

## ISLAMIC OUTFITS IN THE WORKPLACE IN TURKEY, A MUSLIM MAJORITY COUNTRY

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This article attempts to explore the ways in which the headscarf issue is invoked to characterize differentiated visions of secularism in Turkey's sociopolitical structure and history. It attempts to assess the legitimacy of laws and practices that restrict a large segment's religious and cultural practices. The headscarf is a symbol of controversies causing heightened social and political tensions. The issue has escalated into a much controversial political topic causing exacerbation of differences and identities. Laws and practices based on a rigid interpretation of secularism have so far increased segmentation and proved to be inappropriate for addressing the societal diversities. Whether the provided bans are part of the "fight against religious bigotry" or a "pretext to seize power or to establish bureaucracy's primacy over the popularly elected governments" and dress codes in state and private employment are the core questions of the article.

The hard-liner secularist elites view the headscarf as a symbol of resistance to secular modernity and refuse to treat it as a subject of legal discourses relating to human rights and equality. Islam, sectarianism, and separatist nationalism are envisaged as divisive forces by the uncompromisingly secular forces that support and applaud the headscarf ban as a protection of secularism. Created public apprehensions serve as a basis for military and/or judicial coups/interventions. University students desiring to wear headscarves are deemed "subversive" and "disloyal" to the secularism principle around which the unitary state is centered. Pandora's box was opened with both the election of the new President of the Republic and the attempts of the government party, AKP, to allow headscarf wearing in the universities. The alarmed "state forces" intervened and the boiling point was reached with the atavistic dissolution suit against AKP. These developments manifest a conviction that a "common identity" must take

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precedence over any divergent religious or cultural aspect of an individual's identity. The pressure and engineering by "not governing but ruling elites" for the "sameness" is the basis of the headscarf ban. Social harmony cannot be achieved unless an active endeavor is made to understand the meanings of such practices. This article supports the view that it is essential for the state to recognize and respect distinct religious practices of adherents to the same religion to achieve an atmosphere of mutual toleration.

#### I. THE UNDERSTANDING AND INTERPRETATION OF SECULARISM

Secular movements started in the Ottoman Empire in the 1800s, especially with the introduction of reforms through the Edicts of Tanzimat (1839) and Islahat (1856). Adoption of Western laws started during the 1850s and 1860s of the Ottoman Empire period when modernization attempts also acquired a legal and institutional nature through the introduction of new, European-inspired, law books such as the criminal or commercial code and the institution of new courts. Of all areas, family law remained under Islamic law the longest, but even that was abolished in 1917.<sup>1</sup> The Turkish Republic, established in 1923, adopted the Swiss Civil Code in 1926 as a part of an unprecedented legal reform.<sup>2</sup> Adoption of the Swiss Civil Code was a radical step that is still unique in the present-day Islamic world. The Criminal Code was adopted from Italy and administrative laws were adopted from France. The elitist cadre in the early years of the Turkish Republic knew French and they were influenced to a large extent by French philosophers, its administrative system, and understanding of secularism.<sup>3</sup> In 1937, secularism became a constitutional principle in Turkey.

The secularist project shaped during the single-party period (1923–1946) of the Republic meant the expunging of all religious signs and

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1. E. Zürcher & H. Linden, *Searching for the Fault-Line, A survey of the role of Turkish Islam, in the accession of Turkey to the European Union in the light of the 'clash of civilizations'*, WRR, THE EUROPEAN UNION, TURKEY AND ISLAM (2004), available at <http://www.wrr.nl/english/content.jsp?objectid=3605>.

2. The Civil Code became effective on October 4, 1926, as envisaged by Article 48 of the Code on Implementation of the Civil Code (OFFICIAL GAZETTE (Turk.), June 19, 1926, No. 402) following its publication in the Official Gazette of April 4, 1926. The Civil Code remained in effect until January 1, 2002, the effective date of the new Turkish Civil Code (OFFICIAL GAZETTE (Turk.), Dec. 8, 2001, No. 24607). The Swiss Obligations Code (OFFICIAL GAZETTE (Turk.), Apr. 29, 1926, No. 359) was adopted together with the Civil Code.

3. For a comparison of approaches to the headscarf problem in the United Kingdom, France, and Turkey see Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 L. & SOC'Y REV. 699 (2007). See also Ahmet T. Kuru, *Secularism in the United States, France, and Turkey: An Historical Perspective* (Paper presented at the annual meeting of the American Political Science Association, Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington, D.C., Sept. 1–4, 2005), available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/4/2/2/5/pages42250/p42250-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/4/2/2/5/pages42250/p42250-1.php) (last accessed Mar. 11, 2008).

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practices from the public sphere in order to install the “modern way of life.”<sup>4</sup> There were the banning of religious shrines and the dervish orders;<sup>5</sup> the prohibition of the fez, the traditional Ottoman headgear, and its replacement by the European hat;<sup>6</sup> the adoption of the European (Gregorian) calendar,<sup>7</sup> the Turkish alphabet (Latin script replacing Arabic script),<sup>8</sup> international numerals,<sup>9</sup> the metric system,<sup>10</sup> Sunday as the weekly rest day,<sup>11</sup> and the principle of civil marriages;<sup>12</sup> the secularization and unification of the educational system;<sup>13</sup> and the establishment of civil rights for women including to elect and to be elected.<sup>14</sup> In 1924, all educational matters were given to the jurisdiction of the Ministry of Education. All *medreses* (Ottoman colleges that emphasized law and theology) were closed. Schools for prayer-leaders (*imam*) and preachers (*hatip*) and a theological faculty at the University of Istanbul were opened, but in 1930–1931, two dozen schools for prayer-leaders and preachers were closed and in the years following 1932, the theological faculty at the University of Istanbul was reduced in status to an Institute of Islamic Studies.<sup>15</sup> In 1928,

4. Nilüfer Göle, *Contemporary Islamist Movements and New Sources for Religious Tolerance*, 2 J. HUM. RTS. 17, 22 (2003).

5. *Tekke ve Zaviyelerle Türbelerin Seddine ve Türbedarlıklar ile Bir Takım Ünvanların Men ve İlgasına Dair Kanun (Law on the Closure of Dervish Convents and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles)*, Law no. 677, OFFICIAL GAZETTE (Turk.), Nov. 30, 1925.

6. *Şapka İktisası Hakkında Kanun (Law on the Wearing of Hats)*, Law no. 671, OFFICIAL GAZETTE (Turk.), Nov. 25, 1925.

7. *Takvimde Tarih Mebdeinin Tebdili Hakkında Kanun (Law on Calendar Amendment)*, Law no. 698, OFFICIAL GAZETTE (Turk.), Jan. 2, 1926. The new calendar was to become effective starting from Jan. 1, 1926. *Günün Yirmi Dört Saate Taksimine Dair Kanun (The Law on Division of the Day into 24 Hours)* Law no. 697, OFFICIAL GAZETTE (Turk.), Jan. 2, 1926, was adopted on the same day as the Law on Calendar Amendment, ruled out the Islamic lunar calendar. The 30th meridian was accepted with a two hours difference with the Greenwich mean time (GMT) for the whole country.

8. *Türk Harflerinin Kabulü ve Tatbiki Hakkında Kanun (Law on the Adoption and Application of the Turkish Alphabet)*, Law no. 1353, OFFICIAL GAZETTE (Turk.), Nov. 1, 1928.

9. *Beynelmülêl Erkamın Kabulü Hakkında Kanun (Law on the Adoption of International Numerals)*, Law no. 1288, OFFICIAL GAZETTE (Turk.), May 20, 1928.

10. *Ölçüler Kanunu (Law on Measurements)*, Law no. 1782, OFFICIAL GAZETTE (Turk.), Apr. 4, 1931. This Law was lifted by a later law on measurements (*Ölçüler ve Ayar Kanunu*), Law no. 3516, OFFICIAL GAZETTE (Turk.), Jan. 21, 1989.

11. *Hafta Tatili Kanunu (Law on Weekly Rest Periods)*, Law no. 394, OFFICIAL GAZETTE (Turk.), Jan. 21, 1926.

12. *Türk Medeni Kanunu (Turkish Civil Code)*, Law no. 743, art. 110, OFFICIAL GAZETTE (Turk.), Apr. 4, 1926. See *supra* note 1.

13. *Tevhid-i Tedrisat Kanunu (Law on the Unification of the Educational System)*, Law no. 430, OFFICIAL GAZETTE (Turk.), Mar. 3, 1924.

