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**Committee on the Elimination of Discrimination  
against Women**

**Thirty-fourth session**

16 January-3 February 2006

**Decision of the Committee on the Elimination of Discrimination  
against Women under the Optional Protocol to the Convention on  
the Elimination of All Forms of Discrimination against Women  
(thirty-fourth session)**

concerning

**Communication No. --8/2005**

<i>Submitted by:</i>	Rahime Kayhan
<i>Alleged victim:</i>	The author (represented by counsel, Ms. Fatma Benli)
<i>State party:</i>	Turkey
<i>Date of communication:</i>	Dated 20 August 2004
<i>Document references:</i>	Transmitted to the State party on 10 February 2005 (not issued in document form)

*The Committee on the Elimination of Discrimination against Women,*  
established under article 17 of the Convention on the Elimination of All Forms of  
Discrimination against Women,

*Meeting on 27 January 2006*

*Adopts the following:*

## **Decision on admissibility**

1.1 The author of the communication dated 20 August 2004, is Ms. Rahime Kayhan, born on 3 March 1968 and a national of Turkey. She claims to be a victim of a violation by Turkey of article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsel, Ms. Fatma Benli, Attorney at law. The Convention and its Optional Protocol entered into force for the State party on 19 January 1986 and 29 January 2003, respectively.

### **The facts as presented**

2.1 The author, a teacher of religion and ethics, is married and the mother of three children between the ages of two and 10. She has worn a scarf covering her hair and neck (her face is exposed) since the age of 16, including while studying at a State university.

2.2 On 26 September 1991, the author was hired to work at Bursa Karacabey Imam Hatip High School, a State school under the Ministry of Education. She began to teach at Erzurum Imam Hatip High School on 12 September 1994 and taught at that institution for the next five years until her transfer to Mehmetcik Middle School. She wore a headscarf when she got her first appointment and when she was photographed for her identification cards (for example on her driver's licence, teacher ID, health insurance card, etc.).

2.3 On 16 July 1999, she received warnings and then a deduction was taken from her salary (1/30) for wearing a headscarf. The author appealed against this penalty and, during the proceedings Amnesty Law No. 4455 came into effect and the warnings and penalty were removed from her record.

2.4 On 13 January 2000, the author received a document stating that an investigation had begun into a claim that she did not obey regulations on appearance, that she entered the classroom with her hair covered and that she spoiled the peace, quiet, work and harmony of the institution with her ideological and political objectives. She was asked to submit a written statement.

2.5 On 8 February 2000, the author defended herself by pointing out that she had in no way acted in a manner that would spoil the peace and quiet of the institution. She had worked hard during the past eight years despite having two infants, she had never had political or ideological objectives, she had been praised so many times by the inspectors for her teaching successes and was a person who loved her country and was devoted to the republic and democracy and that she aimed to help raise Turkish youth to be devoted to their country and nation.

2.6 On 29 March 2000, the Ministry of Education informed the author that she had the right to study her file and defend herself orally or be defended by counsel.

2.7 The author responded by sending the sworn statements of 10 persons who claimed that the accusations and imputations against her were untrue. Her lawyer made written and oral statements to the Higher Disciplinary Council, stating that the allegations against the author were untrue and that there were no indications that she had "spoiled the harmony in the investigation report". If she were to be punished, it would amount to a violation of national and international principles of law, including freedom to work, of religion, conscience, thought and freedom of choice.

It would also be discrimination and a violation of the right to develop one's physical and spiritual being.

2.8 The author states that on 9 June 2000, she was arbitrarily dismissed from her position by the Higher Disciplinary Council. The Council's decision suggested that the author's wearing of a headscarf in the classroom was the equivalent of "spoiling the peace, quiet and work harmony" of the institution by political means in accordance with article 125E/a of the Public Servants Law No. 657. As a result, she permanently lost her status as a civil servant. The author lost, inter alia, her means of subsistence to a great extent, the deductions that would go towards her pension entitlement, interest on her salary and income, her education grant and her health insurance. She would be unable to teach in a private school as well while wearing a headscarf allegedly because the private schools in Turkey depend on the Ministry of National Education. Nobody would want to employ a woman who had been given the gravest of disciplinary penalties.

