

The Islamic Headscarf: Does Context Matter?

María Fraile Ortiz

Facultad de Ciencias Sociales y Jurídicas
Universidad Carlos III de Madrid

*Abstract**

This article deals with one of the most interesting contemporary conflicts between fundamental rights, that concerning freedom of thought, conscience and religion, with particular reference to the use of the Islamic headscarf use in educational institutions (I, The conflict). As an illustration of this conflict, we shall focus on one particular case, Leyla Sahin's case, brought before the European Court of Human Rights in 2004 (II, The case). That case will be our starting point, as it contains some of the essential "coordinates" which must be borne in mind when resolving such conflicts. Our next step will be to identify these "coordinates" (III, The coordinates). Then with these coordinates we shall examine the "course" set by the different rulings that have been handed down in order to resolve the conflict and by the specific legislation enacted (IV, The course). Finally, we shall attempt to draw certain conclusions (V, Conclusion).

El presente trabajo aborda uno de los más interesantes conflictos entre derechos fundamentales de los últimos tiempos; el referido a la libertad de pensamiento, conciencia y religión, en particular, al uso del velo islámico en el ámbito educativo (I, El conflicto). Como ejemplo de dicho conflicto, nos centraremos en un caso concreto, el asunto Leyla Sahin defendido ante el Tribunal Europeo de Derechos Humanos en el año 2004 (II, El caso). El citado caso será nuestro punto de partida, pues contiene alguna de las "coordenadas" esenciales que deben de tenerse en cuenta al abordar tales conflictos. Identificar tales coordenadas en la jurisprudencia y en la normativa, será nuestro siguiente paso (III. Las coordenadas). Una vez identificadas tales coordenadas, analizaremos el "rumbo" seguido por los tribunales que han abordado dichos conflictos, así como por la normativa adoptada al respecto por el legislador (IV. El rumbo). Finalmente, trataremos de "arribar a buen puerto" (V, Conclusiones).

Título: El velo islámico: ¿hasta qué punto el contexto es importante?

Keywords: Islamic Headscarf; Freedom of Religion; Educational Institutions; Europe; Conflicts between Fundamental Rights

Palabras clave: velo islámico; libertad religiosa; instituciones educativas; Europa; conflictos entre derechos fundamentales

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1. *The conflict*

One of the most interesting contemporary conflicts between fundamental rights is that involving freedom of thought, conscience and religion: and in particular that concerning the use of the Islamic headscarf in educational institutions. It is worth noting that many cases dealing with this question have come before the courts in European countries in recent years. Some deserve special consideration, such as for instance Ferestha Ludin's case before the Federal Constitutional Court of Germany in 2003, or the case of *Begum v. Headteacher and Governors of Denbigh High School* [2004], recently reversed by the House of Lords on 22 March 2006. Moreover, the European Court of Human Rights has handed down several rulings on the issue (*Leyla Sahin v. Turkey*, *Dahlab v. Switzerland*), as have also other institutions (UN Commission of Human Rights: Communication No. 931/2000, Uzbekistan, 2005). As it is well known, this matter has also been addressed within specific legislation, for example the French law enacted on 15 March 2004.

The aim of this article is to provide a comparative view of the treatment of this conflict within case-law, with particular reference to the increasing number of cases in the public eye and the fact that the legitimacy of measures taken by the authorities regarding the wearing of the headscarf is frequently called into question. In order to illustrate the truth of this, I shall refer, as an example, to the recent case of Aishah Azmi, a Muslim teaching assistant in a protestant school (Dewsbury, West Yorkshire) who was not allowed to wear the veil on school premises. As she did not accept the ban, she was suspended on full pay. An employment tribunal found on 17 October 2006 that she had been victimised by the school which suspended her (awarding the applicant £1,100 for "injury to feelings") but dismissed the claim that she had suffered from religious discrimination and harassment. A more recent case concerned a different aspect of this problem, in which a dentist in Greater Manchester refused to treat a female Muslim patient unless she wore an Islamic headscarf. Finally, it is worth mentioning the latest measure related to this issue which is of particular interest: on 10 February 2008, the Turkish Parliament lifted the ban over Islamic headscarves in universities by changing the Turkish constitution (the constitutional reform received 411 votes in favour from the 550 deputies). However, three months later, on 5 June 2008, the Turkish Constitutional Court annulled that reform. As we will see below, it was this ban which was at issue in Leyla Sahin's case.

In order to proceed with this investigation it is necessary to take various elements into consideration; which are the rights in conflict in the Islamic headscarf case? To what extent do other circumstances affect the content of judicial decisions or specific legislation? Is the country involved relevant in this sense (Turkey, France, UK...)? Does the time in which a specific decision or rule is adopted also have an impact?

2. The case

Our starting point will be the case mentioned above of *Leyla Sahin v. Turkey*, of June 2004 and November 2005 (European Court of Human Rights, No. 44774/98), a case that concerns the prohibition on the applicant wearing the Islamic headscarf at university.