14. In local elections: *Belediye Kanunu (Municipalities Law)*, Law no. 1580, OFFICIAL GAZETTE (Turk.), Apr. 14, 1930; and *Law no. 2329 of 26.10.1933*, OFFICIAL GAZETTE (Turk.), Oct. 28, 1933, (amending *Art. 20 of the Köy Kanunu (Villages Law)*, Law no. 442, OFFICIAL GAZETTE (Turk.), Apr. 7, 1924); and in general elections: *Law no. 2599*, OFFICIAL GAZETTE (Turk.), Dec. 11, 1934 (amending the 1924 Constitution (*Law no. 491*, OFFICIAL GAZETTE (Turk.), Apr. 23, 1924). In the first general elections held on February 8, 1935, following the amendment of the 1924 Constitution, eighteen women were elected parliamentarians (18/395).

15. NİYAZI BERKES, THE DEVELOPMENT OF SECULARISM IN TURKEY 477, 490–92 (1964); Zürcher & Linden, *supra* note 1, at 104.

Article 2 of the 1924 Constitution referring to Islam as the religion of the state was deleted. In the same year, the teaching of Arabic and Persian was removed from the school curricula and left to specialized departments at the university level. The Ministry of Education started taking steps to drop classes in religion from the school curricula. Classes in religion were dropped in the urban schools in 1930 and in the village schools in 1933. In 1937, secularism became a constitutional principle.<sup>16</sup>

Despite the high religiosity of society, political secularization excluded religion from the public sphere as a top-down process achieved by the civil and military bureaucratic hegemony.<sup>17</sup> Establishment of strict state control over all institutions of Islam—mosques, pious foundations, and institutions of religious education meant, in political practice, an effective foreclosure to any attempt at seizing political power in the name of Islam.<sup>18</sup> Religion was guaranteed freedom and protection insofar as it was not utilized to promote any social or political ideology having institutional implications.<sup>19</sup>

A rigid understanding and interpretation of secularism has always been predominant in the high civil and military bureaucratic cadres and reflected in the decisions of the high courts. This rigidity attempts to confine religion to individual spirituality excluding it from the public sphere. To many people, the Turkish case may seem to be a struggle between secularists and fundamentalists. The real choice is between a more authoritarian, state-centered way of organizing a fast-changing society, of which Islam is an inextinguishable social factor, and a more democratic, civic society-oriented way.<sup>20</sup> Pro-Islamic parties desire not fundamentalism, but rather a degree of public visibility of the “repressed” religion and an advancement of the social status of Muslim believers by overcoming the traditional dichotomy between the center and periphery in Turkish society and politics. The relatively low proportion of Islamic fundamentalists revealed by social surveys<sup>21</sup> do not instill the fears of defenders of secularism or reduce the vigilance of the armed forces, which see themselves, and are seen by society, as the ultimate guardians of the modern, secular republic.<sup>22</sup> There is a distinction between “state” and “government.” “State” denotes

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16. For details, see BERKES, *supra* note 15, at 477.

17. The religious scene in Turkey differs from that in Western Europe in the sense that while church congregations tend to be middle-class, the mosque congregations are largely lower-middle or working class. Andrew Mango, *Review Article, Religion and Culture in Turkey*, 42 MIDDLE E. STUD. 997, 999 (2006).

18. HEINZ KRAMER, *A CHANGING TURKEY, THE CHALLENGE TO EUROPE AND THE UNITED STATES* 5 (2000).

19. BERKES, *supra* note 15, at 499.

20. KRAMER, *supra* note 18, at 56.

21. If we employ as the chief characteristic of fundamentalism the desire to base society on the Islamic law (shariat), then it can be said that a maximum of between 10–15% of the population are susceptible to fundamentalist thinking. Zürcher & Linden, *supra* note 1, at 164.

22. ANDREW MANGO, *THE TURKS TODAY* 134–35 (2004).

“bureaucratic hegemony,” whereas “government” denotes the governing party surrounded by the bureaucratic hegemony.

Turkey’s strictly secular political parties equate democracy with secularism compromising too readily with military and judicial coups/interventions in the political process whereas demands for full democratization and liberalization come from the counter elite, conservative parties. The general tendency of having polemicized, politicized, and even ideologized debates hinders or slows down consensus building. The effective interpretation of secularism contributes to an undermining of the democratic process and initiates a vicious circle of interventions. In the words of Turkish sociologist Nilüfer Göle:

Secularism, because of its origins in Western historical development, is expected to be an alien principle in other contexts, especially in Muslim ones. Yet in the Turkish case, for instance, not only can we observe its shaping of the state and penetration into civil and military elite ideology, but also its becoming part of ‘l’imaginaire social’, of civil society and women’s associations. In some ways we can speak of the excess of secularism to the extent that it becomes a fetish idea of modernity overriding from time to time the principle of liberal democracy and justifying authoritarian politics. Consequently secularism is not always a guarantee for politics of tolerance.<sup>23</sup>

Turkish Islam is emerging from decades of intellectual stagnation to meet the modern world on its own terms.<sup>24</sup> The pro-Islamic political and social actors in Turkey approach secularism as state neutrality toward religion, rather than as an ideology that excludes religion from the public sphere.<sup>25</sup> The current government party, the Justice and Development Party (AKP), renounced all connections with political Islam and is now considered by some circles as a model for the reconciliation of Islam with Western democracy. Its pursuance of consensual politics drew massive public support. Liberal opinion makers, academics, business circles, and pro-European forces backed AKP for its pro-EU and pro-business policies. However, the rise of pro-Islamic parties has always been considered a serious challenge to the established notion of secularism. The hard-liner secularist elites, with the so-called “despite the people for the people”<sup>26</sup> understanding, have, from time to time, overturned the electoral will of the people through military coups/interventions.<sup>27</sup> So far, in all general

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23. Göle, *supra* note 4, at 22; see also: Nilüfer Göle, *Islam in Europe*, 33 INDEX ON CENSORSHIP 93, 110–16 (2004), [http://pdfserve.informaworld.com/772546\\_731205513\\_783363010.pdf](http://pdfserve.informaworld.com/772546_731205513_783363010.pdf).

24. MANGO, *supra* note 22, at 127–28.

25. Kuru, *supra* note 3, at 8.

26. This is an interpretation of Kemalist policy by latter-day liberals. Mango, *supra* note 17, at 999.

27. So far, there have been five military coups/interventions: May 27, 1960, March 12, 1971, September 12, 1980, February 28, 1997 (post-modern coup), and April 27, 2007 (e-coup). For a better

elections that followed military coups/interventions, the electorate has always shown its opposition by voting in favor of displaced political parties or their successors. Lately, taking the world conjuncture into consideration, judicial tutelage replacing military tutelage seemed preferable in convincing the people of the necessity of ousting the AKP government.

According to the constitution, where the internal regulations, programs, and activities of a political party are found to be in conflict with the secular character of the state, the chief prosecutor is to file a dissolution suit before the Constitutional Court (Art. 68/4, 69). The dissolution suit against AKP, which received 47% of the votes in the last general election held in July 2007, was on the basis of AKP being the center of activities against secularism. The major accusation was that AKP opted for the freedom of scarf-wearing in the universities and that this revealed its "hidden intention" of establishing a theocratic state. According to the indictment prepared by Abdurrahman Yalçınkaya, the chief prosecutor, headscarf is merely a political sign and, in no way should be interpreted as a human right and be allowed in the universities. Of eleven members of the Court, six voted for dissolution (one beneath the number required for dissolution), four voted for a fine (return of 1/2 of last year's State financial aid), and only one (the president of the Court) voted against disclosure. The Court added six votes for disclosure to the four for a fine and imposed a fine with ten votes. This subsequent process is open to legal discussions. Decisions of the Court are final; the case may be challenged only before the European Court of Human Rights (ECtHR) by AKP.

The Constitutional Court did not rule for abolishment but its decision, a confirmation of ideological secularism, is Damocles' sword: Tutelaries are there to establish their tutelage whenever they feel a threat against secularism. A worn-out AKP entrapped in the toils of the law was desirable to a disclosed one to be followed by a stronger successor. In such political suits, the Court takes an ideology-based approach, not a rights-based approach; not democracy but state integrity is deemed important.<sup>28</sup> The constitution provides for serious criteria for party disclosures. It is not the constitution but the Court composition<sup>29</sup> that is problematic. Appointments

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understanding of the military's role, see Umit Cizre Sakallioğlu, *The Anatomy of the Turkish Military's Political Autonomy*, 29 COMP. POL. 151 (1997).

