COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF LEYLA ŞAHİN v. TURKEY

(Application no. 44774/98)

JUDGMENT

STRASBOURG

10 November 2005

In the case of Leyla Şahin v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr B. ZUPANČIČ,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr S.E. JEBENS, *judges*,

and Mr T.L. EARLY, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 18 May and 5 October 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44774/98) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Ms Leyla Şahin ("the applicant"), on 21 July 1998.

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

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

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

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

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

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

8. In its judgment of 29 June 2004 ("the Chamber judgment"), the Chamber held unanimously that there had been no violation of Article 9 of the Convention on account of the ban on wearing the headscarf and that no separate question arose under Articles 8 and 10, Article 14 taken in conjunction with Article 9 of the Convention, and Article 2 of Protocol No. 1.

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

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

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

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

13. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 May 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

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

(b) *for the applicant*

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

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. The circular of 23 February 1998

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

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

> "By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose 'heads are covered' (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students. However, students who insist on attending tutorials and entering lecture theatres although their names and numbers are not on the lists must be advised of the position and, should they refuse to leave, their names and numbers must be taken and they must be informed that they are not entitled to attend lectures. If they refuse to leave the lecture theatre, the teacher shall record the incident in a report explaining why it was not possible to give the lecture and shall bring the incident to the attention of the university authorities as a matter of urgency so that disciplinary measures can be taken."

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

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

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

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

20. On 19 April 2001 the Supreme Administrative Court dismissed an appeal on points of law by the applicant.

C. The disciplinary measures taken against the applicant

21. In May 1998 disciplinary proceedings were brought against the applicant under paragraph 6 (a) of the Students Disciplinary Procedure Rules (see paragraph 50 below) as a result of her failure to comply with the rules on dress.

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

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

24. On 26 February 1999 the dean of the faculty began disciplinary proceedings against various students, including the applicant, for joining the assembly. On 13 April 1999, after hearing her representations, he suspended her from the university for a semester pursuant to Article 9 (j) of the Students Disciplinary Procedure Rules (see paragraph 50 below).

25. On 10 June 1999 the applicant lodged an application with the Istanbul Administrative Court for an order quashing the decision to suspend her. The application was dismissed on 30 November 1999 by the Istanbul

Administrative Court on the ground that, in the light of the material in the case file and the settled case-law on the subject, the impugned measure could not be regarded as illegal.

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

27. On 28 September 2000 the Supreme Administrative Court held that Law no. 4584 made it unnecessary to examine the merits of the applicant's appeal on points of law against the judgment of 30 November 1999.

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

II. RELEVANT LAW AND PRACTICE

A. The Constitution

29. The relevant provisions of the Constitution provide:

Article 2

"The Republic of Turkey is a democratic, secular [*laik*] and social State based on the rule of law that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble."

Article 4

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

Article 10

"All individuals shall be equal before the law without any distinction based on language, race, colour, sex, political opinion, philosophical belief, religion, membership of a religious sect or other similar grounds.

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

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

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

Article 13

"Fundamental rights and freedoms may be restricted only by law and on the grounds set out in special provisions of the Constitution, provided always that the essence of such rights and freedoms must remain intact. Any such restriction shall not conflict with the letter or spirit of the Constitution or the requirements of a democratic, secular social order and shall comply with the principle of proportionality."

Article 14

"The rights and freedoms set out in the Constitution may not be exercised with a view to undermining the territorial integrity of the State, the unity of the nation or the democratic and secular Republic founded on human rights.

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

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

Article 24

"Everyone shall have the right to freedom of conscience, belief and religious conviction.

Prayers, worship and religious services shall be conducted freely, provided that they do not violate the provisions of Article 14.

No one shall be compelled to participate in prayers, worship or religious services or to reveal his or her religious beliefs and convictions; no one shall be censured or prosecuted for his religious beliefs or convictions.

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

No one shall exploit or abuse religion, religious feelings or things held sacred by religion in any manner whatsoever with a view to causing the social, economic, political or legal order of the State to be based on religious precepts, even if only in part, or for the purpose of securing political or personal interest or influence thereby."

Article 42

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

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

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

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

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

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

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

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

Article 153

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

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

...

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

B. History and background

1. Religious dress and the principle of secularism

30. The Turkish Republic was founded on the principle that the State should be secular (*laik*). Before and after the proclamation of the Republic on 29 October 1923, the public and religious spheres were separated through a series of revolutionary reforms: the abolition of the caliphate on 3 March 1923; the repeal of the constitutional provision declaring Islam the religion of the State on 10 April 1928; and, lastly, on 5 February 1937, a constitutional amendment according constitutional status to the principle of secularism (see Article 2 of the Constitution of 1924 and Article 2 of the Constitutions of 1961 and 1982, as set out in paragraph 29 above).

31. The principle of secularism was inspired by developments in Ottoman society in the period between the nineteenth century and the proclamation of the Republic. The idea of creating a modern public society in which equality was guaranteed to all citizens without distinction on grounds of religion, denomination or sex had already been mooted in the Ottoman debates of the nineteenth century. Significant advances in women's rights were made during this period (equality of treatment in education, the introduction of a ban on polygamy in 1914, the transfer of jurisdiction in matrimonial cases to the secular courts that had been established in the nineteenth century).

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

33. The first legislation to regulate dress was the Headgear Act of 28 November 1925 (Law no. 671), which treated dress as a modernity issue. Similarly, a ban was imposed on wearing religious attire other than in places of worship or at religious ceremonies, irrespective of the religion or belief concerned, by the Dress (Regulations) Act of 3 December 1934 (Law no. 2596).

