

Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights

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Introduction

In June 2004, the European Court of Human Rights issued one of its most significant and controversial judgments involving freedom of religion: *Leyla Sahin v. Turkey*.¹ The judgment was issued by a seven-judge Chamber, which unanimously declared that Turkey's policy of prohibiting female university students from wearing the "Islamic headscarf" did not violate Article 9 of the European Convention on Human Rights.² The *Sahin* case subsequently was referred to a seventeen-judge Grand Chamber of the European Court, whose decision presumably will become the final judgment.³ Regardless of the final outcome in *Sahin v. Turkey*, the Chamber's judgment illustrates how institutions with important responsibilities can misunderstand the complicated issues surrounding Islam in Europe. Unfortunately, the judgment also serves as a warning of how failing to analyze the issues objectively and openly can result in the suppression of human rights by an institution that was created to protect them.⁴

¹ Application 44774/98, decided 23 June 2004. The text was delivered in French and English, the French version being authentic.

² Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (as amended), provides that:

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.

In Turkish, the word that is now used for the "Islamic headscarf" is "*türban*."

³ The case was referred to the Grand Chamber on 22 November 2004. [Save following site checking purposes only then delete <http://www.kemo.gr/en/index.asp>] This article was prepared following the Grand Chamber's 18 May 2005 hearing but before a decision was published. In accordance with the rules of the European Court, two of the Chamber judges sit as members of the *Sahin* Grand Chamber (in this case judges Nicolas Bratza of Great Britain and Riza Türmen of Turkey).

⁴ This article will analyze the *Sahin* decision with respect to its discussion of the situation

I. The Factual Background and an Overview of the Chamber's Decision

Between 1993 and 1997, Ms. Leyla Sahin was a medical student at the University of Bursa in Turkey.⁵ During this period she was a devout Muslim who believed that she had a religious duty to cover her hair, and she chose to fulfill this perceived obligation by wearing a headscarf. In August 1997, Ms. Sahin transferred to the Cerrahpasa Faculty of Medicine at the University of Istanbul to complete her studies. Between the time she began her studies in Bursa until February of 1998, she wore a headscarf without incident and without being accused of provoking any incidents or participating in any disruptive activities. The *Sahin* Chamber never suggested that Ms. Sahin held any radical religious or political views nor that she could be characterized in any way as a religious extremist or fundamentalist. Nor did the Chamber suggest that anyone pressured Ms. Sahin into wearing the headscarf.

On 23 February 1998, the Vice-Chancellor of Istanbul University issued a circular ("1998 Circular") that prohibited female students from wearing headscarves and male students from wearing beards to lectures, courses, and tutorials. (*Sahin* ¶ 12) The 1998 Circular, as quoted by the Chamber, does not provide any reasons why headscarves and beards should be prohibited. Following the issuance of the 1998 Circular, Ms. Sahin was prohibited from taking examinations and from enrolling in courses while wearing the headscarf, and she refused to remove it in order to continue her studies. After unsuccessfully pursuing several avenues in the Turkish legal system (*Sahin* ¶¶ 14-16),⁶ she filed an application with the European Court of

in Turkey rather than offer a legal analysis of the right to wear religious garb generally. Thus it will not discuss the important UN Human Rights Committee General Comment 22 ¶ 4 (1993) (which determined that "the wearing of distinctive clothing or head coverings" as coming within the scope of Article 18 of the International Covenant on Civil and Political Rights), nor the Human Rights Committee decision finding in favor of the right to wear the headscarf, nor will it discuss other cases of the European Court and Commission. For a discussion of such cases see Bahia G. Tahzib-Lie, "Dissenting Women, Religion or Belief, and the State: Contemporary Challenges that Require Attention," in *Facilitating Freedom of Religion or Belief*, ed. by Tore Lindholm, et al., (Leiden, 2004), pp. 457-95 (esp. 473-83). Dr. Tahzib-Lie found that a prior European Commission decision denying that wearing the Islamic headscarf to come within the scope of freedom of religion or belief as being "incomprehensible." Ibid. 473 n. 85.

⁵ All of the facts presented here are uncontested.

⁶ Disciplinary proceedings were subsequently brought against Sahin because her "attitude and failure to comply with the rules on dress were not befitting of a student." (*Sahin* ¶ 18) She also was accused of taking part in a demonstration against the headscarf ban. (*Sahin* ¶ 22) Sahin challenged these assertions and ultimately received amnesty by virtue of Law no. 4584 of 28 June 2000. Although the disciplinary proceedings and Sahin's appeals provide an interesting dimension of the case, and reveal a system that attempted to stifle dissent, they will not be

Human Rights, arguing that her rights to freedom of thought, conscience, and religion had been infringed under Article 9 of the European Convention on Human Rights. She left Turkey in order to continue her medical studies at the University of Vienna.

The *Sahin* Chamber identified its task, in large measure, as determining whether the 1998 Circular, as issued and applied by Istanbul University officials, violated Article 9 of the European Convention -- particularly with respect to Leyla Sahin. The Chamber's opinion followed the standard form for analyzing a case under Article 9, which first asks whether a state infringed upon a right protected by Article 9.1. If an infringement is found, the analysis then shifts to determine whether the infringement was based upon a legitimate state interest as determined by a three-part "limitations clause" test under Article 9.2.⁷ Following this standard procedure, the Chamber found that Leyla Sahin's right to manifest her religion by wearing the headscarf was in fact infringed by Turkey. After reviewing the facts, the Chamber held that her "decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief" (*Sahin* ¶ 71) and found that the 1998 Circular, as implemented, "constituted an interference with the applicant's right to manifest her religion." (Ibid.)

Having found there to be an Article 9.1 infringement, the Chamber then examined three separate issues pertaining to Istanbul University's 1998 Circular in order to determine whether the infringement was justified: first, whether the prohibition on wearing the headscarf was "prescribed by law" (*Sahin* ¶¶ 72-81), second, whether the prohibition had a legitimate aim (*Sahin* ¶¶ 82-84), and third whether the prohibition was "necessary in a democratic society" (*Sahin* ¶¶ 97-115). For each of these three elements, the Chamber ultimately concluded that Turkey had satisfied the requirements of Article 9.2 of the Convention and that it had acted in accordance with the European Convention. The Chamber's analyses of the first two elements ("prescribed by law" and "legitimate aim") were unremarkable and generally followed the reasoning of the European Court -- and they will not be considered further in this article.

With regard to the third element, which typically is the principal focus of limitations clause analysis by the European Court, the Chamber concluded that the 1998 Circular and the University's actions regarding Ms. Sahin were "justified in principle and proportionate to the aims pursued, and therefore could be regarded as 'necessary in a democratic society.'" (*Sahin* ¶ 114)⁸ The Chamber accepted, without any criticism whatever, not only the 1998 Circular that

discussed further.

⁷ For a forthcoming discussion of the interpretation of the limitations clause in Article 9.2, see Javier Martinez-Torron, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: The European Convention on Human Rights," *Emory International Law Journal* (forthcoming 2005).

⁸ Regarding this third element, the Chamber makes the traditional boilerplate assertions that although national officials are better placed to observe the facts, they are subject to European supervision (*Sahin* ¶ 100). The Chamber asserts that this "margin of appreciation is

was the immediate basis for excluding Ms. Sahin from her courses, but other Turkish laws and court decisions -- going as far back as 1981 -- that formed the underlying legal basis and rationale for the issuance of the 1998 Circular.

Having found that Turkey infringed on Ms. Sahin's right of religious expression, the state was obliged to prove, and the Chamber to show under Article 9 of the European Convention, that the issuance of the 1998 Circular was "*necessary in a democratic society*." Thus the relevant standard is not whether the 1998 Circular was "advisable," "defensible," "acceptable," "a good idea," or even "reasonable under the circumstances." Rather, the explicit "human rights" language requires the Chamber to find that the Circular's prohibition was "necessary in a democratic society."

The Chamber explained its own criteria for determining whether the recognized infringement was "necessary in a democratic society":

In order to assess the "necessity" of the interference caused by the circular of 23 February 1998 imposing restrictions as to place and manner on the rights of students such as Ms Sahin to wear the Islamic headscarf on university premises, the Court must put the circular in its legal and social context and examine it in the light of the circumstances of the case. Regard being had to the principles applicable in the instant case, the Court's task is confined to determining whether the reasons given for the interference were relevant and sufficient and the measures taken at the national level proportionate to the aims pursued. (*Sahin* ¶ 103)

Thus, according to the Chamber itself, to satisfy the Article 9.2 "necessity" requirement of the European Convention in the *Sahin* case, first, the 1998 Circular "must" be placed in its "legal and social context" and be examined "in the light of the circumstances of the case" (Part II below); and second, the Chamber's task should be to determine whether the reasons for the interference: "were relevant and sufficient" (III.A) and whether the measures were "proportionate to the aims pursued" (III.B).

particularly appropriate when it comes to the regulation . . . of the wearing religious symbols in teaching institutions." (*Sahin* ¶ 102) The Chamber offers no *reason* why regulating clothing for university students is a "particularly appropriate" place for allowing a broader margin of appreciation. Indeed, exactly the opposite might well have been assumed – that the State's interest in regulating the clothing of university students is so slight that it must have an overwhelming and compelling reason for doing so when a right of conscience is involved.

