EUROPEAN COURT OF HUMAN RIGHTS
UNDER THE LIGHT OF
LEYLA SAHIN DECISION

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2010 İSTANBUL
Preface

Though during the 80s it is a time-to time recurring food of controversy; “headscarf in the Turkish Universities”, become a material problem after the February 28 Post-Modern coup d’Etat. First the sentence of “Behaviors about the apparel which are emerged against law, push the Turkey into an outdated image; shall be banned; the law and Constitutional Court Decisions about this subject shall be applied without any exception especially on the public instutions and associations.” had been added to the well-known MGK (National Security Council) decisions. Approximately a year later, The Constitutional Court had cited the Party’s defence for freedom of headscarf in Universities as a reason of their decision of the ban of Refah Party. (Welfare Party)

After the Ban decision, while wearing headscarf was completely free, a retired military officer who had a duty at the MGK, had given briefings on “how the headscarf would be banned”, to firstly university rectors, then to Judges. After then, Committee of Rectors, had published a declaration with the title of “The regulations governing the apparel at the Higher Education Institutions and Legal Comments” –which is probably had been prepared during those briefings-. After that declaration of Committee of rectors, “the rectors that are taken the briefing” had understood that the headscarf is banned at the universities and they applied the headscarf ban at this direction.

Because of there is no legal grounds of exercises of “Headscarf Ban” in Universities, in different cities, the Administrative Courts had been accepted the first applications and had sentenced that the “Headscarf Ban” is unlawful. But there had instituted disciplinary proceedings against the Judges who had found the “Headscarf Ban” is unlawful; the cases had been removed from those Judges, And those Judges who had found the ban is unlawful, had been relegated and punished. From Edirne (the most west
city of Turkey) to the Van (one of the most east city in Turkey) lots of Judges had been punished because of their sentence of “Headscarf Ban” is unlawful. As a result of this period, Judges had became “agree” upon the “Headscarf Ban” is lawful and legal. Consequently at the end of this period which lasts approximately 3 years, “Headscarf Ban” became “settled” in universities by de facto means. This de facto situation is continuing still without any legal grounds and based upon Constitutional Court’s decisions and Council of State’s decisions.

One leg of one of the most biggest unlawfulness of Turkey; “Headscarf Ban” had been carried to the ECHR. The ECHR who has an undisputable sensibility towards the freedom of religion of people who have religion other than Islam, may change Its attitude when the subject is about Muslims. Its decision on “Headscarf Ban” is one of the typical sample of this attitude.

This work of Attorney Fatma Benli who had dedicated his life and his works to struggle with this “Headscarf Ban”; do not only have a meaning of an analyze of ECHR’s “headscarf veil decision” but also have a significance of make an aggregated and a well organized recording over the subject. We want to emphasize that we are accepting this work as a herald of other works which reflects the knowledge of Attorney. Fatma Benli on this subject who is one of the pioneers off the struggle of “Headscarf Ban” By the way I want to remind the importance of publishing a work upon a most controversial subject upon which there is not much well qualified works are published.

Assoc. Prof. Dr. Mustafa Şentop
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ABBREVIATIONS

AKART: Academic Research Centre
AMNESTY: Amnesty International
AYMKD: The Journal of Constitutional Court Adjudgements
ECHR: European Court Human Rights
EKAM: Head of Women’s Issues Research and Implementation Centers
UN: United Nations
CEDAW: Committee on the Elimination of Discrimination against Women
CEDAW: Convention on the Elimination of All Forms of Discrimination against Women
cit.: Cited
D.R.: Governmental Publication European Commission of Human Rights
DRA: Department of Religious Affairs
E.: Court File No
ESI: European Stability Initiative
EU: European Union
HAZAR: Hazar Education Culture and Solidarity Association
HRW: Human Rights Watch
Ibid: In the same place
i.e.: id est (that is)
ICCPR: The International Covenant on Civil and Political Rights
IHK: Commission of Human Rights
K.: Court Order No
KSSGM: General Directorate on the Status and Questions of Women
KSGM: General Directorate on the Status of Women
LDT: Association for Liberal Thinking
N: Number
OECD: Organization for Economic Co-operation and Development
op: Opus
ÖSS: University Entrance Exam in Turkey
p: Page
Para: Paragraph
TBMM: Turkish Grand National Assembly
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EUROPEAN COURT OF HUMAN RIGHTS
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I. INTRODUCTION

Leyla Sahin is a student whose graduate education on Medicine was dropped out after the headscarf ban came into force. She demanded the violation of her human rights to be determined as applying to European Court of Human Rights. Leyla Sahin was forced to abandon her medical studies when the headscarf ban was introduced in Turkish universities. She applied to the European Court of Human Rights (ECHR) claiming the ban was a violation of her rights. On 10 November 2005, the ECHR Grand Chamber ruled that the interference with university students who wear a headscarf was justified in principle and proportionate to the aim pursued in a democratic society.

This study assesses the Leyla Sahin decision in the light of the Court’s own founding principles, asks whether the ban is legitimate, and questions whether the grounds cited to justify the ban match the facts on the ground. Firstly it is examined that this subject was left to the discretion of local courts and the allegation if there is a common of application on the use of headscarf overall Europe. Then it is analyzed that if the concrete reasons comply with the reasons which was accepted as legitimacy reasons in the decision. It was investigated if these reasons are in accordance with the concrete event. It is observed that the decision handles not the facts passed in reality, but the threats and dangers which can possibly be lived in the future. It is also observed that the validity of the allegations if the use of headscarf creates an imposition on the other students who wear other clothes and if the secularism requires the ban of headscarf or not. It also examines the legal arguments for the headscarf ban, considers the impact of the Sahin decision in subsequent applications and on the efforts to lift the ban within Turkey, and concludes with a general evaluation.

1. THE JUDICIAL PROCESS

In Turkey, both public and private universities are under the authority of the Higher Education Council (YÖK). Following the rectorship elections in 1998, the new rector of Istanbul University published circular concerning students who wore the headscarf. Turkish courts deemed that the 23 February 1998 Circular, which required that headscarved and bearded students should not be admitted to classes, and that classes should be canceled if such students entered them, to be lawful. After the circular was published, the students of Cerrahpasa and Istanbul Medicine Faculties were not permitted to come into the Campuses. Hereupon the students filed suit in administrative courts. On these dates a process called as “28 February

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post-modern coup” existed in Turkey1. Besides this high-level military officers was giving briefings to the judges about the subject of “Political Extempore” There are many judges in tax and administrative courts to whom were set up administrative inquiries with the reason that “theirs wives were wearing against to modern dressing”2. However Istanbul 6th Administrative Court decided to “stay of execution” with the reason that the Circular is against to law and the application of the circular would create irreparable damages3. It also decided that the change of law is required in accordance with the constitution law. However the file was withdrew from these judges and hold inquiries against these judges4. The District Court did not approve the “stay of execution” decision with the reason that university was to competent5. The specialists of National Security Council, Higher Education Council (YOK) Minister and Rector of Universites were given briefings6. Later, the Higher Education Council expanded the headscarf ban to all universities7. At this time the applicant Leyla Sahin was a fifth year

1 On 28th February 1997, National Security Council meeting was convened and the obligations that has to be done in the “combat with political reaction (extempore)” were listed and accepted as 18 articed sanctions. The most effective article that is practiced until now is; the applications which ere performed against the headscarfed women in pulic bodies.


3 26.06.1998 dated, 1998/369 E.

4 Selami Demirkol and Seher Bayrak who judges of İstanbul 6th Administrative Court, The same condition is repeated by the Administrative Court which decided to the stay of execution. (Investigation of Reaction in Adjudication for 40 judges and prosecutors and the answer of the Ministry of Justice to the motion of question, (T. B. M. M. Records Journal, 17th Session, 11.11. 1998) http://www.tbmm.gov.tr/tutanak/donem20/yil4/bas/b017m.htm)

5 19.08.1998 dated, 1998/947 E.

6 14 March 1998, “National Security Council to the Rector: No passage to Turban (Headscarf)”, Milliyet (Newspaper), “At the first time National Security Council experts took place in the Committee of Rectors to which YÖK’s President Kemal Gürüz and 71 universities’ rectors attended, and they gave a message to imply that headscarf ban should be applied according to regulations on attire.”

7 Circular No. 5786, 23.02.1998, Office of the Rector of Istanbul University; “...By virtue of the Constitution, the law and the regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by university administrative boards, students whose ‘heads are covered’ and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and the 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 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”. In response to the appeal of the Office of the Rector of Istanbul University against the 19.08.1998 stay of implementation decision of the Istanbul Regional Administrative Court (1998/947) in the action brought against the university concerning the 23.02.1998 action of the Istanbul University Rectorate prohibiting the entry of students without identity cards into the University Campus and buildings, and prohibiting the participation of headscarfed female students and bearded male students in lectures, courses or tutorials, judgment was given that the provisions prohibiting entry of students without student
medical student, having transferred from Uludağ Medical School to Cerrahpaşa Medical School. She petitioned the ECHR as a last means of legal redress that might permit her to continue her education.

The Court ruled the application of the circular admissible on 2 July 2002. (This decision represented a step forward from other cases concerning the headscarf in which the Court had set precedents. In 1993 the European Human Rights Commission had ruled the cases of Şenay Karaduman and Lamia Akbulut, who had not been permitted to use headscarfed photographs on their university diplomas inadmissible).

Six years later, on 29 June 2004, the 4th Chamber ruled against Leyla Sahin. The Court accepted that the ban was an interference with her right to freedom of religion, but concluded that such interference in issue was justified in principle and proportionate to the aim pursued in a democratic society in the Turkish context. Leyla Sahin asked for the case to be referred to the Grand Chamber, and a five-judge panel accepted her application.

On 10 November 2005, the Grand Chamber rejected Leyla Sahin’s case by a majority decision. The Grand Chamber examined the application in terms of the right to freedom of religion and right to education. Reiterating arguments that had been put forward in the decision of 4th Chamber, the Grand Chamber concluded that, in the light of Turkey’s special circumstances, the headscarf ban and its interference in fundamental rights to education and freedom of religion was legitimate.

II. GENERAL ASSESSMENT OF THE GROUNDS FOR THE DECISION IN THE ŞAHİN CASE

1. THE GROUNDS FOR THE COURT’S FINDING THAT THE STATE INTERFERENCE IN FREEDOM OF EDUCATION AND RELIGION WAS ACCEPTABLE

In the Sahin decision it was accepted as non contentious by the applicant, the Government and the Court that Islamic headscarf is motivated or inspired by religious beliefs, and should, as such, be evaluated within article 9 of the European Human Rights Convention. The Court found that the Turkish government’s interference in Leyla Sahin’s rights was justified in principle and proportionate to the aim pursued in a democratic society. According to Rozakis and Vajic’s discrete opinion who justice agree with majority opinion about was not violated that the 9th article of the agreement the point in question in the case. “We agree with the

cards to the university campuses and buildings, and prohibiting the participation of headscarfed female students and bearded male students in lectures, courses or tutorials are in compliance with law and regulations.


majority that there has been no violation of Article 9 of the Convention in the present case.” As we see it, the main issue before the Court was the interference of the State with the applicant’s right to wear a headscarf at the University and, through that, to manifest in public her religious beliefs. Hence, the central question in the case was the protection of her religious freedom as enshrined in Article 9 of the Convention”1.

According to the Grand Chamber, the ban on wearing of the headscarf in universities was a state interference with individuals’ right in public to express their religious beliefs2.

Article 9 of the European Human Rights Convention states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

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

Article 9 of the Convention protects not only the right to have a religion and hold a belief, but also the right to practice that religion and carry out its requirements. The freedom to manifest religion or belief described in the second part of paragraph 1 is neither absolute nor without limitation. This freedom is subject to the limitations provided in the convention.

The second paragraph of article 9 of the ECHR outlines the framework within which the freedom to express/manifest a religion or belief can be applied. The right to express or manifest religion or belief is subject to five limiting criteria. These criteria, referred to as legitimate aims are “public safety,” “public order,” “health,” “morals” and “the protection of the rights and freedoms of others”3. The Court found the Turkish government’s interference in Leyla Sahin’s rights to be justified in principle and proportionate to the aim pursued in a democratic society.

The ECHR also accepted that it was reasonable to forbid the wearing of the headscarf in university institutions in order to protect the rights and freedoms of others. In the Sahin judgment the Grand Chamber affirmed that “freedom of ... religion is one of the foundations of a democratic society” but underlined that “Article 9 does not protect every act motivated or inspired by a religion or belief.”

The judgment states that “In a democratic society, the right to education ... is indispensable to the furtherance of human rights;” “there is no watertight division separating higher education from other forms of education;” “State[s] ... will be under an obligation to afford an effective right of access to [education facilities that they may establish].” The Court evaluated that the

1 Sahin v. Turkey, (a) joint concurring opinion of Mr Rozakis and Mrs Vajić, para. 2.
2 This is joint opinion of Judges Rozakis and Vajic.
3 Gemalmaz, op cit., p. 1279.
The fact that Leyla Sahin “was refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education, the Court accepted the fact that she had had access to the University and been able to read the subject of her choice in accordance with the results she had achieved in the university entrance examination.” But it concluded that the interference in respect of the headscarf was “to protect the students’ interests.”

The Chamber also found that, in the view of the series of judicial decisions and circulars on the matter, the headscarf prohibition was precedent enough for a law. It stated that Leyla Sahin continued to wear the headscarf in spite of the rulings of Turkish courts, that the interference was inevitable, and that at her enrolment in the university Leyla Sahin might have anticipated a risk that her right to education might be restricted.

The Grand Chamber, quoting judgments of the Turkish Constitutional Court, emphasized that the aim of secularism was to protect the individuals from extremist groups. It also stated that consideration should be given to how an Islam-based practice in a majority Muslim country, where there was a history of extremism like in Turkey, might impact on those who did not observe the practice. The Grand Chamber emphasized the importance of gender equality and women’s rights. The Chamber stated that the state officials’ margin of appreciation should be respected in the light of conditions in Turkey.

2. ASSESSMENT OF THE DECISION IN LIGHT OF THE COURT’S FOUNDING PRINCIPLES AND PRECEDENTS

In examining any limitation of the rights protected by the ECHR, the critical criteria is whether or not a state’s intervention is necessary in a democratic society. This principle ensures that the interference is proportionate with the legitimate aim.

But the ECHR admitted that in Sahin’s case it did not test the legitimacy of the interference in the rights of women wearing the headscarf, because the national authorities’ were supposedly entitled to a margin of appreciation. It is stated that:

1The Turkish Constitutional Court decision (1989/1 E. 1989/12 K., 07.03.1989 RG, AYMKD S.25, p. 149, 151, 153, 154, 155) that the headscarf, “because it was an individual manifestation of religion” contravened “the essentials of free thought,” “the essentials of reason and science” was to some extent significant in the Karaduman decision which was adduced as grounds in the Sahin judgment. In fact, there are some commentators who feel that it is unnecessary examine the judgment of the European Human Rights Commission once the Constitutional Court’s decision has been examined, since the Karaduman decision was used directly as the basis of the Constitutional Court decision; Alperen Vakur, Başörtüsü Yasasının Hukuki Açıdan İncelemesi [A Legal Evaluation of the Headscarf Ban], Istanbul: Human Rights and Freedoms Foundation, (1998), p.43; Akif Emre Oktem, Uluslararası Hukukta İnanç Özgürlüğü [Freedom of Belief in International Law], Ankara: Liberte Publications, (2002), p. 493.

2Gemalmaz, op cit., p. 1284.
“As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities ... Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution’s “internal rules” devoid of purpose. 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 ... 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.”

With these words, the Chamber declined to intervene in the activities of the university officials who were applying the ban.

As the ECHR judge Tulkens stated in her dissenting opinion; The Court’s conclusion was to accept that state authorities were entitled to a margin of appreciation in fulfilling their responsibilities in a sensitive issue such as the headscarf question, that its authority of the judiciary was subsidiary, and that the Court should not set out to impose uniform solutions1. The judgment that rejected the complaint depended to a large extent on this acquiescence.

aa. The decision conflicts with the ECHR’s own founding principles
The ECHR is a judicial mechanism founded with the explicit purpose of preventing human rights violations and establishing universally high democratic standards.2 Its reason of foundation is to protect the rights of individuals against the state. But in the Leyla Sahin decision the Court said that it respected the relevant institutions’ margin of appreciation, and could not set out to alter rules laid down by university officials by bringing to bear principles of proportionality and justice upon those rules. Under these circumstances, the ECHR was in conflict with its own founding purpose under the Convention of removing injustices committed against individuals.

Obviously, a degree of discretion must be granted to national authorities who are fully capable to decide on whether or not a particular interference is “necessary.” The opinions of national authorities concerning relations between the state and religion are clearly of great significance 3. However, this margin of appreciation is subject to the supervision of the Strasbourg structure (the European Human Rights Commission and the ECHR). If a restriction corresponds to a “pressing social need,” it may be reasonable 4. The danger or tension, which makes it pressing, may be very urgent5. Besides in assessing the extent of the margin of appreciation allowed to states, the importance of the restricted right, and the aim of the restriction must be taken into consideration6.

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1 Dissenting opinion of Judge Tulkens in the case of Leyla Sahin v. Turkey, para. 2.
2 Vahap Çaşkun, Zaman (Newspaper) 06.07.2004.
3 The case of Cha’are Shalom and Tsedek v. France, Application No. 274/17/95, 27.06.2000, Para. 84.
5 The case of Serif v. Greece, Application No. 38178/97, para. 53.
None of these considerations were weighed in the Sahin case. The Court embraced that all beliefs deserve respect, but failed to acknowledge the rights of that sector of the public who feel the need to cover their heads on religious grounds. The Court upheld the rights of secular society over those of a group of devoutly religious women, and in doing so, sacrificed the principle of a pluralist society in order to shut headscarfed women out of education.

**bb. Assessment of the Court’s abandonment to leave the matter to the discretion of the domestic authorities, without any analysis**

The ECHR’s refusal to examine the margin of appreciation indicates an a priori acceptance on its part that there is a legitimate ground for the headscarf ban. Legitimacy means, in the last analysis, a commonwealth’s consent for public policies. All surveys indicate that a large majority of the public opposes the headscarf ban imposed on university students. In Turkey the problem is not the headscarf but the ban and the discrimination on grounds of dress. However the ECHR did not bother to explore the validity of claims that the headscarf was a

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1 Levent Korkut, *AİHM’nin Başörtüsü Kararına Tepkiler Devam Ediyor, Strasbourg Yargıçları Oryantalist mı?,* [Reactions to the ECHR’s Headscarf Decision Continue, are the Strasbourg Judges Orientalist?], Zaman (Newspaper), 03.07.2004.

2 In a 1999 Survey of the Turkish Economic and Social Studies Foundation (TESEV) entitled “Religion, Society and Politics in Turkey” found that 76% of respondents felt that it was not right to bar headscarfed students from school, while 16% were of the opposite opinion. In 2003 the Association for Liberal Thinking (LDT) conducted an opinion survey entitled “Human Rights and Freedom of Expression in Turkey,” and found that 70% of participants believed that university students should be free to wear the headscarf. In a 2002 survey of AKART (Academic Research Centre) about political trends, the European Union, unemployment, economic crisis, the earthquake and external migration in Turkey; “66.7% of respondents thought that the headscarf should be permitted everywhere without exception, 15% thought it should be permitted only in schools providing religious education, and 12.7% thought it should be forbidden without exception in all schools and workplaces, and 4.8% thought that the headscarf should be forbidden in public institutions, but permitted in schools.” On that basis, 86.5% of society were, in varying degrees, positive in their attitude to the headscarf, while 12.7% were entirely negative. According to the “Headscarf File” prepared by Milliyet (Newspaper) in 2003, three out of four members of the public opposed the headscarf ban in universities. Gender and age differences did not affect this preference. 75.5% of informants stated “There should be no ban on the headscarf in universities.” In a research series entitled “Research into the political alignment of political party supporters and voters according to their ethnic/religious identity” carried out by the Social, Economic and Political Research Foundation of Turkey (TÜSES), 71% approved of students attending university wearing the headscarf, while 80% approved of the headscarf being worn during parliamentary visits, 81% approved of headscarfs being worn by defendants in court, 90% approved of headscarfs being worn during visits to State offices, 90% approved of headscarfs being worn during treatment in hospital, and 95% approved of the headscarf being worn while doing the shopping”;

3 93% of the Public are Reconciled to the Headscarf, Open Society Institute; *Türkiye’de Muhabazakarlık, [Conservatism in Turkey]*, 11.03.2006, http://www.samanyoluhaber.com/haber-5369.html
cause of discord, and therefore the judgment, which contains generalizations, does not compromise with the facts of the issue that the court was examining.

*cc. Evaluation of the claim that there is no consistent European practice concerning the wearing of the headscarf in European*

In fact, by emphasizing in paragraph 109 that “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,” and making a few statements to the effect that the evaluation of local needs and conditions should be left to the state, the Court left states free to interpret the Convention rights as they choose.

As the ECHR judge Tulkens stated in her dissenting opinion; “*The issue raised in the application, whose significance to the right to freedom of religion guaranteed by the Convention is evident, is not merely a “local” issue, but one of importance to all the member States.*”.

But the Court held that each state had devised its own approach to the issue, that there was no common European standard and that the margin of appreciation left to the state is correspondingly wide. Moreover, the Fourth Chamber expressed the view, with which the Grand Chamber concurred, that:

“A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since rules on the subject vary from one country to another depending on national traditions and there is no uniform European conception of the requirements of ‘the protection of the rights of others’ and of ‘public order’.”

This is a misleading statement since the issue on which policy varies within Europe concerns that the students and staff who wear the headscarf are in pre-university education.

It could be considered as not problematic, under the terms of the Convention, for the state authorities to interfere with the freedom of youngsters fewer than 18 about to manifest their religion, or to require that those who are responsible for the education of youngsters should not manifest their own religious identity. But the case of adult individuals studying at university who are able to make their own decisions is quite different. Actually, there is a shared European standard with regard to application to the universities: “[N]one of the member States has the ban on wearing religious symbols extended to university education, which is intended for young adults, who are less amenable to pressure.”

The claimant Leyla Sahin was obliged to abandon her education in Turkey so she went abroad and was able to complete her education successfully. Because no practice remotely resembling that in force in Turkey can be found in higher education in any other European state.

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1 Dissenting opinion of Judge Tulkens, para. 3.
2 Para. 102 of the case of Leyla Sahin v. Turkey.
3 Dissenting opinion of Judge Tulkens, para. 3.
Even in France, which has been most trenchant in its approach, the ban on religious symbols only applies to state primary schools and high school\(^1\), and does not apply in private schools or universities\(^2\). Turkey prohibits the use of the headscarf in all state and private primary and high-schools. The ban is applied across all levels of education without exception. Nevertheless, the Court asserted, in the face of evidence to the contrary, that there is a lack of clarity in policy in 12 European states.

It was not appropriate to allow an overly broad margin of appreciation to Member states on intervention of the use of religious symbols in universities. As the Fourth Chamber stated in paragraph 53, and as Altıparmak / Karahanoğlu emphasized in respect of national doctrine\(^3\), the educational institutions presented by the ECHR as examples were primary and middle schools, whereas the Sahin case concerns higher education. Students in primary and middle schools are children, whereas students in higher education are adults.

Consequently, we are talking about individuals from two entirely different groups (primary and middle school students, and university students) with entirely different position and legal status. It is clearly controversial for the court, in taking a comparative law approach, to reconcile two very different groups on the same platform and then claim that there is no consistency of approach, and then, on the basis of this assertion, move on to suggest that States should be given a broad margin of appreciation on the use of the headscarf in universities and in their interpretation of the Convention \(^4\). In the Sahin decision the Court alleged that there was no consensus on the matter in order to excuse itself for avoiding a judgment that might have set a precedent for all member countries. In holding back from examining the issue on the grounds that it was within the authorities’ margin of appreciation, the ECHR was neglecting its duty.

In concluding like the choice of the extent and form such regulations must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned, the Court relinquished its own proper function in effect its decision in the Sahin case, the Court suggested that the rights safeguarded by the Convention were reserved for people living in certain countries, and that countries such as Turkey could restrict rights on the grounds of the unique conditions prevailing there. If every state can restrict rights safeguarded by the European Human Rights Convention by showing the existence of special circumstances and a right of discretion, then we will have no need of an international judicial body. If all states can restrict rights under the Convention on the grounds of a margin of appreciation rooted in the

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special circumstances of that country, and the Court refuses to examine this, then no universal standard can ever be established. Thus in the Sahin decision, the ECHR failed to fulfill its target of safeguarding human rights.

3. THE GAP BETWEEN THE SITUATION DESCRIBED IN THE REASONING OF THE JUDGMENT AND THE REAL SITUATION AS EXPERIENCED BY STUDENTS SUBJECT TO THE HEADSCARF BAN

According to the ECHR: “[I]n democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected” However, the grounds which, in the Court’s view, justified the restriction of rights were in direct contradiction with straightforward, concrete matters of fact.

