international community.

125. For a discussion on whether the United Nations discriminatorily holds First World countries to a higher standard in the protection of human rights than it does the Third World, see Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811 (1984).

126. Sullivan, *supra* note 107, at 508.

127. Otherwise, there would be no need for the ban in the first place.

128. See Sullivan, *supra* note 107, at 508.

129. *Id.*

130. France recently expelled a Muslim cleric (who, not surprisingly, opposed the ban on the *hijab*) to Casablanca for speaking out against Muslim integration and for having views that were deemed "incompatible with a state of law." *Muslim Cleric Expelled as "Threat" to France*, WASH. TIMES, Oct. 24, 1994, at A15.

131. Sullivan, *supra* note 107, at 499.

132. *Id.*

As this Note discusses previously, under the Declaration, an individual has the right to manifest religious beliefs in worship, observance, practice, or teaching,<sup>133</sup> subject only to legitimate state interests in safety, health, morals, or other fundamental rights of others.<sup>134</sup> Thus, the Declaration clearly provides that Muslim schoolgirls should be allowed to express their religion by wearing the *hijab*, unless France can show a competing and overriding interest. Furthermore, the Declaration states that one cannot be discriminated against through any exclusion or distinction based on religion or the manifestation thereof.<sup>135</sup> Hence, France's singling out of the *hijab* in its ban on ostentatious symbols also seems to violate the terms of the Declaration.

Sullivan has suggested a framework for settling conflicts arising between the rights enunciated in the Declaration and other human rights or state interests. This approach identifies the significant interests of both sides and balances those rights and interests.<sup>136</sup>

Before attempting to quantify an individual's right to religious expression and in order to properly balance that interest, one must consider some basic human rights concerns that stem from religious law. Religious law may incorporate elements hostile to various human rights, infringing upon those rights by differing degrees. As one commentator has suggested, dress codes for women are among the least intrusive, in contrast with such extreme violations of human rights, such as the freedom from torture and the right to life, by practices such as mutilation and the *suttee*.<sup>137</sup>

Some manifestations of religion or belief are "so obviously contrary to morality, public order, or the general welfare that public authorities are always entitled to limit them or even to prohibit them altogether."<sup>138</sup> These include human sacrifice, self-immolation, mutilation of oneself or others, or slavery, all of which may be restricted without constituting discrimination per

133. *Declaration, supra* note 94, art. 1.

134. *Id.* art. 1(3).

135. *Id.* art. 2(2).

136. Sullivan, *supra* note 107, at 510. U.S. law comports somewhat with this type of balancing. See *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450 (S.D.N.Y. 1987) (holding that the school district's refusal to assign women bus drivers to routes serving Hasidic male students, as an accommodation to the Hasidic belief in strict separation of the sexes, violates both the First Amendment and Title VII of the 1964 Civil Rights Act).

137. Sullivan, *supra* note 107, at 514. *Suttee* refers to the practice whereby a widow immolates herself on the funeral pyre of her husband.

138. ARCOT KRISHNASWAMI, *STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES* 29 (1960).

se.<sup>139</sup> France has dealt with one such practice, the African tradition of female "circumcision,"<sup>140</sup> through criminal prosecution.<sup>141</sup> Even these types of restrictions can be grounded in the rights and freedoms of others (freedom from genital mutilation, for example) and balanced according to Sullivan's model.<sup>142</sup> Applying the above balancing test to the situation in France involves not only identifying the significance of the *hijab* to the adherents of the Islamic faith, but also the importance of the state interest in prohibiting the *hijab* in school.

In balancing the interests in *L'Affaire des Foulards*, various factors must be taken into account.<sup>143</sup> On the one hand are France's secular school tradition, its interest in the assimilation of immigrants, and its interest in equality of the sexes. On the other hand, are the interests of the schoolgirls in following and expressing their religious beliefs and the interests of the girls' parents in raising their children according to the teachings of their religion.

France does have legitimate concerns about the true aims of the Muslim fundamentalists.<sup>144</sup> Nevertheless, on balance, the prohibition of a simple scarf wrapped around a Muslim schoolgirl's head will not prevent a major hijacking or assassination.<sup>145</sup> Furthermore, France's proffered explanation for

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139. *Id.*

140. For discussions of the cultural clash and human rights debate over the predominantly African tradition of female "circumcision," see Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944 (1993); Robyn Cerny Smith, Note, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449 (1992).

