

Quick Reference Rules of Law

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Şahin v. Turkey

Turkish Muslim (P) v. Sovereign state (D)

Eur. Ct. of Human Rights, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2005).

NATURE OF CASE: Application alleging violations of rights and freedoms under the Convention for the Protection of Human Rights and Fundamental Freedoms.

FACT SUMMARY: Şahin (P), a Turkish Muslim, claimed the Republic of Turkey (Turkey) (D) violated her rights and freedoms under the Convention for the Protection of Human Rights and Fundamental Freedoms by banning the wearing of the Islamic headscarf in institutions of higher education.


RULE OF LAW

The ban by a secular country on wearing religious clothing in institutions of higher education does not violate students' rights and freedoms under the Convention for the Protection of Human Rights and Fundamental Freedoms.

FACTS: Şahin (P), a Turkish Muslim, came from a traditional family of practicing Muslims and considered it her religious duty to wear the Islamic headscarf. When she was a fifth-year student at the faculty of medicine of the University of Istanbul, in 1998, the Vice-Chancellor of the University issued a circular directing that students with beards and students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials. Subsequently, Şahin (P) was denied access to a written examination on one of the subjects she was studying because she was wearing the Islamic headscarf, and university authorities refused on the same grounds to enroll her in a course, or to admit her to various lectures and another written examination. She left Istanbul in 1999 to pursue her medical studies at the Faculty of Medicine at Vienna University and has lived in Vienna since then. Before moving, Şahin (P) filed an application against the Republic of Turkey (Turkey) (P) with the European Commission of Human Rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, alleging that her rights and freedoms under the Convention had been violated by the ban on the wearing of the Islamic headscarf in institutions of higher education. The European Court of Human Rights heard the case and rendered a judgment.

ISSUE: Does the ban by a secular country on wearing religious clothing in institutions of higher education violate students' rights and freedoms under the Convention for the Protection of Human Rights and Fundamental Freedoms?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.] No. The ban by a secular country on wearing religious clothing in institutions of higher education does not violate students' rights and freedoms under

the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). Turkey (D) is constitutionally a secular ("laik" in Turkish) state founded on the principles of equality without regard to distinctions based on sex, religion, or denomination. Historically, Turkey (D) banned wearing religious attire other than in places of worship or at religious ceremonies, and the nation's religious schools were closed and came under public control. The wearing of the Islamic headscarf in educational institutions is a relatively recent development and has engendered much debate in Turkish society, which has taken on strong political overtones. Some see the Islamic headscarf as a symbol of a political Islam, and this has been perceived as a threat to republican values and civil peace. Turkey's (D) Constitutional Court decided in 1989 that granting legal recognition to a religious symbol such as the Islamic headscarf was not compatible with the principle that state education must be neutral and might generate conflicts between students of different religions. In 1990, transitional section 17 of Law no. 2547 entered into force, providing that: "Choice of dress shall be free in higher-education institutions, provided that it does not contravene the laws in force." In 1991, the Constitutional Court ruled that this provision did not permit headscarves to be worn in higher-education institutions on religious grounds and so was consistent with the Constitution. In explaining the ban on the headscarf at the University School of Medicine, the school's Vice Chancellor circulated a memorandum in which he emphasized that the ban was not intended to infringe on students' freedom of conscience or religion, but to comply with the laws and regulations in force, and that such compliance would be sensitive to patients' rights. In arguing that the ban on wearing the Islamic headscarf in higher-education institutions constituted an unjustified interference with her right to freedom of religion, and, in particular, her right to manifest her religion, Şahin (P) relied on Article 9 of the Convention, which provides: "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." Thus, the Court must decide whether the ban interfered with Şahin's

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(P) rights under Article 9, and, if so, whether the interference was "prescribed by law," pursued a legitimate aim and was "necessary in a democratic society" within the meaning of Article 9 § 2 of the Convention. As to the first issue, because Şahin (P) was wearing the headscarf to obey a religious precept, the ban interfered with her right to manifest her religion. This leads to the second issue—whether such interference was supported under Article 9 § 2. The phrase "prescribed by law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. Here, transitional section 17 of Law no. 2547 provided the legal basis for interference under Turkish law and satisfies the requirements that it be specific and its consequences foreseeable. Additionally, the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order. The freedom enshrined in Article 9, which is a foundation of democratic society, is the freedom to hold or not to hold religious beliefs, and to practice or not practice a religion. While religious freedom is primarily a private matter, it also implies freedom to manifest one's religion in community with others, in public and within the circle of those whose faith one shares. Nonetheless, Article 9 does not protect every act motivated or inspired by religious belief. In democratic societies, in which several religions coexist within the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. The state has a duty to be neutral in ensuring that there is public order, religious harmony and tolerance in a democratic society, and ensuring that there is mutual tolerance between opposing groups. This does not entail the elimination of pluralism, which along with tolerance and broadmindedness are hallmarks of a democratic society. Instead, this requires a balancing that ensures fair treatment of minorities without abuse of a dominant group, even if individual interests must sometimes be subordinated to those of a group. Where there is great divergence of opinion on certain issues—such as the wearing of an Islamic headscarf—the national decision-making body's role must be given great importance. Rules on such issues may vary greatly from one country to the next according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Each state, therefore, must, to a certain degree, be permitted to decide the extent and form such regulations should take based on the domestic context. This "margin of appreciation" requires the Court to decide whether the measures taken at the national level were justified and proportionate. In determining the boundaries of this margin of appreciation, the Court must keep in mind the state's need to protect the rights and freedoms of others, to preserve public order, and to secure civil peace and true religious pluralism, which is vital to the