Leyla Sahin made an appeal against a violation she had suffered as an individual, but the decision rejecting her complaint was based on grounds which were unconnected with Leyla Sahin’s circumstances, and which, in fact, had no basis. The judgment contained several factual errors concerning Leyla Sahin’s particular case and of general situation of headscarfed women in Turkey.

Throughout the judgment there were examples of partiality and manipulation in the description of events. In describing events which influenced the judgment, the section commencing with “The Turkish Republic was founded on the principle that the State should be secular ... The defining feature of the Republican ideal was the presence of women in public life and their active participation in society” contains expressions which give the impression of having been written, not by an impartial court, but by those very authorities who were implementing the ban, and attempting to dictate uniformity in dress and in thought.

The Grand Chamber, in its introductory summary of the judgment, states that “presenting the wearing of the Islamic headscarf as a mandatory religious duty would result in discrimination between practising Muslims, non-practising Muslims and non-believers on grounds of dress with anyone who refused to wear the headscarf undoubtedly being regarded as opposed to religion or as irreligious”. This expression is attributed to Leyla Sahin, and illustrates how the Court was misdirected from the start by the government. No such a claim or argument is being put forth in Turkey. A woman who covers her head does not consider herself entitled to discriminate in this manner. Leyla Sahin and her lawyers only claimed that while most students were able to be educated in any garb they chose, those who covered their heads were very directly discriminated against. There is no suggestion in her petition that Leyla Sahin or other headscarfed women count not covering one’s head in any way as “not believing.”

1 The case of Kokkinakis v. Greece, Application No. 3/1992/348/421, 25.05.1993, para. 33
2 Para. 43 and 44 of the case of Leyla Sahin v. Turkey.
3 The case of Leyla Sahin v. Turkey.
This partial approach in the Sahin judgment was combined with generalized assumptions, which were completely ungrounded in the actual situation in Turkey. The ECHR, like the Turkish Constitutional Court, which it constantly quoted, distorted the meaning of concepts such as “equality, pluralism, women’s rights and secularism,” and then used them against Leyla Sahin.

**aa. The principle of accommodating diversity in a shared space, and pluralism**

The Court found the imposition of a prohibition exclusively on headcovering in an environment where everyone was wearing a wide variety of clothing to be appropriate and acceptable. But accommodating diversity within the same space is at the very heart of pluralism. Differences in perceptions about social life (concerning religion, language, race, mode of living, sexual orientation, dress etc) do not prevent people from living alongside one another. Pluralism permits people to bring their identity into shared spaces. The pluralist ideal is a multicultural society in which people respect one another’s identity and allow diversity to flourish without causing mutual harm.

The Court stated that “it is established that institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others. But travelling the path to “peaceful co-existence” surely should not involve expelling students who dress differently. In practice, the prohibition in the universities removed the shared space for communication with people of diverse opinions and severely undermined the “pluralist principle.”

**bb. The principle of equality**

The Grand Chamber claims the principle of equality requires that women should uncover their heads. However, no other form of clothing is forbidden in the universities and even party badges are permitted. The principle of equality should prevent discrimination in access to and use of public services, but in fact, young women with headscarves are deprived of their education.

**cc. The principle of proportionality**

The ECHR stated that the headscarf ban did not impair the very essence of the applicant’s right to education. However, since there is uniformity of education in Turkey, students have no chance to seek other educational alternatives, because the same prohibition applies in private and public educational institutions. When the Court spoke of of balancing interests, it must have taken no account of the realities in Turkey. Leyla Sahin’s exclusion from education breached of the principle of proportionality.

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The claim that habitual forms of religious observance were accommodated

The ECHR stated that the habitual forms of religious observance of Muslim students were accommodated in universities in Turkey. The decision stated that;

“Firstly, the measures in question manifestly did not hinder the students in performing the duties imposed by the habitual forms of religious observance. Secondly, the decision-making process for applying the internal regulations satisfied, so far as was possible, the requirement to weigh up the various interests at stake. The university authorities judiciously sought a means whereby they could avoid having to turn away students wearing the headscarf and at the same time honour their obligation to protect the rights of others and the interests of the education system. Lastly, the process also appears to have been accompanied by safeguards – the rule requiring conformity with statute and judicial review – that were apt to protect the students’ interests.”

Paragraph 118 also expresses similar ideas. Paragraph 165 of the judgment states:

“The regulations on the Islamic headscarf were not directed against the applicant’s religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions.”

At this point the ECHR refused to accept the headscarf as a “habitual form of religious observance.” Yet there is not the slightest doubt that students who wear the headscarf are motivated by their religious beliefs, and it is equally clear that these same students are barred from the university and deprived of their education. Special importance is attributed to the beliefs of members of other religions where necessary. For example, the Turkish authorities have issued circulars excusing Jewish students from sitting exams on their religious holidays. The Higher Education Council only forbids the covering of heads in accordance to the basis of Muslim beliefs. Indeed, it has banned the wearing any kind of hat, beret, or even wig in order

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2 Katherine Bullock, Müslüman Kadınları ve Tesettürü Yeniden Düşünün Tarihsel ve Modern Klişelere Meydan Okumak, Turkish Version Karakalem Pres, İstanbul 2005.
3 Higher Education Council (YÖK), No: B.30.0.GNS.56.65.65, 08.12.1998; “Religious holidays which apply to our Jewish citizens are on the dates indicated below. Please ensure that where Jewish members of the teaching staff or student body so request, they may be deemed as on leave on these dates”. Religious Festivals are Pesach, Rosh Hashanah, Yom Kippur, Sukkor. Similarly, the European Court of Justice, which is European Union’s court, has accepted the demand of a Jewish student who objected to examinations being held on a Saturday. The court ruled that the applicant had refused to enter an examination on a Saturday because of their religious beliefs, and that a measure which forced the applicant to act contrary to those beliefs was a restriction of freedom of religion. Prais/EC Council, 130/75(1976), ECR 1589,EC) Quoted by: Haris and others, 1., Law of the European Convention on Human Rights, p. 365.
to ensure that heads are not covered. It cannot be claimed that a measure, which involves such a specific prohibition, is not contrary to freedom of religion.

**ee. Protection of the rights of others**

The Court judgment suggested that it was necessary to protect women who did not cover their heads from possible violations of their rights. The rights of students who wear the headscarf were actually and very concretely violated. Obstructing the education of those students, who prefer to cover their heads in order to fulfill their religious duties, is to punish those persons for the thoughts that are presumed to be in their heads. Freedoms may not be restricted on these grounds without a clearly defined danger—a hypothetical future risk cannot be considered sufficient grounds.

Yet it is not, nor can be, argued that there is any legal or social need in Turkey which would justify this prohibition. Leyla Sahin had pursued her education wearing the headscarf quite uneventfully up to 23 February 1998 when the new rules came into effect. In this period there were no incidents of hostility or tension between her and the other students. In fact, the government did not assert that the applicant had tried to convince other students to wear a headscarf, or had in any other way obstructed teaching and research activities, or interrupted the normal functioning of the institution. The precedents at the French *Conseil d'Etat* confirm that a headscarf worn by a person in order to express their religious beliefs “cannot in itself be counted as a form of pressure, protest or demonstration.”

A state is not entitled to constrain rights and freedoms on the basis of hypothetical threats. Any symbol, religious or otherwise, may have an impact on persons, who do not use that symbol, and in a society that accommodates people of different religious practices, such an effect is inevitable. What is required in such a situation is not the suppression of such symbols, but the provision of ensuring an environment of mutual recognition and tolerance where those symbols can exist.

According to well-established precedents of the ECHR, the sphere of freedom of thought and expression is very broad, and this freedom is a guarantee of the “democratic society” which is the foundation of the convention. Even views or expressions, which are offensive or shocking to the majority of society, are protected by the Convention, provided that they do not contain incitement to violence. Dress associated with a particular faith is also an expression of belief or conviction. As indicated in the dissenting opinion, “remarks which could be construed as incitement to religious hatred are covered by freedom of expression” according to the Court (Gündüz v. Turkey). Thus it is ironic that manifesting one’s religion by peacefully wearing a

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4 Higher Education Council’s Letter of 27.03.2002, Ref. B.30.2.MAR.0.00.00.01/2959.


2 Arslan, op. cit., p. 85.

3 Gemalmaz, op. cit., p. 1303.
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” (Tulkens para. 2).

**ff. The development of women’s rights**

According to the Court, “The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, without distinction”. Students who wear the headscarf in Turkey are unable to exercise their right to education, a right which is acknowledged to be indispensable to the whole human rights system.

The Court presented “the emphasis placed in the Turkish constitutional system on the protection of the rights of women” as a justification for the headscarf ban. However, the restrictions on the wearing of the headscarf by Muslim women, which were deemed to be in conformity with the principles of secularism and equality, has had a negative effects for the development of women in Turkey. Prohibiting headscarfed girls and women from taking up places in schools, universities and other public institutions has resulted in the exclusion of many girls and women from universities and schools.

There is no benefit for Turkish society in banning the headscarf in university buildings and annexes, and there has also been a heavy cost for the hundreds of thousands of young women who either had to leave university or open their heads against their will, or who never even had a chance to enter university because they were not admitted into the entrance examinations. When the general consequences of the prohibition suffered by Leyla Sahin are considered, it becomes clear that it is simply self-contradictory to claim that women are protected by being deprived of education—as Judge Tulkens points out, “Advocating freedom and equality for women cannot mean depriving them of the chance to decide on their future”.

Women’s rights cannot be protected by telling women what they can and cannot wear, and then, when they fail to comply with instructions, depriving them of the right to education and work. Clothing is not an issue on which other people can or should decide. Clearly, there can be no serious talk of women’s rights in an environment in which they cannot decide themselves whether or not to cover their hair.

**gg. Context of dialogue in universities**

In its assessment, the Court stated that the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the headscarf, through continued dialogue with those concerned, while at the same time ensuring that order was maintained. However, the dialogue concerning dress discrimination was entirely one-sided, since headscarfed students are excluded from all areas of the universities. It

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2 Para. 43 and 44 of the case of Leyla Sahin v. Turkey.
4 Dissenting opinion of Judge Tulkens, para. 19.
is not discriminating against people on the basis of their attire that protects “public order”. It must be remembered that during the five years that Leyla Sahin was a university student, no problems arose in connection with the dress problem. What has disturbed public order is the removal of all dialogue with the exclusion from university premises of, first, students, and then, their mothers.

Here again it is clear that the grounds adduced in the Sahin judgment to justify the prohibition in a democratic society are not consistent with the real facts on the ground in Turkey.

4. LEGALITY OF THE ALLEGATION THAT LEYLA ŞAHİN WOULD HAVE AN IMPACT ON STUDENTS WHO CHOOSE NOT TO WEAR HEADSCARF

Approval of the current practice in the case of Leyla Sahin by ECHR is based on the allegation that those who wear Islamic headscarf would impose their beliefs on those who choose not to wear it. According to the Article 9/2 of the Convention on account of “protection of rights and freedom of others” as a legal aim, the ban on wearing the Islamic headscarf in the universities imposed by the State may be regarded as meeting a pressing social need. The Court’s decision was predicated on the following consideration; “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”.

The Court referred to the decisions of Turkish Constitutional Court in order to support this argument. It also concluded that the State may practice rules to place restrictions on individuals’ rights with the legitimate aims of protecting the rights and freedoms of others and maintaining public order.

The allegation of the ECHR that “the Islamic headscarf may have an impact on those who choose not to wear it” was based on the Court’s decisions in the cases of Karaduman and Refah (Welfare) Party. The Court advanced the idea that the State was entitled to place restrictions on rights of individuals because of the impact on others in the case of Karaduman. It referred to the decisions of Turkish Constitutional Court and its own decisions on headscarf (Karaduman and Dahlab) without relying on any concrete investigations and data in the case of Leyla Sahin. In fact, the reason used to give the State entitlement to place restrictions on the education right of individuals is because of the reasoned impact on others and the established link that was worked up in the case of Karaduman and used in other cases involving Turkey. However, the allegation in the case of Refah Party, which was one of the

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1 Gemalmaz, op. cit., p. 1290.
2 Para. 115 of the case of Leyla Sahin v. Turkey.
3 Gemalmaz, op. cit., p. 1291.
4 The case of Karaduman v. Turkey, Application No. 16278/90, 03.05.1993. Osman Doğru, ibid.,p.355.
5 Gemalmaz, op. cit., p. 1291.
referred decisions in Leyla Sahin case, was already supported by referral to Karaduman decision of the Court.

**aa. Karaduman case does not have a concrete basis**

The decision of the Committee in the case of Karaduman was as follows:

“It is established that institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others.”

According to the Court, in a country where the great majority of the population belong to a particular religion, manifestation of the rites and symbols of a religion without considering the place and manner of such manifestation may have an impact on students who do not practise that religion or on those who belong to another religion. Universities in secular countries should take some measures by putting regulations on students’ dress 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 and from breaking public order.

The justification of the Court was not based on any concrete investigation or data and was just a hypothesis. The justification of the Court in the decision of the case of Karaduman as “in Turkey women who wear the Islamic headscarf have an impact on those who choose not to wear it” does not have a concrete basis. Indeed, the subject of the application of Karaduman was about a woman who wore headscarf as she studied and graduated but wanted her diploma with a photo on which her head was covered. It is very clear that a de facto photo may not violate third parties’ rights and freedom.

ECHR ignored that this hypothesis used in Sahin case was not proved any way. As it is stated in the dissenting opinion of judges:

“Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement of pressing social need and justifying interference with a right guaranteed by the Convention. 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” (Smith and Grady v. the United Kingdom, judgment of 27 September 1999, § 89).

In the Sahin case, the Court did not seek this provision that was required for the others.

In the Karaduman case, the Commission considered the determination of Turkish Constitutional Court that “presenting the wearing of the Islamic headscarf as a mandatory religious duty would result in discrimination between practising Muslims, non-practising Muslims” in Karaduman case. The ECHR used the latter statement of Turkish Constitutional Court and Council of State in Sahin case.

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1 Gemalmaz, op. cit., p. 1300.
2 Dissenting opinion of Judge Tulkens, para. 5.
3 Gemalmaz, op. cit., p. 1300.
There is no concrete evidence to prove that Leyla Sahin’s headscarf restricted the rights of others. The allegation that, by wearing the Islamic headscarf, she had an impact on third parties was wholly unfounded. As it is stated in the dissenting opinion of judge Tulkens, in previous decisions of the Court, “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.”

Turkish and international press criticized the Court’s decision in the Sahin case especially because of the allegation that “she would have an impact on those who choose not to wear the Islamic headscarf” was unfounded.

As it was stated in the minority vote:

“The Court decides that the ban on wearing headscarf was necessary to meet a pressing social need in Turkey’s circumstances” but it avoids showing the concrete reasons displaying the pressing social need. After repeating Article 9/2; it state that ‘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 proselytize or to spread propaganda and undermined- or was liable to undermine- the convictions of others. However, the Government did not argue this was the case and there was no evidence before the Court to suggest that Ms Sahin had any such intention. 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 taken against her.”

There is no evidence suggesting that Leyla Sahin has such an intention:

**bb. The decision is based on probable risks but not on reality**

Leyla Sahin studied in three different universities, two of which were in Turkey, and never broke the order of education in any of these universities. Up until 1998, before the ban was applied, there were many students who wore headscarf and studied in the universities. There was not a single event in which students wearing headscarf restricted others rights during this period.

However, the Grand Chamber, which takes into account false fear, expresses the following statement: “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.” Thus, it assumes that there is a connection between headscarf and extremist and fundamentalist movements. With this assumption, it denies realities in Turkey and justifies its decision a speculative connection.

The Court disregarded the facts that the claim of imposition on society in Turkey is not valid, that there are not any concrete examples justifying this claim, that discrimination is performed against covered students who are deprived of education rights while their friends are allowed to attend the lessons in the universities. Jurisprudence is based on “present events,” not “possible future events.” Every case should be concluded in the circumstances in which the case was opened. It is totally wrong to decide according to the suspicions and future possibilities.

If the assumption that women who wear a headscarf may present a pressure on society is accepted, then women who choose not to wear headscarf and men and women who are against headscarf may perceive covered women as a threat, who can potentially exert pressure on her/himself. In this instance, everyone will think that they have rights to apply to authorities to overcome the threats. Likewise, every covered woman will perceive women who do not wear headscarf as threats.

However, attire is not a matter of threat to the public order. Covering or not covering one’s head or not cannot exert pressure on others’ rights and cannot negatively affect others’ rights. This claim is equivalent to the following statement: “people with long hair have bad influence on those with short hair or they want to restrict the rights of those with short hair so they should be forced to have their hair cut.”

On top of that there is a period of 10 years between the Karaduman case in 1993 and the Sahin case in 2004. The ECHR did not state whether “the issue of pressure on society in Turkey,” which was shown as a base of the decision, has changed or not during this 10 year period.

If a young adult, university student is under pressure in the university, she may be under pressure in every social circumstances. In this respect, the state should take all possible precautions to prevent this. Indeed this matter has already been considered in the recommendation of the Council of Europe Parliamentary Assembly. The Assembly recommends that the Committee of Ministers call upon the governments of the member states, to allow for flexibility in the accommodation of different religious practices (for example in dress, eating and observance of holy days). According to the recommendation, “religious extremism” is the only matter that is out of state’s protection. Thus with the Court’s decision

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1 Para. 115 of the case of Leyla Sahin v. Turkey.
2 Coskun, op. cit.
3 Kerem Altiparmak / Onur Karahanogullari, op. cit., p. 189.
of approving the headscarf ban, they are implying that wearing a headscarf is an act of extremism. However, there was not any single event of extremism caused by the headscarf in Istanbul University where Leyla Sahin studied. If such an event had happened, according to the Court “the duty of State is not to eliminate the parties of the tension but to form an environment of tolerance between groups in conflict”. In a libertarian society it might be possible to say that those who use their freedoms in accordance with their beliefs might create an atmosphere that limit others’ freedoms even if they do not intend that. In such a case the duty of the liberal State is to make legal arrangement for every individual to enjoy their rights in a way that makes sure nobody is forced to cover her head. It is inevitable that differing beliefs form diversity in libertarian society, therefore, exerting limitation on using individual’s freedom by the State allows the danger of creating a social model excluding pluralism and democracy.

**cc. The decision brings an accusation against all women whose heads are covered**

With this decision, the Court does not consider wearing headscarf as an individual or personal choice or as a result of individuals’ belief to practice her religion. The Court approves of the headscarf ban with an assumption that headscarf can turn into a way of exerting pressure upon a certain groups by others. It has not taken into consideration that “pressing social need” should be proven.

Moreover, the Court brings an accusation against all women wearing headscarf by following statements:

> “The Court 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”.

Therefore, university lecturers who support the ban for political aims use the decision against opposers to the ban. Prof. Dr. Taninli assessed the decision as follows: “the decision of the ECHR is a juridical reflection of widespread sensitivity against political Islam in rise in Europe”.

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1 At the same respect, United Nations Committee of Human Rights mentions that the interference against the freedom of religion and conscience must be in proportionate with the legitimate aim that causes to have the freedoms limited, UN Human Rights Committee, Compilation of General Comments and General Recomendations, General Comment 22, Article 18. 48 Session, 1993; Akif Emre, *Uluslararası Hukukta İnanç Özgürluğu*, (Freedom of Religious Beliefs in International Law), Ankara: Liberti, (2002), p. 126.
2 Borovali/Turan, op. cit., p. 4.
3 Para. 115 of the case of Leyla Sahin v. Turkey.
4 Gemalmaz, op. cit., p.60, 55. footnote; Server Tanilli defends that with the final decision of Leyla Sahin v. Turkey, it was the end of the case of turban in entire Europe, Server Tanilli, *Nasıl Bir Eğitim İstiyoruz?*, (How an Education We Want?), Istanbul: Adam Publications, (2004), p. 114.
The approach of the ECHR with this interpretation is loaded with significant problems such as labelling all covered women as Islamic fundamentalist and sacrificing the freedom of religion and conscience for a political aim (the imprisonment of Islamic fundamentalism). As Mr Lagendijk, former co-chair of Turkey-EU Joint Commission, stated, “The base of headscarf ban in Turkey should not be the fear of radicalism. Because radicalism is prevented by democracy, radicalism can be stopped by practicing democracy widespread not by expanding the bans against radicalism”.

Being a university student in headscarf cannot be linked with fundamentalism or extremism, contrary to the implication of the Court. There has not been a single established event that would require the ban on headscarves in Turkey in order to limit extreme political movements. In Turkish universities there was never any event requiring the claim of “presence of extreme religious movements.” As a matter of fact, wearing headscarf is an individual and sincere choice of Muslim women and expression of their religious beliefs and never ever associated with fundamentalism. However, the decision of the Court automatically but wrongly labels all Muslim women wearing headscarf as fundamentalist. This baseless explanation comes to conclusion that that all women who wear headscarves in the world do so out of political and ideological aims.

At this point, the allegation by Court that the Islamic headscarf may have an impact on those who choose not to wear it, is baseless and causes more serious allegations.

5. DOES THE PRINCIPLE OF SECULARISM REQUIRE HEADSCARF BAN?

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1 Gemalmaz, op. cit., p. 1296 footnote 56; Ozdek, op. cit., p. 237.
2 Basortusu Yasagi Savunulamaz, (The Ban of Headcarf cannot be Defended), Sabah (Newspaper), 22.03.2006.
3 A report of the TESEV entitled ‘Religion, Society and Politics in Changing Turkey’, prepared by Ali Arkoglu (Sabanci University) and Binnaz Toprak (Bogazici University), defended that only % 2 error can be occured, the answers for the question of “Why do they cover their heads?” displays that the mere reason of wearing headscarf is not concerned with fundamentallism;
   I wear the headscarf because;
   • It is a mandatory religious duty %71.5,
   • It means I am a part of a political action %0.1,
   • My husband/fiancee wants %1.1,
   • My family wants (except husband, mother-father-brother-sister) %0.2,
   • Of the comfort while going around in the society, not because of my family’s will %1.2,
   • Everyone is wearing it in my environment, it is not suitable for me not to wear %0.2,
   • I suppose that it is the condition of my virtue for a woman %3.4,
   • I did not wear it when I was young, I am wearing it when I get older %7,
   • Covering my head is an integral part of my identity, if it is not covered I feel myself naked in the society %3.9.
The Court stated: the “Headscarf ban in the universities is being practiced on the ground of principle of secularism.” Therefore the ban can be accepted as legal in a democratic society. In the Sahin case the following statements were used:

“Having regard to the ECHR, it is the principle of secularism, as elucidated by the Constitutional Court (see paragraph 39 above), 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 and, in particular, equality before the law of men and women are being taught and applied in practice, 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” (para. 116).

The principle of secularism in a democratic society, where different religions and beliefs are held, requires denominational neutrality in the state in its responsibility in the education process. According to the Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief by United Nations on 25.11.1981, the State should not make distinction, exclusion, restriction or preference for any religion or belief. In this case, secularism cannot mean to discriminate students according to the attire or exclude all religious matters from social life and public sphere. The principle of secularism should take protection of religious practices under guarantee, rather than banning it.

Secularism requires that the State remain neutral on matters of beliefs and religions and opinions and should not take side for any of them. According to the decision in the Sahin case of the ECHR, "Secularism is the guarantee for democratic values, prevents discrimination against any religion or belief and is a common point for freedom and equality." This kind of approach to the description of secularism should have been the guarantee for all students and Leyla Sahin to complete their education. Therefore, the ban is in contradiction with the government undertaking of neutrality policy. In a secular state, there should not be different consequences based on whether Leyla Sahin's decision to wear a headscarf.

Secularism can only be maintained when the State remains equally distanced to each religion, furthermore, it does not require the prevention of people from practicing their religion. Secularism requires maximum neutrality on matters of religion and beliefs and prevention of any positive or negative discrimination among different religious groups by the state. The concerns over religious pressure and the request for prevention of these concerns do not require or justify religious suppression. The basic principles are set for the protection of human beings; and basic rights cannot be sacrificed for protection of these principles. Secularism, being one of the principles of the State in Turkey, does not require the banning of headscarves in universities.

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1 Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief by United Nations on 25.11.1981, md. 2(2)).
3 Zühtü Arslan, ibid., p.87.
The 2nd article of the Turkish Constitution states that the Republic of Turkey is a secular state. The legal ground of the 2nd article expounds, "Secularism, which is never equal to atheism, means that everyone is free to choose their religion or belief and religious sect, to practice it and that everyone should be treated equally regardless of their religion."

At this point, secularism in Turkey should result in no pressure to individuals on the matter of covering their head or not, "It is state's responsibility to protect women's freedom to choose, not to limit. It is state's responsibility to provide a safe environment for women in order them to have right to choose without pressure or threat!".