141. See Rone Tempest, *Ancient Traditions vs. the Law; Prosecution of Two Immigrants for "Female Circumcision" in France Highlight an Increasingly Common Cultural Clash; Customs in One Part of the World Are Viewed as Repulsive in Another*, L.A. TIMES, Feb. 18, 1993, at A1.

142. Sullivan, *supra* note 107, at 511.

143. The debate over the propriety of the Muslim *hijab* is not limited to France or Canada. For a legal perspective in the United States, including a similar balancing of interests, see EEOC Decision No. 71-2620 (1971), 4 FEP Cases (BNA) 23, available in LEXIS, BNA Library, LRRFEP File (holding that the black Muslim faith is religion and that discharge for wearing a long skirt was unlawful bias). *Contra* United States v. Bd. of Educ., 911 F.2d 882 (3d. Cir. 1990) (holding that it would have imposed an "undue hardship" on the school board to require it to accommodate a Muslim public school teacher by allowing her to teach in her religious clothes).

144. See *supra* Parts II and III.

145. Compare the viewpoint of Arezki Dahmani, who argues that "[y]ou can say that four scarves won't destabilize France, but every time we look into it, we find there are Islamic organizations behind each case." Waxman, *supra* note 47, at 1.

the ban, the divisive nature of the *hijab* itself, is unparalleled by the divisive nature of the ban. France's other explanation, the tradition of secular education, also fails in the face of years of tolerance of yarmulkes and crucifixes. Finally, as this Note discusses below, the ban cannot be explained by a public policy that aims to eliminate discrimination against women.

### C. *Why the Ban is a Bad Idea from Both Policy and Pragmatic Standpoints*

In France, where society and the law mandate equality between the sexes, the *hijab* should not be banned—especially not by using the rationale that it is a symbol of oppression of women. Prohibiting a woman's right to choose to wear the *hijab* may be just as oppressive. In its report urging schools to be tolerant of Muslim girls wearing the *hijab*, the Quebec Human Rights Committee acknowledged the *hijab* as a sign of sexual inequality in some countries, but said that in Quebec, "one should presume that hijab-wearers are expressing their religious convictions and the hijab should only be banned when it is demonstrated—and not just presumed—that public order or sexual equality is in danger."<sup>146</sup> Similarly, in France, where the Constitution guarantees sexual equality,<sup>147</sup> choosing to wear the *hijab* should be just that—a choice.

Additionally, the ban causes tension by creating (or at least spotlighting) a division in French society where none previously existed. In fact, *L'Affaire des Foulards* has sparked a furious national fervor; riot police have had to break up demonstrations in several schools.<sup>148</sup> Sending Muslim schoolgirls home only emphasizes the division in French society between the Muslims and the French community at large.<sup>149</sup>

By singling out the Muslim scarves for banishment, and ignoring the other innocuous symbols that students wear to school every day, the French government has evidenced its true intent to discriminate against Muslims because they are Muslims (and not Christians or Jews). Bruno Megret, deputy leader of the far right National Front, was quoted as saying that there was no

146. *Hijab Report Is Right on the Mark*, *supra* note 46, at B2.

147. "The law shall guarantee to women, in all spheres, equal rights to men." FR. CONST. (1946) pmbll., para. 3.

148. *Secularity Defied*, *supra* note 49, at 53.

149. "In sending us home from school [the government] is only going to feed fundamentalism. . . . We understand there is fear, we know it very well. But we say, let's try to calm things down, not by scapegoating Islam . . . but by dialogue." Waxman, *supra* note 47, at 1 (quoting Sonja Merazga, a veil-wearing student expelled from school in November of 1994).

need to treat Islam equitably with "traditional European religions [because] it is incompatible with our civilization and our laws."<sup>150</sup> The French Constitution, however, provides for freedom from religious persecution and does not limit religion to Western or traditional European faiths.<sup>151</sup>

Furthermore, if public education must truly be secular, the ban must be reconciled with the Constitution and common sense, by either extending it to yarmulkes, crucifixes, and the like, or eliminating it altogether. On a political level, conservative politicians may have bitten off more than they can chew by basing their objections to the *hijab* on the principle of secular education. For instance, some Muslim groups are demanding that the school calendar be changed because it violates the hallowed principle of secularity by recognizing Christian holidays.<sup>152</sup>