2.9 On 23 October 2000, the author appealed to Erzurum Administrative Court demanding that the dismissal be cancelled because she had not violated article 125E/a of the States Officials Act by wearing a headscarf. At most she should have been reprimanded or condemned — not dismissed. She claims that the penalty lacked a legitimate purpose and was not a necessary intervention for a democratic society.

2.10 On 22 March 2001, Erzurum Administrative Court refused the appeal, finding that her punishment did not violate the law.

2.11 On 15 May 2001, the author appealed against the decision of Erzurum Administrative Court to the State Council, and claimed that in order to apply article 125E/a of the Public Servants Law No. 657, a concrete act to upset public order will have had to be committed. There was no evidence of the author committing such an act. She had covered her head and thus had violated the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments.

2.12 On 9 April 2003, the Chair of the 12th Department of the State Council rejected this appeal, upholding the judgement of the Erzurum Administrative Court on grounds that it was justified in procedure and law. The author was notified of the final decision on 28 July 2003.

### **The complaint**

3.1 The author complains that she is a victim of a violation by the State party of article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. By dismissing her and terminating her status as a civil servant for wearing a headscarf, a piece of clothing that is unique to women, the State party is said to have violated the author's right to work, her right to the same employment opportunities as others, as well as her right to promotion, job security, pension rights and equal treatment. Allegedly she is one of more than 1,500 women civil servants who have been dismissed for wearing a headscarf.

3.2 The author also claims that her right to a personal identity includes her right to choose Islamic attire without discrimination. She considers that the wearing of a headscarf is covered by the right to freedom of religion and thought. Had she not considered the headscarf so important and vital, she would not have jeopardized her family's income and future. The author considers that the act of forcing her to make

a choice between working and uncovering her head violates her fundamental rights that are protected in international conventions. She believes it to have been unjust, legally unforeseeable, illegitimate and unacceptable in a democratic society.

3.3 The author complains that the action taken against her was arbitrary because it was not grounded in any law or a judicial decision. The only dress code is the so-called Regulation relevant to the Attire of the Personnel working in Public Office and Establishments of 25 October 1982, which specifies that “Heads should be uncovered at the work place” (art. 5). It is alleged that this regulation no longer applies in practice and that persons who have disobeyed it have not been warned or disciplined.

3.4 The author also claims that the punishment for violating article 125A/g of the Public Servants Law No. 657 on the issue of clothing is a warning (for the first infraction) and condemnation (for a repeated infraction). Instead of this, the author was allegedly punished for the crime of “breaking the peace, silence and working order of the institutions with ideological and political reasons” without evidence of her having committed the offence. She maintains thus that the decisions of the Erzurum Administrative Court and the State Council were based on the application of the wrong provision. They do not answer the question of why the acts of the defendant were considered political and ideological actions. She questions why the administration had permitted her to wear a headscarf for nine years if it had been an ideological action.

3.5 The punishment to which she was subjected restricted her right to work, violated equality among employees and fostered an intolerant work environment by categorizing persons according to the clothes that they wear. She claims that had she been a man with similar ideas, she would not have been so punished.

3.6 Having been unjustly expelled from the civil service and her teaching position, the author feels compelled to have recourse to the Committee and requests it to find that the State party has violated her rights and discriminated against her on the basis of her sex. She further requests the Committee to recommend to the State party that it amend the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments, prevent the High Disciplinary Boards from meting out punishment for anything other than proven and concrete offences and lift the ban on wearing headscarves.

3.7 As to the admissibility of the communication, the author maintains that all domestic remedies have been exhausted with her appeal to the State Council. She also states that she has not submitted the communication to any other international body.

