

manner in which the death penalty is imposed is a factor capable of bringing the treatment of the condemned person within the proscription under Article 3.

In sum, the Grand Chamber's judgment in *Öcalan* will serve as an important reference for identifying the pertinent level of human rights protection in cases involving terrorist offenses. Its unequivocal message is that the international community should respect the basic values of humanity in all circumstances, including the "war on terror." Still absent, however, is a clear determination by the Court that the prohibition of capital punishment is an integral part of those fundamental values.

MIRJA TRILSCH AND ALEXANDRA RÜTH  
*University of Düsseldorf*

*Religious freedom—state neutrality—public order—role of international standards in interpreting and implementing constitutionally guaranteed rights*

ŞAHİN V. TURKEY. App. No. 44774/98. *At* <<http://www.echr.coe.int>>.

European Court of Human Rights, June 29, 2004 (chamber), and November 10, 2005 (Grand Chamber).

"TEACHER HEADSCARF." Case No. 2BvR 1436/02. *At* <<http://www.bverfg.de/cgi-bin/link.pl?entscheidungen>>.

German Constitutional Court, September 24, 2003.

Two recent cases—*Şahin v. Turkey* (2005), in which the European Court of Human Rights (ECHR) permitted the state to regulate the wearing of headscarves, and the *Teacher Headscarf* case (2003), in which the German Constitutional Court rejected such regulation (at least on the particular facts of the case)—illuminate critical questions concerning the justiciability of religious freedom as protected by the constitutions of European Union member states and by the European Convention for the Protection of Human Rights and Fundamental Freedoms. These critical cases further suggest the complexity of legislation that attempts to limit religious freedom in the name of state neutrality,<sup>1</sup> a principle that is also protected by the constitutions of the member states and by the European Convention, and that is currently being rethought in the increasingly diverse European Union. Taken together, these cases illustrate the multi-level dynamics of international and municipal law in an increasingly globalized world.

### *Şahin v. Turkey*

The events leading to the judgment in *Şahin v. Turkey*<sup>2</sup> (Grand Chamber) (Şahin 2005, referral of Şahin 2004) began on August 26, 1997, when Şahin, a 24-year-old woman then in her fifth year of studies in the Faculty of Medicine at the University of Bursa, Turkey, enrolled in the Cerrahpasa Faculty of Medicine at the University of Istanbul. According to Şahin, she had been wearing an Islamic headscarf during her first four years at the University of Bursa, and then continued to wear the headscarf at the University of Istanbul until February 1998. On

<sup>1</sup> The principle of state neutrality, its definition, application and interpretation, differ among countries. For the Council of Europe, for example, this principle regards state neutrality and equal protection before the law as fundamental safeguards against discrimination, and it therefore calls upon state authorities to refrain from taking measures based on value judgments concerning beliefs, creeds, and religions.

<sup>2</sup> Şahin v. Turkey, App. No. 44774/98 (Eur. Ct. H.R. November 10, 2005) (Grand Chamber), *referral of Şahin v. Turkey*, App. No. 44774/98 (Eur. Ct. H.R. June 29, 2004). The judgments and other decisions of the European Court of Human Rights are available online at <<http://www.echr.coe.int>>.

February 23 of that month, the vice-chancellor of the University of Istanbul issued an official statement (a “circular”) declaring:

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” (wearing the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. (Şahin 2004, para. 12)

Accordingly, on March 12, Şahin, wearing the Islamic headscarf, was denied entrance to a written university exam. On March 20, and again on April 16 and June 10, she was refused entrance into lectures and examinations. The dean of the faculty then issued a warning to Şahin, stating that her attitude and failure to comply with the dress code were not befitting of a student. On July 21, Şahin filed an application with the European Commission for Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>3</sup> She alleged that a ban on the Islamic headscarf in higher education institutions violated her rights and freedoms under Articles 8 (right to privacy), 9 (freedom of thought, conscience, and religion), 10 (freedom of expression), and 14 (freedom from discrimination) of the Convention, and Article 2 of its Protocol No. 1 (right to education).