On a practical level, if the French government disagrees with establishing true secularity in public schools, and insists on upholding the ban on ostentatious symbols only against Muslims, Islam, as the second largest religion in France, should be entitled to state funding for Muslim private schools—the same as Catholics receive for their private schools.<sup>153</sup> With Muslim private schools, the Muslim girls could attend school without pressure to abandon their religious practices, albeit separately from the rest of French society and contrary to the stated French goals of assimilation.<sup>154</sup>

The common sense solution is to rescind the ban on the scarves.<sup>155</sup> In this way, the divisive nature of *L'Affaire des Foulards* will be put to rest, so that France and its Muslim community can work together for reconciliation. "French Islam can be a force for moderation and integration."<sup>156</sup> Currently, the enforcement of the *hijab* ban threatens such peaceful coexistence.

## V. CONCLUSION

From one perspective, the *hijab* debate is a controversy over whether an "ostentatious" religious scarf should be banned in France's secular public schools while other symbols are not—a

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150. *Ban on Islamic Scarves*, *supra* note 7, at 3A.

151. *See supra* Part III.A.

152. *Secularity Defied*, *supra* note 49, at 53.

153. *See id.*

154. *See discussion supra* Part II.C.

155. *See Draft*, *supra* note 9 (illustrating the problems that result from a lack of communication).

156. Drozdziak, *supra* note 47, at A31.

simple case of religious discrimination. On the other hand, the *hijab* is not merely a form of religious expression, it also symbolizes the division in French society along many lines besides religious and secular, including cultural, political, and racial.

Though the French may see the *hijab* as a symbol of the oppression of women—a belief that some Muslims also share—the schoolgirls and their families maintain that it is an important symbol of religious faith and feminine reaffirmation. And while the French interpret the *hijab* as a refusal to integrate and consider it disruptive of the secular classroom, the *hijab*-wearers insist upon its religious significance, not unlike a crucifix or yarmulke. The ban on Muslim head scarves in France's public schools is simply a bad idea.

Although the whole issue can be skirted superficially by labeling it a mere fashion debate, moving the discourse back to the rights of schools to enforce dress codes,<sup>157</sup> the issue is properly one for scrutiny under both French and international law. The ban contrasts with France's traditions of liberty and equality. By choosing a seemingly innocuous, yet symbolically powerful issue in an attempt to force Muslims in France into "Frenchness," the government has created an even greater rift in French society. The ban also seems to violate the French Constitution, though the *Conseil Constitutionnel*<sup>158</sup> has never ruled on that question. Additionally, the ban violates the tenets of the United Nations, of which France is a member. The U.N. Charter, and more specifically, the U.N. Declaration on the Elimination of Religion Intolerance and Discrimination, provides for religious freedom. While France may not accept the assertion that international law is controlling, at the very least, these

157. "In the land of Hermes, it hardly seems possible that a schoolgirl's shawl could become a matter of state." *Veil of Tears*, *supra* note 4, at 54.

The ban is all the more ridiculous since prominent French and other Western fashion designers often produce dresses with scarves and other types of headgear and Western women are often seen sporting these scarves. If a head scarf is a threat to the Western philosophy, then it is not philosophy, it's a joke.

*Western Paranoia*. MONEYCLIPS, Sept. 14, 1994, available in LEXIS, News Library, Moclip File.

158. The *Conseil Constitutionnel* can be compared with the United States Supreme Court. However, unlike the U.S. Supreme Court, the *Conseil* may not create policy. It passes on the constitutionality of French laws, but is limited to reviewing only the procedural and jurisdictional propriety of the law. Kublicki, *supra* note 88, at 80. As of 1971, however, the *Conseil* does have the power to protect individual freedoms under the Constitution. See generally, Cynthia Vroom, *Constitutional Protection of Individual Liberties in France, The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265 (1988).

documents present persuasive evidence of an international norm, purportedly supported by France as a U.N. member, against this type of religious discrimination. In this case, no interest of the French government or other human rights initiatives supports such an infringement of these girls' freedom to worship.

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