It is necessary to start from the very beginning. In 1998, the applicant claimed before the European Court of Human Rights that her rights as guaranteed by Articles 8, 9, 10 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention, from now on) and Article 2 of the First Additional Protocol to the Convention had been violated through the prohibition on wearing the Islamic headscarf at Istanbul University, where she had moved to study her fifth year of Medicine; up until that time, she had studied at Bursa University and had worn the veil without any problems. The prohibition was issued by an internal circular and stated that, “by virtue of the (Turkish) Constitution, the law and regulations, and in accordance with the case-law of the (Turkish) Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards”, admission would be refused to those “whose heads are covered”, in other words, anyone wearing the Islamic headscarf.

Certainly, it was not the first time that the European Court had been called upon to address the question of the freedom to manifest one's religion or beliefs. There had been many cases in which the Court had referred to Article 9, including in particular *Kokkinakis v. Greece* of 25 May 1993, ECHR, paragraph 26, concerning the values underlying Article 9(1) ECHR, or *Hasan and Chaush v. Bulgaria*, of 26 October 2000, ECHR, paragraph 49, on the court's inability to assess the legitimacy of religious beliefs. Nor was it the first time that the European Court had faced the Islamic headscarf issue; this had already happened in *Dahlab v. Switzerland*, a case concerning a primary school teacher who was not allowed to wear the Islamic headscarf while teaching, in which the Court declared the application to be inadmissible. A further application regarding the prohibition of the Islamic headscarf at University was brought by the court on the same day as Leyla Sahin's case (*Zeynep Tekin v. Turkey*, 29 June 2004, ECHR, No. 41556/98); the claimant finally withdrew her application and the Court accordingly did not deliver any ruling.

As everybody probably knows, on 29 June 2004, the ECHR unanimously held 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”. Nevertheless, “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 (...); that is, the protection of the rights and freedoms of others, and the protection of public order. In the European Court's view, this measure “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's judgment). The Chamber found that no separate question arose under Articles 8, 10 and 14 of the Convention or Article 2 of Protocol No. 1, as alleged by the applicant, since the relevant circumstances were the same as those examined in relation to Article 9, in respect of which it had found there to be no violation.

In order to reach this conclusion, the European Court took into consideration “the Turkish context” as well as the privileged role of national authorities in assessing local context and needs, “especially regarding questions concerning the relationship between State and religions, on which opinion in a democratic society may reasonably differ widely, and thus, the role of the national decision-making body must be given special importance”¹. The conclusion which emerged from that argument was that the safeguarding of the principle of secularism in Turkey, through the ban on the wearing of the veil, could be considered necessary for the protection of the Turkish democratic system.

We shall now focus on the Turkish context from the European Court’s point of view. After recalling certain dates and events, the Court paid special attention to the new values of the Turkish Republic, built on secularism and which strove to create a free public space where equality could be guaranteed to every citizen irrespective of differences based on religion or beliefs. In its view, the veil is often observed as the political symbol of Islam, attempting to restore a political regime based on religious rules which threatens social peace and the achievement of new rights for women. It is important not to lose sight of the fact that an Islamist political party came to power (within coalition government) in 1996, and how it was perceived by society as a real threat to “republican values” (see *Refah Partisi and others v. Turkey*, 2003, ECHR). Consequently, the Court held that the fact that Turkish institutions (University, Supreme Administrative Court and Constitutional Court) banned attitudes that could be reminiscent of the past regime could be regarded as a necessary measure for the protection of Turkish republican values, and in particular secularism.

The most sensible conclusion we can come to is that the European Court perceived *Leyla Sahin v. Turkey*’s case as if it was *Leyla Sahin or Turkey*: the veil issue did not involve simply a medicine student who finally had to move to another country in order to finish her higher education, but the very consolidation of the Turkish democratic system itself, a system threatened – to varying degrees – by fundamentalist religious movements.

This ruling, adopted in June 2004, was later referred to the Grand Chamber which delivered its definitive judgment in November 2005, once again dismissing the applicant’s appeal.

¹ “... 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” (*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*, judgment 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 domestic context concerned [see, *mutatis mutandis*, *Gorzelik*, judgment cited above, § 67; and *Murphy v. Ireland*, no. 44179/98, § 73, ECHR 2003-IX (extracts)]”, para.109.

It is interesting to note the details of the applicant's *petitum* to the Grand Chamber, as it did not claim a general recognition of a woman's right to wear the Islamic headscarf everywhere, thus assuming that wearing the veil is not always protected by Article 9 ECHR. I find this point interesting because it brings out the real scope of her complaint, that is, the ban on wearing the Islamic headscarf in "her" particular circumstances, which should be kept in mind in a case like this where "context" is – as defended – so important.

This line of thought (that focusing on "context") brings us into the realm of comparative law. It is worth noting that Leyla Sahin 2005's ruling gave quite a broad overview of the use of the Islamic headscarf in European countries (Turkey, Azerbaijan, Albania, France, Belgium, Austria, Germany, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, the Czech Republic, Greece, Hungary, Poland and Slovakia), with particular reference to educational institutions. It can be concluded on the basis of that comparative law material that only a few countries have introduced regulations on wearing the Islamic headscarf in universities (Turkey, Azerbaijan and Albania; and as far as we know also Uzbekistan, which was denounced before the Human Rights Committee in 2000²). In most European countries, the debate has focused mainly on primary and secondary schools, where freedom to decide whether to wear the veil or not is generally accepted. The interesting point is however less this conclusion, and more the fact that in making such an overview the Court tried to focus seriously on the issue for the first time, in particular since freedom of religion, belief and thought was at stake, which meant that the states' margin of appreciation was, so to speak, "broader". The list of countries with problems involving the Islamic headscarf is also interesting. It usually includes those in which the veil is an element introduced through immigration. In fact, the question is not really the number of Muslims living in a given state, but whether or not they are immigrants in that state. That is why countries such as Czech Republic, Greece, Hungary, Poland or Slovakia have not so far been involved in any conflict regarding the veil: they are either emigration countries (like Poland) or non-Muslim immigration countries.

