

# The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education

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## INTRODUCTION

On the 17<sup>th</sup> of March 2008, the Chief Public Prosecutor’s Office (*Yargıtay Cumhuriyet Başsavcılığı*) filed an indictment to the Turkish Constitutional Court (Court) against the governing “Justice and Development Party” (*Adalet ve Kalkınma Partisi*). The main allegation concerned acts which were deemed to be in violation of the principle of laicism, protected by the Turkish Constitution.<sup>1</sup> The Chief Prosecutor’s Office demanded that, in light of the evidence provided, the dissolution of the Justice and Development Party by the Court under Article 101 of Law No. 2820 on Political Parties; which above all stipulates that the Court has competence to dissolve a political party in case “*a political party’s regulatory statute or program is contrary to the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the*

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1. For brief information on the affiliations of the Justice and Development Party and Political Islam in Turkey, see, AYDIN Senem Aydın & ÇAKIR Ruşen Çakır, *Political Islam in Turkey*, CEPS Working Paper No. 265, April 2007, for brief information on the affiliations of the Justice and Development Party and Political Islam in Turkey. See also, Nilüfer Narlı, *The Rise of the Islamist Movement in Turkey, in REVOLUTIONARIES AND REFORMISTS: CONTEMPORARY ISLAMIST MOVEMENTS IN THE MIDDLE EAST* 125-40 (Barry Rubin ed., SUNY Press 2003).

*nation, the principles of the democratic and [laic]<sup>2</sup> republic, they shall not aim to [support] or establish [a social] class or group dictatorship or dictatorship of any kind, nor shall they [promote the commission of crime] or in cases the ‘Court determines that the [political] party . . . has become a center for . . . such act[s.]’<sup>3</sup>*

Unsurprisingly, the news generated vast political debate both due to the severe nature of the allegations and the genuine possibility of the dissolution of a political party, which not only possessed a vast majority within the Parliament but also had been in power since 2002. Unfortunately, Turkish constitutional and political tradition offers numerous examples of political party dissolutions, including instances based partially or exclusively on allegations of “*becom[ing] the centre of such act[s]” contrary to the principle of laicism.*<sup>4</sup> For example, on May 20, 1970, the National Order Party (*Milli Nizam Partisi*) was dissolved by the Constitutional Court on the premises that it had “become [a center] of such act[s].”<sup>5</sup> On March 16, 1998 and on June 22, 2001, the

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2. The Turkish text of the Constitution uses the Turkish term ‘*laik*’ (laic). Official translations to English use the expression “secular” when used as an adjective. Taking into consideration the differences between these expressions, we have preferred to use the term “laic” in our translations of the Constitutional text so that normative confusion can be avoided and the paper is overall conceptually consistent. The official English translation of the Constitution can be found at the Turkish Constitutional Court’s official website, [http://www.anayasa.gov.tr/images/loaded/pdf\\_dosyalari/THE\\_CONSTITUTION\\_OF\\_THE\\_REPUBLIC\\_OF\\_TURKEY.pdf](http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf).

3. TURK. CONST. art. 69. Article 69 of the Constitution provides the legal basis for Article 101 of Law No. 2820, which was modified in 1995 with Law No. 4121 under which the “*becom[ing] a centre [off]”* criteria was inserted, in order to make dissolution more difficult. In 2001, Article 69 was further amended with Law No. 4709 which brought an additional provision clarifying in detail the scope of the “*becom[ing] a centre [off]”* criteria. Some writers believe that even though the criteria have been restricted to a certain degree, in light of jurisprudence, the Court still has the possibility to interpret it extensively. See GÖZLER Kemal, *Parti Kapatmanın Kriteri Ne? Parti Kapatmaya Karşı Anayasa Değişikliği Çözüm mü?* [What are the Criteria for Party Dissolution? Is a Constitutional Amendment Against Party Dissolution the Solution?], 93 *Türkiye Günlüğü*, Sayı 24-31, Bahar (2008). GÖZLER proposes changing the composition of the Court (putting emphasis on the parliament’s discretion in the proposal of judges) in order to moderate its stance towards political parties. See *Id.*

4. See Rapor, *Siyasi Partilerin Kapatılması Konusunda Türkiye ve Bazı Ülkelerdeki Yasal Düzenlemeler*, TBMM Araştırma Merkezi, Hukuk Bölümü, Mart 2008. [Report, The Legal Regulation of the Dissolution of Political Parties in Turkey and in some Countries, Turkish Grand National Assembly, Research Center, Legal Department, March 2008]. The Constitutional Court has dissolved 25 political parties since its establishment in 1961. See *id.* These dissolutions have been based on different rationales, ranging from procedural deficiencies to separatist activities, including incitation to violence. See *id.*

5. See Judgment of 20 May 1971, E: 1971/1(*Parti kapatılması*), K: 1971/1, *Anayasa Mahkemesi* [Constitutional Court] (Turkey). All judgments of the Turkish Constitutional Court are accessible at <http://www.anayasa.gov.tr/>. Texts are in Turkish.

Welfare Party (*Refah Partisi*)<sup>6</sup> and its extension, the Virtue Party (*Fazilet Partisi*),<sup>7</sup> were respectively dissolved on similar grounds. Thus, there was no doubt that the Court could decide on the dissolution of the Justice and Development Party if it saw fit, no matter its popularity. The Court delivered its judgment on the 30<sup>th</sup> of July 2008 in which it found that the Party had in effect become a center of acts contrary to the principle of laicism; yet unable to acquire the necessary qualified majority of votes, ruled on the next adverse measure foreseen by law.<sup>8</sup>

One interesting point in the indictment was the allegation that the adoption of Law No. 5735 on February 9, 2008, a constitutional amendment proposed by the Justice and Development Party and supported by the Nationalist Action Party (*Milliyetçi Hareket Partisi*), constituted primary evidence towards the alleged anti-laic policies of the Party. Law No. 5735 had been adopted amid intense political debate on an existing prohibition on the use of the Islamic veil<sup>9</sup> throughout higher

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6. See Judgment of 16 January 1998, E: 1997/1 (*Siyasi Parti Kapatma*), K: 1998/1 (16 January 1998), Anayasa Mahkemesi [Constitutional Court] (Turkey). Deciding on the issue, the European Court on Human Rights (ECHR) found that the dissolution of the Welfare Party was not a violation of the European Convention on Human Rights (ECHR). See Case of Refah Partisi and others v. Turkey, 2003-II, App. Nos. 41340/98, 41342/98, 41343/98 & 41344/98, Eur. Ct. H.R. (2003).

7. See Judgment of 22 June 2001, E: 1992/2 (*Siyasi Parti Kapatma*), K: 2001/2, Anayasa Mahkemesi [Constitutional Court] (Turkey). Similar to the Welfare Party, the Virtue Party took its case to the ECHR, but at a later stage pulled back its application alleging that the ECHR had proven itself to be prejudiced against “Muslim Communities” as shown by its previous jurisprudence, specifically citing the Case of Refah Partisi and others v. Turkey, Eur. Ct. H.R. (2003), and the Case of Leyla Şahin v. Turkey, 2005-XI, App. No. 44774/98, Eur. Ct. H.R. (2005). See *Affaire Fazilet Partisi et Kutan c. Turquie*, Arrêt (*radiation*), App. No. 1444/02, Eur. Ct. H.R. (2006) (text in French only).

8. See Judgment of 30 June 2008, E: 2008/1 (*siyasi parti kapatma*), K: 2008/2, Anayasa Mahkemesi [Constitutional Court] (Turkey). Ten out of the eleven sitting judges determined that the Party had in effect become a center of unconstitutional acts. See *id.* On the measure to be taken, only six judges voted for the dissolution of the Party. See *id.* Lacking one vote, the Court had to, under its regulations, rule on the next most adverse measure against the Party, which in this case was its deprivation of state financial aid. See *id.*

9. There are numerous terms for the cover used by Muslim women to cover their hair/head. Moreover, the style that the cover is used may vary between countries, regions, traditions and sects. A shift in the use and connotations of specific terms also vary during periods. For example in the 1990’s in Turkey, the “Islamic headscarf” (*başörtüsü*) was seen by the laic section of the society as a symbol of regressive-rural religious practice, while the “Turban” (*turban*) was considered urbanized and modern; thus “tolerable” (The Council of Higher Education had deemed this second method acceptable in higher education in a circular adopted in 1984, see *infra* Heading II/A). However, today the meanings have shifted and the ‘turban’ is regularly affiliated with political Islam and fundamentalist movements by the laic segments of society, while the Islamic headscarf has come to be regarded as a more traditional, cultural or conservative practice. In order to not enter into these debates, we have chosen to simply use the term “Islamic veil” from which the reader should understand as any material used by a Muslim female to cover partially or entirely her hair, head and/or neck in general, due to religious

education establishments. The legislation foresaw the amendment of the Constitution in order to nullify this restriction. Also known as the “*Turban Amendment*” in public discourse, the legislation was adopted by a large majority in Parliament (411/518 affirmative votes). Political actors supporting the motion claimed that the law would bring an end to the decades’ long socio-political struggle surrounding the issue. However, in accord with the main opposition party’s objections against the legislation, and citing its standing jurisprudence, the Court struck down Law No. 5735 on June 5, 2008 for violating, first and foremost, the principle of laicism.<sup>10</sup> The Court found that the aim of the amendment was to make lawful the use of the Islamic veil in higher education in direct violation of the Court’s longstanding jurisprudence.<sup>11</sup>

It was through a landmark judgment in 1989 that the Court had declared the use of the Islamic veil in higher education irreconcilable with the principle of laicism.<sup>12</sup> The case concerned the constitutionality of Law No. 3511, which foresaw the incorporation of Additional Article 16 into Law No. 2547 on Higher Education. The proposed article stipulated the freedom to “*cover the neck and hair with a veil or turban for religious beliefs*” in higher education establishments.<sup>13</sup> The judgment of 1989 which annulled Law No. 3511 would bring a definitive legal answer to the issue that had stirred conflict between various actors in Turkish political life since the 1970’s. It would also constitute the basis of future judicial decisions on the issue, and would become the main point of reference for higher education establishments willing to take measures against those students who insisted on using the Islamic veil during their higher education. Within this respect, the issue of the use of the Islamic veil in higher education would naturally transform within legal dialectics into a conflict between individual rights and freedoms and the state as the regulator of their enjoyment.

At this point we can easily express that there is no shortage of examples, both on a national and international level, which demonstrate how often such significant conflicts arise due to the public manifestation of religious symbols, especially if they are deemed to be expressively

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convictions. Although we acknowledge that the variety of the cover used and the difference in spiritual and social meanings are vast, with regards to the applied prohibition in higher education in Turkey the measures taken against them remain the same.

10. See Judgment of 5 June 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turkey).

11. See *id.*

12. See Judgment of 7 March 1989, E: 1989/1, K: 1989/12, Anayasa Mahkemesi [Constitutional Court] (Turkey).

13. See *id.*

proselytizing.<sup>14</sup> In situations such as these, the interaction between the right of the individual to enjoy the *forum externum* of the freedom of religion and the right of a third party not to be exposed to abusive proselytism is always further complicated with the inclusion of legal concepts such as the states positive and negative obligations towards guaranteeing the enjoyment of all rights and freedoms to the fullest extent possible through the installment of a balance between conflicting interests; while simultaneously ensuring the effective practice of state neutrality and non-discrimination and refraining from disproportionate and unnecessary interventions. Within this context and separated from the surrounding political rhetoric, the prohibition on the use of the Islamic veil in higher education and the socio-political and legal difficulties that stem from it can be deduced to the difficulty of balancing these individual rights whilst preserving state neutrality and public order. Especially in the case of Turkey—a state which not only rejoices in the fact that it is able to practice western liberal democracy, but also emphasizes the dominant position of the principle of laicism for the safeguard of this system<sup>15</sup>—this delicate balance is sometimes harder to manage.

Within this general framework, this paper will be devoted to the illustration of the fundamental position of the principle of laicism in Turkish constitutional law, in particular with respect to the use of the Islamic veil in higher education. It is our firm belief that the stalemate in Turkey relative to the use of the Islamic veil in higher education provides us an exceptional case study which will not only allow us to expose the hermeneutics of the principle of laicism under Turkish constitutional law, but will also enable us to surpass the realms of constitutional theory and present the practical ramifications of the application of the principle, both from a legal and political perspective. Furthermore, this inquiry is also relevant since its socio-political impact for Turkey is an ongoing issue. Likewise, for many western countries which have started to experience similar issues, the debate is becoming increasingly vocal.<sup>16</sup>

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14. One recent example of such a case concerns the status of crucifixes in classrooms in Italy, in which the ECHR declared that the practice itself was in violation of the ECHR, for the state was required to observe confessional neutrality, specifically in the context of public education. *See* Case of Lautsi v. Italy, App. No. 30814/06, Eur. Ct. H.R. (2009).

