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LEGAL EVALUATION OF THE BAN IMPOSED ON UNIVERSITY STUDENTS WHO WEAR THE HEADSCARF SUBSEQUENT TO THE ECtHR'S RULING IN *LEYLA ŞAHIN v TURKEY*

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I. INTRODUCTION

On 10 November 2005 the Grand Chamber of the European Court of Human Rights (ECtHR) ruled that the obstruction of Leyla Şahin's education by means of the headscarf ban in Turkish Universities is acceptable in a democratic society.

This evaluation assesses the ECtHR decision in the Leyla Şahin case in the light of the Court's own founding principles, asks whether the ban is legitimate and tests the integrity of the grounds cited to justify the ban. The impacts of the ruling on comparable cases, and on the future of the ban are also examined, concluding with a more general evaluation.[1]

1. THE JUDICIAL PROCESS

The headscarf ban began with a circular following rectorship elections in 1998, first in Istanbul University and later in other universities. When the applicant Leyla Şahin, then a fifth year medical student, transferred from Cerrahpaşa Medical School to Uludağ Medical School, she was not allowed even to enter the faculty campus, even though she had the same education entitlements gained through the university entrance examination as others students who were permitted to continue with their studies. She therefore applied to the ECtHR as a means of last resort to redress, since she had exhausted all domestic remedies.

When the ECtHR ruled the application as admissible on 2 July 2002, this was itself a first. (In 1993 the European Human Rights Commission had ruled inadmissible the applications of Şenay Karaduman and Lamia Akbulut, who had applied concerning the prohibition of their use of a picture with a headscarf on their diplomas during an earlier chapter of the ban).

Six years later, on 29 June 2004, the 4th Chamber rejected Leyla Şahin's application. The Court accepted that Leyla Şahin's deprivation of her right to freedom of religion was an interference, but concluded that such interference was acceptable in the Turkish context. Leyla Şahin asked for the case to be referred to the Grand Chamber, and the five-judge panel accepted her application.

On 10 December 2005, after a public hearing, the Grand Chamber rejected Leyla Şahin's application by a majority vote. The Grand Chamber examined the application from standpoint of freedom of religion and right to education. Reiterating reasonings that had been put forward in the decision of 4th Chamber, and bearing in mind Turkey's special circumstances, the Grand Chamber concluded that the interference/violations of fundamental rights concerning headscarf were acceptable and legitimate.

II. THE GENERAL ASSESSMENT OF THE GRAND CHAMBER'S GROUNDS FOR ITS DECISION IN LEYLA ŞAHİN DECISION

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

The Grand Chamber recognized that in banning the headscarf the state was interfering with the individual's right publicly to express her religion,[2] but went on to state that the ban was acceptable if it was imposed to protect the rights of third parties, to preserve public order, and to safeguard the principles of secularism and equality in Turkey.

The Grand Chamber accepted that freedom of religion is a fundamental principle in a democratic society, but emphasized that that the European Convention on Human Rights Article 9 does not cover all acts motivated by religious beliefs. The Grand Chamber stressed that in a democratic society, the right to education is indispensable to the furtherance of human rights and benefiting from higher education institutions is only a natural result of exercising one's right to education and that the state is the agency responsible for ensuring effective access to education. The Court stated that the denial of Leyla Şahin's access to various lectures and examinations because she wore the Islamic headscarf constituted a restriction on her right to education. It accepted that Leyla Şahin was entitled, by her scores in the university entrance examinations, to go to university and study the subject of her choice. However, the interference triggered by her wearing of a headscarf was found to be necessary for "protecting the rights and freedoms of others and maintaining public order."

The Grand Chamber stated that Leyla Şahin continued to wear headscarf despite of Turkish Judicial decisions. The Court found the Turkish judiciary's decisions were sufficient to allow that ban was provided for in law, and emphasized that Leyla Şahin had continue to wear the scarf in spite of these rulings. It further held that the existence of higher education institutions' circulars required Leyla Şahin to be aware of the restriction on her right to education prior to her registration at the university.

The Grand Chamber emphasized that the principle of laicism aims to protect the individual from extremist groups. The court stated that the effect of the application of a compulsory Islamic rule in a majority Muslim country where there were some extremists should be taken into consideration. The importance of gender equality was also emphasized.

