Case Note

European Court of Human Rights

After *Şahin:* The debate on headscarves is not over, *Leyla Şahin* v. *Turkey*, Grand Chamber Judgment of 10 November 2005, Application No. 44774/98

In Memory of Judge Mustafa Yücel Özbilgin*

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Introduction

On 10 November 2005 the Grand Chamber of the European Court of Human Rights ('Court') decided the long-running headscarf battle between Muslim students and Turkish universities in the *Şahin* judgment.[1] On appeal, it held that the prohibition against wearing headscarves on university premises did not violate Article 9 of the European Convention on Human Rights ('Convention') on freedom of thought, conscience and religion. It thereby confirmed the decision of the Fourth Section of the Court of 29 June 2004.[2]

* After this article had been written, on 17 May 2006, a lawyer accredited with the Istanbul bar association opened fire to the members of the second chamber of the Turkish Council of State while they were in session. One of the judges was killed and four others were injured. The assailant later told police that he carried out the attack because the Chamber had ruled in February against the promotion of an elementary school teacher who wore a headscarf outside of work. The authors would like to dedicate this article to the late Judge Mustafa Yücel Özbilgin, who lost his life in this dishonourable attack and to the Turkish Council of State, the guardian of rule of law in Turkey.

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[1] ECtHR 10 Nov. 2005, Application No. 44774/98, *Şahin* v. *Turkey*, Grand Chamber judgment, Hereinafter 'Şahin GC'.

[2] Hereinafter 'Şahin C'. This judgment has already been the subject of several critiques: E. Bribosia and I. Rorive, 'Le voile à l'école: une Europe divisée', *Revue trimestrielle des droits de l'homme* (2004), p. 951; A. Nieuwenhuis, 'State and Religion, Schools and Scarves, An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey, Decision of 29 June 2004, Application Number 44774/98', 1 *EuConst* (2005), p. 495; D.C. Decker, 'Leyla Sahin v Turkey', 6 *European Human Rights Law Review* (2004), p. 672

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The reaction of the members of the Turkish government and political elite, in and of itself, is enough to make the judgment interesting to examine. Indeed, perhaps for the first time in the Court's history, leading figures of a government, including the Prime Minister, Minister of Foreign Affairs and the leader of the Parliament harshly criticised the Court for delivering a judgment in favour of the government. It is not a coincidence that their wives also wear headscarves.

It was generally assumed that the tensions between the military and civil bureaucracy on the one hand and the government on the other would grow, if the latter enacted a law that permitted wearing headscarves on university premises. Therefore, a judgment from the European Court in favour of the applicant would have been extremely helpful to the government to convince the bureaucracy of its position.

In short, the importance of the debate in Turkey cannot be overestimated. As recent debates over the subject in various jurisdictions[3] prove, it has become a common European problem.

As was predicted, the Court's judgment did not really resolve the problem. On the contrary, it only brought the legal aspect of this social problem to a new and complicated level. It has been reported that students affected by the headscarf prohibition have already found solutions to bypass the legal obstacles, such as wearing wigs. As a Muslim French pupil, Cennet, has shown, dying the hair could also be a practical solution.[4] It is obvious that the problems arising from Islamic demands will remain and not disappear in the medium term. These facts alone do not render the judgment wrong, as a judgment can be legally correct even if it conflicts with the needs of real life. However, the Court seemed to have failed to evaluate the consequences of the judgment as well as the other factors affecting the case.

The *Şahin* judgment is not only important for its subject-matter, but also for the implied perception of Islam, the headscarf and Islamic fundamentalism by the judges of the Court, who, to some extent, reflect the *élite* approach of the Western democracies to the problem of Islam. Indeed, the subject-matter of the case was not merely the wearing of a headscarf, but the question of how to incorporate

[3] Amongst them see *R (Shabina Begum)* v. *Head Teacher and Governors of Denbigh High School* [2005] *EWCA Civ* 199; German Constitutional Court Judgment ona teacher's headscarf case, Judgment of 24 Sept. 2003, 2 BVerfGE 1436/02; Commission de réflexion sur l'application du principe de laïcité dans la République (2003), rapport au Président de la République, 11 déc. 2003 (available at <http://www.ladocfrancaise.gouv.fr/brp/notices/034000725.shtml>), Loi 2004-228 2004-03-15, Loi encadrant, en application du principe de laïcité, le port de_signes_ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics. (1), D0, V:En vigueur, 01, 2004-09-01. See in general International Helsinki Federation for Human Rights, *Intolerance and Discrimination against Muslims in the EU: Developments since September 11,* (Vienna, International Helsinki Federation for Human Rights 2005). (hereinafter IHF Report)

[4] 'Muslim Girl Shaves Head over Ban' *BBC,* 1 Oct. 2004.

Islamic values into Western democracies without making concessions to its basic principles. This is not an easy task, considering that the tensions between the western democracies and Islam are growing continuously. In this context, removing the Islamic headscarf from the education system is seen as one of the main steps of this challenge. [5]

The *Şahin* judgment can be evaluated from different perspectives, including the sociological and the political. This article however will only examine the judgment and its damaging effects on the cause of human rights from a legal perspective.

The article is divided into three main parts. Part I explains the background of the *Şahin* case as well as the language and the construction of the judgment. It is submitted that the presentation of the case was unusual and aimed to justify the Court's findings in the law section. This Part also examines the interpretation of the 'prescribed by law' phrase by the Court. Part II focuses on the Court's departure from the precedents in the *Şahin* case. Special emphasis is placed on the Court's departure from its interpretation of some basic concepts, such as 'pluralism' and 'proportionality'. The final part examines the socio-legal effects of the *Şahin* judgment.

Circumstances and language

Circumstances of the case

Contrary to mass media coverage, the *Şahin* case did not concern a university student excluded from a university for wearing an Islamic headscarf nor a disciplinary measure imposed on her for that reason. Ms. Şahin's story can be summarised as follows.

On 23 February 1998, the Vice-Chancellor of Istanbul University issued a circular, which restricted students wearing beards or Islamic headscarves from admission to the university campus. On 12 March 1998, the applicant was denied access to a written examination because she was wearing an Islamic headscarf. In May 1998, disciplinary measures were imposed on the applicant as a result of her failure to comply with the rules on dress. Then, on 26 February 1999, the dean of the Cerrahpaşa Faculty of Medicine suspended her from the university for a semester for taking part in a demonstration concerning the headscarf. Thereafter, on 29 July 1998, the applicant lodged an application for an order setting aside the restriction. The Istanbul Administrative Court dismissed her application, which

[5] For the effects of 11 September on the European Court, see IHF Report; K Kanev 'Muslim religious freedom in the OSCE area after September 11', (2004) *Helsinki Monitor* 233; K. Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case', 1 *Essex Human Rights Review* (2004), p. 1.

was upheld by the Council of State on 19 April 2001. She also lodged an application with the Istanbul Administrative Court for an order quashing the decision to suspend her. This application was also dismissed. On 16 September 1999, the applicant, who was forced to switch to a university that does not prevent girls from wearing Islamic headscarves, enrolled at Vienna University, where she pursued her university education. On 28 June 2000, Law No. 4584 was enacted, granting amnesty for disciplinary offences and annulling any resulting penalties or disabilities. The applicant was granted amnesty under this Statute (Şahin, Grand Chamber, paras. 16-28).