28. Ergun Ozbudun, *Siyasi Parti Kapatma Davalarında Türk Anayasa Mahkemesi ile AIHM Arasındaki Yaklaşım Farkı*, 93 TÜRKİYE GÜNÜ 12-23 (2008) (Turk.).

29. The Constitutional Court is composed of eleven regular and four substitute members. The President of the Republic has the appointive power. He is to appoint two regular and two substitute members from the High Court of Appeals; two regular and one substitute member from the Council of State; and one member each from the Military High Court of Appeals, the High Military Administrative Court, and the Audit Court. Three candidates to be nominated for each vacant office by the Plenary Assemblies of each court from among their respective presidents and members, by an absolute majority of the total number of members; the President of the Republic is also to appoint one member from a list

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have to be made on the basis of qualifications, not the ideological standings of the judges, and the term of office has to be limited. There is not a sufficient number of court members who have grasped the necessities of a democratic society order.<sup>30</sup>

## II. CONSTITUTIONAL RULES ON SECULARISM

Turkey is a party to the Universal Declaration of Human Rights, European Convention on Human Rights, ILO C111,<sup>31</sup> and the 1996 Revised European Social Charter on the grounds of which religion and belief are protected. International agreements, once duly put into effect, bear the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements regulating fundamental rights and freedoms and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail (Const., Art. 90 as amended in May 2004).<sup>32</sup>

Secularism is the official ideology. It is one of the main characteristics of the State as prescribed (irrevocably) by Article 2 of the Constitution: The Republic of Turkey is a democratic, secular, and social State governed by the rule of law. Within the general administration, there is the Department of Religious Affairs to which all prayer-leaders (*imam*) and preachers (*hatip*) are attached (Const., Art. 136). The Department of Religious Affairs symbolizes the state-controlled official Islam.

The State has a constitutional obligation to protect religious freedom. Article 24 on freedom of religion and conscience tries to confine religion to the individual sphere<sup>33</sup> and tries to establish an official monopoly on religious education:

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of three candidates nominated by the Higher Education Council from among members of the teaching staff of institutions of higher education who are not members of the Council (indirect appointment), and three members and one substitute member from among senior administrative officers and lawyers (direct appointment). To qualify for appointments as regular or substitute members of the Constitutional Court, members of the teaching staff of institutions of higher education, senior administrative officers, and lawyers shall be required to be over the age of forty and to have completed their higher education, or to have served at least fifteen years as a member of the teaching staff of institutions of higher education or to have actually worked at least fifteen years in public service or to have practiced as a lawyer for at least fifteen years. The members of the Constitutional Court shall retire on reaching the age of sixty-five. See Anayasa [Constitution] art. 146-147 (Turk.).

30. Kemal Gozler, *Parti Kapatmanin Kriteri Ne? Parti Kapatmaya Karsi Anayasa Degisikligi Cozum mu?*, 93 TURKIYE GUNLUGU 24-31 (2008) (Turk.).

31. Discrimination (Employment and Occupation) Convention, 1958.

32. *Law no. 5170*, OFFICIAL GAZETTE (Turk.), May 22, 2004.

33. Mustafa Kemal, the founder of modern Turkey and originally a member of the Young Turks movement, propagated Islam as a personal conviction which required no intermediaries between God and the individual. The Young Turks, young officers and civil servants who had been schooled in the modern educational institutions developed under the reign of Sultan Abdülhamit, saw the role of Islam primarily as that of social cement, and were simultaneously driven by a strong anticlericalism to clear

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

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

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

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

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

There is the interaction of the right to freedom of religion with the non-discrimination principle: All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations (Const., Art. 10). The term "any such considerations" implies that the list of non-discrimination grounds is non-exhaustive.

### III. PRESIDENCY AND UNIVERSITIES AS RECENT "BATTLEFIELDS"

The Turkish mode of secularism offers us a privileged terrain for observing the interplay between secularist and Islamist actors competing over definitions of self, tolerance, and public sphere.<sup>34</sup> There has always been extensive debate about the extent of neutrality in the public sector in contrast to the right to the public expression of faith. The Islamic headscarf is viewed as part of the expression of religious beliefs by the conservatives but as a threat and attack to secularism by the hard-liner secularists. Among the positions and institutions considered "castles of secularism" by the hard-liner secularist elitist circles are the Presidency of the Republic and the universities. To have a better insight into ongoing interplay including the dissolution suit against AKP, it should be noted that there are people and institutions conceptualizing themselves as "guardians of secularism" attempting to use "self-created powers" with the idea of "defending" secularism. Due to this tendency, there is, unfortunately, the politicization

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Islam from its superstitious mysticism and from narrow conservatism of its ulema, the religious scholars. See Zürcher & Linden, *supra* note 1, at 100-02.

34. Göle, *supra* note 4, at 21.

of the judiciary, especially the high courts and the consequent judicial interventions. There are political statements and decisions by the high courts revealing a strict and intolerant interpretation of secularism, and a political standing against the EU, privatizations, and foreign investments. Siege mentality, fed by the “threat of emergence of a theocratic state,” serves as a means of justification for military and judicial interventions.

*A. Presidency as a “Battlefield”*

The 2007 Turkish presidential election refers to two attempts to elect Abdullah Gül, the former minister of foreign affairs, as the country’s eleventh president to succeed A. Necdet Sezer. Sezer was a hard-liner secularist to the extent of not inviting legislators’ wives with headscarves to official receptions at the presidential palace and refusing to sign decrees of the appointment of high civil bureaucrats with wives who wore headscarves. Having a new president with a wife wearing the Islamic style headscarf feared the secularists as it meant “conquest of a castle of secularism by Islamists.” Controversies surrounded Mrs. Gül’s headscarf. There were seven mass rallies, the first of which was organized two days before nomination announcements. This was a mass public protest against having a candidate from AKP. Controversially, there was a single candidate nominated by AKP with no candidates nominated by other political parties. General Yaşar Büyükanıt, the then Chief of General Staff, stated on April 12, 2007, that the President had to be loyal to the characteristics of the Turkish Republic not only by words but also by heart.

The quorum required for parliamentary sessions is one-third of the total number of deputies (184/550) (Const. of Turk., Art. 96) whereas the first two rounds for Presidential elections required a two-thirds majority, the third and the fourth rounds required an absolute majority (276) (Const. of Turk., original form of Art. 102).<sup>35</sup> Sabih Kanadoğlu, a former chief prosecutor of the Republic, started voicing the firm defenders of secularism claiming that the two-thirds majority required for the first two ballots is also the quorum for such a session. This unconstitutional claim was immediately upheld by the Republican People’s Party (CHP), the main opposition party with which the hard-liner secularist elites associate themselves,<sup>36</sup> and the deputies from this political party boycotted the first

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35. Now, it is the general electorate who elects the President.

36. The ferociously secular CHP is a supporter of “*status-quo* democracy.” It claims to be a center-left political party, but it has recently transformed itself into a mainstream nationalist party advocating policies of a “walled-off Turkey” (international ostracism), a retrogress to the nationalism and isolation of the 1930s and the 1940s. Although it claims the contrary, CHP pursues anti-EU, anti-foreign investment, and anti-privatization policies. It is criticized for being the “bureaucratic state party.”

round of elections held on April 27, 2007, together with other opposing parties. Abdullah Gül received 357 votes, the highest number ever achieved in presidential elections following the adoption of the Constitution in 1982, but the number of those present was less than the manufactured 367, the two-thirds majority. At midnight on the same day of the first ballot there was the military intervention reputed as the “e-intervention.” On its Web site, the strictly secular military expressed its anxieties over the election process stating that “it should not be forgotten that the military is a party to the ongoing discussions and a strict defender of secularism.” The leader of CHP stated that if the Constitutional Court was not to annul the election, there would be a chaos in Turkey<sup>37</sup> and CHP contested the ballot in the Constitutional Court. The Constitutional Court, on May 1, 2007, controversially annulled the first round of presidential elections on the grounds that a quorum of two-thirds was necessary, which was impossible without opposition support.<sup>38</sup> This decision constituted a judicial intervention. The election process was deadlocked. To overcome the so-called “367 decision,” AKP called a snap election resulting in a major increase in its votes. The party renominated Abdullah Gül right after the convention of the newly elected legislature. He eventually became President on August 28, 2007, and took his presidential oath right after; this session was not attended by the Chief of General Staff and was boycotted by CHP. Gül’s ascension to presidency disturbed the country’s strictly secular forces. His presidency will be under close scrutiny by these forces and thus provides a test of maturity for the Turkish democracy. The indictment that sought abolishment of the government party demanded that, apart from 71 AKP officials including the Prime Minister Recep Tayyip Erdoğan, President Abdullah Gül, should also be unseated and banned from politics for five years despite the fact that the President is solely responsible for high treason (Const., Art. 105).