The Grand Chamber stated that it would not intrude upon the state's margin of appreciation within the Turkish context. The judgment stated: "As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course … Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose. Article 9 does not always guarantee the right

to behave in a manner governed by a religious belief … and does not confer on people who do so the right to disregard rules that have proved to be justified. … In the light of the foregoing and having regard to the Contracting States' margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued. … Consequently, there has been no breach of Article 9 of the Convention."

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

The Court stated that the authorities were entitled to a margin of appreciation in fulfilling their responsibilities in a sensitive issue like the headscarf question. But the Court's jurisdiction is subsidiary and its role is not to impose uniform solutions.[3] At this point, the decision conflicts with the ECtHR's aim, as laid out in the Convention, of removing individual injustice. The ECtHR is a judicial mechanism founded with the explicit purpose of preventing human rights violations and establishing high democratic standards *universally*.[4] But in the Leyla Şahin decision the Court said that it respected the relevant institutions' margin of appreciation, and conceded that university officials cannot set themselves up to the institutions' regulations by applying principles of proportionality and justice. In saying this, the ECtHR effectively denied the force of its own existence. After all, if every country can plead its own special circumstances in order to limit the rights within the European Convention, then there will be not role for the ECtHR, and it will be impossible to develop any universal standards.

In allowing states to avoid scrutiny by claiming their margin of appreciation, the ECtHR is avoiding its own duties. The violation of the freedom of religion, guaranteed under the Convention, is not a local problem but one of importance to all state parties to the ECHR. In the Leyla Şahin ruling, avoids establishing a criterion which can apply to all member states on the grounds that there is no consensus in Europe. But as Judge Tulkens points out in her dissenting opinion, there is no diversity of practice in European universities.[5] When Leyla Şahin was deprived of her education, she went abroad and completed her education successfully and without problems in another Council of Europe member state. No practice remotely resembling that in force in Turkey can be found in higher education in any other European state. It would be surprising a democratic state founded on the rule of law behaved otherwise.

France has introduced different practices concerning the headscarf, but the ban is only applicable to primary and secondary school students. Moreover, French schoolchildren can still get education of their choice in private primary and secondary schools. In French universities there is no ban or nor indeed any problem concerning the headscarf.

Democracy depends vitally on recognizing diverse views and giving them the space to live. The ECtHR was founded to defend individuals' freedoms and rights to express diverse views against state interference. But in the Şahin case, the Court merely reiterates an abstract reasoning from the Turkish Constitutional Court, in marked contrast to its own judicial tradition. It appears that the ECtHR applies a different standard in such cases and this undermines the confidence of the Turkish public in its standard of justice. This decision

suggests that when Islamic values are on the agenda, universally held values and understanding of justice are suspended while fear, suspicion and prejudice take over the decision-making process.[6] Any decision based primarily on the state's right to a margin of appreciation and "special circumstances" applying exclusively to that state conflicts directly with the Court's founding principles.

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

Leyla Şahin went to the court to seek redress for violations of her individual rights. However, the Court based its decision on circumstances that did not apply in Leyla Şahin's case. The ruling makes false observations specifically about Leyla Şahin, and generally about women wearing headscarf in Turkey.

For example, in its summary of the complaint in the introduction to the judgment, the Grand Chamber states that Leyla Şahin "argues that the prohibition on wearing the Islamic headscarf obliged students to choose between education and religion and discriminated between believers and non-believers". However Leyla Şahin never made such a complaint, and the suggestion that she did gives some indication of the bias in the development and writing of this judgment. This so-called complaint, standing alone, proves the influence in decision formation. Any women wearing headscarf does not see her as entitled to pass such judgments and there is no such claim or debater over it. Everyone in Turkey knows very well that just because somebody does not wear a headscarf does mean that they are a "non-believer." Nobody claims that it does, and there is no argument on this issue. Nobody who does wear the headscarf has any right to make such a judgment. Leyla Şahin and her attorneys only stated that while students in various attires could get education, only those wearing headscarf were discriminated against. The Court was therefore misguided about Leyla Şahin's claim.

