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6 Islam and national law in Turkey[1]

Mustafa Koçak[2]

Abstract

This study examines the effect of religion on the national law in Turkey from the time of the nineteenth century Ottoman State until the present. The period of secularisation of the law, which began with the 1839 *Tanzimat* (Reorganisation), was largely complete after the declaration of the Republic, at which time Atatůrk initiated a course of staunchly secular reforms, including the abolishment of the constitutional clause that had previously identified the state's religion as Islam. After the transition to a multiparty regime in 1945 more liberal policies in the field of freedom of religion and conscience were explored. Within the freer environment introduced by the Constitution of 1961, new opportunities for the organisation and expression of Marxist and social democratic party ideologies emerged, along with efforts of groups to expand upon religious freedom. A loosening on the tight state control of the strictly secular operations within the country has been greatly facilitated by the E.U. membership negotiations and the adoption of the E.U. *acquis communautaire*. Even in light of what appears to be increased calls for religiosity over the last decades, however, Islam has had no effect on law, no religious reference has been made in legal texts, and a secular understanding of the organisation of the state has consistently been executed since 1928. The main debate in Turkey is not about Islamisation of the law, but rather about the expansion of freedom of religion and conscience.

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The Republic of Turkey was created in 1923 out of the remnants of the Ottoman Empire. According to the 2007 census Turkey's population is close to 71 million and is almost completely Muslim (99.8%). The remaining 0.2 per cent is mostly made up of Christian and Jewish communities. Turks are by far the largest ethnic group in the country, with Kurds forming the most significant community alongside Arab, Armenian, and Greek communities. While Turkish is the official language of the country, Arabic, Kurdish, Armenian, and Greek are also spoken.[3]

(Source: Bartleby 2010)

6.1 The period until 1920

The Ottoman Empire and its modernisation

Throughout the eighteenth century there had been protracted debate between the Ottoman governing class and the religious scholars (*ulama*) on how to make the Ottoman regime more effective. Since the reign of Selim I between 1512 and 1520, the Ottoman sultans had been without doubt the most powerful Muslim rulers in the world. They ruled over large parts of the Middle East, North Africa, and the Balkans and were also the guardians of the three holiest cities of Islam, Mecca, Medina, and Jerusalem. As a result 'Sunnite orthodoxy and the shari'a (*şeriat*),[4] expounded by the *ulama* (learned men) of the Arab world, had become important at the Ottoman court' (Davison 1990: 9).

Confronted with the expansion of the European economic and military spheres of influence in the seventeenth and eighteenth centuries, the Ottoman leaders were divided into two camps. The conservatives favoured a return to the laws of Süleyman (Sulaiman) I (1520-1566) and resisted any reformist movement towards embracing the Judeo-Christian European laws, concepts, and techniques. In contrast, reformists called for the adoption of Western methods of military training, organisation, and administration and for civil, economic, and educational changes as part of the necessary requirements of a modern state. The conservatives pointed to the prescripts of orthodox Islam, stating that state and religion are inseparable. The ruling elite, for its part, attributed the weakening of the Empire to religious bigotry (Toprak 2003: 120-121).

It would, however, be overly simplistic to claim that one camp advocated the shari'a and the other the Western legal tradition. In fact, the Ottoman legal system had already consisted of two different laws for centuries:

> According to Tursun Bey, writing in the late fifteenth century, the sultan could make regulations and enact laws entirely on his own initiative (*siyasa*). These laws, independent of the *şeriat* and known as *kanun,* were based on rational and not religious principles and were enacted primarily in the spheres of public and administrative law (İnalcık 1989: 70).

The area left to the will (*irade*) of the Ottoman sultan was free from the limitations of the shari'a. He could enact laws (*kanun*) in various forms in accordance with – but outside the realm of – the shari'a on the basis of his right to discretion and censure (*takdir* and *tazir*), as recognised by the shari'a (Berkes 1998: 14). As İnalcık writes, '[w]ith the spread of Turkish rule in the mid-eleventh century, the principle of *kanun* became firmly established in Islamic legal practice, since, in Turkish tradition, sovereignty and the establishment of a royal code of laws and *töre* were intimately related. Furthermore, rulers did not wish to recognise any limitation to their political authority' (1989: 70). Schacht further expands on this notion, explaining that:

> In fact the very first of these Ottoman *kanun-names*, that of Sultan Mehmed II (1451-1481), repeatedly refers to Islamic law and freely uses its concepts. It treats, among other matters (Office of the Grand Vizier, court, ceremonial, financial ordinances) penal law; it presupposes that *hadd* punishments are obsolete and replaces them by *ta'zir*, i.e. beating, and/or monetary fines which are graded according to the economic position of the culprit. In fact, these provisions go beyond merely supplementing the *sharia* by the *siyasa* of the ruler, and amount to superseding it. The so-called *kanun-name* of Süleyman I, which in its major parts seems to have been compiled previously under Bayezid II (1481-1512), shows a considerable development along these lines (1964: 91).

In line with these developments, the punishment of *rejm* (killing by stoning of an adulterous woman) was first and last seen in the Ottoman State in 1680 (Öztuna 1978: 200; Akyavaş 1950). Sultan Mehmet IV, who watched the execution of this punishment in Sultanahmet Square (Gökçen 1989: 68), put an end to this punishment, stating, '[f]rom now on, I do not want such disgrace in the Ottoman lands' (Toprak 2003: 118).

After 1800, the reform-minded, who were in favour of modernisation based on European models, began gaining ground relative to the conservatives. The Ottoman Empire could no longer defend itself against the growing military power of Europe, nor ward off European

commercial penetration. The realisation of this led Selim III (1789-1807) to introduce the first programme of reforms, increase taxation, establish the so-called New Order (*Nizam-i Jedid*), and establish a modern army and modern technical schools to train cadres for the new regime. Selim's reorganisation sparked protests from a conservative coalition of certain military elites, religious leaders, and others who felt adversely affected by the reforms. Selim was eventually deposed by auxiliary conscripts in 1807. His successor, Mahmud II (1807-1839), nevertheless continued the process of modernisation. He was helped in this by the Grand Vizier Mustafa Reshit Pasha. For all reforms in the aforementioned areas, an educational system was required to furnish young Ottomans with the necessary knowledge. To this end, 'liberal schools' were established based on educational principles different from those prevailing in the rest of the Empire. From these schools there emerged a new generation of reformers with a critical stance towards the traditional (religious) institutions (Berkes 1998: 400-401).

In 1839, the regime proclaimed the 'Noble Rescript', a drastic programme of reforms (the *Hattı Şerif of Gülhane*) developed by Reshit Pasha; this programme also became known as the 'Reorganisation' (*Tanzimat*). The year 1839 was therefore crucial in the process of modernisation and Westernisation of the Ottoman Empire. It marked the start of four decades of major changes throughout the Empire. These changes encompassed the reorganisation of the Ottoman state structure, of civil, territorial, and trade laws, and of the judiciary. The Constitution of 1876 completed this reform process.

Several important steps had, however, already been taken prior to 1839. Mahmud II had already enacted a number of administrative reforms, and in 1838 he promulgated two criminal laws for civil servants. In addition, towards the end of his reign, Mahmud II changed the organisation of the state by establishing a semi-legislative institution which was called the 'Supreme Council for Justice Regulations' (*Meclis-i Valay-i Ahkam-i Adliye*). This advisory organ had the task of preparing laws to carry out proposed reforms. The council worked on the basis of procedures adopted from Western parliamentary democracies. Twenty years later, in 1858, a new advisory organ independent of the Supreme Council was created; the Supreme Council of Reformation (*Meclis-i Ali-i Tanzimat*), whose membership included ministers, *ulama*, and high-level civil servants. Its main function was to prepare legislative designs and regulations, and it generally concerned itself with the principles of the reform policy, while the Supreme Council from then on exclusively focused on matters of administrative adjudication (Bozkurt 1996: 134-137).

In 1861, the two organisations were united into one body called the Council for Judicial Ordinances (Cevdet Paşa 1986 I: 36; II: 153). This

council was, in turn, divided into three departments, according to the principles of the separation of powers. The first department focused on administrative matters, the second on the preparation of laws and regulations, and the third on administrative adjudication (Űçok et al. 2002: 284). In 1868 the council was reorganised yet again. This time two judicial authorities were created, a Supreme Civil Court and a Supreme Administrative Court (the so-called Council of State). The former department functioned as the highest body of appeal for civil cases, and the second became the first independent high administrative court (Üçok et al. 2002: 284).

As a result of the 1839 *Tanzimat* (Reorganisation), several important changes had already occurred in the field of criminal law. In 1840, a new penal code was promulgated (Akagündüz 1986: 809). Because it was already commonplace in the Ottoman state to punish offences that were not recognised in Islamic law by using the sultan's right as a pre-Islamic ruler to promulgate laws (*örf* powers), there was little resistance to this promulgation. It was the first criminal law in the Ottoman Empire that applied equally to everyone. Article 1 of the first section of the code formulated this principle as follows: 'a shepherd in the mountains and a vizier will be equal.' In this way, the Ottoman law put an end to the traditional practice in which Muslims received only half the punishment non-Muslims received for the commission of the same offence. The principle of equality and the formulation of this article illustrated the influence of Western law (Bozkurt 1996: 98). In 1851, another new secular penal code was introduced, which recognised for the first time the possibility of bringing a public suit against an accused. The new code created in 1858, which in actual fact was a translation of the 1810 French Penal Code, abolished the traditional *hadd* crimes, for which punishments are ordained by the Holy Qur'an or Sunnah (shari'a), with the exception of the death penalty for apostasy. This code remained in force until 1926.

Changes took place across a whole range of legal areas. For example, in 1858 a Land Code was introduced (Cevdet Paşa 1986 iv: 73-74), which incorporated a number of Islamic laws into a national codification. In addition, closer ties with the West necessitated the introduction of commercial legislation. The first law in this area came in 1850 in the form of a commercial code (Örücü 1992: 45). This legal code was partially a direct translation of the 1807 French Commercial Code (Velidoğlu 1999: 196-197). It included provisions concerning the payment of interest, despite the fact that the payment and collection of interest were prohibited by the shari'a. As such, this legislation constituted a radical step that was then left to the newly-established (1840) commercial courts to implement (Shaw & Shaw 1977: 118).

In 1861, a Code of Commercial Procedure was introduced based on the French model; in 1863 the Maritime Commercial Code, which incorporated parts of French, Belgian, and Prussian law, was created; and, in 1879, a Code of Criminal Procedure followed, the latter essentially being a copy of the French Criminal Procedure Code of 1807.