Secularism in Turkey suffers from a shift in meaning. Secularism in Turkey does not mean neutrality of the state towards religions and beliefs, rather it is the formulation of religions by the state. The State in Turkey works to formulate and manage religions. The State does not consider religions that are not consistent of its description legal, regardless of the religion. For this reason, secularism in France and Turkey is not an actor of social harmony, but an agent of conflict and chaos.

As Erdoğan stated, the approach of judicial bodies and bureaucrats are as follows:

Secularism in Turkey does not have so much in common with secularism in Western countries which is based on differentiation and neutrality between state and church. The secularism model in Turkey is based on state control over religions and prejudgment against religious matters. The main authority giving power to state to control over religion is Department of Religious Affairs in Turkey. Therefore the former President Sezer said that: "Secularism is already described in the Constitution and in the decisions of Constitutional Court. Therefore it is not valid to describe it according to the legal ground of the relevant article and these approaches are not consistent with the Constitution". With same point of view, former head of Constitutional Court, Mustafa Bumin, stated that the headscarf ban, which prevents students from obtaining a university education and civil servants from working, has become

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2 There is Department of Religious Affairs(DRA) under the control of Republic of Turkey’s Prime Ministry in Turkey. According to the Law no. 633 article 1 “it is DRA responsibility to govern the services about Islamic beliefs, practices and morality, to enlighten public about religion and control places where religious practices are done”.
   http://www.diyanet.gov.tr/turkish/mevzuat/mevzuatkanunicerik.asp?id=1419. According to the Article 136 of 1982 Constitution, DRA functions in accordance with the principle of secularism, with aims of reaching nation’s solidarity and out of all sorts of political ideas and opinions. The government via DRA provides education and salary to ecclesiastics, builds mosques, controls religious education in schools and determines the content of khutbas in mosques.
4 “Interesting word from Sezer: ‘Secularism does not mean freedom of religion and conscience’, Zaman (Newspaper), 06.02.2007.
universal and therefore it is now impossible to lift this ban even by the TBMM (Grand National Assembly of Turkey)\(^1\).

Regarding headscarf wear, the Constitutional Court of the ECHR stated that “it is forbidden to demand for freedoms on rights which are not compatible with secularism\(^2\);” “secularism is one of the regulatory principle of social and cultural life and philosophy of life in Turkey;” “secularism is a sovereign concept over other constitutional principles\(^3\);” “it is the starring and noble principle of Turkey” and that “other constitutional principles - democracy, rule of law and human rights - are all dependent on it and they have only a constitutional authority commented according to secularism”

Therefore, in accordance with this kind of secularism, the public sector in Turkey is described as a secular area where there should not be any religious symbols or covered women present. The practice of religion should be restricted to the private life and the expression of it prohibited in public areas\(^4\). However, the public sector is a place necessary for reaching a democratic society, where there are no limitations on differentiations and the practice of expression and media structure are guaranteed and public opinion is obtained with clarity\(^5\). However, public area in Turkey has tried to be turned into a place where covered women cannot be present.

Whereas university lecturer Vahap Coşkun stated that it is not possible to build a rule of law that solves current issues of different social groups when dealing with the concept of a public area that is open to discussion in political philosophy. The headscarf ban from which university students and civil servants (and wives of individuals waiting to receive promotions in government positions) suffer from is a problem that influences their life adversely and that should be solved immediately. Right juridical regulations cannot be made on a conceptualization of the public sector that differs according to different individuals. It is a concept which neither legitimizes the behavior against headscarf nor ends the argument on it, because it has not reached a conclusion on the description of “public area” that is accepted by all\(^6\).

\textit{aa. The concept of secularism provided by the ECHR for Turkey}

In the Sahin case, the ECHR accepted a stance of the Turkish Constitutional Court that is not compatible with international law. It could not submit a juridical or legal reasoning that would justify the understanding of how “wearing the headscarf is against secularism.” The ECHR

\(^1\) Vahap Coşkun, ibid.
\(^3\) Official Gazette No. 20216, 5 July 1989.
\(^6\) Vahap Coşkun, “Public area do (can) not solve headscarf problem”, Yenişafak (Newspaper), 22.08.2007.
acted against its own principles. It did not consider that a state, which should be equally distanced towards each religion, should not intervene in Leyla Sahin’s practices of her religion.

Assessing the ECHR’s views on the headscarf and principle of secularism, Judge Tulkens, the dissenting judge from the opinion of the court, stated:

“In Sahin case, it is considered that wearing headscarf violates the principle of secularism. (At this point) the court took side on the matter of relation between wearing headscarf and principle of secularism.”

Judge Tulkens was referring to the Article:

“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 (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 proselytize 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 Sahin 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 taken against her” (Tulkens parag 8/2).

However, although the Grand Chamber stresses that in a democratic society the right to education is indispensable to the furtherance of human rights (see paragraph 137 of the judgment), it is surprising and regrettable for it then to proceed to deprive the applicant of that right for reasons, which do not appear to me to be either relevant or sufficient. The applicant did not, on religious grounds, seek to be excused from certain activities or request changes to be made to the university course for which she had enrolled as a student (unlike the position in the case of Kjeldsen, Busk, Madsen and Pedersen v. Denmark, judgment of 7 December 1976). She simply wished to complete her studies in the conditions that had obtained when she first enrolled at the University and during the initial years of her university career, when she had been free to wear the headscarf without any problem” (Tulkens parag 15).

**bb. The perception of the European Union on secularism**

It is paramount to the EU to protect an individual’s rights to freedom of religion. International agreements and constitutions of European countries contain a juridical principle focused on two subjects. They are:

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1. To guarantee the right to express his/her religion to people related to other religion (or people of no religion) and to guarantee that this right does not restrict political and civil rights.

2. To give permission to people related to any religion to come together, practice their beliefs and establish legal foundations and religious community within the limitation of law.

The boundary between freedom to express religion and secularism in EU countries is not very clear. In contrast, pluralism is established on the basis of autonomy and collaboration. The difference between individual national systems is minimized by the ECHR’s case laws.

At this point, it is not possible to reconcile the decisions of Turkish jurisprudence on secularism with statement of international human rights. The principle of secularism does not prevent people from practicing their religion. Former Head of Court of Appeals Professor Sami Selçuk stated:

“Secularism means that the state must keep a principled distance from all religions and must not interfere in their practice. Religions and members of them do not attempt to weaken the neutrality of the state. In secular states, religions and state are strictly separate from each other. However, secularism in Turkey is perceived that religion should be practiced according to the way the state determines. Secularism in Turkey is formed by the decisions of the Constitutional Court and Council of State. The decision on the case of headscarf is concluded according to the circumstances of the state. Courts, the Constitutional Court in particular, cannot make eligibility assessment. They only make decisions within the boundaries of laws. The Constitutional Court and Council of State bring forward that covered women have ideological aims and therefore it is not allowed. Courts interfered in individual’s private life and judged them accordingly. That is wrong. If someone says that she wears headscarf because of her belief, it is not possible to prove the opposite of what she says.”

A secular state must be neutral towards its citizens. Because it is neutral, it cannot make any discrimination (positive or negative) towards the religion. Civil and political rights are not dependent on prescribing to religion. The State must behave equally and respectfully to all religious beliefs. However, the headscarf ban means that people are prevented from practicing their religion.

Secularism in a democratic society should be adopted not to eliminate religion from public life but to protect individual’s rights and freedoms and to make the government keep a principled distance from all ideas. As long as it does not restrict others’ freedoms or threaten public health or public, it is an unacceptable practice to limit use of symbols and religious practice and rituals in public area in democracy. This practice can only be seen in totalitarian regimes.


2 Sami Selçuk : “Mustafa Bumin’s conversation about secularism, full of scientific errors, 06.05.2005, http://entelektuel.proboards24.com

Therefore, approval of the practice based on the principle of secularism attributed to the decision of the Refah Party by the ECHR is wrong.

**cc. The assessment of the attribution of the Refah decision to the Sahin case**

The ECHR considers intervening with covered students justified in a democratic society using the Refah decision as a precedent. The decision summary states:

> As the Chamber rightly stated (see paragraph 106 of its judgment), the Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention (see Refah Partisi and Others, judgment cited above, § 93)(parag 114).

It is possible to see the influence of the Refah decision in various places of the Sahin decision. Actually the Sahin case and Refah party case form a united case, especially when Chamber No.4 first referred to the decision of Refah Party and made specific references to it:

> 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 (see Karaduman, decision cited above; and Refah Partisi and freedoms of others” and the issues at stake include the protection of the “rights 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 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.” (Para. 115)

At this point, according to the ECHR the headscarf is a political symbol reflecting a wish to impose a regime based on religious practice. In the decision the following statements are written referring to the Constitutional Court:

> “In this context, it should be noted that one of the points considered by the Constitutional Court regarding two decisions on repeal of political parties was use of religious symbols for political aims1. It was considered that speech of leaders of these political parties regarding freedom of

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wearing headscarf in public area and universities means that they want to establish a regime based on Sheria.(parag 32)."

There is no debate on whether there will be a regime change in Turkey that will establish an Islamic law. As a matter of fact, there are many reports proving that such an assumption is not true in Turkey’s circumstances. Having a majority of Muslim people does not make the possibility of founding of a religious regime a near threat.

As it is stated in the reports of TESEV, it is not possible to decide that the state departs from the principle of secularism when the number of religious people increases. The research conducted in 1999 and 2006 about religion, society and politics showed that the majority of people in Turkey do not consider secularism to be in danger nor that the foundation of a religious state is supported. Beyond perceptions, there is no indication that the foundation of a religious state is supported by a majority of Turkish people. In fact, there is a decrease in number of people supporting a religious state. The percentage of answer to the question of “do you want a religious state of Sheria?” decreased from 21% in 1999 to 9% in 2006.

Therefore, it is wrong to use the Refah Party decision to precedent the Sahin case.

aaa. The true nature of the ECHR and the establishment of a judgment by from two differing cases of different claimants.

The Refah party case and Leyla Sahin’s case are such different cases that one cannot be used as precedent for the other. There is a difference in nature regarding “identity, statute and taking over the power” between two the cases. The Court established a judgment by establishing connection between two cases of different claimants. The subject in Refah party case is one regarding a political party that has an opportunity to take power (and indeed did take power). According to the data validated by the Constitutional Court and the ECHR, although the process of repeal of a political foundation which whose goal is to establish an Islamic order and does activities towards there goal is consistent with the Constitution, the component turning this threat into a danger is that a political party expresses these opinions from high positions. Leyla Sahin is an individual who applied to the ECHR citing a violation of her rights. As Gemalmaz stated it has to be explained by the Court how the automatic and inevitable relation between Leyla Sahin and covered women in Turkey and the Refah party, whose repeal was not found against the Convention, is established.

In the Sahin case, the is discussion is of an individual whose rights are violated. There is not present a chain of action-hidden or obvious- which would imply or allow imposing a mode of

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2 “Religion Society and Politics in Turkey in Change”, TESEV, ibid. p. 94, the percentage of the negative answer to the question of “do you want a religious state of Sheria?” was %76 in 2006 and %68 in 1998. The percentage of positive answer was %15 in 2006 and %11 in 1999.
3 Mehmet Semih Gemalmaz, ibid, p. 1302.
dressing forcefully on people. In other words, there is an incomparable difference in nature regarding “identity, statute and taking over the power” between the two cases.

At this point, the point open to discussion in the Sahin case is not that the Court makes use of the data of a previous case but the Court did not explain how and to what extent the data from a former case influenced the decision of the latter case although the claimants and context are totally different.

But according to the Court:

“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 (see Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II). (para.35)

The Court made a direct connection between the Sahin and Refah cases. It is wrong to base the decision of a case for an individual right into a case for a political right. Furthermore, the decision of the ECHR regarding the repeal of Islamic-oriented political parties in the case of the Refah Party is very different from those of others. The ECHR made a mistake when it included the decision of the Constitutional Court in the Refah decision. Referring to the Refah decision and the decisions of the Constitutional Court resulted in a judgment, which is in contradiction with the facts.

6. THE ECHR’S ALLEGATION REGARDING THE HEADSCARF FOR BEING CONTRADICTORY TO GENDER EQUALITY

In the case of Leyla Sahin the ECHR, referencing the judgments of Turkish Constitutional Court, declared that wearing of islamic headscarf is against gender equality.

In the decision it is explained that:

“In the Dahlab case, which concerned the teacher of a class of small children, the Court stressed among other matters the “powerful external symbol” which her wearing a headscarf represented

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1 Mehmet Semih Gemalmaz, ibid, p. 1303.
2 Bekir Berat Özipek, “Regarding Human Rights, Islam and Europe in Turkey”.
3 Mehmet Semih Gemalmaz, ibid, p. 1312.
and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf 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” (para.111).

Sahin’s decision led some comments such as “In one of the decisions regarding Turkey, the ECHR gave the judgement that headscarf is incongruous with man-woman equality. The Court is now generalizing this component. The Court also considers pressures and compulsions on women about wearing headscarf contradictory to man-woman equality. The Court appraises that women are being humiliated and an inequality is generated between two genders”.

The assertion of the ECHR in Sahin’s case that the wearing of headscarf is incongruous with “gender equality” means that it is discussing an individual’s religious beliefs. It is not possible to reconcile the Court’s biased world view that judges whether wearing a headscarf, which is worn only for religious reasons, is good or bad, with that of an objective work. Courts cannot pass a judgement regarding religious issues. They can only determine whether the restriction of a right in a contract is contradictory to that the contract itself. Besides, in jurisprudence, it is stated that contracts have no authority to define “religion” and the content of this concept is left individuals to judge, save for the restriction of its manifestation provided.

The ECHR stated “wearing headscarf is against the gender equality and not harmonized with human rights principles and tolerance These evaluations are more generalized, abstract, prejudiced and have no legal nature. Moreover, the Court mentioned the possible proselytism effect instead of assessing whether that kind of events happened during the applicant’s working life. However, it is possible to comment on legitimizing any kind of restrictions on rights and freedoms on the basis of possibilities.

An individual’s choice to wear a headscarf is nobody’s business but his/her own. The important issue is how women wearing the headscarf perceive the headscarf itself and the way of looking at this religious issue. Moreover, wearing a headscarf is a religious duty that cannot be attributed solely to Sahin or other women wearing a headscarf. The Department of Turkish Religious Affairs, an official institution under the Prime Ministry, verifies that it is a religious prescription. In other words, in Turkey, The Department of Religious Affairs clearly confirmed that wearing a headscarf is a manifestation of the liberty of conscience and religious. The Head of High Commission for Religious Affairs upheld that “wearing of headscarf that covers the hair, whole head, neck and throat by hanging it on collar is a distinct

1 Ibrahim Kaboğlu, Constitutional attorney and the previous Head of Prime Ministry Advisory Committee for Human Rigths “The Ban on Headscarf is legal”, 11.11.2005, Milliyet (Newspaper).
3 Zühtü Arslan, ibid., p. 80.
order of Islam with the agreement of the Quran, Sunnah and Islamic scholars. It is a religious duty for Muslims to obey these orders. In a secular country, people have the right to choose whether they put this duty into practice or not, and judicial authorities have no authority to discuss the accuracy of a religious duty.

In Turkey, at the level of civil society, there is no problem between people wearing headscarves and others preferring not to wear it. The main problem originates from the government’s interference in both society and individuals with its goal to modernize the state and official ideology. This has been the main cause of politicizing the issue. The headscarf ban passed by the government has been justified by arguing that the headscarf is worn as a “political symbol” or to support a theocratic government and that it has a “reactionary nature.” However, it is not possible to claim that millions of women all wear headscarves due to some “political reasons.” As it can be due to their religion, customs, or political choice, etc., it would be inaccurate to make a generalization about that issue.

Moreover, in the framework of human rights, women can wear a headscarf for any reason, even for political ones, and unless they force others to do so, their choices should only be considered as an individual preference that should be respected by the law. In fact, The Department of Religious Affairs stated that the headscarf is an Islamic obligation and The Human Rights Commission of Grand National Assembly of Turkey confirmed that wearing headscarves is a human rights issue.

1 Decision of the Head of High Commission for Religious Affairs in 03,02.1993 number 6, regarding “headscarf”.
3 In Turkey, normally the government does not interfere with individuals’ attire, but this ban has been applied, as “headscarf is being worn as political exploitation in some circles”. However, either imposing a ban according to assumptions and subjects having no legal grounds like “some circles” or “exploitation” and also punishing all women wearing headscarf due to the acts of “some circles” are not acceptable. Moreover, practically it is impossible to determine who wears headscarf for religious obligations, political expression or any reason and also not a duty of government. On the contrary, what government should take is to remain neutral and legally cover the right of women regarding their preference whether to wear or not to wear a headscarf.
4 The Head of High Commission for Religious Affairs within the Department of Religious Affairs, “Constitutional authority” being responsible for delivering opinion about religious issues, has announced that “covering the head with a scarf is an Islamic obligation. (30.12.1980, N. 77, 03.02.1993, N. 6).
5 However, this commission’s attitude regarding human rights in general and especially the right of religion and conscience is not always stable and affirmative. The Commission’s attitudes can be varied according to political processes and parties accounting for the majority in the Parliament. For instance, in periods of governments established after 1997, in parallel with the authorization of political regimen and the decrease of Parliament’s initiatives, the role of the Human Rights Commission of Grand National Assembly of Turkey has changed and started judging opposite the previous decisions or taking no actions about violations. On the contrary, after 2003 an affirmative alteration in its attitude can be notified. Since this report was written, the Commission has tended to work by drawing an attention to human rights problems and being all in favour of human rights regarding some violations.
The ECHR accepted the interpretation, which states that women wearing headscarves can be deprived of some of their rights, for the purpose of promoting “gender equality,” but on the other hand, they ignored how the results discriminate due against women wearing headscarf who cannot pursue their study or work and are isolated from social life and unable to resist against anymore pressure.

In Turkey, a number of surveys conducted demonstrated that there is no pressure on women regarding wearing a headscarf1. On the contrary, women wearing headscarves face many restrictions and limitations. Unemployment and restricted education are constrains and leads to moral pressure because they are regarded as inferior. On top of that, in Turkey, there is a common assumption that covered women are less educated, country and less developed and as a result, this may lead to lower preference towards wearing a headscarf. However, if covered women are thought to be under the pressure of theirs family, it is necessary to prevent it by bringing the women into a position in which they will have the power to resist that kind of pressure. Having economic freedom and sufficient education could be the way to accessing that power. Therefore, it would be a serious irony to support the gender equality justification of the headscarf ban, since it forces many covered women to stay at home.

At this point, it is necessary to evaluate the rate of participation of women in public life in Turkey. According to legislation in Turkey, women and men are equal and discrimination is prohibited2. Human rights should be continuously implemented in everyday life but in Turkey surveys investigating the extent of women’s right exercised by women have shown that thus have not been put into practice.

**aa. The rates of women’s participation in the social life in Turkey**

There is a direct correlation between the development level of a country and the rate of women’s participation in the labour force, political and decision-making processes. The development of a country depends on having a higher quality of life in every aspects, i.e higher income, more quality in education, higher standards in health and nutrition, lower rates of poverty, more equal opportunities, more individual freedoms and a richer life style.

Turkish modernization and westernization has been put into practice by some defining symbols and women have been the most integral part of the country’s modernization3.

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1 The surveys showed that women do not wear headscarf because of pressure put by society and their family. In a survey called Religion, Society and Politics in developing Turkey (2006), the question of “What would you do if all women around you prefer taking off their headscarf?” was answered by the following answers; “I would not take it off” with the rate of 87.7% and “I would take it off” with the rate of 3.6%. p. 64. In other words, it showed that even if the assumptive social pressure would be lifted, women wearing headscarf would still continue to do it.

2 According to 10th article of constitution, “Women and men have the equal rights. The government supposed to this equality providing to pass to the life.(Date of ratification:7.5.2004, Official Gazette:22.5.2004-25469)

3 Ümit Aksoy, “To wear a headscarf and democrates not showing their true colours, the story of a headscarf”, Anlayis magazine, p.35, April 2006.
Turkey, which has the 17th biggest economy in the world, ranks 105th out of 115 countries\(^1\) on the World Gender Map. Turkey lags behind all EU member states and even some Islamic countries in terms of gender-based inequalities\(^2\).

However, the surveys show that in Turkey 22.4 % of women and girls over 12 years old are illiterate and for boys in the same age range this rate is only 5.9\(^3\). Among the OECD countries, Turkey was ranked the last with low 27% participation of women in the labour force\(^1\). Similarly, according to the results of the July 2007 general election, the ratio of women in Parliament rose 9.1% from 4.4%. Despite all the campaigns in this issue, the ratio has remained well below the world average target of 17.3\(^5\). These percentages reflect the general statistics.

Despite all modernization claims, the rate of women with economic freedom is quite low in Turkey. More than 5 millions of women are illiterate and according to UN sources every year about 600-800,000 girl do not attend school\(^6\). Therefore, to increase the number of girls attending schools, campaigns called “Let’s go to school, girls!” have been mounted with the help of UNICEF.

All in all, special attention should be given to the development of education and women’s rights to encourage women to participate in the public sphere. However, since 1998, the limitation applied very strictly too many youngsters wearing headscarves, who want to get an education at schools and/or universities and participate in the public life, is becoming an obstacle for these efforts to be successful.

**bb. The effects of the headscarf ban on women**

Attire limitations can hinder the relationship of women wearing headscarves with society. They have been discriminated, isolated and kept away from the social and political life. Turkey, where both modernization and development of women’s right are aimed, ignores women’s rights to be an individual, receive education, work and be treated equally by without any kind of obstacles.


\(^2\) Turkey, which ranks the lowest among OECD countries in human development index rates, ranks 84th among 177 countries in human development index. UN Development Program 2007-2008 Human Development Report.

\(^3\) KSSGM and United Nations Development Program, Turkish Statistics Institute www.die.gov.tr/tkba/CEDAW-Ulke.

\(^4\) Women the world over find veil limits job choice, Washingtonpost, 22.08.2007.

\(^5\) World Average According to the data at www.ipu.org on 30 June 2007 is % 17.3.

\(^6\) Prof. Dr. Nurselen Toygar, the Head of Women’s Issues Research and Implementation Centers (EKAM), Ege University, stated that 8 million women are illiterate in Turkey. Despite many attempt, 640,000 girl still do not attend school. It is estimated that the rate of women university graduates in population is only 3%. Among 187 countries, Turkey was ranked 165th regarding the representation of women in Parliament. 57% of women face physical violence in the first day of their marriage. Besides, 90% of domestic violence is applied to women and 9% of them do not need to lodge a complaint against them as they find it normal. “Half of women face physical violence in the first day of their marriage”, 08.03.2007, Radikal (Newspaper).
In the decision mentioned above, there is not a single argument that affirms what affect wearing a headscarf has on gender equality. It is also possible to claim that these statements regarding headscarf, which one cannot expect an unbiased court to make, are partial. As a matter of fact, “in the motion brought by the European Parliament about the role of women in the social, economic and political life in Turkey” on 13 February 2007, the European Parliament determined that attire discrimination had lead to many violations in working life.

In 2005, CEDAW stated the negative effects of the discrimination in education in 32 meetings. In the end, they recommended that it is very worrying to see that “the rate of being educated and registration to a school at any level of education is very low among women and even the rate of finishing the school is very low among the ones who are already registered to a school” and “it is necessary to take into account the effect of the headscarf ban at schools and universities upon girls and women”.

Therefore, it is not acceptable to justify the headscarf ban on the basis of the ECHR’s conclusion that the headscarf is against gender equality, first decided in the Dahlab case and then repeated in the Sahin case. The court committed a mistake because of their prejudice.

However, the statements used in the Sahin decision, have no basis in hard facts in the Constitutional court’s decision:

“Everyone was free to choose how to dress, as the social and religious values and traditions of society also had to be respected. However, when a particular dress code was imposed on individuals by reference to a religion, the religion concerned was perceived and presented as a set of values that were incompatible with those of contemporary society” (para.39).

The following statement, mentioned in the decision, is not appropriate for an unbiased court:

“In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, 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” (para.116).

This point of view is parallel to the comments alleged by some university lecturers, “headscarf is a like a rosette emphasizing the women’s second class status and also indicating the desire

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for sheriah rules as a men dominant, feudal symbol". The Court is not an institution that can make decisions regarding an individual’s religious beliefs or evaluate whether religious duties are appropriate to contemporary values. Therefore, in law courts processed for people whose rights are violated due because they implement their religious duties, the statement of the court concerning the headscarf itself is a mistake. As it was stated in the dissenting opinion Judge Tulkens, it is not possible to accept this situation on the basis of legal grounds.

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 on the basis of Article 8 (Keenan v. the United Kingdom, judgment 3 April 2001, § 92; Pretty v. the United Kingdom, judgment of 29 April 2002, §§ 65-67; Christine Goodwin v. the United Kingdom, judgment of 11 July 2002, § 90).