The ECtHR chose to give unconditional credence to ungrounded and contentious assertions about Leyla Şahin and women wearing headscarf in Turkey, such as that they negatively influenced students who chose not to wear the headscarf and violated others' rights. In the ruling, subjective, false and contentious arguments about Leyla Şahin were used to justify the ban. The ruling gave weight to general statements contained in the Turkish Constitutional Court's decisions which bore no relevance to Leyla Şahin's situation. Yet the court neglected to investigate the accuracy or relevance of the statements and therefore degree of accurateness of these issues was not investigated. As a result, the abstract and theoretical statements in the ECtHR's decision did not fit the real factual characteristics of the case in question.[7]

The Grand Chamber like the Turkish Constitutional Court from which it frequently changes the meaning of concepts. It did review whether the headscarf decision was compatible with the ECHR and Turkish domestic laws. It assumed that the reasoning contained in the Constitutional Court's decisions were correct and adopted them in its own

ruling. The Court careless examination neglected its own responsibility as regards both procedure and content.

When the Court assessed the objection, it used concepts like equality, pluralism, women's rights or secularism as grounds to reject Leyla Şahin's case, whereas in fact, ideas such as freedom from discrimination, equality, women's rights and secularism require that women should not be discriminated against on the grounds of their choice of dress. The ruling implied that what had to be protected against was a hypothetical threat to the rights of women who do not wear the headscarf. The very real violation of Leyla Şahin's rights was not considered significant. If Turkey's special circumstances were an important matter of consideration, then the Grand Chamber should have assessed the accuracy of the picture of Turkish society supplied by the government.

The Court stated, " The obvious purpose of the restriction was to preserve the secular character of educational institutions." It explained, "Secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience." If that was true, secularism as defined by the ECtHR's should be a guarantor of Leyla Şahin's right to complete her education freely. The principle of secularism could only justify protecting the right to exercise one's own religion, not for prohibiting it.[8] Secularism does not mean discriminating among students depending on their dress, or excluding from the environment every last thing related to religion.

Turkey's special circumstances and secularism require impartiality. Nobody should be forced to uncover or to cover her head. As a matter of fact, as Judge Tulkens' in her dissenting opinion pointed out, "The majority thus considers that wearing the headscarf contravenes the principle of secularism. In so doing, they take up position on an issue that has been the subject of much debate, namely the signification of wearing the headscarf and its relationship with the principle of secularism."

The Court ignored a number of Turkey's special circumstances including, for example, the fact that although Turkey is a supposedly secular state, it has a Religious Affairs Directorate under the Office of the Prime Minister, which controls and manipulates certain sects of Islam. By giving priority to a particular interpretation of religion the Directorate infringes the principle of impartiality between religions. The Court ignored the fact that the state, which is supposed to be indifferent to all beliefs, was paying close attention to whether Leyla Şahin was performing her religious duties or not. In a secular state, Leyla Şahin's decision whether to cover her head or not should not have had any practical effects on her life.

The principle of secularism in a democratic society, where different religions or beliefs coexist, requires the state to be neutral towards religions or beliefs while executing its duties concerning education (denominational neutrality). According to the United Nations' Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief dated 25 November 1981,[9] the state should make no distinction, exclusion, restriction or preference based on a particular religion or belief.

Secularism requires the state to be as impartial as possible between religions and not to discriminate negatively or positively between citizens who belong to various religions. Secularism is possible only when the state is indifferent to all beliefs, and does not prevent majority from exercising their religious beliefs. Leyla Şahin received tuition, in a secular education system for five years. The fact that secularism is a fundamental principle of the Turkish Republic should not mean that adult students are prohibited from wearing the headscarf. Basic principles are instituted to protect people's interest; protecting principles by violating individuals' rights cannot be an appropriate solution.

The Court assumed that since students had registered at a secular institution, then they are bound to obey the institutions' rules. The Court ignored the fact that there were no rules regulating student's attire when Leyla Şahin registered. It claimed that the ban on headscarf did not harm the essence of Leyla Şahin's right to education. However, the Court ignored the fact that in Turkey there is an unitary education system. That is to say, students who wear the headscarf do no alternative and cannot go elsewhere to study. Leyla Şahin may have earned a diploma by studying abroad, but since such a diploma is not recognized within Turkey it has no practical effect or significance.

