

The Turkish Constitutional Court and The Use of Religious Symbols in Higher Education Establishments: The Case of 5 June 2008

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INTRODUCTION

After intense debate, Law No. 5735 amending Articles 10 (Equality before the Law) and 42 (Right and Duty of Training and Education) of the Turkish Constitution was adopted by the Turkish National Assembly on the 9th of February 2008. It was presumed that these amendments would bring an end to the decade long dispute concerning the use of Islamic headscarves by female students in higher education establishments. The amendments contained no clear reference on the issue. Instead, they foresaw the introduction of two provisions - one to article 10 and the other to article 42, establishing and reinforcing the existing texts with regards to equality in receiving public services and the prohibition of interfering with the right to a higher education in cases not foreseen by law. Nonetheless, when taken into context with ongoing debates and the General Justification of the Law, it was clear that the *sedes materiae* was the resolution of the complicated legal deadlock surrounding the use of religious symbols within higher education establishments². Law No. 5735 was ratified on the 22nd of February and entered into force the day after. Alleging the unconstitutionality of the law, the main opposition party went before the Constitutional Court (Court) on the 27th of February. This application not only stirred the pre-existing dispute on the socio-political nature of the issue, but also caused the jurisdiction of the Court to be put under scrutiny. Those in defense of the amendment claimed that the Court could not examine the constitutionality of the amendment, for under Article 148/1 of the Constitution, “*Constitutional amendments shall be examined and verified only with regard to their form*”. On the other side of the forum argued that the amendment would undermine the principle of “Laicism”, which not only was an inherent principle of the Turkish constitutional order, but was also at the peak of the *de facto* hierarchy of norms within the Constitution due to its non-amendable nature. On the 5th of June, the Court delivered its judgment and, finding the proposed amendments contrary to the Constitution, annulled Law No. 5735.

In order to understand the true debate, one must understand that within the Turkish legal system no clearly stipulated law or constitutional provision exists prohibiting the use of Islamic headscarves by female students in higher education establishments. The existing ban is

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² The second paragraph of the General Justification of Law No. 5735 states: “*The prevention of the right to training and education of certain students in higher education establishments due to their clothing and attire has become a chronic problem*” which has prevented “*for a long time, the use of the right of training and education by some female students because of the veil they use to cover their heads*”.

the result of a complex legal juxtaposition of constitutional norms and values, and their interpretation by the judiciary. Within this context, the prohibition is derived not from the wording of the Constitution *per se*, but from its spirit and the values and principals that derive from it. To this end, this paper aims to provide a brief insight into the legal dialectics surrounding the issue and the constitutional rationale of the Court. We will not question the legitimacy of the decision or its socio-political effects, for such a brief work cannot exhaust the diverse and complicated aspects of the problem. Any such attempt would be, if nothing else, lacking.

I. A BRIEF OVERVIEW OF THE CONSTITUTIONAL PROTECTION OF LAICISM

Laicism is heavily present in word and spirit in the Constitution, and is firmly protected by the non-amendment regime. The Preamble of the Constitution contains a non-protection clause against acts contrary to the “...reforms and modernism of Atatürk and that, as required by the principle of secularism³” and clearly states that “there shall be no interference whatsoever of the sacred religious feelings in State affairs and politics”. Under Article 1⁴ and Article 2⁵ of the Constitution, the Turkish State is a laic republic. Under Article 4 “The Provisions of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions of Article 2 on the characteristics of the Republic... shall not be amended, nor shall their amendment be proposed”. Beyond the protection provided by Article 4, the Constitution also brings an important self-preservation clause under Article 174, according to which “Reform Laws”⁶ which aim at protecting the laic and western oriented formation of the Republic cannot be interpreted unconstitutional. All these safeguards form an important constitutional basis for the constitutional judge.

The central point of divergence between different political actors about the principle has been, as usually is with constitutional principles, how it should be interpreted and applied in day to day state administration. Although based on the French model, its official interpretation and application has differed. It has gained a *sui generis* conception. This

³ The text of the Constitution uses the expression “*laik*” in Turkish, taken from the french “*laic*”, but official translations use the english expression “*secular*” when used as an adjective. Turkish tradition of laicism stems substantially from the French doctrine and the focus is on the withdrawal of the educational and instructional domains from the sphere of religious influence. TANÖR Bülent, YÜZBAŞIOĞLU Necmi, 1982 Anayasasına Göre Türk Anayasa Hukuku – 2004 Değişikliklerine Göre, 6th Edition, Beta, Istanbul, 2004, p. 76.