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

35. In Turkey, wearing the Islamic headscarf to school and university is a recent phenomenon which only really began to emerge in the 1980s. There has been extensive discussion on the issue and it continues to be the subject of lively debate in Turkish society. Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity. However, the supporters of secularism, who draw a distinction between the *başörtüsü* (traditional Anatolian headscarf, worn loosely) and the *türban* (tight, knotted headscarf hiding the hair and the throat), see the Islamic headscarf as a symbol of a political Islam. As a result of the accession to power on 28 June 1996 of a coalition government comprising the Islamist Refah Partisi, and the centre-right Doğru Yol Partisi, the debate has taken on strong political overtones. The ambivalence displayed by the leaders of the Refah Partisi, including the then Prime Minister, over their attachment to democratic values, and their advocacy of a plurality of legal systems functioning according to different religious rules for each religious community was perceived in Turkish society as a genuine threat to republican values and civil peace (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II).

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

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

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

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

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

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

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

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

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

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

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

The Constitutional Court also said that students had to be permitted to work and pursue their education together in a calm, tolerant and mutually supportive atmosphere without being deflected from that goal by signs of

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

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

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

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

> "... the expression 'laws in force' refers first and foremost to the Constitution ... In institutions of higher education, it is contrary to the principles of secularism and equality for the neck and hair to be covered with a veil or headscarf on grounds of religious conviction. In these circumstances, the freedom of dress which the impugned provision permits in institutions of higher education 'does not concern dress of a religious nature or the act of covering one's neck and hair with a veil and headscarf' ... The freedom afforded by this provision [transitional section 17] is conditional on its not being contrary to 'the laws in force'. The judgment [of 7 March 1989] of the Constitutional Court establishes that covering one's neck and hair with the headscarf is first and foremost contrary to the Constitution. Consequently, the condition set out in the aforementioned section requiring [choice of] dress not to contravene the laws in force removes from the scope of freedom of dress the act of 'covering one's neck and hair with the headscarf' ..."

3. Application of the regulations at Istanbul University

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

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

> "The ban prohibiting students enrolled on the midwifery course from wearing the headscarf during tutorials is not intended to infringe their freedom of conscience and religion, but to comply with the laws and regulations in force. When doing their work, midwives and nurses wear a uniform. That uniform is described in and identified by

regulations issued by the Ministry of Health ... Students who wish to join the profession are aware of this. Imagine a student of midwifery trying to put a baby in or remove it from an incubator, or assisting a doctor in an operating theatre or maternity unit while wearing a long-sleeved coat."

44. The Vice-Chancellor was concerned that the campaign for permission to wear the Islamic headscarf on all university premises had reached the point where there was a risk of its undermining order and causing unrest at the university, the faculty, the Cerrahpaşa Hospital and the School of Medicine. He called on the students to comply with the rules on dress, reminding them, in particular, of the rights of the patients.

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

"The rules governing dress in universities are set out in the laws and regulations. The Constitutional Court has delivered a judgment which prevents religious attire being worn in universities.

This judgment applies to all students of our University and the academic staff, both administrative and otherwise, at all levels. In particular, nurses, midwives, doctors and vets are required to comply with the regulations on dress, as dictated by scientific considerations and the legislation, during health and applied science tutorials (on nursing, laboratory work, surgery and microbiology). Anyone not complying with the rules on dress will be refused access to tutorials."

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

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

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

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

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

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

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

4. Students Disciplinary Procedure Rules

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

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

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

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

5. The regulatory power of the university authorities

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

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

> "...
>
> (b) Vice-chancellors shall have the following powers, competence and responsibilities:
>
> 1. To chair meetings of university boards, implement their resolutions, examine proposals by the university boards and take such decisions as shall be necessary, and ensure that institutions forming part of the university function in a coordinated manner;
>
> ...

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

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

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

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

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

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

D. Comparative law

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

56. In France, where secularism is regarded as one of the cornerstones of republican values, legislation was passed on 15 March 2004 regulating, in accordance with the principle of secularism, the wearing of signs or dress manifesting a religious affiliation in State primary and secondary schools. The legislation inserted a new Article L. 141-5-1 in the Education Code which provides: "In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall state that the institution of disciplinary proceedings shall be preceded by dialogue with the pupil."

The Act applies to all State schools and educational institutions, including post-baccalaureate courses (preparatory classes for entrance to the *grandes écoles* and vocational training courses). It does not apply to State universities. In addition, as a circular of 18 May 2004 makes clear, it only concerns "... signs, such as the Islamic headscarf, however named, the kippa

or a cross that is manifestly oversized, which make the wearer's religious affiliation immediately identifiable".

57. In Belgium there is no general ban on wearing religious signs at school. In the French Community a decree of 13 March 1994 stipulates that education shall be neutral within the Community. Pupils are in principle allowed to wear religious signs. However, they may do so only if human rights, the reputation of others, national security, public order, and public health and morals are protected and internal rules complied with. Further, teachers must not permit religious or philosophical proselytism under their authority or the organisation of political militancy by or on behalf of pupils. The decree stipulates that restrictions may be imposed by school rules. On 19 May 2004 the French Community issued a decree intended to institute equality of treatment. In the Flemish Community, there is no uniform policy among schools on whether to allow religious or philosophical signs to be worn. Some do, others do not. When pupils are permitted to wear such signs, restrictions may be imposed on grounds of hygiene or safety.