The Court claimed that practicing students are free in the universities to manifest their religion in accordance with habitual forms of Muslim observance. But Leyla Şahin was denied access to university precisely because her wearing of the headscarf was motivated her religious beliefs. Indeed, the Higher Education Council has banned the wearing any kind of hat, beret, or even wig.[10] There is no regulation for a uniformed dress code in Turkish universities—only an interference for those students who wear the headscarf. Clearly then, Leyla Şahin was not free to practice or observe her beliefs.

The ECtHR restated the reasoning of the Turkish Constitutional Court's rulings, arguing that an administration could impose limitations on the freedom of individuals in order to maintain public order and to protect the rights and freedoms of others. The Court grounded its reasoning on "the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it."[11] However, Leyla Şahin was very concretely deprived of a right she was entitled to, and the ECtHR did not weigh the impact of that deprivation.

Therefore, as stated in the dissenting opinion, the Court paid no attention to whether the supposed threat to the rights and freedoms of others had been proved. The ruling indicates that the Court's opinion was based on false assumptions regarding Leyla Şahin and women who wear the headscarf in Turkey. The Court accepted the misinformation as fact without investigating their accuracy.

There is no evidence, or even allegation, that Leyla Şahin as an individual had ever attempted to impose anything on a third party. She completed her education in three different universities, two of them in Turkey, without a problem. Prior to 1998 many students studied and graduated while wearing the headscarf. Not a single specific example was put forward of women wearing headscarf restricting other women's rights. When the ban on headscarf was first initiated, there were no reports of violence by those women who had earned the right to study at university but were being denied that right. The Court's job is to judge on the basis of tangible facts, not according to conjectured aims or intentions. A person's attire is not pose a

threat to public order. Wearing or not wearing the headscarf does not influence others' right negatively. Would it be reasonable to claim that persons wearing long hair negatively affect those who keep their hair short, or that people who wear long hair want to restrict the rights of the short haired, and must therefore be forced to cut their hair short too?

As Judge Tulkens wrote in her dissenting opinion: "Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court's case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples (*Smith and Grady v. the United Kingdom*, judgment of 27 September 1999, § 89). Such examples do not appear to have been forthcoming in the present case."

The Grand Chamber clearly stated: "[they did] not lose sight of the fact that there were extremist political movements in Turkey which sought to impose on society as a whole their religious symbols and conception of a society founded on religious precepts". Linking the headscarf directly with extremists and fundamentalist movements simultaneously obscured the reality of Turkey, and suggested hypothetical incidents which could be used to justify the ruling. Contrary to the Court's claim, there are no grounds for suggesting that a student who happens to wear a headscarf is likely to be a fundamentalist or an extremist. There has been incident or pattern of incidents in Turkey which have required the banning of the headscarf for the purpose of restraining an extremist political movement in Turkey.

The majority opinion accepted the ban on headscarf as appropriate due to Turkey's special circumstance and "pressing social need" but neglected to provide any concrete evidence of this pressing social need. There was no suggestion that Leyla Şahin wore the scarf in an ostentatious or aggressive manner, or in a manner that was intended to exert pressure, to provoke a reaction, to proselytize or to spread propaganda, or to undermine the convictions of others. The respondent Government did not even put forward any such claim about Leyla Şahin. There was no evidence before the Court to suggest that Leyla Şahin had any such intention. As the dissenting opinion stated, "it had been neither suggested nor demonstrated that there was any disruption in teaching or in everyday life at the University, or any disorderly conduct, as a result of Leyla Şahin's wearing the headscarf. Indeed, no disciplinary proceedings were taken against her."[12]

The Court accepted the suggestion made by the Turkish Constitutional Court that wearing the headscarf might result in pressure on other women in the same environment who do not wear headscarf. It therefore ruled that the ban on headscarf could lawfully be applied in order to protect the rights of others who do not wear headscarf. In this reasoning, the Court ignored that this claim was not warranted by the actual situation in Turkey, and also ignored that real discrimination was being inflicted on women wearing headscarf who had earned the right to go the university but were left at the university gates while her peers were allowed to enter.