Returning to Leyla Sahin 2005's ruling, we will find almost the same arguments that the Chamber used in 2004. Having found – as the Chamber did – there to be an effective interference with freedom of religion, belief and thought granted by Article 9(1) ECHR, the Grand Chamber considered whether such an interference was "in accordance with the law", as settled by Article 9(2) ECHR, pursued a "legitimate aim" and was "necessary in a democratic society". The latter is indeed the central issue, as it in a way implies the existence of the other two. The difficulty lies in the justification and proportionality of the measure adopted, that is, whether the ban on wearing the veil was justified and proportional to the aim pursued, and, therefore, could be regarded as "necessary in a democratic society".

The Grand Chamber did not add anything new to the Chamber's ruling. The aims of protecting the rights and freedoms of others and of protecting public order were considered legitimate and the measure proportional, since the University applied only Turkish case-law and was particularly

² *Raihon Hudoyberganova* case, 18 January 2005, UN Human Rights Committee, *CCPR/C/82/D/931/2000*, Communication.

well-placed to consider the requirements of university life. It is interesting to note the use of this kind of argument when trying to justify a particular action: indeed, greater proximity to the base of the problem (whether the state or a university) presents *a priori* many advantages: closeness to the problem places the subject in a privileged position when attempting to resolve it. On the other hand, this could be regarded with suspicion as an ECHR argumentative technique because it could be used to justify all sorts of measures with no real solid arguments/basis. All this shows that proximity does not necessarily guarantee that the best possible decision for citizens is taken; in fact one could argue that a certain distance could be better, insofar as it allows for objective observations!. Thus, institutions which are closer to citizens are not necessarily those which are best placed to take care of their interests. Safeguarding such interests is precisely the role of judges and international courts.

As anticipated, the Grand Chamber saw “ no good reason to depart from the approach taken by the Chamber” in this respect. The truth is that after considering the interference with Article 9, it also considered the applicability of Article 2 of the First Protocol to the ECHR, which did not occur in the previous ruling (even though it eventually concluded that there had not been any violation of this article either).

One of the most interesting aspects of Leyla Sahin’s case is undoubtedly, the dissenting opinion of Judge Mrs Françoise Tulkens; it was the only dissenting opinion to the ruling adopted, by sixteen votes to one, dismissing the student’s application.

Judge Mrs Tulkens questioned the way in which the European Court positioned itself with reference to the states “margin of appreciation” in similar cases in which freedom of thought, religion or belief was at stake. Why did the Court not practice a “judicial restraint” in cases such as *Serif v. Greece*, of 14 December 1999, or *Metropolitan Church of Bessarabia and others v. Moldova*, of 13 December 2001, where the religious freedom of religious communities was involved and the respondent states were the Orthodox Christian Greece and Moldova, whilst doing so in *Leyla Sahin v. Turkey* – a secular country with a strong Muslim history and society? In her view, “other than in connection with Turkey’s specific historical background, European supervision seems quite simply to be absent from the judgment” (paragraph 3 of the dissenting opinion). Indeed, in this case, when assessing the alleged grounds for interfering with the applicant’s right to freedom of religion through the ban on wearing the headscarf, the majority relied exclusively on the reasons given by the Turkish authorities and courts, that is, secularism and equality. Judge Tulkens’ dissent did not concern the content of these principles but the way they were applied to Leyla Sahin’s case, which did not involve any attempt to harmonise them with freedom.

Focusing on secularism, Judge Tulkens criticised the ECHR for not having reviewed Turkey’s margin of appreciation on the case. In her view, the European Court had adopted a position on the meaning of wearing the Islamic headscarf (a political symbol that impacts directly against the principle of secularism) by accepting (without question) the reasons given by the Turkish authorities. She thus based her criticism not only on the fact the Court adopted a position – which is not its role – but also that this position was mistaken insofar as it ignored the multiple meanings

associated with wearing the veil throughout Europe. In addition, she criticised the ruling insofar as it contained only a general assessment relating to a particular case. That is, the European Court did not answer Sahin's particular claim: whether the ban on wearing the Islamic headscarf violated her right to manifest her own beliefs. By contrast, it delivered a general ruling on the veil without taking into account the particular facts surrounding the prohibition (such as the particular attitude of students to the use of the veil and the fact that she claimed to agree with the principle of secularism). It seems interesting to me – as Judge Tulkens astutely points out – that this is an unusual form of the European Court's "argument technique" (its general approach in fact involves observing the particular attitude of the applicant in the case; "a test the Court has always applied in its case-law (*Kokkinakis v. Greece*, 25 May 1993, ECHR; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, ECHR)" (paragraph 7 of the dissenting opinion).