On July 29, Şahin requested in writing an exception to the vice-chancellor’s circular. She claimed that the circular and its implementation by the university infringed her rights as guaranteed by Articles 8, 9, 10, and 14 of the Convention, and Article 2 of Protocol No. 1, and that the university had no regulatory power in this sphere. On February 26, 1999, ten days after an unauthorized assembly protested the dress code outside the dean’s office at the Faculty of Medicine, the dean began disciplinary proceedings against various students, including Şahin. On March 19, the Istanbul Administrative Court dismissed her application to suspend the circular and held, instead, that section 13(b) of Law No. 2547, the Higher Education Act, gave university chancellors “power to regulate students’ dress in order to maintain order” (Şahin 2004, para. 15). Şahin appealed. On April 13, the dean suspended the applicant for one semester, citing Article 9(j) of the Students Disciplinary Procedure Rules. On June 10, Şahin filed an application with the Istanbul Administrative Court for an order reversing her suspension. On September 16, she enrolled in the University of Vienna. The Istanbul Administrative Court dismissed her application on November 30, holding that “in 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” (Şahin 2004, para. 23). The applicant appealed.

On June 28, 2000, Turkish Law No. 4584 came into force, affording students an amnesty for disciplinary offenses, annulling all penalties. In light of the amnesty legislation, the Supreme Administrative Court ruled it unnecessary to examine Şahin’s appeal against the judgment of November 30, 1999. On April 19, 2001, that court therefore dismissed her appeal of the November 30 decision of the Istanbul Administrative Court.

In its decision of June 29, 2004, regarding the Şahin’s application of July 1998, a seven-judge chamber of the ECHR held unanimously that there had been no violation of Şahin’s freedom of thought, conscience, and religion under Convention Article 9, and that there was no separate question arising from that article in conjunction with Articles 8, 10, or 14, or Article 2 of Protocol No. 1 (Şahin 2004, paras. 117, 117). Moreover, the Court explicitly stated that

<sup>3</sup> Nov. 4, 1950, ETS No. 5, 213 UNTS 222. The Convention and its protocols are available at <<http://www.echr.coe.int>>.

“the University of Istanbul’s regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as ‘necessary in a democratic society’” (*id.*, para. 114). In reaching its decision, the Court drew on the Constitution of Turkey and on legal practice concerning Turkey’s development as a secular (*laik*) state, as well as on the case law of Turkey’s Constitutional Court. Importantly, the ECHR also drew on comparative law that included court decisions and legal debates concerning the Islamic headscarf and state education in Belgium, France, Germany, the Netherlands, Switzerland, and the United Kingdom. In so doing, the ECHR explicitly quoted the French National Assembly’s bill of February 2004, which banned “visible” religious symbols in state primary and secondary schools.<sup>4</sup> The ECHR also cited the decision of the German Constitutional Court in the *Teacher Headscarf* case of September 24, 2003, discussed below, as an example of a legal position that seemed to run counter to that of other member states of the European Union.

On September 27, 2004, the applicant requested that the case be referred to the Grand Chamber of the European Court of Human Rights, pursuant to Convention Article 43. On November 10, the Grand Chamber agreed to hear the case and, exactly one year later, a 17-judge panel handed down a 51-page decision, which included one separate, “concurring opinion” of two judges (Rozakis and Vajić) and one dissenting opinion (Tulkens). The majority decision held that there was no violation of Article 9 of the Convention (16-1 vote), that there had been no violation of the first sentence of Article 2 of Protocol No. 1 (16-1), that there had been no violation of Article 8 of the Convention (unanimous), that there had been no violation of Article 10 of the Convention (unanimous), and that there had been no violation of Article 14 of the Convention (unanimous). Relying substantially on the existing rules and regulations of various organs of the Turkish state, along with the case law of the Turkish Constitutional Court, the Grand Chamber stated that “[b]y 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” (Şahin 2005, para. 121). It went on to note that “[i]n light of the foregoing and having regard to the Contracting State’s margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued. Consequently, there has been no breach of Article 9 of the Convention” (*id.*, paras. 122–23).

### Teacher Headscarf Case

The events leading to the judgment in what is known as the *Teacher Headscarf* case<sup>5</sup> (Headscarf) began when Fereshta Ludin, a 26-year-old German school teacher of Muslim faith, was turned down for a teaching position in the Baden-Württemberg school system because the Islamic headscarf she wore in the classroom was considered incompatible with the principle of separation of church and state in the German Basic Law (*Grundgesetz*).<sup>6</sup> Ludin was born in Kabul, Afghanistan, in 1972, moved to Germany in 1987, and became a German citizen in 1995 (Headscarf, para. 2). After having passed the First State Examination (required of all

<sup>4</sup> This bill became law (No. 2004-28) in March 2004.

<sup>5</sup> Case No. 2BvR 1436/02 (Bundesverfassungsgericht [BVerfG; Constitutional Court] Sept. 24, 2003). The Constitutional Court’s own press release announcing the judgment describes the case as *Lehrerin mit Kopftuch* (*Teacher with Headscarf*). Press Release No. 71/2003 (Sept. 24, 2003), at <<http://www.bverfg.de/cgi-bin/link.pl?presse>>. All translations from the German are by the author.