Preventing students who choose to wear the headscarf because of their beliefs from getting education punishes them for supposed intentions and ideas that are projected upon them. The ECtHR took into consideration a possible future threat and permitted constraint to

be imposed on freedoms in the absence of a manifest threat. Individuals should not be prevented from exercising their fundamental rights on the basis of hypothetical incidents. Mere assumptions cannot justify the violation of a right *in concreto*.

The Court found that in an environment in which every dresses as they wish, only a ban on the headscarf is "just." But the very essence of pluralism is an accommodation between people with varying perceptions concerning social life (language, race, life style, sexual orientation, religion, attire etc). Moreover, women's rights are unlikely to be effectively protected by telling women what they can and cannot wear, or depriving women of their right to education and work when they do not follow the rules laid down for them.

The Grand Chamber implied that pressuring or forcing women to cover their head is against the principle of the equality. As Judge Tulkens stated "the majority considered wearing the headscarf is synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. It is not the Court's role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant. The applicant, a young adult university student, said – and there is nothing to suggest that she was not telling the truth – that she wore the headscarf of her own free will."

The Grand Chamber claimed women's rights and equality of sexes make this ban justifiable, but set aside a woman's right to make choice concerning her personal future. Indeed, it is seriously insulting to women to assume that if a woman cannot wear a headscarf by her own free choice, but must be doing so at the behest of someone else. This assumes that women do not have the will to make a personal decision, yet choice of attire is part of women's freedom and that choice will be conditioned by her personal ideas and beliefs.

The Grand Chamber found that forcing a woman to remove her headscarf was justifiable on the principle of equality, but disregarded the fact that students wearing headscarf are openly discriminated against. Leyla Şahin passed the same university entrance exam as other student, but was deprived of her right to education. The principles of equality and freedom from discrimination demand that institutions should not categorize people according to their attire. Practical educational equality for men and women cannot be achieved by depriving those women who wear the headscarf in accordance with their religious beliefs of the education they deserve.

In its reasoning the Court stated 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." It ignored the fact that discriminating against people on the basis of their attire does not protect "public order." While Leyla Şahin had studied for five years there were no incidents, denying women who wear the headscarf entry into university premises—first students, and recently student's mothers—indeed has indeed disturbed public order.

The ECtHR accepted that the ban on headscarf is legitimate. However, any legitimacy comes from public acceptance of public policies, and all surveys indicate that the majority of the Turkish public were against the ban.[13]

As stated in the dissenting opinion, " The applicant did not, on religious grounds, seek to be excused from certain activities or request changes to be made to the university course for which she had enrolled as a student … She simply wished to complete her studies in the conditions that had obtained when she first enrolled at the University and during the initial years of her university career, when she had been free to wear the headscarf without any problem." The damage sustained by the applicant – who not only was deprived of any possibility of completing her studies in Turkey because of her religious convictions but also maintained that it was unlikely that she would be able to return to her country to practice her profession owing to the difficulties that existed there in obtaining recognition for foreign diplomas.[14] There is no benefit to be gained for Turkish society by prohibiting the headscarf on university premises that can be set in the balance against the personal *in concreto* cost to Leyla Şahin. Creating inequality directed against students wearing the headscarf provided no concrete benefit to anyone.

Therefore the Grand Chamber cast doubt on its own perception of justice by not changing the decision of the 4th Chamber's which was criticized by European and USA-based legal experts. The decision conflicts with the objective situation in Turkey, offends public's sense of justice and its confidence in the ECtHR. Despite the fact that fundamental issues of human rights were at stake, in the Leyla Şahin, the court effectively ruled that countries could apply varying standards, justify them with completely hypothetical future violations, and flatly ignore serious patterns of human rights violations *in concreto*.