Probably the most important legal reform of the nineteenth century was the promulgation of a new civil code, the *Mecelle*. The first section of the *Mecelle* was promulgated in 1868, and the code was completed in 1876. Ahmet Cevdet Paşa, a historian and jurist who lived from 1822 until 1895, wrote the biggest part of this grand piece of legislation. Ali Paşa, the Grand Vizier, was an advocate of adopting parts of the French Civil Code and making them the civil laws of the Ottoman Empire, as had been done earlier in the case of the commercial code. Ahmet Cevdet Paşa, however, insisted on following the Islamic tradition and as such prepared a legal code firmly based on the shari'a (Lewis 1968: 122-123). Although the *Mecelle* only remained in force in Turkey until 1926, in other parts of the former Ottoman Empire it remained in use for much longer. This codification proved also to have a significant influence on the Islamic world more generally, remaining in existence until long after the code had been officially abolished following the establishment of the Turkish Republic.[5]

With regard to the Ottoman court system, a reform edict had come into force in 1856 promising equality for all subjects. In order to live up to the promises made to the Western powers, independent mixed courts had already been established to hear civil and criminal cases involving both Muslims and non-Muslim foreigners. In 1847, mixed courts were established for criminal matters and in 1848 for commercial matters. In 1856, a four-level secular court system was designed (Belgesay 1999: 215; Düstur 1872: 445) that culminated in the establishment of a secular jurisdiction in 1869.

Two years later, in 1871, this new system came into force alongside the shari'a courts and, in fact, reduced the authority and jurisdiction of those shari'a courts (Shaw & Shaw 1977: 119). All matters except shari'a were now within the competence of the secular (*Nizamiye*) courts.

The jurisdiction of the shari'a courts was limited to conflicts relating to questions of personal status, family, and succession, subjects that the courts had already handled prior to 1839 and 1871. There were, however, frequent conflicts about jurisdiction between the two sets of courts that ultimately led the Minister of Justice to declare a division of labour between the courts in a circular in 1877. Accordingly, marriage, divorce, alimony, emancipation of slaves, analogy, blood-money (*diyet*), wills, and succession were to be in the domain of the shari'a courts. Commercial matters, penal matters, damages, and contract were to be dealt with by the secular *Nizamiye* courts. Legal suits outside these areas were

covered by shari'a jurisdiction, if the parties involved consented to this; they were otherwise subject to *Nizamiye* jurisdiction. Whereas conflicts between the competing courts continued for decades (Bozkurt 1996: 124-125), the national court system was further consolidated by the coming into force of a Code of Civil Procedure in 1879, which created civil as well as commercial courts established on a secular basis.

During the process of codification that followed the establishment of the Supreme Council of Reformation (*Meclis-i Ali-i Tanzimat*), no legal provisions for marriage were enacted. There were also no provisions in the *Mecelle* concerning family law. According to the 1881 Population Regulation, Muslims wishing to marry required permission from the Islamic judge (*kadı*), and non-Muslims had to obtain permission from their own religious heads. The first Ottoman regulation of family matters came in the form of the Family Code of 1917, which will be explained later in detail.

Thus, over the course of about 35 years, the complete modernisation of the Ottoman law was realised. The ideology underlying this change was based on nationalism and modernisation, and later also on constitutionalism. Lapidus comments on this period as follows: 'The modernist point of view was first espoused by the Young Ottomans in the 1860s and 1870s. While committed to the principles of Islam, they called upon the endangered Ottoman regime to transform itself into a constitutional government' (2002: 460). Through this transformation they also promoted a new social morality and revived national culture.

A process of constitutional change was initiated by the issuance of the Ottoman Code of Public Laws, a series started in 1865 (Shaw & Shaw 1977: 119). In 1876, taking advantage of the Ottoman defeat by Russia, the constitutionalists staged a coup that brought Abdul Hamid II to power (1876-1908). Under the pressure of the constitutionalists, Abdul Hamid accepted a new constitution. This first Ottoman constitution (of 1876) was inspired by the Belgian Constitution of 1832 and the Prussian Constitution of 1850 and established a democratic structure in which the role of religious authorities was restricted. It also limited the powers of the sultan, established a representative and decentralised administration, and mandated equality for all religious groups.

The 1876 Constitution still declared Islam as the state religion and set up the caliphate as a constitutional institution. As the Muslim Caliph, the sultan was given the duty to protect and apply the rules of the shari'a and to swear a religious oath accepting this responsibility. The *Sheikh ul-Islam* ('Şeyhülislam' in Turkish), who was the dignitary responsible for all matters related to religious law, religious schools, etc. and next in line after the Grand Vizier, was appointed by the sultan as a member of the Council of Ministers. The *Sheikh ul-Islam* was charged with ensuring harmony between the laws and the shari'a. To this end,

he examined whether the laws conformed to Islamic jurisprudence (*fiqh*) and the shari'a. But because the *Sheikh ul-Islam* belonged to the Council of Ministers, he lost his power to issue authoritative legal decisions (*fatwas*) independently. Likewise, his position within the Council of Ministers gradually became less significant. The religious scholars (*ulama*), who were incorporated into the civilian bureaucracy, also lost their independence over time. As such, the bureaucratisation of the *ulama*, a process that began under Mahmud II, had now reached its logical conclusion (Tanör 2002: 267).

The Constitution of 1876 furthermore established a Parliament consisting of two chambers: an elected Chamber of Deputies and a Senate consisting of members of both Muslim and non-Muslim communities, nominated by the sultan. On the various regional and local levels, administrative councils were created consisting of the chief judge, the chief finance officer, and the chief secretary; these functionaries were joined by Muslim and non-Muslim representatives and religious leaders from both the Muslim and non-Muslim communities (Lewis 1968: 388). These representative institutions restricted the monarchical and theocratic character of the Ottoman system.

Neither the Constitution of 1876 nor the new parliament proved durable; before long, the sultan suspended parliament and set up an authoritarian and religiously conservative regime. As head of Islam, Abdul Hamid claimed global authority over all Muslims (Lapidus 2002: 496-497). His regime would be the last of the centuries-old Ottoman Empire.

In 1907, a Congress of the Young Turks established the Committee for Union and Progress (CUP). Following a military coup, the CUP and the army came into power together (Lapidus 2002: 497). They created a parliamentary government and forced the sultan to reintroduce the Constitution of 1876. This constitution, with the inclusion of a few amendments, was then put into effect for the second time. As a reaction to the pan-Islamic policies of Sultan Abdul Hamid II (1876-1908), the Young Turks went from being Islamic modernists to being champions of secular constitutionalism (Lapidus 2002: 460).

Between 1913 and 1918, the CUP carried out a broad programme of secularisation of schools, courts, and legislation. The government also took its first steps towards the emancipation of women. In 1916, the CUP government reduced the powers of the *Sheikh ul-Islam* by transferring jurisdiction over Muslim courts to the Ministry of Justice and the control over Muslim colleges to the Ministry of Education.

In 1917, a new family code based on European principles was promulgated (Lapidus 2002: 498) in the form of a decree, but it remained in

force in the Ottoman Empire for only a year and a half, though elsewhere its lifespan proved longer.[6] Because all reforms in the Ottoman Empire were decreed by the sultan, they had a substantial influence and a modernising effect on other Muslim societies. Since the sultan was also the Muslim Caliph, his edicts were accepted even if they deviated from orthodox Islamic practice.

The new family law also established unity in the court structure as competences in the field of family law were removed from the Religious Courts. In the drafting of the family code, the views of all shari'a schools were taken into consideration, rather than just the Hanafi School which was followed by the majority of Ottoman Muslims. The code included separate provisions for Muslims, Christians, and Jews. With the new code, marriage was accepted as a contractual legal act that had to be registered by an authority appointed by the state even though the contracting parties were left free to practise whatever ritual or sacramental forms of marriage they wished (Berkes 1998: 417). Section 38 of the code was aimed at ending the practice of polygamy, relying on a view held by the Hanbali School. According to this section, a marriage contract contained a vow to the effect that the man would not take a second wife and that if he were to do so the first marriage would be deemed to have ended in divorce. As such, it effectively introduced an indirect prohibition on 'second' (polygamous) marriages (Aydın 1998: 314-318).

It was only with the 1926 Turkish Civil Code that unity was created in this field, including for succession, which had until then been subject to shari'a rules. Even today there are separate shari'a succession provisions that apply to individuals who died prior to 4 October 1926 and whose succession issues have not yet been settled.

6.2 The period from 1920 until 1965

The move toward a fully secular republic

The First World War ended in 1918, and on the 30th of October of that same year, a Turkish delegation signed an armistice with the Allies on behalf of the Ottoman Empire. Allied troops occupied various districts in Istanbul, as well as a number of Turkish provinces, strategic roads, and railroads. The various Arab lands that had belonged to the Ottoman Empire were already controlled by the Allied forces, and their imminent independence was assured to them. On 21 December 1918, the Ottoman Sultan Mehmet VI dismissed Parliament. Under the protection of British, French, and American warships, the Greeks invaded Izmir by sea on 15 May 1919, after which they pushed eastwards into the interior (Lewis 1968: 239-242).

Four days after the Greek landing in İzmir, Mustafa Kemal Paşa, Inspector-General of the Ninth Army, landed in Samsun, on the coast of the Black Sea, with orders from Istanbul to supervise the disbanding of the remaining Ottoman forces. Instead, he immediately began organising a nationalist movement and raising an army (Lewis 1968: 242-243). On 23 July 1919, a congress of delegates from the eastern provinces assembled in Erzurum and on 4 September an even more important congress was held in Sivas. The main political goals of these nationalists were preserving the territorial integrity and national independence of Turkey. Meanwhile, under the authority of the sultan new elections were held in December 1919.

In 1920, a power struggle took place between the nationalist movement led by Mustafa Kemal (later to be known as Atatürk) and the followers of the Sultan-Caliph's forces. This conflict threatened to divide the country: 'It was unfortunate for Islam in Turkey that it came to be intimately identified with the forces more concerned to retain their own power, even by collaborating with Great Britain, the supporter of the Greek invasion, than to save the country from partition' (Lewis 1968: 234-274)[7]. The last Ottoman Parliament convened on 12 January 1920; it adjourned its own sessions until 18 March, and on the 11th of April the sultan dissolved it entirely. That same day, *Sheikh ul-Islam* Durrizade Abdullah Efendi, '[...] issued a fetva [*fatwa*] declaring that the killing of rebels, on the orders of the Caliph, was a religious duty [...] (Lewis 1968: 252). Subsequently, the nationalist movement obtained a counter-*fatwa* from the pro-nationalist *müftü* of Ankara aimed at mitigating the effects of the earlier *fatwa*.