II. Placing Turkey’s University Headscarf in its “Legal and Social Context”

The language of the *Sahin* Chamber’s decision is presented in such a way as to suggest that the first university headscarf ban, announced in 1982, was in part due to Turkey’s “democratic”⁹ decision-making processes and that Turkey is a country operating under a Constitution and that its courts make prudent decisions interpreting the Constitution.¹⁰ Indeed the Chamber never questions whether Turkey’s headscarf ban was anything other than a legitimate decision made by a fully democratic country operating according to democratic constitutional requirements. The Chamber accepted without any criticism the Turkish Constitutional Court’s decisions that the ban was not only constitutionally permissible, but that banning the Islamic headscarf in universities is *required* by Turkey’s Constitution.

While the Chamber freely used variations on the words “democratic” and “constitution” to describe Turkey and its laws and court decisions banning headscarves, it never once used the terms “military,” “dictator,” “*coup d’état*,” or “martial law” in its decision. Indeed, the Chamber did not mention the fact that the headscarf laws of 1981-82 were actually imposed by a military junta that had come to power through a *coup d’état* in 1980 and that repeated attempts by democratically elected governments to reverse the ban were prevented by the military. The Chamber, in support of its conclusion that the 1998 Circular was in accordance with the Turkish Constitution and laws, rather misleadingly explained that the regulations prohibiting the wearing of headscarves at universities “had existed for a number of years.” (*Sahin* ¶ 112)

To show how the “legal and social context” provided by the Chamber systematically misleads the reader, the text below adds in **bold typeface** contextual facts **omitted** by the Chamber’s reference to the headscarf ban that in theory “had existed for a number of years.” The text in regular typeface are the statements drawn from the Chamber’s opinion.¹¹

⁹ For the Chamber’s use of the terms “democracy” and “democratic” as an adjective describing *Turkey*, see *Sahin* ¶¶ 26, 31, 36, 91, 105, and 106. For the Chamber’s use of the term “democratic” as term that describes requirements of the European Convention (which it appears to believe that Turkey has satisfied) see ¶¶ 64, 66, 67, 89, 97, 98, 101, 114.

¹⁰ For favorable uses of the terms “constitution” and “constitutional” as applying to Turkey generally (and the headscarf ban specifically), see *Sahin* ¶¶ 12, 26, 27, 30, 36, 38, 50, 51, 72, 78, 85, 107, and 112. For references to Turkey’s Constitutional Court, see ¶¶ 15, 32, 36, 38, 42, 45, 51, 52, 56, 72, 76, 78, 105, 107, 108, and 110.

¹¹ Technically, the Chamber begins its analysis with a brief mention of some Turkish laws that had been enacted during the 1920s. In this discussion, the Chamber appears to imply, although it does not explicitly state, that the Islamic veil was prohibited during the founding years of the Turkish republic under Atatürk. The Chamber states:

The reforms introduced by the Republic on the question of dress were inspired by the evolution of society in the nineteenth century and sought first and foremost to

The 1980 Coup d'Etat and the First Headscarf Laws: 1980-1983

- On 12 September 1980, following a period of crisis and violence in Turkish political life, General Kenan Evren and the Turkish military overthrew Turkey's democratically elected government in a *coup d'état*.¹² The junta

create a religion-free zone in which all citizens were guaranteed equality, without distinction on the grounds of religion or denomination. The first enactment in this sphere was the Headgear Act of 28 November 1925 (Law no. 671), which treated dress as an issue relating to modernity. 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) (*Sahin* ¶ 29)

The Chamber fails to explain that Law no. 671 pertained only to men and only to traditional headgear (particularly the fez that was despised by Atatürk) and had nothing to do with women or Islamic headscarves. Law no. 2596 similarly had nothing to do with women or Islamic headscarves; rather, it prohibited imams from wearing religious clothing in the streets. The Islamic headscarf was *not* prohibited by Atatürk. There was, therefore, no “religion-free zone” in the way suggested by the Chamber. The Chamber’s discussion of the early laws thus gives a misleading impression about the context of the banning of the headscarf both by what it implies (here that laws in its early years the republic prohibited wearing “headgear” and “religious clothing”) and by what it fails to clarify (here that these laws had nothing to do with women or Islamic headscarves).

The issue of Atatürk and religion is more complicated than the Chamber implies. Some supporters of Atatürk choose to emphasize, for example, his co-operation with religious elites in 1919-1922. See Kemal H. Karpat, “Military Interventions: Army-Civilian Relations in Turkey Before and After 1980,” in *State, Democracy and the Military: Turkey in the 1980s*, ed. by Metin Heper and Ahmet Evin (Berlin, 1988), pp. 153. According to his biographer, Atatürk believed the veil should be officially discouraged but not prohibited. Andrew Mango, *Atatürk* (New York, 2000), 434-35. Mango quotes Atatürk as saying about religious beliefs in Turkey: “Let them worship as they will; every man can follow his own conscience, provided it does not interfere with sane reason or bid him act against the liberty of his fellow-men.” Ibid. 463.

¹² This was Turkey’s third coup d’état in twenty years. For a discussion of the 1980 coup and subsequent events, see Erik J. Zürcher, *Turkey: A Modern History* (2004), pp. 278-323 and several of the articles largely sympathetic to the military coup included in *State, Democracy and the Military: Turkey in the 1980s*, ed. by Metin Heper and Ahmet Evin (Berlin, 1988). It should be noted that Turkey had been in turmoil for several years before the coup and that many Turks welcomed it. It also can be said that the coup did bring about some stability and that coup leaders had, from the outset, ultimately intended to return Turkey to civilian rule. But the issue here is not the benefits and costs of the coup – it is whether the *Sahin* chamber explained

dissolved the bicameral Grand National Assembly, deposed the cabinet, and revoked parliamentary immunity. The junta declared martial law, suspended all political parties and trade unions, and prohibited citizens from leaving the country. Tens of thousands of people were arrested and imprisoned, including more than 2000 politicians.¹³ Martial law remained in effect until 1987 throughout most of Turkey, and in some regions, including Istanbul, even longer. General Evren ruled as head of state until 1989. Political and military power was held by General Evren and the five-member, all-military, National Security Council (NSC). The NSC in turn appointed a 27-member cabinet (*Conseil des ministres*) headed by a retired admiral and which included six retired generals, but included no politicians. The Cabinet's "only functions were to advise the NSC and execute its decisions"¹⁴ In June 1981 "all public discussion of political matters was prohibited."¹⁵ This NSC-controlled Cabinet issued on 22 July 1981, "the first piece of legislation on dress in higher-education institutions," which the *Sahin* Chamber describes as prohibiting female students and staffs at universities from wearing the Islamic headscarf. (*Sahin* ¶ 33)¹⁶

- In November 1981, the NSC-controlled Cabinet enacted Law 2547 on Higher

appropriately the circumstances surrounding the headscarf ban.

¹³ "In the first six weeks after the coup 11,500 people were arrested; by the end of 1980 the number had grown to 30,000 and after one year 122,600 arrests had been made. By September 1982, two years after the coup, 80,000 were still in prison, 30,000 of them awaiting trial." Zürcher, *Turkey*, p. 279. Torture of prisoners was widespread and was condemned by the international human rights community. Thousands were executed following trials before military tribunals. *Ibid.*, 280. For a detailed discussion of the events following the coup, see Karpat, "Military Interventions," pp. 150-55.

¹⁴ Zürcher, *Turkey*, p. 279. "The NSCE acted not only through the cabinet but also through regional and local commanders, who, under martial law, were given very wide-ranging powers. They were put in charge of education, the press, chambers of commerce and trade unions, and they did not hesitate to use their powers. Especially in Istanbul, the centre of intellectual life and of the press, this led to a continuous series of closures of newspapers and arrests of journalists and editors." *Ibid.* For a general discussion, see William Hale, "Transition to Civilian Government in *Turkey*," in *State, Democracy and the Military: Turkey in the 1980s*, ed. by Metin Heper and Ahmet Evin (Berlin, 1988), pp. 166-69.

¹⁵ *Ibid.*

¹⁶ HRW describes this as "Regulation concerning the Dress of Students and Staff in School Under the Ministry of National Education and Other Ministries No. 8/3349 (amended 26 Nov. 82) (HRW p. 27)

Education and created the Higher Education Council (HEC – sometimes translated as Higher Education Authority), which continues to be responsible for implementing state education policies, including universities.¹⁷ **The military was entitled to put its representative on the HEC. The HEC appoints all rectors and deans in public universities in Turkey. Under martial law, hundreds of university officials and professors were dismissed by the HEC.**¹⁸

- In 1982, the NSC directed the appointment of a commission to draft a new Constitution.¹⁹ The 1982 Constitution, whose “chief architect” was General Evren, was submitted to a popular referendum while the media was under military control and while hundreds of Turkey’s leading politicians were prohibited from engaging in political activities.²⁰ The 1982 Constitution

¹⁷ According to Human Rights Watch:

The HEC exercises central control over the university system and violates international human rights law and standards on academic freedom. It restricts the liberty of professors to write, teach, and take an active role within society, and limits the autonomy of universities in their staffing, teaching, and research policies and practice.