Thereafter, on 21 July 1998, Ms. Şahin, lodged a complaint with the European Commission of Human Rights against the Republic of Turkey, alleging that a ban on wearing Islamic headscarves in higher-education institutions violated her rights and freedoms under Articles 8, 9, 10 and 14 of the Convention, and Article 2 of Protocol No. 1. The following discussion focuses solely on the alleged infringement of the freedom of religion.

Language and construction

The *Şahin* judgment had all the standard sections involved in Strasbourg jurisprudence – 'the procedure', 'the facts', and 'the law'. However, in this case, the factual section played an unusual role. In this section, the Court's manner of summarising the circumstances and the applicable domestic law was not completely impartial. The facts of the case were written as an essential part of the judgment's motivation. It seems that the Court first answered the major question of the case and then arrived at its decision in the factual section of the judgment.

Although the Grand Chamber judgment was formulated on the basis of the Chamber's judgment, it tried to avoid some important mistakes.[6] For example the Chamber presented the applicant's complaint as arising from 'a ban on wearing the Islamic headscarf in higher-education institutions' (*Şahin*, C, para. 2). However, bearing in mind that the term refers to 'the act of prohibiting by law', the Grand Chamber perceived it not as 'a ban' but as 'regulations' (*Şahin*, GC, para. 3). This change helped the Grand Chamber define the restriction on wearing Islamic headscarves as merely the internal rules of İstanbul University (*Şahin*, GC, para. 95). In another example, the Chamber judgment took sides in a domestic dispute: 'Merely wearing the Islamic headscarf on university premises does not constitute a disciplinary offence. However, failure to comply with the rules on dress may entail the application of another provision of the (disciplinary) rules'

[6] For a critique of the Chamber's *Şahin* judgment see, Kerem Altıparmak, Onur Karahanoğulları, 'Pyrrhus Zaferi: Leyla Şahin v. Türkiye, AİHM v. Hukuk, Düzenleyici İşlem v. Kanun', 3 *Hukuk ve Adalet Dergisi* (2004), p. 249-276.

(*Şahin*, C, para. 47). As the second part of this quotation was absent in its decision, the Grand Chamber obviously tried to avoid the partial approach adopted by the Chamber.

Despite its deviation from the Chamber judgment, the Grand Chamber still followed the way paved by the Chamber. Indeed, the Court described a historical background by comparing the modern Turkish Republic with the Ottoman Empire. To this historical horror effect, facts of the *Refah Partisi*[7] case were added as if they were actual ones. Developments hardly relevant to the particular case, like the abolition of the caliphate, were also added (*Şahin,* GC, paras. 30-35).

In some places, the Court made some generalisations without relying on any sources. One of them is striking:

> 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. (*Şahin*, GC, para. 35)[8]

It is not clear how the Court got this information. Yet, these questions should be answered: Who are the supporters of secularism? How can their distinction justify the interference in others' freedom of religion? Does their perception override the applicant's freedom of religion, who sees wearing a headscarf as a duty and/or a form of expression linked to religious identity?

The result is that the Court did not judge Şahin's claims but rather the challenge of Islamic movements to the secular system. Furthermore, certain paragraphs of the decision indicate that the Court did not hesitate to take the side of the secular Istanbul University. For instance, in paragraph 120, the Court noted that '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.'[9] Yet, this fact was not so clear for the applicant.

[7] ECrtHR 13 Feb. 2003, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi and Others* v. *Turkey*, (Grand Chamber).

[8] The Chamber judgment contains stronger expression: '[…]those against regard it as a symbol of a political Islam that is seeking to establish a regime based on religious precepts and threatens to cause civil unrest and undermine the rights acquired by women under the republican system' *Şahin*, C, para. 31.

[9] Once again at para. 159 the Court honours the domestic authorities: '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.'

It is necessary to note that the places where this dialogue was carried out are notoriously known as 'persuasion rooms' in Turkey. It was widely reported in the Turkish press during the relevant period that female students wearing headscarves had been put under psychological pressure in those rooms to convince them to remove their headscarves.[10] As will be shown below, the Court did not discuss the proportionality of the impugned measures. One may contend that the Court regarded this dialogue as sufficient to render the measure proportional.

Moreover, the Court went even further and assumed the religious task of describing which Islamic duties are suitable to be performed at secular universities: Practising Muslim students in Turkish universities are free 'to manifest their religion in accordance with *habitual forms* of Muslim observance' (paras. 118 and 159). The Court did not explain which religious duties were being carried out in Turkish universities. Since no example was presented, this statement was not only futile, but also misleading.

The Grand Chamber judgment obviously tried to avoid the mistakes made by the Chamber. However, it failed in this respect, too. For example, the Chamber judgment referred to the *secular universities* of Turkey.[11] Pursuant to the Chamber judgment, 'secular universities may regulate manifestation of the rites and symbols of the said religion'. The Turkish legal system does not have such a term, as all universities, according to the Turkish Constitution and to the relevant statutes, are secular institutions. The Grand Chamber judgment employed the same sentence, but replaced 'secular universities' with 'institutions of higher education'.[12] Yet the adjective 'secular' is not devoid of any meaning. When the Chamber used this term, it possibly had in mind that the applicant could have pursued her career in a non-secular university. The lack of such an opportunity in Turkey, however, compelled the applicant to continue her career in Vienna, and this definitely should have been one of the factors taken into account while assessing the proportionality of the impugned measure.[13] No doubt, merely replacing the words does not solve problems.

Gathering the facts

The discussion on the domestic law was particularly important in the *Şahin* case, as the applicant had insisted that the impugned circular and its restrictions did not have a legal basis under Turkish law. Pursuant to Article 13 of the Turkish

[10] See interview with Prof. Dr. Kemal Alemdaroğlu, vice-chancellor of the Istanbul University, before his re-election for a second term. Available at <www.radikal.com.tr/haber.php?haberno=22829>, (4.12.2001).

[11] *Şahin*, C, para. 99.

[12] *Şahin*, GC, para. 111.

[13] See Judge Tulkens' dissenting opinion, para. 17.

Constitution 'Fundamental rights and freedoms may be restricted only by an act of parliament.'[14] The Court not only cites to the provision but also states that:

> 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.[15]

However, the Court could not explain how the University authorities had interfered with the applicant's right to manifest her religion in the absence of a statutory basis. Instead, the Court stated that it would be difficult to frame laws with a high degree of precision on matters such as internal university rules.[16]

Presently, no explicit legal provision in Turkish law prohibits wearing headscarves or other religious garments in higher education institutions. However, in the absence of any legal basis, the Court referred to a controversial decision of the Turkish Constitutional Court:[17]

> 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 (*Şahin*, GC, para 92).