We now turn to the issue of the rights in conflict: if the ban on wearing the Islamic headscarf pursued the aim of protecting the rights and freedoms of others and public order, then how could the Court value this without going into the facts of the case? This is hardly possible. Nobody (neither the Turkish Government nor the Court itself) argued that Leyla Sahin had used the veil to exert pressure, provoke a reaction, proselytise or undermine the convictions of others. Nor did anybody give any evidence of disorder in daily university life as a result of the applicant wearing the Islamic headscarf. Nevertheless, the Court held the prohibition on wearing the veil was "necessary"... Why? It seems to me that reasons had nothing to do with Leyla Sahin's particular case. Behind the veil lies the Court's preconceived approach regarding the Turkish "context", when freedom of thought, conscience and beliefs is concerned. Somehow this approach could be found in the ECHR case *Refah Partisi and others v. Turkey* (February 2003), where the Court held: "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 practice that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention".

Focusing on equality, Judge Tulkens questioned the general approach that links the ban on wearing the headscarf with the protection of women's rights, also questioning in particular the internal limits of the Court's role. To assert, as the Court did, that 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", would be to go too far.

In conclusion, according to her dissenting opinion, the reasons given to prohibit wearing the Islamic headscarf were not relevant or sufficient. Accordingly, the measure adopted by University authorities was not "necessary in a democratic society": in her view, the applicant's right to freedom of thought, conscience and religion as guaranteed by Article 9 ECHR had been violated.

Judge Tulkens went on to consider the applicant's other claims, especially that which dealt with the right to education protected by Article 2 of the First Protocol to the ECHR. She understood that Leyla Sahin had "de facto" been deprived of the right of access to the University and, consequently, of her right to education. She tried to highlight the lack of proportionality of the measure adopted

by the University regarding the use of the Islamic headscarf. What I find most interesting in her opinion can be found almost at the end of the dissenting opinion (in paragraph 19), where she paid attention to the inherent absurd of the measure adopted by the University, an educational institution, which had nonetheless been accepted by the majority:

“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 (...) 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. (...). 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”.

3. *The coordinates*

The above ECHR case of *Leyla Sahin v. Turkey* was not certainly the only one concerning the use of the Islamic headscarf in educational institutions. It was noted at the outset that many cases involving this issue have arisen in European countries in recent years and have resulted in various judicial rulings or legislative measures.

What is really significant about Leyla Sahin’s case is that it serves as a perfect starting point for considering the legitimacy of a ban on the Islamic headscarf, as it contains a number of essential “coordinates” which should be borne in mind when resolving such conflicts, “coordinates” that we will now discuss.

What “coordinates” will help us *plot the course* of our research? That is, which specific factors do we need to take into account when measuring the legitimacy of prohibitions on the veil? We shall now refer to some of the elements which we have identified as relevant to that assessment.

Examining the facts in these cases, there are various significant coordinates against which the legitimacy of the measure can be mapped out.

The first refers in particular to the applicants, who are always women who cover themselves with the veil as a way of expressing their beliefs. We should consider whether the applicant is a teacher or a student at the educational institution where wearing the Islamic headscarf is forbidden; moreover, where the person concerned is a student we should focus on whether that student is a child or a young adult. Secondly, the types of veil involved differ: it may cover the head and neck but not the face, thus still making it possible to identify the women – an aspect that has been

considered to be very relevant in some recent disputes³; it may cover the whole body with the exception of face, hands and feet –as occurred in Shabina Begum’s case (UK, 2004 and 2006), or even involve the *burka* which also covers the face, leaving a little free space for the eyes). Still focusing on the applicant, it is also important to establish whether the wearing of the veil is also linked to any particular pattern of behaviour towards other students – namely in order to exert pressure, provoke a reaction, proselytise or undermine the convictions of others – or to consider any evidence of day-to-day disorders within the university. Besides this, it is also important to consider whether the veil is worn as the result of a personal decision or has more to do with tradition or even with collective/patriarchal pressure to wear it. These two last points are extremely sensitive as they contain a large element of subjectivity, which makes them difficult to prove.

The next step involves focusing on the educational institution responsible for imposing the prohibition. Two elements appear to be particularly relevant when determining its legitimacy: first, it is important to establish whether we are talking about primary and secondary education or about higher education, that is, a school or a University (pupils from a school could be more exposed to the potential pressures flowing from the use of the veil); second, we should ask whether the educational institution is private or public (the scope for determining educational conditions is not the same).

Moreover, it should be pointed out that none of the cases we are dealing with (and to which we shall refer below) give consideration to the opinion of those for whom the use of the veil could be detrimental, i.e. the students or their parents – especially where the pupils are particularly young children. We will see that the institutions responsible for the ban justify such measures by asserting that they protect the rights and freedoms of other students, but that the theoretical beneficiaries of the ban never participate in the debate. When reference is made to them in some rulings, it is precisely in order to point out that there are no real conflicts in educational institutions as a result of wearing the veil. Such measures are thus generally taken in order to confront a theoretical threat, or a mere potential for harm. In other words, none of the cases is based on an application made by a particular student or by someone from the student’s family against another student or teacher as a result of wearing a veil. On the contrary, it is always the woman who complains of the situation, not because the use of the veil has been rejected by pupils or parents but because it has been prohibited by the institution in which she works or studies.