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

59. In Germany, where the debate focused on whether teachers should be allowed to wear the Islamic headscarf, the Constitutional Court stated on 24 September 2003 in a case between a teacher and the *Land* of Baden-Württemberg that the lack of any express statutory prohibition meant that teachers were entitled to wear the headscarf. Consequently, it imposed a duty on the *Länder* to lay down rules on dress if they wished to prohibit the wearing of the Islamic headscarf in State schools.

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

61. In the United Kingdom a tolerant attitude is shown to pupils who wear religious signs. Difficulties with respect to the Islamic headscarf are rare. The issue has also been debated in the context of the elimination of racial discrimination in schools in order to preserve their multicultural character (see, in particular, *Mandla v. Dowell*, The Law Reports 1983, pp. 548-70). The Commission for Racial Equality, whose opinions have recommendation status only, also considered the issue of the Islamic headscarf in 1988 in the *Altrincham Grammar School* case, which ended in a compromise between a private school and members of the family of two sisters who wished to be allowed to wear the Islamic headscarf at the school. The school agreed to allow them to wear the headscarf provided it was navy blue (the colour of the school uniform), kept fastened at the neck and not decorated.

In *R. (On the application of Begum) v. Headteacher and Governors of Denbigh High School* ([2004] EWHC 1389 (Admin)), the High Court had to decide a dispute between the school and a Muslim pupil wishing to wear the *jilbab* (a full-length gown). The school required pupils to wear a uniform, one of the possible options being the headscarf and the *shalwar kameez*e (long traditional garments from the Indian subcontinent). In June 2004 the High Court dismissed the pupil's application, holding that there had been no violation of her freedom of religion. However, that judgment was reversed in March 2005 by the Court of Appeal, which accepted that there had been interference with the pupil's freedom of religion, as a minority of Muslims in the United Kingdom considered that a religious duty to wear the *jilbab* from the age of puberty existed and the pupil was genuinely of that opinion. No justification for the interference had been provided by the school authorities, as the decision-making process was not compatible with freedom of religion.

62. In Spain there is no express statutory prohibition on pupils' wearing religious head coverings in State schools. By virtue of two royal decrees of 26 January 1996, which are applicable in primary and secondary schools unless the competent authority – the autonomous community – has introduced specific measures, the school governors have power to issue school rules which may include provisions on dress. Generally speaking, State schools allow the headscarf to be worn.

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

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

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

E. The relevant Council of Europe texts on higher education

66. Among the various texts adopted by the Council of Europe on higher education, should be cited, first of all, Parliamentary Assembly Recommendation 1353 (1998) on the access of minorities to higher education, which was adopted on 27 January 1998, and Committee of Ministers Recommendation No. R (98) 3 on access to higher education, which was adopted on 17 March 1998.

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

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

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

68. On 17 March 1998 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (98) 3 on access to higher education. In the preamble to the recommendation it is stated:

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

69. Likewise, Article 2 of Recommendation 1353 (1998) on the access of minorities to higher education, which was adopted by the Parliamentary Assembly of the Council of Europe on 27 January 1998, provides:

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

70. The applicant submitted that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified

interference with her right to freedom of religion, in particular, her right to manifest her religion.

She relied on Article 9 of the Convention, which provides:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

A. The Chamber judgment

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

B. The parties' submissions to the Grand Chamber

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

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

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

C. The Court's assessment

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

"prescribed by law", pursued a legitimate aim and was "necessary in a democratic society" within the meaning of Article 9 § 2 of the Convention.

1. Whether there was interference

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

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

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

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

2. "Prescribed by law"

(a) The parties' submissions to the Grand Chamber

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

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

premises of institutions of higher education, while the reasons given by the Constitutional Court for its decision did not have the force of law.

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

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

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

(b) The Court's assessment

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

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

and in accordance with the regulatory provisions that had been adopted earlier.

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

87. The Court must therefore consider whether transitional section 17 of Law no. 2547 was capable of constituting a legal basis for the circular. It reiterates in that connection that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Kruslin v. France*, judgment of 24 April 1990, Series A no. 176-A, pp. 21-22, § 29) and notes that, in rejecting the argument that the circular was illegal, the administrative courts relied on the settled case-law of the Supreme Administrative Court and the Constitutional Court (see paragraph 19 above).

88. Further, as regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, pp. 45-46, § 93) and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament (see *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, pp. 21-22, § 46), and unwritten law. "Law" must be understood to include both statutory law and judge-made "law" (see, among other authorities, The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 30, § 47; *Kruslin*, cited above, pp. 21-22, § 29 *in fine*; and *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 18, § 43). In sum, the "law" is the provision in force as the competent courts have interpreted it.

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

In that connection, as the Constitutional Court noted in its judgment of 9 April 1991 (see paragraph 41 above), the wording of that section shows that freedom of dress in institutions of higher education is not absolute. Under the terms of that provision, students are free to dress as they wish "provided that [their choice] does not contravene the laws in force".

90. The dispute therefore concerns the meaning of the words "laws in force" in the aforementioned provision.

91. The Court reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover, and the number and status of those

to whom it is addressed. It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of "foreseeability" for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (see *Gorzelik and Others*, cited above, § 65).

92. The Court notes in that connection that in its aforementioned judgment the Constitutional Court found that the words "laws in force" necessarily included the Constitution. The judgment also made it clear that allowing students' "neck and hair to be covered with a veil or headscarf on grounds of religious conviction" in universities was contrary to the Constitution (see paragraph 41 above).