It is a 'fact' that the Constitutional Court made such a decision, but it is not a 'fact' in the meaning of 'an actual or alleged event as distinguished from its legal effect' on which the Court easily could have based its judgment. These are legal facts with their legal qualifications and problems. The unresolved problem in Turkish law is whether a Court can derive concrete restrictions from the general principles of the Constitution. Section 153, missing in the Chamber judgment and appearing for the first time in the Grand Chamber judgment, is clear on this point: '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.' It is quite difficult to understand how the Court could

[14] An unofficial translation of the Constitution can be found in the Constitutional Court's website: <http://www.anayasa.gov.tr/engconst/const.htm>.

[15] *Şahin*, GC, para. 95.

[16] *Şahin*, GC, para. 96.

[17] Judgment of 9 April 1991, Case No. 1990/36, Judgment No. 1991/8. *Official Gazette,* 31 July 1991, No. 20946, See *Şahin*, para. 38.

have been persuaded by the arguments of the government, despite the precise wording of sections 13 and 153.

Furthermore, a passage quoted from the Constitutional Court is not a *ratio decidendi* but an *obiter dictum*. There is no doubt that the Constitutional Court's well-established case law requires an act of parliament for the restriction of fundamental rights and freedoms. Provisions of the Turkish Constitution that are quoted by the European Court prove that the legislature might be bound by the reasoning of the Court, but that does not mean that human rights can also be restricted by Court decisions without a clear legal basis.

Against this legal structure, the Court justified its rationale in the following way:

> … 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. (*Şahin,* GC*,* para. 111)

The Vice Chancellor's legal grounds, according to this argument, should not be sought in a clear legal text but in the social need of a university to regulate the manifestation of Islam.

The authors are aware that the Court has consistently reiterated that it is primarily the responsibility of the national authorities, notably the courts, to interpret and apply domestic law.[18] This is the consequence of the subsidiary nature of the Strasbourg supervision.[19] Accordingly, the Court stated that it could not be seen as a fourth instance court and generally respected the findings of law and fact by national courts.[20] It should be remembered that whether a restriction is prescribed by law or not is primarily an issue of domestic law, and this requirement cannot be examined without referring to domestic law. However, in the *Şahin* case, the Court seemed to twist the domestic law. In response to the applicant's argument that the legislature had at no stage imposed a ban on wearing the headscarf, the Court reiterated:

[18] ECtHR 24 April 1990, Application No. 11801/85, *Kruslin* v. *France*, Series A No. 176-A, para. 29.

[19] H. Petzold, 'The Convention and the Principle of Subsidiarity', in R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dodrecht, Martinus Nijhoff Publishers 1993), p. 41; G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *AJIL* (2003), p. 38.

[20] ECtHR, 16 Dec. 1992, Application No. 13071/87. *Edwards* v. *United Kingdom*, Series A 247-B. James A Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', 54 *ICLQ* (2005), p. 459, 472.

> 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 (*Şahin*, GC, para 99).

In the *Şahin* case, the legislature of Turkey had not adopted any 'methods' to ban headscarves in universities. Ironically, transitional section 17 of Law No. 2547, which the Court accepts as a legal basis,[21] only states 'Choice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force.'

Gradual approach

The Court's reading of domestic law was guided by an interpretation method according to which the terms in the Convention have an 'autonomous meaning'.[22] This method, which aims to prevent states from dictating the meaning of the terms to the Court, is generally perceived as being in favour of human rights. According to this interpretation method, the term 'be prescribed by law' has also an autonomous Convention meaning.

Under the established case-law of the Court, the words 'prescribed by law' not only require the impugned measure to have some basis in domestic law, but also refer to the quality of the law in question. The latter requires that the law should be accessible to the person concerned and foreseeable as to its effects.[23] Any domestic measure having these qualities regardless of its legal form, i.e., acts of parliament, administrative regulations,[24] judge-made law, will meet the standard. Nevertheless, in the Court's view, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power.[25] This is, however, the outcome to which the Court's judgment in *Şahin* may lead.

[21] *Şahin*, GC, para. 88.

[22] W.J. Ganshof and Van Der Meersch, 'La caractère « autonome » des termes et la « marge d'appréciation » des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme' in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension, Studies in honour of Gérard J. Wiarda* (Carl Heymans Verlag, Köln 1988), p. 201; G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *EJIL* (2004), p. 279.

[23] ECtHR 26 April 1979, Application No. 6538/74, *Sunday Times* v. *United Kingdom (No. 1)*, Series A No. 30, para. 49; ECtHR 13 July 1995, Application No. 18139/91, *Tolstoy Miloslavsky* v. *United Kingdom*, Series A No. 316-B, para. 37; *Şahin*, para. 74.

[24] ECtHR 18 June 1971, Application Nos. 2832/66, 2835/66, 2899/66, *De Wilde, Ooms and Versyp* v. *Belgium*, Series A No 12, para. 93; ECtHR 25 March 1985, Application No. 8734/79, *Barthold* v. *Germany*, Series A No. 90, para. 46.

[25] ECtHR 2 Aug. 1984, Application No. 8691/79, *Malone* v. *United Kingdom*, Series A No. 82, para. 67; ECtHR 4 May 2000, Application No. 28341/95 *Rotaru* v. *Romania*, RJD 2000-V, para. 55.

However, a legal rule enacted in clear contradiction with the domestic constitutional system should not be deemed accessible or foreseeable. Under the Turkish constitutional system, a provision restricting a fundamental right could only meet the minimum standards of accessibility and foreseeability if it is enacted by the parliament. To avoid this kind of contradiction, at least the explicit provisions of the domestic human rights protection system should be taken into consideration when assessing whether the impugned measures meet the conditions of being 'law' pursuant to the Convention. To do this, the Court should first check whether the domestic law is in line with the European standard as a system. If the domestic protection system is deemed to be in line with the Convention, then the question of whether the law satisfies the requirements of accessibility and foreseeability can only be answered by reference to this system.[26]

Subject of the case? Headscarf issue in general or islam?

The section on 'the facts' of the *Şahin* judgment is not the only part that is open to debate. The Court's assessment on the substantive part of the case is also open to criticism. In the *Şahin* case, the applicant asked the Court whether the respondent state had violated her right to religion by preventing her entry to the University. The Court, however, preferred to discuss religious radicalism in Turkey rather than the particulars of Ms. Şahin's case. In doing this, the Court ignored its previous case law on the subject.

Legitimate aims

In *Karaduman,*[27] the European Commission on Human Rights ('Commission') held that wearing a headscarf in a photograph affixed to a degree certificate could not be used to manifest a religious belief. This finding follows the *Arrowsmith* decision, in which the Commission stated that the term 'practice' in Article 9(1) does not cover each act motivated or influenced by a religion or belief.[28] In *Şahin*,

[26] A violation originating from administrative practice might be accessible to the person concerned and foreseeable as to its effects. But this does not mean that the administrative practice becomes binding law. In Turkey, many human rights violations are the result of constant, foreseeable and accessible administrative practices. It would be senseless to accept these practices as laws in the meaning of the Convention. To avoid this unsound result, the Court should adopt a *gradual approach.*

[27] ECommissionHR, 3 May 1993, Application No. 16278/90, *Karaduman* v. *Turkey*, 74 *DR* 93, 109. See also ECommissionHR, 3 May 1993*, Bulut* v. *Turkey,* Application No. 18783/91.