<sup>6</sup> At <[http://www.bundestag.de/htdocs\\_e/info/index.html](http://www.bundestag.de/htdocs_e/info/index.html)>.

teachers in Germany), and after having completed a required apprenticeship, Ludin passed the Second State Examination for teachers in primary and secondary schools.

In July 1998, the state of Baden-Württemberg's board of education (*Oberschulamt*) declined Ludin's application for employment as a teacher in primary and secondary schools in the state of Baden-Württemberg on the ground that she was not "suitable" (*geeignet*) for the teaching profession (Headscarf, para. 5). According to the board of education's office in Stuttgart, Ludin showed no interest in removing her headscarf while teaching classes. From the board of education's point of view, this refusal was problematic because the board believed that the Islamic headscarf had a "signaling effect" (*Signalwirkung*), which it considered incompatible with the principle of state neutrality (*staatlichen Neutralitätsgebot*). The board feared that the wearing of headscarves by teachers in Baden-Württemberg's primary and secondary schools would not only force impressionable young students to confront Islam, but, more importantly, undermine the objective of integration, notably of Muslim girls. In this context, the board considered the headscarf to be an expression of cultural demarcation and therefore a *political*, as well as a religious, symbol (*id.*, para. 2).

Ludin appealed this decision through three levels of the German administrative courts: from the administrative court (Verwaltungsgericht) of Stuttgart (decision of March 24, 2000), to the administrative court (Verwaltungsgerichtshof) of Baden-Württemberg (June 26, 2001), to the Federal Administrative Court (Bundesverwaltungsgericht) (July 4, 2002), the highest court of appeal for administrative law in Germany. The Federal Administrative Court upheld the board of education's denial of employment to Ludin and ruled that teachers in public schools must refrain from openly displaying religious symbols in class.<sup>7</sup> It reasoned that public school teachers are representatives of the state and must serve as role models for students.

Having exhausted all possible lines of appeal in the German administrative court system, Ludin launched a "constitutional complaint" (*Verfassungsbeschwerde*) with the German Constitutional Court (Bundesverfassungsgericht). Her complaint alleged that her basic right of religious freedom, as enshrined in German Basic Law Article 4, had been violated. Specifically, Ludin maintained that her wearing of the headscarf was a characteristic of her personality and an expression of her internal religious beliefs. She therefore claimed a violation of her rights under German Basic Law Articles 1(1) (human dignity), 2(1) (personal freedoms), 3(1) and (3) (equality before the law), 4(1) and (2) (freedom of faith, conscience, and creed), and 33(2) and (3) (equal citizenship and equal access to civil service employment).

Ludin's attorney before the Constitutional Court, Hansjörg Melchinger, maintained that Ludin's right to act in accordance with her beliefs should be protected, and he cautioned that the Islamic headscarf should not be in itself equated with Islamic fundamentalism. He also argued that the scarf's so-called signaling effect was less significant than had been stated by the board of education, noting, in particular, that "it is not about what a teacher has *on* the head, but rather, what she has *in* her head."<sup>8</sup>

Arguing the case for Baden-Württemberg, Ferdinand Kirchhof maintained that regardless of Ludin's motive for wearing the scarf, the state's principal source of concern was the symbolic meaning and signaling effect of the Islamic scarf itself. Invoking the state neutrality principle in German constitutional law (*staatlichen Neutralitätsgebot*), Kirchhof went on to argue that increased immigration in Germany obligates the state to be vigilant with respect to all religious matters, and particularly with respect to school children—who, he claimed, learn through

<sup>7</sup> July 4, 2002, BVerwG 2 C 21.01.

<sup>8</sup> *Court Hears Muslim Teacher's Case for Head Scarf* (June 6, 2003), at <<http://www.germany.info/relaunch/info/publications/week/2003/030606/politics4.html>>.

imitation and are, when entering primary and secondary schools, at a critical stage of development.<sup>9</sup>