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37. According to Article 138 of the Constitution on the independence of the courts, no organ, authority, or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions. No questions shall be asked, debates held, or statements made in the parliament relating to the exercise of judicial power concerning a case under trial. Also, according to Article 277 of the Criminal Law, exerting pressure on the courts or attempts to influence the courts is a crime punishable by two to four years in prison.

38. OFFICIAL GAZETTE (Turk.), June 27, 2007.

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**Table 1**  
**Sequence of Events for the Presidential Election**

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| <ul style="list-style-type: none"> <li>• April 12, 2007: Chief of General Staff, “The President has to be loyal to the characteristics of the Turkish Republic not only by words but also by heart”</li> <li>• May 16, 2007: Termination of office of the former president, A. Necdet Sezer</li> <li>• April 24, 2007: Abdullah Gül being nominated</li> <li>• April 27, 2007: 1st round of elections (357/550) and “e-intervention”</li> <li>• May 1, 2007: “367 decision”</li> <li>• July 22, 2007: Snap election (AKP 47%)</li> <li>• August 28, 2007: Gül’s ascension to presidency</li> <li>• March 14, 2008: Dissolution suit initiated against AKP</li> <li>• July 30, 2008: Court decision on dissolution suit</li> </ul> |
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**Table 2**  
**Composition of the Parliament in August 2008**

• AKP (Justice and Development Party):	339
• CHP (Republican People’s Party):	98
• MHP (Nationalist Action Party):	70
• DTP (Democratic Society Party):	20
• DSP (Democratic Leftist Party):	13
• ÖDP (Freedom and Solidarity Party):	1
• BBP (Grand Unity Party):	1
• Unaffiliated:	5
• Total:	547

*B. Universities as a “Battlefield”: The Headscarf Dilemma*

In Turkey, there is a unified and secular national education. In 1946, Turkey became a multi-party democracy. The Faculty of Theology reopened. Islamic education was reintroduced. In the early 1950s, the opening of seven-year high schools for prayer-leaders (*imam*) and preachers (*hatip*) was considered a break from the universal system of secular education. These schools multiplied until they constituted an alternative religious stream of education.<sup>39</sup>

There is a complete non-headscarf and secular dressing policy in the educational arena. All schools, public and private, are attached to the Ministry of Education under the Law on Unification of the Educational System. The Law on Unification of the Educational System<sup>40</sup> and the Law on the Prohibition of the Wearing of Certain Garments<sup>41</sup> are among the

39. MANGO, *supra* note 22, at 108.

40. *Tevhid-i Tedrisat Kanunu*, Law no. 430, OFFICIAL GAZETTE (Turk.), Mar. 3, 1924.

41. *Bazı Kisvelerin Giyilemeyeceğine Dair Kanun*, Law no. 2596, OFFICIAL GAZETTE (Turk.), Dec. 13, 1934.

early Republican reform laws preserved by the Constitution. No provision of the Constitution can be construed or interpreted as rendering unconstitutional the reform laws “which aim to raise Turkish society above the level of contemporary civilisation and to safeguard the secular character of the Republic” (Const. of Turk., art. 174). The Law on the Prohibition of the Wearing of Certain Garments prohibits religious outfits outside religious places and ceremonies for all clerics, irrespective of religion. If an imam, nun, priest, or a rabbi is simultaneously a school teacher, he or she cannot attend classes in religious outfits.

University education, in particular, is a highly contested arena, in which policies are made through ongoing struggles. In universities, including the faculties of theology, the headscarf is not allowed. The headscarf has an iconic force. The demand by female Muslim students to be allowed to attend university classes with headscarves is deemed to constitute the most visible assault on the secularist project and is perceived by the secular elites as the politicization of the “Islamic way of life” and an invasion of “their” public sphere (university classes, parliament, television, concert halls, streets, etc.).<sup>42</sup> The “other” appears as an enemy. There are the counter arguments that the state should represent all religious colors as a sign of its neutrality and that dressing is a personal freedom and a reflection of individual belief, having nothing to do with reflecting the views of the state.

In 1988, an article was added to the Act on Higher Education<sup>43</sup> and headscarves that covered the hair and neck were allowed. This was challenged at the Constitutional Court. The Court emphasized the necessity of confining the religion to individual spirituality and annulled the rule in 1989 on the basis that in a secular state, legal rules cannot be drawn on religious rules.<sup>44</sup> In 1990, the additional Article 17 was added.<sup>45</sup> This article, which is still in effect, envisages freedom of dress. The request for its annulment was rejected by the Constitutional Court in 1991, but the Court stated in its justification to the decision that this freedom did not involve headscarves (“interpretative rejection”).<sup>46</sup> Despite the fact that restrictions and prohibitions can be created not by the courts but by the laws, the justification for the 1991 decision serves as the sole basis of the headscarf ban. From the legal point of view, the headscarf ban is actually non-existent.

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42. Göle, *supra* note 4, at 23–24.

43. *Law no. 2547*, OFFICIAL GAZETTE (Turk.), Nov. 6, 1981.

44. Decision no 1989/12 of 7.3.1989, AMKD p. 133.

45. *Law no. 3670*, OFFICIAL GAZETTE (Turk.), Oct. 25, 1990.

46. *Decision no. 1991/8 of 9.4.1991*, OFFICIAL GAZETTE (Turk.), July 31, 1991.

The judgment of the ECtHR, in *Şahin v. Turkey*,<sup>47</sup> largely drew on the 1989 decision of the Turkish Constitutional Court. The ECtHR, in *Şahin v. Turkey*, ruled that headscarves in schools do not breach the religious freedom of individuals but it has not ruled that a headscarf automatically breaches the negative right to freedom from religion, implying that allowing headscarves is also compatible with basic human rights.<sup>48</sup> The justification to the decision rendered in *Şahin v. Turkey* is weak and superficial. The decision argues that “having regard to the Contracting States’ margin of appreciation, the Court found that the interference in issue was justified in principle and proportionate to the aims pursued, and could therefore be considered to have been necessary in a democratic country.” Such an argument might have served for the headscarf ban in primary and secondary schools, but there are no justifiable foundations for such a ban in universities. University students are older and are free to decide whether or not to wear the headscarf in all contracting states. It is stated that wearing the headscarf in the universities can put those of the same faith without headscarves under pressure<sup>49</sup> by referring to the decision of the Turkish Constitutional Court, but this is not an argument upheld therein. The Court also states that the headscarf is a political symbol and that there are extremist fundamentalist political movements in Turkey, assuming a relationship between students with headscarves and fundamentalist movements. What about the freedoms of religion and conscience? Is it the job of the courts to interpret for women the meanings of their actions? These issues were not discussed by the Court. Moreover, a Turkish university cannot issue a rule banning headscarves unless it is authorized to do so by a law. Such a law is non-existent. Therefore, the universities’ prescription of such a rule, while using the law as a legal basis of interference has been a major mistake by the ECtHR.

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47. Application no. 44774/98, Judgment of May 18, 2005 (<http://cmiskp.echr.coe.int>). This is the first case where wearing of headscarves in the universities has been found admissible and analyzed under Article 9 of the EHRC. Previously, two cases in which the applicants’ requests for degree certificates were rejected by the university administrations due to university regulations requiring identity photos with heads uncovered were found inadmissible. *Karaduman v. Turkey*, Application no. 16278/90, Decision of May 3, 1993, and *Bulut v. Turkey*, Application no. 18783/91, Decision of May 3, 1993 (<http://cmiskp.echr.coe.int>). In a country such as Sweden, where people can wear religious garments in photos on official documents like passports and driving licences, it might very well be considered a violation of freedom of religion if a state university required photos without them. Reinhold Fahlbeck, *Ora et Labora—On Freedom of Religion at the Work Place: A Stakeholder cum Balancing Factors Model*, 20 INT’L. J. COMP. LAB. L. & INDUS. REL. 27, 33 (2004).