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

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

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

rules of the educational institution concerned in accordance with the rule requiring conformity with statute and subject to the administrative courts' powers of review.

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

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

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

3. Legitimate aim

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

4. "Necessary in a democratic society"

(a) The parties' submissions to the Grand Chamber

(i) The applicant

100. The applicant contested the Chamber's findings. In her observations of 27 September 2004 and her oral submissions at the hearing, she argued that the notions of "democracy" and "republic" were not alike. While many totalitarian regimes claimed to be "republics", only a true democracy could be based on the principles of pluralism and broadmindedness. The structure of the judicial and university systems in Turkey had been determined by the successive *coups d'état* by the military in 1960, 1971 and 1980. Referring to the Court's case-law and the practice that had been adopted in a number of countries in Europe, the applicant further submitted that the Contracting States should not be given a wide margin of appreciation to regulate students' dress. She explained that no

European State prohibited students from wearing the Islamic headscarf at university and added that there had been no sign of tension in institutions of higher education that would have justified such a radical measure.

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

102. Conversely, in her observations of 27 January 2005, the applicant said that she was able to accept that wearing the Islamic headscarf would not always be protected by freedom of religion (see paragraph 73 above).

(ii) The Government

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

(b) The Court's assessment

(i) General principles

104. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see, among other authorities, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31, and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I).

105. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the

circle of those whose faith one shares. Article 9 lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 73, ECHR 2000-VII).

Article 9 does not protect every act motivated or inspired by a religion or belief (see, among many other authorities, *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1209, § 27; *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission's report of 12 October 1978, Decisions and Reports (DR) 19, p. 5; *C. v. the United Kingdom*, no. 10358/83, Commission decision of 15 December 1983, DR 37, p. 142; and *Tepeli and Others v. Turkey* (dec.), no. 31876/96, 11 September 2001).

106. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (see *Kokkinakis*, cited above, p. 18, § 33). This follows both from paragraph 2 of Article 9 and the State's positive obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein.

107. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see *Manoussakis and Others v. Greece*, judgment of 26 September 1996, *Reports* 1996-IV, p. 1365, § 47; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 91, ECHR 2003-II), and that it requires the State to ensure mutual tolerance between opposing groups (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I, p. 27, § 57). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (see *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999-IX).

108. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (see, *mutatis mutandis*, *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A

no. 44, p. 25, § 63, and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 112, ECHR 1999-III). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (see, *mutatis mutandis*, *the United Communist Party of Turkey and Others*, cited above, pp. 21-22, § 45, and *Refah Partisi (the Welfare Party) and Others*, cited above § 99). Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society" (see *Chassagnou and Others*, cited above, § 113).

109. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek*, cited above, § 84, and *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports* 1996-V, pp. 1957-58, § 58). This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially (as the comparative-law materials illustrate – see paragraphs 55-65 above) in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society (see *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, p. 19, § 50), and the meaning or impact of the public expression of a religious belief will differ according to time and context (see, among other authorities, *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V). Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (see, *mutatis mutandis*, *Wingrove*, cited above, p. 1957, § 57). Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context (see, *mutatis mutandis*, *Gorzelik and Others*, cited above, § 67, and *Murphy v. Ireland*, no. 44179/98, § 73, ECHR 2003-IX).

110. This margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate (see *Manoussakis and Others*, cited above, p. 1364, § 44). In delimiting the extent of the margin of

appreciation in the present case, the Court must have regard to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society (see, *mutatis mutandis*, *Kokkinakis*, cited above, p. 17, § 31; *Manoussakis and Others*, cited above, p. 1364, § 44; and *Casado Coca*, cited above, p. 21, § 55).

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

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

112. The interference in issue caused by the circular of 23 February 1998 imposing restrictions as to place and manner on the rights of students such as Ms Şahin to wear the Islamic headscarf on university premises was, according to the Turkish courts (see paragraphs 37, 39 and 41 above), based in particular on the two principles of secularism and equality.

113. In its judgment of 7 March 1989, the Constitutional Court stated that secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of

religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements. The Constitutional Court added that freedom to manifest one's religion could be restricted in order to defend those values and principles (see paragraph 39 above).

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

115. After examining the parties' submissions, the Grand Chamber sees no good reason to depart from the approach taken by the Chamber (see paragraphs 107-09 of the Chamber judgment) as follows:

> "... The Court ... notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women ... Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe (see, among other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, pp. 37-38, § 78; *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 21-22, § 67; *Burgharz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, p. 186, § 39 *in fine*; and *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, p. 587, § 37) – was also found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution ...
>
> ... In addition, like the Constitutional Court ..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see *Karaduman*, decision cited above, and *Refah Partisi (the Welfare Party) and Others*, cited above, § 95), the issues at stake include the protection of the 'rights and freedoms of others' and the 'maintenance of public order' in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in Turkey in recent years.
>
> ... The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts ... It has previously said that each Contracting State may, in accordance with the Convention provisions,

take a stance against such political movements, based on its historical experience (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university."

116. Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court (see paragraph 39 above), which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

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

118. Like the Chamber (see paragraph 111 of its judgment), the Grand Chamber notes at the outset that it is common ground that practising Muslim students in Turkish universities are free, within the limits imposed by the constraints of educational organisation, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, the resolution adopted by Istanbul University on 9 July 1998 shows that various other forms of religious attire are also forbidden on the university premises (see paragraph 47 above).