It is possible to identify a fourth element which it is necessary to consider when freedom of thought, religion or belief is at stake. This is the role which freedom of religion plays within the State under whose jurisdiction the conflict develops. The situation within a confessional state, such as the UK which recognises an official religious confession and tolerates others, is not the same as that within a non-confessional State like Germany, which does not identify itself with any belief but does attribute legal relevance to religious organisations, which in turn is different from that within

³ See in particular the case of Aishah Azmi referred to at the beginning of this paper, the Muslim teaching assistant in a protestant school (Dewsbury, West Yorkshire) who was not allowed to wear the veil on school premises: the school highlighted students’ difficulties in understanding the teacher when she spoke with her face covered (only the eyes were visible).

a secular State like France, where church and state are strictly separated. This question is important because the courts take this into account when ruling on the legitimacy of measures outlawing the veil. The role which the ECHR plays in this kind of conflict seems to me to be of particular interest. It should consider the “margin of appreciation” of the respondent state without relinquishing its task of supervising that state’s decisions (“... European supervision cannot, therefore, be escaped simply by invoking the margin of appreciation”, *Leyla Sahin v. Turkey*, ECHR, dissenting opinion of Judge Tulkens, paragraph 3). It should not limit itself to accepting, for instance, a state’s decisions without question. In my view, when examining rulings handed down by the ECHR, the role which religion plays in a particular state becomes especially relevant due to the ECHR’s “margin-of-appreciation” approach. Sometimes this approach may be too wide.

We shall now undertake an examination of the measure itself.

It is necessary to distinguish, first, between prohibitions introduced by specific legislation (only the French case) and those confirmed in particular court judgments. For the latter, it is necessary to consider the particular facts of the case and the concrete way in which the court assesses the measure in its final ruling (sometimes this final ruling can be subsequently reversed, as recently occurred in the *Shabina Begum v. Denbigh High School* case, reversed by the House of Lords in March 2006, definitively dismissing the student’s claim). It is necessary to observe the way in which the judge identified the right or rights in conflict and struck a balance between them, along with the solution that was finally adopted.

It is necessary to focus first on the way the court considers the particular conflict: it may find that there is a conflict between fundamental rights or, perhaps, a single fundamental right whose limits should be defined. This aspect deserves especial consideration because it on occasion poses an additional problem: the problem of identifying those cases that allegedly deal with a conflict between fundamental rights, but in reality “hide” something different, the expression of which is not “politically correct” (namely, a preconceived approach to the meaning of the Islamic headscarf).

Second, it is important to focus on the result – the decision itself – i.e. to analyse the details of the solution finally adopted, thus questioning for instance whether the court identified the conflict as a conflict between fundamental rights or has considered it as a question of limits. Where the court finds that it was a question of conflicting rights, to what extent may one right restrict another? Does the giving of priority to one fundamental right imply an absolute sacrifice of the other one? Alternatively, is it possible to propose other measures that would have a less drastic effect on different rights of the applicant (such as for instance the right to education in *Leyla Sahin’s* case and the *Shabina Begum v. Denbigh High School* case; or the right to of access to a public position in *Fereshta Ludin v. Federal Constitutional Court of Germany*).

4. *The course*

We shall now consider the “course” set by the various rulings or rules on the basis of the “coordinates” sketched out above.

- The first case is *Dahlab v. Switzerland*, brought before the ECHR in 2001 (*Dahlab v. Switzerland*, 2001, ECHR, no. 42393/98) by a teacher in a public primary school in Switzerland. The school had banned the veil, having found that its use could have an impact on children between 4 and 8 years of age. In addition, the ban followed the dual purpose of upholding the confessional neutrality of education. In this case the material facts, or “coordinates” were therefore the following: first, the applicant was a primary school teacher, and thus in charge of pupils who could be easily influenced due to their young age and for whom the teacher functioned as a role model; secondly, she taught in a public school which, according to the decisions of the national courts, made her to some extent a “representative of the state”; thirdly, and closely related to the previous point, the veil was regarded as an ostentatious model of religious belief imposed on very young pupils; finally, the use of the veil had never given cause for complaint by the affected pupils’ parents.

The ECHR was confronted with the applicant’s claim against the Swiss state, following rejection both by the national education authorities and in the courts. The ECHR found that the case concerned the limits of the claimant’s fundamental rights (the principle of religious neutrality in public education, the principle of equality and non-discrimination on the grounds of sex that every teacher should convey in the performance of their professional duties). The European Court considered the application manifestly to be ungrounded (which is at least surprising, given the content of the ruling), rejecting the argument that teachers, as representatives of the state, have a particular positive duty of religious neutrality, especially given the lack of criticism or complaints during the 3 years she had been teaching before the authorities required her to stop wearing the headscarf, finding on the contrary that “it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect” on very young children. From this perspective, the ECHR’s opinion may be accepted, in the sense that the measure adopted is legitimate, because there has been a sufficient assessment of its aim and adequacy – its necessity and proportionality *stricto sensu*. Nevertheless, the ECHR’s ruling should have rejected the application, instead of considering it inadmissible.