Law reforms in the Turkish Republic

On 23 April 1920, the Turkish Grand National Assembly (*Türkiye Büyük Millet Meclisi*, TBBM) held its opening session in Ankara. This occasion marked the beginning of a new era for the Turkish state, namely the era of the secular republic. The basis of the policy of the new Turkish state became laicism, not irreligion: the new regime was not out to destroy Islam, but rather aimed at abrogating its political authority. The power of religion and its exponents in political, social, and cultural affairs would be put to an end and a limit would be set to matters of worship and belief (Lewis 1968: 412). To set an example, the TBBM, in the same year, enacted a Law against High Treason aimed at preventing the misuse of religion for political ends.

The Kemalist period of governance began with the 1921 Constitution, which stipulated that ultimate sovereignty belonged to the Turkish people. On 1 November 1922 the national assembly abolished the sultanate (Decree No. 308/1922, dated 1-2 November).[8] In 1923, the Republican

People's Party (Cumhuriyet Halk Partisi, CHP) was created, with Mustafa Kemal as its first president. Shortly afterwards, he was elected President of the Turkish state. In 1924 the abolition of the caliphate was implemented (see Law No. 431/1924)[9]. The Sultan-Caliph was sent into exile. 'Sovereignty belongs to the nation' became the new slogan of the Republic. The abolition of the sultanate and the caliphate ended a period where a religious institution sat at the apex of the state and was, therefore, a significant step on the path to secularism. The concept of loyalty to the nation replaced the concept of submission to God, and thus secularised the people's identity and sense of belonging. Now that the concept of national sovereignty had been incorporated into the constitution and had moreover been implemented in practice, a new era in which the position of the bourgeois class was significantly strengthened dawned on the Turkish Republic.

Another law, also promulgated in 1924 (Law (*Kanun*) No. 429/1924), abolished the position and office of the *Sheikh ul-Islam*, as well as the Ministry of Religious Foundations. The latter was replaced by a small Office of Religious Affairs. Religious foundations (*Evkaf Müdürlüğü*) came under the direct authority of the Prime Minister. A large number of the religious scholars (*ulama*) were sent into retirement and the remaining religious clerics became minor civil servants. The entire system of religious schools was also dismantled, the *mektep* (school) and the *medrese* (the special high school) being incorporated into a unified system of national education under the direction of the Ministry of Education (Shaw & Shaw 1977: 384-385).

The influence of Islam on the legal system, however, did not disappear entirely. According to Law No. 364/1923 (dated 29 October), which amended the 1921 Constitution, Islam was still recognised as the state religion. In addition, the age-old duty of the ruler to carry out the application of shari'a laws was initially formally upheld by the TBBM.[10] And, when delivering the oath of office, the president and the members of Parliament still accepted the religious formula, the *vallahi* (oath in the name of Allah (God)). Despite these formalities and official recognition of a continued role for Islam, in 1924 shari'a courts were abolished.

In 1925, representatives of the three separate non-Muslim communities (Jews, Armenians, and Greeks) declared to the government in Ankara that they were prepared to give up their rights to their own community laws. This was a very significant development (Tanör 2002: 225-226). In addition to this, the Sufi-orders were declared illegal and closed on the grounds of Law No. 677/1925.[11] Another example of the secularisation of social life was the ban on the wearing of the *fez* and other religious garments. The wearing of the *fez* was prohibited through a separate law (Law No. 671/1925), and regulations were inserted into the penal code making the wearing of religious attributes in public

punishable acts (Law No. 676/1925). Another law further specified that certain garments, such as robes and *türban* of an imam or robes and *kippah* of a rabbi, could not be worn (law of 13 December 1934). In addition, certain titles such as *efendi*, *bey*, and *Paşa*, could no longer be used, and religious titles, such as *hacı*, *hafiz*, *hoca*, and *molla*, were also abolished. And finally, calendar and national holidays were revised to remove any connotations of non-secular association.

The principle of separation of religion from politics was further affirmed in the Penal Code of 1926, which laid down penalties for those 'who, by misuse of religion, religious sentiments, or things that are religiously considered as holy, in any way incite the people to action prejudicial to the security of the state, or form associations for this purpose [...] Political associations on the basis of religion or religious sentiments may not be formed' (Art. 163). The same code also prescribed punishments for religious leaders and preachers, who, in the course of their functions, bring the administration, the laws, or executive action into discredit (Art. 241), incite disobedience (Art. 242), or who conduct religious celebrations and processions outside recognised places of worship (Art. 529).

On 4 October 1926, a new civil code, which also incorporated family law based on the Swiss civil code, was enacted. This civil code replaced the *Mecelle*, which was essentially based on the shari'a. The new law abolished polygamy, made the sexes substantially equal in rights to divorce, and required that divorce be subject to court rulings on specified grounds rather than acting as a male prerogative. The regulation of births, upbringing and custody of children, cultural education, marriage, death, and inheritance were no longer the domain of the *ulama* (Örücü 1992: 51-52; Tanör 2002: 276): a marriage contract now had to be concluded before an official marriage registrar; parents were responsible for the religious education of children; and upon reaching majority one had the freedom to choose one's religion.

The influence of European law increased, as witnessed by the foundations of many laws. The 1926 Law of Obligations was for example based upon the Swiss Code, and the Turkish Commercial Law was predominantly German, but eclectically also based upon the French, Belgium, and Swiss Commercial Codes. The Turkish Code of Civil Procedure was adopted from the canton of Neuchatel (Örücü 1992: 52).

The date 14 April 1928 is a significant moment in the process of Turkish laicism. Section 2 of the 1924 Constitution, which said that '[t]he religion of the Turkish State is Islam' and Section 16, citing 'to apply the Shari'a Law' among the duties of the Parliament, were removed from the Constitution, and the oaths in parliament were secularised. The reason given for this was that in the contemporary civilised world it is generally accepted that the most progressive and developed type of

state enabling the realisation of the national sovereignty is a laic and democratic republic. Also in 1928, a new Latin alphabet was introduced to replace Arabic. The next measure was the purification of the Turkish language, which was achieved through the removal of all Arabic and Persian influences. And, in 1929, both Arabic and Persian were eliminated from the school curricula.

This was a firm departure from the Arab culture and its religious source. Religious teaching was removed from the curriculum of urban primary schools in 1930 and from that of rural schools in 1939. In addition, foreign school programmes were no longer allowed to contain any religious elements. The Constitution guaranteed women the right to equality in education and employment, and in 1934 they were accorded the right to vote in national elections. In 1935, the first female deputies were elected to the Turkish Parliament.

In 1929, a new Turkish Penal Code was enacted based on the German Penal Code, and in the same year the new Maritime Commercial Code, also inspired by a German code, was accepted. The Code of Bankruptcy was adopted from the Swiss Federal Code. In 1935, all Turks were required to take surnames in the Western fashion. In the 1940s, 'Village Institutes' (*Köy Enstitüleri*) carried the laicist world view to rural areas.

While the Kemalist reforms did indeed restrict the public role of religion, they did not try to change the content of religion except for the call to prayer (*ezan*), which as from January 1932 sounded from the minarets in Turkish. A purely Turkish version of the call was prepared by the Linguistics Society and published by the Office of Religious Affairs (Lewis 1968: 416; Tanör 2002: 276-277). Some reforms, however, did have a clear role in constraining the freedom of religion. Examples of this include: the Law of 1935, which classified mosques and mescit (*masjids)* and allowed some of them to be used for non-religious purposes[12]; restrictive regulations on pilgrimages; and the dissolution of religious Sufi associations (*tarikat*, pl. *tariqas*), the impounding of their assets, the closing of their convents and sanctuaries, and prohibition on their prayer meetings and ceremonies. At times, Article 163 of the Penal Code was used in order to ban and disperse religious meetings (Tanör 2002: 276-277).

Thus, in the 1920s and 1930s Islam was 'de-established' and deprived of its role in public life. The ordinary symbols of Turkish attachment to traditional culture were replaced by new legal, linguistic, and other signs of modern identity (Lapidus 2002: 502-503). Nonetheless, Islam remained 'deeply rooted in the minds and hearts of the people' (Rosenthal 1965: 61).

On 10 November 1938, Mustafa Kemal Atatürk, the founder of modern Turkey, died. İsmet İnönü was elected as the second President of

the Turkish Republic. From 1938 to 1945, the Republican People's Party (CHP) was the only political party. It acted in a rather totalitarian manner and maintained its strict laicist policies towards religion. There was no democratic opposition. However, the CHP-run government permitted the reintroduction of military imams into the army as early as 1941 (Ahmad 1977: 364). In 1949, religious education was reintroduced into schools. This consisted of two hours of instruction on Saturday afternoons, but was restricted to those children whose parents had explicitly requested such education. In this way, the state retained control over religion and religious institutions.

Transition to a multi-party regime

In 1945, Turkey introduced a multi-party regime. The Democratic Party was established from within the CHP in 1946. The new democratic dispensation gave much more freedom of expression to various groups, including religious leaders. At this time, the competition for votes forced the CHP and the opposition parties to reconsider their policies concerning Islam. The first thing the Democratic Party did after coming to power (1950-1960) was to amend the Penal Code (§ 526), which from 1932 onwards had forbidden the call to prayer in any language other than Turkish. On 5 July, the ban on religious radio programmes was abolished, and radio stations immediately resumed broadcasting readings from the Qur'an. In October 1950, religious lessons in schools became compulsory for the fourth and fifth grades of primary school, unless parents indicated that they did not desire such education for their children. For the other grades and levels of schools, religious instruction remained optional (Lewis 1968: 418; Ahmad 1977: 365).

In 1951, however, a series of court cases were brought against Islamic reactionaries and against Islamic publications. On 25 July 1951, a bill on Atatürk came into force, giving the government powers to deal with those who challenged the Atatürk reforms. In July 1953, the Law to Protect the Freedom of Conscience was passed to prevent religion from being used for political purposes (Ahmad 1977: 369). This law corresponds to the provisions of the Penal Code of 1926 whereby it was considered a crime to 'establish, organise or administer associations with the aim of adapting the fundamentals of state order to religious rules and beliefs, contrary to secularism, or to affiliate with or encourage others to affiliate with these type of associations' (Art.163). Both laws aimed to protect secularism in the country and the Law to Protect the Freedom of Conscience reinforced Article 163 of the Penal Code. After 1952, a number of political parties were banned. The authorities dissolved the Islamic Democratic Party (IDP) and subjected the party's founders to criminal investigation (Tunaya 1995: 742-744). In 1953, the

Nation Party was temporarily closed on grounds that it was engaging in subversive activities under the cloak of religion; on 27 January 1954, the party was dissolved by court order.