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

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

continued dialogue with those concerned, while at the same time ensuring that order was maintained and in particular that the requirements imposed by the nature of the course in question were complied with.

121. In that connection, the Court does not accept the applicant's submission that the fact that there were no disciplinary penalties for failing to comply with the dress code effectively meant that no rules existed (see paragraph 81 above). As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course (see, *mutatis mutandis*, *Valsamis v. Greece*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2325, § 32). Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief (see *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X) and does not confer on people who do so the right to disregard rules that have proved to be justified (see *Valsamis*, cited above, opinion of the Commission, p. 2337, § 51).

122. In the light of the foregoing and having regard to the Contracting States' margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.

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

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

A. Whether a separate examination of this complaint is necessary

1. The parties' submissions

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

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

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

2. The Chamber judgment

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

3. The Court's assessment

128. The Court observes that under its case-law that is now well-established, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, there being no basis for a merely partial referral of the case to the Grand Chamber (see, as the most recent authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 66, ECHR 2004-XI, and *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII). The "case" referred to the Grand Chamber is the application as it has been declared admissible.

129. The Court considers that, having regard to the special circumstances of the case, the fundamental importance of the right to education and the position of the parties, the complaint under the first sentence of Article 2 of Protocol No. 1 can be considered as separate from the complaint under Article 9 of the Convention, notwithstanding the fact that, as was the case with Article 9, the substance of the complaint is criticism of the regulations that were issued on 23 February 1998.

130. In conclusion, the Court will examine this complaint separately (see, *mutatis mutandis*, *Göç v. Turkey* [GC], no. 36590/97, § 46, ECHR 2002-V).

B. Applicability

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

> "No person shall be denied the right to education."

Scope of the first sentence of Article 2 of Protocol No. 1

(a) The parties' submissions to the Grand Chamber

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

133. The Government did not comment on this issue.

(b) The Court's assessment

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

135. As to the content of the right to education and the scope of the obligation it imposes, the Court notes that in the *Case "relating to certain aspects of laws on the use of languages in education in Belgium"* ("the *Belgian linguistic case*" (merits), judgment of 23 July 1968, Series A no. 6, pp. 30-31, § 3), it stated: "The negative formulation indicates, as is confirmed by the 'preparatory work' ..., that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol. As a 'right' does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State."

136. The Court does not lose sight of the fact that the development of the right to education, whose content varies from one time or place to another according to economic and social circumstances, mainly depends on the needs and resources of the community. However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 19, § 41; *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26; and, as the most recent

authority, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I). While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education. In a number of recently adopted instruments, the Council of Europe has stressed the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy (see, *inter alia*, Recommendation No. R (98) 3 and Recommendation 1353 (1998) – cited in paragraphs 68 and 69 above). As the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (see paragraph 67 above) states, higher education "is instrumental in the pursuit and advancement of knowledge" and "constitutes an exceptionally rich cultural and scientific asset for both individuals and society".

137. Consequently, it would be hard to imagine that institutions of higher education existing at a given time do not come within the scope of the first sentence of Article 2 of Protocol No 1. Although that Article does not impose a duty on the Contracting States to set up institutions of higher education, any State doing so will be under an obligation to afford an effective right of access to them. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision (see, *mutatis mutandis*, the *Belgian linguistic case*, cited above, pp. 33-34, § 9, and *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 13-15, § 25).

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

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

Yanasik v. Turkey, no. 14524/89, Commission decision of 6 January 1993, DR 74, p. 14, and *Sulak v. Turkey*, no. 24515/94, Commission decision of 17 January 1996, DR 84-A, p. 98).

140. For its part, after the *Belgian linguistic case* the Court declared a series of cases on higher education inadmissible, not because the first sentence of Article 2 of Protocol No. 1 was inapplicable, but on other grounds (complaint of a disabled person who did not satisfy a university's entrance requirements, *Lukach v. Russia* (dec.), no. 48041/99, 16 November 1999; refusal of permission to an applicant in custody to prepare for and sit a final university examination for a legal diploma, *Georgiou v. Greece* (dec.), no. 45138/98, 13 January 2000; interruption of advanced studies by a valid conviction and sentence, *Durmaz and Others v. Turkey* (dec.), nos. 46506/99, 46569/99, 46570/99 and 46939/99, 4 September 2001).

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

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

C. Merits

1. The parties' submissions to the Grand Chamber

(a) The applicant

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

144. She accepted that, by its nature, the right to education had to be regulated by the State. In her view, the criteria to be used in the regulations should be the same as those applicable to permitted interference under

Articles 8 to 11 of the Convention. In that connection, she pointed to the lack of any provision in Turkish domestic law preventing the pursuit of higher education and said that the vice-chancellor's offices had no authority or power under the laws in force to refuse students wearing the headscarf access to university.

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

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

147. The applicant argued that making the pursuit of her studies conditional on her abandoning the headscarf and refusing her access to educational institutions if she refused to comply with that condition had effectively and wrongfully violated the substance of her right to education and rendered it ineffective. This had been compounded by the fact that she was a young adult with a fully developed personality and social and moral values who was deprived of all possibility of pursuing her studies in Turkey in a manner consistent with her beliefs.

148. For all these reasons, the applicant submitted that the respondent State had overstepped the limits of its margin of appreciation, however wide it might be, and violated her right to education, read in the light of Articles 8, 9 and 10 of the Convention.