#### **The State party’s submission on admissibility**

4.1 By submission of 10 May 2005, the State party argues that domestic remedies have not been exhausted in that the author did not bring an action in accordance with the Regulation on the Complaints and Applications by Civil Servants, which was adopted by decree 8/5743 of the Council of Ministers on 28 November 1982 and published in the Official Gazette on 12 January 1983. Moreover, she did not bring an action before the Turkish Parliament (Grand National Assembly) under article 74 of the Constitution and she did not use the remedy provided under section

3 (Remedies against Decisions), article 54 of the Law on Administrative Judicial Procedures.

4.2 The State party contends that the same matter has been examined by another procedure of international investigation. In particular, the European Court of Human Rights examined a similar case in which the applicant, Leyla Sahin claimed that she was unable to complete her education because of wearing a headscarf and that this constituted a violation of the European Convention on Human Rights. The Court ruled unanimously that article 9 of that Convention (freedom of thought, conscience and religion) was not violated and that there was no need to further examine the claims that article 10 (freedom of expression), article 14 (prohibition of discrimination) and article 2 of Protocol No. 1 Additional to that Convention (education) were violated.

4.3 The State party argues that the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for Turkey in 2002. The author was dismissed on 9 June 2000 and her communication is therefore inadmissible in accordance with article 4, paragraph 2 (e) of the Optional Protocol.

4.4 The State party also submits that the communication violates the spirit of the Convention because her claims are not relevant to the definition of discrimination against women as contained in article 1 of the Convention. The attire of civil servants is specified in the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments, which was prepared in conformity with the Constitution and the relevant laws. This regulation applies to male and female civil servants and both sexes face the same disciplinary and legal actions as the author faced and there is no element of the regulation — content or application — that constitutes discrimination against women. Rulings of the High Courts, such as the Constitutional Court of the Council of State, underline the obligation of civil servants and other public employees to abide by the dress code. When persons (male and female) join the public service, they take office being aware of the relevant provisions of the Constitution, other legislation and case law. It is an obligation for them to abide by the dress code. It is clear that Ms. Kayhan acted consistently against the relevant legislation, namely article 129 of the Constitution, articles 6/1 and 19 of Law No. 657 on Civil Servants, and article 5a of the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments. The relevant Court decided that Ms. Kayhan insisted on coming to work and to her lectures with her head covered despite warnings and penalties. She was therefore discharged from service in accordance with article 125/E-a of Law No. 657 on Civil Servants (spoiling the peace and order of the work place for political and ideological reasons). Her religious beliefs are only her own concern and she has the right to act and dress as she wishes in her private life. However, as a public employee, she must abide by principles and rules of the State. In accordance with the public nature of her work, she is obliged to follow the laws and regulation mentioned above. There has been no discrimination in the disciplinary actions taken against the author, nor is there any contradiction in the law. In the implementation of the relevant norms and the case law, no discrimination is made between men and women. The Constitutional Court has already made rulings in this respect, which form the basis for the application of the laws and other norms in Turkey. In the light of these rulings, it should be noted that the ban on the headscarf in the workplace for female public employees does not constitute discrimination against them, but aims at achieving compliance with the laws and other regulations in force. The rules

on attire for those in public service (women and men) are clearly defined by the provisions of the laws and regulations. Therefore, it is known that for those wishing to join public service, there are rules for attire.

4.5 For the stated reasons, the State party considers that the author's communication should be deemed inadmissible within the context of discrimination.

#### **The author's comments on the State party's observations on admissibility**

5.1 The author maintains that she applied to the administrative court when she was dismissed and lost her status as a civil servant and appealed to the State Council after the administrative court ruled against her. She argues that the State Council is the highest body to which she could appeal. She lost that appeal. She could not bring an action to have the dress code for civil servants rescinded because there is a 60-day deadline for such an action from the moment that a regulation is published in the Official Gazette or as soon as the treatment at issue has ended. The Regulation relevant to the Attire of the Personnel working in Public Office and Establishments was published in the Official Gazette on 12 January 1983 — when the author was 15-years old and not yet a civil servant. She considers that she need not exhaust this remedy as she has already gone the judicial route, claiming that the treatment to which she was subjected was unjust.