Human Rights Watch, *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. 2 (http://hrw.org/backgrounder/eca/turkey/2004/headscarf_memo.pdf) (“HRW Memorandum”)

¹⁸ Zürcher, *Turkey*, p. 280. According to Human Rights Watch, “the Turkish military has continued to use its considerable political clout to influence education policy. The military seems particularly concerned to protect its own creation, the HEC.” HRW Memorandum, 3.

¹⁹ Zürcher, *Turkey*, pp. 280-81.

²⁰ For Evren as “chief architect,” see Ergun Özbudun, “The Status of the President of the Republic under the Turkish constitution of 1982: Presidentialism or Parliamentarism?,” in *State, Democracy and the Military: Turkey in the 1980s*, ed. by Metin Heper and Ahmet Evin (Berlin, 1988), p. 44. Evren was regarded as widely popular in 1982. *Ibid.*, 45. For additional discussion on political limits under the immediate post-coup regime, see Binnaz Toprak, “The State, Politics and Religion in *Turkey*,” in *State, Democracy and the Military: Turkey in the 1980s*, ed. by Metin Heper and Ahmet Evin (Berlin, 1988), pp. 126-27. For example, in “1982, an NSC decree forbade the old politicians, in almost Orwellian fashion, to discuss publicly the past, the present or the future.” Zürcher, *Turkey*, p. 279. For discussion of the control of the referendum, see *ibid.* pp. 280-81.

“was to a large extent formulated according to specific demands made by the military leadership”²¹ Article 2 of the 1982 Constitution provides that: “The Republic of Turkey is a democratic, secular and social state governed by the rule of law” The *Sahin* Chamber also cites other provisions of the 1982 Constitution pertaining to gender equality and other rights -- and quotes them in full.²² (*Sahin* ¶ 26) **The *Sahin* Chamber accepts these Turkish constitutional principles without noting the circumstances under which they were written or the fact that the Constitution was written in part for the purpose of curtailing personal freedoms.**²³ **The Chamber neither quotes nor mentions the provisions of the Turkish Constitution that gave significant powers, directly and indirectly, to the Turkish military and to the head of state.**²⁴

- In 1982, Law 2547 on Higher Education was revised. The 1982 Law on Higher Education (as amended) continues in effect in Turkey to this day. **The Higher Education Law “gave the armed forces substantial influence over the HEC, and enabled them to exercise direct influence over its deliberations at nearly every level.”**²⁵ **Thus, for the most part, university administration since 1980 has been under the dominant influence of the Turkish military.**

- On 20 December 1982, **while Turkey continued under martial law**, the HEC, **which was under the control of the NSC**, issued a circular that the Chamber describes as banning the headscarf in lecture halls. (*Sahin* ¶ 34)

²¹ Ahmet Evin, “Changing Patterns of Cleavages Before and After 1980,” in *n State, Democracy and the Military: Turkey in the 1980s*, ed. by Metin Heper and Ahmet Evin (Berlin, 1988), p. 208. More than 91% of the votes favored ratification of the 1982 Constitution.

²² Including article 4, article 20 sect. 1, article 14 sect. 1, and article 24 sects. 1 and 4.

²³ The “new Constitution put extensive limits on basic rights and liberties which could now be curtailed by law for the protection of national or public concerns.” Toprak, “The State, Politics and Religion in *Turkey*,” p. 126.

²⁴ Article 104 gives the President of Turkey (a position held by General Evren until 1989), the authority to preside over the National Security Council, to promulgate laws, to appoint and dismiss the Prime Minister and other state ministers, to preside over the Council of Ministers, to represent the Supreme Military Command, to declare martial law, to appoint the Chief of the General Staff, to appoint members of the Higher Education Council, to appoint rectors of universities, to appoint members of the Supreme Military Administrative Court, to appoint one-fourth of the members of the Cabinet (*Conseil d’État*) (the appointment of the other three-fourths is governed by Article 155) and to appoint the members of the Constitutional Court.

²⁵ HRW Memorandum, p. 12.

- In November 1983, Turkey held its first elections following the *coup d'état*. All parties and candidates for office were required to be approved in advance by the NSC, which prohibited dozens of proposed parties and allowed only three. It also prohibited hundreds of candidates from seeking office (including many who were members of the three approved parties). Of the three permitted parties, the one that was endorsed by the military, the Party of Nationalist Democracy, came in last place.²⁶ The conservative Motherland Party came into power.

The Second Phase of Headscarf Laws: 1984-1997

- In 1984, the religious wing of the governing Motherland Party prevailed on the party and the Higher Education Council to redefine the headscarf (“*türban*”) as “modern” and thereby permit students to wear it to university classes.²⁷ The *Sahin* Chamber says *nothing* about the HEC’s (ultimately temporary) revocation of the headscarf ban. General Evren thereupon “intervened to reverse the decision”²⁸

- On 13 December 1984, the Cabinet, **whose members were appointed by General Evren and who were opposed to the HEC’s allowing headscarves**, issued a decision holding that the 20 December 1982 Circular banning headscarves was lawful.²⁹

- In 1987, the Turkish population, in a national referendum, overwhelmingly

²⁶ Zürcher, *Turkey*, pp. 281-83; Hale, “Transition to Civilian Government in *Turkey*,” pp. 170-73.

²⁷ Alev Çinar, *Modernity, Islam, and Secularism in Turkey: Bodies, Places, and Time* (Minneapolis, 2005), p. 78; Özlem Denli, “The Head-Cover Controversy in Contemporary *Turkey*,” in *Facilitating Freedom of Religion or Belief*, ed. by Tore Lindholm, et al., (Leiden, 2004), p. 502.

²⁸ *Ibid.*

²⁹ The Chamber quoted the Supreme Administrative Court’s decision as follows: “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.” [“Au-delà d’une simple habitude innocente, le foulard est en train de devenir le symbole d’une vision contraire aux libertés de la femme et aux principes fondamentaux de la République.”] (*Sahin* ¶ 34)

repudiated the existing ban on participation in politics of those who had been leading figures from before 1980. The first nationwide elections without military control over parties and candidates were held and a new parliament was elected.³⁰

- The first elected parliament following the end of full military control voted to amend the Higher Education Act (Law no. 2547) to include a new transitional section 16 that stated: “A veil or headscarf covering the neck and hair may be worn out of religious conviction.” (*Sahin* ¶ 35, emphasis added) This transitional section was scheduled to go into effect in December 1988. **This provision of the law, which explicitly permitted the wearing of the headscarf, was opposed by the Turkish military. The Chamber discusses none of the circumstances surrounding the legally elected parliament’s effort to permit the wearing of the headscarf nor the military’s opposition to it.**

- Following the parliamentary elections in 1989, the newly elected Motherland Party government passed a law lifting the ban. General Evren, however, vetoed the new law. The government also attempted to modify *Manual of Higher Education* by stating that wearing the *türban* did not conflict with the modern styles. The parliament thereupon overrode General Evren’s veto.³¹ Unwilling to accept the override of his veto, General Evren instructed the Constitutional Court, whose members he was largely responsible for appointing, to review the constitutionality of the law. The 5 July 1989 judgment of the Constitutional Court **obligingly** held that transitional section 16 provision permitting the wearing of the headscarf violated the Turkish Constitution.

- Beginning in 1989, following Turgut Özal’s having succeeded General Evren as president, the Turkish government “embarked on a gradual liberalization of the political system.”³² The democratically elected parliament of Turkey once again adopted a law to give university students **freedom of choice of clothing**. The parliament enacted transitional section 17 of the Higher-Education that provided: “Choice of dress shall be free in higher-

³⁰ Zürcher, *Turkey*, pp. 284-85.

³¹ Denli, “The Head-Cover Controversy,” pp. 502-03.

