CASE OF LEYLA ŞAHİN v. TURKEY

(Application no. 44774/98)
Strasbourg, France
10 November 2005

Author's Note: A European Court of Human Rights (ECHR) Chamber issued its Judgment on the Merits, against the plaintiff, in June 2004. Her request for a *Grand* Chamber hearing (seventeen judges) was granted—resulting in the following opinion by the majority of the ECHR judges. (The concurring opinion of two judges is omitted. They agreed with the result, but argued that plaintiff's "Right to Education" assertion—in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms—should have been considered in a separate opinion by another ECHR Chamber). The equally superb dissenting opinion is included, so that readers can savour the importance of the intriguing issue at hand.

The author made minor editorial modifications to the Court's original formatting.

Majority Opinion: The European Court of Human Rights, sitting as a Grand Chamber … [d]elivers the following judgment … :

PROCEDURE

1. The case originated in an application against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under . . . the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Ms Leyla Şahin ("the applicant"), on 21 July 1998.

. . .

3. The applicant alleged that her rights and freedoms under . . . the Convention . . . had been violated by regulations on wearing the Islamic headscarf in institutions of higher education.

. . .

7. A hearing on the merits took place in public in the Human Rights Building, Strasbourg, on 19 November 2002.

8. In its judgment of 29 June 2004 ("the [petite] Chamber judgment"), the Chamber held unanimously that there had been no violation of Article 9 of the Convention on account of the ban on wearing the headscarf . . . .

9. On 27 September 2004 the applicant requested that the case be referred to the Grand Chamber.

. . .

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

14. The applicant was born in 1973 and has lived in Vienna since 1999, when she left Istanbul to pursue her medical studies at the Faculty of Medicine at Vienna University. She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.

A. Circular of 23 February 1998

15. On 26 August 1997 the applicant, then in her fifth year at the Faculty of Medicine at Bursa University, enrolled at the Cerrahpaşa Faculty of Medicine at Istanbul University. She says that she wore the Islamic headscarf during the four years she spent studying medicine at the University of Bursa and continued to do so until February 1998.

16. On 23 February 1998 the Vice Chancellor of Istanbul University issued a circular, the relevant part of which provides:

> . . . [S]tudents whose 'heads are covered' (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students. However, students who insist on attending tutorials and entering lecture theatres although their names and numbers are not on the lists must be advised of the position and, should they refuse to leave, their names and numbers must be taken and they must be informed that they are not entitled to attend lectures. If they refuse to leave the lecture theatre, the teacher shall record the incident in a report explaining why it was not possible to give the lecture and shall bring the incident to the attention of the university authorities as a matter of urgency so that disciplinary measures can be taken.

17. On 12 March 1998, in accordance with the aforementioned circular, the applicant was denied access by invigilators to a written examination on oncology because she was wearing the Islamic headscarf. On 20 March 1998 the secretariat of the chair of orthopaedic traumatology refused to allow her to enrol because she was wearing a headscarf. On 16 April 1998 she was refused admission to a neurology lecture and on 10 June 1998 to a written examination on public health, again for the same reason.

. . .

C. The disciplinary measures taken against the applicant

21. In May 1998 disciplinary proceedings were brought against the applicant under . . . the Students Disciplinary Procedure Rules . . . as a result of her failure to comply with the rules on dress.

22. On 26 May 1998, in view of the fact that the applicant had shown by her actions that she intended to continue wearing the headscarf to lectures and/or tutorials, the dean of the faculty declared that her attitude and failure to comply with the rules on dress were not befitting of a student. He therefore decided to issue her with a warning.

23. On 15 February 1999 an unauthorised assembly gathered outside the deanery of the Cerrahpaşa Faculty of Medicine to protest against the rules on dress.

24. On 26 February 1999 the dean of the faculty began disciplinary proceedings against various students, including the applicant, for joining the assembly. On 13 April 1999, after hearing her representations, he suspended her from the university for a semester pursuant to . . . the Students Disciplinary Procedure Rules.

. . .

26. Following the entry into force of Law no. 4584 on 28 June 2000 (which provided for students to be given an amnesty in respect of penalties imposed for disciplinary offences and for any resulting disability to be annulled) the applicant was granted an

amnesty releasing her from all the penalties that had been imposed on her and the resultant disabilities.

27. On 28 September 2000 the Supreme Administrative Court held that Law no. 4584 made it unnecessary to examine the merits of the applicant's appeal on points of law . . . .