15. This point will be elaborated upon in detail. *See infra* Heading I/A and I/C.

16. Already a prohibition on the use of religious symbols which openly show religious affiliation has been adopted within the context of secondary education in France in 2004. *See* Law No. 2004-228 of March 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France] (Law No. 2004-228). In relation to the question of immigration and the growing number of Muslim minority communities in various western countries, the proposals made by various political actors on the adoption of strict measures are more and more visible throughout European media. For example,

In order to achieve a comprehensive study on the issue our approach will comprise a two level analysis. Our first undertaking will consist of framing the constitutional regulation of the principle of laicism within Turkish law. This descriptive level will not solely consist of the positive constitutional framework, but will also include its historical context as well as its detailed elaboration by the Court. This regulatory framework is a prerequisite of any discussion on the issue of the Islamic veil; for without understanding the genuine focus put on the principle of laicism within the Turkish legal construct it would be impossible to achieve a true understanding of the fragility of the relationship between state and religion. Building upon this normative framework, the second level of our analysis will explore the complicated legal matrix regarding the prohibition on the use on the Islamic veil in higher education and provide insight into the dialectics concerning the present constitutional argument. This will enable the reader to witness the use of legal interpretation as a tool for the effective application of the principle of laicism under the present Constitution. It will also provide further foresight vis-à-vis potential future conflicts under the regulation of religion by the state in Turkey.

Finally, we would also like to specifically remark that this brief work does not have any ambition of providing an exhaustive account of the numerous parameters which might be relevant for a possible solution to the problem. Neither does it possess the aspiration of scrutinizing the legitimacy of the current prohibition; detached of all political rhetoric, such a task can be objectively achieved only if the social, economic and psychological dimensions of the issue are meticulously put forth. Taking on such an endeavor is an inspiration that unfortunately this brief work cannot address. Within this perspective, this paper only seeks to offer a modest contribution to comparative constitutional law studies on the relation between state and religion through a detailed account of the practice of Turkish laicism within the context of the Islamic veil.

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Switzerland has become the first European country to take more radical measures when confronted with this dilemma (the referendum on the 29<sup>th</sup> of November 2009 concerning banning the construction of Minarets for mosques in Switzerland). See Nick Cumming-Bruce & Steve Erlanger, *Swiss Ban Buidling of Minarets on Mosques*, N.Y. TIMES, Nov. 30, 2009, at A6, available at [http://www.nytimes.com/2009/11/30/world/europe/30swiss.html?\\_r=1](http://www.nytimes.com/2009/11/30/world/europe/30swiss.html?_r=1). However, we must express that the issue of the Islamic veil has different socio-political consequences for Turkey, which perceives it as a socio-political dilemma, and for European states that seem to perceive it rather as an identity issue. See Gavin Hewitt, *Europe's Identity Crisis*, B.B.C. NEWS, Nov. 24, 2009, [http://www.bbc.co.uk/blogs/thereporters/gavinhe Witt/2009/11/europes\\_identity\\_crisis.html](http://www.bbc.co.uk/blogs/thereporters/gavinhe Witt/2009/11/europes_identity_crisis.html).

## I. THE NORMATIVE PROTECTION OF LAICISM IN TURKISH CONSTITUTIONAL LAW

Although the dominant position of the principle of laicism within the Turkish constitutional order has been debated *ad nauseam* by Turkish constitutional literature, we still consider underlining the characteristics of this principal, as well as its normative standing in Turkish legal construct a crucial step for the demonstration of its concrete application. The heavy presence of the principle, both in word and spirit, makes of it one of the basic foundations of the republican state order and enables Turkey to exercise to a large extent western liberal democracy. Despite the alignment of their legal systems with western norms to a certain degree; within the countries which possess a majority Muslim population Turkey with its laic political order based on European legal values and norms still stands unique in comparison.<sup>17</sup> It is for this reason that the principle has been strongly present and protected within the Turkish constitutional order; and albeit numerous amendments to the constitutional text, it has never been open to direct debate.

As Öktem clearly puts it: “*the principle of laicism appears to be one of the most important kemalist principles*<sup>18</sup> *because it makes out of*

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17. See Uygun Oktay, *Avrupa ve Türk Anayasası: Temel İlkeler Yönünden Genel bir Değerlendirme* [Europe and the Turkish Constitution: General Evaluation of the Fundamental Principles], 22 PUBLICATION OF THE CONSTITUTIONAL COURT, 377-387 (2005) (Turk.) for a detailed comparison. As Uygun correctly points out, harmonization of constitutional and penal law principles have taken place between the west and “Muslim countries” to a certain degree, but Turkey is the sole example possessing both a laic constitution and civil code. See *id.* On the other side, it is hard to deny that some effective regulations and practices in Turkey cannot be reconciled with an isolated understanding of laicism, but must also take into account the political developments within the country and region. For example, it is difficult to envisage perfect conformity between laicism and the existence of the Turkish State Religious Affairs Directorate (*T.C. Diyanet İşleri Başkanlığı*), which is a constitutional organ under the executive branch functioning according to the official Sunnite doctrines and compromising more than 80.000 employees, including *Imam*'s, which are all state employed. See also Öktem A. Emre & Uzun Mehmet C., *National Report on the Relation between State and Religion, Report submitted to the XVII<sup>th</sup> International Congress of Comparative Law, International Academy of Comparative Law and The American Society of Comparative Law* (Turk.) (forthcoming July 25–Aug. 1, 2010) for an overview of the current situation on the relation between state and religion.

18. Various expressions in Turkish legal practice such as “Kemalist Principles” and “Reforms and Modernism of Atatürk” refer to the major revolutionary reforms adopted during the foundation of the Turkish Republic under the vision of its founding father, Mustafa Kemal Atatürk. Within this context, during the Turkish war of national liberation and after the formation of the Turkish Republic out of the ashes of the disintegrated Ottoman Empire, revolutionary measures were taken by the government headed by Mustafa Kemal Atatürk in order to ascertain the success of the new nation state. Laicism is one of these principles and its historical context will be briefly dealt with *infra*. Others include major principles such as republicanism, nationalism, modernism, rationalism, national sovereignty, gender equality etc. These principals have

*Turkey the only Muslim country genuinely laic . . . beyond a simple separation of the religious sphere from the temporal sphere, the Turkish laicism carries a very important mission.*"<sup>19</sup> For Yüzbaşıoğlu the mission of "the principle of laicism and kemalist principles and reforms which constitute the means of its application within the society, is to implement in Turkey in a very short amount of time, the processes of Renaissance and Enlightenment of the West and to achieve the level of contemporary civilization thanks to the new form of the laic society. Thus, the principle of laicism sets out for Turkey a social dimension which is more important than its legal dimension which constitutes its infrastructure."<sup>20</sup>

The pertinence of this social dimension has been further elevated by the Turkish constitutional judge, whom while fulfilling the task of clarifying the scope of the principle has gone beyond the normative framework and has afforded the principle an existential importance for the Republic under a teleological and historical approach.<sup>21</sup> Specifically the historical context has inclined the Turkish judiciary in general to formulate a strict interpretation and rigid application of the principle. Interesting to observe, this approach has not only become a focal point for the Turkish constitutional judge, but has also formed an important anchor for his European counterpart, as witnessed in the jurisprudence of the European Court of Human Rights (ECHR) in the *Case of Refah Partisi and Others v. Turkey*<sup>22</sup> and the *Case of Leyla Şahin v. Turkey*.<sup>23</sup> To this respect, an overview of the constitutional development of laicism in Turkey is a *sine qua non* before any illustration of its normative and interpretative aspects. It will thus be possible to understand both the multi-layered mechanisms that are currently in place protecting its form

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been concretized through numerous statutes, also known as "Reform Laws." These statutes range from the adoption of the Latin alphabet and Roman numerals, to the abolishment of certain feudal and religious titles and insignia. The process undertaken by the adoption of these measures which aimed modernizing in great haste a society ruled under religious and feudal tenets is also called the "Turkish Revolution" within Turkish history. See generally LORD PATRICK KINROSS, *ATATURK: THE REBIRTH OF A NATION*, (Weidenfeld & Nicolson 1966) for a historical account of the foundation of the republic.

19. See Öktem A. Emre, *La Spécificité de la Laïcité Turque*, 29 ISLAMOCRISTIANA (PONTIFICAL INSTITUTE FOR ARABIC AND ISLAMIC STUDIES) [P.I.S.A.I] 93-94 (2003) (Turk.).

20. See Yüzbaşıoğlu Necmi, *Türk Anayasa Yargısında Anayasallık Bloku* [The Constitutional Block in Turkish Constitutional Jurisdiction], 3762 İstanbul Üniversitesi Yayınları, [ISTANBUL U. PUBLICATIONS] 170 (1993) (Turk.).

21. See discussion *infra* Part I.C.

22. See generally *Case of Refah Partisi and Others v. Turkey*, [GC] App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98 Eur. Ct. H.R. (2003).

23. See generally *Case of Leyla Şahin v. Turkey*, Grand Chamber, [GC] App. No. 44774/98 Eur. Ct. H.R. (2005).

and essence, and the substantive jurisprudential protection provided by the Turkish constitutional judge.

A. *The Historical Context of Laicism in Turkish Constitutional Law*

The source of the principle of laicism in Turkish constitutional law can be found in the doctrine of “*laïcisme*” adopted from French constitutional tradition. Unlike secularism which essentially focuses on issues concerning the status of clergy and church and the religious indifference of the state institution,<sup>24</sup> the Turkish perspective, similar to its French origins, concentrates on the withdrawal of the religious spheres influence from political and public life; and its foremost exclusion from the educational and instructional spheres.<sup>25</sup> Yet, during its historical development in Turkish legal practice, it has also differed to a large extent from its French origins, achieving its own very particular conception.<sup>26</sup> This *sui generis* conception of laicism<sup>27</sup> was primarily due to the necessity of the newly independent Turkish state to modernize in revolutionary haste. It was furthermore promoted by Turkish legal activism, which since its initial formation in the first quarter of the 20<sup>th</sup> Century has “*tried to transform the social, political, ideological, religious and economic systems it encountered*”<sup>28</sup> with the aim of meeting the requirements of socio-political change necessary for the sustained existence of the modern Turkish nation state; thus guaranteeing non-regression to the theocratic imperial model of governance witnessed under the Ottoman Empire.

Essentially, the background constitutional movement for the laicization of the State can be traced back to the *Tanzimat* period (administrative reforms era of 1839); a period in which intensifying pressures from European States in conjunction with the profound

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24. See Elisabeth Zoller, *Les Rapports Entre Les Eglises et Les Etats aux Etats Unis: Le Modele Americain de Pluralisme Religieux Egalitaire* [The Relationship between Church and State in the United States: the American Model of Religious Pluralism Egalitarian in Secularism], in LAICITE, LIBERTE DE RELIGION ET CONVENTION EUROPEENNE DES DROITS DE L’HOMME [FREEDOM OF RELIGION & EUR. CONVENTION ON HUM. RTS.] 15-16 (Gerald Gonzalez ed. 2006) (Belg.).

25. See Tanör Bülent & Yüzbaşıoğlu Necmi, *1982 Anayasasına Göre Türk Anayasa Hukuku—2004 Değişikliklerine Göre* [Turkish Constitutional Law according to the Constitution of 1982—According to the 2004 Amendments], 6 BASKI, BETA 76-79 (2004) (Turk.).

26. Unlike in France where laicism has forced the institutions of “State” and “Religion” to be rigorously separated, the Turkish system has construed a model in which the State has an important role in regulating religious affairs. *Id.* at 77. See also *supra* note 16.

27. See Öktem, *supra* note 19.

28. Örucü Esin, *Judicial Navigation as Official Law Meets Culture in Turkey*, 41 INT’L J. L. IN CONTEXT 40 (2008).

influence of western enlightenment and human rights doctrines<sup>29</sup> resulted with the adoption of legal reforms by the Ottoman Empire. These reforms predominantly aimed the establishment of certain western principles within the Empire's legal order and included the embracement of legal concepts such as the equality before law. These legal reforms also brought into existence concrete policies of institutional westernization, such as the formation of the *Nizamiye* Courts limiting the jurisdiction of the *Şer'iye* Courts,<sup>30</sup> the establishment of modern education institutions besides traditional *Medrasah's*<sup>31</sup> and the adoption of the new civil code, the *Mecelle* (Codex) in 1877.<sup>32</sup> These institutional reforms came to a pause with the eruption of the First World War, after which the National Liberation Government in Ankara established the Turkish National Assembly in 1920. With the adoption of the first Constitution on January 20, 1921<sup>33</sup> the modern Turkish nation-state was born under a constitutional system according to which sovereignty resided within the Nation (Article 3, Constitution of 1921). This was a clear-cut separation from the legal and philosophical foundations of the Ottoman Empire. While initially Islam continued to be reserved as the official state religion, the complete laicization process of the state had irreversibly begun. The governing ideology recognized that only through the adoption of principles such as laicism and republicanism could the state rupture the legal, historical and psychological barriers that might still bind it to the Empire, which was now considered *de facto* dead.