- Our next case is Fereshta Ludin’s case, brought before the German Federal Constitutional Court in 2003. Ludin, a German national and Muslim of Afghan origin had applied for a post in a German school as a primary and secondary teacher (specialising in German, English, Economics and social and civic education). After having passed the relevant exams, the board of education in the state of Baden Württemberg ruled that she was not suitable for this public post as she intended to wear the veil in the classroom.

In this case, the most significant facts were the following: first, the fact the applicant had already been teaching at that school in a temporary position, during which period her use of the veil had

not caused any problems within the school. In this sense the question also arose as to whether wearing the veil might pose a real or simply hypothetical threat, as occurred in the previous case.

Secondly, other relevant elements are the conflict between fundamental rights, as identified by the German Constitutional Court. On the one hand, the applicant's right to express her religious beliefs by wearing the veil, which may be limited by the state's duty of religious neutrality in public schools; on the other hand, this right may be restricted by the "negative" freedom of religion consisting in the right of pupils and parents to choose the religious education which their children are to receive.

The German Constitutional Court referred expressly to the first aspect, finding that the protection of ideological and religious neutrality, as guaranteed in the Constitution, did not *per se* require the headscarf to be banned. In this sense it is possible to find a slight difference between the way the issue of the Islamic veil is dealt with in this as opposed to the previous case. In the previous case, the veil itself constituted a strong religious symbol which tended to provoke a certain rejection in judicial and educational institutions; in the latter case on the other hand, the veil seems to be considered in a more neutral way, or at least without the negative connotations which appear to be present in the previous and many other cases.

However, the Constitutional Court found the fundamental rights to be in conflict with Mrs Ludin's freedom of religion and, regarding the pupil's right to "negative" freedom of religion, stated that this did not imply any right not to be exposed to any religious symbol whatsoever or to require all symbols to remain hidden. In a certain sense, the court appears to have weighed the conflicting rights in a manner favourable to the teacher's claims. What is surprising therefore is the court's final decision: it is favourable to Mrs Ludin, but not as a consequence of a consideration of the question of conflicts of rights, but simply because it concluded that the school did not have a sufficient legal basis to take such measure, and therefore, until specific legislation is passed to authorise such decisions, court rulings would be uphold the right to wear the veil. This judgment was accompanied by several dissenting opinions. One of them in fact questioned the decision because it did not take a stand on the conflicting rights, in spite of the fact that it carefully identified them and considered them in the reasoning leading up to its decision. Does this suggest that the court wished to follow an elegant line of reasoning, or simply that it did not want to commit itself?

- Continuing in chronological order, we must now discuss the French law of March 2004 which banned, as of the beginning of the academic term 2004-2005, the use of "ostensible" religious symbols in public schools (*Law No. 2004-228, regulating, in accordance with the principle of secularism, the wearing of symbols or clothing manifesting a religious affiliation in state primary and secondary schools*, JO No. 65 17 March 2004, p. 5190)

It is now necessary to focus on the case involving the prohibition on the wearing of the veil in French schools, irrespective of whether the veil is worn by pupils, teachers or even other women working for the school. This measure aims to protect the values of the Republic, namely

secularism. The material facts of this case are the following: first, the norm – a law - was adopted in a state, France, whose identity is somehow defined by the strict separation between the church and state. Second, there is no other similar bans contained in specific legislation and which apply to primary education throughout the country.

Is this a measure that, with the fictitious aim of banning any visible sign of religious affiliation, is really intended to prohibit the Islamic headscarf at school (we should not forget that the above provision did not prevent the pupils from using “discreet religious signs”, which suggests, for example, that it did not intend to ban the Christian crucifix). In passing the ban, the French parliament did not outlaw the particular expression of faith through the wearing of the veil in public, but rather the goal of Muslims – at least in the opinion of Parliament - of distinguishing themselves from other non-believers. As the specific legislation shows (the circular of 18 May 2004, J.O No. 118 of 22 May 2004, p. 9033), its aim is to prevent the visible manifestation of religious affiliation, simply because it is *ostensible*, that is “capable of being ostentatious”, irrespective of the real will of the pupil or teacher wearing the veil. Underlying the legislator’s approach is the preconceived perception of the headscarf as a political symbol of a certain belief that is not welcome in French society. It may well be the case that certain forms of religious fundamentalism use the veil as a political vehicle for obtaining a political result; however, not all women who wear the headscarf are fundamentalists.

Even though the principle of proportionality does not apply in the same way to Parliament as it does in the courts, some elements of the French ban lead us to question that prohibition. Could be the measure adopted be understood as “necessary in a democratic society” within the meaning of Article 9(2) ECHR? In other words, is this measure the least restrictive one? Is this measure the best available for obtaining the goal pursued –namely the application of the principle of secularism in public schools - after balancing the benefits to society and the harm to women of a ban on the veil?

In my view, there are many other means of apply the principle of secularism in public education that seem to be more suitable and less restrictive on freedom of thought, religion and belief than a general ban such as the one contained in the law: for instance, a clampdown on selective absenteeism in natural science or physical education classes.

