



**Article 18: An Orphaned Right
A Report by the APPPG on International Religious Freedom**

Submission by the International Center for Advocates Against Discrimination (ICAAD)

February 8, 2013

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I. About International Center for Advocates Against Discrimination (ICAAD)

(1) The International Center for Advocates Against Discrimination (ICAAD) is a non-governmental organization (NGO) founded to combat structural discrimination and to promote human rights norms consistent with public international law globally. ICAAD's organizational model uses an innovative interdisciplinary approach that empowers NGOs and vulnerable populations through advocacy, education, and impact litigation.

(2) ICAAD's three thematic areas include: women's rights, religious freedom, and minority rights, and has identified three key factors that contribute to structural discrimination:

- **Social Exclusion:** Deeply embedded societal and cultural norms requiring similar behavior and expectations from all members of society, which results in the “othering” of specific individuals and communities who do not conform.
- **Formal equality/ equality per se:** General laws of neutral applicability which seemingly mandate equal treatment for all, but have a disparate impact on minority or marginalized communities because the laws reflect majoritarian ideals.
- **Denial or suppression of identity:** When the State views the identity of a specific community with suspicion or fear and uses majoritarian power to mandate conformity through laws and policies.

(3) ICAAD attorneys have years of experience combating policies that deny religious accommodation through both advocacy and litigation. Recently, in 2012, ICAAD successfully settled a case against the United States Transportation Security Agency (TSA) for not providing an adequate religious accommodation to one of their own employees.¹ Additionally, at the end of 2012, ICAAD was cited, by the Office of High Commissioner for Human Rights (OHCHR) who produced a NGO summary report for the Universal Periodic Review (UPR) process, for highlighting that France continues to bar children from religious minority communities (Jews, Muslims, and Sikhs) to manifest their faith in public schools (primary and secondary schooling).²

II. Executive Summary

(4) Structural discrimination that is embedded in "seemingly" neutral legislative policy and has the impact of marginalizing vulnerable communities is one of the most pernicious forms of discrimination. Today, the assault on religious manifestation has extended to many European countries.³ This assault first began with the Stasi Commission Report leading to the

¹ Lisa Rein, *TSA Screener Wins EEOC Case, Can Wear Religious Bracelet*, WASHINGTON POST (June 11, 2012), <http://icaadglobal.org/mediaItem.php?id=69>.

² Human Rights Council (HRC), *Summary Prepared by the Office of High Commissioner for Human Rights in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: France* (Nov. 8, 2012), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/180/19/PDF/G1218019.pdf?OpenElement>.

³ Switzerland, by referendum, banned the Muslim architectural style of using minarets for the building of Mosques. Nick Cumming-Bruce and Steven Erlanger, *Swiss Ban Building of Minarets on Mosques*, NYTIMES

passage of French Law No. 2004-22 Mar. 15, 2004 (also known as the "Headscarf Ban"). This Report focuses on why Law No. 2004-22 undermines religious freedom under international law.⁴

(5) After successfully defending numerous domestic and regional legal challenges, the French government has been squarely opposed by the United Nations Human Rights Committee ("HRC") who recently found France in violation of Article 18 (religious freedom) of the International Covenant on Civil and Political Rights (ICCPR). This challenge was brought by Bikramjit Singh who was barred from manifesting his faith with a *keski* (small turban) in public school.⁵

(6) Generally, any country seeking to restrict religious manifestation must show that the law is:

a) "necessary to protect public safety, public order, health, or morals, or the fundamental rights and freedoms of others";⁶ b) "proportionate to the specific need"; and c) non-discriminatory.⁷ Although the European Court of Human Rights (ECtHR) has generally granted States a margin of appreciation in religious manifestation cases, the HRC found that the application of Law No. 2004-22 to Bikramjit's case violated Art. 18 because there was no compelling evidence that manifesting his faith would threaten the rights and freedoms of others, and furthermore, that the penalty imposed was disproportionate and unnecessary to meet the objective aims of the law.⁸

(7) Thus, Law No. 2004-22 must be repealed and conform to international human rights norms. The homogeneity that Law No. 2004 seeks to create is antithetical to the values of secularism (*laïcité*), pluralism, and democracy because it is the essence of structural discrimination. The HRC must push for France to comply with its decision or initiate a State investigation.