³² Özal was the founder of the Motherland Party and served in various offices, including that of Prime Minister, between the 1980 coup and the time he became President. He was the first non-military figure to serve as President of Turkey. The legacy of Özal is very complicated. Under him, Turkey undertook economic liberalization and witnessed numerous financial scandals of the business and political elite. Zürcher, *Turkey*, pp. 282-85.

education institutions, provided that it does not contravene the laws in force.” (*Sahin* ¶ 37) The new transitional section 17 was scheduled to enter into force on 25 October 1990. **The *Sahin* Chamber offers no background to explain why such a law was adopted, nor does it note that the Turkish military opposed this liberalization of the dress requirements.**

- On 28 December 1989, following the departure of General Evren, the guidelines prohibiting the headscarf were cancelled and university officials were giving the freedom to establish their own procedures.³³

- On 9 April 1991, the Constitutional Court, **the majority of whom had been appointed by General Evren [VERIFY]**, issued a judgment that held the 25 October 1990 transitional section, which provided for “free” dress, cannot be interpreted to permit the wearing of headscarves. **The Chamber, in accepting this decision as a statement of Turkish constitutional law, does not analyze it nor describe the circumstances under which it was made.**

- On 27 March 1994, the Islamist Refah Partisi (Welfare Party), which had “become the voice of the poorest sections of the population” won elections in several cities, including Istanbul.³⁴ **Secularists in Turkey were “in a state of panic”**³⁵ **and only five days later, on 1 June 1994 Istanbul University issued an executive resolution prohibiting religious attire from being worn at the university (*Sahin* ¶ 42)**³⁶ **After the initial panic, “the situation calmed down and an**

³³ Denli, “The Head-Cover Controversy,” pp. 503.

³⁴ Zürcher, *Turkey*, pp. 295. The arrangements of the Turkish electoral system often allow pluralities to obtain complete control, as was the case here.

³⁵ Zürcher, *Turkey*, pp. 296. Zürcher later describes the reaction as one of “panic in secularist circles,” *ibid.* 299, which he contrasts to a calmer acceptance of the Refah Partisi’s coming to national power in 1996. Yael Navaro-Yashin describes the reaction to the results of the 1994 municipal elections as one of “uncertainty, sometimes ridden by panic, depression, and serious anxiety.” *Faces of the State: Secularism and Public Life in Turkey* (Princeton, 2002), p. 23.

³⁶ The Chamber notes that the University of Istanbul is a public-law corporation under article 130 of the Turkish Constitution, and that it has the authority to issue the types of regulation that will be described below under the Higher-Education Act of 1982. (*Sahin* ¶¶ 50-52) Once again, the Chamber does not disclose that both the Constitution and the Higher Education Act were adopted under martial law. Similarly, it does not state that university officials were appointed by the Higher Education Council, which was appointed by the National Security Council, which was in turn is dominated by the Turkish military.

uneasy *modus vivendi* was gradually found in the cities”³⁷ The Chamber does not explain that the resolution was adopted during a “secularist panic” nor that the panic ultimately proved to be unfounded.³⁸

The “Post-Modern Coup” of 1997 and the 1998 Headscarf Circular

- Following the election of Prime Minister Necmettin Erbakan, of the Islamist Welfare Party in 1996, the military continued to pressure the government to enforce a headscarf ban at state universities. The ban was only intermittently and sporadically enforced. For example, Leyla Sahin, who began her medical studies outside of Istanbul, had no difficulties in wearing the headscarf during this period.³⁹

- In early February 1997, the military announced that it had formed a task force to study evidence about fundamentalist threats to Turkey. Shortly thereafter, on 28 February, the military “presented the cabinet with a long list of demands (officially ‘advice’) aimed at curbing the influence of Islamists in the economy, in education and inside the state apparatus.”⁴⁰ The military told the government that religious schools, many of which provided free education to poor students, should be closed. The government was also told to enforce a headscarf ban. Ultimately, the Erbakan government resigned rather than enforce the demands. In Turkey, this military-forced

³⁷ Zürcher, *Turkey*, pp. 296.

³⁸ Navaro-Yashin, referring to the period during which this executive resolution was prepared, observes: “Times of social hysteria create many imaginings.” *Faces of the State*, p. 23. Navaro-Yashin analyzes the fears immediately after the elections that often expressed themselves in black humor about an Islamist takeover of Turkey. Secularists nervously told ominous jokes about all women being forced to wear the veil in Istanbul. Nevertheless, Navaro-Yashin argues, when secularists evaluated the situation rationally, they knew that “*the religious order that they demonized did not exist in their country.*” *Ibid.*, 25 (emphasis added)

³⁹ While it is common to imagine that the headscarf-covered university students of this time were dour and oppressed, an anthropological analysis of the situation portrays it rather differently. “In the mid-1990s, specific colors were in fashion among ‘covered’ university students: light pink and lavender, all shades of purple, pastel blue, green, yellow, and gray. Students carefully matched the color of their *türbans* (as one version of headscarf came to be called after the 1980s) to that over their overcoats” Navaro-Yashin, *Faces of the State*, pp. 82-83.

⁴⁰ Zürcher, *Turkey*, pp. 300.

resignation was widely described as “the first postmodern coup.”⁴¹

- After this “postmodern coup,” the “government’s main task obviously was to implement the reforms demanded by the army.”⁴² On 16 January the Constitutional Court banned the Welfare Party and Erbakan was banned from politics. On 23 February 1998 deputies from the former Welfare Party founded the new Virtue Party (Fazilet Partisi). On the same day, the Vice Chancellor of the University of Istanbul issued the 1998 Circular banning headscarves and beards at universities.⁴³ The *Sahin* Chamber misleadingly suggested that this 1998 Circular was simply part of a legal approach that “had existed for a number of years.” (*Sahin* ¶ 112)

- On 9 July 1998, the University of Istanbul issued resolution no. 11 that prohibited students from wearing clothes identifying a religious, racial, political, or ideological persuasion, or from “displaying an attitude that is contrary to the aforementioned points.” (*Sahin* ¶ 45)

- In 1999, the Turkish military continued to play a dominant role in university education policy by successfully reappointing Professor Kemal Gûrüz as the President of the Higher Education Council, despite widespread opposition by the Turkish academic community.⁴⁴

- There have been several reports that judges who refuse to enforce the headscarf ban, or whose family members wear the headscarf, have been dismissed or reassigned.⁴⁵

- On May 7, 2004, the Turkish Parliament enacted Law 5170 to remove military representation on the Higher Education Council.

⁴¹ Zürcher, *Turkey*, p. 301. See also HRW Memorandum, p. 28. The *New York Times* described it as a “backdoor coup.” Marvine Howe, *Turkey Today: A Nation Divided over Islam’s Revival* (2001), 143.

⁴² Zürcher, *Turkey*, p. 301.

⁴³ It was this regulation, mentioned above, that constituted the basis for Sahin’s being denied access to examinations and courses. The principal issue facing the *Sahin* Chamber, by its own analysis, was whether this 1998 Circular complied with the requirements of the European Convention.

⁴⁴ HRW Memorandum, p. 13.

⁴⁵ HRW Memorandum, p. 29.

The “legal and social context” that the Chamber offered consistently omitted (or obscured) the real origins of headscarf ban and the circumstances under which it operated. One cannot help but wonder why a Chamber of the European Court of Human Rights – which repeatedly referred to Turkey’s constitution and democracy -- systematically omitted any mention of the role played by the Turkish military in imposing the headscarf ban and systematically failed to provide any explanation of the efforts of democratically elected governments to revoke it.

III. The Proffered Justifications for Infringing upon Leyla Sahin’s Right to Manifest Her Religion

As discussed above, the Chamber acknowledged that the Turkish government infringed upon Leyla Sahin’s right to manifest her religion. (*Sahin* ¶ 71) The question remains, however, whether the reasons justifying this interference were: (A) “relevant and sufficient,” and (B) “proportionate” to a legitimate government objective. These will be discussed in turn.

A. Were the Reasons for the Headscarf ban in the 1998 Circular “Relevant and Sufficient”?

The Chamber asks whether the reasons provided by the Turkish government for the headscarf ban in the 1998 Circular were “relevant and sufficient” (*Sahin* ¶ 103) in order to satisfy the requirements of being “necessary in a democratic society.” The Chamber essentially accepted three interrelated justifications for the 1998 Circular: (1) that it was consistent with the Turkish constitutional principle of “secularism” (*laïcité*) (which in turn is consistent with the European Convention); (2) that it promoted gender equality; and (3) that it promoted “public order” in Turkey. These three justifications will be analyzed in turn.

1. Banning the Headscarf as Promoting Secularism (*Laïcité*)

The Chamber refers approvingly to the Turkish doctrine of secularism (*laïcité* in French) throughout its decision⁴⁶ and it makes several references to its importance as a constitutional and founding principle of the Turkish Republic. (*Sahin* ¶¶ 26, 27, 82, 83, 104) The Chamber asserts, for example, that Turkish secularism is “undoubtedly one of the fundamental principles of the State.” (*Sahin* ¶ 99) The Chamber, accepting the position of the Turkish government, also agrees that secularism helps promote gender equality as well as public order (the subjects of topics (b) and (c) below). After reviewing the Turkish doctrine of secularism, the *Sahin* Chamber concluded it “appears to be consistent with the values underpinning the Convention” (*Sahin* ¶ 106)

⁴⁶ *Sahin* ¶¶ 26, 27, 36, 38, 82, 83, 91, 93, 94, 99, 104, 105, 106, 108, and 110. The chamber also briefly discusses French *laïcité* (*Sahin*, ¶¶ 54-55) *Sahin*’s own brief statements about the meaning of secularism, which are not adopted by the Chamber also are included. (*Sahin* ¶¶ 85 and 87)

Although finding that Turkish secularism appeared to be consistent with the European Convention, *the Chamber never explains exactly what this “secularism” is*. The closest that the Chamber comes to describing the doctrine of secularism is when it suggests that secularism means something like: (a) state “neutrality” with regard to religion (*Sahin* ¶¶ 36⁴⁷, 93⁴⁸); and perhaps (b) the separation of the “public and religious spheres.” (*Sahin* ¶ 27) But once again the Chamber does not engage in any inquiry as to whether these two terms -- “neutrality” and “separation” -- in fact accurately describe the Turkish system, a rather serious failure for a court that had decided to accept Turkish secularism as “consistent” with the European Convention on Human Rights. Regardless of whether one approves or disapproves of Turkish “secularism,” it cannot properly be assumed – as the *Sahin* Chamber inaccurately did – that Turkish secularism is “neutral” with respect to religion or that it “separates” religion and state.” Even a brief examination of the facts shows that the Turkish state is *not* “neutral” with regard to religious and theological matters.