On September 24, 2003, the Constitutional Court overturned the Federal Administrative Court's decision and upheld Ludin's right to wear a headscarf in the classroom. The Constitutional Court's rationale, supported by five of the eight judges in its second chamber (*Senat*), was that in the absence of any clear, unambiguous regulations in the German states concerning the wearing of religious symbols in the classroom, the states could not legally ban qualified teachers, such as Ludin, from holding this public office. At the same time, the majority noted that, given the increased religious pluralism in German society, there may indeed be an "increased potential for possible conflicts in schools." Therefore, the majority concluded, there may be both good reasons for a stricter interpretation of the neutrality principle when it comes to schools and, in particular, a need for rules governing the "outward appearance" (*äußeres Auftreten*) of instructors (Headscarf, para. 64). The majority stressed, however, that decisions regarding which *particular* rules should be enacted in order to keep "religious peace" (*religiösen Frieden*) in schools, as well as the content of specific rules that might eventually govern the suitability (*Eignung*) of a teacher for the teaching profession in this changed social environment, were not to be taken by public school authorities themselves. Rather, the majority stressed, such a decision could be taken *only* by the "democratically legitimized regional legislator" (*id.*, para. 66).

This majority opinion further opened the door for new regional laws concerning the relationship between state neutrality and freedom of religion by declaring that future legislation concerning headscarves in public schools would represent "a permissible restriction of the freedom of religion" that conforms to Article 9 of the European Convention (Headscarf, para. 65). Article 9, as discussed above, guarantees the right to freedom of thought, conscience, and religion, but makes this right subject "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."

\* \* \* \* \*

Taken together, these cases raise critical questions about the possibility, and limits, of religious freedom in increasingly diverse polities, within the European Union and beyond. On the one hand, they signify a growing tension between a "coming world order" that aims at the "cultural extension and legal enforcement of human rights," including freedom of religion and belief.<sup>10</sup> On the other hand, the cases reflect both an increased vigilance of religious practices that are considered indicative of a "clash of civilizations," and the resulting restrictions on religious freedom in the name of public order. The cases also demonstrate the growth of a pan-European legal discourse of religious symbols not only as text, but as a mechanism, however broad and ambiguous, of social control.<sup>11</sup>

Accordingly, these cases raise at least two sets of crucial and divisive questions that are worthy of commentary and debate. First, does the wearing of the Islamic headscarf in public schools have, in and of itself, an important political significance that threatens public order and individual freedom in a democracy? If so, what is that significance, and does it provide a sufficient

<sup>9</sup> *Kampf ums Kopftuch [Battle over Headscarf]* (Sept. 23, 2003), at <<http://www.zdf.de/ZDFde/inhalt/26/0,1872,2068602,00.html>>.

<sup>10</sup> WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 157 (2005).

<sup>11</sup> On the clash of civilizations see, principally, SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

basis for government restrictions on religious expression?<sup>12</sup> Second, what is the appropriate allocation of decision-making authority concerning these divisive issues? Are local government authorities, or central and international courts, in a better position to decide these issues?

The German Basic Law appears to be straightforward on the question of religion and public order: Article 4 protects freedom of religion without reservation.<sup>13</sup> This strongly enforced constitutional protection of the individual from the power of the state undoubtedly stems from Germany's totalitarian history. As was noted by Jutta Limbach, former president of the German Constitutional Court, "the Weimar Republic collapsed . . . from deep-rooted authoritarian state traditions. The Court's case law may be seen as one fruit of this insight," and the protection of religious freedom is no exception.<sup>14</sup> This long-established German approach contrasts sharply with the European Convention, which expressly states that some limitations on freedom of religion may be necessary in a democratic society in the interests of public safety, public order, health, or morals, or for the protection of the rights and freedoms of others.

The *Classroom Crucifix* case of 1995 marked the first shift in German jurisprudence toward an understanding of religious freedom that is in greater harmony with the European Convention and the jurisprudence of the ECHR.<sup>15</sup> In that case, the Constitutional Court held that an existing law requiring crucifixes to hang in all public elementary school classrooms was unconstitutional (though the state of Bavaria then passed laws that enabled schools in this predominantly Catholic region to sidestep the Court's ruling). *Teacher Headscarf*, as the next high-profile case concerning religious freedom and public neutrality to reach the Constitutional Court since that time, is of considerable significance. The Court's holding—in which it overturned the decision of the Baden-Württemberg board of education *solely* on the ground that there were no regulations in place that would allow for a ban on religious symbols, and suggested the possibility of future restrictions on religious freedom according to Article 9(2) of the European Convention—implies a consolidation of the trend that began with *Classroom Crucifix*.

In their separate opinion, the three dissenting judges in *Teacher Headscarf* went further than the majority in this direction, stressing that the individual rights of *civil servants*, in particular, could be limited, and that public school teachers, as civil servants, do not enjoy the same legal rights as school children and their parents—precisely because teachers are organs of the state. These dissenting judges observed that the majority position (*Headscarf*, paras. 75–138) misjudged this special position of civil servants and their role in the realization of the democratic will.