[28] *Arrowsmith* v. *United Kingdom*, App. No. 7050/75, 19 *DR* 5, para. 71. For an assessment of Arrowsmith test, see Carolyn Evans (2001), *Freedom of Religion Under the European Convention on Human Rights* (Oxford, OUP), p. 111 et seq.

the Court proceeded on the assumption that the regulations at issue constituted an interference with the applicant's right to manifest her religion.[29]

According to the Court in *Şahin,* the University's decision was aimed at protecting the rights and freedoms of others and the public order (para. 99); these aims are among the aims which according to Article 9(2), may justify a restriction to the right of freedom of religion. However, the following part of the judgment proves that the principle of secularism was the main reason to ban the headscarf. Particularly at paragraph 116, the Grand Chamber stated that:

> […] it is the principle of secularism, as elucidated by the Constitutional Court, which is the paramount consideration underlying the ban on the wearing of religious symbols in universities.

The principle of secularism can, no doubt, be the paramount consideration for the Constitutional Court, as this principle is one of the founding principles of the Republic.[30] Yet, can the European Court really convincingly base its judgment on the principle of secularism, considering that secularism has not been enumerated as a legitimate aim to restrict a right in the Convention and the fact that some member states still have state churches?[31]

The Court did not discuss this point. Instead, as it does generally, it accepted the respondent government's argument that the impugned measure pursued legitimate aims under Article 9 (2), and then examined in detail whether this interference with the applicant's right to freedom to manifest her religion was necessary in a democratic society.

'Necessary in a democratic society'

Citing the *Dahlab* decision, the Court stated that in a democratic society the state is entitled to place restrictions on the wearing of Islamic headscarves if wearing them is incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety.[32] Three significant points were highlighted in *Dahlab*: a. wearing a headscarf conveys a 'powerful external symbol'; b. wearing a headscarf might have some kind of proselytising effect; and c. it is difficult to reconcile wearing a headscarf with the principle of gender equality.

Şahin thus offered a good opportunity to test the principles developed by the Strasbourg organs in *Dahlab* and *Karaduman*. Following the criteria developed in

[29] *Şahin*, GC, para. 78; *Şahin*, C, para. 71. According to this dictum, there still might be cases where wearing headscarves cannot be deemed to be a manifestation of religion.

[30] See Article 2 of the Turkish Constitution.

[31] See Carolyn Evans, *supra* n. 28, p. 499 et seq.

[32] ECtHR 15 Feb. 2001, Application No 42393/98, *Dahlab* v. *Switzerland*, ECHR 2001-V; ECommissionHR, 3 May 1993, Application No. 16278/90, *Karaduman* v. *Turkey*, 74 *DR* 93

the previous case-law, one would have expected the Court to analyse whether public order or the rights and freedoms of others in the University of Istanbul were negatively affected by the applicant's headscarf. The question then should have been whether wearing a headscarf as a 'powerful external symbol' had a proselytising effect, or more importantly, created pressure on other students at the University.

This could not be done, obviously, without using the data gathered from the University of Istanbul. Unfortunately, however, nowhere in the judgment was it shown that the Court was in possession of such information. It evidently failed to gather and assess these data. It gave priority to the danger caused by Islam in Turkey in general over the particular facts of Ms. Şahin's application. It goes without saying that the Court should have also assessed the political climate of the state to understand the conditions surrounding the subject of the case. Nevertheless, such an assessment should not have replaced the particulars of the case.

It seems that the Court substituted Turkey for the University of Istanbul and Islam for the headscarf. This was a very dangerous path to pursue. The following paragraph from the chamber judgment, which was later endorsed by the Grand Chamber,[33] is an example of this approach:

> 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. (*Şahin*, C, para. 99; *Şahin*, GC, para. 115)

It would not be an overstatement to claim that the Court drew a picture similar to Algeria where thousands of people have been killed due to clashes between the state forces and Islamic militants. Here is an extract from the judgment:

> 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. (*Şahin*, C, para. 99; *Şahin*, GC, para. 115)

Its logic can be summarised in two steps:

[33] *Şahin*, GC, para. 115.

1. There are extremist political movements in Turkey. One of their demands is the freedom of women to wear Islamic *hijab* in public places;[34]
2. Any measure preventing students from wearing headscarves is therefore in line with the Convention.

However, the Court left the main questions in the case unanswered: Were there any effective extremist groups in the Istanbul University? If so, what activities of these groups affected the public order in the University? Were there any troubles caused by these activities that prevented the public authorities from carrying out public duties? Was there concrete evidence showing that wearing a headscarf by the applicant, or by other students, imposed any kind of pressure on the students not wearing headscarves? Were there any disciplinary measures taken against those who were trying to impose their religious beliefs upon others? If so, were those measures sufficient to lift the pressure? Was the decision to ban the headscarf in the Istanbul University taken completely in response to the failure of less severe measures aiming to lift the pressure?[35] None of these questions were answered by the Court.[36]

The Court's categorical approach sets forth a general rule for Turkey rather than a resolution of the legal dispute before it. The rule is that since the majority of the population belongs to Islam in Turkey, for the sake of the protection of public order and the rights and freedoms of others, secularism and equality, a student who covers her head with a headscarf cannot benefit from a University education. The Court did not make any distinction between the University of Istanbul and other higher education institutions in Turkey. Nor did it between

[34] This rather odd connection was also made by the Court in the *Refah* case. In the *Refah* case, the policy statements made by Refah's leaders on the question of the Islamic headscarf were assessed as a supporting reason for the dissolution of the party. See ECtHR, Applications Nos. 41340/98, 41342/98, 41343/98 and 41344/98 *Refah Partisi and Others* v. *Turkey*, 31 July 2001 (Chamber), 13 Feb. 2003 (Grand Chamber) judgments. C, para. 73; GC, para. 95, 122 This approach has been rightly criticised. See Joint Dissenting Opinion of Judges Fuhrmann, Loucaides and Sir Nicolas Bratza in the Chamber Judgment; Boyle, *supra* n. 5, p. 7.

[35] The *Shabina* case before the English Courts provides a good illustration on this point. At the Administrative Court, Bennett J. assessed the head teacher's and deputy head teacher's testimony on the danger caused by the litigant's claim to wear Jilbab. *R on the application of Shabina Begum (through her litigation friend Sherwas Rahman)* v. *The Headteacher and Governors of Denbigh High School* [2004] *EWHC* 1389 Admin); [2004] *ELR* 374, paras. 82-91. The Court of Appeal, while quashing this judgment, also made it clear that any court prohibiting religious garments in the public school should meticulously examine the facts of the case. See *R on the application of Shabina Begum* v. *The Headteacher and Governors of Denbigh High School* [2005] *EWCA* Civ 199, para. 81. For an excellent review of the case, see G. Davies, 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v. Denbigh High School. Decision of 2 March 2005', 1 *EuConst* (2005), p. 511.