(b) The Government

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

150. They added that the applicant had enrolled at the Cerrahpaşa Faculty of Medicine at Istanbul University after studying for five years at the Faculty of Medicine of Bursa University, where she had worn the headscarf. The Vice-Chancellor of Istanbul University had issued a circular prohibiting students from wearing the headscarf in the university. The ban

was based on judgments of the Constitutional Court and the Supreme Administrative Court. As the application and the request for a referral to the Grand Chamber indicated, the applicant had not encountered any difficulty in enrolling at the Cerrahpaşa Faculty of Medicine, which proved that she had enjoyed equality of treatment in the right of access to educational institutions. As regards the interference caused by the implementation of the circular of 23 February 1998, the Government confined themselves to saying that it had been the subject of scrutiny by the courts.

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

2. The Court's assessment

(a) General principles

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

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

154. In spite of its importance, this right is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State" (see the *Belgian linguistic case*, cited above, p. 32, § 5; see also, *mutatis mutandis*, *Golder*, cited above, pp. 18-19, § 38, and *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65). Admittedly, the regulation of educational institutions may vary in time and in place, *inter alia*, according to the needs and resources of the community and the distinctive features of different levels of education. Consequently, the Contracting States enjoy a certain margin of appreciation in this sphere,

although the final decision as to the observance of the Convention's requirements rests with the Court. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of "legitimate aims" under Article 2 of Protocol No. 1 (see, *mutatis mutandis*, *Podkolzina v. Latvia*, no. 46726/99, § 36, ECHR 2002-II). Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

155. Such restrictions must not conflict with other rights enshrined in the Convention and its Protocols either (see the *Belgian linguistic case*, cited above, p. 32, § 5; *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48, p. 19, § 41; and *Yanasik*, decision cited above). The provisions of the Convention and its Protocols must be considered as a whole. Accordingly, the first sentence of Article 2 of Protocol No. 1 must, where appropriate, be read in the light in particular of Articles 8, 9 and 10 of the Convention (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, p. 26, § 52 *in fine*).

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

(b) Application of these principles to the present case

157. By analogy with its reasoning on the question of the existence of interference under Article 9 of the Convention (see paragraph 78 above), the Court is able to accept that the regulations on the basis of which the applicant was refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education, notwithstanding the fact that she had had access to the university and been able to read the subject of her choice in accordance with the results she had achieved in the university entrance examination. However, an analysis of the case by reference to the right to education cannot in this instance be divorced from the conclusion reached by the Court with respect to Article 9 (see paragraph 122 above), as the considerations taken into

account under that provision are clearly applicable to the complaint under Article 2 of Protocol No. 1, which complaint consists of criticism of the regulation concerned that takes much the same form as that made with respect to Article 9.

158. In that connection, the Court has already found that the restriction was foreseeable to those concerned and pursued the legitimate aims of protecting the rights and freedoms of others and maintaining public order (see paragraphs 98 and 99 above). The obvious purpose of the restriction was to preserve the secular character of educational institutions.

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

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

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

162. In conclusion, there has been no violation of the first sentence of Article 2 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLES 8, 10 AND 14 OF THE CONVENTION

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

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

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

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

FOR THESE REASONS, THE COURT

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

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

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

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

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

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

Luzius WILDHABER
President

Lawrence EARLY
Deputy to the Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mr Rozakis and Mrs Vajić;
(b) dissenting opinion of Mrs Tulkens.

L.W.
T.L.E.

JOINT CONCURRING OPINION OF JUDGES ROZAKIS AND VAJIĆ

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

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

DISSENTING OPINION OF JUDGE TULKENS

(Translation)

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

A. Freedom of religion

1. As regards the general principles reiterated in the judgment, there are points on which I strongly agree with the majority (see paragraphs 104-08 of the judgment). The right to freedom of religion guaranteed by Article 9 of the Convention is a "precious asset" not only for believers, but also for atheists, agnostics, sceptics and the unconcerned. It is true that Article 9 of the Convention does not protect every act motivated or inspired by a religion or belief and that in democratic societies, in which several religions coexist, it may be necessary to place restrictions on freedom to manifest one's religion in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (see paragraph 106 of the judgment). Further, pluralism, tolerance and broadmindedness are hallmarks of a democratic society and this entails certain consequences. The first is that these ideals and values of a democratic society must also be based on dialogue and a spirit of compromise, which necessarily entails mutual concessions on the part of individuals. The second is that the role of the authorities in such circumstances is not to remove the cause of the tensions by eliminating pluralism, but, as the Court again reiterated only recently, to ensure that the competing groups tolerate each other (see *Ouranio Toxo and Others v. Greece*, no. 74989/01, § 40, ECHR 2005-X).

2. Once the majority had accepted that the ban on wearing the Islamic headscarf on university premises constituted interference with the applicant's right under Article 9 of the Convention to manifest her religion, and that the ban was prescribed by law and pursued a legitimate aim – in this case the protection of the rights and freedom of others and of public order – the main issue became whether such interference was "necessary in a democratic society". Owing to its nature, the Court's review must be conducted *in concreto*, in principle by reference to three criteria: firstly, whether the interference, which must be capable of protecting the legitimate interest that has been put at risk, was appropriate; secondly, whether the measure that has been chosen is the measure that is the least restrictive of the right or freedom concerned; and, lastly, whether the measure was proportionate, a question which entails a balancing of the competing

interests[1].