However, it is very clear that students wearing headscarf at universities agree with content of their study and do not require any special exemption for some parts of it due to religious reasons. It is a fact that, women do not wear the headscarf as a religious symbol as they always wear it in their life.

The ECHR’s decision concerning the religious applications is wrong for it digresses from its purpose to promote human rights.

7. EVALUATION OF CRITERIA OF DISCRIMINATION AND IMPARTIALITY

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1 Emre Kongar “Political aspects and the headscarf problem” Cumhuriyet (Newspaper)16.08.2004, V. 28803 p. 3. The Writer assumes that women wearing headscarf accept the dominancy of men and feudalism and can not wear a headscarf as an individual. The writer can not find any crude fact to support his argument and he just ignores the fact that this ban prevents women having a job and economic freedom and also leaves them uneducated and isolated from the society.

2 Cevat Özkaya, “The ECHR did not pass the exam for freedom, now it’s Europe’s turn”, 20 November 2005, Yenişafak (Newspaper), http://www.tumgazeteler.com/?a=1163268

3 Dissenting opinion of Judge Tulkens, para.12.
The headscarf ban violates right to education, freedom of thought, religion and conscience\(^1\). Amnesty International has reported that the ban is discriminatory and too strictly in universities\(^2\).

The ECHR concluded in the Sahin case that intervening with to Leyla Sahin’s education is to protect the principle of religious neutrality. It was explained in the decision as below:

(With reference to Karaduman decision and decision of the Constitutional Court) In addition, in Turkey, where the majority of the population were Muslims, presenting the wearing of the Islamic headscarf as a mandatory religious duty would result in discrimination between practicing Muslims, non-practicing Muslims and non-believers on grounds of dress with anyone who refused to wear the headscarf undoubtedly being regarded as opposed to religion or as irreligious. The Constitutional Court also said that students had to be able 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 higher-education institutions 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. (para. 36)

However, the Sahin decision could not still clarify whether the headscarf ban serves to preserve religious ‘neutrality’ or that the ban, itself, is a kind of ‘discrimination.’ Akif Emre explains that the allegation that the religious freedom to wear a headscarf could create discrimination among people of the same faith is a logical error\(^3\). By the same logic we could conclude that the freedom to attend mosque creates discrimination between people who attend and who do not attend mosque, thus, we should close all mosques. Just like the headscarf, daily prayers are another kind of worship. However, not performing daily prayers is not a sign of opposition to religion or being irreligious. It is also true that wearing a headscarf does not the refusal to wear a headscarf is an opposition to religion or being irreligious. Practically speaking, when we look at social life in Turkey, those who refuse to wear a headscarf have never been regarded as opposed to religion or irreligious. Wearing a headscarf is seen as a personal preference. Thus, there is no tension between students who have different religions, faiths and religious behaviors. People living in democratic and secular countries have the right not to practice rules of religion as well as the right to practice them. The Grand Chamber’s statements, which are largely based on the interpretations of Turkish jurists, are not in accordance with the facts in Turkey. In this context:

- There is no pressure on women in Turkey to wear some certain clothing. On the contrary, women are deprived from their rights to education, to work, when they wear headscarf.

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\(^3\) Akif Emre, 26.04.2005, Yenisafak (Newspaper).
- Neutrality in education can only be provided by that the State stays equally distanced to all citizens who have different thoughts, faiths and clothing styles and not by introducing limitations to anybody’s essential rights.

- It is an obvious mistake to violate concrete rights of women wearing headscarf on ground of the possibility that 'the other students may be affected negatively.

- Pluralism cannot be nurtured by excluding people from universities due to their different thoughts.

- Having legal goals cannot justify the deprivation of covered women from education.

- Secularism cannot be an excuse to punish people by depriving from education due to their religious practices.

- We cannot form a mutual respectful atmosphere by forcing one side to abandon practicing their faith.

- Gender equality cannot be ensured by leaving who women wear headscarves uneducated.

- While egalitarianism is the ground for freedom for all the other types of clothing, it cannot be the basis for banning only headscarves. Allowing covered women to obtain education does not create discrimination; on the contrary, depriving them from education creates real discrimination.

Therefore, the ECHR incorrectly used the principles of nondiscrimination and neutrality and thus ended with an erroneous decision.

### III. TURKISH JURISPRUDENCE AND THE GROUNDS OF THE COURT FOR UPHOLDING THE INTERVENTION

#### 1. The consideration of the ECHR on the legality of the intervention

The ECHR ruled on the headscarf ban that had been implemented in universities as legally justifiable. The Court decided that the intervention has a legal base in domestic law and this base is applicable on individuals and its application is justifiable.

The ECHR stated that restricting intervention women who wear headscarves is justifiable, because it does not break the case laws of the Constitutional Court of Turkish Republic. The ECHR alleged that the ban is legally justifiable on the grounds that the Turkish Constitutional Court had ruled on related cases that wearing a headscarf by for religious reasons is contrary to the principles of the Turkish Constitution.

The court based its consideration on the precedent of previous case laws. However, the structure of Turkish jurisprudence was totally misunderstood and quoted incorrectly. The ECHR assumed that Turkey, like Strasbourg, also relies on precedents. The Sahin decision showed us that the Turkish jurisprudence system could be explained correctly to the judges.
coming from different jurisprudence systems however, the Court did not take these points in
the law suit into consideration.

2. The decision contains some partial legal grounds

In the sections of the decision titled ‘History and Background’ (article 30-53) and ‘Relevant
Law and Practice’ (article 29), the ECHR quoted some provisions that could be interpreted
against the applicant. However, the decision does not include the provisions that could be
interpreted for the applicant at all. For instance, the Court cited the circular of Higher
Education Council, dated 1982, that forbids wearing of headscarf. On the other hand, the
Court did not mention about the same Council’s circular, dated 1984, that ‘headscarf could be
worn when it has a modern style’1. It was also stated that the circulars and Court decisions
were the grounds of the ban, and Ms. Sahin should have known this. However, it was a well-
known fact that the article 13 of the Constitution regarding essential rights has not been
applied in Turkish jurisprudence. In addition, the existence of articles of the Constitution (125
and 153/) declaring that court decisions do not have the authority of legislation was ignored.

3. The ECHR puts the court decisions before the laws

When the ECHR was considering the legality of the ban, it relied on the circulars and court
decisions. However, it ignored the articles of the Constitution prohibiting the limitation of
essential rights by circulars or regulations.

Article 13 of the Turkish Constitution denotes the conditions under which the rights can be
limited:

“Fundamental rights and freedoms may be restricted only by law and in conformity with the
reasons mentioned in the relevant articles of the Constitution without infringing upon their
essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and
the requirements of the democratic order of the society and the secular Republic and the principle
of proportionality.”

The constitution, dated 1980, does not include any articles that put limitations on clothing.
There is no law in Turkey denoting on the headscarf.

Only law can limit rights and freedoms, and this rule was put into place to prevent arbitrary
actions of administrations. The ECHR broadened the spectrum of provisions that can
introduce limitation on rights. The power of the Higher Education Council does not include
any limiting provision and amendments on circulations, and regulations do not have the power

1 The Higher Education Council’s decision, numbered 84.35.527, dated 10th of May, 1984; ‘....after
consideration of the subject that some women students (though their number is law) wear headscarf in
some of universities despite the fact that it was ordered not to wear headscarf before and the decision
was made by the majority of the members of the Council that wearing of headscarf should be
effectively prevented, however headscarf could be worn when it is worn in a modern style so called
‘turban’.
to introduce legal ban on rights. However, these facts were overlooked. Instead of citing it’s own case laws, the Court cited Turkish Court’s decisions and Turkish jurisprudence essential references.

Since the Higher Education Council cannot quote any written law provision as grounds to ban the wearing of headscarves, it quotes court decisions instead. Gemalmaz follows, “Allowing the wearing of headscarf is not possible due to Turkish Constitutional Court’s decisions. The Council of State considers that the punishments for not complying with the headscarf ban are legal, too. Therefore, one of the grounds for headscarf ban is case-laws.”

The ECHR also denotes that “Law” must be understood to include both statutory law and court-made “laws” (article 77). By quoting that “Accordingly, the question must be examined on the basis not only of the wording of transitional section 17 of the Higher-Education Act (Law no. 2547), but also of the case-law,” ECHR relies it’s decision on the decision of the Constitutional Court, (article 78).

The ECHR alleges that the article setting the clothing free imposes ban on headscarf. The transitional section of the Higher Education Act that sets all kinds of clothing free was considered by ECHR as ground for the ban. However, the purpose in legislation of the transitional section of the Higher Education Act, and intent of the parliament was to introduce freedom on clothing. Even the Constitutional Court, itself, has stated in former decisions that only the wording of laws has legislative power, different interpretations of laws means substitution of the parliament. The Constitutional Court declared in one of it’s decisions that

“The laws are implemented according to, above all, their wording. The words used in laws should be understood according to their meaning in legal terminology. Although it is sometimes thought that the law is in conflict with the current social and economical conditions, we should continue to implement them as long as they are still in force. Sometimes this rule is transgressed due to some considerations, or texts are interpreted differently then their original meaning, or a kind of amendment is made by means of interpretation. However, all these acts means to impose a provision to law that it did not include originally and to change it’s aim by means of interpretation, or to try to substitute the legislative authorities.”

4. The position of court decisions in Turkish jurisprudence

Under the section titled ‘The binding force of the reasoning in judgments of the Constitutional Court,’ the ECHR stated that the rulings of the Constitutional Court are binding. This has led the ECHR to a ruling mad by the Turkish Constitution Court that is in fact, in conflict with Turkish jurisprudence that ECHR relied it’s decision.

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1 Semih Gemalmaz, reference cited above, p.1287, This view considers that Turkish jurisprudence can sometimes rely on case-laws. However, this approach overlooks some articles of the Constitution and jurisprudence system of Continental Europe.
According to Turkish jurisprudence, the authorities and power of legislation, judgment and implementation are distinctly separated from each other. No authority can infringe within the working scope of the others’, according to the principle of ‘separation of powers,’ which is a distinctive sign of a democratic state ruled by law. In other words, only legislative authority can make laws, only proper authorities for implementation can implement these laws, and the judiciary authorities work independently from the former two and judge the implementation of laws. Each of these authorities is autonomous. The functioning of a democratic system is dependent on the protection of the autonomous power in these divisions.

The Constitutional Court can veto a law that has been introduced by the Parliament, if it is in conflict with Turkish jurisprudence. However, it is not within the scope of the Court’s powers to introduce new laws or make suggestions on how to practice law. The second paragraph of article 153 of the Constitution denotes that “In the course of annulling the whole, or a provision, of laws or decrees having the force of law, the Constitutional Court shall not act as a law-maker and pass judgment leading to new implementation.

When the transitional section 17 of the Higher Education Act was to be implemented, the oppositional party at the time appealed to the Constitutional Court to rule against that law. However, the Constitutional Court decided that the law was not in conflict with the Constitution and was thus valid. From juridical perspective, it is important to note here that the Court had the authority to strike down this law, but it did not. The Court offered some explanations in the decision, mainly that the headscarf does not fall within the scope of freedom of clothing. The Higher Education Council alleged that this explanation forms adequate grounds for the ban. When considering an appeal against a law, the Constitutional Court’s only authorized action is whether to uphold or veto a law. After deciding to uphold a law, however, it has no authority to offer suggestions on how the law is to be implemented.

The Constitutional Court was not authorized to make suggestions on how to practice laws or to introduce new provisions that was not included in the law.

However, in the Sahin case the ECHR ignored all these important points. The ECHR has treated this case just like how the Turkish Court did. The ECHR formulated its interpretation of the ban by using quotes from the decisions of the Turkish Council of State and Constitutional Court.

In its decision, the ECHR included statements such as:

“\textit{In these circumstances, the Court finds that there was a basis for the interference in Turkish law. The law was also accessible and sufficiently precise in its terms to satisfy the requirement of foresee ability. It would have been clear to the applicant, from the moment she entered the University of Istanbul, that there were regulations on wearing the Islamic headscarf and, from 23


2 The decision of the Constitutional Court dated 09.04.1991 (Journal of Decisions of the Constitutional Court, Number 27).

February 1998, that she was liable to be refused access to lectures if she continued to do so” (article 81).

If the Constitutional Court had been able to introduce a legally valid provision, covered women would not have received education since 1991 when that the decision was made. As a matter of fact, if wearing a headscarf is in conflict with the Constitution, this ban should cover all places including mosques. In that case, women should not wear headscarves not only in universities, but also in streets and even in their own home.

As a matter of fact, during the case against transitional section 17, Sezer, 10th President of Turkey, was a member of the Constitutional Court. He did not agree with the decision made by majority of members and he wrote a dissenting opinion on the decision. He stated in his opinion that The rule that forms the subject of the case provides freedom for all kinds of clothing in universities. This freedom covers all types of clothing that are worn due to religious believes and also the turban or headscarf which it’s features and aim determined in the cancellation decision, dated 3.7.1989, numbered 1989/1-12. Transitional section 17 should be canceled. Due to these mentioned reasoning, I do not agree with the decision of majority. Therefore, according to view of Sezer, all clothing, including the headscarf, are legal in universities, because the transitional section 17 was not repealed and is still legally in force1. If transitional section 17 had not provided the freedom to wear a scarf, and the Constitutional Court had had authority for introducing a new rule, then the reasoning of the Court would have been enough for limitation and Sezer would not have needed to write a dissenting opinion.

5. The ECHR intervened Turkish jurisprudence

Transitional section 17 of Higher Education Act provides “Choice of dress shall be free in higher-education institutions, provided that it does not contravene the laws in force2”. The Turkish Parliament introduced the above-mentioned law in order to protect people from being deprived of studying in universities due to their clothing. Instead, the ECHR considered a law that uses freedom of clothing as a legal ground to the ban on clothing. The ECHR held the Constitutional Court in a position that was superior to even the Parliament and this shows that, it was not partial on evaluation of this case.

The ECHR delegated to university rectors the “regulatory power (power for introducing abstract rules).” With the Sahin decision, rectors who do not actually have regulatory power were placed in a position that gave them the power to even introduce rules infringing on essential rights. It presented a similar view to a supporter of the ban, Ali Ulku Azrak who stated that “this treatment infringes the principle of equality in getting public services. However, institutions that student have legal relation, have the authority for determining the

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2 Official Gazette, Number: 20679, 10.28.1990, Relevant text of the law, transitional section 17, was removed from the book containing texts of all laws, regulations and circulars concerning higher education. It is a book consists of 279 pages and published by ‘Film Center and Publishing Office of Istanbul University’. Yusuf Akca, ‘Legislation on Higher Education Council and Istanbul University’, C:1, Film Center and Publishing Office of Istanbul University
conditions including clothing of students. This authority is in the coverage of the authorities that are formed by the special statute\(^1\). However, it is a clear fact that Turkish jurisprudence does not delegate the authority for rectors to introduce regulations that can limit essential rights. According to Turkish jurisprudence, laws can only limit essential rights and regulations that are introduced by administrative units are not law\(^2\).

The ECHR attached more importance to regulations and case laws than the Turkish Constitution and laws. The ECHR stated that it would have been clear to Leyla Sahin, from the moment she entered the university that legal conditions were the same as the time of the ban, that there were regulations on wearing the Islamic headscarf due to case-laws. Moreover, the ECHR stated that not complying with the rules on dress does not constitute a disciplinary offense. However, failure to comply with the rules on dress may entail the application of another provision of the rules (parag 47). However, the ECHR ignored that there is no provision on this subject in Disciplinary Regulation\(^3\), because the disciplinary article that defines wearing of headscarf as a disciplinary crime requiring disciplinary penalty of reprimand, was repealed\(^4\).

Actually, what Leyla Sahin would have known was that Turkish jurisprudence does not rely on case laws in area of public laws. The Turkish Constitution provides that Legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated (article 7), and the provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial branches, and administrative authorities and other institutions and individuals (article 11). The ECHR’s statement that Turkish case laws justifies the headscarf ban, is itself conflict with Turkish jurisprudence.

### 6. The decision brought about comments that discriminatory treatment against covered women not be excluded

The ECHR concluded in the Sahin decision that as long as the provision is accessible and foreseeable, even the administrative units who have not the necessary authority, could introduce limitations on rights. Therefore, it changed its purview as an authority that determines whether there is a violation of rights and turned into a court that delegates national authorities. The ECHR intervened in Turkish jurisprudence system by delegating an authority with a power that it actually do not have before. One of the former presidents of the Constitutional Court, Mustafa Bumin, made an address in the 43\(^{rd}\) annual of the foundation of

\(^1\) Ali Ulku Azrak, ‘Headscarf, Public sphere and beyond’, Cumhuriyet (Newspaper), 07.09. 2004, N: 28675, p. 2. Dear Author ignores the fact that authorities of rectors was defined in Higher Education Act and a rector having regulatory power, for instance, can not introduce a regulation ordering to prevent students from entering the school if they have red hair which is a sign of a certain ideology, and also cancellation of the lessons if red haired students entered.

\(^2\) Kerem Altiparmak / Onur Karahanogullari, ibid. p.181.

\(^3\) ‘Disciplinary Regulations for Students of Higher Education Institutions’.

\(^4\) An amendment was made in ‘Disciplinary Regulations for Students of Higher Education Institutions’ on 12.20.1989 and article (h) of the amended article 7 was repealed.
the Constitutional Court where he said that after the Sahin decision, even an amendment in the Constitution can not be made to grant the freedom to wear a headscarf.

The ruling in the Sahin decision of the ECHR is not compatible with a democratic state relying on jurisprudence. Only the legislative body of the State, no other authority, can make decisions on what subject a legislation is to be made and what content laws is to include. Therefore, the former president of the Constitutional Court intervened with the authority of the legislative body by refusing the possibility of a new legislation in advance. The Constitutional Court has authority for only the evaluation of existing laws. However, the president, on behalf of the institution that he presides, attempted to give orders to a legislative body on how it should behave about a possible forthcoming subject. This kind of intervention cannot be considered as acceptable in a State that relies on democracy and laws. Therefore, Turkish jurisprudence system was the most harmed body by the Sahin decision.

IV. PRACTICAL APPLICATION OF COVERED HUMAN RIGHTS

1. Prescribed Rights in International Human Rights

The code of international human rights secures education, freedom of religion and the right not to be discriminated. Human rights is an issue with real counterparts. As it is stated by ECHR, human rights are not theoretical or fictional and should be practised properly.

All well-known international human rights documents stipulate freedom of religion, conscience and thought as well as their expression, application and practice as a right. Expression and practice of religious beliefs includes their teaching, application and celebration. Because of this, article 9 of the Convention understands that it is not only believing in a religion (faith), but also the freedom of expression of religion (inferring of the religious belief). The freedom of thought, religion and conscience are covered by article 18 of “The International Covenant on Civil and Political Rights.” According to that article, which cannot be even restricted in extraordinary conditions, restrictions can only be applied if “they are required to maintain public order, security, health and moral values or other parties’ fundamental rights and freedom.”

The Human Rights Commission defined “observance and practice of a religion or belief” in the General Declaration #22 on 20.07.1993 in terms of the article of 18 International Covenant on Civil and Political Rights which regulates freedom of religion (the observance and practice

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1 Vahap Coskun, the reference cited above.
2 Dissenting opinion of Judge Tulkens, Para. 6.
3 Mehmet Semih Gemalmaz, ibid., p. 1308, 78. see also. Emre Öktem, ibid. p.498, footnote 1445.
of religion or belief may include... the wearing of distinctive clothing or head coverings) (paragraph 5) Therefore, the article can aid the Islamic headscarf in the debate.

However, in a decision given against Uzbekistan by the Human Rights Commission, which was established to observe the practice of The International Covenant on Civil and Political Rights in the countries where it was accepted:

"Author's claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public, which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion."  

General Comment No.22 (paragraph 5), states that:

'The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.'

Thus concluding that wearing of special religious headgear is, for some, part for maintaining a religious life.

In this frame, the United Nations Human Rights Commission includes in the definition of the freedom of expression of one’s religious beliefs the wearing of special attire and headscarf. The Human Rights Commission finds interventions against freedom of expression of one’s religion illegal. It is required that all countries contracted to The United Nations International Covenant on Civil and Political Rights to organize their domestic laws and politics according to ascertainments of The Human Rights Commission.

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1 Mehmet Semih Gemalmaz, ibid., p. 1308, recited from footnote 78 pointing the same example see also Emre Öktem, ibid. p.498, footnote 1445, Öktem’s “general comment” as an example see International Covenant on Civil and Political Rights: 40/4; HRC rules of procedure: 71 ).
However, paragraph 22 of the Vienna Declaration which was accepted at The International Human Rights Conference on 25 June 1993, emphasizes that:

“Freedom of expression of religion and belief shall include not only practicing particular rituals but shall also include the freedom to practice religious traditions, fasting regularly on certain days, applying special diets (such as vegetarian diets), wearing special dress or hats or headscarves, participating in certain rituals regarding different stages of life”.

2. The Necessity of concrete application of the rights

The ECHR preserves concrete and existing rights in reality, not theoretical and imaginary rights\(^1\). The legal grounds in Sahin’s decision point out that freedom of religion, which is secured by law does not exist practically in Turkey. Besides that, in this decision the importance of freedom of religion is also mentioned. It states that freedom of religion is an indispensable element and “essential basis” of the democratic society\(^2\).

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 (see, mutatis mutandis, Cha’are Shalom Ve Tseedek v. France [GC], no. 27417/95, § 73, ECHR 2000-VII). (Leyla Sahin decision para. 105.)

According to the ECHR, freedom of thought, conscience and religion depend on the expression of religious belief and for the European Human Rights Commission, article 9 which secures that freedom protects “internal space.” Furthermore, it also maintains the generally recognized form of practical part of religious belief or religion such as worship, which is tightly dependent on belief and\(^3\) the known components of this freedom and its effect in individual situations\(^4\).

However, in the Sahin case, practice of one’s own religious belief was found to be enough cause to restrict their right of getting education. The Court found the ban on usage of religious symbols suitable to remove the discussion of religion away from society. They not only ignored that one’s right of freedom of religion is not an internal belief, but also that it is a freedom of expression of religious belief. Hence, this decision harmed the principle highlighting the necessity of practice of rights secured in international agreements.

3. The necessity of practice of education rights in life

\(^1\) 25.05.1993 Kokkinakis v. Greece decision.
\(^3\) May 1986, K. N. 11308/84, D. R. c. 46, p. 200.
In the ECHR’s decisions, it is mentioned that no government should violate one’s right to education. That means the right of access to education facilities provided by the state and that their practice should not be interfered with by the governments. Moreover, it is required that “the education should not include dogmatic information and as a requirement of states, information should be given in a way which is impartial, open to criticism and has a pluralist approach”.

In the Sahin decision, the ECHR emphasized importance of the right to education but on the other hand they found the abstract comments enough to impede that right. In paragraph 136, it mentions that:

“The Court does not lose sight of the fact that the development of the right to education, whose content varies from one time or place to another, according to economic and social circumstances, mainly depends on the needs and resources of the community. However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions (Marcks v. Belgium, judgment of 13 June 1979, Series A no. 31, p. 19, § 41; Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26; and, as the most recent authority, Mamakulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, § 121, 4 February 2005). While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education. In a number of recently adopted instruments, the Council of Europe has stressed the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy (see, inter alia, Recommendation no. R (98) 3 and Recommendation no. 1353 (1998) – cited in paragraphs 68 and 69 above). As the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (see paragraph 67 above) states, higher education “is instrumental in the pursuit and advancement of knowledge” and “constitutes an exceptionally rich cultural and scientific asset for both individuals and society”.

However, in Turkey, the right to receive higher was just ignored for students wearing headscarves. Moreover, the Sahin decision states in paragraph 137:

In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision (see, mutatis mutandis, the “Belgian Linguistic case”, cited above, p. 33, § 9; and Delcourt v. Belgium, judgment of 17 January 1970, Series A no. 11, p. 14, § 25).

However, the officials concluded “the right of having education is under control of a state and can be made unavailable whenever it is required.”

Whereas, regarding Access of Higher Education for Minorities, it was stated in recommendation numbered 1353 of the article 2 accepted by The European Parliamentarian Assemblies on 27th January 1998:

1 Salih Efe, Education right in the frame of European Human Rights Convention and Courts decision.
“Education is a basic human right and ones settled down in any countries which are signed Europe Culture Agreement must have equal access to every level of it including higher education.” (para. 69).

But the Sahin decision made “Access of higher education” unavailable for students who wear headscarves.

V. OVERALL RESULTS OF SAHIN CASE

1. THE ALLEGATION THAT THE DECISION PROVIDED A FOOTHOLE FOR WINNING THE PROSPECTIVE CASES CONCERNING HEADSCARF

Despite the fact that the decision of the ECHR in the Leyla Sahin case was against the claimant, it still gives rise to a significant progress for the applicants of headscarf ban cases. The progress was achieved by the decision that banning the headscarf in social facility buildings of universities and introducing disciplinary actions for those who do not comply with this ban is an interference to the right to freedom of religion and conscience that is described in Article 9 of European Convention of Human Rights.