III. The Freedom to Manifest One's Faith: France

(8) On December 11, 2003, the Stasi Commission Report laid the foundation and justification for what would become Law No. 2004-22 where public school students were barred from

(Nov. 29, 2009); Human Rights Watch, *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany* 12 (Feb. 26, 2009); Belgium and France both fine Muslim women who wear full cover veils. BBC, *France Imposes First Niqab Fines* (Sept. 22, 2011); Turkey recently lifted its ban on headscarves. Jonathan Head, *Quiet End to Turkey's College Headscarf Ban*, BBC (Dec. 31, 2010).

⁴ Article 18 of the Universal Declaration of Human Rights (UDHR) finds its analog in Article 18 of the International Covenant on Civil & Political Rights (ICCPR) and Article 9 of the European Convention on Human Rights (ECHR).

⁵ *Bikramjit v. France*, Communication No. 1852/2008, U.N. Doc. CCPR/C/106/D/1852/2008 (Dec. 4, 2012) (Advance Unedited), bit.ly/X4CXD8. The Covenant and its Optional Protocol entered into force for the State party (France) on 4 February 1981 and 17 May 1984 respectively.

⁶ International Covenant on Civil and Political Rights (ICCPR), UN Doc. A/6316 (1966), at Art. 18.

⁷ Office of the High Commissioner for Human Rights (OHCHR), *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, CCPR/C/21/Rev.1/Add.4, ¶ 8 (July 30, 1993).

⁸ *Bikramjit*, *supra* note 5, at ¶ 8.7.

"ostensibly manifest[ing] a religious affiliation."⁹ The passing of this Act led to its codification in the Education Code as article L.141-5-5, under which: "In public primary schools, secondary schools and lycées, the wearing of symbols or clothing by which pupils manifest their religious affiliation in a conspicuous manner is forbidden. Under the rules of procedure, disciplinary procedures shall be preceded by a dialogue with the pupil."¹⁰

(9) Almost ten years later, the legislation and subsequent educational policy has widespread governmental and societal support, yet, three minority communities (Sikhs, Muslims, and Jews) have faced a disproportionate or disparate impact and are at risk of having a generation of youth in France lose their religious identity.¹¹ It is important to note that Christians were not impacted by this legislation because the crucifix was exempted.¹²

(10) Further, France has been emboldened by domestic court decisions that have been upheld by the European Court of Human Rights (ECtHR).¹³ By surveying cases before the ECtHR on the right to manifest one's faith, a trend appears where the religious rights of minority communities are superseded by ECtHR's willingness to defer to the State by invoking the margin of appreciation doctrine.

A. Margin of Appreciation

(11) The margin of appreciation is a judicially crafted doctrine with "no textual basis within the Convention itself."¹⁴ As scholars have noted, the Court has applied this doctrine "with the least clarity, predictability, and equality" especially when it has been applied to Articles 8-11 of the Convention, which includes Art. 9 on religious freedom.¹⁵

(12) In ECtHR cases dealing with religious manifestation, the margin of appreciation doctrine has arisen when "questions concerning the relationship between State and religions are at

⁹ Law No. 2004-22 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190 ("*Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.*").

¹⁰ *Bikramjit*, supra note 5, at ¶ 2.1.

¹¹ There is direct evidence of harm caused by this legislation.¹¹ In a survey conducted in 2010, 42 Sikh students in the Bobigny region of Paris gave direct testimony of their experiences with Law No. 2004-22.¹¹ In this Report, over 50% of students who complied with the law (removal of their turban/ *patkas*), felt humiliated and singled out and over 33% of the students felt a complete loss of identity.¹¹ Additionally, school administrators told a Sikh child that "he would get nowhere in life with his uncut hair."¹¹ The most revealing part of this study is that prior to the 2004 law, "all 42 of the Sikh children were able to wear their turbans or *patkas* without incidence, whereas, after the passage of the law, 39 out of the 42 (over ninety percent) were forced to remove their article of faith (turban or *patka*) to receive an education." Hansdeep Singh and Ilana Ofgang, *Global Sikh Civil & Human Rights Report 2010: The State of the Global Sikh Nation*, at 55 (Jan. 2011), bit.ly/WyEq58.

¹² Only a cross of a manifestly excessive size was impermissible.

¹³ *Aktas* against France (petition no. 43563/08), *Bayrak* against France (no. 14308/08), *Gamaleddyn* against France (no. 18527/08), *Ghazal* against France (no. 29134/08), *J. Singh* against France (no. 25463/08) and *R. Singh* against France (no 27561/08).