The first military coup and a new constitution

In 1960, the Democratic Party government was overthrown by a military coup. The army, which took control, represented the Westernised elite and was aligned to bureaucrats and students, all of whom defended the laic Kemalist policies. Their opponents were largely rural, small-town business owners and Islamic interest groups. A major reason for the coup was the dire economic situation. There was no question of an Islamic resurgence threatening the reforms. In fact, Kemalism had now brought about a generation of socio-economic changes that had positively influenced a significant minority in Turkey (Ahmad 1977: 373).

The army promulgated a new constitution, a parliamentary regime, and a new economic policy (Lapidus 2002: 506). The Constitution of 1961, which was adopted by the Constituent Assembly, confirmed the laic character of the democratic, social Republic. This constitution forbade the use of religion for political purposes[13], left all decisions regarding the religious education of children to parental discretion[14], and left the Office of Religious Affairs intact. In addition, the Constitution formulated a special article designed to '[s]afeguard [...] the Reform Laws which aim at raising Turkish society to the level of contemporary civilization and at safeguarding the secular character of the Republic and which were in effect on the date this constitution was adopted by popular vote [...]' (Art. 153). The laws in question were then enumerated. Article 154 safeguarded the Office of Religious Affairs, stating that that office 'incorporated in the general administration, discharges the function prescribed by a special law'.

6.3 The period from 1965 until 1985

Grappling with the division between religious identity and political influence

In the period between 1965 and 1985, Turkey maintained its secular character and strengthened its image as a moderate alternative to Islamising countries such as Iran, Pakistan, and Sudan. Nonetheless, in Turkey, emotions frequently ran high when religious matters were at stake.

In the 1965 elections, nearly all Turkish political parties exploited religion. The Justice Party (JP), established in 1961, won the elections. Led by Süleyman Demirel, the JP used the slogan 'we are right of centre

and on the path to God'. The CHP, as usual more ambivalent about exploiting Islam, used the old tactics of denouncing the JP and Demirel, for example with the laic retort 'We elected him as a political leader, not as the imam of a mosque' (Ahmad 1977: 378). The JP formed the government and pledged that graduates of the Islamic *İmam Hatip* schools, secondary schools for the training of Islamic religious personnel in Turkey, would be admitted to universities. During this political period, a number of *İmam Hatip* schools were opened in nearly every Turkish province.

The effects of the 1968 student revolution in Paris were also noticeable on Turkish campuses. The first student boycott took place in April 1968 at the Faculty of Divinity at the University of Ankara. This protest was prompted by an incident in which a female student had insisted on wearing her headscarf in class.

On the political front, several revolutionary developments also took place during this turbulent period. In 1969, the National Order Party (Milli Nizam Partisi, MNP), with an Islamic inclination, was established under the leadership of Necmettin Erbakan. In 1971, the army temporarily took control of the state, but quickly restored a civilian administration. Nonetheless, the Constitutional Court closed down Erbakan's MNP in 1972 for having used religion for political gain (Shankland 1999: 87-131).

In 1973, the new Islamic National Salvation Party (Milli Selamet Partisi, MSP) was established; it formed a coalition government under CHP leader Bülent Ecevit. However, the tensions between leftist and rightist parties increased dramatically in the 1970s, leading to violence and bloody clashes that claimed many lives.

The second military coup and the Constitution of 1982

In 1980, yet another military coup took place. The National Security Council banned all parties, outlawed strikes, and abrogated the legislature by forbidding its members from participating in politics for the next ten years. The Consultative Council, comprised of civilians, and the National Security Council together formed the Constitutive Council. This council prepared a new constitution as well as a law regulating the referendum on the Constitution. The Constitution was adopted after the 7 November 1982 referendum yielded a 91.37 per cent yes-vote.[15] Subsequently the 1983 general elections were held in November, and a new democratic period began with the meeting of the new Parliament (Özbudun 1993: 32-33).

In 1983, the Islamic Welfare Party (Refah Partisi, RP) was founded, consisting almost entirely of former members of the MSP (Turan 1994:

31-55). Initially, the party was only able to participate in local government elections; the military authorities of the period prohibited the RP from participating in general elections..

In December 1982, the Higher Education Council issued a regulation banning the wearing of head covers (*türban*). In a 1984 case, the Council of State upheld this prohibition and declared that 'the *türban* is no longer an innocent tradition, but has become a symbol of a world view against the freedom of women and against the fundamental principles of the Republic'.[16]

Before we continue with the events of the 1985 to the present period, we should say a few words about the conflicts inherent in the 1982 Constitution. Three main conflicts can be identified in the Constitution. The first paragraphs of Article 24, which concern freedom of religion and conscience, state that:

> 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.

First, in distinction from the 1961 Constitution, the 1982 Constitution places education and instruction of religion and ethics under state supervision and control. Article 24 states further that instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Since obligatory religious lessons were taught according to the Sunni interpretation of Islam, they came under criticism from other religious groups, especially from the Alevis. The subject was taken to court, as will be explained in the following section, but could not be challenged at the European Human Rights Court since at that time Turkey had not yet accepted the jurisdiction of this court.

The second conflict is stated in Article 136 of the 1982 Constitution. This article ensured the continuity of the Office of Religious Affairs as a part of the general administration, similar to the 1961 Constitution. It is generally accepted in Western democracies that the separation of religion and state affairs is essential in a secular state. Yet, Article 2 of the Constitution firstly identifies the Turkish Republic as a secular state,

whilst simultaneously creating an agency to manage religious affairs within the general administration by way of Article 136. Further, Article 89 of the Political Parties Act forbids political parties to aim to abolish or to change the status of the Office of Religious Affairs as an agency of the general administration. Indeed, a number of parties have been closed on grounds that their party programmes were contrary to Article 89 (see 5.4 below).

Thirdly, contrary to Article 24 of the 1982 Constitution, which states that 'no one shall be compelled to reveal religious beliefs and convictions', Article 7 of the Civil Registration Services Act (Law No. 5480/2006) provided that the religion to which people belonged had to be shown in the state register and on identity cards. This issue has been challenged on grounds that it is contrary to secularism, as will also be explained in the following section.

6.4 The period from 1985 until the present

Defending the laic order – The battle against visible signs of Islamism

The period starting with 1985 did not open a new leaf for the state-religion relations in Turkey.[17]. Thus, the events described and analysed in this section should be seen as a natural extension of the previous section. Within the liberal environment introduced by the Constitution of 1961 different thoughts and ideologies found a chance to flourish and to become more organised. During the period of 1960-1980 a young generation had begun to develop under the influence of Marxism, while on the other hand there had been clear signs of development of a group with growing Islamic inclinations. As a result, ideological conflicts and violence followed.

Thus, after the military coup of 1980, the military government was careful to create an environment in which ideological conflicts could not exist, limiting freedoms and eliminating differences. The new generation would, according to their plan, be close to the Turkish-Islam synthesis, being Turkish, Sunni, and secular. Yet, under this authoritarian and nationalist constitutional order, movements demanding the expansion of liberal freedoms in the field of religion and conscience, especially from Muslims of Sunni and Alevi sects, became increasingly organised and vocal from 1985 onwards.

Turkey's acceptance of the jurisdiction of the European Court of Human Rights in 1987 paved the way for many applications for review of the conflicts between the constitution and other regulations outlined above. As will become evident in the discussion below, the issue of religious dress was particularly symbolic and vital in the government's

resistance to perceived threats from non-secular groups and their ideas of political and formal social expression.

Legislation banning the Turban

In 1987, yet another legislative prohibition on the wearing of head covers was upheld by the Council of State. Two years later, in 1989, a law from 1988[18] removing the restrictions was annulled by the Constitutional Court in a decision holding as follows:

> A legal regulation cannot take into consideration religious rules, religious beliefs and religious requirements; the regulation related to covering the neck and hair because of religious beliefs is contrary to the principles in the Preamble of the Constitution and specifically to secularism.[19]

In 1992, the government removed a number of religiously-grounded articles from the Penal Code, in order to prohibit the exploitation of religious feelings and propaganda for a state based on religion. Shortly afterwards, in 1993, tensions mounted when several intellectuals were assassinated and allegations that their murders had been carried out by terrorist organisations with Islamic connections surfaced. It was also claimed that there was foreign involvement in these assassinations (Kongar 1998: 225, 261). Around this same time, a hotel in Sivas where 33 writers and artists were staying was burnt down; thirty-seven people were killed, including locals. Various interpretations of this incident see it as a Sunni-Alevi conflict, a clash of secular and religious forces, the use of religion for political ends, or a battle for power between the two camps.

In the local elections of 27 March 1994, the Islamic Welfare Party (Refah Partisi) won more than 19 per cent of the votes. The party gained the mayorships in Istanbul and Ankara; Recep Tayyip Erdoğan became mayor of Istanbul. In March 1995, an Istanbul coffee shop located in a neighbourhood primarily popular with Alevis was attacked, leaving two people dead and fifteen wounded. The military had to be called upon to ease the popular tension following the attack. In the elections of 24 December 1995 the RP even became the biggest party, gaining 21.4 per cent of the votes. Its chairman, Necmettin Erbakan, became Prime Minister of the coalition government.

Banning parties in the name of democracy

In 1996 and 1997, *Refah* politicians gave the impression on several occasions that they no longer supported the secular approach advocated by Kemalism.[20] Consequently, in 1997 the National Security Council acted against the anti-laic activities of the party and forced the RP to give up their participation in the coalition government. The military forces briefed the public prosecutor, the judicial authorities, academics, and the press on the situation, sending the clear message that religious bigotry had become the prime factor threatening national security and that it would no longer be tolerated. A special unit was set up in the General Staff to monitor Islamic activities. The Public Prosecutor of the Republic took further steps, requesting the Constitutional Court to permanently dissolve the RP on the basis that it had become a centre for anti-laic activities. Faced with strong pressure from public opinion, Erbakan handed in his resignation from the chairmanship of the RP and his post as Prime Minister to the President in June 1997.

In January 1998, the Constitutional Court dissolved the RP. However, by February, a new party – the Virtue Party (Fazilet Partisi, FP) – had already been created; all RP mayors joined this new party. In April, the Diyarbakir State Security Court decided that Erdoğan, who was still serving as mayor of Greater İstanbul, had 'sown seeds of hatred among the people' in a speech in Siirt in late 1997. For this offence, the court sentenced him to ten months in prison on the basis of Article 312 of the Penal Code. In addition, he was prohibited henceforth from taking public office and participating in elections.