In the Karaduman case, the European Commission on Human Rights considered that obliging students to submit a ‘bare-headed/without-a-headscarf’ photograph to obtain their diploma is not an interference to the applicant’s right to freedom of religion and conscience, and did not accept the case. However, the decision of the Sahin case shows that the ECHR accepts the existence of interference to freedom to religion (to manifest religion). As it is well known, the ECHR (EC on HR in former system) evaluates first whether the event that was alleged to have a relation with violation of rights is related to any of the concerned rights. If it has a relation, then it evaluates whether there is an interference to the right, and if there is, it lastly evaluates if this interference is justifiable or not. If the first two steps are negative, the Court will not accept the case and not make a decision about the subject. In Leyla Sahin case, the Court had already considered that there was an ‘interference’ by State to the right of the applicant, and as a result, the case was accepted for evaluation by the Court. If there had been no interference to the right, the application would not have been accepted.

Therefore, the Sahin case should be considered as a progression in ECHR case law. The subjects of Karaduman and Sahin cases are not exactly the same; however, the essence of both cases is the violation of rights due to ‘headscarf’ bans. According to the general approach of

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1 Mehmet Semih Gemalmaz, reference cited above, p. 1292, from the 47th footnote: Jurisprudential criticism was made for Karaduman case here. ‘If we accept that wearing headscarf is a manifestation of religious belief, it will drive us to the conclusion that obliging students to submit a photo--not wearing headscarf--is an interference to freedom to manifest applicant’s religion. Therefore, the Commission contradicts its own statements by refusing the case due to “no interference” reason. Oktem, reference cited above, p. 492.

European Convention of Human Rights, accepting an intervention as justifiable means the same intervention could be considered as “necessary in a democratic society” when the conditions are changed. “An unnecessary intervention in a democratic society” violates the convention. In brief, the ECHR eases the way for winning the possible future applications related to headscarf issue. Therefore, it is not possible to agree with the opinions that the headscarf issue has been resolved legally and that it is not possible to apply to ECHR for the further cases related to headscarf issue. As far as the intervention/ban continues, it is possible to get decisions considering the ban to be against the needs of democratic society in long term.

The European Parliamentary Assembly accepted the bill number 1464 (2005) on January 4, 2005. Although it was not considered for the Sahin case, the bill calls on the member states of the Council of Europe to “fully protect all women living in their country against all violations of their rights based on or attributed to religion.” This is an important duty for the states [to protect the religious or non-religious rights of women], and there is no reason why it is not applicable in Turkey.

Numerous national and international human rights organizations agreed with the Human Rights Watch’s statement: “The ECHR has been a powerful force in extending basic freedoms in Turkey, but it missed an important opportunity in Sahin case to stand firmly behind principles of freedom of religion, expression, and non-discrimination.” Nevertheless, as it has been stated in ECHR’s settled considerations: “the Convention is a living text, and therefore, it should be interpreted according to the current conditions of life.”

The ECHR has a dynamic approach while interpreting the Convention by considering the needs of current day. Therefore, ECHR’s interpretations are not fixed and permanent; rather, they seem to change by time. As a matter of fact, ECHR has made negative decisions in several past cases and later changed its interpretation and made positive decisions about the cases having the same subjects as the former ones. New conditions might appear in continuing process, and therefore, the decision might change in subsequent cases.

Looking back to the jurisprudence history, we see many erroneous decisions that were changed later. The interpretation and opinion of the Court might change if we continue to present the evidences that the conditions, which ECHR alleged as justifying reasons of the intervention, do not exist in Turkey.

2. IMPACT OF THE DECISION ON CURRENT IMPLEMENTATION OF THE HEADSCARF BAN

aa. Common Comments on the Decision

The Sahin decision was used as a ground for generalizing the implementation of the ban. Before this case, the decision of the Constitutional Court used to be presented as a ground for the ban. Now, it has been stated after the decision that ECHR decided that the ban is rightful and that the ban cannot be lifted anymore because there is no higher authority to appeal to.

The university administrators especially the ones who implement the ban made statements after the decision that the headscarf issue has been resolved. Ibrahim Kaboglu stated: “If Leyla Sahin applied to the Grand Chamber and her case were refused, this would close the door for further applications from Turkey, and therefore, the headscarf issue would be closed permanently.”

The former Chief of the Higher Education Council, Professor Erdogan Tezic stated: “ECHR has confirmed its previous decision. Implementing this decision is an obligation. Our domestic jurisprudence has to comply with this decision as well. I suppose that there will be no further discussions about this issue. Since the decision is issued at an international level, making new adjustment in domestic law is no longer possible.”

The President, Necdet Sezer, has commented: “From the point of jurisprudence, this issue has come to an end.” When he rejected a law proposal, he also stated: “Both the Constitutional Law and the rules of European Convention on Human Rights have certainly removed the headscarf issue from the agenda in Turkey in a way that the issue may not be discussed again ever”.

bb. Binding Nature of decision of ECHR

According to the rules of juristic interpretation, the essential principle is permissive approach to freedoms and rights, and intervention with them is only an exceptional condition. Therefore, a narrow construction should be used for the exceptional conditions, and an extensive construction should be used about the essential principle (the provisions concerning the freedoms and rights). As Gemalmaz also indicated, “the decision of the ECHR in one case is binding for only subject of that case. When evaluating a case, the ECHR decides about the concordance to the convention. And its decision has no impact beyond this aspect”. The ECHR decided in the Leyla Sahin case that the intervention mentioned in the application is acceptable in a democratic society. The decision of Sahin case may be restated as follows: “Banning the headscarf in universities is not an obligation; however, the ban is justifiable for Turkey.” The decision does not include comments on whether wearing headscarf is concordant with the Convention or not. Moreover, the Court has no authority for judging

1 “The headscarf ban is justified”, 11.11.2005, Milliyet (Newspaper).
2 “Sezer: This issue has finished” 11.11.2005, Sabah (Newspaper).
3 ‘Rejection to law proposal concerning affairs of state came together with comments on headscarf issue’, 04.08.2004 Yeni Şafak (Newspaper).
5 Mehmet Semih Gemalmaz, fore mentioned reference, p. 1294.
headscarf use. The Court evaluates only the concordance of intervention to the Convention. ECHR considers each case according to the application’s own conditions. And decisions of the Court can not be evaluated without paying attention to the conditions and developments of that time period.

The ECHR considered the case according the data it had and the statements of the defense, and decided against the applicant. However, this decision does not mean that wearing headscarves will be banned in Turkey and in all the other countries, which have signed the Convention. It also does not mean that the Court will never permit lifting this ban anymore. The Court decided that “alleged” conditions that justify the ban do exist in Turkey. However, we cannot draw the conclusion from the decision that wearing headscarf should be banned permanently. The ECHR does not introduce the provision that the State party (Turkey) has to ban “headscarf” in public sphere. The State party is free in banning or not. The State Party has a broad discretionary power on this subject. Nevertheless, when the State party decides to use its power in a direction banning the use of headscarf, this decision is still under supervision of ECHR, and the ban stays in concordance with the convention in only certain conditions.

At this point, the Sahin decision should not be interpreted as an obstacle for lifting the ban in Turkey. Mustafa Erdogan, Professor of the Constitutional law, express his view:

The decision of ECHR would have introduced a binding provision if it had decided for existence of a violation of a right by Republic of Turkey. This would have obliged Turkey to take necessary measures for excluding the violation. On the other hand, when it decided that violation did not exist, this would not saddle Turkey with any responsibility for amendment. After this, the decision is up to the State party. When State would like, it can still draw a broader frame for freedoms. The decision is not an obstacle for this. The decision does not form a condition for alleging that this issue can not be discussed and the ban can not be lifted anymore.

Erdogan also stated:

2 Necdet Pakdil, Impact of International Conventions on Domestic Law, Journal of Jurisprudence and Democracy, Year 1, Chap:10, p.44.
3 Quoted from Gemalmaz’s footnote 53, (p.1295) for similar comments see; Cuneyt Ulsever “Let’s discuss decision of ECHR in dept,” Hurriyet (Newspaper), 05.07.2004; Murat Belge, “Did ECHR introduce an obligatory ban?”, Radikal (Newspaper), 17.07.2004; Emre Oktem, “What does the decision of ECHR mean?”, Current Law (Journal), N:8 August 2004, p.41; Journal of Juristic Perspective, N:2 Autumn 2004, p. 54-85, 63-64; and also Mustafa Erdogan stated similarly in a talk show having title of “Human being is always in need of freedom,” directed by Adem Sozuer.
5 Mustafa Erdoğan, “The solution for the headscarf ban is in the hand of the Public’s Assembly” http://www.network54.com/Forum/353569/thread/1132075580/last-1132144402/T%DCRBAN+YASA%DD0INA+%C7%D6Z%DCM++HALKIM+MECL%DDS%DDNDE
There is no law banning the headscarf in universities. The ban is a practical implementation without legal base. Therefore, there is no need to make amendments in the Constitutional law for lifting the ban. To legitimize our freedoms, we do not need new laws or a new Constitution. The problem is a political problem—not a legislative problem, and its solution is in the hands of the National Assembly. We can not say that this issue can not be discussed after the decision of Court and that the ban can not be lifted anymore.

Murat Belge commented on the Sahin decision and denoted in his article titled “Did ECHR introduce an obligatory ban?” as follows:

The decision of the Court means that if a university in Turkey, by considering some reasons, decides to ban the students wearing headscarf from entering the university, it can do this because it has legal authority for this. It does not mean anything else beyond that. The decision does not indicate that all the universities in Turkey should ban the headscarf. ECHR do not introduce an obligatory principle to implement. . . . Therefore, we have right to use our discretionary power for banning as well as for allowing.

It is clear that the allegations that this issue was closed by the decision and that after this point the ban can not be lifted are not correct. Each case that is under evaluation of the ECHR is unique, and all factors related to the case should be taken into consideration. If the ECHR had decided that according to the convention the headscarf is to be banned in any condition, this would have introduced a new principle, and in that case, this would have been binding for all the countries signing the Convention. In addition, it would have meant that all the countries, which allow the headscarf to be freely worn, would not be complying with the Convention. However, at the present, the headscarf ban does not exist in universities of any of the European countries except in Turkey.

The essential principle in both international and European jurisprudence on human rights is the utmost extension and protection of the freedoms. The international conventions already present broad margins for freedoms. Nevertheless, due to the principle mentioned above, utmost attention is paid while preparing the international conventions so that they do not form an obstacle for extending the freedoms. According to Article 53 of the European Convention on Human Rights, no provision of the Convention can limit human rights and essential freedoms that were described in domestic laws of stakeholder countries or in other conventions that were signed by them and the Convention cannot be interpreted as against the freedom that is provided by such laws and agreements.

1 Mustafa Erdoğan, http://www.network54.com/Forum /353569/thread/1132075580/ last-1132144 402/T%DCRBAN+YASA%D0INA+%C7%D6Z%DCM ++HALKIM+ MECL %DDS' %DDNDE
The philosophy of the ECHR on human rights can be summarized as “the lesser the limitation, the better.” The exemption to this rule can be tolerated, but is never advised or supported.\(^1\) As a matter of fact, it is not possible to think that the international conventions, including the EC on Human Rights, regulating a dress code for people.\(^2\) Introducing limitations on women according to their clothing is discrimination violating their right to education, freedom of thought and principle of self-determination.\(^3\) In contrast to authoritarian states, in all democratic societies the clothing style is an individual preference and may not be interfered. Therefore, the Sahin decision is not an obstacle to end the discrimination that is based on the dress code.

### 3. THE IMPACT OF THE DECISION ON THE IMAGE OF THE ECHR

#### aa. The esteem of ECHR in international jurisprudence

The ECHR is an international institution that was formed to establish democracy and respect for human rights in undersigning countries. It gets some criticisms due to the fact that the judges have been chosen among the candidates who are nominated by the member states. Since it is an institution formed by states, at times it makes political decisions. However, the Court made decisions such as the right to a fair trial as well as decisions against state parties due to violations of human rights of individuals and their freedoms. As matter of fact, these decisions have contributed to member countries making improvements in their implementations on human rights.

Since the Court was established for protecting the human rights, Leyla Sahin and other university students who wear headscarves applied to the ECHR. The countries which have signed the EC on HR guarantee that they will provide the rights and freedoms described by the convention to everybody that lives within their jurisdiction\(^4\).

#### bb. Comments made after the Sahin decision

The decision has resulted in long-lasting criticisms. First, rights and freedoms were sacrificed for assumptions. Then, the grounds for the decision were almost the same as the grounds stated by the Constitutional Court of Turkey. Therefore, the grounds were political in decision\(^5\). The Sahin decision was also described by American and European jurists as the most controversial decision on the freedom of belief\(^6\). It was even described as the clearest example that embodies the expression of “the jurisprudence is politics”\(^7\).

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\(^1\) Commission of Stasi of Belgium : “Headscarf can not be banned” 17.05.2005, Zaman (Newspaper), “The world try to find a solution for headscarf”.

\(^2\) Necdet Pakdil, reference cited above, p.44.

\(^3\) Levent Korkut, 03.07.2004, Zaman (Newspaper).

\(^4\) Feyyaz Golcuklu / Şeref Gozubuyuk, ECHR and it’s practice, Ankara 2005, p. V.


\(^7\) Zuhtu Arslan p. 91.
The ECHR is responsible for defending human rights for all people from every class. However, the Court did not provide a convincing explanation showing that the ban is really necessary in a democratic society. Consequently, the decision brought about big debates in Turkey. It caused some to believe that the Court is not neutral or it does not stay in equally distanced to all faiths. It was perceived as a decision interfering with the freedom of education. In addition, it was stated that the decision describes limitations on an individual’s right to choose a religion according to her/his own preferences and to practice what she/he has chosen, and that these limitations are not based on laws.

The decision has been criticized by many international academic authorities and human rights organizations\(^1\). To be able to decide against the claimant, ECHR receded significantly from its position which it had formed by its previous enriched case laws in favor of human rights.\(^2\) Even the columnists supporting the ban indicated the politic nature of the decision. Gunduz Altan wrote: “It is not for the first time for ECHR to make a decision by considering the political factors. Almost every important decision has a political aspect. Is the jurisprudence something other than a continuation of politics by adopting rules?”\(^3\). The former Chief Prosecutor of Supreme Court of Appeals, Nuri Ok, expressed a similar opinion:

> “The decision of ECHR is consistent with the decisions of Council of State, Supreme Court of Appeals and the Constitutional Court in Turkey. Courts are not ignorant to social events. Regarding the headscarf issue, there are some Court decisions in Europe, especially in France and Germany. ECHR did pay attention not only to Turkish society but also to the reactions and opinions of European societies. The democracies have to protect themselves, and when this principle is taken into consideration, it will lead you to this conclusion.”\(^4\).

As it was stated even by the authors who agree with the grounds of the decision, the Sahin decision is a result of general fears that are not directly related to Leyla Sahin who is applicant. On this account, the decision was described as the result that was formed by constrained methods of interpretations and by sacrificing from the ECHR’s previously formed case laws. It was also denoted that principles of lawfulness, proportionality and pluralism were harmed by this decision,\(^5\) and “it opened a door for cultural racism”\(^6\).

\(\text{cc. The allegation that the Court applies double standard}\)

The Sahin decision was also surprising for jurists who were impartial and objective and expected a just trial and ruling about the case. After the Sahin decision, quite a few authors commented that the ECHR is biased against Muslims, and applied double standards in

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\(^3\) Gunduz Aktan, “ECHR’s headscarf decision (I)”, 07.07.2004, Radikal (Newspaper).
\(^5\) Kerem Altiparmak / Onur Karahanogullari, reference cited above, p.199.
\(^6\) Levent Korkut, “The decision opened a door for cultural racism”, 03.07.2004, Zaman (Newspaper)
considering the case. The decision has justified the claims that ECHR’s decisions are generally political, rather than juridical, and that “a different decision could not be expected”.

Ali Bulaç, author-researcher, commented in his newspaper column:

"It was understood after the headscarf decision that ECHR can not keep impartiality on the matters related to Islam but confirms authoritarian and repressive politics. In brief, if the subject is Muslims, it does not abstain from clearly supporting anti-democratic approaches. In other words, the members of the Court have different gowns that they wear according to applicant’s religion and political identity. The Europe still has a long way to go [to establish the basic human rights for all]."

The author explained in another article that the ECHR is biased:

"The biggest mistake of people who apply to ECHR for the headscarf case is to expect that the Court would make a fair and juristic decision. From the beginning, people should not have had expectations that ECHR could make a fair decision about Islam and Muslims. The Court would not even apply their own criteria and the criteria of EC on HR, when it comes to a Muslim applicant."

Amine Hilal Usul draws our attention to this by her statement:

"There are some decisions that are made according to applicant’s identity, religion and faith, and these show that judges of ECHR are partial, not neutral and fair. This situation may be explained by statement of (this is also observed by) Mustafa Erdogan, Professor of the Constitutional law: ‘Are there neutral judges in Europe? Maybe yes, but not neutral for Muslims.’ By applying criteria supporting freedoms in cases of non-Muslim applicants and applying new and different criteria for Muslim applicants, ECHR shows that it applies double standards."
Berat Özipek made a similar statement: “This decision exposed that there is a quarter of Europe who apply double standards or even violate the principles that have been described as the essentials of Western civilization when the matter is Muslims”1.

It has also been alleged that ECHR does not consider Muslim applicants as a wronged/injured party and after the Sahin decision, its notion of justice and human rights is open to questioning2. Especially the grounds of the decision seem to justify people who say: “ECHR does exist for protecting the rights of only white and Christian individuals. When the subject is practices of Islam, it makes partial decisions. People should not have trusted to ECHR to be a fair and just Court in the first place”, for the ECHR was founded to be a Court to safeguard human rights and freedoms for all. The aim of ECHR is to provide an atmosphere for people with different thoughts and faiths to live together in peace. The court has undermined this aim by its decisions regarding the headscarf issue. Because of the Sahin decision, both the Court and claimants who trusted ECHR were criticized3.

**dd. The decision damaged the esteem of the ECHR**

In the decision, the Court has justified an approach that puts people who think and live differently in the group of “the others” without leaving any room for them to exist. The Grand Chamber did not change the decision of the 4th Section that had been criticized by both American and European Jurists,4 and this made its consideration of justice open to question. The statements in the ground of the decision contradict the facts of Turkey, and it was alleged that this “shakes the trust for justice and ECHR.” Seeing the decision, people understood that the Court could apply different standards to different countries, and it could allow the violation of concrete rights with the excuse of protecting the others’ rights from presumptive violations. Therefore, the decision hurts first and foremost, the esteem of the Court.

Ozipek commented that the ECHR hurt it’s own trustworthiness:

“The decisions of Refah Party and Leyla Sahin, clearly proved that ECHR, at times, could make legally wrong decisions by contradicting both its own case-laws and provisions of EC on HR. Many decisions by ECHR make us think that it is a trustworthy regional institution in protecting the jurisprudence. It even made some decisions suggesting that EC on HR should be interpreted dynamically not statistically and thus drew some conclusions for the rights that are not spelled out in the Convention. Therefore, Sahin and other decisions are dramatically different in interpretation, and we can not explain this approach [except for the discrimination against Muslims].”5

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1 Bekir Berat Ozipek, reference cited above.
2 Demet Tezcan, “Is Tukey rightful or wrongful?”, Vakit (Newspaper).
3 Abdurrahim Karakoç: “Didn’t I warn you in the beginning [that you will not get a fair decision]? Was it so important to apply ECHR? You should be conscientious and do not do such mistakes. Refrain from having Christians decide about us...’ 13.11.2005, Vakit (Newspaper). Yalçın Dogan, “My Dear Master Nevzat, I am surprised’, 06.07.2004, Hurriyet (Newspaper), Emin Colasan, “A prime minister shall not speak in this way” 06.07.2004, Hurriyet (Newspaper).
5 Bekir Berat Ozipek, reference cited above.
Former member of the ECHR, Turkish Judge Riza Turmen, released a statement to the press: “After Sahin decision, similar 100 case will be rejected.” This led to a downpour of newspaper articles with titles such as “Solution door for headscarf was closed.” Other statements of Riza Turmen also strengthen this opinion in public because he said: “The decision of this case will affect all other cases concerning headscarf. The decision is very important for not only Turkey but also for European countries and especially for France.” After the Sahin decision, cases of claimants wearing headscarf were refused without evaluation by presenting the decisions as attached lists. The judge from Turkey did not pay any attention to not to hurt “an impartial judge” image. His conduct as well contributed in harming the esteem of the Court.

The trustworthiness of the ECHR in Turkey has already been questioned. A survey which was conducted by the collaboration of the European Commission, asked Turkish people if they thought the ECHR was just and impartial in decisions concerning Turkey. While 29.0 % answered “yes,” 49.6% answered “no,” and 21.4 % abstained from declaring an opinion. Therefore, 49.6 % of people answering the survey expressed negative opinion about ECHR. This survey was conducted before the Sahin decision, and it was guessed that trustworthiness of the Court has decreased even more after the decision.

**ee. Impact of Decision on Image of European Union**

The Sahin decision has affected the perception of both the ECHR and the EU. It is a well-known fact that especially after September the 11th, Muslims have been perceived as the new threat in Europe and in the world. One of the measures that were taken against this threat has been to ban the way of expressions of this perceived threat. The headscarf has continuously been subjected to bans in different areas, and the Sahin decision was based on hypothetical interpretations instead of concrete facts. These facts, consequently, conclude that the judges in the ECHR were affected from this negative atmosphere.

In this context, the Sahin decision brought about many comments about the ECHR. Although ECHR is not a unit of the EU, it has been affected by the EU’s tendencies and political atmosphere ECHR failed in freedom exam; Turkish people’s thrust for the EU might be harmed because of double standards in EU’s progression reports. This decision has declined

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2 “The Public Survey reserching human rights and freedoms in Turkey ”, Association for Liberal Thinking – European Comission, Assoc. Dr. İhsan D. Dağı, Assoc Dr. Metin Toprak, Assoc Dr. Omer Demir, June 2003.
3 Zühtü Arslan, reference cited above, p. 72.
the enthusiasm for the EU. Contradicting approaches are first of all harmful for their image and esteem.

Akyol attempted to explain the cause of the bias in the decision: “ECHR has statements in the decision of headscarf that are contrary to concrete, social facts. It did so because ECHR did not call for an ‘exploration’ to determine how Turkey’s social structure is, how it is changing and what features women of wearing headscarf have. It decided, instead, according to the fear of ‘radical Islam’ that the men in streets of Europe feel, and as a result of this psychology, it even did violate its own case-law.” He also stated: “This ‘liberal’ decision that was formed by Europe’s Christian and Jacobian subconscious mind in contrast to its liberal tradition proves that ECHR is ‘impartial for only certain people’. ECHR did not resolve this issue, but made it worse.”

In the headscarf case, the ECHR applied an approach different from how it approaches other cases. This approach originates from the opinion that the limitation of rights in countries like Turkey is more justifiable. Levent Korkut explains:

\[\text{By the decision it made in June 29^{th}}, \text{ the Court earned the title of ‘being the first international Court justifying headscarf ban for university students.’ While adopting this title, it had an approach which indicates logically that it supposed, since the beginning, the social structure of Turkey as not pluralist. According to the ECHR judges, state authority in Turkey can not protect freedoms of individuals without bans. A ‘different’ decision can be made, due to special conditions of Turkey. ECHR considers that the decision was ‘special’ for Turkey; in other words, it was a decision for ‘them.’}\]

The term “special conditions of Turkey” is such an ambiguous statement that it can justify any kind of limitation of rights. With this view, criteria for rights might be described according to each person or each country.

It is clear that the grounds in the Sahin case raised doubts to the Court’s conception of justice and legitimation. The International Helsinki Federation for Human Rights claims that the headscarf ban would contradict the international human rights standards on freedom of religion because wearing religious clothing can be an inherent part of manifestation of one’s religion. It is not at the discretion of a state to determine which manifestations are legitimate as long as they do not violate other people’s basic human rights or endanger public safety, health, or morals, as defined by international law.