In the context of this dissent, it is helpful to contrast the official positions—and to understand the implications thereof for public order—of Şahin, the applicant to the ECHR, versus Ludin, the applicant to the German Constitutional Court. Şahin was a university student, a woman of legal age, who wished to attend a state university while wearing a headscarf. Although Ludin was also a woman of legal age, she was applying to be a civil servant (a representative of the state) and wished to teach in the classroom, also while wearing a headscarf. The difference has important implications for those adjudicating the delicate line between religious freedom and state neutrality; for although the decisions in both cases permitted prohibitions—either

<sup>12</sup> Interestingly, it was one year *after* France's 2004 ban on "visible" religious symbols for students in all public primary and secondary schools that France saw its worst disturbance to public order since the events of 1968. During this public order crisis of November 2005, rioting youth in disadvantaged neighborhoods throughout France (many of which had significant, if not majority, Muslim populations) set thousands of vehicles on fire and destroyed numerous public buildings, including schools, resulting in the imposition of more than three months of a "state of emergency" (and of restricted civil liberties) throughout France. For an analysis of these events, see Laurent Bonelli, *Les raisons d'une colère*, LE MONDE DIPLOMATIQUE, Dec. 2005, at 1.

<sup>13</sup> See Oliver Gerstenberg, *Germany: Freedom of Conscience in Public Schools*, 3 INT'L J. CONST. L. 94 (2005).

<sup>14</sup> 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, pt. 1, at vi (1998).

<sup>15</sup> BVerfG, May 16, 1995, 93 BVerfGE 1.

the maintenance of prohibitions on Islamic headscarves for students in public universities, or the eventual creation of new prohibitions on Islamic headscarves for teachers in state schools—the dissenting opinion of the German judges in *Teacher Headscarf* draws our attention to the critical question of the applicants' different positions vis-à-vis the civil service, and the tensions between individual religious freedom and the neutrality of those employed by the state in diverse societies. In *Şahin*, the majority opinion did not acknowledge this critical difference in the applicant's position—which the single dissenting judge saw as a crucial failure (*Headscarf*, para. 7).

The different positions of these applicants, along with the implication that the official position of a woman vis-à-vis the state administration may affect the meaning and potential consequences of her wearing the Islamic headscarf, raise a core controversy that will continue to provoke debate in plural societies. What was explicit, if not fully developed, in the majority and dissenting opinions in *Teacher Headscarf*, as well as the majority opinion in *Şahin*, was the perceived *political*, and potentially negative, meaning of the Islamic headscarf in a democratic society. These decisions suggest that the Islamic headscarf is no longer simply considered a religious symbol but is increasingly perceived as a political symbol that has, in and of itself, negative implications for public order and individual freedom in a democratic society. In neither *Teacher Headscarf* nor *Şahin*, however, did the majority demonstrate that the headscarf, in the specific contexts relative to the applicants, presented a clear and present threat to public order or to the liberty of others.

More specifically, neither the ECHR in *Şahin* nor the German Constitutional Court in *Teacher Headscarf* presented any tangible argument or evidence that the headscarves posed a threat to public order, to women's rights, or to the religious freedom and expression of others. The lack of evidence concerning such issues was specifically noted by the dissenting judge in *Şahin*, who, in criticizing the majority's views on the meaning of headscarves in a secular and democratic society, stressed that not even the Turkish government, in its defense, argued that *Şahin* used the headscarf in an "ostentatious or aggressive" manner or to "exert pressure, to provoke a reaction, to proselytize or to spread propaganda" (*Şahin* 2005 dissent, para. 8). This dissenting judge went on to raise a fundamental point that is increasingly contested across Europe—namely, that "[m]erely 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" (*id.*, para. 10). The same judge asked, "[W]hat, in fact, is the connection between the ban [on wearing headscarves] and sexual equality? . . . As the German Constitutional Court noted in [*Teacher Headscarf*], wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons" (*id.*, para. 11 (footnote omitted)).