At this time, some preventive measures were taken to reduce the number of graduates of *İmam-Hatip* schools working in the public sector. Obligatory state education was extended from five to eight years. The university entrance system was also changed so as not to allow graduates from vocational schools to attend any other faculty department except those in their own fields. Many army officers who had come from *İmam Hatip* schools of higher education or who had connections with religious Sufi organisations were dismissed.

The Higher Education Council imposed a new dress code, banning the wearing of head covers and of beards on university campuses. As a result of the legal obligation to have photographs without headcovers on school documents, hundreds of female students could not attend school, which led to protests in October 1998. In May 1998, the president of the Islamic business association 'MÜSİAD' was tried by the Ankara State Security Court because of a speech he made in October 1997, in which he too had allegedly 'sowed seeds of hatred among the people'. In 1999, he was sentenced to sixteen months imprisonment, but the sentence was suspended on the condition of non-recidivism.

Also, in 1998 the building and running of mosques was placed under the supervision of a state organisation. The aim of this was to prevent Islamic communities from having their own mosques and also to reduce their sphere of influence (Kramer 2001: 121-122). At the same time, the High Council for Radio and Television warned Islamic radio and television stations against exploiting religious sentiments. Technical measures to be used as possible measures against the stations if they did not abide by the rules were outlined and discussed. It has been said that these developments were part of a comprehensive campaign begun by the General Staff against 'the spread of Islamic fundamentalism' (Kramer 2001: 122).

In the 1999 elections, the Virtue Party's votes were reduced to 15.41 per cent. A few weeks before the election, the Public Prosecutor had requested the Constitutional Court to ban the party completely. Another law suit related to the dissolution of this party was heard after a female Member of Parliament of the party had taken her oath of office while wearing a headscarf, causing turmoil among Members of Parliament. The Court subsequently dissolved the party, in whose place the Justice and Development Party (Adalet ve Kalkınma Partisi, AK Party) was swiftly created.

The period of the Justice and Development Party and the decision of the European Court of Human Rights concerning the Turban

The elections of 2002 brought the AK Party into power. They emerged the outright winner in the elections, despite having garnered only 34 per cent of the votes. In the local elections of 2004, the party increased in popularity, winning 44 per cent of the vote. Despite its Islamic roots, the party projects the image of a centre-right conservative party that aims for economic development and respects the basic principles of a secular constitutional order. The AK Party has also supported Turkey's efforts towards attaining full membership status in the European Union, and as such considerable progress has been made in the area of human rights, including the rights of suspects and prisoners.

The '*türban* question', a chronic problem in Turkey, reached the European Court of Human Rights (EctHR) in 1998. The applicant, a female student named Leyla *Ş*ahin, alleged that a ban on wearing the Islamic headscarf (*türban*) in higher-education institutions violated her rights and freedoms under Articles 8, 9, 10 and 14 of the Convention and Article 2 of Protocol No. 1. (Case of *Leyla Şahin vs. Turkey*, Application No. 44774/98). The judgment of 29 June 2004 referred to the historical and sociological circumstances in Turkey, and appeared to be influenced by the previous *Refah* case:

> 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 (see para.s 32, 33) [...] Each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (*Refah Partisi and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university (para. 109).

The Court went on to say:

> A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since rules on the subject vary from one country to another depending on national traditions [...] and there is no uniform European conception of the requirements of 'the protection of the rights of others' and of 'public order' [...]. It should be noted in this connection that the very nature of education makes regulatory powers necessary (para. 102).

In so holding, the court granted Turkey the discretion to preserve the laic life-style, women's rights and public order in the face of religious movements seen to be attempting to impose their world-views.

This judgment was assessed differently by different sectors of the Turkish community. The general consensus was that this was more a political decision than a legal one. For instance, Nuray Mert of the *Radikal* newspaper, critical of the judgment, wrote: 'European democracies have not yet gone beyond their preconceptions and assumptions about Islam, Moslems and their social demands. Therefore, the decisions reached reflect these views.'[21] Another journalist, Gündüz Aktan, also of *Radikal*, drew attention to the inconsistencies in the judgment:

> The inconsistencies can be explained thus: Even though those that wear the *türban* are in the minority, in a country where there are extreme trends, they can become the majority, in which case equality will be violated for those who do not wear the *türban*. Those who now benefit from Article 9 by following their beliefs in a pluralist society, except being able to wear the *türban*, may not respect this principle then. Authorities must remain 'neutral' regarding religious beliefs. Allowing the wearing

> of the *türban* would create a privilege for those who wear it and constitute a discrimination against those who do not.[22]

From time to time, the Head of the Office of Religious Affairs (*Diyanet*), Ali Bardakoğlu, has taken up the discussion on the '*türban* question,' once expressing the view that 'the wearing of the headscarf has never been a condition of either being a Moslem or being considered one.'[23]

A recent development is a draft bill on the organisation of the *Diyanet* (*Diyanet İşleri Başkanlığı Teşkilat Kanunu Tasarısı*) prepared by the Council of Ministers.[24] According to this bill, the usage and administration of all mosques in Turkey will belong to the *Diyanet*. At present, of approximately 80,000 mosques in Turkey, only 4,000 belong to the *Diyanet*, the rest belong to associations (7,076), private persons (3,379), and private foundations (936). The *Diyanet* states that they only hear of a newly constructed mosque when asked to allocate religious posts and that this situation leads to a gap in supervision.[25] If the draft becomes law, all new mosques and their annexes, such as gardens, courtyards, lodgings for the *imams*, will be transferred to the *Diyanet*.[26] The aim of this significant development is to have the administration and control by the state in all areas pertaining to mosques and to prevent their use for purposes other than for religious services.

Regime discussions and the search for a new constitution

In May 2007, the AK Party proceeded to elect the President of the Republic by insistence rather than by reaching consensus, which led to a strong reaction in some quarters of the society. The Constitutional Court annulled the first round of the elections for lack of the necessary quorum of two-thirds of the full membership of the Assembly. On the evening of the same day that the opposition party took the elections to the Court for annulment, the Chief of General Staff drew attention on the army web page to the fact that attempts by those who want to erode the foundations of the Republic have become denser and that the reactionary sectors of society have taken courage from recent developments.[27] This has been interpreted in the media as a 'warning'.[28]

The army accused the government of tolerating radical Islam and vowed to defend laicism. It must be remembered that Turkey's army has toppled three governments since 1960, and analysts said there were fears that it could intervene again. In 1997, it had been army pressure that led to the ousting of Turkey's first Islamist Prime Minister Necmettin Erbakan.[29]

In demonstrations throughout April and May of 2007 in Ankara, İstanbul, İzmir and Samsun, the message was 'the laic order of Turkey

is in danger'. Many have been complaining that religious sentiments were becoming more prominent in daily life, children were being harassed, alcoholic drinks had become expensive, religion had become a criterion of promotions in public sector jobs, and many areas of İstanbul looked more and more like the Middle East, with girls and boys sitting separately in many places and an increasing number of covered women.

However, the surveys carried out in 1999 and 2006 by the Turkish Economic and Social Studies Foundation (TESEV) showed a different analysis of the picture than the generally accepted views or preconceptions in Turkish society. In November 2006, the Foundation published the results of their survey *Değişen Türkiye'de Din, Toplum ve Siyaset* ('Religion, society, and politics in a changing Turkey'). The aim of the survey was to provide a rational basis for discussion as the foundation believed that misinformation and manipulation of the public opinion were causing conflict between various sectors of society in the public sphere. The report (hereinafter 'TESEV Report') is the first serious study conducted on the much debated Islam factor and its threat to the secular order of the state and deserves to be examined in more detail in order to show the changes in the sociological nature of the Turkish society.

The respondents of the survey identified the five most important problems in Turkey as follows: (1) unemployment (38.2%); (2) terrorism/national security/Southeast problem/the Kurdish problem (13.8%); (3) the high cost of living/inflation (12.1%); (4) education (10.2%); and (5) economic instability (6.5%). Interestingly, only 3.7 per cent of those polled saw the *türban* issue as an important problem (TESEV Report: 23, 45). Contrary to general belief, findings revealed that there had been a decrease in the number of 'covered' women in 2006, as compared to 1999. The percentage of women who said they did not 'cover up' in public was 27.3 per cent in 1999, versus 36.5 per cent in 2006. The percentage of those wearing a headscarf, stole or head-handkerchief (*yemeni*) went from 53.4 per cent in 1999 to 48.8 per cent in 2006; the percentage of those wearing the over-garment (*çarşaf*) was 3.4 per cent in 1999, but only 1.1 per cent in 2006; and the percentage of women wearing the *türban* went down from 15.7 per cent in 1999 to 11.4 per cent in 2006. Thus, the conclusions of the survey indicate that contrary to the claims of both the 'laic' and the 'Islamist' sectors, the '*türban* question' is not on the agenda of Turkish people (TESEV Report: 23).

Yet, the survey also simultaneously indicated an overall increase in pietism in Turkey. The percentage of those who answered the question about how they would define themselves with 'Turkish' remained fairly constant at 19-20 per cent in the intervening seven years. But the percentage of those who answered 'Moslem' went from 36 per cent in

1999 up to 45 per cent in 2006, while the percentage of those who defined themselves as 'a citizen of the Turkish Republic' fell from 34 per cent to 30 per cent. However, while 73 per cent of those surveyed said that laicism was not under threat, when asked whether they would like to see a *shari'a state*, 21 per cent in 1999 and 8.9 per cent in 2006 answered in the positive (ibid: 30).

According to the journalist-author Taha Akyol:

> If further questions had been put to those who answered in the positive in order to find out what people meant by the word *shari'a* which they regarded as sacred, this percentage would have fallen to 7-8% even in 1999, and in 2006 this percentage would have been 4-5%.[30]

Also, according to the survey, as the social status of the individual moved higher, religious tendencies were replaced by liberalism and laic law was preferred (TESEV Report: 39-43). Akyol said that in the end, difficulties in this area would be overcome if Turkey could sustain stability in democracy, market economy, urbanisation and education (ibid).

Results also highlighted that the vast majority of the Turkish population did not see a connection between terrorism and Islam. Moreover, respondents expressed their belief that even if a country were to be occupied, its people should not resort to terrorism and generally rejected any support for such action against a civilian population (TESEV Report: 30).

On 22 July 2007, an early general election took place. Immediately after the elections, in spite of the results indicated in the TESEV Report above, discussions about the secular regime and the constitution surged anew. The AK Party asked Professor Özbudun to head a commission to prepare a draft of a new constitution. However, commission deliberations on the feasibility of lifting the ban on head covering, which was preventing female students from attending university, were perceived as damaging to the secular nature of the state.