Underlying the majority's approach is the margin of appreciation which the national authorities are recognised as possessing and which reflects, *inter alia*, the notion that they are "better placed" to decide how best to discharge their Convention obligations in what is a sensitive area (see paragraph 109 of the judgment). The Court's jurisdiction is, of course, subsidiary and its role is not to impose uniform solutions, especially "with regard to establishment of the delicate relations between the Churches and the State" (see *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 84, ECHR 2000-VII), even if, in certain other judgments concerning conflicts between religious communities, the Court has not always shown the same judicial restraint (see *Serif v. Greece*, no. 38178/97, ECHR 1999-IX, and *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, ECHR 2001-XII). I therefore entirely agree with the view that the Court must seek to reconcile universality and diversity and that it is not its role to express an opinion on any religious model whatsoever.

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

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

1. See S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des Droits de l'Homme. Prendre l'idée simple au sérieux*, Brussels, Bruylant, 2001.

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

5. As regards, firstly, *secularism*, I would reiterate that I consider it an essential principle and one which, as the Constitutional Court stated in its judgment of 7 March 1989, is undoubtedly necessary for the protection of the democratic system in Turkey. Religious freedom is, however, also a founding principle of democratic societies. Accordingly, the fact that the Grand Chamber recognised the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a "pressing social need". Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court's case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 89, ECHR 1999-VI). Such examples do not appear to have been forthcoming in the present case.

6. Under Article 9 of the Convention, the freedom with which this case is concerned is not freedom to have a religion (the internal conviction) but to manifest one's religion (the expression of that conviction). If the Court has been very protective (perhaps overprotective) of religious sentiment (see *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, and *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V), it has shown itself less willing to intervene in cases concerning religious practices (see *Cha'are Shalom Ve Tsedek*, cited above, and *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V), which only appear to receive a subsidiary form of protection (see paragraph 105 of the judgment). This is, in fact, an aspect of freedom of religion with which the Court has rarely been confronted up to now and on which it has not yet had an opportunity to form an opinion with regard to external symbols of religious practice, such as particular items of clothing, whose symbolic importance may vary greatly according to the faith concerned[1].

7. Referring to *Refah Partisi (the Welfare Party) and Others v. Turkey* ([GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II), the judgment states: "An attitude which fails to respect that principle [of

1. See E. Brems, "The approach of the European Court of Human Rights to religion", in Th. Marauhn (ed.), *Die Rechtsstellung des Menschen im Völkerrecht. Entwicklungen und Perspektiven*, Tübingen, Mohr Siebeck, 2003, pp. 1 et seq.

secularism] will not necessarily be accepted as being covered by the freedom to manifest one's religion" (see paragraph 114). The majority thus consider that wearing the headscarf contravenes the principle of secularism. In so doing, they take up position on an issue that has been the subject of much debate, namely the signification of wearing the headscarf and its relationship with the principle of secularism[1].

In the present case, a generalised assessment of that type gives rise to at least three difficulties. Firstly, the judgment does not address the applicant's argument – which the Government did not dispute – that she had no intention of calling the principle of secularism, a principle with which she agreed, into question. Secondly, there is no evidence to show that the applicant, through her attitude, conduct or acts, contravened that principle. This is a test the Court has always applied in its case-law (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, and *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I). Lastly, the judgment makes no distinction between teachers and students, whereas in *Dahlab* (decision cited above), which concerned a teacher, the Court expressly noted the role-model aspect which the teacher's wearing the headscarf had. While the principle of secularism requires education to be provided without any manifestation of religion and while it has to be compulsory for teachers and all public servants, as they have voluntarily taken up posts in a neutral environment, the position of pupils and students seems to me to be different.

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

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

9. The majority maintain, however, that, "when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a

1. See E. Bribosia and I. Rorive, "*Le voile à l'école : une Europe divisée*", *Revue trimestrielle des droits de l'homme*, 2004, p. 958.

compulsory religious duty, may have on those who choose not to wear it" (see paragraph 115 of the judgment).

Unless the level of protection of the right to freedom of religion is reduced to take account of the context, the possible effect which wearing the headscarf, which is presented as a symbol, may have on those who do not wear it does not appear to me, in the light of the Court's case-law, to satisfy the requirement of a pressing social need. *Mutatis mutandis*, in the sphere of freedom of expression (Article 10), the Court has never accepted that interference with the exercise of the right to freedom of expression can be justified by the fact that the ideas or views concerned are not shared by everyone and may even offend some people. Recently, in *Gündüz v. Turkey* (no. 35071/97, ECHR 2003-XI), the Court held that there had been a violation of freedom of expression where a Muslim religious leader had been convicted for violently criticising the secular regime in Turkey, calling for the introduction of the sharia and referring to children born of marriages celebrated solely before the secular authorities as "bastards". Thus, manifesting one's religion by peacefully wearing a headscarf may be prohibited whereas, in the same context, remarks which could be construed as incitement to religious hatred are covered by freedom of expression[1].

10. In fact, it is the threat posed by "extremist political movements" seeking to "impose on society as a whole their religious symbols and conception of a society founded on religious precepts" which, in the Court's view, serves to justify the regulations in issue, which constitute "a measure intended to ... preserve pluralism in the university" (see paragraph 115 *in fine* of the judgment). The Court had already made this clear in *Refah Partisi (the Welfare Party) and Others* (cited above, § 95), when it stated: "In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention."

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

1. See S. Van Drooghenbroeck, "*Strasbourg et le voile*", *Journal du juriste*, 2004, no. 34, p. 10.

pressure concerned. The applicant's personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism[1].