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1 Bekir Karliaga, “ECHR failed in freedoms exam, it’s turn for Europe”, 20.11. 2005, Yenisafak (Newspaper).
2 Hidayet Sefkatlı Tuksal, “ECHR failed in freedoms exam, it’s turn for Europe”, 20.11. 2005, Yenisafak (Newspaper).
3 Levent Korkut, 03.07.2004, Zaman (Newspaper).
4 Halim Yılmaz, reference cited above, p.122-123.
Furthermore, the Human Rights Watch stated that by the Sahin decision, the ECHR has ended the hopes of thousands of women who are prevented from studying at universities in Turkey. Amine Hilal Usul also stated:

*By introducing a ban without legal base on the wearing of headscarf at universities and public sphere, the State institutions violated rights of thousands of women students. The ban ended these students’ and their families’ hopes for future. The ban prevents these students from using their right to education and aims to keep them in ignorance. Despite existence of this violation, EU does not present a significant reaction, and one of the main reasons for this is West’s essential fears and biases about Islam.*

These kinds of biases have expanded the scope of the implementation of the ban. The former Chief of Higher Education Council, Erdogan Tezic, commented:

*Previously, our domestic Courts such as Council of State and the Constitutional Court decided that wearing headscarf as a religious symbol in public institutions was banned. The decision of ECHR is a kind of confirmation for domestic decisions. In practice, we can say that neither universities nor the means of legislation are permitted to make amendments for letting headscarf free anymore. The decision of ECHR is binding. It is no longer legally possible to give freedom to headscarf, but some can continue to discuss it the political area.*

It is not surprising that those who fall in with view cited above are usually high level bureaucrats, lecturers, and Turkish Court members who do not support freedom for headscarf. The Court decided that headscarf was a kind of protest against the “secular Republic,” instead of considering that the wearing of it, by women who are at age of university education, is an individual preference that should be respected according to universal human rights and essentiality of freedom. Due the to domineering character of the Turkish Republic, for those who represent the government “public” means solely “state.” Therefore, the State in Turkey alleges that everything that is related to “public,” does belong to the State, and State has ascendancy over them. Consequently, the university is not an area for people, rather it belongs to the State. The jurisprudence of the Constitutional Court supports this view. However, it is really surprising that the view of the Constitutional Court that is not compatible with democracy was repeated by the ECHR in the Sahin decision.

Nuray Mert comments on how the ECHR contradicted itself in the Sahin case:

*It is a new entity for European democracies to run into Muslims’ social demands concerning their religious practices. The current picture clearly indicates that Western democracies have failed the test. People who allege that ECHR applied double standard in this subject and contradicted its own case-laws and basic tenets are telling the truth.*

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2 Amine Hilal Usul, reference cited above.
4 Mustafa Erdogan, ‘Headscarf problem is legal or political in Turkey?’ .
It was stated in the dissenting opinion that making a decision without concrete grounds was a mistake. Yayla commented on this opinion: “There are still jurists who know that the essential mission of jurisprudence is to protect human rights and freedoms”. Yayla continued:

In the light of the opinion of this judge, we all, especially domestic jurists, should see that notions such as republic or secularism can only be instruments; they are not values that should be protected in any condition. They are important values as long as they serve as instruments to protect rights and freedoms. Notions such as being contemporary, modernism and civilization do not have authorization to invalidate human rights and freedoms. People who attribute these notions such an authorization are actually trying to practice totalitarian governance model that they hold in their mind on public.

After the Sahin decision these opinions became more widely accepted. One such opinion is that the ECHR made the decision according to political views instead of just principles of jurisprudence. Another such opinion is that ECHR is not impartial, or that the Court justifies the imposition of totalitarian governance models. It is surprising that the applicant was deprived from her essential rights with hypothetical grounds that are not consistent with facts. The decision is also regrettable because it impaired the trustworthiness of the Court.

4. RESULTS OF AUTHORIZATION OF STATE PARTY WITH DISCRETIONARY POWER

In the Sahin decision, the ECHR decided that the State party should have a broad discretionary power on banning or not banning headscarf in universities and that Turkey’s mentioned implementation is within the frame of its discretionary power.

As a general principle, if the ECHR decides that a violation is against the requirements of a democratic society, State parties who signed the Convention are responsible for elimination of the violation. When the Court decides that State party violated the Convention, defending State has to take necessary measures for eliminating the violation and make amendments in laws that are not complying with the Convention. For instance, in the case of Incal vs. Turkey, the ECHR decided that presence of a military judge in the State Security Court violates the applicant’s right to fair trial. After the decision, Turkey made an amendment in the law titled “The Establishment of State Security Courts and Principles of Trials,” and the provision requiring presence of military judge was removed.

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1 Atilla Yayla, ‘The grounds in dissenting opinion for ECHR’s decision are striking (II),’ Zaman (Newspaper), 20.11.2005.
2 Yasin Şamlı, ‘Justice and ECHR’.
When the Court decides a lack of violation of the Convention, State parties does not have to take any special measures. Even when the Court decides that the intervention is justifiable, there is no obligation on State parties for continuing the intervention. Drawing a broader picture for freedoms is to be State parties’ own decision. The ECHR decided that the obligation for wearing helmet when riding motorcycle does not violates a Sikh’s right to freedom of religion, and that for individuals riding motorcycles, wearing a helmet is necessary and a health protective measure. However, the UK made an amendment for the freedom of religion and exempted Sikhs wearing turban from the obligation of use of helmet. Therefore, the decision of ECHR for the UK did not prevent the State from changing its practice.

Moreover, the ECHR declared in the Leyla Sahin decision that the Court will not practice the principles of fair and proportional treatment in order not to intervene in domestic measures. The Court declared that it will not intervene with the administrative discretion, and left the issue the discretionary power of Turkey. Therefore, national authorities are free in lifting the ban that is in practice or in making an amendment in laws or the Constitutional law.

There are opinions that the European Court of Human Rights violated the European Convention by its verdict in Leyla Sahin case. Professor Kevin Boyle of Essex University stated the following:

The Court essentially decided that this was something for Turkey. If the facts in the case had been different, for example the ban on head covering had been removed in Turkey and some one managed to complain to Strasbourg that the removal of the ban was in violation of secularism, the Court would have also dismissed the case saying the matter was within Turkey’s discretion. So the Court did not really rule on the issue as a question of substance but said that in the specific conditions of Turkey and given the arguments of the Constitutional Court, the matter was for Turkey’s courts, its people and government to decide. The judge who disagreed, judge Tulkens, criticised this approach. She said that the Court should have stood first for the freedom of religion and right to education of the individual woman – Leyla Sahin, because the State had not offered sufficiently strong reasons to interfere with those rights. I agree with that position.

Former president of the Supreme Court of Appeals, Sami Selçuk, Professor, PhD, also commented similarly: “The headscarf issue is an ongoing process. The ban can be lifted. The issue has not come to the end. Some people draw conclusions without considering the essential principles of jurisprudence. That’s a wrong approach”.

In brief, the facts presented above prove that it is not possible to interpret the Sahin decision as an obstacle in lifting the headscarf ban that has been implemented in Turkey.

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2 Kevin Boyle: “Leyla Sahin decision is against the Convention” 24.11.2005, Zaman (Newspaper).
3 Sami Selçuk, Mustafa Erdoğan, “The solution for headscarf issue is in hand of Assembly of public” http://www.network54.com/Forum/353569/thread/1132075580/last-1132144402/T %DCRBAN+YASA%D0INA+%C7%D6Z%DCM++HALKIM+MECL%DDS%DDNDE.
VI. CONCLUSION

In Turkey, women’s right to education and work are restricted if they wear a headscarf due to their religious beliefs. Also, their right to self-control is violated. The headscarf prohibition is an unwarranted infringement on the right to religious practice. Moreover, the restriction of women’s dress is discriminatory and violates their right to education, their right to freedom of thought, conscience and religion, and their right to privacy. This discrimination is carried out by the State. Therefore, the Sahin decision is a denial of all civil rights of equality, justice, legality, right to religion, freedom of speech, and right to education.

The Sahin decision became an additional ground for widening scope of violation of rights of women wearing headscarf. After the decision, the headscarf ban in universities has been expanded to include the women who are not university students. The former Chief of Higher Education Council claimed after the decision that women must take off their headscarf on street when they are asked to do so by police officers. He showed us there is no time and place limit in forcing women to take off their headscarf by his statements: “Suppose you are walking on a street. You are a woman wearing headscarf. When police alleges that he/she cannot identify you, you have to take off your covering. When police says that he cannot identify you, that place becomes a public sphere.” The Chief stated that the same principle is also valid in private homes of individuals. For instance, the former Chief of the Constitutional Court cannot decide to take off her headscarf in Court but wear it in the bazaar. She should be bear-headed everywhere.

After the decision, the Council of State decided in another case that it is lawful to discharge a headmaster who does not wear headscarf at work but had presented an identity card with her photographed in headscarf. Wearing of the headscarf outside of work was considered as a justified reason for punishing a teacher. In addition, the Council decided that it is lawful to prevent a male teacher, who completed the selection process with the highest score, from

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3 Nur Batur, Tezic: “It is not acceptable to take off in Court and on in bazaar,” 10.02.2006, Hurriyet (Newspaper).
being sent by State to work abroad due to the fact that his wife, also a teacher, would be bare-headed at workplace but wore a headscarf outside of workplace\textsuperscript{1}.

The ECHR applied a biased approach while evaluating the conditions in Turkey, and this did not contribute to extending the equality or the use of freedoms by women. On the contrary, it made women’s situation in Turkey worse. The ECHR did accept the information that was presented to it as correct, but this does not alter the fact that the intervention is unjust. The ECHR impaired its own esteem by founding the decision on hypothetical grounds of the Constitutional law, instead of concrete facts. At this point, the most appropriate approach for the ECHR in forthcoming cases concerning freedom and rights to education and religion would be to rule a case based on the availability of concrete evidence and not founding it on assumptions and generalizations.

\textsuperscript{1} CNN TURK, ‘The Council of State: A teacher can not work abroad if his wife wear headscarf’, 23.02.2006.
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VII. CASE OF LEYLA ŞAHİN v. TURKEY (Application no. 44774/98)

CASE OF LEYLA ŞAHİN v. TURKEY

(Application no. 44774/98)

JUDGMENT

STRASBOURG

10 November 2005

This judgment is final but may be subject to editorial revision.
In the case of Leyla Şahin v. Turkey,
The European Court of Human Rights, sitting as a Grand Chamber composed of:
Mr L. WILDHABER, President,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr B.M. ZUPANČIČ,
Mr R. TÜRKMEN,
Mrs F. TULKENS,
Mr C. BIRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. UGREKHELDZE,
Mrs A. MULARONI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr S.E. JEBENS, judges,
and Mr T.L. EARLY, Deputy Grand Chamber Registrar,
Having deliberated in private on 18 May and 5 October 2005,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE


2. The applicant was represented by Mr X. Magnée, of the Brussels Bar, and Mr K. Berzeg, of the Ankara Bar. The Turkish Government (“the Government”) were represented by Mr M. Özmén, co-Agent.

3. The applicant alleged that her rights and freedoms under Articles 8, 9, 10 and 14 of the Convention and Article 2 of Protocol No. 1 had been violated by regulations on wearing the Islamic headscarf in institutions of higher education.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court).

6. By a decision of 2 July 2002 the application was declared admissible by a Chamber from that Section composed of the following judges: Sir Nicolas Bratza, Mr M. Pellonpää, Mrs E.
Palm, Mr R. Türmen, Mr M. Fischbach, Mr J. Casadevall and Mr S. Pavlovski, and Mr M. O’Boyle, Section Registrar.

7. A hearing on the merits (Rule 54 § 3) took place in public in the Human Rights Building, Strasbourg, on 19 November 2002.

8. In its judgment of 29 June 2004 (“the 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 and that no separate question arose under Articles 8 and 10, Article 14 taken together with Article 9 of the Convention, and Article 2 of Protocol No. 1.

9. On 27 September 2004 the applicant requested that the case be referred to the Grand Chamber (Article 43 of the Convention).

10. On 10 November 2004 a panel of the Grand Chamber decided to accept her request (Rule 73).

11. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

12. The applicant and the Government each filed written observations on the merits.


There appeared before the Court:

– for the Government

Mr. M. ÖZMEN, co-Agent,
Mr. E. İŞCAN, Counsel,
Ms. A. EMÜLER,
Ms. G. AKYÜZ,
Ms. D. KILISLIOĞLU, Advisers;

– for the applicant

Mr. X. MAGNÉE,
Mr. K. BERZEG, Counsel,

The Court heard addresses by Mr Berzeg, Mr Özmen and Mr Magnée.

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:

“By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students 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.

B. The application for an order setting aside the circular of 23 February 1998

18. On 29 July 1998 the applicant lodged an application for an order setting aside the circular of 23 February 1998. In her written pleadings, she submitted that the circular and its implementation had infringed her rights guaranteed by Articles 8, 9 and 14 of the Convention and Article 2 of Protocol No. 1, in that there was no statutory basis for the circular and the Vice-Chancellor’s Office had no regulatory power in that sphere.

19. In a judgment of 19 March 1999, the Istanbul Administrative Court dismissed the application, holding that by virtue of section 13(b) of the Higher-Education Act (Law no. 2547 – see paragraph 52 below) a university vice chancellor, as the executive organ of the university, had power to regulate students’ dress for the purposes of maintaining order. That regulatory power had to be exercised in accordance with the relevant legislation and the judgments of the Constitutional Court and the Supreme Administrative Court. Referring to the settled case-law of those courts, the Administrative Court held that neither the regulations in issue, nor the measures taken against the applicant, could be considered illegal.

20. On 19 April 2001 the Supreme Administrative Court dismissed an appeal on points of law by the applicant.
C. The disciplinary measures taken against the applicant

21. In May 1998 disciplinary proceedings were brought against the applicant under Article 6(a) of the Students Disciplinary Procedure Rules (see paragraph 50 below) 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 Article 9(j) of the Students Disciplinary Procedure Rules (see paragraph 50 below).

25. On 10 June 1999 the applicant lodged an application with the Istanbul Administrative Court for an order quashing the decision to suspend her. The application was dismissed on 30 November 1999 by the Istanbul Administrative Court, on the ground that in the light of the material in the case file and the settled case-law on the subject, the impugned measure could not be regarded as illegal.

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 against the judgment of 30 November 1999.

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 4

“No amendment may be made or proposed to the provisions of Article 1 of the Constitution laying down that the State shall be a Republic, the provisions of Article 2 concerning the characteristics of the Republic or the provisions of Article 3.”

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.

Men and women shall have equal rights. The State shall take action to achieve such equality in practice.

No privileges shall be granted to any individual, family, group or class.

State bodies and administrative authorities shall act in compliance with the principle of equality before the law in all circumstances...”

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.

No provision of this Constitution shall be interpreted in a manner that would grant the State or individuals the right to engage in activities intended to destroy the fundamental rights and freedoms embodied in the Constitution or to restrict them beyond what is permitted by the Constitution.

The penalties to which persons who engage in activities that contravene these provisions are liable shall be determined by law.”

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.

Education and instruction in religion and ethics shall be provided under the supervision and control of the State. Instruction in religious culture and in morals shall be a compulsory part of the curricula of primary and secondary schools. Other religious education and instruction shall be a matter for individual choice, with the decision in the case of minors being taken by their legal guardians.

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.

The scope of the right to education shall be defined and regulated by law.

Instruction and teaching shall be provided under the supervision and control of the State in accordance with the principles and reforms of Atatürk and contemporary scientific and educational methods. No educational or teaching institution may be set up that does not follow these rules.

Citizens are not absolved from the duty to remain loyal to the Constitution by freedom of instruction and teaching.

Primary education shall be compulsory for all citizens of both sexes and provided free of charge in State schools.

The rules governing the functioning of private primary and secondary schools shall be regulated by law in keeping with the standards set for State schools.

The State shall provide able pupils of limited financial means with the necessary aid in the form of scholarships or other assistance to enable them to pursue their studies. It shall take suitable measures to rehabilitate those in need of special training so as to render them useful to society.

Education, teaching, research, and study are the only activities that may be pursued in educational and teaching institutions. These activities shall not be impeded in any way...”

Article 153

“The decisions of the Constitutional Court shall be final. A decision to invalidate a provision shall not be made public without a written statement of reasons.

When striking down a law or legislative-decree or a provision thereof, the Constitutional Court may not act as a quasi-legislature by drafting provisions that would be enforceable.

...Judgments of the Constitutional Court shall be published immediately in the Official Gazette and shall be binding on the legislative, executive, and judicial organs, the administrative authorities, and natural and juristic persons.”

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 (see Article 2 of the Constitution of 1924 and Article 2 of the Constitutions of 1961 and 1982, as set out in paragraph 29 above).

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. Significant advances in women’s rights were made during this period.
(equality of treatment in education, the introduction of a ban on polygamy in 1914, the transfer of jurisdiction in matrimonial cases to the secular courts that had been established in the nineteenth century).

32. The defining feature of the Republican ideal was the presence of women in public life and their active participation in society. Consequently, the ideas that women should be freed from religious constraints and that society should be modernised had a common origin. Thus, on 17 February 1926 the Civil Code was adopted, which provided for equality of the sexes in the enjoyment of civic rights, in particular with regard to divorce and succession. Subsequently, through a constitutional amendment of 5 December 1934 (Article 10 of the 1924 Constitution), women obtained equal political rights with men.

33. The first legislation to regulate dress was the Headgear Act of 28 November 1925 (Law no. 671), 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 (Law no. 2596).

34. Under the Education Services (Merger) Act of 3 March 1924 (Law no. 430), religious schools were closed and all schools came under the control of the Ministry for Education. The Act is one of the laws with constitutional status that are protected by Article 174 of the Turkish Constitution.

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 şapka (tight, knotted headscarf), 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 (see Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II).

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

36. The first piece of legislation on dress in institutions of higher education was a set of regulations issued by the Cabinet on 22 July 1981 requiring staff working for public organisations and institutions and personnel and female students at State institutions to wear ordinary, sober, modern dress. The regulations also provided that female members of staff and students should not wear veils in educational institutions.

37. On 20 December 1982 the Higher-Education Authority issued a circular on the wearing of headscarves in institutions of higher education. The Islamic headscarf was banned in lecture
theatres. In a judgment of 13 December 1984, the Supreme Administrative Court held that the regulations were lawful, noting:

“Beyond being a mere innocent practice, wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.”

38. On 10 December 1988 transitional section 16 of the Higher-Education Act (Law no. 2547 – “the Higher-Education Act”) entered into force. It provided:

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

39. In a judgment of 7 March 1989 published in the Official Gazette of 5 July 1989, the Constitutional Court held that the aforementioned provision was contrary to Articles 2 (secularism), 10 (equality before the law) and 24 (freedom of religion) of the Constitution. It also found that it could not be reconciled with the principle of sexual equality implicit, *inter alia*, in republican and revolutionary values (see the Constitution – Preamble and Article 174).

In their judgment, the Constitutional Court judges explained, firstly, that secularism had acquired constitutional status by reason of the historical experience of the country and the particularities of Islam compared to other religions; secularism was an essential condition for democracy and acted as a guarantor of freedom of religion and of equality before the law. It also prevented the State from showing a preference for a particular religion or belief; consequently, a secular State could not invoke religious conviction when performing its legislative function. They stated, *inter alia*:

“Secularism is the civil organiser of political, social and cultural life, based on national sovereignty, democracy, freedom and science. Secularism is the principle which offers the individual the possibility to affirm his or her own personality through freedom of thought and which, by the distinction it makes between politics and religious beliefs, renders freedom of conscience and religion effective. In societies based on religion, which function with religious thought and religious rules, political organisation is religious in character. In a secular regime, religion is shielded from a political role. It is not a tool of the authorities and remains in its respectable place, to be determined by the conscience of each and everyone...”

Stressing its inviolable nature, the Constitutional Court observed that freedom of religion, conscience and worship, which could not be equated with a right to wear any particular religious attire, guaranteed first and foremost the liberty to decide whether or not to follow a religion. It explained that, once outside the private sphere of individual conscience, freedom to manifest one’s religion could be restricted on public-order grounds to defend the principle of secularism.

Everyone was free to choose how to dress, as the social and religious values and traditions of society also had to be respected. However, when a particular dress code was imposed on individuals by reference to a religion, the religion concerned was perceived and presented as a set of values that were incompatible with those of contemporary society. In addition, in Turkey, where the majority of the population were Muslims, presenting the wearing of the Islamic headscarf as a mandatory religious duty would result in discrimination between practising Muslims, non-practising Muslims and non-believers on grounds of dress with anyone who refused to wear the headscarf undoubtedly being regarded as opposed to religion or as irreligious.
The Constitutional Court 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 [transitional section 17] 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).

47. The University adopted a resolution (no. 11 of 9 July 1998 ) worded as follows:

“1. Students at Istanbul University shall comply with the legal principles and rules on dress set out in the
decisions of the Constitutional Court and higher judicial bodies.

2. Students shall not wear clothes that symbolise or manifest any religion, faith, race, or political or
ideological persuasion in any institution or department of the university, or on any of its premises.

3. Students shall comply with the rules requiring specific clothes to be worn for occupational reasons in the
institutions and departments at which they are enrolled.

4. Photographs supplied by students to their institution or department [must be taken] from the ‘front’ ‘with
head and neck uncovered’. They must be no more than six months old and make the student readily
identifiable.

5. Anyone displaying an attitude that is contrary to the aforementioned points or who, through his words,
 writings or deeds, encourages such an attitude shall be liable to action under the provisions of the Students
Disciplinary Proceedings Rules.”

4. Students Disciplinary Procedure Rules

48. The Students Disciplinary Procedure Rules, which were published in the Official Gazette
of 13 January 1985, prescribe five forms of disciplinary penalty: a warning, a reprimand,
temporary suspension of between a week and a month, temporary suspension of one or two
semesters and expulsion.

49. Merely wearing the Islamic headscarf on university premises does not constitute a
disciplinary offence.

50. By virtue of paragraph 6(a) of the Rules, a student whose “behaviour and attitude are not
befitting of students” will be liable to a warning. A reprimand will be issued, inter alia, to
students whose conduct is such as to lose them the respect and trust which students are required
to command or who disrupt lectures, seminars, tutorials in laboratory or workshops
(paragraph 7(a) and (e)). Students who directly or indirectly restrict the freedom of others to
learn and teach or whose conduct is liable to disturb the calm, tranquillity and industriousness
required in institutions of higher education or who engage in political activities in such
institutions are liable to temporary suspension of between a week and a month (paragraph 8(a) and (c)). Paragraph 9(j) lays down that students who organise or take part in unauthorised meetings on university premises are liable to one or two semesters’ suspension.

51. The procedure for investigating disciplinary complaints is governed by paragraphs 13 to 34 of the Rules. Paragraphs 16 and 33 provide that the rights of defence of students must be respected and the disciplinary board must take into account the reasons that caused the student to transgress the rules. All disciplinary measures are subject to judicial review in the administrative courts.

5. The regulatory power of the university authorities

52. Since universities are public-law bodies by virtue of Article 130 of the Constitution, they enjoy a degree of autonomy, subject to State control, that is reflected in the fact that they are run by management organs, such as the vice chancellor, with delegated statutory powers.

The relevant parts of section 13 of Law no. 2547 provide:

“... (b) Vice chancellors shall have the following powers, competence and responsibilities:

1. To chair meetings of university boards, implement their resolutions, examine proposals by the university boards and take such decisions as shall be necessary, and ensure that institutions forming part of the university function in a coordinated manner; ...

5. To supervise and monitor the university departments and university staff at all levels.

It is the vice chancellor who shall have primary responsibility for taking safety measures and for supervising and monitoring the administrative and scientific aspects of the functioning of the university...”

53. The monitoring and supervisory power conferred on the vice chancellor by section 13 of Law no. 2547 is subject to the requirement of lawfulness and to scrutiny by the administrative courts.

C. The binding force of the reasoning in judgments of the Constitutional Court

54. In its judgment of 27 May 1999 (E. 1998/58, K. 1999/19), which was published in the Official Gazette of 4 March 2000, the Constitutional Court stated, inter alia:

“The legislature and executive are bound by both the operative provisions of judgments and the reasoning taken as a whole. Judgments and the reasons stated in them lay down the standards by which legislative activity will be measured and establish guidelines for such activity.”

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 L. 141-5-1 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”.

The Act applies to all State schools and educational institutions, including post-baccalaureate courses (preparatory classes for entrance to the grandes écoles and vocational training courses). It does not apply to State universities. In addition, as the circular of 18 May 2004 makes clear, it only concerns “… signs …, such as the Islamic headscarf, however named, the kippa or a cross that is manifestly oversized, which make the wearer’s religious affiliation immediately identifiable”.

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 on 24 September 2003 in a case between a teacher and the Land of Baden-Württemberg that the lack of any express statutory prohibition meant that teachers were entitled to wear the headscarf. Consequently, it imposed a duty on the Länder 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. The issue has also been debated in the context of the elimination of racial discrimination in schools in order to preserve their multicultural character (see, in particular, Mandla v. Dowell, ‘The Law Reports’ 1983, 548-570). The Commission for Racial Equality, whose opinions have recommendation status only, also considered the issue of the Islamic headscarf in 1988 in the Altrincham Grammar School case, which ended in a compromise between a private school and members of the family of two sisters
who wished to be allowed to wear the Islamic headscarf at the school. The school agreed to allow them to wear the headscarf provided it was navy blue (the colour of the school uniform), kept fastened at the neck and not decorated.