The first signs of a new legal regulation relating to the *türban* were evident in Prime Minister Recep Tayyip Erdoğan's statement at a press conference on 14 January 2008 on the occasion of an official visit to Spain. In his statement Erdoğan expressed that even if it is used as a political symbol, it is not a crime to wear a headscarf and that symbols cannot be banned. He further stated that it was sad that while students in Europe and America could freely attend university wearing the *türban* that in the so-called age of freedom such a problem should exist in a country where 99 per cent of the population is Muslim. He said that this problem would be resolved in a short time.

As a result of this speech, the ensuing debate on the *türban* occupied Turkey's agenda, causing lawyers, a number of organisations such as the main opposition party, the Court of Cassation, the Council of State, universities, and so forth to make consecutive statements on the matter. While some legal experts argued that – being contrary to the decisions of the Constitutional Court, the Council of State, and the European Court of Human Rights – Erdoğan's consideration of the *türban* as a political symbol was unconstitutional, others asserted that it should be considered an expression of freedom of speech.

Without waiting until the draft constitution was presented to the parliament, in 2008 a bill was prepared reforming Articles 10 and 42 of the current Constitution (1982) to allow female students to attend university while wearing a scarf or other head covering. AK Party in coalition with MHP was able to pass the bill, thus amending the constitution. The opposition parties, namely deputies from the CHP and DSP, brought these changes to the Constitutional Court on the basis that such changes were unconstitutional because they damaged the secular foundation of the state. The Constitutional Court annulled the constitutional changes on the grounds that it was contrary to the irrevocable provisions of the constitution. According to the Court,

> Covering for the sake of religious belief and the freedom to wear clothing symbolising one's accepted religion may cause conflict in society by the use of pressure on individuals whom they understand do not share the same belief as themselves. This may induce them to perform preventive and harmful acts against one another's freedom of religion and belief and even to exclude those who are not of their own beliefs.[31]

While the Court deliberations continued, on 14 March 2008 the Chief Prosecutor filed a brief before the Constitutional Court requesting the dissolution of AK Party on the basis of its activities, deemed to constitute 'anti-secularism.' The Chief Prosecutor claimed that the AK Party has become the focus of acts contrary to secularism and also requested that 71 persons be prohibited from politics, among these being President Gül and Prime Minister Erdoğan.

The case concerning AK Party's closure was decided on 30 July 2008. The qualified majority needed for the closure could not be achieved, so the request for closure was denied by the Constitutional Court with six acceptances to five rejections. The court held that the evidence did not prove that the aim of the defendant political party was to eliminate the democratic and secular order of the state or to destroy the general principles of the constitutional order by intolerance or by use of force. The court further found that the defendant party had not used

the political power available to it for the purpose of inciting violence and that as such the actions of the AK Party were not seen to be serious enough for the dissolution of the party. The court concluded, however, that the actions in question did violate the principle of a democratic and secular republic and that the aggravating nature of these actions warranted penalisation of the defendant party in the form of a reduction of one-half the amount of state financial assistance received by AK Party.

6.5 Constitutional law

Turkey is a constitutional parliamentary democracy with a wide range of human rights enshrined in the present Constitution of 1982. The first three articles formulate a number of fundamental principles described as 'immutable provisions' in Article 4. Articles 1, 2, and 3 stipulate that the form of government is a republic and outline the constituent characteristics of the system which include it being a democratic, laic, constitutional state that respects human rights. The Constitution further sets forth that the state is an indivisible whole. The republic remains loyal to Atatürk's nationalism and the fundamental tenets set forth in the preamble, which reads in part as follows:

> In line with the concept of nationalism and the reforms and principles introduced by the founder of the Republic of Turkey, Atatürk [...] The understanding of absolute supremacy of the will of the nation [...] the recognition that [...] reforms and modernism of Atatürk and that, as required by the principle of laicism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics [...] thus commanding respect for, and absolute loyalty to its letter and spirit.

In addition to these limitations, Article 174 of the Constitution affords protection to certain laws, namely the Laws of the Radical Reform, which were passed at the time of the formation of the republic, and which still are regarded as a *sine qua non* of modernisation and secularisation – the major aims of the republic. Örücü points out that:

> [t]he aim was to import "modernity" on a major scale. Important consequences arising out of the above are the strict control on political parties and the use of freedoms such as those of expression, the press, association and religion, and a self-referential legal system (Örücü 2003: 133).

The Office of Religious Affairs (Diyanet)

The Office of Religious Affairs was created in the Republican period and was given a structure that complied with the secular structure of the state; it was given the mandate to carry out religious affairs pertaining to faith, worship, and moral principles; to inform society on religion; and to administer places of worship.[32] As indicated above, the Constitution of 1982 places the Office of Religious Affairs within the administrative structure of the state. Article 136 reads as follows:

> The Office of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity.

In terms of its structure, the Office of Religious Affairs is a public institution placed within the state organisation. This fact has been seen as a contradiction to the secular nature of the state. It can be observed that within this context, there are three views regarding the functioning of the *Diyanet*. The first view is that the *Diyanet* should be totally abolished and that religious matters should be dealt with solely by the religious communities. The second view is that the *Diyanet* should not provide services for different religious communities, that it should be above religious conflicts, and that it should only serve to protect religion at large. The third is the majority view, which protects the present position of the *Diyanet*. This reflects the official position. The cases that signify these views are discussed in the following subsection.

Banning of parties

Constitutional Court cases concerning the banning of parties on the grounds of preserving either the secular nature of the state or the position of the *Diyanet* within the central government can be seen throughout the 1980s to the present day, the most recent case being the abovementioned dissolution of AK Party in 2008.

The Law on Political Parties sanctions in its Article 89 advocating changes in the position of the Office of Religious Affairs within the framework of the Constitution with dissolution of the political parties involved. The decisions of the Turkish Constitutional Court have drawn on this regulation a number of times. For example, the Freedom and Democracy Party (Özgürlük ve Demokrasi Partisi, ÖZDEP) stated in its party programme that the state should not interfere in religious affairs; this should remain within the realm of the religious communities. On

this point, the party pledged to grant national and religious minorities the means to develop their communities, language, culture, traditions, philosophy, and religious convictions and practices in an atmosphere of democracy and freedom. The Constitutional Court decided, on the basis of this, to dissolve the party for its promotion of ideas contrary to Section 89 of the Law on Political Parties,[33] among other reasons: 'ÖZDEP interpreted secularism in its modern shape and defined secularism as the separation of state and religion. ÖZDEP believed that the *Diyanet* (Office of Religious Affairs) should not be situated in the general administration of the state.'[34] The Court said that advocating the abolition of the Office of Religion Affairs amounted to undermining the principle of secularism.[35]

The second political party brought before the Constitutional Court was the Democratic Peace Movement Party (Demokratik Barış Hareketi Partisi, DBHP). In its preliminary defence the party relied on criticism voiced by lawyers and said: 'Since the *Diyanet* only deals with the religious affairs of Muslims, this creates inequality between them and members of other religions.' Although the party foresaw some changes in the organisation of the *Diyanet*, it did not want to abolish it and accordingly proposed that 'the *Diyanet* should be above all religions and protect them all rather than being involved in the conflict between religious sects.'[36]

A third party, the Democratic Mass Party (Demokratik Kitle Partisi, DKP) stated in its programme that '[r]eligious affairs and education should not be undertaken by the State but be left to the community at large and religious communities.[37] They further voiced their opinion that '[t]he running of religious centres and the education and training of religious personnel, their appointment, pay and related matters should be the concern of only religious communities.'[38]

Only one party which suggested the abolition of the *Diyanet* was dissolved;[39] the others, which wished to change the status and function of the *Diyanet*, were not dissolved (Koçak 2002: 146-147).

Another important judgment in this connection was the dissolution of the *Refah Partisi*, a case which was also dealt with by the European Court of Human Rights (EctHR).[40] The EctHR agreed with the interpretation of the Turkish Constitutional Court that the RP was dissolved on grounds that it had become 'a centre of activities inimical to the principle of secularism' and that 'the rules of the sharia are deemed to be incompatible with democracy, and the intervention of the State to preserve the secular nature of the political regime is considered "necessary in a democratic society."'[41] As such, dissolution of the party was not found to be in violation of Article 11 of the European Convention on Human Rights (ECHR). The EctHR worded its decision as follows:

> Refah's infringements of the principle of secularism can be classified in three main categories: (i) those which tended to show that the Refah intended to set up a plurality of legal systems, introducing discrimination on the grounds of belief; (ii) those based on references made by Refah members to jihad (holy war) as a political method; (iii) those which tended to show that Refah wanted to apply the shari'a to the Moslem community.[42]

This ruling is still under discussion in Turkey. Many agree with the joint *dissenting opinion* of the European Court that the evidence was not compelling. The *dissenting opinion* declared that the dissolution of the party was based exclusively on the public statements and actions of leaders and members of the party, but not on the statutes or political programme of the party, nor the election manifesto or other public statements issued by the party. No provision was found that served to undermine the secular character of the state as embodied in the constitution and the party programme rather explicitly recognised the fundamental principle of secularism.[43]

The majority of judges on the European Court, like the Constitutional Court, determined that a system of legal pluralism would lead to discrimination between individuals on the basis of their religion and that such a societal model would be incompatible with the values and principles outlined in the ECHR. But according to the *dissenting opinion*, there was no evidence in the material presented to the court that the party, once in government, had undertaken steps to actually introduce legal pluralism as described above.

Later the decision was reaffirmed by the Grand Chamber stating that 'the constitution and programme of a political party could not be taken into account as the sole criterion for determining its objectives and intentions'. The Court further concluded that:

> There were thus convincing and compelling reasons justifying Refah's dissolution and the temporary forfeiture of certain political rights imposed on the other applicants. It followed that Refah's dissolution might be regarded as "necessary in a democratic society" within the meaning of Article 11 § 2 and there had accordingly been no violation of Article 11.

Mandatory religious education

Article 24 of the 1982 Constitution introduced a new course on religious culture and morality into all primary and secondary schools as a compulsory subject.[44] Since 1980, the national curriculum presents

both Atatürk and the Prophet Mohammad, showing them in some way as objects related to religion (Kaplan 2003: 113). Such courses thus promote identification with the Turkish nation and its impressive history, reaching contemporary levels of economy and technology and obedience to State authority (Kaplan 2003: 114).