48. Lucy Vickers, *Religion and Belief Discrimination in Employment—the EU Law, thematic report 49* (2007), [http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/legnet/07relbel\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07relbel_en.pdf).

49. The majority–minority dichotomy was applied earlier to the *Karaduman* case (Law No. 2596, *supra* note 41, at 108): “manifestations of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students that do not practice that religion or who adhere to another religion”

The government party, AKP, amended the Constitution<sup>50</sup> with the political support of two oppositional parties, to overcome the Constitutional Court decisions. An addition was made to the last paragraph of Article 10 of the Constitution on equality before the law. The addition is nothing more than confirmation of the principle in the original form of the article: The state is to observe the equality principle in its provision of all public services. The new paragraph added to Article 42 on the right and duty of training and education states that no one could be deprived of the right to a university education for a reason other than those explicitly stated in the laws. As there is no legal rule banning headscarves, this simply meant that students with headscarves could not be deprived of their right to a university education. CHP applied to the Constitutional Court, contesting the constitutionality of these amendments approved by 411 out of 550 deputies. It should be noted here that in Turkey, many times, laws are not discussed on a technical basis but are politicized and even ideologized with overriding slogans and polemics and are carried to the judiciary. The CHP contests nearly all the laws enacted in the ruling of AKP before the Constitutional Court. In fact, it is not the laws but political controversies that are being carried to the courts.

The Constitutional Court can examine a constitutional amendment only with regard to form, not substance (Art. 148). What is meant by form has been clarified<sup>51</sup> so that the Constitutional Court does not exceed its authority as it has done in some cases previously. The strictly secularist circles voiced again by the leading theoretician of such political cases, Sabih Kanadoğlu, pressured the court to render an annulment decision on the basis of “violation of the irrevocable principle of secularism.” The Court of Cassation and thereafter the Council of State issued harsh public statements in May 2008 criticizing the government and favoring annulment of the constitutional amendments. These initiatives named “j(udicial)-memorandums” were immediately upheld by CHP. This annulment suit was resolved on June 5, 2008. As expected, the Constitutional Court made an analysis of substance and ruled for annulment. This decision was a severe limitation to the powers of the legislature and at the same time a powerful stroke to the constitutional order and democracy.

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50. *Law no. 5735*, OFFICIAL GAZETTE (Turk.), Feb. 23, 2008.

51. The verification of constitutional amendments are restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the amendment proposal was debated twice or not.

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**Table 3**  
**Sequence of Recent Developments as Regards the Headscarf Issue**

- January 17, 2008: Warning by the chief prosecutor, “Regulating headscarf shall lead to sanctions”
- February 9, 2008: Adoption of Law No. 5735 amending articles 10 and 42 of the constitution (411/550 votes) (Official Gazette, 23.02.2008)
- February 27, 2008: Application to the Constitutional Court by CHP and DSP
- March 14, 2008: Dissolution suit initiated against AKP
- May 21, 2008: First of “j-memorandums”
- June 5, 2008: Constitutional Court’s annulment of Law no. 5735

#### IV. RELIGIOUS CLOTHES AND SYMBOLS IN PUBLIC AND PRIVATE WORKPLACES

Religion is one of the factors that influence the educational and employment opportunities of women in Turkey. To address the employment problems, it is essential to make a distinction between state employment and private employment.

Workers are wage earning employees as opposed to public officials (staff employees), who are salary-earning employees. The state employs both public officials and workers. Public officials are covered by administrative law, mainly by the Civil Servants Act.<sup>52</sup> The main statute covering workers is the Labour Act (LA).<sup>53</sup> The Labour Act governs individual labor relations, i.e., labor relations between an employer—a private person or a legal entity (legal person; corporate body)—and a private worker. The Labour Act covers public and private sector workers as well as manual and non-manual workers.

##### *A. Religious Clothes and Symbols in Public Workplaces*

All Turkish citizens have the right to enter the public service. No criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service (Const. of Turk., Art. 70). There is a central entrance examination open to all with complete neutrality as to religion, sect, and other such considerations. A central examination system for recruitments secures equal treatment in practices relating to conditions of access and selection to jobs or positions in the public sector.

52. *Devlet Memurları Kanunu, Law no. 657, OFFICIAL GAZETTE (Turk.), July 23, 1965.*

53. *Law no. 4857, OFFICIAL GAZETTE (Turk.), June 10, 2003.*

In the public sphere, there is the individualization of religion with the erosion of its public role. The prevalent idea is that the staff has to represent the state neutrality. Another argument is that Muslims wearing the religious outfits can pressure those Muslims who choose not to. Public officials and public sector workers have to conform to the specific dress codes. They cannot have religious garments or symbols. This view also covers the staff that do not typically represent the state, such as the cleaning, catering, or delivery workers. All prayer-leaders and preachers in mosques nationwide are public officials paid by the Department of Religious Affairs.

The quite detailed By-law on the Garments of the Public Personnel<sup>54</sup> covers officials and workers employed in the public sector. The garments have to be contemporary, clean, plain, and appropriate for the services provided (Art. 1). Both males and females have to work bareheaded (Art. 5). The relevant public body determining the type, model, and color of garments for those employed in health related institutions, mines, ateliers, construction areas, landscape, and similar places (Art. 7). No badge, emblem, or sign other than those indicating the place of work, the school graduated, or a token produced by the government for special days, can be worn by the public personnel (Art. 9). Women who want to pursue their chosen profession in the public sector may do so by abiding by the dress codes—no Islamic outfits (headscarf and Islamic dresses, e.g., hijab (face uncovered), niqab (eyes uncovered) or burka (face covered)). There are separate by-laws for the personnel and students in schools attached to the Ministry of Education and those who have to wear uniforms. Religious manifestations by teachers are out of the question in the Turkish context. The ECtHR upholds the legality of the headscarf ban in certain places such as schools and state-run hospitals. It found applications of two female high school teachers wanting to wear headscarves inadmissible.<sup>55</sup>

Controversy erupted in Turkey when a parliamentarian newly elected from the pro-Islamic Virtue Party, Merve Kavakçı, entered the opening

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54. *Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kiyafetine Dair Yönetmelik*, OFFICIAL GAZETTE (Turk.), Oct. 25, 1982.

55. In *Karaduman and Tandogan v. Turkey* (nos. 41296/04 and 41298/04, June 3, 2008), the applicants, Fatma Karaduman and Sevil Tandogan, contested before the ECtHR, administrative proceedings relating to their dismissal from their posts as high-school teachers on account of their persistent refusal to remove Islamic headscarves during lessons, contrary to the clothing rules in force at the relevant time. Relying on Article 6 § 1 (right to a fair trial), they complained that they had not been allowed to respond to the opinion of Principal State Counsel at the Council of State. The Court referred to previous cases in which a complaint similar to that of the applicants had been submitted and it had found a violation of Article 6 § 1. It accordingly held, unanimously, that there had been a violation of Article 6 § 1 on account of a breach of the rights to adversarial proceedings before the Council of State, and found that the finding of a violation provided in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants. Claims for wearing Islamic headscarves during lessons were found inadmissible. See <http://cmiskp.echr.coe.int>.

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session of Parliament on May 2, 1999, wearing her headscarf. She was immediately obliged to leave Parliament without taking the oath by the ferocious parliamentarians from other political parties, especially the then government party, the Democratic Leftist Party (DSP). Once she was found to have become an American citizen without prior permission, the authorities stripped her of her Turkish citizenship.<sup>56</sup> To secularist elites, the Islamic headscarf is not only a political cultural symbol but also a means of resistance to secular modernity. This incident offers us multiple ways to analyze the complex relations between Islamists and secularists, but it also forces us to rethink the question of tolerance and democracy from a different perspective.<sup>57</sup>

Merve Kavakçı's incident signifies another important issue. A great majority of young Islamist girls exhibit assertive behavior while voluntarily adopting a symbol of gender subservience. The headscarf has been reappropriated by this young generation of educated women, e.g., Merve Kavakçı, a computer engineer trained in Texas, or university students, alters the so-far accustomed image of the uneducated, male-bound, male-dominated women assumed to have been forced to wear headscarves. It disturbs and threatens the modern social imagination. It is as if the headscarf is reversed into a positive identity affirmation—such as “black is beautiful”—endowing Muslimness with a higher sense of self; a historical sense of loss of dignity and humiliation is turned into a search for distinction, prestige, and power.<sup>58</sup> Is this tradition mixing modernity? In other words, are such Islamic women both “Muslim” and “modern” without wanting to give up one for the other? Are they “neither Muslim” “nor modern,” but critical of both religious traditions and assimilative modernity? Does the headscarf advertise a conservative role model for the women? Is the headscarf an act of liberation or a symbol of oppression? Is the headscarf a symbol of backwardness, ignorance, and subservience for Muslim women in modern contexts, becoming a symbol of distinction and prestige for urban Muslim women? What is modernity? Can there be multiple modernities (Western and non-Western)? Scholars are trying to probe into these new realms of Islamic outfits.<sup>59</sup>

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56. For details on the incident, see KRAMER, *supra* note 18, at 77–78.