In the case of *R (On the application of Begum) v. Headteacher and Governors of Denbigh High School* [2004], the High Court had to decide a dispute between the school and a Muslim pupil wishing to wear the jilbab (a full-length gown). The school required pupils to wear a uniform, one of the possible options being the headscarf and a shalwar kameeze (long traditional garments from the Indian subcontinent). In June 2004 the High Court dismissed the pupil’s application, holding that there had been no violation of her freedom of religion. However, that judgment was reversed in March 2005 by the Court of Appeal, which accepted that there had been interference with the pupil’s freedom of religion, as a minority of Muslims in the United Kingdom considered that a religious duty to wear the jilbab from the age of puberty existed and the pupil was genuinely of that opinion. No justification for the interference had been provided by the school authorities, as the decision-making process was not compatible with freedom of religion.

62. In Spain, there is no express statutory prohibition on pupils’ wearing religious head coverings in State schools. By virtue of two royal Decrees of 26 January 1996, which are applicable in primary and secondary schools unless the competent authority – the autonomous community – has introduced specific measures, the school governors have power to issue school rules which may include provisions on dress. 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.
E. The relevant Council of Europe texts on higher education

66. Among the various texts adopted by the Council of Europe on higher education should be cited, firstly, Parliamentary Assembly Recommendation no. 1353 (1998) on the Access of Minorities to Higher Education, which was adopted on 27 January 1998, and Committee of Ministers Recommendation no. R (98) 3 on Access to Higher Education, which was adopted on 17 March 1998.

Another relevant instrument in this sphere is the joint Council of Europe/UNESCO Convention on the Recognition of Qualifications concerning Higher Education in the European Region, which was signed in Lisbon on 11 April 1997 and entered into force on 1 February 1999.

67. The preamble to the Convention on the Recognition of Qualifications concerning Higher Education in the European Region states:

“Conscious of the fact that the right to education is a human right, and that higher education, which is instrumental in the pursuit and advancement of knowledge, constitutes an exceptionally rich cultural and scientific asset for both individuals and society. …”

68. On 17 March 1998 the Committee of Ministers of the Council of Europe adopted Recommendation no. R (98) 3 on Access to Higher Education. In the preamble to the recommendation it is stated:

“… higher education has a key role to play in the promotion of human rights and fundamental freedoms and the strengthening of pluralistic democracy and tolerance [and] … widening opportunities for members of all groups in society to participate in higher education can contribute to securing democracy and building confidence in situations of social tension…”

69. Likewise, Article 2 of Recommendation no. 1353 (1998) on the Access of Minorities to Higher Education, which was adopted by the Parliamentary Assembly of the Council of Europe on 27 January 1998, provides:

“Education is a fundamental human right and therefore access to all levels, including higher education, should be equally available to all permanent residents of the states signatories to the European Cultural Convention.”

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, 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.”

A. The Chamber judgment

71. The Chamber found that the Istanbul University regulations restricting the right to wear the Islamic headscarf and the measures taken thereunder had interfered with the applicant’s right to manifest her religion. It went on to find that the interference was prescribed by law and pursued one of the legitimate aims set out in the second paragraph of Article 9 of the Convention. It was justified in principle and proportionate to the aims pursued and could therefore be regarded as having been “necessary in a democratic society” (see paragraphs 66 to 116 of the Chamber judgment).

B. The parties’ submissions before the Grand Chamber

72. In her request for a referral to the Grand Chamber dated 27 September 2004 and in her oral submissions at the hearing, the applicant contested the grounds on which the Chamber had concluded that there had been no violation of Article 9 of the Convention.

73. However, in the observations she submitted to the Grand Chamber on 27 January 2005 she said that she was not seeking legal recognition of a right for all women to wear the Islamic headscarf in all places, inter alia in these terms: “Implicit in the section judgment is the notion that the right to wear the headscarf will not always be protected by freedom of religion. [I] do not contest that approach”.

74. The Government asked the Grand Chamber to endorse the Chamber’s finding that there had been no violation of Article 9.

C. The Court’s assessment

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

76. The applicant said that her choice of dress had to be treated as obedience to a religious rule which she regarded as “recognised practice”. She maintained that the restriction in issue, namely the rules on wearing the Islamic headscarf on university premises, was a clear interference with her right to freedom to manifest her religion.

77. The Government did not make any submissions to the Grand Chamber on this question.

78. As to whether there was interference, the Grand Chamber endorses the following findings of the Chamber (see paragraph 71 of the Chamber judgment):
“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”

(a) The parties’ submissions to the Grand Chamber

79. The applicant said that there had been no “written law” to prohibit students from wearing the Islamic headscarf at university, either when she enrolled in 1993 or in the period thereafter. She explained that under the Students Disciplinary Procedure Rules it was not a disciplinary offence merely to wear the Islamic headscarf (see paragraphs 49 and 50 above). The first regulation to restrict her right to wear the headscarf had been the circular issued by the University Vice Chancellor on 23 February 1998, some four and a half years later.

80. In the applicant’s submission, it could not validly be argued that the legal basis for that regulation was the case-law of the Turkish courts, as the courts only had jurisdiction to apply the law, not to establish new legal rules. Although in its judgments of 7 March 1989 and 9 April 1991 (see paragraphs 39 and 41 above) the Constitutional Court had not acted ultra vires in proscribing the headscarf in individual cases, the legislature had not construed the first of that court’s judgments as requiring it to introduce legislation prohibiting the Islamic headscarf. There was no statutory provision in force to prohibit students from wearing the headscarf on the premises of institutions of higher education, while the reasons given by the Constitutional Court for its decision did not have the force of law.

81. The applicant said that while university authorities, including vice chancellors’ offices and deaneries, were unquestionably at liberty to use the powers vested in them by law, the scope of those powers and the limits on them were also defined by law, as were the procedures by which they were to be exercised and the safeguards against abuse of authority. In the instant case, the Vice Chancellor had not possessed the authority or power, either under the laws in force or the Students Disciplinary Procedure Rules, to refuse students “wearing the headscarf” access to university premises or examination rooms. In addition, the legislature had at no stage sought to issue a general ban on wearing religious signs in schools and universities and there had never been support for such a ban in Parliament, despite the fierce debate to which the Islamic headscarf had given rise. Moreover, the fact that the administrative authorities had not introduced any general regulations providing for the imposition of disciplinary penalties on students wearing the headscarf in institutions of higher education meant that no such ban existed.

82. The applicant considered that the interference with her right had not been foreseeable and was not based on a “law” within the meaning of the Convention.

83. The Government confined themselves to asking the Grand Chamber to endorse the Chamber’s finding on this point.

(b) The Court’s assessment

84. The Court reiterates its settled case-law that the expression “prescribed by law” requires firstly that the impugned measure should have a basis in domestic law. It also refers to the
quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct (Gorzelik and Others v. Poland [GC], no. 44158/98, § 64, ECHR 2004-...).

85. The Court observes that the applicant’s arguments relating to the alleged unforeseeability of Turkish law do not concern the circular of 23 February 1998 on which the ban on students wearing the veil from lectures, courses and tutorials was based. That circular was issued by the Vice Chancellor of Istanbul University, who, as the person in charge in whom the main decision-making powers were vested, was responsible for overseeing and monitoring the administrative and scientific aspects of the functioning of the University. He issued the circular within the statutory framework set out in section 13 of Law no. 2547 (see paragraph 52 above) and in accordance with the regulatory provisions that had been adopted earlier.

86. According to the applicant, however, the circular was not compatible with transitional section 17 of Law no. 2547, as that section did not proscribe the Islamic headscarf and there were no legislative norms in existence capable of constituting a legal basis for a regulatory provision.

87. The Court must therefore consider whether transitional section 17 of Law no. 2547 was capable of constituting a legal basis for the circular. It reiterates in that connection that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see Kruslin v. France, judgment of 24 April 1990, Series A no. 176-A, p. 21, § 29) and notes that in rejecting the argument that the circular was illegal, the administrative courts relied on the settled case-law of the Supreme Administrative Court and the Constitutional Court (see paragraph 19 above).

88. Further, as regards the words “in accordance with the law” and “prescribed by law” which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term “law” in its “substantive” sense, not its “formal” one; it has included both “written law”, encompassing enactments of lower ranking statutes (De Wilde, Ooms and Versyp v. Belgium, judgment of 18 June 1971, Series A no 12, p. 45, § 93) and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by parliament (Bartold v. Germany, judgment of 25 March 1985, Series A no. 90, p. 21, § 46), and unwritten law. “Law” must be understood to include both statutory law and judge-made “law” (see, among other authorities, Sunday Times v. the United Kingdom (no. 1), judgment of 26 April 1979, Series A no. 30, p. 30, § 47; Kruslin, cited above, § 29 in fine; and Casado Coca v. Spain, judgment of 24 February 1994, Series A no 285-A, p. 18, § 43). In sum, the “law” is the provision in force as the competent courts have interpreted it.

89. Accordingly, the question must be examined on the basis not only of the wording of transitional section 17 of Law no. 2547, 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”.

90. The dispute therefore concerns the meaning of the words “laws in force” in the aforementioned provision.
91. The Court reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of “foreseeability” for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (Gorzelik and Others, judgment cited above, § 65).

92. The Court notes in that connection that in its aforementioned judgment the Constitutional Court found that the words “laws in force” necessarily included the Constitution. The judgment also made it clear that authorising students to “cover the neck and hair with a veil or headscarf for reasons of religious conviction” in the universities was contrary to the Constitution (see paragraph 41 above).

93. That decision of the Constitutional Court, which was both binding (see paragraphs 29 and 54 above) and accessible, as it had been published in the Official Gazette of 31 July 1991, supplemented the letter of transitional section 17 and followed the Constitutional Court’s previous case-law (see paragraph 39 above). In addition, the Supreme Administrative Court had by then consistently held for a number of years that wearing the Islamic headscarf at university was not compatible with the fundamental principles of the Republic, since the headscarf was in the process of becoming the symbol of a vision that was contrary to the freedoms of women and those fundamental principles (see paragraph 37 above).

94. As to the applicant’s argument that the legislature had at no stage imposed a ban on wearing the headscarf, the Court reiterates that it is not for it to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (Gorzelik and Others, judgment cited above, § 67).

95. Furthermore, the fact that Istanbul University or other universities may not have applied a particular rule – in this instance transitional section 17 of Law no. 2547 read in the light of the relevant case-law – rigorously in all cases, preferring to take into account the context and the special features of individual courses, does not by itself make that rule unforeseeable. In the Turkish constitutional system, the university authorities may not under any circumstances place restrictions on fundamental rights without a basis in law (see Article 13 of the Constitution – paragraph 29 above). Their role is confined to establishing the internal rules of the educational institution concerned in accordance with the rule requiring conformity with statute and subject to the administrative courts’ powers of review.

96. Further, the Court accepts that it can prove difficult to frame laws with a high degree of precision on matters such as internal university rules, and tight regulation may be inappropriate (see, mutatis mutandis, Gorzelik and Others, judgment cited above, § 67).

97. Likewise, it is beyond doubt that regulations on wearing the Islamic headscarf existed at Istanbul University since 1994 at the latest, well before the applicant enrolled there (see paragraphs 43 and 45 above).
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*”

(a) **Submissions of the parties before the Grand Chamber**

(i) **The applicant**

100. The applicant contested the Chamber’s findings. In her observations of 27 September 2004 and her oral submissions at the hearing, she argued that the notions of “democracy” and “republic” were not alike. While many totalitarian regimes claimed to be “republics”, only a true democracy could be based on the principles of pluralism and broadmindedness. The structure of the judicial and university systems in Turkey had been determined by the successive coups d’état by the military in 1960, 1971 and 1980. Referring to the Court’s case-law and the practice that had been adopted in a number of countries in Europe, the applicant further submitted that the Contracting States should not be given a wide margin of appreciation to regulate students’ dress. She explained that no European State prohibited students from wearing the Islamic headscarf at university and added that there had been no sign of tension in institutions of higher education that would have justified such a radical measure.

101. The applicant further explained in her aforementioned observations that students were discerning adults who enjoyed full legal capacity and were capable of deciding for themselves what was appropriate conduct. Consequently, the allegation that, by wearing the Islamic headscarf, she had shown a lack of respect for the convictions of others or sought to influence fellow students and to undermine their rights and freedoms was wholly unfounded. Nor had she created an external restriction on any freedom with the support or authority of the State. Her choice had been based on religious conviction, which was the most important fundamental right that pluralistic, liberal democracy had granted her. It was, to her mind, indisputable that people were free to subject themselves to restrictions if they considered it appropriate. It was also unjust to say that merely wearing the Islamic headscarf was contrary to the principle of equality between men and women, as all religions imposed such restrictions on dress which people were free to choose whether or not to comply with.
102. Conversely, in her observations of 27 January 2005, the applicant said that she was able to accept that wearing the Islamic headscarf would not always be protected by freedom of religion (see paragraph 73 above).

(ii) The Government

103. The Government agreed with the Chamber’s findings (see paragraph 71 above).

(b) The Court’s assessment

(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 (see, among other authorities, _Kokkinakis v. Greece_, 25 May 1993, Series A no. 260-A, p. 17, § 3; and _Buscarini and Others v. San Marino [GC]_, no. 24645/94, § 34, ECHR 1999-I).

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 (see, _mutatis mutandis_, _Cha’are Shalom Ve Tsedek v. France [GC]_, no. 27417/95, § 73, ECHR 2000-VII).

Article 9 does not protect every act motivated or inspired by a religion or belief (see, among many other authorities, _Kalaç v. Turkey_, judgment of 1 July 1997, _Reports of Judgments and Decisions_ 1997-IV, p. 1209, § 27; _Arrowsmith v. the United Kingdom_, no. 7050/75, Commission decision of 12 October 1978, Decisions and Reports (DR) 19, p. 5; _C. v. the United Kingdom_, no. 10358/83, Commission decision of 15 December 1983, DR 37, p. 142; and _Tepeli and Others v. Turkey_ (dec.), no. 31876/96, 11 September 2001).

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 (_Kokkinakis_, cited above, p. 18, § 33). 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 (see _Manoussakis and Others v. Greece_, judgment of 26 September 1996, _Reports 1996-IV_, p. 1365, § 47; _Hassan and Tchaouch v. Bulgaria [GC]_, no. 30985/96, § 78, ECHR
2000-XI; Refah Partisi and Others, judgment cited above, § 91) and that it requires the State to ensure mutual tolerance between opposing groups (United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Reports 1998-I, § 57). 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 (Serif v. Greece, no. 38178/97, § 53, ECHR 1999-IX).

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 (see, mutatis mutandis, Young, James and Webster v. the United Kingdom, judgment of 13 August 1981, Series A no. 44, p. 25, § 63; and Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, § 112, ECHR 1999-III). 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 (see, mutatis mutandis, the United Communist Party of Turkey and Others, judgment cited above, pp. 21-22, § 45; and Refah Partisi and Others, judgment cited above § 99). 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” (Chassagnou and Others, judgment cited above, § 113).

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 (see, mutatis mutandis, Cha’are Shalom Ve Tsedek, cited above, § 84; and Wingrove v. the United Kingdom judgment of 25 November 1996, Reports 1996-V, p. 1958, § 58). 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 (Otto-Preminger-Institut v. Austria, judgment of 20 September 1994, Series A no. 295-A, p. 19, § 50) and the meaning or impact of the public expression of a religious belief will differ according to time and context (see, among other authorities, Dahlab v. Switzerland (dec.) no. 42393/98, ECHR 2001-V). 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 (see, mutatis mutandis, Wingrove, judgment cited above, p. 1957, § 57). 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 (see, mutatis mutandis, Gorzelik, judgment cited above, § 67; and Murphy v. Ireland, no. 44179/98, § 73, ECHR 2003-IX (extracts)).

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 proportionate (Manoussakis and Others, judgment cited above, § 44). 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 (see, mutatis mutandis, Kokkinakis, judgment cited above, § 31; Manoussakis and Others, judgment cited above, p. 1364, § 44; and Casado Coca, judgment cited above, § 55).

111. The Court also notes that in the decisions of Karaduman v. Turkey (no. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93) and Dahlab v. Switzerland (no. 42393/98, ECHR 2001-V) the Convention institutions found that in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. In the Karaduman case, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practise their religion or who belonged to another religion were found to be justified under Article 9 § 2 of the Convention. Consequently, it is established that institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others (see, among other authorities, Refah Partisi and Others, cited above, § 95). In the Dahlab case, which concerned the teacher of a class of small children, the Court stressed among other matters the “powerful external symbol” which her wearing a headscarf represented and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf 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.

(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 (see paragraphs 37, 39 and 41 above), based in particular on the two principles of secularism and equality.

113. In its judgment of 7 March 1989, the Constitutional Court stated that secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements. The Constitutional Court added that freedom to manifest one’s religion could be restricted in order to defend those values and principles (see paragraph 39 above).

114. As the Chamber rightly stated (see paragraph 106 of its judgment), the Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the
Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention (see 
*Refah Partisi and Others*, judgment cited above, § 93).

115. After examining the parties’ arguments, the Grand Chamber sees no good reason to depart from the approach taken by the Chamber (see paragraphs 107-109 of the Chamber judgment) as follows:

“... The Court ... notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women... Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe (see, among other authorities, *Abdulaziz, Cabales and Balkandali v. United-Kingdom*, judgment of 28 May 1985, Series A no. 77, p. 38, § 78; *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 21–22, § 67; *Burgharz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Van Raalte v. Netherlands*, judgment of 21 February 1997, Reports 1997-I, p. 186, § 39, *in fine*; and *Petrovic v. Austria* judgment of 27 March 1998, Reports 1998-II, p. 587, § 37) – was also found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution...

... 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 (see *Karaduman*, decision cited above; and *Refah Partisi and Others*, cited above, § 95), 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 (see paragraph 39 above), 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 and, in particular, equality before the law of men and women are being taught and applied in practice, 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 (see paragraph 111 of its judgment), 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 (see paragraph 47 above).

119. It should also be noted that when the issue of whether students should be allowed to wear the Islamic headscarf surfaced at Istanbul University in 1994 in relation to the medical courses, the Vice Chancellor reminded them of the reasons for the rules on dress. Arguing that calls for permission to wear the Islamic headscarf in all parts of the university premises were misconceived and pointing to the public-order constraints applicable to medical courses, he asked the students to abide by the rules, which were consistent with both the legislation and the case-law of the higher courts (see paragraphs 43-44 above).

120. Furthermore, the process whereby the regulations that led to the decision of 9 July 1998 were implemented took several years and was accompanied by a wide debate within Turkish society and the teaching profession (see paragraph 35 above). The two highest courts, the Supreme Administrative Court and the Constitutional Court, have managed to establish settled case-law on this issue (see paragraphs 37, 39 and 41 above). It is quite clear that throughout that decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned, while at the same time ensuring that order was maintained and in particular that the requirements imposed by the nature of the course in question were complied with.

121. In that connection, the Court does not accept the applicant’s submission that the fact that there were no disciplinary penalties for failing to comply with the dress code effectively meant that no rules existed (see paragraph 81 above). As to how compliance with the internal rules should have been secured, it 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 (see, mutatis mutandis, Valsamis v. Greece, judgment of 18 December 1996, Reports 1996-VI, p. 2325, § 32). Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution’s “internal rules” devoid of purpose. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief (Pichon and Sajous v. France (dec.), no. 49853/99, ECHR 2001-X) and does not confer on people who do so the right to disregard rules that have proved to be justified (see the opinion of the Commission, § 51, contained in its report of 6 July 1995 appended to the Valsamis judgment cited above, p. 2337).

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.
II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 1

A. Whether a separate examination of this complaint is necessary

1. The parties’ submissions

124. The Court notes that although the applicant relied on various provisions of the Convention (Articles 8, 10 and 14, and Article 2 of Protocol No. 1) before the Chamber, her principal argument was that there had been a violation of Article 9 of the Convention. In her request for a referral, the applicant asked the Grand Chamber to find a violation of Articles 8, 9, 10 and 14 of the Convention and of Article 2 of Protocol No. 1. She did not make any legal submissions with regard to Article 10.

125. In her written pleadings of 27 January 2005, however, the applicant appears to present her case concerning the regulations of 23 February 1998 in a different light to that in which it had been presented before the Chamber. In those pleadings, she “allege[d] as her main submission a violation of Article 2 of Protocol No. 1 and request[ed] the Grand Chamber to hold accordingly”. Among other things, she asked the Court to “find that the decision to refuse [her] access to the University when wearing the Islamic headscarf amounts in the present case to a violation of her right to education, as guaranteed by Article 2 of Protocol No. 1, read in the light of Articles 8, 9 and 10 of the Convention”.

126. The Government submitted that there had been no violation of the first sentence of Article 2 of Protocol No. 1.

2. The Chamber judgment

127. The Chamber found that no separate question arose under Articles 8, 10 and 14 of the Convention or Article 2 of Protocol No. 1, the provisions that had been relied on by the applicant, as the relevant circumstances were the same as those it had examined in relation to Article 9, in respect of which it had found no violation.

3. The Court’s assessment

128. The Court observes that under its case-law that is now well-established, the “case” referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, there being no basis for a merely partial referral of the case to the Grand Chamber (see, as the most recent authorities, Cumpănă and Mazăre v. Romania [GC], no. 33348/96, § 66, ECHR 2004-...; and K. and T. v. Finland [GC], no. 25702/94, §§ 140-141, ECHR 2001-VII). The “case” referred to the Grand Chamber is the application as it has been declared admissible.

129. The Court considers that, having regard to the special circumstances of the case, the fundamental importance of the right to education and the position of the parties, the complaint under the first sentence of Article 2 of Protocol No. 1 can be considered as separate from the complaint under Article 9 of the Convention, notwithstanding the fact that, as was the case with Article 9, the substance of the complaint is criticism of the regulations that were issued on 23 February 1998.
130. In conclusion, the Court will examine this complaint separately (see, \textit{mutatis mutandis}, \textit{Göç v. Turkey} [GC], no. 36590/97, § 46, ECHR 2002-V).

\section*{B. Applicability}

131. The applicant alleged a violation of the first sentence of Article 2 Protocol No. 1, which provides:

“No person shall be denied the right to education.”

\subsection*{1. Scope of the first sentence of Article 2 of Protocol No. 1}

\subsubsection*{(a) The parties’ submissions before the Grand Chamber}

132. The applicant said that there was no in doubt that the right to education, as guaranteed by the first sentence of Article 2 of Protocol No. 1, applied to higher education, since that provision applied to all institutions existing at a given time.

133. The Government did not comment on this issue.

\subsubsection*{(b) The Court’s assessment}

134. The first sentence of Article 2 of Protocol No 1 provides that no one shall be denied the right to education. Although the provision makes no mention of higher education, there is nothing to suggest that it does not apply to all levels of education, including higher education.

135. As to the content of the right to education and the scope of the obligation it imposes, the Court notes that in the “\textit{Belgium linguistic}” case (judgment (on the merits) of 23 July 1968, Series A no. 6, p. 31, § 3), it stated: “The negative formulation indicates, as is confirmed by the ‘preparatory work’..., that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol. As a ‘right’ does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State”.

136. The Court does not lose sight of the fact that the development of the right to education, whose content varies from one time or place to another, according to economic and social circumstances, mainly depends on the needs and resources of the community. However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions (\textit{Marckx v. Belgium}, judgment of 13 June 1979, Series A no. 31, p. 19, § 41; \textit{Airey v. Ireland}, judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26; and, as the most recent authority, \textit{Mamatkulov and Askarov v. Turkey} [GC], nos. 46827/99 and 46951/99, § 121, 4 February 2005). While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education. In a number of recently adopted instruments, the Council of Europe has stressed the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the
strengthening of democracy (see, *inter alia*, Recommendation no. R (98) 3 and Recommendation no. 1353 (1998) – cited in paragraphs 68 and 69 above). As the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (see paragraph 67 above) states, higher education “is instrumental in the pursuit and advancement of knowledge” and “constitutes an exceptionally rich cultural and scientific asset for both individuals and society”.

137. Consequently, it would be hard to imagine that institutions of higher education existing at a given time do not come within the scope of the first sentence of Article 2 of Protocol No 1. Although that Article does not impose a duty on the Contracting States to set up institutions of higher education, any State so doing will be under an obligation to afford an effective right of access to them. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision (see, *mutatis mutandis*, the “Belgian Linguistic case”, cited above, p. 33, § 9; and *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, p. 14, § 25).

138. This approach is in line with the Commission’s report in the “Belgian Linguistic case” (see the judgment cited above, p. 22), in which as far back as 1965 it stated that although the scope of the right protected by Article 2 of Protocol No. 1 was not defined or specified in the Convention, it included, “for the purposes of examining the present case”, “entry to nursery, primary, secondary and higher education”.