28. In the meantime, on 16 September 1999, the applicant abandoned her studies in Turkey and enrolled at Vienna University, where she pursued her university education.

II. Relevant Law And Practice

A. The Constitution

29. The relevant provisions of the Constitution provide:

> Article 2
>
> 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.
>
> . . .
>
> Article 10
>
> All individuals shall be equal before the law without any distinction based on language, race, colour, sex, political opinion, philosophical belief, religion, membership of a religious sect or other similar grounds.
>
> . . .
>
> Article 13
>
> Fundamental rights and freedoms may be restricted only by law and on the grounds set out in special provisions of the Constitution, provided always that the essence of such rights and freedoms must remain intact. Any such restriction shall not conflict with the letter or spirit of the Constitution or the requirements of a democratic, secular social order and shall comply with the principle of proportionality.
>
> Article 14
>
> The rights and freedoms set out in the Constitution may be not exercised with a view to undermining the territorial integrity of the State, the unity of the Nation or the democratic and secular Republic founded on human rights.
>
> . . .
>
> Article 24
>
> Everyone shall have 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 or her religious beliefs and convictions; no one shall be censured or prosecuted for his religious beliefs or convictions.
>
> . . .
>
> No one shall 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.

Article 42
No one may be deprived of the right to instruction and education.

B. History and background

1. Religious dress and the principle of secularism

30. The Turkish Republic was founded on the principle that the State should be secular (*laik*). Before and after the proclamation of the Republic on 29 October 1923, the public and religious spheres were separated through a series of revolutionary reforms: the abolition of the caliphate on 3 March 1923; the repeal of the constitutional provision declaring Islam the religion of the State on 10 April 1928; and, lastly, on 5 February 1937 a constitutional amendment according constitutional status to the principle of secularism.

31. The principle of secularism was inspired by developments in Ottoman society in the period between the nineteenth century and the proclamation of the Republic. The idea of creating a modern public society in which equality was guaranteed to all citizens without distinction on grounds of religion, denomination or sex had already been mooted in the Ottoman debates of the nineteenth century. . . .

33. The first legislation to regulate dress was the Headgear Act of 28 November 1925, which treated dress as a modernity issue. Similarly, a ban was imposed on wearing religious attire other than in places of worship or at religious ceremonies, irrespective of the religion or belief concerned, by the Dress (Regulations) Act of 3 December 1934.

34. Under the Education Services (Merger) Act of 3 March 1924, religious schools were closed and all schools came under the control of the Ministry for Education. . . .

35. In Turkey wearing the Islamic headscarf to school and university is a recent phenomenon which only really began to emerge in the 1980s. There has been extensive discussion on the issue and it continues to be the subject of lively debate in Turkish society. Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity. However, the supporters of secularism, who draw a distinction between the *başörtüsü* (traditional Anatolian headscarf, worn loosely) and the *türban* (tight, knotted headscarf hiding the hair and the throat), see the Islamic headscarf as a symbol of a political Islam. As a result of the accession to power on 28 June 1996 of a coalition government comprising the Islamist *Refah Partisi*, and the centre-right *Doğru Yol Partisi*, the debate has taken on strong political overtones. The ambivalence displayed by the leaders of the *Refah Partisi*, including the then Prime Minister, over their attachment to democratic values, and their advocacy of a plurality of legal systems functioning according to different religious rules for each religious community was perceived in Turkish society as a genuine threat to republican values and civil peace.

2. The rules on dress in institutions of higher education and the case-law of the Constitutional Court

. . .

The Constitutional Court[’s 1989 judgment] also said that students had to be permitted to work and pursue their education together in a calm, tolerant and mutually supportive atmosphere without being deflected from that goal by signs of religious affiliation. It

found that, irrespective of whether the Islamic headscarf was a precept of Islam, granting legal recognition to a religious symbol of that type in institutions of higher education was not compatible with the principle that State education must be neutral, as it would be liable to generate conflicts between students with differing religious convictions or beliefs.

40. On 25 October 1990 transitional section 17 of Law no. 2547 entered into force. It provides:

> Choice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force.

41. In a judgment of 9 April 1991, which was published in the Official Gazette of 31 July 1991, the Constitutional Court noted that, in the light of the principles it had established in its judgment of 7 March 1989, the aforementioned provision did not allow headscarves to be worn in institutions of higher education on religious grounds and so was consistent with the Constitution. It stated, *inter alia*:

> . . . the expression 'laws in force' refers first and foremost to the Constitution. . . . 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. In these circumstances, the freedom of dress which the impugned provision permits in institutions of higher education 'does not concern dress of a religious nature or the act of covering one's neck and hair with a veil and headscarf'... The freedom afforded by this provision . . . is conditional on its not being contrary 'to the laws in force.' 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. Consequently, the condition set out in the aforementioned section requiring [choice of] dress not to contravene the laws in force removes from the scope of freedom of dress the act of 'covering one's neck and hair with the headscarf'. . . .