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29. Timur Taner, Osmanlı Devlet Düzeni [Ottoman State Order] s.101-102 (1979) (Turk.) (cited in Dinçkol (Vural) Bihterin, 1982 Anayasası Çerçevesinde ve Anayasa Mahkemesi Kararlarında Laiklik [Laicism within the Framework of the 1982 Constitution and in the Constitutional Court's Judgments] Kazancı 28 (1992) (Turk.).

30. *Id.* at 29. Unlike the *Şer'iye* Courts, which exclusively applied Islamic law, the *Nizamiye* Courts were hybrid. It was foreseen that these Courts would look at a wide array of disputes in such cases as those that non-Muslims were involved or those in which complicated conflicts arose between different legal systems and principles (especially with regards to international trade or transposed legislation from Europe).

31. See Sayar Nihad S., Türkiye İmparatorluk Dönemi, Siyasi, Askeri, İdari ve Mali Olayları [Turkish Imperial Era, Political, Military, Administrative and Financial Developments], 2. BASKI, İTİA 182 (1978).

32. The *Mecelle* was in force until 1926, at which time it was replaced by the new Turkish Civil Code, a western model code based on the Swiss Civil Code. The *Mecelle* was hybrid in the sense that it maintained its Islamic law foundation, yet it incorporated certain western legal notions in order to better regulate complicated legal issues.

33. The Constitution of 1921 must essentially be seen as a transitional Constitution, adopted during foreign occupation and construed as a typical incarnation of the concept of fusion of powers, due to the needs of a centralized national liberation government. The principle of separation of powers was later adopted through the Constitution of 1961. For brief information on the political system put in place by the first Constitution of Turkey. See Özbudun Ergun, Türk Anayasa Hukuku [Turkish Constitutional Law], 8. Baskı, Yetkin 27-30 (2004).

In order to comb out any risk of political regression towards the Empire, the government adopted progressive revolutionary steps. First of all, Decision No. 307 and Decision No. 308 were adopted in 1922 abolishing the Sultanate and *de jure* terminating the Ottoman Empire in order to ascertain the legal situation. However, the abolishment of the Caliphate would have to wait for one more year, until the required moral and social grounds for such a radical social derogation could be achieved while still under ongoing foreign occupation. This measure was undertaken through Law No. 431 adopted on March 3, 1924 abolishing the Caliphate and the Ministry on Religion and Religious Foundations. In addition Law No. 430 on the Unification of the Educational System terminated the religious-laic duality within the education system to the benefit of the latter. Approximately a month later, on April 8, 1924, the unification of the judiciary was likewise established.<sup>34</sup> Thus, the state had taken measures in order to both socially and legally laicize itself and the society.

Although the Second Constitution of Turkey of April 20, 1924 continued to embrace Islam as the official State religion, it did include under Article 80 the freedom of conscience for all individuals. Further reforms for the laicization of state and society included such examples as the adoption of the Law on the Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles on November 30, 1925,<sup>35</sup> the Law on the Wearing of Hats on November 28, 1925 and the adoption of the Turkish Civil Code, The Commercial Code and Criminal Code in 1926.<sup>36</sup> Specifically in the context of the new laic Civil Code, emphasis was added on gender equality. This was done in order to elevate the standards of equality between men and women to a greater extent in a society which had been ruled under the dictates of religious law for centuries. A vast number of measures were also adopted to bridge the gap between males and females, bringing provisions for their protection and the empowerment of the latter. For instance, the right to vote in municipal elections was recognized for women in 1930 and the right for women to vote and stand for office in national elections was recognized as early as 1934.<sup>37</sup>

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34. See Dinçkol, *supra* note 29, at 34.

35. These titles include religious and feudal titles; a step taken in order to further develop the understanding of equality of citizens within the new nation state.

36. Most of these laws, known as the "Reform Laws," are protected under Article 174 of the Constitution of 1982. See *also supra* note 18.

37. In elections held on the 8<sup>th</sup> of February 1935, 17 Turkish women were elected in to the National Assembly for the first time.

With an amendment in 1928, reference to the state religion was removed altogether from the text of the Constitution. Law No. 3115 was adopted on February 5, 1937, which inserted the principle of laicism as a fundamental characteristic of the state. Since forth, both the Constitution of 1961 and the current Constitution of 1982 have included mutually pertinent reference to the principle, and have foreseen diverse layers of constitutional protection against acts that might try to undermine it. These mechanisms have been specifically put in place due to the direct identification established between the principle and the state. Perceived as the main dynamic of the revolutionary transformation of Turkey from empire to nation-state, the principle is vital for protecting the State and the nation. As expressed by the Court in 1998, laicism is the opposite of Sharia.<sup>38</sup> As the indicator of modernism, laicism has been the driving force for Turkey in the transition from the “*umma*”<sup>39</sup> to the “nation.”<sup>40</sup> This is why Turkish laicism not only provides for State neutrality towards all religions, but also puts into place a large number of mechanisms that are specifically designed to “check and balance” the influences of religion within the public sphere. These also include mechanisms which actively foresee direct regulation of the religious sphere by the State.

*B. The Multi-Layered Normative Protection of Laicism under the Turkish Constitution of 1982*

Under Article 2 of the Constitution of 1982, the Turkish State is “*a democratic, laic 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.*” Additionally, Article 10 of the Constitution stipulates, “*All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations*” and affirms that the State has the obligation “*to ensure that this equality exists in practice*”; obliging all organs of the

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38. Islamic religious law.

39. The Islamic community. Under the Ottoman Empire nationhood was identified through religious affiliation. Thus the “*umma*” would be compromised of communities such as Turks, Albanians and Arabs and they would be considered one national unit, while the non-Muslim communities were divided according to their church affiliation so that the Armenians were separated as Catholics and Protestant and the Bulgarians and Romanians were considered one single national unit. Ortaylı Ilber, *Osmanlı Devletinde Laiklik Hareketleri Üzerine* [On Laicism Movements in the Ottoman State], cited in Dr. Ümit Doğanay’ın Anısına Armağan, 501 (1982) (Turk.).

40. See generally Judgment of 16 January 1998, E: 1997/1 (*Siyasi Parti Kapatma*), K: 1998/1, Anayasa Mahkemesi [Constitutional Court] (Turkey).

State to “*act in compliance with the principle of equality before the law in all their proceeding.*” In light of these two articles, the Turkish State structure can be legally considered “religion-neutral.” Yet, this constitutional neutrality should not be perceived as indifference. On the contrary, Turkish legal activism, which includes the regulation of the external aspects of religion in order to implement the Turkish conception of laicism, finds its normative basis in the multi-layered protection mechanism provided by the Constitution. These mechanisms structured to guard the principle are concretized within the Constitution under three different layers of normative control: The Non-Protection Regime, The Restriction of Fundamental Rights and Freedoms Regime and the Irrevocable Provisions Regime.

### 1. The Non-Protection Regime

The first level of protection is provided by the non-protection regime foreseen in the Preamble, and further built upon through Article 14 of the Constitution. Paragraph 5 of the Preamble, which under Article 176 of the Constitution forms “*an integral part of the Constitution,*” plainly stipulates that “*no protection shall be accorded to an activity contrary to . . . the nationalism, principles, reforms and modernism of Atatürk<sup>41</sup> and that, as required by the principle of laicism,*” so as to guarantee “*no interference whatsoever by sacred religious feelings in state affairs and politics.*” This provision is largely referred to by the Court in cases that necessitate recourse to a teleological interpretation of the principle. Further building upon this, the first paragraph of Article 14 on the Prohibition of Abuse of Fundamental Rights and Freedom prescribes that “*none of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and laic order of the Turkish Republic based upon human right.*” Consequently, interpreted in conjunction with the Preamble, Article 14 provides an important tool depriving acts contrary to laicism from constitutional justification. In other words, the pretext of the enjoyment of a right or freedom cannot stand on a constitutional basis if the involved acts are contrary to the principle.

### 2. The Restriction of Fundamental Rights and Freedoms Regime

The second level of protection, the limitation of fundamental rights and freedoms regime, is established through direct restriction clauses brought to specific fundamental rights and freedoms enumerated within

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41. See *supra* note 18.

the Constitution. For example, Article 24 of the Constitution which regulates the Freedom of Religion and Conscience foresees both the freedom and the necessary safeguards for potential conflict with the principle of laicism. The Article reads:

*Everyone has the right to freedom of conscience, religious belief and conviction.*

*Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14.*

*No one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.*

*Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives.*

*No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.<sup>42</sup>*

As it can be observed, despite the exclusive protection provided for the *forum internum* of the freedom of religion, direct reference to the "Abuse of Rights" clause and the clearly stipulated provisions of paragraph 4 and 5 concerning state supervision over religious education and the prohibition of abuse of religious feelings narrows the *forum externum* of the freedom considerably. In practice the consequences of these provisions are witnessed in cases that involve manifestations involving acts of proselytism and religious education. In connection with the latter, the Right and Duty of Training and Education formulated under Article 42 also expressly stipulates that even though all possess the right and freedom of not being "*deprived of the right of learning and education,*" this right should be "*conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science*

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42. TURK. CONST. art. 24.

*and educational methods, under the supervision and control of the state*"; and in any case, the second paragraph of the Article also expresses that the practice of this right in no way relieves citizens from their duty of loyalty towards the Constitution. Similarly, other fundamental human rights and freedoms under the Constitution which do at certain levels interrelate with the effective enjoyment of the freedom of religion<sup>43</sup> also contain distinctive restriction regimes, comparable to the ones articulated in the Articles 24 and 42. Thus, the state is able to intervene and restrict the effective enjoyment of rights and freedoms to the extent that they contradict with the principle of laicism.

One other point to observe at this level concerns the last paragraph of Article 42, which recognizes that in all circumstances concerning the right to education "*provisions of international treaties are reserved.*" Taking into consideration the fact that in Turkish law duly ratified international treaties have the force of law and that in circumstances of conflict between a statute and an international treaty relative to fundamental rights and freedoms the treaty rules prevail,<sup>44</sup> some regulations concerning religious education might raise issues under various human rights treaties that have been ratified by Turkey. To avoid such conflicts and protect the laic educational system, Turkey has opted to place specific reservations to the treaty provisions on the right to education. The reservation placed on March 10, 1954 to Article 2 of the additional Protocol No I to the European Convention on Human Rights can be cited as one such instance.<sup>45</sup>

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43. Such rights and freedoms enumerated within the Constitution include: Article 20 on the right to the Privacy of Individual life, Article 21 on the Right to the Inviolability of the Domicile, Article 22 on the Freedom of Communication, Article 23 on the Freedom of Movement, Article 25 on the Freedom of Thought and Opinion, Article 26 on the Freedom of Expression and Dissemination of Thought, Article 28 on the Freedom of the Press, Article 33 and 34 on the Freedom of Association and Assembly.

44. The place of international treaties in Turkish law is established under Article 90 of the Constitution. The provision concerning the conflict rule between legislation and international treaties was introduced into Article 90 through an amendment law (Law No. 5170) in 2004. This step was taken in order to harmonize Turkish legislation with European human rights standards within the scope of EU accession talks. Before the amendment, no such conflict rule existed, resulting in the adoption of different standards of application by different levels of the judiciary when a conflict arose between human right treaties and national statutes.

45. Article 3 of Law No. 6366 foresees that "*The second article of the Additional Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms cannot breach the provisions of Law No. 430 adopted in 3 March 1924 on the Unification of the Educational System.*"

### 3. The Irrevocable Provisions Regime

The third and without a doubt most important level of normative protection brought towards the principle is the general self-preservation regime foreseen directly for the principle of laicism and indirectly extended towards the specific legislation which materialize its concrete application. The first step of this regime is articulated under the “Irrevocable Provisions”<sup>46</sup> clause set forth by Article 4 of the Constitution which states, “*The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic . . . shall not be amended, nor shall their amendment be proposed.*” Therefore, the principle of laicism is protected against initiatives that aspire to distort its presence as a constitutional norm through direct modification to the constitutional text. This regime is supplemented by an indirect protection clause provided under Article 174, which extends protection to the “*Reform Laws*” incarnating *in concreto* the principle of laicism; thus foreseeing their constitutional self-preservation.