In his country report on Turkey in 2000, the UN Special Rapporteur on Religion or Belief made some observations that reveal undermine the *Sahin* Chamber’s naïve assumptions.⁴⁹ The Special Rapporteur, Professor Abdelfattah Amor of Tunisia, described Turkish “secularism” as “highly complex” and found that “the State is directly responsible for administering Muslim religious affairs, through the Department of Religious Affairs” (Amor Report, ¶ 16) Based upon his review of Turkish law and consultation with Turkish officials, the Special Rapporteur found that the state that is officially founded on “secularism” in reality “entrusts public institutions with State prerogatives to handle matters relating to one religion, Islam.” (Amor Report, ¶ 16)⁵⁰ Rather than being “neutral” or “separating religion and state,” the Turkish government directs

Muslim religious education, whether through courses organized by the Department of Religious Affairs, through its schools for imams and preachers, through its faculties of theology, or through compulsory courses in religion and

⁴⁷ The Turkish Constitution requires that “state education must be neutral,” according to the Turkish Constitutional Court.

⁴⁸ “[S]ecularism, of which the principle of neutrality formed an integral part.”

⁴⁹ Interim report of the Special Rapporteur of the Commission on Human Rights on the elimination of all forms of intolerance and of discrimination based on religion or belief, 11 August 2000 Addendum 1, “Situation in Turkey,” A/55/280/Add.1 (“Amor Report”), ¶ 15.

⁵⁰ One of the reasons that Professor Amor was concerned about this arrangement was that the state “seems to promote a single conception of Islam, the Hanafi, and this could be seen as taking a position in favour of Hanafism.” (ibid) Thus the “secular” state has decided to promote one of several competing versions of Islam – which demonstrates both a clear lack of neutrality and a clear unwillingness to accept a separation of religion and the state.

ethics at the primary and secondary school level Religious instruction outside the State sphere is permitted, but the State retains the right to control it. (Amor Report, ¶ 17)

Special Rapporteur Amor concluded that “Muslim religious teaching is thus essentially in the hands of the State.” (Amor Report, ¶ 17)

But it is not only the education of Muslim religious officials that the state controls. Article 24 of the Turkish Constitution requires that the state provide religious education for all children. In Turkey, the supposedly “secular” Turkish Education Ministry is responsible for providing Islamic *religious* education in public schools.⁵¹ The decision for the state to provide religious education was made by the leaders of the 1980 coup, who believed that there was insufficient religious education of Turkey’s youth and consequently made it a constitutional obligation of the state to provide such education. It is Turkish state that decides which religious doctrines will be taught at schools.⁵² The religious doctrines taught in Turkish schools are in fact a blend of the teachings of Sunni Islam and of Atatürk and have been called the “Turkish-Islamic Synthesis.”⁵³ (To see just how far this is from French “*laïcité*” we can only try to imagine the French state as *requiring* all children to be educated in post-Vatican II Gaullist-Catholic theology.)

By 1990, Turkey’s Department of Religious Affairs had more than 84,000 employees, and by 2001 the number had grown to more than 88,000 – and it was seeking to hire more.⁵⁴ The budget of the Department of Religious Affairs was equal to that of five other ministries: Tourism, Environment, Industry, Transport, and Energy and Natural Resources.⁵⁵ The responsibilities of this “secular” Department of Religious Affairs includes, among other tasks:

⁵¹ See also Zürcher, *Turkey*, p. 288.

⁵² Hugh Poulton, *Top Hat, Grey Wolf and Crescent: Turkish Nationalism and the Turkish Republic* (New York, 1997), p. 181-82. The “concept of ‘religion’ was limited to Sunni Islam. State policies of control and supervision continue to confer legitimacy upon the Sunni creed at the expense of other religions and Shia.” Denli, “Head-Cover Controversy,” p. 505.

⁵³ Poulton, *Top Hat*, pp. 181-84 (quoting lesson plans from school textbooks). The Turkish Islamic Synthesis (TIS) was conceived by conservative nationalist intellectual and business leaders in the 1970s. Following the 1980 coup, the government purged academics (particularly leftists) who did not support the TIS agenda. *Ibid.* 184. Poulton suggests that the rise of Islamist strength in Turkey in the 1980s was in part a reaction to the state’s promulgation of its own version of political Islam. *Ibid.*, 185. Thus it was not *true secularism* versus politicized Islam, but Islamism that emerged in part in response to official state-Islam.

⁵⁴ Poulton, *Top Hat*, pp. 185-86; Howe, *Turkey Today*, p. 39.

⁵⁵ Poulton, *Top Hat*, p. 186.

(a) supervising the hiring and firing of imams; (b) writing Friday sermons for mosques; (c) operating religious “Imam-Hatip” schools to train imams and prayer leaders; (d) overseeing the construction and operation of mosques; and (e) approving and distributing religious literature.⁵⁶ Public funds are used to subsidize Sunnite mosques, religious schools, *Qur’an* courses, religious programs on television and radio, but only such funds are provided for Shia and Alevi sects.⁵⁷ “The republican elite not only kept religious institutions under state control, but also dedicated a great deal of energy to regulating ordinary, day-to-day expressions of Islamic tradition and popular religiosity.”⁵⁸ It is rather difficult to understand how the Chamber could possibly have understood the Turkish state to be “neutral” (in any ordinary sense of the word) in matters of religion or to have imagined that religion and the state are separate.

The Chamber accepts, without criticism, that Turkish secularism can be used as one of the grounds for suppressing religious symbols that others might find offensive. 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 . . . may have on those who choose not to wear it.” (*Sahin* ¶ 108) Here the Chamber seems to be suggesting that the headscarf can be banned at universities to protect the feelings of those who do not want to wear it. We would not normally expect a human rights tribunal to be more solicitous of the sensibilities of those who do not like religious expression (which is *not* guaranteed by the European Convention) than on the right to manifest religion (which *is* guaranteed by the Convention). Such a conclusion is completely inconsistent with one of the most oft-cited principles articulated by the European Court of Human Rights: that expression that is of public interest or of a political nature cannot be restricted on the grounds that it might “offend, shock, or disturb.”⁵⁹

According to the Court’s well-established case-law, there is little scope under Article 10.2 of the Convention for restrictions on political speech or on debate of questions of public interest. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broad-mindedness, without which there is no ‘democratic society’. This freedom

⁵⁶ Poulton, *Top Hat*, pp. 185-86; HRW Memorandum, 32; Howe, *Turkey Today*, p. 39. “Public resources are used to promote Sunni teaching through the establishment of special

⁵⁷ Denli, “The Head-Cover Controversy,” pp. 505.

⁵⁸ Denli, “The Head-Cover Controversy,” pp. 505.

⁵⁹ There are some accepted grounds for limiting some speech, such as if it is defamatory, pornographic, or incites someone to violence -- none of which is at issue in the *Sahin* case.

is subject to the exceptions set out in Article 10.2, which must, however, be construed strictly. The need for any restrictions must be established convincingly.⁶⁰

The Chamber, without even considering the European Court’s longstanding protection for rights of expression, appears to have carved out a single exception for suppression: the Islamic headscarf.

2. Banning the Headscarf in Order to Promote Gender Equality

The second “reasonable and sufficient” argument offered by the Chamber (and the Turkish government) for banning the headscarf is that it helps support “gender equality” by protecting women against pressures that are placed on them by Islamists. (*Sahin* ¶¶ 31, 93, 96, 99) The Chamber readily accepts Turkey’s self-description that it is a country that makes gender equality a respected constitutional principle (*Sahin* ¶¶ 26, 28), and that banning the headscarf at universities is an appropriate means of responding to Islamist pressures on women. (*Sahin* ¶¶ 36, 93, 110) Although the Chamber adopts the conclusions of the Turkish government on these points, it is nevertheless important to examine the quality of the Chamber’s reasoning and the quality of the evidence it cites to reach these conclusions.