3. Application of the regulations at Istanbul University

42. Istanbul University was founded in the fifteenth century and is one of the main centres of State higher education in Turkey. It has seventeen faculties (including two faculties of medicine–Cerrahpaşa and Çapa) and twelve schools of higher education. It is attended by approximately 50,000 students.

43. In 1994, following a petitioning campaign launched by female students enrolled on the midwifery course at the University School of Medicine, the Vice Chancellor circulated a memorandum in which he explained the background to the Islamic-headscarf issue and the legal basis for the relevant regulations, noting in particular:

> The ban prohibiting students enrolled on the midwifery course from wearing the headscarf during tutorials is not intended to infringe their freedom of conscience and religion, but to comply with the laws and regulations in force. When doing their work, midwives and nurses wear a uniform. That uniform is described in and identified by regulations issued by the Ministry of Health... Students who wish to join the profession are aware of this. Imagine a student of midwifery trying to put a baby in or remove it from an incubator, or assisting a doctor in an operating theatre or maternity unit while wearing a long-sleeved coat.

44. The Vice Chancellor was concerned that the campaign for permission to wear the Islamic headscarf on all university premises had reached the point where there was a risk

of its undermining order and causing unrest at the University, the Faculty, the Cerrahpaşa Hospital and the School of Medicine. He called on the students to comply with the rules on dress, reminding them, in particular, of the rights of the patients.

45. A resolution regarding the rules on dress for students and university staff was adopted on 1 June 1994 by the University executive and provides:

> 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.

46. On 23 February 1998 a circular signed by the Vice Chancellor of Istanbul University was distributed containing instructions on the admission of students with beards or wearing the Islamic headscarf (for the text of this circular, see paragraph 16 above).

. . .

5. The regulatory power of the university authorities

53. The monitoring and supervisory power conferred on the vice chancellor . . . is subject to the requirement of lawfulness and to scrutiny by the administrative [and judicial] courts.

D. COMPARATIVE LAW

55. For more than twenty years the place of the Islamic headscarf in State education has been the subject of debate across Europe. In most European countries, the debate has focused mainly on primary and secondary schools. However, in Turkey, Azerbaijan and Albania it has concerned not just the question of individual liberty, but also the political meaning of the Islamic headscarf. These are the only member States to have introduced regulations on wearing the Islamic headscarf in universities.

56. In France, where secularism is regarded as one of the cornerstones of republican values, legislation was passed on 15 March 2004 regulating, in accordance with the principle of secularism, the wearing of signs or dress manifesting a religious affiliation in State primary and secondary schools. The legislation inserted a new Article . . . in the Education Code which provides: "In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall state that the institution of disciplinary proceedings shall be preceded by dialogue with the pupil."

. . .

57. In Belgium there is no general ban on wearing religious signs at school. In the French Community a decree of 13 March 1994 stipulates that education shall be neutral within the Community. Pupils are in principle allowed to wear religious signs. However, they may do so only if human rights, the reputation of others, national security, public

order, and public health and morals are protected and internal rules complied with. Further, teachers must not permit religious or philosophical proselytism under their authority or the organisation of political militancy by or on behalf of pupils. The decree stipulates that restrictions may be imposed by school rules. On 19 May 2004 the French Community issued a decree intended to institute equality of treatment. In the Flemish Community, there is no uniform policy among schools on whether to allow religious or philosophical signs to be worn. Some do, others do not. When pupils are permitted to wear such signs, restrictions may be imposed on grounds of hygiene or safety.

58. In other countries (Austria, Germany, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom), in some cases following a protracted legal debate, the State education authorities permit Muslim pupils and students to wear the Islamic headscarf.

59. In Germany, where the debate focused on whether teachers should be allowed to wear the Islamic headscarf, the Constitutional Court stated . . . that the lack of any express statutory prohibition meant that teachers were entitled to wear the headscarf. Consequently, it imposed a duty . . . to lay down rules on dress if they wished to prohibit the wearing of the Islamic headscarf in State schools.

60. In Austria there is no special legislation governing the wearing of the headscarf, turban or kippa. In general, it is considered that a ban on wearing the headscarf will only be justified if it poses a health or safety hazard for pupils.