According to Article 174:

*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 laic character of the Republic, and which were in force on the date of the adoption by referendum of the Constitution of Turkey.*<sup>47</sup>

These laws and principles which are considered *de iure* constitutional include the Law on the Unification of the Educational System; the Law on the Wearing of Hats; the Law on the Closure of Dervish Monasteries 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 marriage act shall be concluded in the presence of the competent official, adopted with the Turkish Civil Code

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46. This regime is not unique. There are other countries that have similar regimes provided within their constitutional system. Just to cite a few, Article 79 of the Constitution of Germany (Grundgesetz für die Bundesrepublik Deutschland 79GG.), Article 152 of the Constitution of Romania (1991 CONST. 152.), Article 139 of the Constitution of Italy (COST. 139.), and Article 89 of the Constitution of France (1958 COST. 89.) all recognize the non amenable nature of certain core principles, values or political institutions. On the other hand, some countries which have no such clear provisions have through jurisprudence developed a similar strategy of self preservation. For example the Indian Supreme Court in the *Case of Kesavananda Baharati* formulated the similar rationale under a “Theory of Basic Structure.” *Kesavananda Bharati v. State of Kerala*, A.I.R 1973 S.C. 1461, 1510.

47. TURK. CONST. art. 174.

of 1926; The Law on the Adoption of International Numerals; The Law on the Adoption and Application of the Turkish Alphabet; The Law on the Abolition of Titles and Appellations such as *Efendi*, *Bey* or *Paşa* and The Law on the Prohibition of the Wearing of Certain Garments. Thus, whatever the circumstances be, it becomes impossible to allege the illegality of any measures taken under these statutes since they are directly elevated to a semi-constitutional status.

At this point it is always possible for one to inquire about the lack of direct protection to the Articles 4 and 174, since it remains constitutionally possible to amend these two articles before any direct attempt to modify the norms that they protect. True that may be from a normative perspective; it is exactly at this point that the Court, through jurisprudence, has formulated the necessary functional safeguard against any such indirect attempt. Based on a rationale of self-preservation, the “Protection against indirect amendments” regime construed by the Court has in effect structured a conception of the Constitution which affords to the principle of laicism a *de facto* functional hierarchy over most other provisions. It will be exactly this point which will give rise to one of the major arguments in the case concerning the annulment of Law No. 5735 concerning the “*Turban Amendment*.” However, in order understand the legal discourse; it is of foremost importance to illustrate the existential significance afforded to laicism by the Turkish constitutional judge.

C. *The Existential Significance of Laicism under the Court's Teleological Interpretation*

As the guardian of the constitutional order, the Court has also become the central pillar for the protection of laicism. Numerous factors have contributed to this stance, including domestic and international developments such the perceived proliferation of political fundamentalist religious movements, as well as the aforementioned historical context which identifies the state directly with the principle. Thus, the principle is recognized not only as one of the main pillars of the Turkish state, but also as the basis of fundamental democratic values. Since, as described by the Court—from a historical standpoint,—being “*a tool of transition to democracy*” renders laicism a pivotal value within “*Turkey's existential philosophy*.”<sup>48</sup> This value has also effected the conception of the principle itself, differentiating it both in theory and practice, from its western origins.

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48. Judgment of 16 January 1998, E: 1997/1 (*Siyasi Parti Kapatma*), K: 1998/1, Anayasa Mahkemesi [Constitutional Court] (Turkey). For the existential importance of laicism, see also Bülent Tanör & Necmi, Yüzbaşıoğlu, *supra* note 25, at 81.

### 1. The differentiation of Turkish Laicism

In face of arguments of deviation from its original conception, the Court has expressed that the necessity for this differentiation was evident since “laicism is not only a philosophical and ideological concept, [but] is a principle that is implemented”; thus influenced by the “religious, political and social conditions of the country that it is applied.”<sup>49</sup> Within this sense, when Turkey abandoned the theocratic imperial model of state, and adopted through revolutionary reforms democratic republicanism, it has interpreted the meaning of laicism “somewhat different from that of the western world.”<sup>50</sup> The influence of the concrete conditions of the Country has transformed the principle into an essential deterrent against “a worldview that might prevent any endeavor for the development of the society and its attainment of the standards of modern civilization.”<sup>51</sup> Thus, its application presents a greater importance for Turkey when compared with some western states that do not seem to be under any concrete risk of regressive movements, threatening on the long run the State’s political regime. Elaborating on this difference the Court acknowledged this difference, stating that:

It is natural that the principle of laicism should be inspired by the present conditions of each country and the characteristics of each religion, and that the conformity or non-conformity of these conditions and characteristics should project on the understanding of laicism producing different attributes and practices . . . due to the differences of the religions of Islam and Christianity, the cases and the results in our country and western countries have been different. The adoption on the same level and understanding of the practice of laicism in countries with different religions and religious understandings cannot be expected. This situation is the natural result of the distinction between the circumstances and rules. Moreover, the conception of laicism in western countries that embrace the same religion has shown contrast.<sup>52</sup>

With this rationale in hand, the Court has expressed that within the context of Turkey, laicism carries an existential significance, identifying the principle with the Turkish revolution from empire to nation.<sup>53</sup>

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49. Judgment of 4 November 1986, E: 1986/11, K: 1986/26, Anayasa Mahkemesi [Constitutional Court] (Turkey).

50. *Id.*

51. *Id.*

52. Judgment of 16 January 1998, E: 1997/1 (*Siyasi Parti Kapatma*), K: 1998/1, Anayasa Mahkemesi [Constitutional Court] (Turkey).

53. Çetin Özek, 100 Soruda Türkiye’de Gerici Akımlar [Regressive Movements in Turkey in 100 Questions], 121 (1968).

## 2. The Existential Significance of Laicism

When giving meaning to the principle, the Court has naturally adopted a teleological approach, taking first and foremost the justification for the principles initial adoption during the Republics foundation: “the institutionalization of the state according to the rules of reason and science.”<sup>54</sup> Building upon this, the Court furthermore expressed its own perception of the concept:

Laicism is the regulator of political, social, cultural modern life based on national sovereignty, democracy, freedom and science. It is the principle that provides the individual the possibilities of individuality and free opinion, thus necessitating the differentiation of politics-religion and belief in order to provide freedom of religion and conscience.<sup>55</sup>

The consequence of this vision is the perception that laicism not only separates the religious from the state, but it does this in order to free the individual from pressures of religious belief; enabling freedom of religion to be practiced to the greatest extent possible. The Court reinforces this point of view by emphasizing that the freedom of religion can only be achieved in a laic order where:

[r]eligion is freed from politicization; it is removed from being a tool of governance, left in its respectful place in the conscience of individuals. The rule that material matters are dealt with laic law, spiritual matters are dealt with their own rules is one of the foundations that modern democracies are based upon. Construing public regulations according to religious rules is inconceivable. The foundation of regulations cannot be religious rules.<sup>56</sup>

For the Court, the concept of the equality of all before the law necessitates such an interpretation since:

The Democratic and laic state does not discriminate between individuals based on their beliefs. Everyone is free to choose their religion, express their beliefs within the confines of the freedom of religion and conscience. In a laic society, the individual’s choice of holding religion and belief is outside of the legislatives influence. The suggestion that the State prefers one of the religions is also contrary to the equality of citizens whom adhere to different religions. Being able to express true freedom of conscience in laic

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54. Judgment of 16 January 1998, E: 1997/1 (*Siyasi Parti Kapatma*), K: 1998/1, Anayasa Mahkemesi [Constitutional Court] (Turkey).

55. *Id.*

56. *Id.*

states also demonstrates that laicism is the assurance of this freedom.<sup>57</sup>

According to this vision, laicism enables within Turkey pluralism and democracy. This last point has also been adopted with clear reference to the Court's jurisprudence by other levels of judiciary. For example, in a high profile case before it, Turkish Court of Appeals (*Yargıtay*) reiterated the Court's vision on laicism by stating that from a legal perspective, laicism was the pre-condition of Turkish democracy and within this sense it was natural for there to exist a differentiation in conception between European laicism which was a result of the formation of the nation state and Turkish laicism which was the pre-condition of the formation of Turkish nation-state.<sup>58</sup> The unification of two different concepts such as "nation" and "laicism" is the result of the "Turkish path of secularization" which "is an amalgam of religion, nation, and laicism that is unique not just among Islamic societies but worldwide."<sup>59</sup> It is then natural for Turkish laicism to include some specific elements that may not be found in other laic/secular states.

### 3. The Essential Elements of Turkish Laicism

When taken into context with the detailed reference to the principle within the Constitution and the multi-layered protection mechanisms formulated around it, the Court has been able to adopt a firm application of the principle. The importance put on the principle made it natural to recognize to the "State the right of control and supervision of religious issue" which could not be "considered a restriction to the freedom of religion and conscience in violation of the necessities of the democratic social order."<sup>60</sup> To this effect, the Court has spelled out clearly the

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57. *Id.*

58. Turkish Court of Appeals (*Yargıtay*), Judgment, General Penal Council (*Ceza Genel Kurulu*), 15 March 2005, E: 2004/8-201, K: 2005/30. The case concerned an article named "The Terror of Religion Enmity" written by a known Islamist columnist, in which the author alleged the atheism of all who were adverse to the Islamic veil as the symbol of Islam and in which defamatory language was constantly used against the laic segments of society. *See id.* Similarly anti-Semitism was a reoccurring theme within the article. *See id.* The Court of Appeals, after an elaborate analysis on the international standards of the freedom of expression, which included not only domestic, foreign and international jurisprudence but also contemporary doctrinal literature, arrived to the conclusion that the author had committed the crime of inciting the population to hatred and enmity. *See id.*

59. Cemal Karakas, *Turkey: Islam and Laicism Between the Interests of State, Politics, and Society*, 78 PEACE RESEARCH INSTITUTE FRANKFURT REPORTS, at 8 (2007), available at <http://www.hsfk.de/fileadmin/downloads/prif78.pdf>.

60. Judgment of 16 Jan. 1998, E: 1997/1 (*Siyasi Parti Kapatma*), K: 1998/1, Anayasa Mahkemesi [Constitutional Court] (Turkey).

essential elements of the application of the principle of laicism within the Turkish context, which are:

- a-) The Adoption of the principal that religion should not be sovereign and effective in State affairs,
- b-) Religion should be constitutionally protected, recognizing that the area of religion which deals with the spiritual life of individuals should be, without discrimination, an unrestricted freedom,
- c-) Restrictions should be accepted in order to protect public order, safety and interests and prohibit the abuse of religion for the aspects of religion, which exceed individuals spiritual life, effect their social acts and behaviors,
- d-) Recognize to the State, as the protector of public order and rights, the competence of supervision over religious rights and freedoms. . . .<sup>61</sup>

In particular the last point of this articulation determines openly the margin of maneuver recognized to the State for an active interventionist approach towards the external manifestations of religion.<sup>62</sup> It is also this element, in conjunction with the Court's elaborate teleological interpretation, which has allowed it to come to the conclusion that the significance of laicism gracefully provides it the necessary legal justification for an expansion of the legal extent of its own judicial control over legislative acts.<sup>63</sup> It is this last point which resides behind the complicated legal matrix of constitutional interpretation and judicial activism, which above all has formulated the prohibition of the Islamic veil in higher education in Turkey.<sup>64</sup>

## II. LEGISLATIVE ACTION, JUDICIAL COUNTER ACTION: AN OVERVIEW OF THE PROHIBITION ON THE USE OF THE ISLAMIC VEIL IN HIGHER EDUCATION AND THE CASE CONCERNING THE "*TURBAN AMENDMENT*"

In Turkey it is currently not possible for a female student to attend classes or take exams in the campuses of higher education establishments while wearing the Islamic veil.<sup>65</sup> This prohibition is the result of a

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61. Judgment of 21 Oct. 1971, E: 1970/53, K: 1971/76, Anayasa Mahkemesi [Constitutional Court] (Turkey).