5.2 The author claims that an appeal to Parliament is not a remedy that she need exhaust vis -à-vis the discrimination that she suffered because a remedy must offer exact and clear solutions — not only in theory but in practice. She maintains that the only remedies to which she is obligated to resort to are judicial remedies. The author also maintains that she need not resort to using the procedure governed by article 54 of the Administrative procedural law. She considers this to be an extraordinary remedy because it entails a review of the decision in question by the same authority that has issued the decision. Therefore, it is not de facto possible to obtain an effective result by addressing the 12th Department of the State Council. By way of substantiation, the author claims that the claims of two other applicants, a laboratory assistant and a nurse, were dismissed because there was “no reason for correction of decisions” by the very same Department of the State Council. The author believes this procedure to be a waste of time and a pecuniary burden.

5.3 The author maintains that her complaint is not the same matter that has been examined under another procedure of international investigation or settlement. She has not applied to other international bodies. The applicant before the European Court of Human Rights, Leyla Sahin, is a different individual and the case has different characteristics. The purpose and characteristics of the Convention on the Elimination of All Forms of Discrimination against Women and the European Convention on Human Rights are completely different. Furthermore, the right to work is not covered under the latter instrument and thus, a petition before the European Court of Human Rights should not be considered the same matter as a communication brought to the attention of the Committee.

5.4 The author argues that her communication is not time-barred because the impact of the discrimination she suffered has continued after the Optional Protocol came into force for Turkey. The author was expelled from the civil service and will never again be able to take up her former duties. She cannot work as a teacher in a private school either and has been deprived of any social security and lost her health insurance.

5.5 The author argues that the violations of which she complains are protected rights under the Convention on the Elimination of All Forms of Discrimination against Women. She maintains that the discrimination to which she was subjected occurred because she wore a headscarf. A male or a female who violated another rule of the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments would likely be able to continue to work. The author did not conduct herself in a manner that could justify her exclusion from public service. The punishment meted out in her case for disobeying the dress code should have been a warning or a reproof, but she was dismissed. The author claims that the harsh punishment itself is indicative of the discrimination to which she has been subjected. She maintains that banning the veil denies women their capacity to decide, tarnishes their dignity and offends the notion of gender equality. The ban on wearing a headscarf generates inequality among women in work and education.

#### **Additional comments of the State party on admissibility**

6.1 The case of Leyla Sahin before the European Court of Human Rights and the author's communication are the same in essence, irregardless of one being a student and the other a teacher. Regardless of gender, individuals are free and equal to wear what they will. In the public sphere, they must abide by the rules.

6.2 The State party explains that under Turkish Administrative Law, administrative acts create a new state of law and have immediate legal consequences. Suits of law do not have the effect of suspending the decisions. Courts set aside such decisions. Ms. Kayhan was dismissed on 9 June 2000 by decision of the High Disciplinary Board of the Ministry of National Education. This decision stripped her of her status as a civil servant. Therefore, the relevant date to be taken into account in deciding whether article 4, paragraph 2 (e) of the Optional Protocol would bar the admissibility of the communication would be 9 June 2000 — that is prior to the entry into force of the Optional Protocol for Turkey.

6.3 The State party maintains that the communication is incompatible with the Convention in accordance with article 4, paragraph 2 (b) of the Optional Protocol. The State party considers baseless the claim made by the author that she would still be employed had she been a man or had she failed to comply with any other provision of the dress code for civil servants. The author was dismissed because it was discovered that her stance stemmed from her political and ideological opinions. The same sanctions would apply to male civil servants whose actions were undertaken for political and ideological reasons. Gender is not a consideration and does not affect the sanction and therefore, there is no discrimination based on sex.

6.4 The State party argues that there is no discrimination against women concerning their participation in social life, education and involvement with work in the public sphere. Statistics on the number and percentage of women who work in schools and academic institutions clearly indicate this assertion. Many women hold high public posts, such as judges, governors, high-level administrators, deans and presidents of universities, including the President of the Constitutional Court and the President of the Turkish Institution for Scientific and Technical Research (TUBITAK).