61. In the United Kingdom a tolerant attitude is shown to pupils who wear religious signs. Difficulties with respect to the Islamic headscarf are rare. . . .

62. In Spain, there is no express statutory prohibition on pupils' wearing religious head coverings in State schools. . . . Generally speaking, State schools allow the headscarf to be worn.

63. In Finland and Sweden the veil can be worn at school. However, a distinction is made between the burka (the term used to describe the full veil covering the whole of the body and the face) and the niqab (a veil covering all the upper body with the exception of the eyes). In Sweden mandatory directives were issued in 2003 by the National Education Agency. These allow schools to prohibit the burka and niqab, provided they do so in a spirit of dialogue on the common values of equality of the sexes and respect for the democratic principle on which the education system is based.

64. In the Netherlands, where the question of the Islamic headscarf is considered from the standpoint of discrimination rather than of freedom of religion, it is generally tolerated. In 2003 a non-binding directive was issued. Schools may require pupils to wear a uniform provided that the rules are not discriminatory and are included in the school prospectus and that the punishment for transgressions is not disproportionate. A ban on the burka is regarded as justified by the need to be able to identify and communicate with pupils. In addition, the Equal Treatment Commission ruled in 1997 that a ban on wearing the veil during general lessons for safety reasons was not discriminatory.

65. In a number of other countries (the Czech Republic, Greece, Hungary, Poland or Slovakia), the issue of the Islamic headscarf does not yet appear to have given rise to any detailed legal debate.

. . .

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

70. The applicant submitted that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified interference with her right to freedom of religion, in particular, her right to manifest her religion.

She relied on Article 9 of the Convention [Convention for the Protection of Human Rights and Fundamental Freedoms], which provides:

> 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 freedoms of others.

. . .

75. The Court must consider whether the applicant's right under Article 9 was interfered with and, if so, 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.

1. Whether there was interference

. . .

78. As to whether there was interference, the Grand Chamber endorses the following findings of the [2004] Chamber:

> The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.

"2. Prescribed by law"

. . .

89. Accordingly, the question must be examined on the basis not only of the wording of transitional section 17 of Law no. 2547 [basis for the university regulations], but also of the relevant case-law.

In that connection, as the Constitutional Court noted in its judgment of 9 April 1991 (see paragraph 41 above), the wording of that section shows that freedom of dress in institutions of higher education is not absolute. Under the terms of that provision,

students are free to dress as they wish "provided that [their choice] does not contravene the laws in force."

. . .

98. In these circumstances, the Court finds that there was a legal basis for the interference in Turkish law, namely transitional section 17 of Law no. 2547 read in the light of the relevant case-law of the domestic courts. The law was also accessible and can be considered sufficiently precise in its terms to satisfy the requirement of foreseeability. It would have been clear to the applicant, from the moment she entered Istanbul University, that there were restrictions on wearing the Islamic headscarf on the university premises and, from 23 February 1998, that she was liable to be refused access to lectures and examinations if she continued to do so.

3. Legitimate aim

99. Having regard to the circumstances of the case and the terms of the domestic courts' decisions, the Court is able to accept that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, a point which is not in issue between the parties.

4. "Necessary in a democratic society"

. . .

(i) General principles

104. The Court reiterates that as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.

105. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance.

Article 9 does not protect every act motivated or inspired by a religion or belief.

106. In 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. This follows both from paragraph 2 of Article 9 and the State's positive obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention.

107. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which

those beliefs are expressed and that it requires the State to ensure mutual tolerance between opposing groups. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.

108. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society." Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society."

109. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, 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 (as the comparative-law materials illustrate–see paragraphs 55-65 above) in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society. and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, 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.

110. This margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and. In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society.

. . .

(ii) Application of the foregoing principles to the present case

112. The interference in issue caused by the circular of 23 February 1998 imposing restrictions as to place and manner on the rights of students such as Ms Şahin to wear the Islamic headscarf on university premises was, according to the Turkish courts . . . , based in particular on the two principles of secularism and equality.

. . .

115. After examining the parties' arguments, the Grand Chamber sees no good reason to depart from the approach taken by the Chamber . . . as follows:

. . .

> . . . In addition, like the Constitutional Court. . . , the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted, the issues at stake include the protection of the "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated..., this religious symbol has taken on political significance in Turkey in recent years.
>
> . . . The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (*Refah Partisi and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.

116. Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court . . . , which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others . . . , it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

117. The Court must now determine whether in the instant case there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference.