¹⁴ Tom Lewis, *What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, 56 INT'L & COMP. L.Q. 395, 397 (2007); *Handyside v. UK*, (1976) 1 ECHR 737, ¶ 48.

¹⁵ Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 Columbia Journal of European Law 113, 121 (2005); Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion Under the European Convention on Human Rights*, COUNCIL OF EUROPE, 41-42 (2012).

stake, on which opinion in a democratic society may reasonably differ widely . . .”¹⁶ In effect, if there is no consensus or there exists a divergence of viewpoints between Member States of the Council of Europe, the ECtHR will defer to the State authorities and grant them primacy in protecting the rights of its citizens.¹⁷

(13) Since 2001, whenever a State has protected policies that limit the practice of minority communities from manifesting their faith, whether as a teacher in public school,¹⁸ a student taking her medical examinations,¹⁹ or as students in public school,²⁰ the ECtHR has used the margin of appreciation doctrine as a means to circumvent the rigorous analysis necessary to ensure that the State's policy was legitimate and proportionate to its stated aim.²¹ More importantly, the ECtHR has failed to recognize the discriminatory application of these restrictions.²² Yet, in *Lautsi*,²³ an Italian case regarding the crucifix in schools, the Court found in favor of religious symbols in the classroom because they reasoned that the matter fell within the margin of appreciation of the State, since there was no European consensus with respect to this question.

(14) What does this mean in reality? In deferring to the State in religious manifestation cases, the Court signals that the "domestic situation is likely to reflect historical, cultural and political sensitivities"²⁴ which the Court is not well placed to resolve. Therefore, France and Turkey can rely on their secular Constitution (their historical and cultural tradition) to ban religious manifestation (in certain contexts) and Italy can rely on its strong history and tradition of being a Christian State, and thus, continue to have crucifixes prominently placed in school settings. Ultimately, the effect on minority communities when the margin of appreciation doctrine is applied, is that the historical and cultural traditions of minority communities are often not reflected in laws and policies, and therefore, the history and tradition of those in the majority will prevail.

(15) In essence, the Court has abdicated its responsibility to the majoritarian laws put forth by the State and creating internal inconsistencies within the ECtHR case-law. In one set of cases, the ECtHR has no problem claiming that manifestation by members of a minority community risk indoctrination and threaten the rights and freedoms of others without

¹⁶ *Sahin v. Turkey*, App. No. 44774/98, ¶ 109 n. 11 (Eur. Ct. H. R. June 29, 2004).

¹⁷ *Sahin*, at ¶ 109; Murdoch, *supra* note 15, at 42.

¹⁸ *Dahlab v. Switzerland*, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001), Denial of Admissibility.

¹⁹ *Sahin*, at ¶ 109 n. 11.

²⁰ *Aktas v. France* (petition no. 43563/08), *Bayrak v. France* (no. 14308/08), *Gamaleddyn v. France* (no. 18527/08), *Ghazal v. France* (no. 29134/08), *J. Singh v. France* (no. 25463/08) and *R. Singh v. France* (no. 27561/08). Distinguished from these cases is *Ahmet Arslan and Others v. Turkey*, the ECtHR found that unlike other cases where religious manifestation had to give way to religious neutrality, the venue in question here was a public space for all rather than a public establishment.

²¹ Office of the High Commissioner for Human Rights (OHCHR), *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, CCPR/C/21/Rev.1/Add.4, ¶ 8 (July 30, 1993) ("Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.").

²² *Id.* ("Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.").

²³ *Lautsi v. Italy*, App. No. 30814/06 (Eur. Ct. H.R. March, 18, 2011), Grand Chamber Judgment.

²⁴ Murdoch, *supra* note 15, at 43 (2012).

substantive proof and findings that such laws are "necessary".²⁵ Yet, crucifixes in State-school classrooms do not denote indoctrination and the Court found that there was no evidence of intolerance towards pupils of other faiths or non-believers. The lack of consensus among European nations is the very reason the margin of appreciation was used by the ECtHR, and is the very thing the Court's decisions have promoted. In some European States religious manifestation is celebrated and in other European States one can be fined or barred from entry into public spaces for practicing one's faith.