⁴ Article 1. “*The Turkish state is a Republic*”.

⁵ Article 2. “*The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble*”.

⁶ The first paragraph of Article 174 reads “*No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilization and to safeguard the secular character of the Republic, and which were in force on the date of the adoption by referendum of the Constitution of Turkey*”. The Article continues with clearly stipulating which laws in force retain a constitutional value. Some of them are: Act No. 430 on the Unification of the Educational System, Act No. 677 on the Closure of Dervish Convents and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles; The principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official, adopted with the Turkish Civil Code No. 743 of 17 February 1926 etc.

conception of laicism⁷, as underlined by the European Court of Human Rights (ECHR)⁸, is in fact what lies between the prohibitions on religious symbols within higher education establishments. According to the Court in its Judgment of 1989, the importance of laicism for Turkey does not derive from its definition *sensu stricto*; it carries a major value when taken into account with the “*historical evolution of the concept*” within Turkey⁹. The Courts choice of preferring this historical and teleological interpretation – which will also be used by the ECHR¹⁰ - is both in jurisprudence and in execution the main reference point for the ban on Islamic headscarves in higher education establishments.

II. A SHORT STORY OF THE OPERATIVE BAN ON THE ISLAMIC HEADSCARF IN HIGHER EDUCATION ESTABLISHMENTS

In order to understand the rationale behind all the legal dialectics related to the issue one has to understand the fragmented legal history of the headscarf ban. The ban applied in higher education institutions in Turkey is the result of a highly complicated legal matrix of constitutional interpretation and the application of general principals of the Republic. There exists no explicit norm of a constitutional value or law within the Turkish legal system that in a clearly defined scope prohibits the use of the Islamic headscarf by female students within higher education institutions. As a debate in the public sphere, the issue of the use of religious symbols in higher education establishments – especially the Islamic headscarf –first started in the 1970’s. By mid 1980’s, after the adoption of the Constitution of 1982, the issue raised great concern within some spheres while others wanted a clear permission to use religious symbols in higher education establishments. Since no clear regulation existed on the issue, the National Assembly adopted Law No. 3511 in 1989 which inserted Additional Article 16 to Law No. 2547 concerning Higher Education. The article clearly stipulated that “*Within higher education establishments, classrooms, laboratories, clinics, and policlinics and in corridors it is obligatory to be in modern clothing and looks. The closing of the neck and hair with a cloth or with a turban due to religious reasons is unrestricted*”. Openly providing the freedom to use Islamic headscarves in higher education establishments, the law was taken to the Court by the President of the Republic, which on the 7th of March 1989¹¹ annulled the law in question, finding it contrary to the Preamble, Articles 2, 10, 24¹² and 174 of the Constitution.

Having failed to solve the problem, the National Assembly adopted in 1990 Law No. 3670, a vaguely formulated legislation, so that the Court’s judgement of 1989 could be bypassed. Article 12 of the Law inserted Additional Article 17 in to Law No. 2547 on Higher Education and stipulated clearly that “*Without being contrary to legislation in force, clothing*

⁷ ÖKTEM A. Emre, *La Spécificité de la Laïcité Turque*, Islamochristiana, 29, 2003, p. 94.

⁸ See Şahin v. Turkey, Grand Chamber, ECHR, 10.11.2005.

⁹ Turkish Constitutional Court; Judgement of 7 March 1989, E: 1989/1 K: 1989/12.

¹⁰ See Refah Partisi v. Turkey, Grand Chamber, ECHR, 13 February 2003; Şahin v. Turkey, Grand Chamber, ECHR, 10 November 2005.

¹¹ Turkish Constitutional Court; Judgement of 7 March 1989, E: 1989/1 K: 1989/12.

¹² Freedom of Religion.

*and attire is unrestricted in higher education establishments*¹³. Since no clear prohibition ever existed and since there was no clear reference to any political, religious or other sort of ideology, it was clear that the stipulation of a freedom could and would not be contrary to the Constitution. Yet, the game of interpretation came into play after the application of the opposition parties to the Court. The Court in its judgment of 1991¹⁴ came to the conclusion that the regulation in question was not contrary to the Constitution, because the phrase *“Without being contrary to legislation in force”* did not only imply laws in a restrictive sense, but also included the Constitution as norm-superior and the Court’s jurisprudence; for under Article 153 of the Constitution *“The Constitutional Court Judgments... are binding on the legislature, executive and judiciary, administrative offices, natural and legal persons”*.