4. ASSESSMENT OF THE LEGAL DIMENSION OF THE BAN ON HEADSCARF

In assessing the legitimacy of the Leyla Şahin decision the ECtHR referred to the university's regulations and the court decision as reference. Instead of relying on its own precedents, the ECtHR referred to Turkish law, quoted the Council of State's decisions, and treated the Constitutional Court's reasoning as reliable. Moreover it ignored the fact that the dicta contained in a Constitutional Court decisions does not substitute for law. It ignored Provisional Article 17 of the Higher Education Law that leaves choice in dress free and reflects the will of Parliament. Similarly, the ECtHR ignores the fact that under the Turkish legal system rights cannot lawfully be restrained through a mere circular or regulation. The Court assumed that Leyla Şahin must have been aware of possible restrictions on headscarf prior to her registration, yet she was a fifth year medical student when the ban was initiated.

As a matter of fact, no matter which body gives a ruling, the reality in Turkish domestic law is that fundamental rights cannot be restricted without direct provision of a law. According to the Turkish Constitution Article 13, restricting a fundamental right is only possible—for reasons of public health or public order and provided that the essence of the rights is not affected—by a clear provision in law.

In the Turkish law, including the so-called Revolutionary Laws passed during the time of Atatürk, there is no law that regulates women's attire. Indeed it is difficult to imagine how such a law could be passed in a democratic country. Fundamental rights cannot be restricted through interpretation of court decisions. Article 153 section 2 of the Constitution states, "In the course of annulling a law or a provision thereof, or decrees having the force of law, the Constitutional Court shall not act as a law-maker and pass judgment leading to new implementation". This provision explains that when the Constitutional Court annuls a law, it cannot stand in place of the legislature.

Provisional Article 17 of the Higher Education Law states "Attire is free in higher education institutions provided that this does not contravene current law." Neither current law nor the Constitution banned the headscarf. It is difficult to see how a prohibition can be interpreted from the term "free." As a matter of fact, in the relevant decision the Constitutional Court says, "Words used in legal texts are must be understood according to legal terminology. It is normal to implement legal rules as long as they are in force, even if they are outdated or contradict contemporary social or economic conditions. Using some ideas or justification to abandon this rule, and thereby attempting to interpret or correct the law would mean standing in place of the legislature, changing law through interpretation and imputing to the law what is not there."[15]

At this point, the Constitutional Court explicitly confirms that judicial decisions cannot substitute for law and cannot be used as a legal justification for limiting a fundamental right. When the Grand Chamber ruled in favor of the ban, it was ignoring the Turkish legal system, the powers of the Constitutional Court as defined by the Constitution, the impossibility of Courts legally establishing such a ban, and the basic legal criteria which must be fulfilled to establish such a ban. The Court concluded that Leyla Şahin could foresee that ban would be applied because of the existence of the circulars and the Supreme Court's decisions. Nevertheless, it ignored the fact that she was in practice able to continue her education for a five-year with while wearing the headscarf and that this situation did not run counter to the law.

III. ASSESSMENT OF THE PRACTICAL APPLICATION OF THE HUMAN RIGHTS GUARANTEED BY THE TREATIES

Human rights are an experiential phenomenon. As the Court stated, they are not theoretical or abstract. They have also practical consequences. For instance just freedom of conscience means that nobody can say that ideas can be thought but not expressed, freedom of religion and conscience require that the individual can express and exercise their beliefs and consciousness. Article 9 of the Convention is not only about the freedom to have a religion (the internal conviction) but also the freedom to manifest that religion (external _expression of that conviction).[16]

Freedom of thought, conscience and religion is guaranteed by all international human rights treaties, including the United Nations International Covenant on Civil and Political Rights (ICCPR) Article 18. The Article states "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect

public safety, order, health, or morals or the fundamental rights and freedoms of others." Even under martial law it is unacceptable not to uphold article 18. The UN Human Rights Committee interpretation of this article confirms that the freedom of the individual to reveal their religion or beliefs is guaranteed by the ICCPR, and expands its application to a variety of areas including the individual's choice of attire.[17] This statement of 20 July 1993 explains that wearing special headgear is important in conserving religious life. The aim here is to broaden exercise and _expression of these fundamental freedoms and rights as much as possible. If a student is unable to study or enter university because of her head covering, in spite of the fact that she qualified by passing an entrance exam, then she is unable in concreto to exercise the rights guaranteed by those treaties.[18]

Freedom of thought, conscience and religion involves exercising and manifesting beliefs as required by those beliefs. If individuals are not allowed to manifest their beliefs in order to remove the social visibility of the religion, then there is no effective freedom of religion.