(16) Finally, the ECtHR's excessive deference to the State fails to protect minority and vulnerable populations who come before it and undermines international law because it promulgates majoritarian ideals at the cost of applying a rigorous analysis²⁶ of whether such laws are "proportionate to the legitimate aim pursued."²⁷

B. UN Human Rights Committee (HRC) Decision: *Bikramjit v. France*

(17) Although major international committees (CEDAW, CERD, CRC) and Special Rapporteurs have asked France to review Law No. 2004-22 because of the detrimental societal impact on religious minorities,²⁸ the HRC's decision is the first international body to directly find France in violation of religious freedom, Art. 18 of the ICCPR.

(18) According to France's submissions in the *Bikramjit Singh* case before the HRC, the stated aim of the legislation was "a means of putting an end to the tensions and incidents sparked by the wearing of religious symbols in public primary and secondary schools and to safeguard the neutrality of public education, in the interest of pluralism and the freedom of others."²⁹

(19) Yet, the Court found that France was unable to prove how the freedom of others was being impinged because a Sikh boy was wearing his religiously mandated article of faith, a *keski* (small turban). Instead, the Court found that Bikramjit's rights were being limited "solely because of his inclusion in a broad category of persons defined by their religious conduct."³⁰

²⁵ *Bikramjit v. France*, Communication No. 1852/2008, U.N. Doc. CCPR/C/106/D/1852/2008 (Dec. 4, 2012) (Advance Unedited), bit.ly/X4CXD8 (the "State party imposed this harmful sanction [barring him from attending school with his small turban] on the author, **not because his personal conduct created any concrete risk**, but solely because of his inclusion in a broad category of persons defined by their religious conduct.").

²⁶ Murdoch, *supra* note 15, at 40 (the application of the margin of appreciation doctrine has "the consequence in practice of modifying the strictness of the scrutiny applied by the Court to the assessment of the quality of reasons

... for an interference with Article 9 rights").

²⁷ *Id.*

²⁸ Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1: France, Second Session, 5-16 May 2008, A/HRC/WG.6/2/FRA/2, at 5, 7, 8; Concluding Observations of the Committee on the Rights of the Child (CRC): France, CRC/C/FRA/CO/4, June 11, 2009.

²⁹ *Bikramjit v. France*, Communication No. 1852/2008, U.N. Doc. CCPR/C/106/D/1852/2008, ¶ 5.2 (Dec. 4, 2012) (Advance Unedited), bit.ly/X4CXD8

³⁰ *Id.* at ¶ 8.7 (Dec. 4, 2012) (Advance Unedited), bit.ly/X4CXD8

(20) Ultimately, the Committee concluded that the "expulsion of the author from his lycée was not necessary under article 18, paragraph 3, it infringed his right to manifest his religion and constitutes a violation of article 18 of the Covenant."³¹

C. Conclusion

French history stands as a testament to the values of *liberté, égalité, fraternité*. The French Constitution and French adherence to international treaty bodies make clear its respect for international law. Yet, Law No. 2004-22 undermines the values that make France a democratic, pluralistic, and secular social Republic. Minority communities from three distinct faiths are dealing with the loss of identity among their youth in the context of rising Islamophobia and Anti-Semitism in Europe.³² France must take definitive steps to repeal Law No. 2004-22.

D. Recommendations³³

1) **Repeal or Amend Law No. 2004-22:** Under the recent HRC decision, "The State party is also under an obligation to prevent similar violations in the future and should review Act No. 2004-228 in light of its obligations under the Covenant, in particular article 18."³⁴

2) **HRC State Specific Investigation:** If France is unwilling to provide substantive steps in how it will remedy the violation within 180 days of the decision, the HRC should commence a State specific investigation.³⁵

3) **Create an Independent Commission to Monitor the Impact of the Legislation on Muslim, Sikh, and Jewish Children.**

³¹ *Id.*

³² U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (USCIRF), *Annual Report*, at 334 (2012).

³³ For a more detailed list of recommendations and specific discussion, please reference ICAAD's Universal Periodic Review (UPR) Report. Hansdeep Singh and Jaspreet Singh, *Universal Periodic Review: France*, International Center for Advocates Against Discrimination (ICAAD) (July 9, 2012), http://99.198.99.115/files/files/ICAAD_NGO_UPR_Submission_-_FRANCE_15th_Session_2013.pdf

³⁴ *Bikramjit*, at ¶ 10.

³⁵ *Id.* at ¶ 11.