survival of a democratic society. The Court has previously stressed that the headscarf is a "powerful external symbol" that is hard to reconcile with the principle of gender equality or the message of tolerance, respect for others, and, above all, equality and non-discrimination. Applying these principles here, considering the question of the Islamic headscarf in the Turkish context, it is observed that the wearing of the headscarf may have a great impact on those who choose not to wear it, given that the majority of the population, while professing a strong attachment to the rights of women and a secular way life, are Muslims. The impugned interference therefore serves the key goals of secularism and equality. Additionally, the headscarf has taken on political significance as extremist political movements in Turkey (D) seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts. It has previously been held that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience. Here, the ban serves to preserve pluralism in the university. Accordingly, the objectives of the ban were legitimate. This leads to the issue of whether there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference. The ban did not prohibit Muslim students from manifesting their religion in accordance with habitual forms of Muslim observance, and it was not directed only at Muslim attire. Thus, the Court should not substitute its view for that of the university authorities, who are better placed to evaluate local needs. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief and does not confer on people who do so the right to disregard rules that have proved to be justified. Giving due regard to Turkey's (D) margin of appreciation, the interference here was justified in principle and proportionate to the aim pursued. Therefore, Article 9 has not been breached.

DISSENT: (Tulkens, J.) Not only is secularism necessary for the protection of a democratic society, so is religious freedom. The Court should have established, therefore, that the ban on wearing the Islamic headscarf was necessary to secure compliance with secularism and met a "pressing social need." However the Court does not adduce concrete examples that support such a position. The religious freedom at issue is the freedom to manifest one's religion, but the Court has not had much opportunity to opine on this freedom. In the instant case, the Court failed to address Şahin's (P) argument that she had no intention of calling into question the principle of secularism—because she believes in it. Second, no evidence was adduced to show that Şahin (P) in fact contravened the principle of secularism by wearing the headscarf. Further, the Court relies on precedent concerning a teacher—not students. Whereas teachers are role-models, students are not. There was also

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no evidence that the headscarf worn by Şahin (P) was intended to proselytize, spread propaganda, or undermine others' convictions, or that there was any disruption in teaching or in everyday life at the University, or any disorderly conduct, that resulted from her wearing the headscarf. In fact, the Court finds justification for the ban on the need to mitigate the threat posed by "extremist political movements." While everyone agrees on the need to prevent radical Islamism, there has not been a showing that wearing a headscarf is associated with fundamentalism. Not all women who wear the headscarf are extremists. Accordingly, the ban on wearing the headscarf was not based on relevant or sufficient reasons and therefore cannot be deemed interference that is "necessary in a democratic society" within Article 9 § 2's meaning. Şahin's (P) right to freedom of religion under the Convention has therefore been violated.

▶ ANALYSIS

Margin of appreciation is the word-for-word English translation of the French phrase "marge d'appréciation," a concept used in a number of courts in Europe, among them the Strasbourg human rights court and the European Union courts in Luxembourg. It means, roughly, the range of discretion. As this case demonstrates, it is a concept the European Court of Human Rights has developed when considering whether a signatory of the European Convention on Human Rights has breached the declaration. The margin of appreciation doctrine allows the Court to account for the fact that the Convention will be interpreted differently in different signatory states, so that judges are obliged to take into account the cultural, historic, and philosophical contexts of the particular nation in question.



Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

[Parties not identified.]

I.C.J., Advisory Opinion, 2004 I.C.J. 136.

NATURE OF CASE: Advisory opinion of the International Court of Justice.

FACT SUMMARY: [Facts not stated in casebook excerpt.]



RULE OF LAW

The International Covenant on Civil and Political Rights is applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory.

FACTS: [Facts not stated in casebook excerpt.]

ISSUE: Is the International Covenant on Civil and Political Rights applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.] Yes. The International Covenant on Civil and Political Rights (Covenant) is applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory. The scope of the Covenant's application is defined by Article 2, paragraph 1, which provides that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . ." This language can be interpreted to mean that only individuals in a state's territory and subject to its jurisdiction are covered by the Covenant. However, it can also be interpreted as covering both individuals present in a state's territory and those outside the territory, but subject to the State's jurisdiction. A state's jurisdiction is primarily territorial, but may in certain cases also be exercised extraterritorially. Given the Covenant's goals and purpose, it seems natural that this latter interpretation should apply. This is in keeping with the practice of the Human Rights Committee, which has found the Covenant applicable where the state exercises jurisdiction on foreign territory. The Covenant's history, found in the travaux préparatoires (preparatory work), confirms such an interpretation by showing that the drafters did not intend to permit states to escape their obligations when they exercise jurisdiction outside their national territory, but only intended to prevent persons residing abroad from asserting, vis-à-vis their state of origin, rights that do not fall within the competence of that state, but that of the state of residence.

▶ ANALYSIS

Contrary to the I.C.J.'s view in this Advisory Opinion, the history of the Covenant seems to support the plain meaning of Article 2, paragraph 1, namely that only individuals in a state's territory and subject to its jurisdiction are covered by the Covenant. As originally drafted, the Covenant would have required each state party to ensure Covenant rights to everyone "within its jurisdiction." The United States, however, amended this to "within its territory." The Covenant was passed with the amendment. Thus, the original intent of the drafters and the practice of the ratifying states is at odds with the I.C.J.'s opinion.



Quicknotes

ADVISORY OPINION A decision rendered at the request of an interested party of how the court would rule should the particular issue arise.

JURISDICTION The authority of a court to hear and declare judgment in respect to a particular matter.