139. The Commission subsequently observed in a series of decisions: “[T]he right to education envisaged in Article 2 is concerned primarily with elementary education and not necessarily advanced studies such as technology” (*X. v. the United Kingdom*, no. 5962/72, Commission decision of 13 March 1975, DR 2, p. 50; and *Kramelius v. Sweden*, no. 21062/92, Commission decision of 17 January 1996). In more recent cases, leaving the door open to the application of Article 2 of Protocol No. 1 to university education, it examined the legitimacy of certain restrictions on access to institutions of higher education (see, with regard to restrictions on access to higher education, *X. v. the United Kingdom*, no. 8844/80, Commission decision of 9 December 1980, DR 23, p. 228; and with regard to suspension or expulsion from educational institutions, *Yanasik v. Turkey*, no. 14524/89, Commission decision of 6 January 1993, DR 74, p. 14; and *Sulak v. Turkey*, no. 24515/94, Commission decision of 17 January 1996, DR 84, p. 98).

140. For its part, after the “Belgian Linguistic case” the Court declared a series of cases on higher education inadmissible, not because the first sentence of Article 2 of Protocol No. 1 was inapplicable, but on other grounds (complaint of a disabled person who did not satisfy a university’s entrance requirements, *Lukach v. Russia* (dec.), no. 48041/99, 16 November 1999; refusal of permission to an applicant in custody to prepare for and sit a final university examination for a legal diploma, *Georgiou v. Greece* (dec.), no. 45138/98, 13 January 2000; interruption of advanced studies by a valid conviction and sentence, *Durmaz and Others v. Turkey* (dec.), no. 46506/99, 4 September 2001).

141. In the light of all the foregoing considerations, it is clear that any institutions of higher education existing at a given time come within the scope of the first sentence of Article 2 of Protocol No. 1, since the right of access to such institutions is an inherent part of the right set out in that provision. This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 2 of Protocol No. 1 read in its context and having regard to the object and purpose of the Convention, a lawmaking
treaty (see, mutatis mutandis, Golder v. the United Kingdom, judgment of 21 February 1975, Series A no. 18, p. 18, § 36).

142. Consequently, the first sentence of Article 2 of Protocol No. 1 is applicable in the instant case. The manner in which it is applied will, however, obviously depend on the special features of the right to education.

C. Merits

1. The parties’ submissions before the Grand Chamber

(a) The applicant

143. The applicant submitted that the ban imposed by the public authorities on wearing the Islamic headscarf clearly constituted interference with her right to education, which had resulted in her being refused access to oncology examinations on 12 March 1998, prevented from enrolling with the university’s administrative department on 20 March 1998 and refused access to a lecture on neurology on 16 April 1998 and a written examination on public health on 10 June 1998.

144. She accepted that, by its nature, the right to education had to be regulated by the State. In her view, the criteria to be used in the regulations should be the same as those applicable to permitted interference under Articles 8 to 11 of the Convention. In that connection, she pointed to the lack of any provision in Turkish domestic law preventing the pursuit of higher education and said that the vice-chancellor’s offices had no authority or power under the laws in force to refuse students wearing the headscarf access to university.

145. The applicant said that despite wearing the headscarf she had been able to enrol at the university and to pursue her studies there without incident for four and a half years. She therefore argued that at the time of her enrolment at the university and while pursuing her studies, there had been no domestic source of law that would have enabled her to foresee that she would be denied access to the lecture theatres a number of years later.

146. While reiterating that the measures taken in her case were disproportionate to the aim pursued, the applicant accepted that it was in principle legitimate for institutions of higher education to seek to provide education in a calm and safe environment. However, as the lack of any disciplinary proceedings against her showed, her wearing the Islamic headscarf had not in any way prejudiced public order or infringed the rights and freedoms of the other students. Furthermore, in her submission, the relevant university authorities had had sufficient means at their disposal to guarantee the maintenance of public order, such as bringing disciplinary proceedings or lodging a criminal complaint if a student’s conduct contravened the criminal law.

147. The applicant argued that making the pursuit of her studies conditional on her abandoning the headscarf and refusing her access to educational institutions if she refused to comply with that condition had effectively and wrongfully violated the substance of her right to education and rendered it ineffective. This had been compounded by the fact that she was a young adult with a fully developed personality and social and moral values who was deprived of all possibility of pursuing her studies in Turkey in a manner consistent with her beliefs.
148. For all these reasons, the applicant submitted that the respondent State had overstepped the limits of its margin of appreciation, however wide it might be, and violated her right to education, read in the light of Articles 8, 9 and 10 of the Convention.

(b) The Government

149. Referring to the case-law of the Court, the Government observed that the Contracting States had a margin of appreciation to determine how to regulate education.

150. They added that the applicant had enrolled at the Cerrahpaşa Faculty of Medicine at Istanbul University after studying for five years at the Faculty of Medicine of Bursa University, where she had worn the headscarf. The Vice-Chancellor of Istanbul University had issued a circular prohibiting students from wearing the headscarf in the University. The ban was based on judgments of the Constitutional Court and the Supreme Administrative Court. As the application and the request for a referral to the Grand Chamber indicated, the applicant had not encountered any difficulty in enrolling at the Cerrahpaşa Faculty of Medicine, which proved that she had enjoyed equality of treatment in the right of access to educational institutions. As regards the interference caused by the implementation of the circular of 23 February 1998, the Government confined themselves to saying that it had been the subject of scrutiny by the courts.

151. The Government concluded by asking for the judgment of the Chamber to be upheld, arguing that the regulations in issue did not contravene the Court’s case-law, having regard to the margin of appreciation accorded to the Contracting States.

2. The Court’s assessment

(a) General principles

152. The right to education, as set out in the first sentence of Article 2 of Protocol No. 1, guarantees everyone within the jurisdiction of the Contracting States “a right of access to educational institutions existing at a given time”, but such access constitutes only a part of the right to education. For that right “to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed” (Belgian Linguistic case, judgment cited above, pp. 30-32, §§ 3-5; see also Kjeldsen, Busk Madsen and Pedersen v. Denmark, judgment of 7 December 1976, Series A no. 23, pp. 25-26, § 52). Similarly, implicit in the phrase “No person shall...” is the principle of equality of treatment of all citizens in the exercise of their right to education.

153. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, without distinction (Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, Series A no. 247-C, p. 58, § 27).

154. In spite of its importance, this right is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access “by its very nature calls for regulation by the State” (Belgian Linguistic case, judgment cited above, p. 32, § 5; see also, mutatis mutandis, Golder, cited above, pp. 18-19, § 38; and Fayed v. the United Kingdom, judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65). Admittedly, the regulation of educational institutions may vary in time and in place, inter alia, according to the
needs and resources of the community and the distinctive features of different levels of
education. Consequently, the Contracting States enjoy a certain margin of appreciation in this
sphere, although the final decision as to the observance of the Convention’s requirements rests
with the Court. In order to ensure that the restrictions that are imposed do not curtail the right in
question to such an extent as to impair its very essence and deprive it of its effectiveness, the
Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate
aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not
bound by an exhaustive list of “legitimate aims” under Article 2 of Protocol No. 1 (see, \textit{mutatis
mutandis}, Podkolzina v. Latvia, no. 46726/99, § 36, ECHR 2002-II). Furthermore, a limitation
will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of
proportionality between the means employed and the aim sought to be achieved.

155. Such restrictions must not conflict with other rights enshrined in the Convention and its
Protocols either (\textit{Belgian Linguistic case}, judgment cited above, p. 32, § 5; \textit{Campbell and
Cosans v. the United Kingdom}, judgment of 25 February 1982, Series A no. 48, p. 19, § 41; and
Yanasik, decision cited above). The provisions of the Convention and its Protocols must be
considered as a whole. Accordingly, the first sentence of Article 2 must, where appropriate, be
read in the light in particular of Articles 8, 9 and 10 of the Convention (\textit{Kjeldsen, Busk Madsen
and Pedersen}, judgment cited above, p. 26, § 52 in fine).

156. The right to education does not in principle exclude recourse to disciplinary measures,
including suspension or expulsion from an educational institution in order to ensure compliance
with its internal rules. The imposition of disciplinary penalties is an integral part of the process
whereby a school seeks to achieve the object for which it was established, including the
development and moulding of the character and mental powers of its pupils (see, among other
authorities, \textit{Campbell and Cosans}, judgment cited above, p. 14, § 33; see also, with respect to the
expulsion of a cadet from a military academy, \textit{Yanasik}, decision cited above, and the expulsion

(b) Application of these principles to the present case

157. By analogy with its reasoning on the question of the existence of interference under
Article 9 (see paragraph 78 above), the Court is able to accept that the regulations on the basis of
which the applicant was refused access to various lectures and examinations for wearing the
Islamic headscarf constituted a restriction on her right to education, notwithstanding the fact that
she had had access to the University and been able to read the subject of her choice in
accordance with the results she had achieved in the university entrance examination. However,
an analysis of the case by reference to the right to education cannot in this instance be divorced
from the conclusion reached by the Court with respect to Article 9 (see paragraph 122 above), as
the considerations taken into account under that provision are clearly applicable to the complaint
under Article 2 of Protocol No. 1, which complaint consists of criticism of the regulation
concerned that that takes much the same form as that made with respect to Article 9.

158. In that connection, the Court has already found that the restriction was foreseeable to
those concerned and pursued the legitimate aims of protecting the rights and freedoms of others
and maintaining public order (see paragraphs 98 and 99 above). The obvious purpose of the
restriction was to preserve the secular character of educational institutions.
159. As regards the principle of proportionality, the Court found in paragraphs 118 to 121 above that there was a reasonable relationship of proportionality between the means used and the aim pursued. In so finding, it relied in particular on the following factors which are clearly relevant here. Firstly, the measures in question manifestly did not hinder the students in performing the duties imposed by the habitual forms of religious observance. Secondly, the decision-making process for applying the internal regulations satisfied, so far as was possible, the requirement to weigh up the various interests at stake. The university authorities judiciously sought a means whereby they could avoid having to turn away students wearing the headscarf and at the same time honour their obligation to protect the rights of others and the interests of the education system. Lastly, the process also appears to have been accompanied by safeguards – the rule requiring conformity with statute and judicial review – that were apt to protect the students’ interests (see paragraph 95 above).

160. It would, furthermore, be unrealistic to imagine that the applicant, a medical student, was unaware of Istanbul University’s internal regulations restricting the places where religious dress could be worn or had not been sufficiently informed about the reasons for their introduction. She could reasonably have foreseen that she ran the risk of being refused access to lectures and examinations if, as subsequently happened, she continued to wear the Islamic headscarf after 23 February 1998.

161. Consequently, the restriction in question did not impair the very essence of the applicant’s right to education. In addition, in the light of its findings with respect to the other Articles relied on by the applicant (see paragraphs 122 above and 166 below), the Court observes that the restriction did not conflict with other rights enshrined in the Convention or its Protocols either.

162. In conclusion, there has been no violation of the first sentence of Article 2 of Protocol No. 1.
III. ALLEGED VIOLATION OF ARTICLES 8, 10 AND 14 OF THE CONVENTION

163. As she had done before the Chamber, the applicant alleged a violation of Articles 8, 10 and 14 of the Convention, arguing that the impugned regulations had infringed her right to respect for her private life and her right to freedom of expression and was discriminatory.

164. The Court, however, does not find any violation of Articles 8 or 10 of the Convention, the arguments advanced by the applicant being a mere reformulation of her complaint under Article 9 of the Convention and Article 2 of Protocol No. 1, in respect of which the Court has concluded that there had been no violation.

165. As regards the complaint under Article 14, taken individually or together with Article 9 of the Convention or the first sentence of Article 2 of Protocol No. 1, the Court notes that the applicant did not provide detailed particulars in her pleadings before the Grand Chamber. Furthermore, as has already been noted (see paragraphs 99 and 158 above), the regulations on the Islamic headscarf were not directed against the applicant’s religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions. Consequently, the reasons which led the Court to conclude that there has been no violation of Article 9 of the Convention or Article 2 of Protocol No. 1 incontestably also apply to the complaint under Article 14, taken individually or together with the aforementioned provisions.

166. Consequently, the Court holds that there has been no violation of Articles 8, 10 or 14 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;

2. Holds, by sixteen votes to one, that there has been no violation of the first sentence of Article 2 of Protocol No. 1;

3. Holds, unanimously, that there has been no violation of Article 8 of the Convention;

4. Holds, unanimously, that there has been no violation of Article 10 of the Convention;

5. Holds, unanimously, that there has been no violation of Article 14 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 November 2005.

Luzius WILDHABER
President
T.L. Early
Deputy to the Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint concurring opinion of Mr Rozakis and Mrs Vajić;
(b) dissenting opinion of Mrs Tulkens;

L.W.
T.L.E.
We agree with the majority that there has been no violation of Article 9 of the Convention in the present case. We have also voted for the finding that there was no violation of the first sentence of Article 2 of Protocol No. 1 mainly because the text of the judgment is drafted in such a way that it makes it difficult to divide these two findings. As stated in the judgment the “...analysis of the case by reference to the right to education cannot in this instance be divorced from the conclusion reached with respect to Article 9..., as the considerations taken into account under that provision are clearly applicable to the complaint under Article 2 of Protocol No. 1, which complaint consists of criticism of the regulation concerned that takes much the same form as that made with respect to Article 9” (§ 157).

In reality, however, we are of the opinion that the case would have been better dealt with only under Article 9, the way it was done in the Chamber judgment. As we see it, the main issue before the Court was the interference of the State with the applicant’s right to wear a headscarf at the University and, through that, to manifest in public her religious beliefs. Hence, the central question in the case was the protection of her religious freedom as enshrined in Article 9 of the Convention. Article 9 is, in the circumstances, the obvious lex specialis covering the facts of the case, and the applicant’s corollary complaint concerning the same facts under Article 2 of Protocol No. 1, although clearly admissible, does not raise a separate issue under the Convention.
DISSENTING OPINION OF JUDGE TULKENS

(Translation)

For a variety of mutually supporting reasons I did not vote with the majority on the question of Article 9 of the Convention or of Article 2 of Protocol No. 1, which concerns the right to education. I do, however, fully agree with the Court’s ruling that the scope of the latter provision extends to higher and university education.

A. Freedom of religion

1. As regards the general principles reiterated in the judgment there are points on which I strongly agree with the majority (see paragraphs 104 to 108 of the judgment). The right to freedom of religion guaranteed by Article 9 of the Convention is a “precious asset” not only for believers, but also for atheists, agnostics, sceptics and the unconcerned. It is true that Article 9 of the Convention does not protect every act motivated or inspired by a religion or belief and that in democratic societies, in which several religions co-exist, it may be necessary to place restrictions on freedom to manifest one’s religion in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (see paragraph 106 of the judgment). Further, pluralism, tolerance and broadmindedness are hallmarks of a democratic society and this entails certain consequences. The first is that these ideals and values of a democratic society must also be based on dialogue and a spirit of compromise, which necessarily entails mutual concessions on the part of individuals. The second is that the role of the authorities in such circumstances is not to remove the cause of the tensions by eliminating pluralism, but, as the Court again reiterated only recently, to ensure that the competing groups tolerate each other (Ouranio Toxo and Others v. Greece, judgment of 20 October 2005, § 40).

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”. Owing to its nature, the Court’s review must be conducted in concreto, in principle by reference to three criteria: first, whether the interference, which must be capable of protecting the legitimate interest that has been put at risk, was appropriate; second, whether the measure that has been chosen is the measure that is the least restrictive of the right or freedom concerned; and, lastly, whether the measure was proportionate, a question which entails a balancing of the competing
interests. Underlying the majority’s approach is the margin of appreciation which the national authorities are recognised as possessing and which reflects, inter alia, the notion that they are “better placed” to decide how best to discharge their Convention obligations in what is a sensitive area (see paragraph 109 of the judgment). The Court’s jurisdiction is, of course, subsidiary and its role is not to impose uniform solutions, especially “with regard to establishment of the delicate relations between the Churches and the State” (Cha’are Shalom Ve Tsedek v. France, judgment of 27 June 2000, § 84), even if, in certain other judgments concerning conflicts between religious communities, the Court has not always shown the same judicial restraint (Serif v. Greece, judgment of 14 December 1999; Metropolitan Church of Bessarabia and Others v. Moldova, judgment of 13 December 2001). I therefore entirely agree with the view that the Court must seek to reconcile universality and diversity and that it is not its role to express an opinion on any religious model whatsoever.

3. I would perhaps have been able to follow the margin-of-appreciation approach had not two factors drastically reduced its relevance in the instant case. The first concerns the argument the majority use to justify the width of the margin, namely the diversity of practice between the States on the issue of regulating the wearing of religious symbols in educational institutions and, thus, the lack of a European consensus in this sphere. The comparative-law materials do not allow of such a conclusion, as in none of the member States has the ban on wearing religious symbols extended to university education, which is intended for young adults, who are less amenable to pressure. The second factor concerns the European supervision that must accompany the margin of appreciation and which, even though less extensive than in cases in which the national authorities have no margin of appreciation, goes hand in hand with it. However, other than in connection with Turkey’s specific historical background, European supervision seems quite simply to be absent from the judgment. However, the issue raised in the application, whose significance to the right to freedom of religion guaranteed by the Convention is evident, is not merely a “local” issue, but one of importance to all the member States. European supervision cannot, therefore, be escaped simply by invoking the margin of appreciation.

4. On what grounds was the interference with the applicant’s right to freedom of religion through the ban on wearing the headscarf based? In the present case, relying exclusively on the reasons cited by the national authorities and courts, the majority put forward, in general and abstract terms, two main arguments: secularism and equality. While I fully and totally subscribe to each of these principles, I disagree with the manner in

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which they were applied here and to the way they were interpreted in relation to the practice of wearing the headscarf. In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.

5. As regards, firstly, secularism, I would reiterate that I consider it an essential principle and one which, as the Constitutional Court stated in its judgment of 7 March 1989, 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”. Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. 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 (Smith and Grady v. the United Kingdom, judgment of 27 September 1999, § 89). 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 (Otto-Preminger-Institut v. Austria, judgment of 20 September 1994; Wingrove v. the United Kingdom, judgment of 25 November 1996), it has shown itself less willing to intervene in cases concerning religious practices (Cha’are Shalom Ve Tsedek v. France, judgment of 27 June 2000; Dahlab v. Switzerland, decision of 15 February 2001), which only appear to receive a subsidiary form of protection (see paragraph 105 of the 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 1.

7. Referring to the Refah Partisi and Others v. Turkey judgment of 13 February 2003, 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” (see paragraph 114). 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 2.

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

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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 (Kokkinakis v. Greece, judgment of 25 May 1993; United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998). 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 (p. 14). 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 pupils and 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 (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 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 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. Mutatis mutandis, in 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 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 expression1.

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, in fine). 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” (§ 95).

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 1.

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 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 2003,2 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 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” (see paragraph 111 of the judgment, in fine).

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 on the basis of Article 8 (Keenan v. the United Kingdom, judgment 3 April 2001, § 92; Pretty v. the United Kingdom, judgment of 29 April 2002, §§ 65-67; Christine Goodwin v. the United Kingdom, judgment of 11 July 2002, 3

§ 90). 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.

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.

B. The right to education

14. The majority having decided that the applicant’s complaint should also be examined under Article 2 of Protocol No. 1, I entirely agree with the view, which had already been expressed in the Commission’s report in the Case “relating to certain aspects of the laws on the use of languages in education in Belgium” of 24 June 1965, that that provision is applicable to higher and university education. The judgment rightly points out that “there is no watertight division separating higher education from other forms of education” and joins the Council of Europe in reiterating “the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy” (see paragraph 136 of the judgment). Moreover, since the right to education means a right for everyone to benefit from educational facilities, the Grand Chamber notes that a State which has set up higher-education institutions “will be under an obligation to afford an effective right of access to [such facilities]”, without discrimination (see paragraph 137 of the judgment).

15. However, although the Grand Chamber stresses that in a democratic society the right to education is indispensable to the furtherance of human rights (see paragraph 137 of the judgment), it is surprising and regrettable for it then to proceed to deprive the applicant of that right for reasons which do not appear to me to be either relevant or sufficient. The applicant did not, on religious grounds, seek to be excused from certain activities or request changes to be made to the university course for which she had enrolled as a student (unlike the position in the case of Kjeldsen, Busk, Madsen and Pedersen v. Denmark, judgment of 7 December 1976). She simply wished to complete her studies in the conditions that had obtained when she first enrolled at the University and during the initial years of her university career, when she had been free to wear the headscarf without any problem. I consider that by refusing the applicant access to the lectures and examinations that were part of the course at the Faculty of Medicine, she was de facto deprived of the right of access to the University and, consequently, of her right to education.

16. The Grand Chamber adopted “by analogy” its reasoning on the existence of interference under Article 9 of the Convention and found that an analysis by reference to the right to education “cannot in this instance be divorced from the conclusions reached by the Court with respect to Article 9”, as the considerations taken into account under that provision “are clearly applicable to the complaint under Article 2 of Protocol No. 1” (see paragraph 157 of the judgment). In these circumstances, I consider that the Chamber was undoubtedly right in its judgment of 30 November 2004 to hold that no “separate question” arose under Article 2 of Protocol No. 1, as the relevant circumstances and arguments were the same as those it had considered in relation to Article 9, in respect of which it found no violation.

Whatever the position, I am not entirely satisfied that the reasoning with regard to religious freedom “is clearly applicable” to the right to education. Admittedly, this latter right is not absolute and may be subject to limitations by implication, provided they do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness. Nor may such restrictions conflict with other rights enshrined in the Convention, whose provisions must be considered as a whole. Further, the margin of appreciation is narrower for negative obligations and the Court must, in any event, determine in the last resort whether the Convention requirements have been complied with. Lastly, a limitation will only be consistent with the right to education if there is a reasonable relationship of proportionality between the means employed and the aim pursued.

17. What was the position in the instant case? I will not pursue here the debate concerning the right to freedom of religion, but will confine myself to highlighting the additional elements that concerned the proportionality of the limitations that were imposed on the applicant’s right to education.

I would begin by noting that before refusing the applicant access to lectures and examinations, the authorities should have used other means either to encourage her (through mediation, for example) to remove her headscarf and pursue her studies, or to ensure that public order was maintained on the university premises if it was genuinely at risk\(^1\). The fact of the matter is that no attempt was made to try measures that would have had a less drastic effect on the applicant’s right to education in the instant case. My second point is that it is common ground that by making the applicant’s pursuit of her studies conditional on removing the headscarf and by refusing her access to the university if she failed to comply with the requirements, the authorities forced the applicant to leave the country and complete her studies at the University of Vienna. She was thus left with no alternative. However, in the Cha’are Shalom Ve Tsedek v. France judgment of 27 June 2000 the existence of alternative solutions was one of the factors the Court took into account in holding that there had been no violation of the Convention (§§ 80 and 81). Lastly, the Grand Chamber does not weigh up the competing interests, namely, on the one hand, the damage sustained by the applicant – who not only was deprived of any possibility of completing her studies in Turkey because of her religious convictions but also maintained that it was unlikely that she would be able to return to her country to practise her profession owing to the difficulties that existed there in obtaining recognition for foreign diplomas – and, on the other, the benefit to be gained by Turkish society from prohibiting the applicant from wearing the headscarf on the university premises.

In these circumstances, it can reasonably be argued that the applicant’s exclusion from lectures and examinations and, consequently, from the University itself, rendered her right to education ineffective and, therefore, impaired the very essence of that right.

18. The question also arises whether such an infringement of the right to education does not, ultimately, amount to an implicit acceptance of discrimination against the applicant on grounds of religion. In its Resolution no. 1464(2005) of 4 October 2005, the Parliamentary Assembly of the Council of Europe reminded the member States that it was important to: “fully protect all women living in their country against violations of their rights based on or attributed to religion”.

19. More fundamentally, by accepting the applicant’s exclusion from the University in the name of secularism and equality, the majority have accepted her exclusion from precisely the type of liberated environment in which the true meaning of these values can take shape and develop. University affords practical access to knowledge that is free and

independent of all authority. Experience of this kind is far more effective a means of raising awareness of the principles of secularism and equality than an obligation that is not assumed voluntarily, but imposed. A tolerance-based dialogue between religions and cultures is an education in itself, so it is ironic that young women should be deprived of that education on account of the headscarf. Advocating freedom and equality for women cannot mean depriving them of the chance to decide on their future. Bans and exclusions echo that very fundamentalism these measures are intended to combat. Here, as elsewhere, the risks are familiar: radicalisation of beliefs, silent exclusion, a return to religious schools. When rejected by the law of the land, young women are forced to take refuge in their own law. As we are all aware, intolerance breeds intolerance.

20. I end by noting that all these issues must also be considered in the light of the observations set out in the annual activity report published in June 2005 of the European Commission against Racism and Intolerance (ECRI), which expresses concern about the climate of hostility existing against persons who are or are believed to be Muslim and considers that the situation requires attention and action in the future. Above all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights.

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