- We now turn to the case explained in full at the start of this paper, that is *Leyla Sahin v. Turkey*, June 2004 and November 2005, ECHR, No.44774/98. In this case, the conflict concerned a university student who wore the Islamic headscarf during her first four academic years at Bursa University, and encountered problems following a move to Istanbul University. In this university, an internal dress code prevented the veil from being worn during certain activities including “lectures, courses or tutorials”. The most relevant elements were, in the case, the following: first, the role played by Islam in Turkey, a state where the vast majority of the population is Muslim, although secularism constitutes the cornerstone of Republican values. This first element should also be understood in the light of its recent history during which fundamentalist political movements started to emerge: every single Turkish institution

(including the Constitutional Court) seemed to fight against the threat posed by fundamentalism, that is, the restoration of an Islamic state. The second important element is certainly related to the first: wearing the veil is perceived by Turkish institutions as the political symbol associated with that threat. The Turkish Courts dismissed the applicant's arguments in a general and abstract manner, without providing any concrete example relevant to the circumstances of this case - for instance the fact that the case did not involve a child (as occurred in the cases referred to above) but a young adult woman. The court found that the case involved a conflict between fundamental rights (the freedom to manifest one's religion by using the veil *versus* the others' "negative" freedom of religion), although the conflict appeared simply to hide the question of limits on the applicant's right to manifest her religion, with the veil appearing to be "censured" on abstract grounds.

The European Court accepted Leyla Sahin's application against the Turkish state. According to the Court's approach to the case in its 2004 judgment, the Turkish authorities were "better placed" to decide what to do in such a sensitive area (on account of the margin of appreciation of states) and in so doing they did not violate any Convention provision. As we already know, the case was appealed to the Grand Chamber, which found that there had been no violation of the Convention (with particular reference to Articles 9 ECHR and 2 of the First Protocol). However, the ruling was not unanimous, and was accompanied by the dissenting opinion of Judge Tulkens. She argued that there had been a violation of Article 9 of the Convention and Article 2 of the First Protocol. In reaching this conclusion Judge Tulkens analysed the aim pursued by regulations on the wearing the veil in higher education institutions, and the proportionality between this goal and the measure itself. As a result of this analysis, the Judge concluded that the reasons given by the majority in finding the interference to be "necessary in a democratic society" pursuant to Article 9(2) of the Convention were irrelevant and insufficient. More specifically, she criticised the majority's ruling insofar as it did not answer the questions posed by the applicant regarding her particular behaviour at university, nor did it weigh up the possibilities of other measures having less drastic effect on the applicant's right to an education, and did not weigh up "the competing interests" (damages/benefits) in the case.

- The following case is the *Raihon Hudoyberganova* case of 18 January 2005, UN Human Rights Committee (CCPR/C/82/D/931/2000) Communication, the material facts of which were largely similar to the *Leyla Sahin* case, with Uzbekistan as the respondent state. Again, the case involved a university student and an internal circular banning the use of the Islamic headscarf on university premises. This time, however, Uzbekistan was condemned by the Human Rights Committee for violation of the applicant's freedom of religion through the ban on wearing the veil. In the Committee's view, there had been absolutely no appreciation of the fact that there had been an interference with the freedom to manifest one's religion by using the veil, and that such limitations could only be imposed in accordance with the International Covenant on Civil and Political Rights. It is necessary that such measures pursue a legitimate aim and can be considered necessary in a democratic society. This limitation was not properly justified in this particular case, and therefore the Committee found that Uzbekistan had violated Article 18(2) ICCPR.

- It is finally necessary to refer to one of the most controversial cases: *Shabina Begum v. Headteacher and Governors of Denbigh High School* [2004]. Although the ruling was handed down in 2005, it was reversed by the House of Lords on 22 March 2006. This case involved a primary and secondary public school in Luton, England, where the applicant had studied for several years before being rejected for not wearing the school uniform. Some basic facts are already known, the case concerning a state-run non-confessional school within a confessional State, the UK. However, there are also a number of new elements: the veil in question was of a particular kind (a full-length gown referred to in the case as a *jilbab*) that covers the whole body with the exception of face, hands and feet. The most interesting elements in Shabina Begum's case are, therefore, the following: on the one hand, we are dealing with a conflict over the wearing of the Islamic headscarf in a country like the United Kingdom that recognises the Anglican Church as the official Church and tolerates other faiths; on the other hand, the school is state-run and non-confessional, in which the cultural and religious plurality of its community presumably deserves recognition. In addition, the school has a meticulous and sensible – I would say – uniform policy, aimed at contributing to the members' internal cohesion, without disregarding the different religious sensibilities (to illustrate the truth of this, an item called *shalwar kamezee*, a long traditional garment from the Indian subcontinent was integrated to the school uniform, with the specific agreement of the Islamic community, which enjoyed a considerable representation within the school). It was in this multicultural context where the unfortunate incident occurred which resulted in Shabina Begum being excluded from the school: wearing the school uniform became the *sine qua non* condition for her return, and the school failed in all attempts to find an alternative solution for her schooling.

The 14 year-old student claimed that the school had violated her rights to freedom of thought, religion and belief, as well as to an education, as guaranteed by ECHR (incorporated in a particular manner under the British Constitution by virtue of the Human Rights Act 1998). In March 2005 the Court of Appeal accepted her application, holding there had been an interference with the student's freedom of religion. In the Court's view, no justification for the interference had been provided by the school authorities; by contrast, the school had simply defended its uniform policy. The aim pursued by that uniform policy appeared (also to the Court of Appeal!) without doubt to be commensurate, and hence the objection essentially concerned the way in which the uniform provisions were applied to Shabina Begum's case (namely proportionality). According to the Court of Appeal, other schools could in future successfully defend their uniform policies by balancing the conflicting rights in the right way. The court even discussed the best course to be followed, with precise indications in relation to the proper "argumentative *iter*".