118. Like the Chamber . . . , the Grand Chamber notes at the outset that it is common ground that practising Muslim students in Turkish universities are free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, the resolution adopted by Istanbul University on 9 July 1998 shows that various other forms of religious attire are also forbidden on the university premises .

. . .

121. . . . [I]t is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course. . . . Article 9 does not always guarantee the right to behave in a manner governed by a religious belief and does not confer on people who do so the right to disregard rules that have proved to be justified.

122. In the light of the foregoing and having regard to the Contracting States' margin

of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.

123. Consequently, there has been no breach of Article 9 of the Convention.

. . .

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that there has been no violation of Article 9 of the Convention.

. . .

DISSENTING OPINION OF JUDGE TULKENS

. . .

1. As regards the general principles reiterated in the judgment there are points on which I strongly agree with the majority . . . .

2. Once the majority had accepted that the ban on wearing the Islamic headscarf on university premises constituted interference with the applicant's right under Article 9 of the Convention to manifest her religion, and that the ban was prescribed by law and pursued a legitimate aim–in this case the protection of the rights and freedom of others and of public order–*the main issue became whether such interference was "necessary in a democratic society*" [italics added].

. . .

5. As regards, firstly, *secularism*, . . . [it] is undoubtedly necessary for the protection of the democratic system in Turkey. Religious freedom is, however, also a founding principle of democratic societies. Accordingly, the fact that the Grand Chamber recognised the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a "pressing social need." . . . Moreover, where there has been interference with a fundamental right, the Court's case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples. Such examples do not appear to have been forthcoming in the present case.

6. Under Article 9 of the Convention, the freedom with which this case is concerned is not freedom to have a religion (the internal conviction) but to manifest one's religion (the expression of that conviction). If the Court has been very protective (perhaps over-protective) of religious sentiment, it has shown itself less willing to intervene in cases concerning religious practices, which only appear to receive a subsidiary form of protection (see paragraph 105 of the [Majority's] judgment). This is, in fact, an aspect of freedom of religion with which the Court has rarely been confronted up to now and on which it has not yet had an opportunity to form an opinion with regard to external symbols of religious practice, such as particular items of clothing, whose symbolic importance may vary greatly according to the faith concerned.

7. Referring to [another case] . . . , the judgment states: "An attitude which fails to respect that principle [of secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion." The majority thus consider that wearing the headscarf contravenes the principle of secularism. In so doing, they take up position on

an issue that has been the subject of much debate, namely the signification of wearing the headscarf and its relationship with the principle of secularism.[3]

In the present case, a generalised assessment of that type gives rise to at least three difficulties. Firstly, the judgment does not address the applicant's argument–which the Government did not dispute–that she had no intention of calling the principle of secularism, a principle with which she agreed, into doubt. Secondly, there is no evidence to show that the applicant, through her attitude, conduct or acts, contravened that principle. This is a test the Court has always applied in its case-law. Lastly, the judgment makes no distinction between teachers and students, whereas in the *Dahlab v. Switzerland* decision of 15 February 2001, which concerned a teacher, the Court expressly noted the role-model aspect which the teacher's wearing the headscarf had. While the principle of secularism requires education to be provided without any manifestation of religion and while it has to be compulsory for teachers and all public servants, as they have voluntarily taken up posts in a neutral environment, the position of . . . students seems to me to be different.

8. Freedom to manifest a religion entails everyone being allowed to exercise that right, whether individually or collectively, in public or in private, subject to the dual condition that they do not infringe the rights and freedoms of others and do not prejudice public order ([Convention for the Protection of Human Rights and Fundamental Freedoms] Article 9 § 2).

As regards the first condition, this could have been satisfied if the headscarf the applicant wore as a religious symbol had been ostentatious or aggressive or was used to exert pressure, to provoke a reaction, to proselytise or to spread propaganda and undermined–or was liable to undermine–the convictions of others. However, the Government did not argue that this was the case and there was no evidence before the Court to suggest that Ms Şahin had any such intention. As to the second condition, it has been neither suggested nor demonstrated that there was any disruption in teaching or in everyday life at the University, or any disorderly conduct, as a result of the applicant's wearing the headscarf. Indeed, no disciplinary proceedings were [ultimately] taken against her.

9. The majority maintain, however that "when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it" (see paragraph 115 of the [Grand Chamber judgment adopting the wording of the Chamber] judgment).