11. Turning to *equality*, the majority focus on the protection of women's rights and the principle of sexual equality (see paragraphs 115 and 116 of the judgment). Wearing the headscarf is considered on the contrary to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003[2], wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.

12. On this issue, the Grand Chamber refers in its judgment to *Dahlab* (cited above), taking up what to my mind is the most questionable part of the reasoning in that decision, namely that wearing the headscarf represents a "powerful external symbol", which "appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality" and that the practice could not easily be "reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils" (see paragraph 111 *in fine* of the judgment).

It is not the Court's role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant. The applicant, a young adult university student, said – and there is nothing to suggest that she was not telling the truth – that she wore the headscarf of her own free will. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. "Paternalism" of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8 (see *Keenan v. the United Kingdom*, no. 27229/95, § 92, ECHR 2001-III; *Pretty v. the United Kingdom*, no. 2346/02, §§ 65-67, ECHR

1. See E. Bribosia and I. Rorive, "*Le voile à l'école : une Europe divisée*", op. cit., p. 960.
2. Federal Constitutional Court of Germany, judgment of the Second Division of 24 September 2003, 2BvR 1436/042.

2002-III; and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI)[1]. Finally, if wearing the headscarf really was contrary to the principle of equality between men and women in any event, the State would have a positive obligation to prohibit it in all places, whether public or private[2].

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

B. The right to education

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

15. However, although the Grand Chamber stresses that in a democratic society the right to education is indispensable to the furtherance of human rights (see paragraph 137 of the judgment), it is surprising and regrettable for it then to proceed to deprive the applicant of that right for reasons which do not appear to me to be either relevant or sufficient. The applicant did not, on religious grounds, seek to be excused from certain activities or request changes to be made to the university course for which she had enrolled as a student (unlike the position in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23). She simply wished to complete her studies in the conditions that had obtained when she first enrolled at the university and during the initial years of her university career, when she had been free to wear the headscarf without any problem. I

1. See S. Van Drooghenbroeck, "*Strasbourg et le voile*", op. cit.
2. See E. Bribosia and I. Rorive, "*Le voile à l'école : une Europe divisée*", op. cit., p. 962.

consider that by refusing the applicant access to the lectures and examinations that were part of the course at the Faculty of Medicine, she was *de facto* deprived of the right of access to the university and, consequently, of her right to education.

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

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

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

I would begin by noting that before refusing the applicant access to lectures and examinations, the authorities should have used other means either to encourage her (through mediation, for example) to remove her headscarf and pursue her studies, or to ensure that public order was maintained on the university premises if it was genuinely at risk[1]. The fact of the matter is that no attempt was made to try measures that would have had a less drastic effect on the applicant's right to education in the instant case. My second point is that it is common ground that by making the applicant's pursuit of her studies conditional on removing the headscarf and by refusing her access to the university if she failed to comply with this

1. See O. De Schutter and J. Ringelheim, "*La renonciation aux droits fondamentaux. La libre disposition du soi et le règne de l'échange*", CRIDHO Working paper series 1/2005.

requirement, the authorities forced the applicant to leave the country and complete her studies at Vienna University. She was thus left with no alternative. However, in *Cha'are Shalom Ve Tsedek* (cited above, §§ 80 and 81) the existence of alternative solutions was one of the factors the Court took into account in holding that there had been no violation of the Convention. Lastly, the Grand Chamber does not weigh up the competing interests, namely, on the one hand, the damage sustained by the applicant – who was deprived of any possibility of completing her studies in Turkey because of her religious convictions and also maintained that it was unlikely that she would be able to return to her country to practise her profession owing to the difficulties that existed there in obtaining recognition for foreign diplomas – and, on the other, the benefit to be gained by Turkish society from prohibiting the applicant from wearing the headscarf on the university premises.

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

18. The question also arises whether such an infringement of the right to education does not, ultimately, amount to an implicit acceptance of discrimination against the applicant on grounds of religion. In its Resolution 1464 (2005) of 4 October 2005, the Parliamentary Assembly of the Council of Europe reminded the member States that it was important "to fully protect all women living in their country against violations of their rights based on or attributed to religion".

19. More fundamentally, by accepting the applicant's exclusion from the university in the name of secularism and equality, the majority have accepted her exclusion from precisely the type of liberated environment in which the true meaning of these values can take shape and develop. University affords practical access to knowledge that is free and independent of all authority. Experience of this kind is far more effective a means of raising awareness of the principles of secularism and equality than an obligation that is not assumed voluntarily, but imposed. A tolerance-based dialogue between religions and cultures is an education in itself, so it is ironic that young women should be deprived of that education on account of the headscarf. Advocating freedom and equality for women cannot mean depriving them of the chance to decide on their future. Bans and exclusions echo that very fundamentalism these measures are intended to combat. Here, as elsewhere, the risks are familiar: radicalisation of beliefs, silent exclusion, a return to religious schools. When rejected by the law of the land, young women are forced to take refuge in their own law. As we are all aware, intolerance breeds intolerance.

20. I end by noting that all these issues must also be considered in the light of the observations set out in the annual activity report published in

June 2005 of the European Commission against Racism and Intolerance (ECRI), which expresses concern about the climate of hostility existing against persons who are or are believed to be Muslim and considers that the situation requires attention and action in the future[1]. Above all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights.

1. European Commission against Racism and Intolerance, "Annual report on ECRI's activities covering the period from 1 January to 31 December 2004", doc. CRI (2005)36, Strasbourg, June 2005.