62. *See id.*

63. *See id.*

64. *See id.*

65. *See* GILLES KEPEL, *JIHAD* 350-51 (4th ed. 2006) (2002).

complex juxtaposition of judicial interpretation of constitutional norms and values; since there does not exist any clear constitutional provision or openly stipulated statute that foresees such a prohibition.<sup>66</sup> Within this context, the prohibition is derived more from the essence of the constitutional text rather than its wording.<sup>67</sup> The prohibition is formulated upon the core existential values of the republican regime enumerated in Article 2 of the Constitution; namely the democratic and laic state order.<sup>68</sup> Its legal justification is construed upon concepts of gender equality and the protection of the rights and freedoms of others as well as the safeguard of public order and state neutrality.<sup>69</sup> It is interesting to observe that within the dialectics surrounding the issue, those in support and those against it have both been able to formulate their arguments upon the effective enjoyment of fundamental human rights.<sup>70</sup> Those against the prohibition have voiced the freedom of religion for “practicing Muslim female students,” while those in support have introduced a similar argument, but with regards to third party rights concerning abusive proselytism and discrimination.<sup>71</sup>

Within this context, the development and application of the “operational prohibition”<sup>72</sup> of the use of the Islamic veil in higher education provides us the perfect example of the interpretation of the principle of laicism by the Court and the functional hierarchy afforded to it with regards to other norms. In order to illustrate this interesting interaction of laicism and the freedom of religion, a brief account of the political and legal background surrounding the issue is necessary. For this end, this section will first provide a concise history of the “politics of law” that have ended with the establishment of the prohibition. Secondly, it will illustrate the functional and *de facto* hierarchy afforded to the principle, which allows the Court to extend its jurisdictional reach. To conclude, the Court’s perception on the substantial conformity of the Islamic veil in higher education with the principle of laicism shall be exposed in light of its recent judgment in the case concerning Law No. 5735 on the “*Turban Amendment*.”<sup>73</sup>

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66. See generally TURK. CONST.

67. See generally *id.*

68. See *id.* art 2.

69. See GILLES KEPEL, JIHAD 350-51 (4th ed. 2006) (2002).

70. See *id.*

71. See *id.*

72. We use the term ‘operational prohibition’ in order to maintain the idea that the prohibition does not derive from a clearly stipulated statute but from interpretation of constitutional principles.

73. Law No. 5735 of Feb. 23, 2008, Resmi Gazete [R.G.] No. 26796 (Sep. 2, 2008) (Turk.).

A. *A Short Story of the Prohibition on the Use of the Islamic Veil in Higher Education*

While there has always been a socio-political struggle between religious movements and the state since the foundation of the Republic,<sup>74</sup> the debate concerning the use of the Islamic veil in higher education attracted more public attention during the 1970's.<sup>75</sup> This period of Turkey's history was characterized by large-scale urbanization—a process that begun in the 1950's—coinciding conservative policies due to the increase of newly urbanized rural populations in large cities and the external dynamics of the Cold War Era.<sup>76</sup> These developments eventually resulted with the increase of visibility of orthodox religious lifestyle in daily life.<sup>77</sup> As the number of female students preferring to use the Islamic veil in higher education grew, so did social anxiety, mostly about the politicization of religious beliefs in direct defiance to the principle of laicism, mature amongst the established laic segments of society.<sup>78</sup> Within this context, the first reactionary measure came from the University of Ankara, which in 1967 terminated the university affiliation of Mrs. Hatice Babacan, a female student at the Faculty of Theology who insisted entering classes wearing the Islamic veil.<sup>79</sup> Lacking any clear regulation on the issue and the increase of polarization in public opinion, the issue morphed into a socio-political confrontation between various actors and, needless to say, developed into a political quarrel between opposing political parties.<sup>80</sup> On one side, the supporters of the freedom to wear the Islamic veil alleged repressive violation of the

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74. MEHMET OZAY, *ISLAMIC IDENTITY AND DEVELOPMENT STUDIES OF THE ISLAMIC PERIPHERY* 119-20 (1990). For example, on the 23<sup>rd</sup> of December 1930 members of the *Nagshbandi* religious order rallied crowds in the town of *Menemen*, demanding the restoration of Islamic rule. *See id.* The incident also known as the “*Kubilay Incident*” escalated after the crowds overwhelmed the forces sent to quell the uprising and the leader of the forces, Lieutenant *Mustafa Fehmi Kubilay* was beheaded and his head put on a pole to be paraded throughout the town. *See id.* This incident resulted with the declaration of martial law in the region after which 28 people were condemned with the death penalty by court martial. *See id.* This and similar incidents during the formation of the Republic would seem to on a larger scale push the central authority to become more aggressive in implementing policies of laicization. *See id.* Such incidents have also become points of consideration for the Turkish judiciary in conceptualizing Turkish laicism. *See id.*

75. *See* Fadwa El Guindi, *The Veil Becomes a Movement*, in *WOMEN AND ISLAM: SOCIAL CONDITIONS, OBSTACLES, AND PROSPECTS* 70, 70-72 (Haideh Moghissi ed., 2005).

76. *See* Burçak Keskin, *Confronting Double Patriarchy: Islamist Women in Turkey*, in *RIGHT-WING WOMEN: FROM CONSERVATIVES TO EXTREMISTS AROUND THE WORLD* 245, 249 (Paola Bacchetta & Margaret Power eds., 2002).

77. *See id.*

78. *See id.*

79. *See id.* at 245-57.

80. *See id.* at 249.

freedom of religion and the right to education.<sup>81</sup> Opposing this idea, and mostly supported by the laic state establishment, people perceived the Islamic veil movement as the manifestation of political Islam and a direct threat to the laic Republic.<sup>82</sup> There was genuine anxiety that the satisfaction of this demand would put pressure on Muslim female students who preferred not to manifest their beliefs as such and it would also open the door for similar future demands for entry into public service.<sup>83</sup> As an expressive religious symbol such a development was also perceived to hurt deeply state neutrality.<sup>84</sup>

### 1. The Prohibition under the Constitution of 1982

After the adoption of the Constitution of 1982, the newly established Council of Higher Education adopted a circular on the 20<sup>th</sup> of December 1982, which for the first time prohibited the use of the Islamic veil in higher education.<sup>85</sup> Based on this circular, higher education establishments adopted prohibitory measures through internal circulars and took disciplinary measures against students who acted contrary to these regulations.<sup>86</sup> Due to the request for the relaxation of the prohibition by the governing right wing Motherland Party (*Anavatan Partisi*), the Council of Higher Education adopted on the 10<sup>th</sup> of March 1984 another circular which eased the restrictions.<sup>87</sup> This new circular foresaw a differentiation between the various covers used by females and prohibited the traditional headscarf (*başörtüsü*) while accepting more modern covers such as the *Türban*.<sup>88</sup> Having not articulated the differences between the methods of covering the hair and head, this circular naturally gave rise to differences in practice.<sup>89</sup> On the other side the Council of State (*Danıştay*) upheld the validity of disciplinary measures taken by some higher education establishments against the use of the Islamic veil, expressing their conformity to the law in force.<sup>90</sup> In

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81. See Burçak, *supra* note 76, at 245-57.

82. See *id.*

83. See *id.*

84. See generally Case of Leyla Şahin v. Turkey, 41 Eur. H.R. Rep. 8 (2005) (ECtHR), 44 Eur. H.R. Rep 5 (2007) (Grand Chamber).

85. See Burçak, *supra* note 76, at 249.

86. See *id.*

87. See *id.*

88. See *id.* at 249-53.

89. See *id.* at 245-57.

90. Judgment of Feb. 23, 1984, Eighth Chamber, E: 207, K: 330, Danistay Dergisi [Review of the Council of State] [D.D.] (Turk.); Judgment of Oct. 3, 1989, Eighth Chamber, E: 84, K: 724, Danistay Dergisi [Review of the Council of State] [D.D.] (Turk.) Council of State, Judgment, 8th Chamber, 23 February 1984, E: 207, K: 330; Council of State, Judgment, 8th Chamber, 3 October 1989, E: 84, K: 724.

1984 the Council of State expressed clearly its perception according to which the Islamic veil was not an innocent practice *per se*, and instead it was becoming “*the symbol of a worldview contrary to the freedom of women and the fundamental principles of our Republic.*”<sup>91</sup> Relying on the jurisprudence of the Council of State, the Council of Higher Education once more prohibited the general use of the Islamic veil in higher education with a decision on the 24<sup>th</sup> of December 1987.<sup>92</sup>

In order to resolve the issue through legislation, Law No. 3511 was introduced by the governing party and was adopted by the Parliament in 1989.<sup>93</sup> Article 2 of the law provided for an Additional Article 16, which read “[w]ithin higher education establishments, classrooms, laboratories, clinics, and polyclinics 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,” to be added to Law No. 2547 on Higher Education.<sup>94</sup> The article was clear enough to avoid any discussion that the various measures taken by higher education establishments and the Council for Higher Education would thus become null and void.<sup>95</sup> However this legislation was taken to the Court by the President of the Republic on grounds of violating the principles enshrined in the Preamble and Articles 2<sup>96</sup> and 10<sup>97</sup> of the Constitution.<sup>98</sup> Reaching its decision on the 7<sup>th</sup> of March 1989, by 10 votes to 1, the Court annulled Law No. 3511 for violating the Preamble and Articles 2, 10, 24 and 174 of the Constitution.<sup>99</sup>

In its judgment the Court observed that “the principle that sovereignty resides in the nation” also had to be understood as meaning that “it does not reside in religion” and within this sense “loyalty and respect to laicism in education and instruction” had to be considered in detail.<sup>100</sup> For the Court the constitutional invalidity of the abuse of religion for political ends also extended to the domain of education and instruction.<sup>101</sup> Consequently “the necessity to refrain from the use of

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91. See Judgment of Feb. 23, 1984, Eighth Chamber, E: 207, K: 330, Danistay Dergisi [Review of the Council of State] [D.D.] (Turk.).

92. See Burçak, *supra* note 76, at 245-57.

93. See Law No. 3511 of Dec. 12, 1988, Resmî Gazete [R.G.] No. 20032 (Dec. 27, 2008) (Turk.).

94. *Id.*

95. *Id.*

96. See TURK. CONST. art. 2.

97. See *id.* art. 10.

98. See *generally* Law No. 3511 of Dec. 12, 1988, Resmî Gazete [R.G.] No. 20032 (Dec. 27, 2008) (Turk.).

99. See Judgment of 7 Mar. 1989, E: 1989/1 K: 1989/12, Anayasa Mahkemesi [Constitutional Court] (Turkey).

100. *Id.*

101. See *id.*

symbols that represent religious beliefs in classrooms and relevant places” in higher education establishments was the basis of the non-conformity between the Islamic veil and the scientific environment.<sup>102</sup> For this reason the Court did not see an issue arise due to the regulation of clothing in higher education.<sup>103</sup> Firstly, the Court’s aforementioned conception of laicism had already provided it the necessary legal justification in regulating the religious field.<sup>104</sup> Secondly, the Courts underlined the fact that “[r]egulating its own institutions is a State’s most natural right,” and since “male and female clothing in public or private life [could not] be regulated by law according to religious tenets” it would be similarly impossible to regulate the public sphere according to religion; the only acceptable formula was regulations conducted “according to legal necessities.”<sup>105</sup> With regards to the enjoyment of fundamental rights argument, the Court preferred to thwart any such claim expressing abstract views on a democracy without restrictions, isolated of the concrete circumstances of the case, were constitutionally unsound since, “exploiting freedoms in order to cast down freedoms” was unacceptable; and within this sense, “forcing people to dress in this or that manner and cover their heads [would] cause discrepancy between those who are of a different or even of the same religion.”<sup>106</sup> That is why the Court perceived that “freedoms that were not in conformity with laicism” would not gain validity and “could not be defended or protected.”<sup>107</sup> This ruling was important, for not only had the Court upheld the numerous prohibitory practices undertaken by higher education establishments, but it had also for the first time explicitly set the lacking constitutional basis of the prohibition.<sup>108</sup>

After having failed to solve the problem, the Parliament adopted Law No. 3670 in 1990, as yet again an attempt to overcome the prohibition.<sup>109</sup> This time, the legislation was drafted with an open ended formula, containing no reference to religion at all in order to bypass the Court’s Judgment of 1989.<sup>110</sup> Article 12 of the Law foresaw the insertion of an Additional Article 17, which read: “[w]ithout being contrary to law in force, clothing and attire is unrestricted in higher education

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102. *Id.*

103. *See id.*

104. *See id.*

105. *See* Judgment of 7 Mar. 1989, E: 1989/1 K: 1989/12, Anayasa Mahkemesi [Constitutional Court] (Turkey).

106. *Id.*

107. *Id.*

108. *See id.*

109. *See* Law No. 3670 of Oct. 25, 1990, Resmi Gazete [R.G.] No. 20679 (Oct. 28, 1990) (Turk.).