In order to evaluate the merits of the Chamber’s conclusion that the ban on headscarves will reduce pressure on women and promote gender equality, we will look at three specific questions: *first*, what is the quality of the evidence that the Chamber cites to show that there is sufficient Islamist pressure on women to justify a headscarf ban?, *second*, how does the Chamber respond to the evidence of the pressures placed on women *by the Turkish government not to wear the headscarf?*; and *third*, what evidence and reasoning does the Chamber offer to show that banning the headscarves at universities will *lessen Islamist pressures* on women?

First, what is the quality of the evidence the Chamber cites to support the assertion that Islamists are pressuring university students to wear the headscarf? The Chamber asserts that Islamists attempt to force women to wear headscarves and that the Turkish government was justified in responding to these pressures. (*Sahin* ¶¶ 31, 93, 96, 98, 99, 108, 109) Since the ban at issue here pertains only to university students, it is appropriate to ask what *evidence* does the Chamber cite to show that this “fact” justifying the ban is actually true?

The first and most obvious place to look for evidence of Islamist pressure to wear the headscarf at universities should be on the woman who actually brought the case to the court, Ms. Leyla Sahin. Here, of course, the Chamber identified no Islamist pressure on her, and in fact recognized that she made a completely voluntary choice to wear the headscarf.⁶¹

⁶⁰ *Sokołowski v. Poland* (Application no. 75955/01), 29 March 2005, ¶ 41 (case citations omitted).

⁶¹ The Chamber similarly cites the case *Dahlab v. Switzerland* (no. 42393/98, ECHR

A second possible factual source would be statements by Turkish women who asserted that they were being forced by Islamists to wear the headscarf against their will. But the Chamber in fact identifies no specific example of any woman who felt pressured to wear the headscarf. Although many such examples presumably could have been found in Turkey, the Chamber's failure to identify even one reveals just how thin was the evidentiary basis for its decision.⁶²

A third place where the Chamber might have looked for reliable evidence on the extent of Islamist pressure might have been from social-scientific research, including public opinion polls.⁶³ The Chamber, however, neither identifies any such research nor even suggests that such information would have helped guide it. The Chamber indeed exhibits no intellectual curiosity in knowing whether there is any social-scientific evidence that would support its assertions.

A fourth place where the Chamber might have looked for evidence of Islamist pressure on women would have been from human rights organizations or others who have worked to promote human rights for women. But if the Chamber had looked to perhaps the leading women's rights organization in Turkey, Women for Women's Human Rights⁶⁴, it would not have found the headscarf to have been an issue. In its 2002 publication, *The New Legal Status of Women in Turkey*,⁶⁵ the authors identify dozens of serious problems relating to discrimination,

2001-V), as supporting the proposition that Islamists force women to wear the headscarf. (*Sahin* ¶ 98) Curiously, the *Dahlab* Court, like the *Sahin* Chamber, recognized that Ms. Dahlab herself had made the voluntary choice to wear the headscarf -- and indeed she continued to wear the headscarf even after being pressured by state officials to remove it. Curiously, the popular anti-headscarf rhetoric often treats the women who wear the headscarf as docile, oppressed, or forced into wearing the headscarf against their will. However, "this most visible of Islamic symbols can be seen as a way in which women themselves can make radical political statements, and that the veiling by young female radicals is not docile or passive but a powerful sign of Islamism." Poulton, *Top Hat*, pp. 195-96.

⁶² Of course the real evidentiary problem would be to quantify the specific examples in order to assess how serious the problem is. The Chamber, however, does not even begin this process. For a discussion of the cases of many individual women who were caught up in the headscarf wars in Turkey, see Howe, *Turkey Today*, pp. 102-13.

⁶³ Public opinion polls in Turkey suggest that the clear majority of the Turkish population is opposed to the headscarf ban – even though a majority also believes that Turkey should be a secular state. Apparently, for the population, secularism does not imply prohibiting the right of individual religious expression.

⁶⁴ http://www.wwhr.org/_homepage_en.

⁶⁵ Ela Anil, Canan Arin, Ayşe Berktaş Hacimirzaoğlu, Mehveş Bingöllü, Pinar İlkaracan, *The New Legal Status of Women in Turkey* (Women for Women's Human Rights)

violence, economics, sexual abuse, and social standing regarding women. Yet this publication, which catalogues discrimination and abuse, never once mentions the “problem” of Islamist pressures on Turkish women to wear the headscarf.⁶⁶ Similarly, if the Chamber had looked to Human Rights Watch, it would have heard that the principal problem pertaining to headscarf pressures *were those imposed by the Turkish government, not by the Islamists* and that such pressures, according to them, should be understood not in light of Turkey’s constitutional guarantees of equal rights, but “against the Turkish state’s long history of failing to protect women’s rights, safety, and lives against threats posed by society and the state’s own officials.”⁶⁷ Human Rights Watch is thus much more skeptical of the Turkish government’s professed interest in women’s rights than is the very credulous *Sahin* Chamber.

The fifth possible evidentiary source, and the only one on which the Chamber did rely for evidence of Islamist pressures, was from the Turkish government itself. But how good was the evidence? When we evaluate the five paragraphs that suggest that there is Islamist pressure to wear the headscarf (*Sahin* ¶¶ 31, 93, 96, 98, and 99), the factual “evidence” melts away. Indeed, in four of the five paragraphs no *evidence* is cited – the Chamber simply makes conclusory statements.⁶⁸ Ultimately, there is only one sentence in the entire *Sahin* opinion that offers a

(2002) <http://www.wwhr.org/images/newlegalstatus.pdf>

⁶⁶ Women for Women’s Human Rights opposes the manipulation of the headscarf issue both by secularists and Islamists. HRW Memorandum, 25.

⁶⁷ HRW Memorandum, p. 25. See generally pp. 23-32. The reader may wish to compare the relative sophistication and analyses of the HRW Memorandum and the *Sahin* decision, which were released publicly on the same day.

If the Chamber had looked at the report on Turkey by the UN Special Rapporteur, it similarly would have learned that there are legitimate concerns about whether the Turkish may be the principal source of pressure on women. (Amor Report, ¶¶ 18-21, 67, 130-31) The Chamber also could have looked to the UN Special Rapporteur on Freedom of Expression to learn of the many other forms of control the Turkish state and military have exerted over university life. For statements of the Special Rapporteurs, see HRW Memorandum, pp. 9-10,

⁶⁸ In a statement that reveals just how uninformed the Chamber was on Islam and the *Qur’an*, it said that the headscarf served as a “powerful external symbol” that “appeared to be *imposed* on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality.” (*Sahin* ¶ 98, emphasis added) The Chamber noticeably does not actually quote the *Qur’an*, which in fact contains no such precept. The *Qur’an* speaks of female modesty says nothing about a headscarf being imposed on women. For discussions of the textual references to covering for women in the *Qur’an* and *ahadith*, see Blandine Chélini-Pont and Jeremy Gunn, *Dieu en France et aux États-Unis: Quand les mythes font la loi* (2005), pp. 63-64 and T. Jeremy Gunn, “Religious Freedom and *Laïcité*: A Comparison of the United States and France,” *Brigham Young University Law Review* 2004 pp. 471-72, n. 228); HRW Memorandum,

factual basis supporting the conclusion that there is sufficient Islamist pressure to warrant a headscarf ban: “At the hearing on 19 November 2002, the Government indicated that the Istanbul University authorities had restricted the access of students with beards or wearing veils to university premises as a preventive measure following complaints by other students of pressure from students from fundamentalist religious movements.” (*Sahin* ¶ 96) Because this is the *only* cited *factual* basis for the Chamber’s finding that Islamists pressure women university students to wear the headscarf (and men to wear beards), it is appropriate to consider three points. First, the information comes from the year 2002, four years after Sahin was forced to leave the university, and thus it could not have constituted the basis either for the 1998 Circular or the original laws from the early 1980s. If the Chamber had any factual evidence to justify its support of the 1998 Circular, it does not provide it. Second, the information does not satisfy traditional indicia of reliability: it is anecdotal and it is hearsay provided by a self-interested party.⁶⁹ Third, the 2002 information, as cited by the Chamber, pertains not to prohibiting *students from wearing headscarves*, but to prohibiting access to the university by *non-students* who wear headscarves or beards. Thus the reliability and pertinence of this, the only “factual” evidence, is rather tenuous.⁷⁰

Second, how does the Chamber respond to the evidence of the pressures placed on women by the Turkish government not to wear the headscarf? Although the *Sahin* chamber

p. 26 n. 54; Tahzib-Lie, “Dissenting Women,” p. 474 n. 86.

⁶⁹ Of course, the anecdotes may be true -- but how are we to know? The Chamber shows no interest in evaluating the reliability of the evidence, as if it were predisposed to accept it. We cannot imagine that the Chamber would have uncritically accepted a statement by Sahin that “students I talked to did not feel pressured to wear the headscarf.”