6.5 The State party submits that regular remedies are those to which an applicant must resort within required time limits to appeal against a decision or take it on review ("revision of judgement"). Article 54 of the Administrative Trial Procedure

Law (No. 2577) allows the parties to request a “revision of judgement” within a 25-day time limit. The grounds for the remedy’s use include: if the allegations or objections that impact the merits are not dealt with; if there are contradictory elements; if there is a mistake of law or a procedural irregularity; or for fraud or forgery that impact the merits. The Divisions of the Council of State, General Assemblies of Administrative Tax Trial Divisions and Regional Administrative Courts, which have issued the decisions that will be reviewed, receive the applications. Those judges who were involved in the decision-making cannot participate when the (same) decision is being reviewed.

6.6 While the author claims that her appeal to the Council of State was sufficient to satisfy the requirements of article 4, paragraph 1 of the Optional Protocol, because the “revision of judgement” remedy is an extraordinary remedy, the State party argues that “revision of judgement” is a regular remedy within Turkish administrative law that should be utilized after an appellate body has rendered a decision. That the author considers the remedy to be ineffective is immaterial to the issue of exhaustion of domestic remedies and reflects only the personal view of the author’s lawyer. The State party maintains that there are exemplary rulings by the Council of State in favour of applicants for “revision of judgement” and that the communication should be declared inadmissible for failure to exhaust domestic remedies.

6.7 The State party refers to the author’s claim that she had no possibility of or right to complain in accordance with the Regulation on the Complaints and Applications by Civil Servants. The State party submits that the author’s claim was based on an erroneous understanding of the procedure. The author appears to have understood the State party to have argued that she should challenge the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments with a view to obtaining its annulment. The State party explained that it had not intended to give this impression. The State party had argued that the author did not make use of an avenue of complaint provided by the Regulation on the Complaints and Applications by Civil Servants.

6.8 With regard to the remedy under article 74 of the Turkish Constitution, the State party explains that requests and complaints concerning individual authors or the [general] public or “the status of acts taken”, shall be made in writing to the competent authorities and to the Turkish Grand National Assembly. The results are made known to the petitioners in writing as well. Law No. 3071 of 1 November 1984 sets out the procedure on the right to petition. Those petitions that concern matters that fall within the competence of the judiciary may not be considered under this procedure. Petitions before the Turkish Grand National Assembly should be reviewed and finalized within 60 days by the Commission for Petitions.

#### **Issues and proceedings before the Committee concerning admissibility**

7.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol.

7.2 In accordance with rule 66 of its rules of procedure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

7.3 The Committee notes that the State party argues that the communication ought to be declared inadmissible under article 4, paragraph 2 (a) of the Optional Protocol because the European Court of Human Rights had examined a case that was similar. The author assures the Committee that she has not submitted her complaint to any other international body and points to the dissimilarities between the case of Leyla Sahin v. Turkey and her own complaint. In its early case law, the Human Rights Committee pointed out that the identity of the author was one of the elements that it considered when deciding whether a communication submitted under the Optional Protocol to the International Covenant on Civil and Political Rights, was the same matter that was being examined under another procedure of international investigation or settlement. In *Fanali v. Italy* (communication No. 075/1980) the Human Rights Committee held:

“the concept of ‘the same matter’ within the meaning of article 5 (2) (a) of the Optional Protocol had to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body”.

The Committee on the Elimination of Discrimination against Women concludes that the present communication is not inadmissible under article 4, paragraph 2 (a) of the Optional Protocol to the Convention — already, because the author is a different individual than Leyla Sahin, the woman to whom the State party referred.

7.4 In accordance with article 4, paragraph 2 (e) of the Optional Protocol, the Committee shall declare a communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the Protocol for the State party concerned unless those facts continued after that date. In considering this provision, the Committee notes the State party’s argument that the crucial date was 9 June 2000, when the author was dismissed from her position as a teacher. This date preceded the entry into force of the Optional Protocol for Turkey on 29 January 2003. The Committee notes that as a consequence of her dismissal, the author has lost her status as a civil servant in accordance with article 125E/a of the Public Servants Law No. 657. The effects of the loss of her status are also at issue, namely her means of subsistence to a great extent, the deductions that would go towards her pension entitlement, interest on her salary and income, her education grant and her health insurance. The Committee therefore considers that the facts continue after the entry into force of Optional Protocol for the State party and justify admissibility of the communication *ratione temporis*.