110. *See id.*

establishment,”<sup>111</sup> into Law No. 2547 on Higher Education.<sup>112</sup> Law No. 3670 also comprised a Transitional Article which provided for a general amnesty for students who had already received disciplinary measures due to the use of the Islamic veil.<sup>113</sup> Without reference to political or religious ideology, the articulation of a freedom could not be evaluated as violating any constitutional norm.<sup>114</sup> Since no clearly stipulated law prohibiting the use of the Islamic veil in higher education existed, the problem would thus be solved.<sup>115</sup>

Law No. 3670 was this time taken to the Court by the opposition party.<sup>116</sup> The Court rendered its judgment in 1991.<sup>117</sup> As expected, the Court found that the law was conform to the Constitution and refused the request for its annulment.<sup>118</sup> Nevertheless, in its reasoning the Court also pronounced that the phrase “[w]ithout being contrary to law in force” in Additional Article 17 had to be interpreted extensively.<sup>119</sup> Within this sense, the expression “law” did not only imply statutes, but also included in its entire framework the Constitution as norm-superior, as well as the Court’s jurisprudence;<sup>120</sup> since as articulated by Article 153 of the Constitution, “the Constitutional Court Judgments . . . are binding on the legislature, executive and judiciary, administrative offices, natural and legal persons.”<sup>121</sup> Hence, the freedom stipulated by Additional Article 17 on the clothing and attire of students in higher education establishments had to be “accepted as not including ‘the closing of the neck and hair with a cloth or turban due to religious beliefs’” given that the Court’s order of 1989 had already articulated this fact.<sup>122</sup> Thus, taken into consideration in conjunction with the Judgment of 1989, the Court’s Judgment of 1991 became the constitutional reference point for higher education establishments which moved to prohibit the entry of students wearing the Islamic veil into their compounds.<sup>123</sup>

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111. *See id.*

112. *See* Law No. 2547 of Nov. 4, 1981, Resmî Gazete [R.G.] No. 17506 (Nov. 6, 1981) (Turk.).

113. *See* Law No. 3670 of Oct. 25, 1990, Resmî Gazete [R.G.] No. 20679 (Oct. 28, 1990) (Turk.).

114. *See id.*

115. *See id.*

116. *See id.*; Judgment of 9 Apr. 1991, E: 1990/36, K: 1991/8, Anayasa Mahkemesi [Constitutional Court] (Turkey).

117. *See* Judgment of 9 Apr. 1991, E: 1990/36, K: 1991/8, Anayasa Mahkemesi [Constitutional Court] (Turkey).

118. *See id.*

119. *See id.*

120. *See id.*

121. TURK. CONST. art. 153.

122. *See* Judgment of 9 Apr. 1991, E: 1990/36, K: 1991/8, Anayasa Mahkemesi [Constitutional Court] (Turkey).

123. *See id.*

## 2. The “28 February Process” and the Generalization of the Prohibition

With the rise of conservative votes in the 1990's, the pro-Islamist/conservative Welfare Party won the 1995 National Elections and formed the 54<sup>th</sup> government in coalition with the right wing True Path Party (*Doğru Yol Partisi*).<sup>124</sup> Some of the practices of the coalition government and specific scandalous events that took place during those years stirred great anxiety within the laic establishment.<sup>125</sup> On the 28<sup>th</sup> of February 1997, in what would be come to be known as the “28 February Process,” the National Security Council adopted Decision No. 406<sup>126</sup> which expressed the necessity to adopt policies in order to fight against “regressive” religious movements.<sup>127</sup> Article 1 of the decision explicitly declared the necessity to reinforce the principle of laicism and Article 13 advised that the public authorities should apply the Constitutional Court judgments with regards to practices which result in the use of regressive attire.<sup>128</sup> This process resulted on one side with the dissolution of the Welfare Party and on the other side brought great increase in the numbers of higher education establishments which effectively exercised the prohibition on the Islamic veil through reference to the Courts jurisprudence in conjunction with Article 153 of the Constitution.<sup>129</sup>

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124. See Ibrahim Dalmis & Ertan Aydin, *The Social Bases of the Justice and Development Party, in SECULAR AND ISLAMIC POLITICS IN TURKEY, THE MAKING OF THE JUSTICE AND DEVELOPMENT PARTY 201, 207* (Ümit Cirze ed., 2008).

125. See generally *id.* at 201-222. Some include the pro-Islamist statements of the Prime minister during his visits to Egypt, Libya and Nigeria in 1996; a scandalous traffic accident near the town of *Susurluk* in 1996 in which a mafia member, a politician and a chief of police were found riding in the same car; declarations of numerous members of the Welfare party promoting *Sharia*; a Ramadan dinner hosted by the Prime minister for the leaders of religious sects, orders and cults. See generally Yael Navaro-Yashin, *FACES OF THE STATE 50-200* (2002).

126. See Niyazi Gunay, *IMPLEMENTING THE ‘FEBRUARY 28’ RECOMMENDATIONS: A SCORECARD* (2001), available at <http://www.thewashingtoninstitute.org/templateC04.php?CID=218> (follow “Download Now” hyperlink).

127. See Meliha Benli Altunisk & Özlem Tür, *TURKEY CHALLENGES OF CONTINUITY AND CHANGE 59-62* (2005). Some of the advised policies included the adoption of nationwide 8-year obligatory laic education and the effective supervision of private foundations, schools and dormitories administered by religious orders and their transfer to the Ministry of Education under the Unitarian education system. See *id.* Although the decisions of the National Security Council legally have non-binding status, the heavy presence of the military establishment within the Council, and the experience of former coup d'états initiated by the military naturally gave them great political weight. See *id.*

128. See Niyazi Gunay, *IMPLEMENTING THE ‘FEBRUARY 28’ RECOMMENDATIONS: A SCORECARD* (2001), available at <http://www.thewashingtoninstitute.org/templateC04.php?CID=218> (follow “Download Now” hyperlink).

129. See TURK. CONST. art. 153. Naturally this also gave rise to non-uniform practice between various universities and institutes nationwide and caused a new debate about the

This operational prohibition based on the Court's jurisprudence of 1989-1991 is still applied within higher education establishments in Turkey.<sup>130</sup> Female students who wish to use the Islamic veil as the manifestation of their religious beliefs may not do so within the confines of higher education establishments, during classes and exams.<sup>131</sup> The issue rests as a potential field of conflict between the various segments of society and a political clash which clearly speaks to conservative constituencies.<sup>132</sup> To this respect, it is not a surprise that the latest initiative for unrestricting the use of the Islamic veil within higher education came from the governing Justice and Development Party and was actively supported by the Nationalist Action Party; both right wing conservative parties.<sup>133</sup> Having noted the failures of similar previous attempts, and as a final solution, this last initiative foresaw the direct amendment of the Constitution as to bypass the Court's potential scrutiny.<sup>134</sup> However, this initiative misguidedly ignored a fact known by constitutional lawyers: the Court had already within its power the "Control of Form in Substance" formula that it had developed as a protection against indirect amendments to the irrevocable articles regime<sup>135</sup> and which it was more than willing to use.

*B. The "Control of Form in Substance" for the Protection of Laicism*

When Law No. 5735 was approved by the National Assembly, the main legal dilemma was not if the legislation would *per se* allow the use of all religious symbols in higher education and thus limit previous judicial interpretations of laicism.<sup>136</sup> The political process that preceded the adoption of the legislation made it clear that such was the aim of the legislation and that the administration would interpret it so.<sup>137</sup> So when the main opposition Party took the legislation to the Court, the primary question discussed was rather the competence of the Court vis-à-vis constitutional amendments. Supporters of the amendment relied upon Article 148/1 of the Constitution which limited the jurisdiction of the

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prohibition and the interpretation of Additional Article 17. See Judgment of 9 Apr. 1991, E: 1990/36, K: 1991/8, Anayasa Mahkemesi [Constitutional Court] (Turkey).

130. See Burçak, *supra* note 76, at 245-57.

131. See *id.*

132. See *id.*

133. See generally Dalmis & Aydın, *supra* note 124, at 201-222; NAVARO-YASHIN, *supra* note 125, at 118 (2002).

134. See TURK. CONST.

135. See *id.*

136. See Law No. 5735 of Feb. 9, 2008, Resmî Gazete [R.G.] No. 26796 (Feb. 23, 2008) (Turk.).

137. See *id.*

Court.<sup>138</sup> Under the Article, it was foreseen that “[c]onstitutional amendments [could] be examined and verified only with regard to their form.”<sup>139</sup> Thus, the Court could only examine the amendments adoption process and in no case enter into discussions with regards to the substance of the text.<sup>140</sup> From a literal application of Article 148/1, there would be no debate that the amendment satisfied the criteria provided by constitutional provisions concerning the adoption of constitutional amendments.<sup>141</sup> So, as can be expected, when the Court annulled Law No. 5735 declaring it contrary to the Constitution, the Court was accused of overstepping its jurisdiction and acting unconstitutionally.

However, we must remark that long before the case on Law No. 5735 concerning the “*Turban Amendment*” the Court had already formulated a steady jurisprudence on its own jurisdiction *vis-à-vis* constitutional amendments. Within this sense, the recognition of jurisdiction by the Court should not have come as a surprise. An illustration of the interpretative rationale of the Court with regards to its jurisdiction also provides an important example of the importance placed on the irrevocable provisions, including laicism, within Turkish constitutional tradition.

#### 1. Judicial Control over Indirect Attempts to Modify the Irrevocable Provisions of the Constitution

Since the day it was established, the Court had always adopted an approach according to which the jurisdictional framework of the Court was interpreted extensively when it concerned adoption of constitutional amendments which might relate to the irrevocable provisions. According to the Court, explicitly and *a fortiori* implicitly, amendments affecting the legal construct put forth by the irrevocable articles regime under Article 4 of the Constitution were open to its scrutiny since legislative power could and should not be conceived as *legibus solutus*.<sup>142</sup> In 1970 the Court had bypassed a debate on its jurisdictional reach under the 1961 Constitution which comprised a parallel irrevocable articles regime. In that case the Court had come to the conclusion that:

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138. See TURK. CONST. art. 148/1.

139. See *id.*

140. See *id.*

141. See *id.* The procedure for the amendment of the Constitution is foreseen under Article 175 of the Constitution. See *id.*, art. 175. The provision articulates that for an amendment to be proposed it has to be done by one third of the legislature, and adopted with the support of three fifths of the members of Parliament. See *id.*

142. Where a designated person is “not bound by the law.” BLACK’S LAW DICTIONARY (8th ed. 2004).

With its article 9, the 1961 Constitution has put in place the principle of irrevocability. According to this article, “the Constitutional provision which dictates that the form of the State is a Republic cannot be amendment and such an amendment cannot be proposed.”

It is unnecessary to say that the principle of irrevocability here does not aim solely at the expression “Republic.” In other words, to think that in only accepting the irrevocability of the expression “Republic,” it is possible to change all other principles and rules in the Constitution, cannot be reconciled with this constitutional principle. For, the aim of the irrevocability principle within article 9 is the State system articulated by the expression “Republic” defined by the fundamental principles within article 1 and article 2 and within the Preamble as referred to by article 2. In other words, it is not the expression “Republic,” but the Republic regime with its character defined by the aforementioned articles of the Constitution that article 9 binds the principle of irrevocability. 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. Any law adopted contrary to these conditions cannot at all effect and amend present provisions of the Constitution nor bring a Constitutional rule.

Thus it can be seen that according to article 147 of the Constitution the Constitutional Court also has the duty to control in substance over laws foreseeing amendments to the Constitution.<sup>143</sup>

Similarly, in another case before the Court in 1977, the same rationale was stipulated by the applicant, the 5<sup>th</sup> Chamber of the Council of State, expressing that:

It is stated in article 9 of the Constitution that “The Constitutional Provision foreseeing the States form as a Republic cannot be amended and amendments cannot be proposed.” The Constitution of 1961 has foreseen through article 9 the irrevocability principle and

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143. Judgment of 16 Jun. 1970, Official Gazette 7.6.1971/13858, E: 1970/1 K: 1970/31, Anayasa Mahkemesi [Constitutional Court] (Turkey).

has then provided the proposal prohibition. Thus, in substance the provision of article 9 concerning its form consists of a two way rule.

This irrevocability principle not only aims at the word Republic, it includes the outer principles and rules that forms the Republic. The true goal of the irrevocability principle under article 9 is the State system which is designated as Republic, whose characteristic is specified by the fundamental principles and rules referred under article 1 and 2 and the Preamble cited in article 2.

No law can be proposed or adopted which aim a change in the principle and rules that specify in our Constitution the characteristics of the Republic's regime or through changes in other articles of the Constitution aim to change directly or indirectly these principles.

The Turkish State which is specified as a Republic in article 1 of the Constitution is, as expressed in article 2, a national, democratic, laic and social state of law based on human rights and the fundamental principles specified in the Preamble. . . .