⁷⁰ But let us suppose that the Chamber actually provided some concrete testimony or social-scientific evidence to support its position. Would we not then have expected the Chamber to say something along the following lines: “although the evidence is clear that Ms. Sahin herself is a competent woman and was not pressured, we must nevertheless deny her claim because of the larger issues involved and the need to protect other women”? If the Chamber were *genuinely* concerned about the rights of women, we would expect the Chamber to sympathize with the very real woman who was standing before them seeking relief. The Chamber’s articulated concern, however, is not with the real women who brought cases to the European Court of Human Rights, but the abstract women whom it never identified or quoted.

This author has no difficulty believing that many Islamists in Turkey pressure women to wear headscarves against their will -- and that in some cases the pressure may be sufficiently strong that a government should act to protect its citizens. But the discussion provided by the Chamber and Turkey do not deal either with these fine points or with the evidence. Rather, they make broad and unsubstantiated claims and impose a solution that mirrors what they purport to reject: pressuring women on how they should dress.

provides virtually no factual evidence for its conclusion that there is Islamist pressure on female university students to wear the headscarf, it unintentionally provides overwhelming factual evidence that the Turkish government imposed substantial pressure on women *not* to wear the headscarf. Indeed the pressure is so strong that a woman will be expelled from the university if she does not comply with government demands. (There is no evidence even suggested that Islamists will prohibit women from attending the university if they do not wear the headscarf). Faced with the clear and uncontradicted evidence that the Turkish government is exerting substantial pressure on women, what objections or concerns does the Chamber mention with regard to *this* pressure? The answer to this rhetorical question is, of course: “absolutely none.” The Chamber never even hints that it might be wrong for the government to pressure women who, like Ms. Sahin, have a right of conscience to engage in religious expression. Thus the Chamber ignored the importance of clear and documented pressure on women not to wear the headscarf and instead relied on undocumented assertions about Islamist pressures on unidentified women.⁷¹

Third, what evidence did the Chamber offer that banning the headscarf at universities would lessen Islamist pressure on women? The *Sahin* Chamber accepts the university headscarf ban as a way of reducing Islamist pressure on women. It is obviously important to know whether this assertion is factually correct: does banning the headscarf in fact reduce Islamist pressure on university women? If the ban is not effective, then clearly the justification for it collapses. What evidence, proof, or reasons does the Chamber provide to support the efficacy of the ban? Once again, we are left with the answer “absolutely none.” The Chamber seems to assume that the ban will have the desired affect. We could imagine, of course, reasonable factual scenarios where the Chamber’s assumption would be incorrect: (a) Islamists subject university women (including those who do not want to wear the headscarf) to increasing pressures because of the mere fact that they attend a university that prohibits the headscarf; or (b) Islamists pressure girls and women not to attend the university. If either of these scenarios were in fact true, the headscarf ban would be counterproductive and the entire rationale of the Chamber’s opinion would collapse. Thus it would seem to be critically important to know whether the ban in fact had the desired effect. But here, once again, the Chamber shows no interest in knowing whether there is any factual basis for its assertion.

When the answers to the three preceding questions are considered, it becomes quite obvious that the Chamber is not really concerned about the extent of Islamist pressure on women, because it readily accepted flimsy and anachronistic evidence to support the ban and does not pose the question whether the ban accomplish its intended purpose. It is also clear that the Chamber has no principled objections to pressure being placed on women regarding the headscarf, because it does not even consider as relevant the uncontradicted evidence that the

⁷¹ In what may be the most naïve statement in *Sahin*, the Chamber agrees with the Constitutional Court’s observation that secularism protects the individual from “external pressure,” (*Sahin* ¶¶ 105, 106), an observation that flatly ignores the tremendous pressures put on women to comply with secularist ideology.

Turkish government is placing substantial pressure on women to conform to its ideology. And finally, the Chamber fails to provide even one reason why banning headscarves at universities has lessened Islamist pressures on women. The “pressure” and “gender equality” reasons seem to have been after-the-fact justifications for what appears to be the real reason the ban was permitted: the Chamber of the European Court of Human Rights, seems to disapprove of the symbolism of the headscarf so intensely that it is willing to approve of punitive, and perhaps even illogical, measures designed to suppress it.⁷²

3. Banning the Headscarf to Reduce the Islamist Threat to Public Order

In addition to accepting the assertions that Turkey is upholding the principle of secularism and combating Islamist pressure on women (1 and 2 above), the Chamber also speaks briefly of the dangers that Islamism poses to the public order as an additional reason for supporting the headscarf ban. (*Sahin* ¶¶ 31, 93, 96, 99, 108, and 109) Probably the “clearest” assertion of this point of view is in paragraph 108, referring to an earlier European Court decision, where the Chamber says⁷³: “Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need . . . especially since . . . this religious symbol has taken on political significance in Turkey in recent years.” (*Sahin* ¶ 108) Thus the Chamber accepts Turkey’s explanation that the government is promoting public order, that it is promoting “peaceful coexistence between students of various faiths” (*Sahin* ¶ 99), and that students need to be able to study in a calm atmosphere untroubled by Islamist politics. (*Sahin* ¶ 36) So it is against the background of Islamist politics and its threat to the public order that the headscarf ban also is justified.

Unfortunately, the *Sahin* Chamber, in making this argument, lost track of the actual issue with which it was presented. The *Sahin* case involves a prohibition on the wearing of the headscarf and thus the relevant public order analysis here *is limited to the specific question of whether wearing the headscarf disrupts the public order*. (The analytically distinct question of whether advocates infringe on the rights of women by pressuring women to wear the headscarves was discussed above.) We can now focus on the proper question: what evidence or analysis does the Chamber offer to show that *wearing* headscarves actually *causes* disorder at the university? The Chamber appears to offer only two arguments that the wearing of the headscarf (as opposed to its advocacy) could actually disrupt public order: (a) that many people in

⁷² We will revisit this issue briefly when considering whether the ban was a “proportionate” measure. See IV.B below.

⁷³ *Refah Partisi and Others v. Turkey*. Another irony in the *Sahin* decision is that the *Refah* political party that was banned as being a danger to the public order in the earlier case became, after reconfiguring itself, the governing party in Turkey at the time *Sahin* was decided. The Chamber does not draw the obvious conclusion that perhaps the European Court, and its willingness to accept the logic of symbolism, was already proved wrong once.

Turkey's secular society feel uncomfortable when seeing the headscarf at public institutions such as universities, and (b) the mere presence at headscarves at universities causes pressure on women who do not wish to wear the headscarf.

As considered in the discussion of Turkish secularism above (III.A.1), the Chamber reveals sympathy for secular Turks who do not like the sight of the headscarf at public institutions such as universities. But once again the Chamber offers no facts or quantification of this issue, but seems to accept it as self-evident. The Chamber again loses sight of the guidance provided over the years by the European Court of Human Rights: that expression may not be suppressed simply because some people might find that it offends, shocks, or disturbs. Does the Chamber actually believe that a university student wearing a headscarf should be the exception to this general rule? If it does not believe that it is a legitimate exception, it should have said so. If it does believe it should be an exception, it offers no explanation as to why.

The only other argument in support of the assertion that wearing headscarves disrupts the public order is the assumption that some university women find that the presence of headscarves on other women indirectly pressures them also to wear headscarves. Yet again, we are offered no factual evidence to support this assertion. Moreover, how compelling is this position as a matter of reasoning? Suppose that the state prohibited women from wearing miniskirts *for the reason that* if some women wear them then others also would feel pressure to wear them? Would such an argument satisfy the Chamber? Could we seriously imagine prohibiting women from engaging in any of the following activities on the grounds that other students might feel pressured into engaging in them as well: wearing makeup, holding an unpopular political opinion, studying a statistics textbook, quoting the *Qur'an*, jogging, having a boyfriend, or singing? This reasoning is so weak that we are forced to consider the possibility that the Chamber is not *analyzing* a problem but that it is desperately searching to find a justification to for suppressing something it does not like.

When we look closely at the three reasons the Chamber used to justify the headscarf ban in the 1998 Circular – the principle of secularism, Islamist pressures, and public order – it appears that they do not satisfy the Chamber's own stated requirement that they be reasonable and sufficient.

B. Was the Headscarf Prohibition in the 1998 Circular “Proportionate” to the Harms it Sought to Prevent?

The final requirement that the Chamber imposed on itself, and on the Turkish government, was to demonstrate the 1998 Circular banning headscarves was “proportionate” to the harms that needed to be avoided.⁷⁴ If we assume that there were in fact real harms and that

⁷⁴ The discussion above suggested that the harms were not sufficiently justified and that the measures taken by the government did not resolve the alleged harms. The following analysis presumes that there were harms and that in fact the measures prevented the harms from taking place.

banning of the headscarf at universities actually solved the alleged problem, we must nevertheless consider whether the “solution” was disproportionate to the harm. To use a medical analogy, one “solution” to the problem of a broken finger is to cut off the hand. But such a drastic solution, although eliminating the inconvenience of a broken finger, is vastly disproportionate to the original problem. But the Chamber, even after acknowledging that it needed to show that the measures it approved were proportionate to the harm, *never once analyzed this critical issue of proportionality*. It referred to proportionality only twice in its entire opinion (*Sahin* ¶¶ 103 and 114), but both references simply state that this is an issue that should be analyzed. The promised analysis of proportionality is never provided.