57. Göle, *supra* note 4, at 27.

58. Göle, *supra* note 23.

59. For a detailed analysis, see NILÜFER GÖLE, *THE FORBIDDEN MODERN: CIVILIZATION AND VEILING* (1996); Göle, *supra* note 4, at 29; Nilüfer Göle, *The Voluntary Adoption of Islamic Stigma Symbols*, 70 Soc. Res. 809, 813, 816–21 (2003); NILÜFER GÖLE, *ISLAM AS IDEOLOGY, MODEST CLAIMS: DIALOGUES AND ESSAYS ON TOLERANCE AND TRADITION* (Adam B. Seligman ed., 2004); Wiles, *supra* note 3, at 717–23.

*B. Religious Clothes and Symbols in Private Workplaces*

## 1. Fundamental Right to Equal Treatment

Workers have the non-absolute “fundamental right to equal treatment.” Employment discrimination is a violation of this fundamental right. Employment discrimination occurs when workers or applicants are treated less favorably and such conduct by the employer is contrary to certain specified rights or civil liberties. Otherwise, workers are not generally protected from discrimination, however unfair or unethical the employer’s conduct may seem. For example, if the employer or his representative adversely single out some workers for no apparent reason, this does not constitute discrimination unless such behavior is on the basis of sex, race, religion, and a variety of other legally specified reasons. Protection against discriminatory behavior as well as rights to unionize, gender equality at work, decent work, industrial action, etc. are aspects of expansion of human rights system into the domains of work life.

The Employment Equality Directive<sup>60</sup> protects against direct and indirect discrimination on the grounds of religion or belief, disability, age, or sexual orientation as regards employment and occupation (Art. 1). Direct discrimination occurs where one person is treated less favorably than another would be treated in a comparable situation (Art. 2/2a). There shall be a defense where a genuine occupational requirement can be identified and is proportionate (Art. 4/1). Indirect discrimination takes place where an apparently neutral provision, criterion, or practice would put persons at a particular disadvantage compared with other persons (Art. 2/2b). Such a provision, criterion, or practice objectively must be justified by a legitimate aim and the means of achieving that aim must be appropriate and necessary (Art. 2/1b-i).

To protect workers from discrimination and other unfair employment practices, Turkey turns to regulation. The International Labour Organization has established a set of fundamental principles and rights at work covering freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination with respect to employment and occupation. Turkey is a state party to all of these fundamental conventions. Turkey is also bound by the Universal Declaration of Human Rights, European Convention on Human Rights, case law and jurisprudence of the ECtHR, and the 1996

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60. 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 2000. OJ.L303/16.

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Revised European Social Charter. Moreover, Turkey is to transpose the Employment Equality Directive into its legal system.

Article 5 of the Labour Act is the most extensive provision on the prohibition of discrimination. This article regulates the principle of equal treatment prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion, philosophical belief, or any such considerations. The article does not prohibit discrimination only on the basis of the above-mentioned fundamental rights but also on the basis of part-time or fixed-term nature of work. "Any such considerations" implies that the listing is non-exhaustive. For example, gender reassignment and sexual orientation<sup>61</sup> have not been specified in the article but upon a possible validation of a claim of discrimination on such a basis, the judiciary will, most probably, consider the case as falling under "sex discrimination," "any such considerations," or "right to equal treatment."<sup>62</sup>

There are shortcomings of Article 5 of the Labour Act when viewed under Article 141 TEC (Treaty on the European Community) and Directives 2002/73/EC and 2000/78/EC:

1. To specify prohibition of discrimination on the basis of age, disability,<sup>63</sup> ethnic origin, sexual orientation, and gender reassignment.
2. To provide a more effective level of protection, associations, organizations, and other legal entities should also be empowered to engage in proceedings.
3. To have an employee defending or giving evidence on behalf of the discriminated person be entitled to the same protection.
4. To promote dialogue between social partners to address different forms of discrimination based on gender in the workplace and to combat them.
5. To establish a body or bodies for the promotion, analysis, monitoring, or support of equal treatment.

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61. There is a decision of the Appeals Court validating dismissal due to continuous insults and fights in the workplace between two male partner workers. The Appeals Court defines the situation as beyond the "right of sexual orientation." O. GUVEN CANKAYA, CEVDET ILHAN GUNAY & SERACETTIN GOKTAS, *TURK IS HUKUKUNDA ISE IADE DAVALARI* (2006), *TURK IS HUKUKUNDA ISE IADE DAVALARI* 576 (2d ed. 2006) (Turk.).

62. There are labor lawyers stating that a claim of discrimination not specified in the law or not considered to be of a nature similar to the specified ones may be found justified by the courts on the basis of the equal treatment principle stemming from principles of equity and good faith. Devrim Ulucan, *Yeniden Yapılanma Sürecinde İş Hukuku Açısından Eşitlik İlkesi ve Uygulaması*, *TURHAN ESENER'E ARMAGAN* 191, 193 (2000).

63. Article 5 of the Labor Act on equal treatment principle does not cover the disabled but the Law on the Disabled (*Law no. 5378 of 1 July 2005*, OFFICIAL GAZETTE (Turk.), July 7, 2005) clearly prohibits discrimination against the disabled (Art. 4).

## 2. Protection against Religion and Belief Discrimination

In Turkey, bans are mounted almost exclusively on the strict religiously-neutral character of the state. The conflict between the interests of those who want to manifest their beliefs and interests of everybody else—those who prefer religious neutrality for various reasons—is at the heart of the debate. The defenders of religious neutrality raise concerns for those who are not practicing Muslims, Muslims of other sects, those simply not favoring manifestations, atheists, or those of other religions. There are also concerns for gender equality. There is no doubt that women wearing headscarves as a result of oppression should have protection against gender discrimination. In such a case, the gender equality principle will have precedence over religious traditions. There are at the same time too many women assertively claiming that they voluntarily opt for the headscarf as a part of their freedom of religion. This part will also be largely hypothetical as there is no jurisprudence trying to balance religious freedom against entrepreneurial freedom.

### *a. Protection Against Religion and Belief Discrimination in Selection*

In the private sphere, selection is a part of the employer's mandate. The Labour Act does not impose a duty of non-discrimination on employers in selection. Applicants are not protected against discrimination in selection. There is also no duty for employers to make reasonable accommodation for the needs of religious staff. The exception with regard to selection procedures covers job advertisements. ISKUR, the Turkish Employment Office,<sup>64</sup> issued a notice in April 2006 outlawing discriminatory job advertisements. Employment offices cannot include statements or specifications in job notices or advertisements of preferences and limitations constituting discrimination. In practice, large companies in the private sector generally opt for a central examination system. In small- and medium-sized enterprises, selection is done through interviews by the employer or his representatives.

Although Article 5 of the Labour Act does not prohibit discrimination on the basis of race, language, religion and sect, political opinion, or philosophical belief at the time of recruitment, according to Article 122 of the Criminal Code<sup>65</sup> on discrimination, the one who makes employment or non-employment conditional on discrimination on the basis of language,

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64. ISKUR is an incorporated, administratively and financially autonomous public body mainly to maintain, develop, and increase employment, involve in activities to prevent unemployment and to conduct unemployment insurance scheme. *Act no. 4904*, OFFICIAL GAZETTE (Turk.), July 5, 2003. Private employment offices are to be established upon permission by ISKUR and they are under ISKUR's surveillance.