The proposal of an amendment to the Constitution which foresees to change these principles and the attributes that the Turkish State rests upon, defined by the Constitution as a national, democratic, laic and social state of law based on human rights and the fundamental principles specified in the Preamble, is thus, on the basis of this prohibition, impossible. Because, a change brought to them would result also in a modification on the basic foundation and function of the Turkish State as a Republic as characterized above.<sup>144</sup>

As it can be seen, judicial opinion had always reinstated the view that the provision which limits the Court's competence with "form," is not limited to the procedural aspects of constitutional amendments but also includes—under a teleological approach to the irrevocable articles regime—the necessity of examining the substance of any proposed constitutional amendment in order to determine if it can be proposed in the first place. There is no doubt that this reasoning can be easily justified since constitutions are not simple legal texts devoted to mechanic procedure, but above all, also represent an inseparable political philosophy whose revision might constitute the revision of the state.<sup>145</sup>

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144. Judgment of 27 Sept. 1977, Official Gazette 14.1.1978/16169, E: 1977/82 K: 1977/117, Anayasa Mahkemesi [Constitutional Court] (Turkey).

145. Kemal Gözler, *Sur la Validité des Limites a la Révision Constitutionnelle Déduites de l'Esprit de la Constitution* [On the Validity of Limitations on Constitutional Amendment Inferred from the Spirit of Constitution], *Annales de la Faculté de droit d'Istanbul*, Vol. XXXI, Mai 1997, at 109-21, available at [www.anayasa.gen.tr/esprit.htm](http://www.anayasa.gen.tr/esprit.htm)

Within the perspective of this approach, the Court has observed in the present case that “the constitutive powers basic choice of the political order surfaces in the first three articles of the Constitution and its concrete reflections surface in the other articles” and consequently, “the validity of the legislative organs acts are bound by the constitutional limitations foreseen by the primary constitutive power.”<sup>146</sup>

## 2. The Irrevocable Provisions Regime as an Extensive Limitation on Constitutive Power?

Needless to say, this rationale is also widely open to criticism. In fact, Turkish constitutional history bears witness to constitutive action taken against such an interpretation. Under the 1961 Constitution, the initial version of Article 147 bore no limitation on the Courts jurisdiction in face of constitutional amendments. Combined with the Court’s activism, this extensive jurisdiction naturally resulted with the annulment of numerous constitutional amendments, limiting the legislature’s attempts to adapt the text to its own policies. In reaction, Article 147 on the Court’s jurisdiction was amended in 1971 with the adoption of Law No. 1488 which introduced the control of form limitation with regards to constitutional amendments. However, through the establishment of the “*control of form in substance*” formula illustrated above, the Court was able to overcome much of the intended jurisdictional limitation. Taking this into consideration, the drafters of the 1982 Constitution took measures to further clarify the issue. As a result, Paragraph 2 of Article 148 of the Constitution of 1982 elaborated on the limitation of form, explicitly stipulating that with regards to the control of constitutional amendments the Court’s jurisdiction would be limited in essence with the proposal and voting majority of the amendment in question.

Nevertheless, citing its former jurisprudence<sup>147</sup> in the present case on Law No. 5735 concerning the “*Turban Amendment*,” the Court has

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(last visited Apr. 1, 2010) (citing Pierre Wigny, *Droit Constitutionnel: principes et droit positif* [Constitutional Law : Principles and Positive Law], Bruxelles, Bruylant (1952), t.I, p.215) at note 8.

146. Judgment of 5 Jun. 2008, E: 2008/16 K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turkey).

147. Judgment of 4 Apr. 1971, Official Gazette 17.3.1972/14131, E: 1970/41 K: 1971/37, Anayasa Mahkemesi [Constitutional Court] (Turkey); Judgment of 15 Apr. 1975, Official Gazette 26.2.1976/15511, E: 1973/19 K: 1975/87, Anayasa Mahkemesi [Constitutional Court] (Turkey); Judgment of 23 Mar. 1976, Official Gazette 12.8.1976/15675, E: 1975/167 K: 1976/19, Anayasa Mahkemesi [Constitutional Court] (Turkey); Judgment of 12 Oct. 1976, Official Gazette 20.1.1977/15825, E: 1976/38 K: 1976/46, Anayasa Mahkemesi [Constitutional Court] (Turkey); Judgment of 27 Jan. 1977, Official Gazette 21.4.1977/15916, E: 1976/43 K: 1977/4, Anayasa Mahkemesi [Constitutional Court] (Turkey).

insisted that the control of form foreseen by Article 148 also includes the inherent form provided by the irrevocable articles regime and that majority power in the legislative organ does not give this power the ability to change the fundamental political structure of the state as understood by the primary constitutive power.<sup>148</sup> Consequently, when faced with an amendment that might affect laicism, it would look as if the substance of the proposal, if effectively adopted, could give rise to a contrary situation vis-à-vis the principles set forth in Articles 1, 2 and 3 of the Constitution.<sup>149</sup> In their dissenting opinions, this fact has been criticized by Judges Adali and Kiliç. In his dissenting opinion Judge Kiliç underlined the historical efforts to restrict the Courts jurisdiction with regards to constitutional amendments in order to demonstrate how the constitutive powers did not intend for the Court to adopt such an extensive approach. He observed that the adoption of a strict interpretation of the irrevocable articles regime, which extends to all the provisions of the Constitution, not only deducted from the Constitution the power to answer to problems of future generations, but also removed the true purpose of the irrevocable articles regime itself.

*C. The Substance of the “Turban Amendment” in Light of the Principle of Laicism*

Once the Court had determined its jurisdiction over the proposed constitutional amendment, it naturally had to question the conformity of the substance of the proposed amendment with the irrevocable provisions of the Constitution. If the substance was in conformity with the first three articles of the Constitution, the amendment could be accepted. The contrary would give rise to a violation of the form foreseen by Article 4 of the Constitution, rendering it null and void.

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148. See Judgment of 5 Jun. 2008, E: 2008/16, K:2008/116 Anayasa Mahkemesi [Constitutional Court] (Turkey). This stance has naturally given rise to discussion on the power of judges and Courts, a dilemma that many democratic systems face. Although the dialectics of the democracy versus “*juristocracy*”/“*gouvernement des juges*” debate is not a new, it seems the balance between the judiciary and other powers of government is becoming a central theme of discussions in political systems where strong constitutional courts may be involved in actively shaping the political and legal geography of the country. It is for this that the theme is increasingly debated by both lawyers and political scientists. For example see Goldstein’s review of some of the literature on the subject. Leslie F. Goldstein, *From Democracy to Juristocracy*, 38 LAW & SOC’Y REV. 611, 611-29 (2004).

149. Judgment of 5 Jun. 2008, E: 2008/16 K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turkey) (Haşim Kiliç J., dissenting).

1. The “*Turban Amendment*” as an Attempt to Bypass the Court’s Jurisprudence

According to Law No. 5735, the existing text on the equality on receiving public services under Article 10 and the right to higher education under Article 42 would be reinforced. Article 1 of the Law would insert the phrase “and in all enjoyment of public services” into Paragraph 4 of Article 10 of the Constitution so that the final version of Article 10 /4 would read “state organs and administrative authorities have to act in all their processes and in all enjoyment of public services according to the principle of equality before law.” Article 2 of the Law foresaw the inclusion of a new Paragraph to Article 42, which would thus state: “No one shall be deprived from using their right to a higher education for whatever reason unless clearly stipulated by law. The limitations on the use of this right are foreseen by law.” Although these amendments contained no clear reference to the issue of the Islamic veil per se, the foreseen textual changes were on one side presumed to leave existing prohibitory practices without a constitutional basis, and on the other side, force the Court to reinterpret its previous stance on the issue. This clever design was specifically formulated against the Court’s aforementioned jurisprudence of 1989 and 1991. Since no clear legal provision existed on the use of the Islamic veil in higher education, higher education authorities would be deprived of legal backing for circulars that prohibited the use of religious symbols within their compounds. Moreover, any act of enforcement would be *de iure* contrary to Article 10.

Within this perspective, the Court acknowledged that the *sedes materiae* of the amendments focused on the prohibition on the use of the Islamic veil in higher education. As expressed by the Court, “the primary aim is the recognition of the freedom to cover for religious reasons to those who enjoy the right to higher education as a public service.”<sup>150</sup> Declarations by political party members throughout the negotiations within the Constitutional Commission and the General Assembly pointed out this fact. Moreover, the second paragraph of the General Justification of Law No. 5735 rendered this situation obvious; as it stated that “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 had prevented “for a long time, the use of the right of training and education by some female students because of the clothing they use to cover their heads.” These

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150. See Judgment of 5 Jun. 2008, E: 2008/16, K:2008/116, Anayasa Mahkemesi [Constitutional Court] (Turkey).

were sufficient for the Court to consider the amendment a bypass of its jurisprudence and an attempt to modify the practice of laicism in Turkey. However, lacking clear reference to religion in the text, the possibility of the annulling the Law was still not apparent and would need further justification from the Court.

## 2. The Democratic Deficiency Argument

The Court based its primary rationale on the method of the adoption of the law<sup>151</sup>. It acknowledged that the legislation had the prospect of resolving the deprivation of the right to higher education of some students, but noted that criticisms brought against the method of the legislations' adoption had to be also taken into consideration. For the Court, an approach which did not efface "fears in society" and answer "to the demands for guarantees;" essentially "excluding democratic conciliation methods" and "embracing defiance or imposition as a method" naturally jeopardized major democratic values.<sup>152</sup> It stated that:

The Constitution does not allow the abuse of religion, religious feelings and those considered holy by religion as an alternative to

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151. The amendment was adopted in haste, after a long year of political tension surrounding the election of the Republic's President. In 2007 the term of the 10<sup>th</sup> President of the Republic, Ahmet Necdet Sezer, had come to an end and the Parliament was due to elect a new President. The governing Justice and Development Party nominated Abdullah Gül, the Minister of Foreign Affairs. The laic opposition party, the Republican People's Party, was against Gül, expressing his former Islamist affiliations and the fact that his wife wore the Islamic veil as pertinent points of anxiety. Simultaneously, massive rallies were organized by the laic segments of the society in the largest cities of Turkey. See, e.g., BBC NEWS, *Secular rally targets Turkish PM*, Apr. 14, 2007, <http://news.bbc.co.uk/2/hi/europe/6554851.stm>. The government insisted with the nomination and holding a majority, elected Abdullah Gül on the 27<sup>th</sup> of April 2007. The Constitutional Court annulled the election, expressing that the General Assembly meeting quorum had not been met, since the opposition members had not participated in the session. Having not been able to elect the president, early national elections were held in July 2007, in which the right-wing Nationalist Action Party was able to enter into parliament, consequently augmenting the number of conservative votes represented in Parliament. Thus in August 2007, the new conservative dominated parliament elected Abdullah Gül as the 11<sup>th</sup> President of Turkey without any discussions on the subject. While the political tensions surrounding the issue were still high on the political agenda, the amendment concerning the use of the Islamic veil was brought before the parliament without providing ample time for public debate or providing precautionary measures for the anxious laic segments of the population. This point has also been remarked by international observers who have remarked: "... the way [the Prime Minister's] party proposed [the amendment]—abruptly, with little public discussion—angered the secular old guard and disappointed liberals, who support the changes, but want them to be accompanied by changes that strengthen other rights, like free speech." Sabrina Tavernise, *Turkey's High Court Overturns Headscarf Rule*, N.Y. TIMES, Jun. 6 2008, available at <http://www.nytimes.com/2008/06/06/world/europe/06turkey.html>.

152. See Judgment of 5 Jun. 2008, E: 2008/16, K:2008/116, Anayasa Mahkemesi [Constitutional Court] (Turkey).

resolving social problems within the framework of the Constitutions clear provisions through methods based on democratic peace and conciliation. Since all abuse of social problems dislodges the possibilities for the problem to be resolved, it may cause the deepening of social conflicts and the nonfunctioning of democratic processes; consequently the belief that the state power will resolve social problems may be damaged.<sup>153</sup>

The Court thus considered the method which the amendment was brought gave rise to great concern on the principle of democracy protected by Article 2 of the Constitution. For the Court, this democratic deficiency was not only limited to the method of the amendments' adoption, but was also present within the proposed text since it was lacking of sufficient protection for third party rights.