However, the ECtHR, and subsequently the decisions of the Turkish Council of State, found the content of the obligatory nature of religious and ethical studies to be unacceptable. In brief, the Court decision in the case of *Hasan and Eylem Zengin vs. Turkey* reads as follows:

> [...] the Court concludes that the instruction provided in the school subject "religious culture and ethics" cannot be considered to meet the criteria of objectivity and pluralism [...] to respect the religious and philosophical convictions [...] of the Alevi faith, on the subject of which the syllabus is clearly lacking.[45]

Currently, the course on religious studies and ethics is still part of the educational programme and all students of primary and secondary schools are obliged to take this course. However, following the two judgments of the Turkish Council of State (*Danıştay*) corroborating the decision of the ECtHR[46], the syllabus, which was initially in accordance to Sunni principles, was changed incorporating ethics studies and the philosophy of all religions.

6.6 Personal status, family, and inheritance law

Concerning personal status, family, and inheritance law, at present, there is no place within the laws of the Turkish Republic for religious rules or the shari'a. The Swiss civil code concerning persons, family, and succession was promulgated with modifications on 4 October 1926. The Swiss Law of Obligations was translated from its French text and promulgated on 22 April 1926. The current Turkish Civil Code of 2001 is an updated version of the earlier code. In 2001, a first paragraph was added to Article 41 of the Constitution, which states that the family is the basis of the society and relies on equality between the spouses.

Although polygamy was legally banned with the acceptance of the Swiss civil code in 1926, it is still possible to find polygamous unions in some regions, particularly in rural areas in the south-eastern part of the country; however, it is rare and was not very common even before 1926, when the Swiss civil code came into force (Kağıtçıbaşı: 6). A survey by Remzi Oto and Mustafa Ozkan indicated that nearly a third of polygamist men married for the second time after falling in love with

another woman. Some were forced into marriage at an early age and wanted a second wife, while others viewed a second marriage as a form of self-assertion and proof of their manhood.[47]

With respect to inheritance, although the civil code gives the same inheritance rights to women as it does to men, it is not unknown that in some traditional and isolated areas a woman inherits either nothing or one-half of what a man receives. However, the disputes are solved within the family or within the village context and have little or nothing to do with the state legal or administrative structures (Kağıtçıbaşı 1982: 7).

Personal disclosure of religious information

As explained in the previous section, Article 7 of the Civil Registration Services Act is in conflict with Article 24 of the Constitition of 1982, and as such the issue of disclosure of one's religious affilitation remains a concern. This issue had been taken to the Constitutional Court, which decided the case in 1995, stating that the requirement to fill in the information box on one's religion was not contrary to the principle of secularism.[48]

The issue was later challenged again by Mr Işık after his request to change his religious affiliation on his identity card from 'Islam' to 'Alevi' was denied by the administration. On 7 September 2004 the District Court dismissed the applicant's request, basing its decision on the opinion it had sought from the legal advisor to the Office of Religious Affairs. In brief, the court held that the term 'Alevi' referred to a sub-group of Islam and that the indication 'Islam' on the identity card was correct. The applicant appealed against this decision, but the Court of Cassation upheld the judgment of the District Court.

The issue then was taken to the ECtHR, which addressed in its holding the legality of including religious information (or including a 'religion' box) on identification cards as follows:

> The Government further contended that since the law of 2006 the applicant, in any event, could no longer claim that he was a victim of a violation of Article 9, because since then all Turkish citizens had been entitled to request that the information about religion on their identity cards be changed or that the appropriate entry be left blank. On this point the Court found that the law had not affected its assessment of the situation. The fact of having to apply to the authorities in writing for the deletion of the religion in civil registers and on identity cards, and similarly, the mere fact of having an identity card with the "religion" box left blank, obliged the individual to disclose, against his or her will, information concerning an aspect of his or her religion or

most personal convictions. That was undoubtedly at odds with the principle of freedom not to manifest one's religion or belief.[49]

6.7 Criminal law

The Penal Code of 1926 was updated and promulgated on 9 September 2004 in the framework of harmonisation with the laws of the European Union. There have been no direct or indirect references to shari'a law in Turkish criminal legislation since the 1930s.

6.8 Commercial law and banking

In the area of banking, banking with no interest is at times discussed and is not considered to indicate a diversion from laicism. In any event, if there were to be such legislative moves, the Constitutional Court would likely annul these as contravening the constitutional principle of secularism. Moreover, Turkey has met the Copenhagen criteria and obtained on 17 December 2004 a date for negotiations with the European Union for full membership, discussions which began on 3 October 2005 and are ongoing. The Turkish legal system and Western laws are in harmony in this field.

6.9 International agreements concerning human rights

Turkey signed the European Convention on Human Rights in 1950 and ratified it in 1954. It signed the Convention on the Elimination of All Forms of Discrimination against Women in 1979, ratifying it in 1985; it came into force in Turkey on 19 January 1986. On 7 May 2004, a new paragraph on equality was appended to Article 10 of the Constitution, which reads as follows: 'Women and men have equal rights. The State is under an obligation to ensure that this right operates in everyday life.'

Turkey also signed the 1966 International Covenant on Civil and Political Rights in 1970. This covenant was ratified in 2003. The country accepted individual application to the European Commission of Human Rights in 1987, individual application to the European Court of Human Rights in 1989, and compulsory jurisdiction of the European Court of Human Rights in 1990.

Turkey ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987

and signed the Convention Against Torture in 1984, ratifying it in 1988. In 1990, a 'Human Rights Investigation Commission' was set up under the auspices of the Turkish Parliament. Turkey also ratified Protocol 6 of the ECHR concerning the prohibition of the death penalty, as amended by protocol 11 on 17 September 2003, and removed the death penalty from Turkish law.

In June 1997, Turkey ratified the Eleventh Protocol of the European Convention on Human Rights and Fundamental Freedoms, which restructured the machinery for enforcement of rights and liberties guaranteed by the Convention. In the process of harmonisation with the E.U., the country has accepted a number of laws, the so-called 'harmonisation packages,' to adapt the Turkish legal system to the legal systems of European states.

6.10 Conclusion

The dualistic law of the Ottoman Empire, with its division between custom (*örf*) and shari'a law, has to some extent paved the way for the adoption of Western legal codes long before the foundation of the secular Republic (Rosenthal 1965: 313). The large-scale legislation of the Ottoman state, by so-called *kanun*-laws, was based on the sultans' *örf* powers (Rahman 1966: 80), which gave the Ottoman sultan the means to respond to the pressure of events and to promulgate new laws and institutions based on Western laws and Western institutions as he saw fit (Akyol 1999: 143-158).

Although the Ottoman sultans fulfilled the dual functions of head of the sultanate and of the caliphate, they effectively only operated as sultans. It is important to note that European law was not imposed upon the Ottoman Empire; there were rather voluntary borrowings, imitations, and adaptations. No part of the Empire had ever been a European colony (Örücü 1992: 40), though certain parts, such as Egypt, did have a semi-colonial status during the final decades of the Empire. Lapidus also emphasises this point: 'Unlike other Muslim empires, the Ottomans maintained their sovereignty and were able to implement their own program of modernisation and reform' (Lapidus 2002: 493).

Therefore, the modernisation movement hailing from the 1839 Reorganisation (*Tanzimat*) was the result of the will and desire of the Ottoman-Turkish ruling class and elite. The 1839 movement started a transition from religion-based law to national Western-inspired law. Through the increase of Western influences, a cultural and legal dualism was created. The legal system became a 'mixed jurisdiction': two bodies of law of different origin, reflecting the rules and principles of two of the major legal families in the world. The civilian tradition and

Islam were in effect operative together. However, the secular legal system gradually narrowed the scope of religious laws and widened its own area of application: '[T]he nineteenth century surely opened the way for the twentieth century reforms as well as creating that important element, an educated, enlightened elite' (Örücü 1992: 51).

The second extremely important period for the Turkish legal system began in 1920, when the Ottoman Empire collapsed and the Turkish Republic rose from its ashes. The founder of the Republic, Kemal Atatürk, tolerated the continued existence of Islamic law in the Republic for only a very short period of time. Especially during the period 1924-1929, a number of voluntary receptions of codes of law from Western countries gave Turkey its civilian, secular character. The Constitution of 1924 confirmed the principle of laicism as a key foundational principle of the Republic. After the 1930s, the influence of the shari'a on national law evaporated. However, although Islam no longer exercises a direct influence over the political, economic, and legal life of the nation, it does exert an indirect influence on public life through its effect on the social behaviour of the individual and communities.

After 1945, tendencies towards more democracy and Islamisation have alternated with periods of military rule and enforced secularisation. Since the introduction of the multi-party system, religion has become a political tool used for propaganda by most of the political parties. From the establishment of the Republic until today, many political parties have indeed been dissolved on the basis that they were involved in anti-laic activities. In 1960, there was a military *coup d'état*, which resulted in the appending of a bill of fundamental and social rights into the constitutional framework, rather than implementation of a policy of repression, as might have been expected. There was another military coup in 1980, which resulted in a change of attitude both toward rights and liberalism, and which led to the 1982 Constitution.

After the general election of 2002, the AK Party came to power. This party was positioned right-of-centre in the political spectrum and exhibited certain Islamic tendencies. One of the reasons for this politicisation of religion was 'the fact that the State has interfered with religion, and that it has tried to decide what people should believe in and how they should live' (Bulaç 2003: 133). An alternative interpretation is offered by Yavuz (2003), who claims that the AK Party symbolised the 'democratisation of Islam.' According to the second analysis there is no actual difference between any given European Christian democratic party and the AK Party. In fact, it is said that the priority of this party, whose membership is largely drawn from the dissolved Islamic Welfare Party (Refah Partisi), is integration with the European Union. Following a problematic period in the 1980s and 1990s, in which the country was a frequent target of foreign criticism, Turkey has endeavoured to stay

within the limits set by international law and to show its concern for international legitimacy, as evidenced by the role it played in the 1991 Gulf War, in the aftermath of the 11 September 2001 disaster, during the Afghan War, and recently in the 2003 Iraq intervention.

With regards to the relationship between state and religion, it seems that the state is in charge of religious affairs. There are no Religious Courts, only secular national courts. The Office of Religious Affairs is directly responsible for the supervision of all aspects of religious life. There are compulsory courses on religion and ethics, but no religious garments may be worn in schools, including head covers. The country plays an important role in the prevention of a possible clash of civilisations. Turkey has consistently sided with the Western world during the international conflicts listed above. Turkey has also embraced the *acquis communautaire* of the European Union in the legal, political, and economic areas. Despite difficulties, it appears that the country is on its way to becoming a full member of the E.U.

Nonetheless, not all Turks – not even those who insist on the separation of Islam from politics – agree on the current character of Islam and its role in the state. The population can be divided between traditionalists and modernists who continue to debate these issues. Both religious and secular groups express their dissatisfaction with the Republic's understanding of laicism and the way in which this principle is implemented.