65. *Law no. 5237* OFFICIAL GAZETTE (Turk.), Oct. 12, 2004.

race, sex, disability, political opinion, philosophical belief, religion, sect, and similar cases shall be sentenced to six months to one year of imprisonment or fine. In practice, unsolicited job applicants do not apply to the courts with a claim of discrimination most probably due to the widespread belief that employers have absolute discretion as to such decisions. Applicants choose to apply to those workplaces where they can freely wear their religious or non-religious outfits. However, protection is available during the course of employment and at its termination.

*b. Protection Against Religion and Belief Discrimination During the Course of Employment and at its Termination*

In employment procedures, excluding selection, acts of discrimination involving religion and belief discrimination are reasons to justifiably claim wrongful treatment or termination. Proof of discrimination shall suffice, a consequent loss or suffering shall not be sought.<sup>66</sup> A worker who considers himself discriminatorily treated during the course of employment or discriminatorily dismissed may pursue his claims and demand compensation amounting to four months' basic wages. This is the so-called "discrimination pay." Introduction of a ceiling<sup>67</sup> to the amount of discrimination pay contradicts the Community *acquis*.<sup>68</sup> Besides discrimination pay, the employer shall pay an administrative fine of 88 TL (about \$73) for each discriminated worker (Art. 99a). Article 10 of the Employment Equality Directive provides that *prima facie* case of discrimination, in order for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. The last paragraph of Article 5 of the Labour Act prescribes *prima facie* case of discrimination in compliance with the Directive. Apart from these special rules, the general rules on employment termination shall be applied.

Dismissal is employment termination at the initiative of the employer. The Labour Act distinguishes between causes for instant dismissal (summary dismissal, dismissal for just cause) and lesser forms of dismissal

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66. ÇANKAYA, DUNAY & GOKTAS, *supra* note 61, at 59.

67. Whether this ceiling is absolutely or relatively binding is debated in the doctrine but so far there has been no court decision to this end. *Id.*; SARPER SUZEK, İŞ HUKUKU 368 (2d ed. 2005).

68. The Court of Justice of the European Community (ECJ) has ruled that fixing a prior upper limit may preclude effective compensation. The case law of the ECJ is upheld by the Directive 2002/73/EC of the European Parliament and of the Council of September 23, 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

(dismissal on notice). Dismissal on notice is provided by the Labour Act for only open-ended labor contracts.<sup>69</sup>

There are two sets of workers who may be subjected to dismissal on notice. Workers with increased job security enjoy greater protection against dismissal on notice. A worker who has been working for more than six months under an open-ended labor contract at a workplace where at least thirty<sup>70</sup> (fifty in agriculture) workers are employed benefits from increased job security if he is not in the position of an employer's representative managing the whole undertaking or workplace with the authority of making hiring and firing (LA, Art. 18). Where the employer owns more than one workplace in the same industry, the total number of workers shall be considered.

A worker with regular job security may be dismissed at any time for any reason or, indeed, for no reason. The employer is not under the legal obligation of specifying the ground for dismissal (LA, Art. 17). Workers with regular job security have protections against "wrongful termination" and courts will intervene to protect workers from unfair treatment by the employer. A wrongful termination is a breach of "good faith and fair dealing," an implied covenant that workers be treated fairly by their employers. Abusive and discriminatory dismissals are deemed wrongful termination. Where dismissal is found discriminatory, bad-faith pay,<sup>71</sup> discrimination pay, and severance pay<sup>72</sup> are the consequent types of compensation.

Workers with increased job security enjoy a greater protection against wrongful termination of employment. Such workers can be dismissed only for a valid reason connected to the capacity or conduct of the worker or operational requirements of the work or workplace or undertaking. A non-exhaustive listing of incidents that do not constitute valid reasons has been adopted from the ILO C158 (LA, Article 18). Religion, *inter alia*, is not a valid reason for dismissal.

In such a case, the employer has to prove the valid reason he claimed. If the worker claims that there was another reason for dismissal, the burden of proof shifts to the worker. There is no written rule that a dismissal must

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69. A fixed-term labor contract may terminate upon mutual consent, expiry of the specified period or for just cause. Religion does not constitute a just ground in dismissals.

70. The reason for confining the scope of increased job security to workplaces with thirty or more workers is to avoid imposing legal constraints in a way that would hold back the creation and development of small- and medium-sized enterprises (SMEs).

71. The amount of bad-faith pay is thrice the amount of wages corresponding to the notice period. The notice period varies between two to eight weeks on the basis of length of employment of the worker. In dismissal on notice, the labor contract gets terminated not at the time of written notification but with the elapse of the notice period.

72. Last gross monthly wage plus the monthly amount of wage supplements continuous in character, for each year of service by the worker.

be “*ultima ratio*” but according to the rulings of the Appeals Court largely drawn on German law and practices,<sup>73</sup> dismissal has to be the employer’s final solution. The *ultima ratio* rule presumes that alternatives to dismissal such as an offer of reasonable alternative employment, or training for another job in the same workplace or another workplace of the same employer have been envisaged. The employer who does not want to comply with the reinstatement order of the court has to pay job security pay,<sup>74</sup> discrimination pay, and severance pay.

Where a woman is dismissed for wearing a headscarf, the Turkish court will probably try to arrive at a decision based on Article 5 of the Labour Act on the principle of equal treatment, dismissal rules, *ultima ratio* principle, sample decisions by German courts,<sup>75</sup> the Employment Equality Directive, and the high courts’ notion of secularism. The judge has to find out whether the headscarf ban constitutes religious discrimination or not. He has to balance competing interests, mainly a woman’s freedom to wear a headscarf and the entrepreneurial freedom. The desire by the employer to have a politically and religiously neutral workplace for substantiated reasons will probably have precedence over freedom of dress.<sup>76</sup>

### 3. The Issues of Private Company Dress Codes, Company Practices, and Variations in the Terms of the Employment Contract

What will happen if a private employer attempts to impose dress codes?  
Can an employer ask a female worker to wear or not to wear a headscarf?

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73. In the 1930s German professors of Jewish origin found shelter in Turkey adding a lot to the establishment of modern universities. Some 15,000 Turkish Jews from France, and even of some 100,000 Jews from Eastern Europe were rescued by Turkey. J. SHAW STANFORD, *TURKEY AND THE HOLOCAUST: TURKEY’S ROLE IN RESCUING TURKISH AND EUROPEAN JEWRY FROM NAZI PERSECUTION, 1933–1945* (1995); J. STANFORD SHAW, *THE JEWS OF THE OTTOMAN EMPIRE AND THE TURKISH REPUBLIC* (1992); ARNOLD REISMAN, *TURKEY’S MODERNIZATION: REFUGEES FROM NAZISM AND ATATURK’S VISION* (2006). Professors of law served at faculties of law in Istanbul and Ankara educating students and assistants, the next generations of academics. Today many of the academics in the field of labor law as well as in other fields of law, especially private law, are inspired by the German laws and jurisprudence.

74. The amount of job security pay is between four to eight months’ wages of the concerned worker.

75. For example, on October 10, 2002 and on September 24, 2003, the German Federal Labour Court (2 AZR 472/01, NJW 2003, 1685) and the German Federal Constitutional Court (2 BvR, 1436/02, NJW 2003, 3111) each delivered a decision on consequences of wearing a headscarf for the employees. The Federal Labour Court invalidated the dismissal of a salesperson for wearing a headscarf; the Federal Constitutional Court held that a school teacher must not be denied employment for wearing a headscarf. However, both courts also left some room for maneuver in favor of clothing policies or general secularism according to which dismissal or denial to employment might be justified. See Dagmar Schiek, *Just a Piece of Cloth? German Courts and Employees with Headscarves*, 33 *Indus. L.J.* 68 (2004); Fahlbeck, *supra* note 47, at 54–55. The decisions are fact specific and do not suggest that headscarves should generally be allowed. See Vickers, *supra* note 48, at 4.

76. The Danish Supreme Court allowed an employer to justify clothing guidelines in order to create a religious neutral workplace but it is unclear whether this interpretation is consistent with the Employment Equality Directive. See Vickers, *supra* note 48, at 13.

Similarly, can a female worker decide to wear or not to wear a headscarf thus violating prevailing dress codes and/or company practices? How will variations in the terms of the labor contract be possible? These questions cannot be easily answered.