Thus, according to the Court, its jurisprudence of 1989 stood and that the freedom brought with the provision in question *“should be accepted as not including “the closing of the neck and hair with a veil or turban due to religious beliefs”*. With an accelerating pace, especially from 1997 on, many Universities in Turkey, referring to the judgment of 1989 and 1991 and Article 153 of the Constitution, adopted circulars prohibiting the use of religious symbols. Naturally, this created a non-uniform execution between various universities and institutes and gave rise to a new debate about the prohibition and the interpretation of Additional Article 17. Additional Article 17 on the freedom of clothing and attire in higher education establishments is still in force today, and the prohibition due to the Court’s jurisprudence is still applied.

It is within this respect that the National Assembly adopted Law No. 5735 in 2008, this time directly attempting to modify the Constitution itself in order to bypass the Court’s jurisprudence. The solution to the problem was seen as a two step formula. First, according to Article 1 the phrase *‘and in all enjoyment of public services’* would be added after the existing expression *‘in all their proceedings’* in article 10/4. Thus the amended version of the text would have read as *‘State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings and in all enjoyment of public services’*. Taking into account that access to education is a right under article 42 of the Constitution entitled *“Right and Duty to Training and Education”*, providing access to this right constitutes a civil service in which no discrimination would be allowed during its enjoyment.

The second step of the solution was to directly amend Article 42 itself. According to Article 2 of the Law, the phrase *“No one can be denied, for any reason at all, the right to higher education in cases not openly stipulated by law. The limitations of the use of this right are defined by law”* would be added as a new provision after the 6th paragraph of article 42. Hence the drafters of the amendments hoped to force a new interpretation on higher educational establishments and the Court itself. Taking into account that the applied ban, lacking any *“openly stipulated law”* to back it up, stemmed from the application of the Courts interpretation; the rationale intended to create a conflict between the Constitution and the

¹³ The law in question also contained a transitional Article concerning a general amnesty for students who had received disciplinary sanctions due to the use of religious symbols in higher education establishments.

¹⁴ Turkish Constitutional Court, Judgement of 9 April 1991, E: 1990/36, K: 1991/8.

former jurisprudence of the Court in which, the latter was doomed to fail. Thus, the circulars in force lacking any constitutional backing would have to be withdrawn, in respect to the “new” version of Article 10 and Article 42 of the Constitution. The Government expressed on numerous occasions that these amendments would not only suffice to solve the problem, but could not be taken under scrutiny by the Court, for it did not have the competence to do so. Yet such was not the case.

III. THE CONSTITUTIONAL COURTS JUDGMENT ON LAW NO. 5735

The first and main legal dilemma before the Court was not whether the constitutional amendment *per se* would allow all kinds of religious symbols within higher education institutions, although such was expressed as the major aim of the law; but the problem was in fact whether the Court had jurisdiction in the first place to decide on the constitutionality of constitutional amendments. Under Article 148/1 of the Turkish Constitution “*Constitutional amendments shall be examined and verified only with regard to their form...*”. Thus, as can be expected, a vast debate erupted, for not only would the Court examine the amendment, but it would do so by controlling the substance of the amendment itself. At this point, what has not been expressed by those who alleged the Courts decision as unconstitutional is that the Court has in fact a long and steady jurisprudence on its own jurisdiction when faced with constitutional amendments. This is why, although we may not always concur with its jurisprudence, it should have not come as a surprise.

Since its initial establishment the Court had already interpreted its jurisdictional framework extensively when it came to constitutional amendments. According to the Court, amendments explicitly and *a fortiori* implicitly affecting the legal construct put forth by the non-amendable articles regime was open to its scrutiny. The Court adopted the simple rationale that legislative power could not be conceived as *legibus solutus*. For example, in a Judgment given by the Court already in 1970 under the Turkish Constitution of 1961, the Court had bypassed a similar discussion concerning its jurisdictional reach. Under the Constitution of 1961, containing similar conditions, the Court had come to the conclusion that¹⁵:

“According to this article [9], “the Constitutional provision which dictates that the form of the State is a Republic cannot be amendment and such an amendment cannot be proposed ... Then, the unconstitutional character of proposing and accepting a Constitutional amendment which only keeps in place the expression “Republic”, but either entirely or partially or by method of annulling all its elements in order to bring a regime, which ever direction it might lead to, but is impossible to conform with the principles of the Constitution of 1961, is undisputable ... Within this context, no law can be proposed or adopted which aim to change these principles through direct or indirect amendments to them or to other provisions of the Constitution”

¹⁵ Turkish Constitutional Court Judgment, 16 June 1970, K: 1970/31.