There are two different perceptions of secularism which are at the centre of the religious conflict in Turkey. The first of these perceptions is passive secularism, which does not require the state to act. The second is assertive secularism, which differs from passive secularism in that it gives the state a duty to transform the society and the individual in a rational way. This understanding of secularism does not attribute a social role to religion in the lives of individuals except in their own conscience and in places of worship. The fact that the general staff and the judges of the High Courts[50] have accepted the perception of assertive secularism has caused the demands for the expansion of the freedom of religion and conscience to be seen as a threat directed against the Republic. The reason for the conflict over the issue of the *türban* has arisen from these two different and opposing views of secularism. Other concerns are largely in relation to the position of the Office of Religious Affairs within the state's administrative structure and the implementation of compulsory religion and ethics courses in schools. An author reflecting the views of the Islamist circles sums up the situation as follows:

> Religious circles do not oppose "laicism as a natural attitude of the State". The State should guarantee freedom of conscience

> and religion; must be equidistant to all religions and beliefs; prevent the domination of one belief group and system over others; but should not prevent the living together overtly of all beliefs in the public domain according to the principle of "unity within plurality". Religious people in Turkey wish to see laicism understood in this manner (Bulaç 2003: 133 ; Kaplan 2003: 107-116).

On these issues there is a wide variety of opinion and a constant pluralist discussion in Turkey (Kara 2003: 87-106; Kaplan 2003: 107-116). At the root of these debates we find a power struggle between CHP, which is the founder party of the Turkish Republic and the main opposition in the present parliament, the bureaucracy, the military and the judiciary on the one hand and the political power of the government led by the AK Party, backed by the votes of the people, on the other. Although the judgments of the ECtHR have made a certain impact on the Turkish political and constitutional culture, the solution to this conflict is closely related to the historical and political baggage that Turkey carries[51] and depends on leaving the power struggle aside, reaching a compromise, and achieving a political consensus on the issues discussed.

Notes

1 The author has purposefully chosen for a different title for his chapter. The main reason is that the secularisation of the law was largely complete after the declaration of the Republic and the abolishment of the constitutional clause that identified the state's religion as Islam. The rules of shari'a have not played any role since this process was completed about ninety years ago.

2 Professor of Public Law at Okan University Faculty of Law, Istanbul, Turkey. The author wishes to thank Prof. Dr Esin Örücü for her suggestions and comments and also his colleagues Assist. Prof. Dr Sevinc Aydar and Research Assistant Bilgehan Savascı for their assistance and support.

3 For statistics and up-to-date information from the Turkish government, see http://tuik.gov.tr. Note that due to the paucity of objective empirical research done on ethnic groups in Turkey the author has chosen not to provide exact numbers of communities in this chapter. To give a general idea, however, the Turks are thought to form more than three-quarters of the total population.

4 The Turkish word for sharia (shari'a) is *şeriat*. Throughout the text the author will use the term shari'a.

5 Among the countries where the *Mecelle* was in use we can cite Egypt, Hijaz (Saudi Arabia), Iraq, Syria, Jordan, Lebanon, Cyprus, Palestine and Israel. The *Mecelle* was in force in Albania and Bosnia Herzegovina until 1928 and in Kuwait until 1984. Until quite recently, it was also still in force in Israel (Kaşikçi 1997: 33; Karçiç 1994: 46).

6 This law was in force in Syria until 1953 and in Jordan until 1951; it was also used as a reference for decision-making in Israel/West Bank and is still in use in Lebanon. Though this decree was not directly in use in Iraq, two edicts by the sultan on related matters were implemented in that country (Aydın 1998: 318). It has been utilised as

a non-binding, persuasive source of law in family matters in Bosnia Herzegovina (Karçiç 1994: 46).

7 See also Ahmad 1977: 363-364; Berkes 1998: 431-460.

8 Düstur 1872: vol 3, 152.

9 Official Gazette No. 63, dated 6 March 1924.

10 Sections 2 and 16 of the Constitution of 1924 cite the application of the Sharī'a Law among the duties of the Parliament.

11 The law is dated 13 December 1925. It has been said that the role of the Nakşibendi Sect in the Seyh Sait uprising was an important factor in taking such a radical decision (Tanör 2002: 276).

12 For example as stables, lofts for the storage of hay or wheat, etc.

13 Article 19 of Part 2, § 2, states: 'No person shall be allowed to exploit and abuse religion or religious feelings or things considered sacred by religion in any manner whatsoever for the purpose of political or personal benefit, or for gaining power, or for even partially basing the fundamental social, economic, political and legal order of the State on religious dogmas. [...]'

14 Article 19 of Part 2, § 2, states: 'Religious education and teaching shall be subject to the individual's own will and volition, and in the case of minors, to that of their legally appointed guardians.'

15 For more discussion and analysis about the 1982 Constitution, see 5.5.

16 See Danıştay 8. Daire (Council of State, 8th Division) E. 1984/636.K.1984/1574, dated 13 December 1984.

17 As we have stated in the beginning, the sections as constructed for this study this chapter were formed by taking into account the history and key developments of other Islamic countries. For Turkey, the 1980 military coup would have been a more natural time to start a new section.

18 This law made amendments to the Law on Higher Education. It added a provision stating that it is compulsory to be dressed in modern clothes in higher education institutions, but it is free to wear a headscarf or turban to cover one's head and neck for religious beliefs. This law was made to enable access to university education to female students who covered their heads because of their religious beliefs.

19 The judgment of the Constitutional Court, E. 1989/1, K. 1989/12, in *Resmi Gazete* (Official Gazette) No. 20216, dated 7 March 1989.

20 For instance, in January 1997 Prime Minister Erbakan invited some leaders of Sufi paths and dervish orders (*tariqas*) to the Office of the Prime Minister for dinner during Ramadan. The Iranian Ambassador who was invited to a 'Kudüs evening' and the Mayor of the Sincan region of Ankara made speeches on 2 February 1997, understood by some to be calls for the overthrow of the republican regime. The following day military tanks drove through the streets of Sincan, the Mayor was apprehended and Iran had to call back its Ambassador.

21 See Mert, N. (2005), 'AIHM'nin Türban Kararı', in *Radikal*, dated 15 November.

22 See Aktan, G. (2004), 'AIHM Türban Kararı (1)', in *Radikal*, dated 7 July.

23 See Report: http://www.internethaber.com, dated 14 September 2006.

24 For the full text of the Bill see www.basbakanlik.gov.tr/docs/kkgm/kanuntasarilari/101-1262.doc.

25 See http://www.webhatti.com/wh-haber-bulteni/23938-turkiye-de-3-bin-379-kisinin-tapulu-camisi-var.html, 15 May 2007.

26 See http://www.haber3.com/haber.php?haber_id=222515, dated 29 March 2007.

27 See http://www.tsk.mil.tr/, dated 27 April 2007.

28 For analysis and related discussion, see Turkish newspapers from 28 April 2007 (e.g. http://www.radikal.com.tr/index.php?tarih=27/04/2007 and http://hurarsiv.hurriyet.com.tr/goster/haberler.aspx?id=2065&tarih=2007-04-27).

29 See e.g. http://news.bbc.co.uk/2/hi/business/6606723.stm, dated 1 May 2007.
30 See Akyol, T. (2006), 'Dindarlık, Laiklik, Kimlik', in *Milliyet*, dated 22 November.
31 Judgment of Constitutional Court of 5 June 2008, E. 2008/16, K. 2008/116.
32 See http://www.diyanet.gov.tr/english/default.asp,
33 Section 89: 'Political parties shall not have an aim that runs counter to Article 136 of the Constitution, which provides that the Office of Religious Affairs is bound to carry out the duties assigned to it in accordance with the principle of laicism.' It is anticipated that this article will soon be abolished. Discussions surrounding this issue will not, however, be further addressed in this chapter.
34 Judgment of the Constitutional Court of 23 November 1993, E. 1993/1, K.1993/2, AMKD (Journal of Constitutional Court Decisions), No. 30, Vol. II, pp. 845-935, in particular pp. 879, 906.
35 Compare dissenting opinions in E.1993/1 (Siyasi Parti Kapatma), K.1993/2, dated 23 November 1993, AMKD (Journal of Constitutional Court Decisions), No. 30, Vol. II: 841-935.
36 Compare Judgment of the Constitutional Court of 22 May 1997, E.1996/3 (Siyasi Parti Kapatma), K.1997/3, *Resmi Gazete*, No: 24067, dated 2 June 2006, p. 21.
37 Compare E.1997/2 (Siyasi Parti Kapatma), K.1999/1, KT. 26 February 1999, *Resmi Gazete*, No. 24591, dated 22 November 200, p. 63.
38 *Resmi Gazete* (Official Gazette: 131), No. 24591, dated 22 November 2001.
39 See note 32. This was one of the judgments of the Court that led to the decision to revoke Article 89 of the Constitution.
40 Judgment of the Constitutional Court of 16 January 1998: E.1997/1, K.1998/1, dated 16 January 1998, AMKD (Journal of Constitutional Court Decisions), No. 34, Vol. II, pp. 762-1145.
41 See *Refah Partisi Erbakan, Kazan and Tekdal and Others vs. Turkey*, Judgment No.s 41340/98, 41342/98, 41343/98, 41344/98, Decision of 3 October 2000, para. 59. For further analysis, see Koçak & Örücü 2003: 399-423.
42 See ibid, para. 68.
43 The topic of Islamic marriage, for example, was not discussed in the party programme or in speeches made by party functionaries, nor did it play a role in the case against the party.
44 The Turkish Constitution of 1982, § 24(4): 'Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious, cultural 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.'
45 See the case *Hasan and Eylem Zengin vs. Turkey*, Judgement (Application No. 1448/04), dated 9 October 2007, para. 70.
46 See Danıştay 8. Daire (Council of State 8th Division), E. 2006/4107, K. 2007/7481, dated 28 December 2007; and E. 2007/679, K. 2008/1461, dated 29 February 2008; E. 2006/4107, K. 2007/7481, dated 28 December 2007.
47 See Report (2005): 'Too much of a good thing; Turkey and polygamy', *The Economist* 377, Issue 8458: 71, dated 24 December.
48 See Judgment of Constitutional Court of 21 June 1995, E.1995/17, K. 1995/16.
49 See Judgment of ECtHR, *Sinan Işık vs. Turkey*, Application No. 21924/05, dated 2 February 2010.
50 According to Articles 146-158 of the 1982 Constitution, the High Courts in Turkey are the Constitutional Court, the Court of Cassation, the Council of State, the Military Court of Cassation, the High Military Administrative Court and the Court of Conflicts.
51 Koçak & Örücü 2003: 407-408.

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