Nowhere is the narrowness of the ECHR Grand Chamber's outlook more apparent than in its discussion, or lack thereof, of the critical link between the headscarf and gender equality. Although the majority in *Şahin* found that the ban on wearing the headscarf was also a means of protecting gender equality, the Grand Chamber's analysis in this regard was notably thin and unsatisfying: in addition to simply quoting the chamber opinion at length, the Grand Chamber quoted its own language from *Dablab v. Switzerland* (which characterized the headscarf as "powerful external symbol" that was "imposed on women by a [religious] precept" that was "hard to square with the principle of gender equality")<sup>16</sup> and expressed the need to protect citizens "from external pressure from extremist movements" (*Şahin* 2005, para. 113) such as those that would "impose on society as a whole their religious symbols and conception of a society

<sup>16</sup> Admissibility, 2001-V Eur. Ct. H.R.

founded on religious precepts” (*id.*, para. 10). But this kind of conclusory reasoning is simply inadequate to address the fundamental questions here, especially in the context of the particular facts that arose in *Şahin*: To what extent is the wearing of the Islamic headscarf a freely chosen individual act of religious freedom, one that is to be guaranteed and protected? And to what extent might it represent the religious *coercion* of individuals, and of women in particular, thereby threatening the protection of equality between men and women and resulting in discrimination?

In highlighting the German Constitutional Court’s understanding in *Teacher Headscarf* that there is no single, straightforward way of understanding the practice of wearing a headscarf, the dissenting judge in *Şahin* highlighted the striking divergence in the two courts’ discussions concerning the nature, meaning, and consequences of the Islamic headscarf—both in and of itself, and with regard to its implications for women’s rights and for equality between the sexes in a democratic society. It is, indeed, the vehement disagreement over the nature, meaning, and implications of the headscarf that lies at the heart of these cases, and that is therefore essential for understanding and adjudicating the limits of religious freedom. And yet, in neither of the cases are these critical issues sufficiently treated. In *Teacher Headscarf* it was only the dissenting judges who addressed either the controversial question of the symbolic nature of the Islamic headscarf in relation to the equality of men and women, or the relationship between freedom of religion and the protection of other fundamental, individual freedoms in a democratic society. And in *Şahin*, although the Grand Chamber addressed these issues in somewhat greater depth than was done in the earlier, chamber judgment, the Grand Chamber’s analysis still did little to move past generalities and to engage the actual facts and complexities of the case, with regard both to *Şahin* herself and to the larger religious, social, and political phenomena against which her protest needed to be understood.

Even from a strict, narrow legal perspective, the Grand Chamber’s judgment in *Şahin* can be faulted. As the dissenting judge argued, the majority had failed both to clarify the permitted legal reasons for interfering with the applicant’s right to freedom of religion, and—unlike other states where bans on religious attire in public schools apply only to minors (who are considered more vulnerable to pressure)—to take into account that the applicant in this case, *Şahin*, was of legal age. This dissenting judge also noted that in “relying exclusively on the reasons cited by the national authorities and courts” (and one might add, in following so closely the reasoning of the chamber), the majority had merely sought to “weigh” the principles of secularism, equality, and liberty “against the other” rather than attempting to harmonize them (*Şahin* 2005 dissent, para. 4). And here the dissenting judge argued that there was no evidence before the Court to suggest that *Şahin* had any intention of using her headscarf to exert pressure, provoke a reaction, proselytize, or spread propaganda. Moreover, the judge noted that there was no suggestion or demonstration of any disruption in teaching or any disorderly conduct associated with the wearing of the headscarf. Therefore, the judge concluded that the only conditions that would justify imposing legal restrictions on religious freedom—protection of the rights of others and the maintenance of public order—had not been satisfactorily proved in *Şahin*’s case. With her religious freedom on one side of the equation, there was, in effect, nothing on the other. There was, as it were—according to this judge—nothing tangible in the discussion against which *Şahin*’s religious freedom needed to be weighed or balanced.

It is helpful to compare the dissenting judge’s opinion in *Şahin* to the *majority* opinion of the UN Human Rights Committee in *Raihon Hudoyberganova v. Uzbekistan*.<sup>17</sup> In that case, the Committee determined that Uzbekistan had violated Raihon’s rights under Article 18(2)

<sup>17</sup> Communication No. 931/2000, UN Doc. CCPR/C/82/D/931/2000 (2005).