Unless the level of protection of the right to freedom of religion is reduced to take account of the context, the possible effect which wearing the headscarf, which is presented as a symbol, may have on those who do not wear it does not appear to me, in the light of the Court's case-law, to satisfy the requirement of a pressing social need. . . . [I]n the sphere of freedom of expression (Article 10), the Court has never accepted that interference with the exercise of the right to freedom of expression can be justified by the fact that the ideas or views concerned are not shared by everyone and may even offend some people. Recently, in the *Gündüz v. Turkey* judgment of 4 December 2003, the Court

[3] E. BRIBOSIA and I. RORIVE, 'Le voile à l'école : une Europe divisée', *Revue trimestrielle des droits de l'homme*, 2004, p. 958.

held that there had been a violation of freedom of expression in a case in which a Muslim religious leader had been convicted for violently criticising the secular regime in Turkey, calling for the introduction of the sharia and referring to children born of marriages celebrated solely before the secular authorities as "bastards." Thus, manifesting one's religion by peacefully wearing a headscarf may be prohibited whereas, in the same context, remarks which could be construed as incitement to religious hatred are covered by freedom of expression.

10. In fact, it is the threat posed by "extremist political movements" seeking to "impose on society as a whole their religious symbols and conception of a society founded on religious precepts" which, in the Court's view, serves to justify the regulations in issue, which constitute "a measure intended to . . . to preserve pluralism in the university" (see paragraph 115 of the judgment . . .). The Court had already made this clear in its *Refah Partisi and Others v. Turkey* judgment of 13 February 2003, when it stated: "In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention . . . ."

While everyone agrees on the need to prevent radical Islamism, a serious objection may nevertheless be made to such reasoning. Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and "extremists" who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. She is a young adult woman and a university student and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant's personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.

11. Turning to *equality*, the majority focus on the protection of women's rights and the principle of sexual equality (see paragraphs 115 and 116 of the [above] judgment). By converse implication, wearing the headscarf is considered synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003,[6] wearing the headscarf has no single meaning; it is a practise that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.

12. On this issue, the Grand Chamber refers in its judgment to the *Dahlab v. Switzerland* decision of 15 February 2001, citing what to my mind is the most questionable part of the reasoning in that decision, namely that wearing the headscarf

[6] Federal Constitutional Court of Germany, judgment of the Second Division of 24 September 2003, 2BvR 1436/042.

represents a "powerful external symbol", which "appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality" and that the practice could not easily be "reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils" . . . .

It is not the Court's role to make an appraisal of this type–in this instance a unilateral and negative one–of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant. The applicant, a young adult university student, said–and there is nothing to suggest that she was not telling the truth–that she wore the headscarf of her own free will. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. "Paternalism" of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy . . .). Finally, if wearing the headscarf really was contrary to the principle of the equality of men and women in any event, the State would have a positive obligation to prohibit it in all places, whether public or private.[8]

13. Since, to my mind, the ban on wearing the Islamic headscarf on the university premises was not based on reasons that were relevant and sufficient, it cannot be considered to be interference that was "necessary in a democratic society" within the meaning of Article 9 § 2 of the Convention. In these circumstances, there has been a violation of the applicant's right to freedom of religion, as guaranteed by the Convention.

Notes & Questions

1. The ECHR determined that Turkey interfered with Ms Sahin's rights. Why? What specific principle outweighed this interference?

2. Was Istanbul University's dress regulation designed to restrict Islamic practices?

3. Did the university's dress regulation help or hinder gender equality? If so, how?

4. Regarding Judge Tulken's Dissenting Opinion: Did the university's (full) headscarf prohibition violate: (a) the Turkish Constitution? (b) the Convention for the Protection of Human Rights and Fundamental Freedoms?

5. Assume that you are the law clerk to the President of the ECHR. The above *Sahin* case is about to be decided. She asks you to do the final review of her draft opinion—specifically, Section D on Comparative Law ¶¶ 55-65. You of course immediately recall that when you were a student, you studied this textbook's §1.2 on Sources of International Law—specifically, the raging debate within the US Congress and Supreme Court, about the latter's reliance on foreign law when deciding novel issues. You have just reread Justice Scalia's scathing criticism (textbook p. 24-25) of this emerging practice. Putting job security aside, would it be legally appropriate for you to bring the US Supreme Court's *Roper* dissent to the ECHR President's attention, for possible adoption in your response to draft ¶¶ 55-65 of *Sarin*?

---

[8] E. BRIBOSIA and I. RORIVE, 'Le voile à l'école : une Europe divisée', op. cit., p. 962.