7.5 Article 4, paragraph 1 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (the domestic remedies rule) precludes the Committee from declaring a communication admissible unless it has ascertained that “all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief”. The domestic remedies rule should guarantee that States parties have an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems before the Committee considers the violation. This would be an empty rule if authors were to bring the substance of a complaint to the Committee that had not been brought before an appropriate local authority. The Human Rights Committee requires the same of authors of

communications submitted under the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>1</sup>

7.6 The Committee notes that the first time that the author refers to filing an appeal was in respect of a warning and a deduction in her salary for wearing a headscarf at the school where she taught in July of 1999. She stated that in her petition to the court she declared that the penalty for her infraction should have been a warning and not a “higher prosecution”. On this occasion, the author did not raise the issue of discrimination based on sex. The author was pardoned under Amnesty Law No. 4455. The next opportunity to raise the subject of sex-based discrimination came in February 2000, when the author defended herself while she was under investigation for having allegedly entered a classroom with her hair covered and “with ideological and political objectives she spoilt the peace, quiet and work harmony of the institution”. The author focused on political and ideological issues in her defence. She challenged the Ministry of Education to prove when and how she had spoilt the peace and quiet of the institution. Her lawyer defended her before the Higher Disciplinary Council by arguing over a mistake in law. Her lawyer also claimed that freedom of work, religion, conscience, thought and freedom of choice, the prohibition of discrimination and immunity of person, the right to develop one’s physical and spiritual being and national and international principles of law will all be violated if the author were to be punished. When the author appealed against her dismissal from State service to Erzurum Administrative Court on 23 October 2000 she based her claims on nine grounds — none of which were discrimination based on her sex. On 15 May 2001, the author appealed to the Council of State against the decision of Erzurum Administrative Court. Again, she failed to raise sex-based discrimination. On 9 April 2003 the last decision was handed down against the author. The Committee notes that the author pursued no further domestic remedies.

7.7 In sharp contrast to the complaints made before local authorities, the crux of the author’s complaint made to the Committee is that she is a victim of a violation by the State party of article 11 of the Convention by the act of dismissing her and terminating her status as a civil servant for wearing a headscarf, a piece of clothing that is unique to women. By doing this, the State party allegedly violated the author’s right to work, her right to the same employment opportunities as others, as well as her right to promotion, job security, pension rights and equal treatment. The Committee cannot but conclude that the author should have put forward arguments that raised the matter of discrimination based on sex in substance and in accordance with procedural requirements in Turkey before the administrative bodies that she addressed before submitting a communication to the Committee. For this reason, the Committee concludes that domestic remedies have not been exhausted for purposes of admissibility with regard to the author’s allegations relating to article 11 of the Convention on the Elimination of All Forms of Discrimination against Women.

7.8 The Committee notes that the State party drew attention to other remedies that would have been available of which the author did not make use — namely review (“revision of judgement”), the complaints procedure under article 74 of the Turkish Constitution and a procedure under the Regulation on the Complaints and Applications by Civil Servants. However, the Committee considers that the information provided to it on the relief that might reasonably have been expected from the use of the remedies is insufficiently clear to decide on their efficacy in

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<sup>1</sup> See for example, Antonio Parra Corral v. Spain (communication No. 1356/2005), para. 4.2.

relation to article 4, paragraph 1 of the Optional Protocol. In any event the Committee considers it unnecessary to make this determination or whether the communication is inadmissible on any other grounds.

7.9 The Committee therefore decides:

- (a) That the communication is inadmissible under article 4, paragraph 1, of the Optional Protocol for failure to exhaust domestic remedies;
  - (b) That this decision shall be communicated to the State party and to the author.
-