The following three points could have been included in a proportionality analysis, but were not. *First*, could the university have taken measures to prevent alleged Islamist pressures on female students short of banning the headscarf? The university could have, for example, issued a circular that said all students at the university were free to wear or not wear the headscarf as they wished, and that this was an essential liberty guaranteed by the Turkish constitutional principle of secularism. Any student pressuring another student to wear or not to wear a headscarf would be subject to disciplinary actions ultimately leading to expulsion. The university could then have established a disciplinary committee that would hear all cases involving undue pressure. Such an approach, effectively enforced, would have protected rights of all students and would have responded proportionately to the alleged dangers.

Second, was the university headscarf ban really “necessary” in a *democratic* society? The Chamber identifies *no other democratic society anywhere in the world* that believed it was “necessary” to prohibit adult women from wearing the headscarf in universities. It is difficult to see how it could be “necessary” when no other democratic society in the world had adopted a similar prohibition.

Third, was there any evidence that the prohibition was in fact counterproductive and that the ban hardened attitudes and made conflict more likely? The coordinator of the organization Women for Women’s Human Rights, Pinar İlkkaracan, for example, argues that the ban is “bad politics” that will only harden Islamist politicians and will ultimately be counterproductive.⁷⁵ It would be perfectly reasonable to ask the question whether or not Ms. İlkkaracan is correct. It was not reasonable, however, for the Chamber simply to ignore this issue.

Conclusion

The Chamber does not clearly articulate what may in fact have been the most important underlying concern of Turks who wish to ban the headscarf: that it is an evocative symbol of a political Islam that, should it come to power, might suppress human rights generally and rights of women in particular. It is not only the Turkish military that supports the ban; secular Turkish

⁷⁵ Howe, *Turkey Today*, p. 113.

women (and men) do so as well. Many secular supporters of the prohibition see the constant specter of Iran, Saudi Arabia, Kuwait, and Afghanistan under the Taliban, where Islamists require women to wear the headscarf (and sometimes more) and where women are relegated to secondary roles. Rather than seeing headscarves as manifestations of individual religious expression, secularists may see them as ominous signs of potential religious oppression. Non-Turkish European secularists -- perhaps even some members of the European Court -- are also likely to see the headscarf as interfering not only with their visual images of a secular Europe, but perhaps as a long-term threat to European institutions themselves. The headscarf is becoming the symbolic first line in a battle over the influence and dangers of Islamists on society.

The situation in Turkey is very complex and there are genuine dangers posed by some Islamists and some Islamist movements. One shocking incident was the 1993 murder of the famous Turkish journalist Uğur Mumcu, who had reported intrepidly on connections among Turkish, Saudi, and Iranian fundamentalists. Another was the July 1993 riot of an Islamist-incited crowd that burned a hotel and its Alevi occupants.⁷⁶ In 1990, a radical Islamist group claimed responsibility for murder of a retired religion professor who opposed wearing the headscarf.⁷⁷ In 2000, the bodies of dozens of missing businessmen and intellectuals, who had apparently been murdered by members of *Hizbullah*, were found.⁷⁸ But serious problems demand serious analysis – not reactive thinking. The underlying problems in Turkey certainly require sociological, political, and perhaps even theological analysis. Although jurists debate the competency of judges to insert themselves into such subjects, it nevertheless is clearly wrong for judges to make political, sociological, or theological judgments on controversial issues without fully acknowledging what they are doing and considering the broad range of evidence that is available. While a court presumably could decide to abstain from making a legal judgment on a political issue, it should not try to disguise its agreement with one side in a sharply contested dispute by pretending that it is merely giving a legal judgment. Human beings often respond to perceived dangers (such as Islamism) by reactively suppressing perceived symbols of the danger (such as headscarves). It certainly would be a tragedy for a human rights tribunal to give a legal imprimatur for what ultimately may be counterproductive and reactionary impulse that is not based upon a thorough and sophisticated understanding of the complex issues.⁷⁹

⁷⁶ Zürcher, *Turkey*, p. 290; Poulton, *Top Hat*, 197-99.

⁷⁷ Poulton, *Top Hat*, 198-99.

⁷⁸ Zürcher, *Turkey*, p. 304.

⁷⁹ For a rather different analysis of the religious-political conflict in Turkey than that offered by the Turkish government (and implicitly ratified by the *Sahin* Chamber), see Zürcher, *Turkey*, pp. 288-90. Zürcher argues that Turkey is in fact a secular society, and that one of the principal reasons for Islamist influence comes from their appeal to the feelings of economic hopelessness of the poorer classes. Applying such an analysis to the headscarf issue, one could argue that the best way to decrease the influence of Islamists is to improve the economic

During the next half century, Islam will continue to grow in importance in Europe. Demographic trends, measured by immigration, fertility, and mortality, already point to a relative growth of Islamic population groups and a relative decline in traditional national populations. This population shift will likely be accentuated by what appears to be the growing salience of Islamic religion, culture, and symbols. In addition, adherents of a politicized Islam are becoming an increasingly prominent feature not only in Turkey, where the *Sahin* case originated, but in many other parts of Europe as well. *Sahin* thus involves not only the specific human rights question of whether a Muslim medical student has a right to manifest her religion by covering her hair, but the future of the relations between Muslim and non-Muslim populations in Europe. With so much at stake, it is vital that important European institutions, including the Court of Human Rights, properly understand, explain, and decide the controversial issues that arise involving Islam and its symbols.

Unfortunately, the 2004 *Sahin* Chamber decision provides a classic illustration of exactly how decisions involving Islam (whether juridical or political) should not be made. Rather than providing a fair and accurate explanation of the context in which the Turkish headscarf ban was first imposed -- by a military junta that had come to power through a *coup d'état* and that ruled under martial law -- the Chamber misleadingly suggested that it was a decision arising from Turkish democratic values expressed through the Turkish Constitution. The world has seen too many justifications of political decisions based upon distorted readings of history and evidence.

While the Chamber criticized Islamists for violating women's human rights by pressuring them to wear the headscarf, it was utterly silent about the pressure by Turkish authorities on women to remove the headscarf. With regard to the case actual case before it, the Chamber failed to note that there was no Islamist (or any other) pressure on Leyla Sahin to wear the headscarf, though there was substantial pressure placed on her by Turkish authorities to remove it. The Court readily accepted Turkey's argument that the headscarf ban was based in part on promoting gender equality, but did not trouble itself to explain how *denying* women the right of free choice promotes gender equality. In addition, the Chamber failed to explain how banning headscarves will actually resolve -- or ameliorate -- or have any affect whatever -- on the underlying problems of political Islam about which it seemed to be so concerned. Ultimately, we are left with the troubling result that the Chamber was less interested in facts, analysis, or judicial reasoning than in engaging in a battle over symbols. The Chamber acted less as a court of human rights and more as an advocate on one side of a polarized conflict that uses women's hair rather than their minds as the battleground.

In Turkey, an intelligent woman can be entrusted to engage in the study of medicine with the goal of being admitted into a profession where she makes life-and-death decisions about

conditions of those who are being drawn to Islamist rhetoric and not to attack symbols of Islam (which fans the flames of Islamism). Regardless of whether such an analysis is correct, the European Court should not naively assume that suppression of the symbols will bring about the desired result. The attempted suppression of symbols may enhance their perceived importance.

symptoms, diseases, physiology, and pharmacology. But in Turkey, unlike any other democratic country in the world, she can be prohibited from studying in this profession not because she is unintelligent, or incompetent in physiology or diagnosis, or a political trouble-maker, but because she also has the religious belief that she should cover her hair. She can be entrusted to hold the lives of people in her hands, but not to make her own decision about the meaning of passages in the *Qur'an*. Nowhere in the *Sahin* decision is there a suggestion that by wearing the headscarf, Dr. Sahin's medical judgment would be impaired or that a person might die rather than live because her hair is covered. The *Sahin* decision also never suggests that her decision to wear the headscarf was anything other than a voluntary decision made by her in sincerity and good conscience. Nor does the decision ever suggest that she was disruptive to other students, that she attempted to impose her views on others, or that the headscarf interfered in any way with her ability to study medicine.

Turkish authorities, the European Court, and other European institutions are understandably justified in being concerned about the rise of anti-democratic forces in society as well as by religious zealots who would readily suppress the human rights of others. The appropriate response, however, is not to abandon human rights principles or to force people to dress or believe in a preferred way, but to implement principled declarations that such pressures are anathema to society, regardless of whether they are caused by turban-clad zealots or necktie-wearing bureaucrats. Leyla Sahin, an adult woman, should have the right to wear or not to wear a headscarf, and neither fundamentalists, university officials, nor courts should force her to act in accordance with their beliefs – or prejudices. The European Court of Human Rights should be adopting principled decisions permitting manifestations of freedom of conscience and belief -- and not adopting the same choice-suppressing measures favored by the dreaded fundamentalists.