However, by following the proper "course", that is, giving appropriate justification for the limitation, the House of Lords reversed the lower court's ruling in March 2006, now dismissing the student's claims. The new found that a whole range of sensitive elements had to be considered when assessing the proportionality of the measure, including in particular

the significant attempts by the school to integrate the student in to the school community without renouncing to its uniform policy.

5. Conclusion

It is now time to draw some conclusions, that is, to share some final thoughts and reflect on our initial question: “the Islamic headscarf: Does context matter?” which, actually, means: “to what extent does context matter?”

One of our premises is that the assertion that freedom of thought, conscience and religion, as any other fundamental right, is not absolute. This means that it can be subject to limitations, as long as such limitations be prescribed by law and “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”, pursuant to Article 9 ECHR.

It is now necessary to consider the particular conflict considered in this paper: the wearing of the Islamic headscarf in educational institutions. Using the Islamic headscarf constitutes, undoubtedly, an exercise of the freedom to manifest one's religion or beliefs, through the use of a particular garment of religious significance. Hence the prohibition on its use is also, undoubtedly, a measure that interferes with that freedom to manifest one's religion or beliefs.

In that sense, every single case referred to in this paper falls under the same schema. They all refer to a Muslim woman who covers herself with a veil to express her beliefs, and the prohibition of this practice by the educational institution which she attends as a teacher or student, resulting in her making a complaint before the courts. The only exception is the French case which, from the outset, derives not from a particular conflict but from specific legislation banning the use at school of “ostentatious religious symbols”. The ban on wearing the Islamic headscarf occurs therefore, in the French case, *ope legis*. Far from being of secondary importance, this fact has an enormous impact, because the courts and Parliament do not approaches the issue in the same manner with respect to conflicting rights issues. Therefore, in most cases, it has been necessary to focus on a court rulings, which implies the use of specific legitimacy benchmarks in relation to the measures adopted. It also implies a particular approach to the conflict: one which reflects the applicant's view, whose application constitutes the basis for the court's work.

The fact that most cases follow a very similar schema does not however imply that the assessment of the measures adopted must necessarily be the same, because, as we have already noted, there are too many different material circumstances. In some cases, banning the veil could be considered justifiable on the facts. But this should not be necessarily taken for granted in other cases dealing with an identical restriction of the freedom to manifest one's religion⁴. And the same argument

⁴ It should also be remembered how in Leyla Sahin's case the student recognised, in the observations she submitted to the Grand Chamber on 27 January 2005 that she was not seeking legal recognition of a right for all women to wear the Islamic headscarf in all places, *inter alia* in these terms: “Implicit in the section judgment is the

applies *a contrario*: the legitimacy of the measure need not be denied simply because it has been denied previously.

To conclude, legitimacy of the measure adopted depends on the facts of each particular case. Far from being obvious, this assessment tries to offer an answer to the frequent social questioning posed both “in favour of” or “against” the ban. In my view, the ban on wearing the Islamic headscarf cannot be assessed in the abstract, because where the Islamic headscarf is concerned *context really matters*. It is not possible to settle the conflict once and for all, declare ourselves to be in favour or against the ban. It will always be necessary to consider whether the measure adopted has been legitimate on a specific occasion, as this depends entirely on the circumstances of each particular case. In other words, to draw conclusions on some of the cases discussed in this paper, in the opinion of the author the assessment of the prohibition of the veil is not for example the same in the case *Dahlab v. Switzerland* as it is in the case *Leyla Sahin's v. Turkey*. This is for the simple reason that in the first case the woman wearing the veil was a schoolteacher and her pupils were children of a young age (persuasive arguments at present indicate that such a garment may exercise a huge influence on children). On the other hand, in the second example chosen the woman wearing the veil was an adult student who was censured for defying by her individual conduct the system enshrined in the constitutional order of her state, which is at the very least a questionable assertion given the particular facts of the case.

6. ECHR Decisions

<i>Date</i>	<i>Ref.</i>	<i>Case</i>
29.6.2004	JUR 2006\204654	<i>Zeynep Tekin v. Turquía</i>
8.1.2004	JUR 9414	<i>Leyla Sahin v. Turquía</i>
10.7.2003	TEDH 162877	<i>Murphy v. Irlanda</i>
13.12.2001	-	<i>Metropolitan Church of Bessarabia and others v. Moldavia</i>
31.7.2001	TEDH 2001\496	<i>Refah Partisi and others v. Turquía</i>
15.1.2001	-	<i>Dahlab v. Switzerland</i>
26.10. 2000	-	<i>Hasan and Chaush v. Bulgaria</i>
14.12.1999	TEDH 70	<i>Serif v. Grecia</i>
30.1.1998	TEDH 1	<i>United Communist Party of Turkey and Others v. Turquía</i>
25.5.1993	TEDH 1993\21	<i>Kokkinakis v. Grecia</i>

notion that the right to wear the headscarf will not always be protected by freedom of religion. [I] do not contest that approach” (par. 73).