### 3. The Third Party Rights Argument

The Court's second argument resided on the protection of third party rights. According to the Court, in substance the amendment would not only prevent administrative authorities from placing any kind of restriction on the enjoyment of the right to higher education, it would also de-regulate the rules on clothing and attire in higher education, leaving them without any standard and thus preventing the possibility of taking measures against religious attire.<sup>154</sup> For the Court, although religious symbols were the enjoyment of an individual choice and freedom, this de-regulation comprised the risk of evolving such symbols into tools of social pressure in places such as laboratories or classrooms where students of different individual choices and lifestyles were obliged to work together.<sup>155</sup> The proposed amendments would tie the hands of authorities to such an extent that, even if religious symbols were used for social pressure, thus perturbing education and public order, it would be impossible to take measures to resolve conflicts.<sup>156</sup>

On this point the amendment did however provide for the possibility to bring restrictions through law. But as the Court observed, Turkish constitutional order does not provide any legal measure that can force the legislature in adopting such a law. This would leave "the adoption of legal precautions which protect other people's freedoms and the public order" to the legislature's discretion. Taking into consideration that "the majority of the country's population adheres to a specific religion," it would prove difficult for this discretion to be used for the restriction of

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

the freedom of religion. For the Court, human rights necessitated the protection of the fundamental rights and freedoms of third parties, especially those who did not adhere to the beliefs of the majority and this protection should be provided directly within the constitutional text, excluding it from the discretion of political parties.<sup>157</sup>

These two arguments, the first concerning the law's adoption through imposition and in a manner non-compatible with the consensual standards of democracy, and the second referring to the non elimination of public fears due to the lack of an effective introduction of legal safeguards against abuse were sufficient for the Court to express that the proposed amendments were in violation of the Constitution. The Court underlined both its own jurisprudence and that of the Council of State, which expressed that the use of the Islamic veil within higher education would create pressure on non-Muslims and for non-covered Muslims and would open the path for the political abuse of religion.<sup>158</sup> In order to reinforce its position, the Court also cited the pertinent jurisprudence of the ECHR.<sup>159</sup> Consequently, the Court found that the proposed

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157. *Id.* It is possible to criticize the Court's foresight on the future threat of inaction. One can question the legitimacy of a constitutional court's scrutiny of non materialized legislation. This naturally raises the question of the Court's political activism, for it is difficult to understand the legal rationale behind the conclusion reached over legislation that might or might not be passed in an undetermined future. Although it is true that under human rights law the state has to take into consideration protective measures against abuses, such an issue should only arise if in a concrete case the constitutional norm effectively gives rise to such a situation. Mistrust towards the ability of the legislature to address such a situation enforces the fears of 'governing judges' and contradicts with the principle of separation of powers. Such a rationale cannot be explained through abstract legal discussion, but necessarily contains the political circumstances surrounding the debate. Then the question simply comes to: should constitutional judges look into the political aspects of a question or not?

158. See Judgment of 5 June 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turkey).

159. Case of Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. (2001), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (select "Decisions" on the right; search for "Dahlab"; then follow "Dahlab v. Switzerland" hyperlink); Case of Refah Partisi and others v. Turkey, App. No. 1340/98, 41342/98, 41343/98, 41344/98, 2001-III Eur. Ct. H.R. (2001), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search for "Refah"; then follow "Case of Refah Partisi" hyperlink); Case of Leyla Şahin v. Turkey, App. No. 44774/98, 2005-XI Eur. Ct. H.R. at 55 (2005), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search for "Leyla"; then follow "Case of Leyla Sahin v. Turkey" hyperlink). We must point out that the Şahin jurisprudence has been criticized by some authors due to the extensive interpretation of the margin of appreciation doctrine, thus withdrawing European supervision from the relation between state and religion. See Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, And Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367, 381 (2007); Bottoni Rossella, *The Origins of Secularism in Turkey*, 9 ECCLESIASTICAL L. J. 176 (2007).

amendments were in substance directly and indirectly contrary to the irrevocable principle of laicism. According to the Court's own words:

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 in content, the violation of others rights and giving rise to grounds for the disruption of public order, are clearly contrary to the principle of laicism.<sup>160</sup>

#### 4. European Jurisprudence as a Supportive Argument

One final important point to remark concerns the continuous reference by the Court to European jurisprudence within its judgment. Within this sense, while taking European human rights law as a center point of reference for the interpretation of the Constitution, the Court seems to believe that even though the emphasis placed on laicism may differ, European jurisprudence seems to somewhat agree with the Court's assessment on the necessity to apply laicism aggressively. The Court may not be misguided on this assumption. For instance, in the *Case of Leyla Şahin v. Turkey*, the ECHR took the potential of extremist religious movements heavily into consideration when arriving to the conclusion that Turkey's interference to the freedom of religion and right to education could be considered necessary in a democratic society.<sup>161</sup> The ECHR reinstated that "The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."<sup>162</sup> These movements had already been reaffirmed as a threat to democracy in the *Case of Refah Partisi and others v. Turkey* in which the Grand Chamber stated that:

The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society which they had in mind. It considers that, in accordance with the Convention's provisions, each Contracting

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160. Judgment of 5 June 2008, E: 2008/16, K: 2008/116, Anayasa Mahkemesi [Constitutional Court] (Turkey).

161. Case of Leyla Sahin v. Turkey, App. No. 44774/98, 2005-XI Eur. Ct. H.R. (2005), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search for Application Number "44774/98"; then follow the second "Case of Leyla Sahin v. Turkey" hyperlink).

162. *Id.* ¶ 109.

State may oppose such political movements in the light of its historical experience.<sup>163</sup>

The Grand Chamber arrived at this conclusion through reinstating an elaborate comparison between *Sharia* and essential democratic values stated in the Chamber judgment of the same case according to which:

[S]haria, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. . . . It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.<sup>164</sup>

Thus, both the Court and the ECHR seem to place the same significance on the principle of laicism. Moreover, recent judgments seem to illustrate the fact that not only does the ECHR accept laicism as an important European value, but it has more and more conceptualized it within the confines of the Court's original interpretation. For example, in the *Case of Dogru v. France*<sup>165</sup> and *Kervanci v. France*<sup>166</sup> the ECHR has emphasized the States "role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs," expressing the idea that "Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals which are justified in order to maintain and promote the ideals and values of a democratic society"; which would allow the State to "limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety." Thus, for the ECHR laicism, neutrality and pluralism—taken into consideration together—form legitimate grounds for justifying

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163. Case of Refah Partisi and others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, 2001-III Eur. Ct. H.R. at ¶ 124 (2001).

164. Case of Refah Partisi and others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, 2001-III Eur. Ct. H.R. at ¶ 72 (2001), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search for "Refah"; then follow "Case of Refah Partisi" hyperlink).

165. See Case of Dogru v. France, App. No. 27058/05, Eur. Ct. H.R. ¶¶ 61-67 (2008), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search for "Dogru"; then follow "Case of Dogru v. France" hyperlink).

166. See Kervanci v. France, App. No. 31645/04, Eur. Ct. H.R. ¶¶ 61-67 (2008), available in French at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search for "Kervanci"; then follow "Case of Kervanci v. France" hyperlink).

the refusal of admission for students who insist on using the Islamic veil to classes,<sup>167</sup> a rationale in line with that of the Court.

#### CONCLUSION

As previously expressed, this paper did not have the ambition of proposing a watershed solution to the conflict on the use of the Islamic veil in higher education in Turkey. Such a solution cannot be limited to the domain of legal analysis and must take into account the numerous socio-political parameters surrounding the issue. Neither did this paper aim to discuss the legitimacy of the political and legal initiatives undertaken by the various actors, nor that of the counter arguments put forth by the Court. The realization of such an argument essentially necessitates the formulation of a policy view on the probable resolution method of the conflict in order for it to be self-consistent, and this cannot be easily put forth due to aforementioned reasons. Thus, our main aim from the start has been to try to illustrate, to the extent possible, the significance afforded to the principle of laicism by the Turkish constitutional system and the Turkish Constitutional Court through the demonstration of the legal arguments surrounding the controversial issue of the use of the Islamic veil in higher education.

However, refraining from entering into the political dialectics on the issue, one can still discuss the legitimacy of the approach adopted by the Court in the aforementioned instance from two angles. First of all, there can be no doubt that in interpreting Article 148 extensively, in conjunction with the indirect extension of the irrevocable articles regime to the whole of the constitutional text, it has become possible for the Court to practice greater and sometimes limitless control over the legislature; this issue itself is risk inclusive. Under Article 6 of the Constitution, the Turkish Nation uses its sovereignty within the confines of the principles set forth by the Constitution, through the competent authorities, and no state organ may use a state competence which has not been foreseen directly by the Constitution. Within this perspective, an attempt by one power to overshadow the other will openly be in violation of the principle of the separation of powers. However, taking into account that all powers have the tendency to extend their competence to

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167. *See also* Case of Şefika Köse and 93 Others v. Turkey, Decision (Inadmissible), App. No. 26625/02, Eur. Ct. H.R. 24 January (2006), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (select "Decisions"; search for "Kose and 93"; then follow "Kose and 93 Others v. Turkey" hyperlink) (Inadmissible). The expansion of the importance placed on laicism, combined with the margin of appreciation doctrine devised by the ECHR, will definitely grant in the future greater maneuver capabilities when it comes to regulating religion with regards to States party to the European Court of Human Rights.

the largest extent, the fragile balance between them must be kept at all cost.<sup>168</sup>

Secondly, one cannot deny that in a democratic state the use of a religious symbol by an individual should eventually be seen under the auspices of the enjoyment of fundamental rights and freedoms, and religion *per se* should not be construed as an abstract risk to a secular/laic democratic state apparatus. Within this perspective, it can be difficult to see conformity between human rights and the denial of the right to manifest ones religion and enjoy the right to higher education at the same time. However, there can also be no doubt that in legal cases, the concrete circumstances of the case will determine the outcome. Thus, it will be these concrete circumstances that provide the necessary information on whether or not an individual has surpassed the boundaries of recognized rights and freedoms, if the individual has abused them and consequently damaged the rights and freedoms of others and if the individual has thus contributed in disturbing public order. If affirmative, the state is also under the positive obligation of preventing such abuses, protecting public order and preserving the rights and freedoms of others so that, as a *sine qua non* of democracy, pluralism is effectively applied. In some circumstances the barriers surrounding this dilemma are not so easy to unfold. Unfortunately, the use of the Islamic veil in higher education in Turkey is one such situation. On one hand, Turkey as a founding member of the Council of Europe and a candidate for European Union membership has the international obligation to respect and promote the values enshrined in the concepts of human rights and democracy to the greatest extent. On the other hand, Turkey must also answer to the needs of the principle of laicism, which as an existential norm enables it to be the sole country with a majority Muslim population practicing such values.

Finally, with regards to the Case on Law No. 5735 concerning the “*Turban Amendment*,” we must remark that any Turkish constitutional lawyer is well advised that while the Turkish legal construct does not foresee “precedent” *per se*, the Constitutional Court as well as other judiciary bodies have always relied heavily on jurisprudence in construing legal rationale. The Court has especially used domestic and

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168. This is certainly true for all three powers of government and not just the Court. For example, when the Court announced its decision on the unconstitutionality of Law No. 5735 on the “*Turban Amendment*,” regrettably, some political actors, to express their discontent, went as far as implying the legislatures power to close the Court itself if “national will” necessitated it. These expressions were later used by the Chief Public Prosecutor’s Office in the indictment against the Justice and Development Party. Needless to say, such rhetoric is inclusive of great risk for both democracy and the rule of law, two concepts which cannot be sustained one without the other.

international jurisprudence extensively to arrive at a gradual elaboration on the interpretation of fundamental constitutional norms so that they may become applicable in concrete situations. Within this sense, and as illustrated above, the Court has been extremely active with regards to those fundamental norms that also form the foundation blocks of the State's regime. The Court has used these techniques persistently in order to impede acts that might hurt the State. The control of form in substance formula is just one example of the scope of this tradition of extensive interpretation. Besides, albeit allegations on the *ultra vires* assumption of authority, the Constitution of 1982 does unfortunately provide sufficient lack of clarity, both in structure and in normative regulation, that renders efforts towards refuting the Court's assessments on its own competence extremely difficult.

It is for this reason that our sincere belief resides in the idea that sometimes it is more beneficial to leave certain political issues with unforeseeable social implications out of the domains of legal challenge, at least until there is enough democratic understanding within the society on the significance of the issue for all sides. In other words, certain conflicts that are not resolved within the political and social sphere, may never be so if transferred into the legal sphere. Courts are under the obligation of deciding upon the concrete circumstances of the cases that come before them. In complicated issues in which diverse levels of political and social concerns juxtapose, thus giving rise to polarized public opinion, rendering a judgment on the issue might not always *de facto* resolve it. This is especially the case when the political question itself stems directly or indirectly from the interpretation of the Constitution. Such has been the case with regards to the political and social conflicts surrounding the use of the Islamic veil in higher education in Turkey. Although the problem is not legal in essence, when brought before it, the Court is obliged to apply the law as it interprets it. This, in conjunction with the divisive and polarizing language adopted by political actors, have made it much more difficult for there to be an understanding which might allow the substantial resolution of the problem; rather than the imposition of one view over another, shifting the essence of debate to the future. This is why we believe that whether or not in agreement with the judgment, one cannot blame the Court for applying its longstanding jurisprudence. Taking into consideration both the deprivation from the freedom of religion and the right to education caused by this issue, and the generalized severe social fragmentation, it is only possible to resolve this decades long conflict through an unconditional acceptance that democratic dialogue processes between all relevant actors and a consensual adoption of a pluralistic solution by all members of the society is a *sine qua non*.