of the International Covenant on Civil and Political Rights.<sup>18</sup> Raihon, a 22-year-old student at the Tashkent State Institute for Eastern Languages, claimed that she had repeatedly been denied access to the institute's courses and residence for having refused to remove her headscarf (in this case, the word *hijab* was used). The Committee noted that Article 18(2) "prohibits any coercion that would impair the individual's freedom to have or adopt a religion," and that Uzbekistan "has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3" (to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others).<sup>19</sup> In one of the three individual opinions appended to that of the Committee, however, Ruth Wedgwood noted the lack of clarity in the facts of the case; for example, the degree to which the scarf actually covered the woman's face, or whether it just covered her neck and hair, was simply indeterminate. Wedgwood juxtaposed her reasoning to that of the ECHR in *Şahin*, noting that she found "problematic" the ECHR's decision that, on the very general basis that "extremist political movements in Turkey" sought "to impose on society as a whole their religious symbols," Turkey could interfere with the applicant's right to religious expression. By contrast, Wedgwood argued that a "state may be allowed to restrict forms of dress that directly interfere with effective *pedagogy*"; consequently, what was needed in *Raihon*, and presumably in *Şahin*, was a more detailed discussion of the headscarf as a form of clothing that could interfere with the daily classroom activities.<sup>20</sup>

A second major set of questions raised by *Şahin* and *Teacher Headscarf* concerns the appropriate allocation of decision-making authority for the divisive issues discussed in those cases. Are local government authorities, or central and international courts, in a more appropriate position to decide such issues? These cases illustrate the growing tensions inherent in the internationalization of law, including "one of the most cosmopolitan, and controversial, trends in constitutional law: using foreign and international law as an aid to interpreting" domestic constitutional law.<sup>21</sup> In both cases we see the difficulties of establishing and maintaining, in the diverse member states and applicant countries of the European Union, a "European jurisprudence of religious freedom" in line with that of Article 9(2) of the European Convention. That article guarantees religious freedom but also establishes the possibility of legally restricting religious freedom in the name of protecting public order and the rights and fundamental freedoms of others. Interestingly, the ECHR and the German Constitutional Court both delegated the final authority concerning the legalization of religious symbols to the respective subunits of each "federation" (in the case of the ECHR, to the contracting states, and in the case of the Constitutional Court, to the states, or *länder*), thus allowing, in effect, for a plurality of practices across the respective subunits.

Rather than presenting or developing a "European" perspective on this sensitive issue concerning the governmental control of such matters as religious practices, the majority in the ECHR's Grand Chamber specifically declined to intervene in *Şahin*'s situation, which would have required the Court to assess "local needs and conditions" (*Şahin* 2005, para. 121). In so doing, the Grand Chamber left intact two critical judgments of the Constitutional Court of Turkey, one on March 7, 1989, and the other of April 9, 1991. In the 1989 judgment, the Constitutional Court declared unconstitutional the Turkish Higher Education Act (Law No.

<sup>18</sup> Dec. 16, 1966, 999 UNTS 331. Article 18(2) provides: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

<sup>19</sup> Communication No. 931/2000, para. 6.2.

<sup>20</sup> *Id.*, Wedgwood op., paras. 3–4 (emphasis added).

<sup>21</sup> Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, 42.

2547) that specifically allowed for the wearing of a veil or headscarf in institutions of higher education, when done out of religious conviction. Citing the Preamble and Article 174 of the Turkish Constitution, the Court noted that this law “could not be reconciled with the principle of sexual equality implicit, *inter alia*, in republican and revolutionary values” (Şahin 2005, para. 39). The Grand Chamber also noted that the Constitutional Court of Turkey, in its 1989 decision, stressed that freedom of religion was not equivalent to the right to wear religious attire; instead, first and foremost, freedom of religion meant the liberty to decide whether to follow a particular religion. The Grand Chamber noted that in this important sense, the Constitutional Court of Turkey made clear that when the wearing of an Islamic headscarf is imposed on individuals, it is incompatible with the values of a democratic society, especially the values of secularism and the religious neutrality of the state. The Grand Chamber noted, however, that in October 1990, transitional section 17 of Law No. 2547 came into force in Turkey, providing that “choice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force.” But did that imply that university students were entitled to wear any clothing that they chose, thus superseding the holding of the 1989 case? This question, as the Grand Chamber observed, was decided in the April 1991 case: the Turkish Constitutional Court found the Constitution still prohibited the wearing of headscarves (as decided in the 1989 case), with the consequence that section 17 could not be interpreted as authorizing students to wear headscarves (Şahin 2005, para. 41).