[36] In the same line see Kanev, *supra* n. 5, p. 241-242; Bribosia and Rorive, *supra* n. 2, p. 958.

those who wear a headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols.[37]

Necessity and proportionality

The principles of necessity and proportionality have always played a central role in the Strasbourg jurisprudence. In all Article 8 to 11 cases, the Court examines whether the interference corresponds to a 'pressing social need' and whether it is 'proportionate to the legitimate aim pursued'. In order to do this, the Court determines whether the reasons relied on by the national authorities to justify the measures interfering with the applicant's freedom are 'relevant and sufficient' for the purposes of the Convention.[38] This principle is particularly important for the prevention of discrimination based on religion.[39] It follows that if there were not a reasonable relationship of proportionality between the means employed and the aim sought to be realised, the use of the means would violate the Convention.[40]

Although the Court reiterated the principles mentioned above in the *Şahin* case,[41] it failed to apply them to the case at hand. It is very difficult, if not impossible, to understand how the Court reconciled the headscarf with the measures employed. It never assessed whether the applicant's move constituted a threat to the public order in the Istanbul University.[42]

The following question can be posed to clarify our point: Is the threat posed by students wearing headscarves over those who do not wear them the same in all Turkish universities?[43] The Court did not even discuss this issue. More impor-

[37] Judge Tulkens' dissenting opinion in *Şahin*, GC, para. 10.

[38] ECtHR 25 November 1996, Application No. 17419/90, *Wingrove* v. *United Kingdom*, *RJD* 1996-V, para. 53; ECtHR 10 July 2003, Application No. 44179/98, *Murphy* v. *Ireland,* para. 68.

[39] The UN Human Rights Committee in its general comment on the right to freedom of thought, conscience and religion stated that 'Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.' Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 35 (1994), para. 8.

[40] See among other authorities, ECtHR 6 April 2000, Application No. 34369/97, *Thlimmenos* v. *Greece,* ECHR 2000-IV; ECtHR 13 June 1979, Application No. 6833/74, *Marckx* v. *Belgium,* Series A No. 31, para. 33; ECtHR 27 June 2000, Application No. 27417/95, *Cha'are Shalom ve Tsedek* v. *France*, para. 87.

[41] *Şahin*, GC, paras. 104-111.

[42] It is interesting to note that in an opposite case, concerning strict dress requirements imposed upon women in public places, the Human Rights Committee held that these measures cannot be executed under the guise of public order and morality. *Report of the Human Rights Committee, Volume I, General Assembly Official Records, Fifty-third Session Supplement* (1988), No. 40 (A/53/40), para. 133.

[43] Carolyn Evans criticizes the Commission decision in Karaduman for its failure in examining this point. The same critique may be reiterated for the Court's position in the *Şahin* case. Carolyn Evans, *supra* n. 28, p. 206.

tantly, it seems that the Court did not have any data on the subject. The Court attempted to avoid the above-mentioned questions by stating that 'by reason of their direct and continuous contact with education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or requirements of a particular course.'[44]

Considering the aims of the Convention, it is the state that interferes with the right to religion, not the student who wears a headscarf, which has to prove the connection between wearing a headscarf and extremist groups.[45] Although the Contracting Parties are left a certain margin of appreciation in assessing whether a 'pressing social need' exists, this power of appreciation is not unlimited but goes hand in hand with a European supervision by the Court.[46] Nevertheless, the Grand Chamber had no doubts as it abandoned this long-held principle:

> 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.[47]

These words cannot be deemed merely the endorsement of a margin of appreciation but, more than this, as giving *carte blanche* to state parties. One cannot but hope that this would not be the new standard of Article 8-11 cases.

As aptly observed by Judge Tulkens,[48] 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; assertions must be 'substantiated by specific examples'.[49] No specific examples, however, were presented in the *Şahin* case.

The *Şahin* judgment is the first judgment in the Strasbourg case-law, in which the Court did not seek a connection between the public service provided to the

[44] *Şahin*, GC, para. 121.

[45] It is pertinent to note that, in the *Shabina* case, the Court of Appeal quashed the decision of the Administrative Court for this reason: 'Nobody who considered the issues on its behalf started from the premise that the claimant had a right which is recognised by English law, and that the onus lay on the School to justify its interference with that right. Instead, it started from the premise that its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school.' See *R (Shabina Begum)* v. *Head Teacher and Governors of Denbigh High School* [2005] *EWCA Civ* 199, para. 76.

[46] Among many authorities, see ECtHR 20 May 1999, Application No. 21980/93, *Bladet Tromsø and Stensaas* v. *Norway* [GC], ECHR 1999-III, para. 58; ECtHR 17 Dec. 2004, Application No. 33348/95, *Cumpana and Mazare* v. *Romania* [GC], para. 88.

[47] *Şahin*, GC, para. 121.

[48] Judge Tulkens' dissenting opinion, para. 5.

[49] ECtHR 19 Dec. 1994, Application No. 15153/89, *the Vereinigung demokratischer Soldaten Österreichs and Gubi* v. *Austria*, Series A No. 302, para. 38; ECtHR 27 Sept. 1999, Application Nos. 33985/96 and 33986/96, *Smith and Grady* v. *the United Kingdom*, para. 89

applicant and the latter's right to religion. The right to manifest one's religion cannot be protected if this manifestation puts the rights of others at risk. Had the court evaluated the problem in this way, it could not have categorically denied the right to wear a headscarf at universities and, therefore, its conclusions would have relied on solid legal reasons.[50] In contrast, the Court's reference to this part of the facts is misleading:

> 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 paras. 43-44 above). (*Şahin*, GC, para. 119)

Unlike what the above sentence suggests, wearing a headscarf is not only prohibited for the students of the medical school, but for all the students of the Istanbul University. If the measure taken by the domestic authorities was based on the requirement of medical training, it could be deemed to be a reasonable interference.

Indeed, the previous case-law of the Strasbourg organs is in line with what we suggest here. For instance, in the *Dahlab* decision,[51] the Court found the application of a Swiss primary school teacher, who had been fired from her post for wearing a headscarf, inadmissible on the ground that the applicant had worked at a public school. Two points were underlined by the Court: Mrs. Dahlab's students were between 4 and 8 years old; and Mrs. Dahlab represented the state as she worked at a public school. Therefore, according to the Court, the Swiss Federal Court's judgment delivered against the applicant was proportional to the legitimate aims of protecting the rights of others and public order.

In *X* v. *United Kingdom*, the applicant, a practising Muslim and a primary school teacher, continuously attended Friday prayers. It was alleged that teaching periods had to be adjusted because of his attendance at them. As a solution, the Inner London Education Authority asked him to relinquish full-time employment and to apply for appointment as a part-time temporary terminal teacher to work four-and-a-half days a week. In response, the applicant wrote to the authorities that he preferred to be dismissed rather than accept part-time teaching. Later he was re-employed on the basis of a four-and-a-half day week upon his applica-

[50] As aptly stated by Bahia Tahzib-Lie, although in the balancing process more weight should be given to the woman's external freedom, whether the state's curtailment of external freedom will be considered justified will ultimately depend on the particulars of the individual case. See Bahia Tahzib-Lie, 'Applying Gender Perspective in the Area of the Right to Freedom of Religion or Belief', *BYU L. Rev* (2000) p. 983.