Thus, in the present case, the Court citing its long and steady jurisprudence on its jurisdiction towards constitutional amendments¹⁶, reaffirmed that the restriction brought to its competence with the phrase “*with regard to their form*” under Article 148 also included the form foreseen under Article 4. Under the non-amendable articles regime, it could and would examine if the proposal in question could be “*proposed*” in the first place. Consequently, it would look if the substance of the proposal was contrary to the non-amendable articles. Within this respect the Court found that, it was clear from the discussions within the National Assembly, the Commission Reports and the Justification of the Law that the amendment had the main purpose of lifting the restrictions on the use of religious symbols in higher education establishments without eliminating public fears and foreseeing safeguards. The Court also expressed that the adoption of the law had been in a manner non-compatible with the consensual standards of democracy and that the legislation was imposed. Reaffirming both its own jurisprudence and the jurisprudence of the High Administrative Court (*Danıştay*), the use of the Islamic headscarf would not only create pressure on non believers or Muslim females that do not cover, but would also give ground for the use of religion for political purposes, which could not stand before the Constitutional order. Hence the Court, in order to protect public order and the Constitutional legal regime, and in order to protect the fundamental rights and freedoms of others - citing the jurisprudence of the ECHR relevant to the issue¹⁷ - found that the proposed amendment was directly and indirectly contrary to the Constitution and the non-amendable principal of laicism. According to the Court:

“When the Constitutional Court and the European Court of Human Rights judgments are observed, the conclusion has been reached that the provisions brought to articles 10 and 42 of the Constitution; as a method, the use of religion for political means, and contentwise, the violation of others rights and giving rise to grounds for the disruption of public order, are clearly contrary to the principle of laicism”.

CONCLUSION

The debates surrounding the jurisdiction of Constitutional Courts are not new to Constitutional Law. The question of jurisdiction and interpretation has been, and will continue to be a never ending debate between different actors. This is especially the case when the issue in question concerns sensitive socio-political problems such as the relation between state and religion. It is also a fact that high courts have shown a tendency to enlarge their own jurisdiction through the use of interpretative techniques. Such has also been the case within the Turkish constitutional tradition and though the debate surrounding its legitimacy or appropriateness has been in constant fluctuation, this recent case on the direct control of constitutional amendments has resulted in a high profile political and academic discussion. This has not been only due to the legal nature of the issue, but above all, it has become an important rhetoric in Turkish political discourse in which the various political actors have

¹⁶ Judgements of 16 June 1970, K:1970/31; 13 April 1971, K: 1971/37; 15 April 1975, K: 1975/87; 23 March 1976, K: 1976/19; 12 October 1976, K: 1976/46; 27 January 1977, K: 1977/4; 27 September 1977, K: 1977/117.

¹⁷ *Dahlab v. Switzerland*, ECHR, 15 February 2001; *Refah Partisi v. Turkey*, Grand Chamber, ECHR, 13 February 2003; *Şahin v. Turkey*, Grand Chamber, ECHR, 10 November 2005.

regrettably adopted a divisive language. There have even been some unfortunate members of the National Assembly, which we will not cite in this paper, who have argued the necessity for a constitutional court in the first place.

Whether or not one supports the judgement that we have discussed , it is our belief that some issues with important social consequences should not be always left to the Court to decide upon. We believe that questions not resolved within the political and social domain, if left only to the Court may be eventually decided upon, but not resolved. For as all courts, the Constitutional Court has to decide within the range of the Constitution and its own jurisprudence has to be taken into account. If the political question itself stems directly or indirectly from the Constitution, the problem rests non-resolved and the Court is always left to blame. Such is and has been the case in Turkey surrounding the issue of religious symbols in higher education institutions and for this problem to be resolved, a democratic dialogue between all political actors and members of the society is a *sine qua non*.