CHAPTER TEN


I. Introduction

On June 29, 2004, the European Court of Human Rights (Court) decided Şahin v. Turkey in a unanimous vote of its Fourth Section. Leyla Şahin, a Turkish national, sued the Republic of Turkey, asking the Court to declare that a ban on wearing the Islamic headscarf in higher education institutions violated her rights and freedoms under Articles 8, 9, 10, and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) and Protocol No. 1 of the Convention (Protocol 1). The Court dismissed a preliminary objection of the Turkish Government concerning the exhaustion of domestic remedies and ruled that there was no violation of Article 9 of the Convention and that no separate question arose under the other provisions Ms. Şahin invoked. The judgment will become final in accordance with Article 44(2) of the Convention.

In general, the decision is consistent with the Court’s previous rulings based on the recognition of every state’s margin of discretion to determine its own legal system. The decision also should be considered in light of recent developments

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1. Şahin v. Turkey, App. No. 44774/98 (Eur. Ct. H.R. June 29, 2004), available at http://www.echr.coe.int/Eng/Judgments.htm. The author of this article used the English text of the decision that may be subject to editorial revision. The Court made the ruling definitive on November 10, 2005.


4. Şahin, at para. 117.

5. Id. at opening remarks.

affecting the relationship between religion and state. That background includes the debate on the place of God and religious traditions in the proposed European Constitution; the Ten Commandments and the Pledge of Allegiance cases before the U.S. Supreme Court; Spain’s plans regarding separation of church and state; and the situation in France, where the ban on wearing the Islamic foulard (headscarf) entered into force shortly before the writing of this article.

Did the Court strictly follow its own case law? Has the Court, while approving the appealed Turkish measures, taken a line similar to that of most European countries, or did it go beyond that? I comment on the case from a purely secular and human rights approach. As editors of a recent major volume on freedom of religion point out, public debates on wearing headscarfs or other comparable religious symbols in public settings pervade “the crucial sectors of modern life—from culture and civil society, to politics and identity, to security and conflict.”

Starting with a summary of the facts of the Şahin case and the background of Turkish law and practice regarding legislation, judicial decisions, and government

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8 See Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003) (holding that the state legislature had a valid, secular purpose for authorizing the installation of a Ten Commandments monument, which did not have the primary effect of advancing or inhibiting religion from the eyes of the reasonable observer), cert. granted, 125 S.Ct. 346 (U.S. Oct. 12, 2004) (No. 03-1500); ACLU of Kentucky v. McCreary County, 354 F.3d 438 (6th Cir. 2003) (posting of the Ten Commandments in the county courthouse and schools violated the Establishment Clause), cert. granted, 125 S.Ct. 310 (U.S. Oct. 12, 2004) (No. 03-1693). See also David Stout, Ten Commandments case taken up by Supreme Court, INT’L HERALD TRIBUNE, Oct. 13, 2004, at 5 (discussing the U.S. Supreme Court’s acceptance of certiorari to hear Texas and Kentucky cases regarding the constitutionality of displaying the Ten Commandments on government property).


12 For the author’s views on state and religion, see generally Natan Lerner, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW (2d ed. 2003).

13 Tore Lindholm et al., Introduction, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK xxviii (Tore Lindholm et al. eds., 2004).