[51] See *supra* n. 32.

tion. While rejecting the applicant's arguments, the European Commission principally relied on the fact that the applicant, of his own free will, accepted teaching obligations under his contract with the ILEA. Yet, the Commission also took the British education system into account. The Commission noted that the authorities had to take into consideration not only his religious position, but also the requirements of the education system as a whole.[52]

In cases where applicants had been discharged from the army (or from the military academy) on the grounds of acts of insubordination and immoral conduct, the Court ruled that by choosing a military career, the applicants had accepted of their own accord a system of military discipline that by its very nature implied the possibility of limitations on certain rights and freedoms of armed forces members, which could not be imposed on civilians.[53] Although those judgments are flawed for other reasons,[54] at least there was an obvious connection between the service carried out and religious rites.

Measures taken to protect the applicant's own health have also been regarded as justified for the protection of health in accordance with Article 9(2). For instance, the compulsory wearing of crash helmets does not violate the freedom of religion.[55]

To summarize, if the public service provided does not require the interference with the right, manifestation of religion can be restricted only if this expression seriously threatens the rights and freedoms of others.[56]

[52] ECommissionHR 12 March 1981, Application No. 8160/78, *X* v. *United Kingdom*, 22 DR 27 (1981), 36, paras. 18 and 19.

[53] ECtHR 1 July 1997, Application No. 20704/92, *Kalaç* v. *Turkey,* 1997-IV RJD 1210; ECtHR 24 Feb. 1998, Application Nos. 23372/94, 26377/94, 26378/94, *Larissis and Others* v. *Greece*1998-I *RJD* 378; ECommissionHR 6 Jan. 1993, Application No. 14524/89, *Yanaşık* v. *Turkey*, 74 DR 14; ECtHR 6 Feb. 2003, Application No 45624/99, *Akbulut* v. *Turkey*; ECtHR 3 Oct. 2002, Application No. 45631/99, *Başpınar* v. *Turkey*; ECtHR 8 July 2003, Application No. 45824/99, *Şen and Others* v. *Turkey*.

[54] In some admissibility decisions, although the government explicitly admitted that the one of the reasons leading the Supreme Military Council (*Yüksek Askeri Şura*) to discharge the applicants from the army was the fact that the applicants' wives wore Islamic headscarves, the Court concluded that the Supreme Military Council's orders were not based on the applicants' or their wives' religious beliefs and opinions. ECtHR 11 Sept. 2001, Application No. 31876/96, *Tepeli and Others* v. *Turkey*; ECtHR 3 Oct. 2002, Application No. 45823/99, *Acarca* v. *Turkey*; ECtHR 3 Oct. 2002, Application No. 48718/99, *Balcı* v. *Turkey*; ECtHR 3 Oct. 2002, Application No. 45824/99, *Çelikateş and Others* v. *Turkey*.

[55] ECommissionHR 12 July 1978, Application No. 7992/77, *X* v. *United Kingdom,* 14 DR 234 (1978). More recently see, ECtHR 11 Jan. 2005, Application No. 35753/03, *Phull* v. *France*, request for the removal of turban for safety check in an airport. In the same line see the HRC decision in *Bhinder* v. *Canada*, No. 208/1986, 28 Nov. 1989, CCPR/C/37/D/208/1986.

[56] National court decisions that were not cited by the Court are also in line with the same rationale. See for instance, House of Lords in *Mandla* v. *Dowell Lee* [1983] 1 *ALL ER* 1062; French Conseil d'état in *Kherouaa* (1993) *RDDP* 220, *Yılmaz* (1995) *RDDP* 249. For a detailed study on the subject see S. Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France', 17 *Oxford J. Legal Stud.* (1997), p. 43.

Use of comparative law

In this context, another point should also be emphasized. In *Şahin*, the Court reiterated that a margin of appreciation was particularly appropriate when it came to the regulation by the Contracting States of wearing religious symbols in teaching institutions, since rules on the subject vary from one country to another depending on national traditions.[57] The Court's finding was flawed and, at the very least, it should not have been used as a reason in the judgment. The place where a uniform rule on wearing Islamic headscarves exists is in primary and secondary state schools but not higher-education institutions. The prohibition of Islamic headscarves at primary and secondary schools has a reasonable rationale. The state's interference with the right to manifest religion for immature students, or the state's request of those responsible for their education not to express their religious affiliations[58] may not produce a problem under the Convention, as such restrictions may be deemed proportional. However, the same cannot be said about university students who are legally and physically competent to make every decision about their life without any constraint. Indeed, there is a uniform application in Europe on this subject. In not one of the countries that the Court examined was wearing headscarves or carrying any other religious symbols prohibited at their universities.[59]

Unlike the Chamber judgment, the Grand Chamber judgment attempted to overcome that deficiency. The judgment noted that Turkey, Azerbaijan and Albania are the only member states to have introduced regulations on wearing the Islamic headscarf in universities.[60] However, instead of Azerbaijan and Albania, the Court examined in some detail the system in western European countries,[61] none of which has restrictions on wearing headscarves at universities. One wonders why the Court did not compare Turkey to Azerbaijan and Albania, countries whose population is dominantly Muslim.

Moreover, even the information given about western European jurisdictions is not accurate. As to the case of *R (Shabina Begum)* v. *Head Teacher and Governors of Denbigh High School*,[62] the Court claimed that the Court of Appeal admitted the case of the plaintiff since 'no justification for the interference had been provided

[57] *Şahin*, GC, para. 109.

[58] See *Dahlab* decision, *supra* n. 32.

[59] See the press release of Human Rights Watch released after the *Şahin* Chamber judgment. HRW, 'A Certain Lack of Empathy' <http://hrw.org/english/docs/2004/07/01/turkey8985_txt.htm>. See also Judge Tulkens' dissenting opinion.

[60] *Şahin*, GC, para. 55.

[61] France, Belgium, Austria, Germany, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, Finland. *Şahin*, GC, paras. 56-65.

[62] Amongst them see *R* (Shabina Begum) v. *Head Teacher and Governors of Denbigh High School* [2005] *EWCA Civ* 199.

by the school authorities'.[63] This is wrong. In *Shabina Begum*, the Court of Appeal reversed the judgment of the High Court not because there was no justification, but due to the lack of empirical evidence.[64]

Finally, despite the lack of a European consensus on wearing religious symbols in higher educational institutions, the Court had no hesitation in stating that:

> […] the role of the national decision-making body must be given special importance […] when it comes to regulating the wearing of religious symbols in educational institutions, especially (as the comparative-law materials illustrate – see paras. 55-65 above) in view of the diversity of the approaches taken by national authorities on the issue.[65]

Protection of pluralism

Another principle that must be borne in mind while examining the proportionality issue is pluralism. Needless to say, where the majority of the population belongs to a certain religion, it is difficult to satisfy the religious demands of the majority while protecting religious minorities at the same time.[66] This difficulty becomes more obvious in countries like Turkey where religion plays a crucial role in social life. On the one hand a democratic state should respect the manifestation of a majority religion, while on the other it should prevent the oppression of minorities by the majority. The Court also emphasized the importance of pluralism in Article 9 cases. Indeed, the Court proclaimed that 'in 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.'[67]