In challenging the majority’s delegation of decision-making authority to the member states, the dissenting judge in *Şahin* called into question the “margin of appreciation” approach used by the majority to justify their conclusion that “the university authorities are in principle better placed than an international court to evaluate local needs” (Şahin 2005, para. 121). This judge asked: *who* is best placed to decide how member states should “discharge their Convention obligations in what is a sensitive area” (Şahin 2005 dissent, para. 2)? In responding, the judge presented two criticisms of the majority’s analysis, specifically with regard to its argument that a wide margin of appreciation was required because of “the diversity of practice between the States on the issue of regulating the wearing of religious symbols in educational institutions,” with the implication that “a European consensus [was lacking] in this sphere” (*id.*, para. 3). First, the dissenting judge noted that none of the other contracting states had bans in place on religious attire at the university level; the diversity of state practice underlying the majority position simply did not exist. Second, even if the majority chose to deal with these issues through a margin of appreciation, the Court was ignoring its obligation to provide the necessary “European supervision” on such matters; “the issue raised in the application . . . 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” (*id.*).

Taken in their entirety, the majority and dissenting opinions in *Şahin* and *Teacher Headscarf*—along with the interplay between those opinions—raise important issues about the reach and scope of international and municipal law in a world that is increasingly asked to balance diversity and universal values. The principles articulated in both of the cases will have, and are already having, an impact around the world, not least of all in countries that are struggling to maintain religious freedom and state neutrality in an increasingly diverse and socially explosive world. Several countries in Europe have begun looking to Turkey and Germany for models of secularism that they hope will limit, rather than exacerbate, social conflict. Notwithstanding important differences in the jurisprudence of *Şahin* and *Teacher Headscarf*, both judgments point in the direction of a structural transformation, by way of law, of public spheres in Europe. This jurisprudential trend raises thorny questions about the separation of church and state,

about the relationship between individual freedoms and the power of the state, and about the principles of religious freedom and state neutrality in a post-September 11 world.

CINDY SKACH

*Department of Government, Harvard University*

*Publication of photographs of public figure—right to protection of private life—freedom of the press—European Convention on Human Rights—effect of judgment by the European Court of Human Rights in national legal orders*

VON HANNOVER V. GERMANY. APP. NO. 59320/00. 2004-VI EUR. CT. H.R., at <<http://www.echr.coe.int>>.

European Court of Human Rights, June 24, 2004.

In *Von Hannover v. Germany*<sup>1</sup> the European Court of Human Rights (ECHR) was presented with a conflict between the freedom of the press and the right to protection of private life, specifically of public figures. Rejecting the 1999 judgment of the German Constitutional Court (Bundesverfassungsgericht),<sup>2</sup> the ECHR held unanimously<sup>3</sup> that Germany's courts had violated the privacy rights of Princess Caroline of Monaco (Caroline) under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>4</sup> by not protecting her against the publication of photographs of her and her family that related exclusively to her private life. Since Germany subsequently decided not to request that the case be referred to the Grand Chamber, the *Von Hannover* judgment is final.

Caroline, the oldest daughter of the late Prince Rainier, married Prince Ernst-August von Hannover in 1999. Although she is president of various charitable foundations and also represents the reigning Grimaldi family at certain events such as the Red Cross Ball, she does not exercise any official function on behalf of Monaco or any of its institutions. Beginning in the early 1990s, Caroline initiated legal actions in the Hamburg Regional Court (Landgericht) over photos taken in France and published in the German magazines *Bunte*, *Freizeit Revue*, and *Neue Post*. The photos (published along with articles) showed her in ordinary scenes of her everyday life, such as picking up her children from school, practicing sports, shopping at the supermarket, and walking at a beach club. Most of the photos had been taken secretly—some, like the one at the beach club, from a distance of several hundred meters (probably from a neighboring house in that instance).

Caroline's attempts to prevent the publication of the photos through legal action in German courts were not successful. In the most recent attempt, the Constitutional Court ruled in December 1999 that the princess was a "figure of contemporary society '*par excellence*'" who had to tolerate photos of her in public places, even if they showed her in scenes from her daily life, not official duties (*Von Hannover*, para. 23). The Court merely granted an injunction with respect to photos that showed Caroline together with her children; the children's need for protection was greater than that of adults. In 2000 Caroline petitioned the European Court of Human Rights, alleging that Germany had breached her right to respect for her private life under Article 8 of the Convention.

<sup>1</sup> *Von Hannover v. Germany*, 2004-VI EUR. CT. H.R. The judgments and other decisions of the European Court of Human Rights are available online at <<http://www.echr.coe.int>>.

<sup>2</sup> Bundesverfassungsgericht [BVerfG], Dec. 15, 1999, 101 BVerfGE 361. The relevant portions of this judgment are quoted in the ECHR's *Von Hannover* judgment at paragraph 25.

<sup>3</sup> Judges Cabral Barreto and Zupančič wrote concurring opinions.

<sup>4</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 222. The Convention and its protocols are available at <<http://www.echr.coe.int>>.