IV. THE BROAD CONSEQUENCES OF THE GRAND CHAMBER'S DECISION ON LEYLA ŞAHIN v TURKEY

1. IMPACT OF THE DECISION ON THE ONGOING BAN ON THE HEADSCARF

The Grand Chamber's decision on the ban on headscarf as justifiable does not make the ban compulsory. The application requested confirmation that the ban *per se* is a violation of the Convention. The Court rejected this demand, but gave no decision as to whether wearing the headscarf contradicts the Convention. Moreover, the Court has no right to make such a decision, but can only determine whether the interference is compatible with the Convention.

The ECtHR's philosophy of human rights is that "the fewer the restrictions the better." Exceptions can be tolerated but never encouraged and supported.[19] No international human rights treaty, including the ECHR, could be interpreted as regulating or prescribing individuals' attire.[20] Categorizing women according to their attire would be discrimination, violation of their right to education, violation of their freedom of thought and violation of their privacy.[21] By contrast with authoritarian systems, in all democratic structures, an individual's freedom to choose their attire is indispensable.

The Court's ruling that the ban is justifiable in the light of conditions within Turkey is not an open instruction or authorization to enforce permanent ban on the headscarf.[22] The ruling should not be interpreted to the effect that Turkey and other state parties to the ECHR must now ban the headscarf, or as a guarantee that the Court may not annul the ban at some later date. In practice of course, the ban was not extended in other European countries following the ruling on Leyla Şahin's case.

V. CONCLUSION AND GENERAL ASSESSMENT

According to resolution no 1464(2005) of the Parliamentary Assembly of the Council of Europe dated 2 January 2005, called on all member states to "fully protect all women living in their country against all violations of their rights based on or attributed to religion." Unfortunately, the ECtHR seemed to ignore this resolution, but there is no reason why Turkey should not take steps to implement it.[23]

As Human Rights Watch, one of international human rights organizations to condemn the ban and express regret about the ECtHR decision, said, "The ECtHR has been a powerful force in extending basic freedoms in Turkey, but it missed an important opportunity in Leyla Şahin's case to stand firmly behind principles of freedom of religion, _expression, and non-discrimination."[24] But as the Grand Chamber's decision stated, the ECHR is a living document. In the ongoing process, it may be possible to change the decision with the emergence of new conditions, and through forthcoming applications to the Court on cases relating to the headscarf.

Women who wear headscarf as a religious duty are currently deprived of a variety of rights. Not allowing women to choose their dress freely, and when they do wear the headscarf, depriving them of their right to education, their freedom of religion and conscience, and their right to privacy constitute state discrimination against women.[25] The ruling is a negation of every principle of civilization including freedom of religion and conscience, the right to education, the right of non-discrimination, the rights to equality, tolerance and legitimacy.[26] By judging the situation in Turkey in a subjective manner, the ECtHR contributed to the hardship of women who wear the headscarf. This decision has lead not to progress in women's freedom and status in Turkey, but to a recession.

The judgment gave priority not to the oppression that was laid before them for judgment, but the possibility of another oppression in the future. Permission was given to violate a concrete right for the purpose of safeguarding rights against wholly hypothetical threats.

Footnotes:

[1] This evaluation is based on the ECtHR's seven-page press release and the dissenting opinion. Retrieved from http://www.echr.coe.int.

[2] Concurring opinion of Judge Rozakis and Vajic

[3] Dissenting opinion of Judge Tulkens (Leyla Şahin v. Turkey) Para 2

[4] Vahap Çoşkun, Zaman Gazetesi, 06/07/2004

[5] Dissenting opinion of Judge Tulkens (Leyla Şahin v. Turkey) Para 3.

[6] Sefik Sevim, "Bilinç, birliktelik ve mücadele çözüm getirecektir = The Conscious, solidarity and struggle will be bring the solution" Haksöz Dergisi, p.65.

[7] Mustafa Erdoğan, Retrieved on 01.07.2004, from www.liberal-dt.org.tr.

[8] Mustafa Erdoğan, Retrieved on 02/07/2004, from www.liberal-dt.org.tr.

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