Applying the same criteria to the *Şahin* case, in order to contend that the headscarf ban was a reasonable restriction on the right to religion, one also should have proven that wearing a headscarf had direct connections with religious extremism. However, as we have seen, the Court did not examine this point in *Şahin*, and neither did it produce any concrete evidence as to how wearing a headscarf had caused tension in the Istanbul University or in any other university in Turkey. However, even if we assume that wearing a headscarf triggers tension, as aptly stated in the Strasbourg case-law, the first thing to do is to take any neces-

[63] *Şahin*, GC, para. 61.
[64] Ibid., paras. 61-81.
[65] *Şahin*, GC, para. 109.
[66] Theodore S. Orlin, 'Religious Pluralism and Freedom of Religion: Its Protection in Light of Church/State Relationships', in A. Rosas, J. Helgesen (eds.) *The Strength of Diversity*, (Dordrecht, Martinus Nijhoff Publishers 1992), p. 89.
[67] ECtHR 25 May 1993, Application No. 14307/88, *Kokkinakis* v. *Greece*, Series A. No. 260, para. 33; ECtHR 3 Oct. 2002, Application No. 45631/99, *Başpınar* v. *Turkey*.

sary measures to reconcile parties, not to prohibit a group's religious manifestations.

Several times the Court has invoked the 'Less Restrictive Alternative Doctrine' in its case-law.[68] Indeed, in previous cases, the Court noted that the need to secure true religious pluralism is an inherent feature of the notion of a democratic society.[69] *Şerif* v. *Greece*[70] sets a good example. In this case, the Court recognised that it is possible that the tension increases in situations where a religious or any other community is divided. However, according to the Court, this division appears as an unavoidable consequence of pluralism. The Court states that '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.'[71]

It is also interesting to note that in *Şerif,* the Court was dissatisfied with the government's general reference to the creation of tension and its failure to make any allusion to disturbances that had actually happened. In this case, the Court also noted that nothing had been adduced that could warrant qualifying the risk of tension between the Muslims and Christians.[72]

If the state's first duty is to remove the tension between different religious groups without eliminating religious pluralism, it should be first determined, before doing a proportionality test, whether the government has taken all necessary measures to remove the tension between different religious groups without removing religious pluralism. As the Human Rights Watch's recent report on the subject aptly observes, if students do not respect their fellow students' religious or political beliefs or lack of beliefs, it is the responsibility of the government, police and universities to ensure that any expression thereof is within the bounds of the law.[73] Without examining whether the state has carried out this duty properly, one cannot conclude whether the measures taken by the government are proportional or not.[74]

[68] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia 2002), p. 15. See also Judge Tulkens' dissenting opinion, para. 2.

[69] ECtHR 25 May 1993, Application No. 14307/88, *Kokkinakis* v. *Greece*, Series A. No. 260, para. 31; ECtHR 26 Sept. 1996, Application No. 18748/91, *Manoussakis and Others* v. *Greece*, 1997-IV RJD, para. 44.

[70] ECtHR 14 Dec. 1999, Application No. 38178/97, *Şerif* v. *Greece*.

[71] Ibid., para. 53.

[72] Ibid., para. 53.

[73] Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf, Human Rights Watch Briefing Paper, 29 June 2004, p. 35.

[74] In Turkey, the government fails to carry out this duty properly. Every year, during Ramadan, students who do not fast are faced with murderous attacks organised by Muslim and nationalist students.

Socio-legal effect

Gender equality

The effect of headscarves on gender equality might be regarded as the most important dimension of the headscarf affair. Unfortunately, the Court's arguments on this subject could not go beyond superficiality. No doubt, compulsory dress codes for women must be deemed discriminatory based on gender. However, does preventing women who insist on wearing a certain garment from obtaining public services remove this inequality? On the contrary, it might be argued that to exclude students who wear headscarves might violate the Convention's guarantee of their right to an education free from any religious discrimination.[75] In this context, it should be recalled that Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women imposes upon state parties the obligation to take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education.[76] Indeed, while practising Muslim males are not confronted with any obstacles, some Muslim women might be excluded from University because of their religious choice.

The Court referred to the principle of gender equality in *Şahin*.[77] However, clearer indications of the Strasbourg case-law on this subject can be found in the *Dahlab* case. In *Dahlab*, the applicant submitted that the measure prohibiting her from wearing a headscarf in the performance of her teaching duties had not only infringed upon her freedom to manifest her religion, but that this prohibition also amounted to discrimination on the ground of gender within the meaning of Article 14 of the Convention: a man belonging to the Muslim faith could teach at a state school without being subject to any form of prohibition, whereas a woman holding similar beliefs had to refrain from practising her religion in order to be able to teach.[78] The Court asserted that the measure concerning the headscarf had not been directed at the applicant as a member of the female sex but that it pursued the legitimate aim of ensuring the neutrality of the state primary-education system. According to the Court, such a measure could also apply to a man who finds himself in similar circumstances.

[75] Poulter, *supra* n. 56, p. 70; Bahia Tahzib-Lie, *supra* n. 50, p. 982; D. Schiek, 'Just a Piece of Cloth? German Courts and Employees with Headscarves', 33 *Industrial Law J.* (2004) p. 71-73; Bribosia and Rorive, *supra* n. 2, p. 958- 959; Judge Tulkens' dissenting opinion, para. 12.

[76] Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept. 1981, 19 *ILM* (1980) p. 33.

[77] For the Strasbourg case-law on the subject see. ECtHR 28 May 1985, Application Nos. 9214/80,9473/81,9474/81, *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*, Series A No. 94, para. 78; ECtHR 24 June 1993, Application No. 14518/89, *Schuler-Zgraggen* v. *Switzerland*, Series A No. 263, para. 67.

[78] *Dahlab* decision, see *supra* n. 32.

Can this approach, which might be deemed reasonable in *Dahlab*, be applied in *Şahin*? First of all, it should be stated that, unlike Ms. Dahlab, Ms. Şahin was not a teacher at a state primary school. In other words, she did not represent the state. Therefore, the proselytising effect of a teacher, a notion that was mentioned by the Court in *Dahlab*, cannot be an issue in *Şahin*. More importantly, it is not realistic to claim that such a measure could also be applied to a man who can face similar restrictions as in *Şahin*. Although the state can also force men to shave their beards in universities, growing one's beard is not perceived as a compulsory rule of Islam for practising Muslim males.[79] Therefore, the Court's assumption that such a measure could also be applied to a man wearing clothing that clearly identifies him as a member of a different faith is not reasonable.

New problems

The Turkish President[80] and the President of the Turkish Higher Education Council[81] declared that after the European Court's judgment in the *Şahin* case the government could not permit students to wear headscarves at universities even if the Parliament changed the Constitution.

Does *Şahin* indeed mean that the government is not only able to ban wearing the headscarf, but that there is also a positive obligation for the state to ban the headscarf to protect the rights and freedoms of others? Is a ban on headscarves the only way to protect the rights of others who do not wear headscarves?

The Law section of the judgment was brief. Nevertheless, some clues can be derived from it. First, the Court declared that the state is entitled to place restrictions on wearing Islamic headscarves if that wearing is incompatible with the aims of protecting the rights and freedoms of others, public order and public safety (para. 111).[82] This reminder can be taken as an option. However, the Court's analysis did not stop there. The Court also maintained that '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

[79] A recent case concerning a Turkish male student who had been refused entry to the university campus was found inadmissible by the Court. Although the applicant claimed that the measure had violated his Article 9 rights, he did not assert that he grew his beard to observe any religious precept. See ECtHR, 24 May 2005, Application No. 8165/03, *Tığ* v. *Turkey*.

[80] The President's thoughts can be found in his veto concerning Act No. 5227. No. B.01.0.KKB.01-18/A-9-2004-890, 3 Aug. 2004.

[81] '*Türbanın şansı yok*' (Headscarf has no chance), Interview with Erdoğan Teziç, Radikal, 26 July 2004; '*Türbanda Son Karar*' (Final Judgment on Headscarf), Hürriyet, 11 Nov. 2005.

[82] See also *Karaduman* v. *Turkey*; *Dahlab* v. *Switzerland*.

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Convention.'[83] In the Court's view, the regulations concerned had to be viewed in that context and constituted a measure intended to preserve pluralism in the university.[84]

On account of an earlier decision, it has been stated that the only connection between extremist groups and students wearing a headscarf is the headscarf itself, which shows the religious identity of the second group.[85] If this connection is sufficient to create a risk, wearing a headscarf constitutes a threat to the rights and freedoms of others, public order and public safety, both in university and generally in public life.[86] Under these circumstances, the state will *not only be able* to ban wearing a headscarf, but it also will be *under the duty* to do so. Otherwise it would fail to honour its duty to protect others' rights and freedoms as well as to preserve gender equality. Considering that in *Refah* the Court implied that the dissolution of the Party was a positive obligation of the Turkish government,[87] this interpretation may not be sheer fantasy.

If we assume that the Court's judgment imposes a positive duty on the government, we should also recognise that this decision may affect both public and private sectors. The rationale of the judgment is that the ban is required to protect the rights and freedoms of others and gender equality in the society. As the international instruments concerning discrimination clearly state, the state is not only obliged to eradicate discrimination in public institutions, but it is also obliged to take necessary measures to remove discrimination from the whole social life. Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women, which was ratified by Turkey, requires states to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Another relevant instrument is the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Article 4 of the Declaration provides that: 'All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.'[88]

The same can also be said about the application of the ECHR. Article 1 of the Convention obliges state parties to secure to everyone within their jurisdiction

[83] *Şahin,* GC, para. 111; *Refah*, GC, para. 95.

[84] *Şahin*, C, para. 109; *Şahin*, GC, para. 115; *Refah*, GC, para. 124.

[85] Fahlbeck mentions this point in the *Karaduman* decision. Reinhold Fahlbeck, 'Ora et Labora—on freedom of religion at the work place: a stakeholder cum balancing factors model', 20 *International Journal of Comparative Labour Law and Industrial Relations* (2004), p. 27.

[86] Bribosia and Rorive, *supra* n. 2, p. 962.

[87] *Refah*, GC, para. 103.

[88] For a commentary on this point see N. Lerner, *Group Rights and Discrimination in International Law*, (Dordrecht, Martinus Nijhoff Publishers 1991), p. 84-87.

the rights and freedoms defined in the Convention. This provision requires states to prevent breaches of the Convention committed by private parties. Many examples can be found in the Strasbourg jurisprudence on the *horizontal effect* of the Convention.[89] For instance, the state's duty to prevent human rights violations committed by private parties has been expressed in cases concerning the right to life, prohibition of torture and ill-treatment, right to privacy, freedom of expression, freedom of assembly and association.

Since the Court reads all substantial provisions of the Convention and additional protocols in line with Article 1, Article 9 should not only be understood as requiring states to refrain from interfering with the freedom of religion, but also to take necessary measures to create an atmosphere for everyone in its jurisdiction to manifest their religion and belief without confronting any obstacles emanating from third parties.[90]

Let's follow the rationale developed by the Court. If students in state universities who do not wear headscarves were under threat because of those who wear headscarves, there is no doubt that the pressure would be higher on girls working in the private sector, who are sometimes even younger than 18. These girls would feel the pressure more than university students who are 20-25 years old. Then, the state should take the necessary steps to prevent discriminatory behaviour in the private sector.

Although it remains to be seen whether this will be the view of the European Court, the scenario presented is not devoid of all reality. This is indicated by a recent decision of the Turkish Council of State, which endorsed a disciplinary sanction imposed on a teacher working at a day nursery, thereby declaring that a rumour that she had worn a headscarf on her way to the school was enough to impose the sanction. The Council of State opined that as a role model, a teacher working at a nursery should not wear a headscarf even in public places out of the school.[91]

Conclusion

In the midst of technical questions arising from the *Şahin* judgment and the firm and joyful statements of Turkish political elites, jurists must not lose sight of the relationship of law with social reality. Legal problems are often the carriers of

[89] For a detailed work on the subject see A. Clapham, *Human Rights in the Private Sphere* (Oxford, Clarendon Press 1993).

[90] Judge Martens, in the *Kokkinakis* case, asserted that the State does not have a duty to prevent proselytizing. *Kokkinakis*, dissenting opinion, para. 15. Evans finds this opinion insupportable given the explicit wording of Article 1 of the Convention. Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge, Cambridge University Press 1997), p. 332.

[91] Council of State, Section 2, Case No. 2004/4051, Judgment No. 2005/3366, 25 Oct. 2005.

social problems. However, the solution of these legal problems does not always lead to the solution of the underlying social problems.

Until *Şahin*, many thought that the students' will to observe Islamic codes was purely and simply a legal problem. Therefore, a number of Turkish jurists and the political elite have considered the *Şahin* judgment as a decisive solution of this problem. This approach, however, flies in the face of social reality. In a society where religion takes an increasingly important role in defining identity, the decision that accepts a ban on the Islamic headscarf at Universities means moving and transposing the social problem to the field of legality. Contrary to expectations, the headscarf problem of the Turkish higher education system or, more generally, in the secular Turkish political system or in Europe will not be resolved by the *Şahin* judgment as the reaction of the leading figures of the government has shown.

The social dynamics of this tension do not rest merely in the Islamic headscarf issue. Wearing an Islamic headscarf at University might lead to another demand. After university education, women wearing headscarves might demand to enter public service. Moreover, a more important development could be the rise of a new private sector organised on the basis of Islamic codes or Islamic sensitiveness. The judgment of the Court does not serve as a useful basis for these potential debates, but rather as a factor increasing the uncertainty arising from a complex social fact.

Every victory contains the germ of future defeat. The *Şahin* judgment has cost the Turkish legal system its formal legality principle, which gives basic protection against the arbitrariness of administration in this jurisdiction. At the European level, in addition to this domestic effect, the Court's effort to forge jurisprudential techniques and to pass over its relevant precedents has paved the way for the adoption of stricter measures against rights connected to a certain religion. As a result, one cannot be happy with it.