*a. Contracted Dress Codes*

A worker is the one employed in any job under a labor contract. A labor (employment) contract is a contract of service and comes into being when a worker agrees to work for an employer in return for pay. Subordination, work, and pay are indispensable elements of a labor contract. The terms of the contract are the rights and obligations that bind the parties to the contract. The terms of a contract can be express or implied. Express terms are usually laid down by the employer and deemed to be agreed upon by the worker at the time of recruitment. It is also possible to establish express terms by reference to or incorporation of various sources, particularly the laws, company handbooks, company practices, or collective labor agreements. Agreements to contract out of peremptory statutory terms are void under the law.

So far, there has been no lawsuit challenging company dress codes or practices. Had the employer and worker agreed upon neither discriminatory nor disproportionate rules as to clothing at work prohibiting or allowing the headscarf, for example, the courts would, most likely, rule for the observance of such established rules. Also, in case of the prohibition of headscarves, under the light of high courts' decisions reflecting their approaches to the notion of secularism, one may presume that the employer's idea of having a politically and religiously neutral workplace will be accepted as a legitimate aim by the courts.

*b. Subsequent Variations in Dress Codes*

Both employers and workers may wish to vary the terms of a contract. An employer may wish to vary the terms of the contract, company handbooks (company rules), or company practices because of changed economic circumstances or due to a business reorganization. A worker may seek to change the contract to bring about improvements in pay or working conditions, for instance by requesting additional holidays, or by requesting a change from full-time to part-time work because of domestic responsibilities. An existing labor contract, company handbooks (company rules), or company practices can always be changed with the agreement of both parties. Changes may be agreed on an individual basis or through a collective labor agreement. Variations of work conditions shall not be retroactive (Art. 22/2). As long as variations are mutually made or made by

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the employer and then agreed to by the worker, there shall be no problems regarding the binding nature of the rules.

Where the employer is to make unilateral variations, a distinction has to be drawn between unsubstantial and substantial variations. An employer is entitled to make reasonable variations as this is an aspect of employer's prerogatives. According to the Labour Act, substantial variations cannot become effective upon their introduction by the employer. An employer may make substantial changes in the conditions of work provided by the labor contract or to its attachments such as company handbooks (company rules), and company practices by presenting the worker a written notification of the change (Art. 22/1). Variations not communicated to the worker in written form or variations not approved by the worker within a period of six days following notification shall not be binding for the worker. If the worker objects to an amendment, the employer may make a dismissal on notice claiming that the amendment is based on a valid reason or give another valid reason for termination. The worker may apply to the court challenging his or her dismissal according to the legal rules on regular or increased job security.

What if a labor contract contains flexibility clauses? A contract may contain express terms that allow an employer to make changes in working conditions. Flexibility clauses provided by labor contracts are valid.<sup>77</sup> Through flexibility clauses, for example, an employer may expressly reserve the right to alter the worker's conditions of work. In such a case, the employer is permitted to make reasonable changes within the terms of the existing contract. The worker can continue to work under the amended contract. Where a worker continues to work under revised terms without objection, then in due course he may be regarded as having agreed to the changes. Sometimes, a labor contract may be considered to contain implied terms that may authorize or prevent alterations of working conditions. For

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77. Some labor lawyers oppose the validity and effectiveness of flexibility clauses on the basis of Article 22/1 providing for approval by the worker to variations the employer wants to introduce. See Unal Narmanlioglu, *İsverenin Calisma Kosullarında Degisiklik Yapma Hakkini Sakli Tutan Sözlesme Hukukleri Baglayici midir?*, in SICIL 9, 15 (2006); Ali Guzel, *İş Guvencesine İlliskin Yasal Esasların Degerlendirilmesi*, in İŞ GUVENCESİ, SENDİKALAR YASASI, TOPLU İŞ SOZLESMESİ, GREV VE LOKAVT YASASI SEMİNERİ 120 (2004) (Turk.); Savas Taskent, *İş İlliskisinin Sona Ermesi ve Kidem Tazminatı*, in MİLLİ KOMİTE 78 (2004); Suleyman Basterzi, *Türkiye'de Feshe Karsi Koruma Hukuku Reformunun Sosyal Hukuk ve İstihdam Uzerine Etkileri*, 54 AUHFD 60 (2005). The weighty opinion is for the validity and effectiveness of such clauses. See CANKAYA, GUNAY & GOKTAS, *supra* note 61, at 60; Mustafa Alp, *İş Sözlesmesindeki Degisiklik Kayitlarının İcerik Denetimi*, in SICIL 37 (2006); Gulsevil Alpagut, *İş Sözlesmesinin Esaslı Sartlarında Degisiklik ve Yargıtayın Konuya İlliskin Bir Kararınin Dusundurdükleri, Karar İncelemesi*, in CIMENTO İSVEREN 52 (2004); Kubra Dogan Yenisey, *Calisma Kosullarında Degisiklik*, presentation made in a seminar held by the Turkish Cement, Ceramic and Glass Industry Employers' Association on 104 (Sept. 21–25, 2005). The decisions of the Court of Cassation on the issue were contradictory for some time but now the high court accepts the validity and effectiveness of flexibility clauses.

instance, it would be normal for a worker to be expected to be sent on an errand within reasonable daily travelling distance of his or her home.

Where an imposed change involves a significant change to the contract, for example, a reduction in pay or alteration of a day shift to a night shift, an employer may be acting in a fundamental breach of contract. Where there is a fundamental breach, the worker may treat the breach as bringing the contract to an end and leave the job. In such circumstances and subject to having the necessary qualifying service, the worker will have the opportunity to make a claim of unfair dismissal or constructive dismissal and consequential compensation, that is, bad-faith pay or job security pay, and severance pay before a labor court. Here, the court will first have to decide whether the new terms are so substantially different as to be an entirely new contract and not a variation of the old one. In arriving at a decision, the court will consider whether the employer acted reasonably in all the circumstances of the case.

## V. CONCLUSIONS

1. Turkey is a predominantly Muslim country. Problems clustered around religious outfits and symbols do not emanate from religious pluralism as the vast majority of the population are adherents to the Islamic religion. There are those who want to manifest their religion and those who want to be spared from such manifestations. The controversy erupts between two different segments of the society: the bureaucratic elites and the masses. The harsh attempts of social engineering by the elites and resistance by the masses are at the center of this fundamental tension. This deepens the cleavage between the elites and their political parties who reject the Islamic reality of Turkey and the masses. The less visible but not the less important struggle between the center and the periphery is over the bureaucratic posts and positions. Tensions today are considerably more acute. Due to the irrational handling of the issue, Turkey has not yet been able to find out its *modus vivendi*.
2. The actual fight over "secularism" is not between secularists and Islamists, but between the "hard-liner secularists" and "mild-secularists." There is the authoritarian-secular character of the state. Turkey is a country with "militant secularism." Authoritarian political practice of secularism contributes to an undermining of the democratic process. Secularism can be intolerant and serve authoritarian values and policies thus

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threatening democracy. The siege mentality fed on fears created about “imminent threat of theocracy” has been and is being used as the means of justification of a vicious circle of authoritarian military and/or judicial interventions/coups. The fiercely secular circles give the utmost damage to both secularism and democracy through the excessive suppression of religion, thus creating a pressure cooker atmosphere.

3. People and bodies that have to be apolitical and impartial become politicized and biased due to their perceived roles as “ultimate guardians” of secularism. They may take a particular political standing and start using “self-created powers” to “defend” secularism. There have been extraconstitutional attempts to bring down the governmental party. A government controlled by the judiciary is at stake. Disclosure of the pro-Islamic parties on the basis of becoming the center of anti-secular activities hinders democratic development.
4. The Muslim headscarf is the most controversial issue. The headscarf in the universities has been at the center of the struggle between the elites and the masses for the last thirty years. The hard-liner secularist circles, including the high courts have so far not viewed the wearing of headscarves as part of an expression of religious belief but merely as a political symbol and attack to secularism. The decisions rendered by the Constitutional Court in “367,” “headscarf,” and “dissolution” suits reveal that the fiercely secular forces are not willing to allow a “more liberalized” approach to secularism.
5. There is the principle of neutrality for the public sector. State neutrality in religious matters takes precedence over religious manifestations. The public personnel have to work bareheaded and are prohibited from wearing religious garments and signs. Those who provide public services are bound by the dress codes whereas those who receive these services are free of such restrictions with the exception of university students.
6. There is no jurisprudence trying to balance religious freedom against entrepreneurial freedom in private workplaces. There is the entrepreneurial freedom in selection. Workers are protected against discrimination not in selection but during the course of employment and at its termination. For the time being, we do not know whether courts are going to ask private

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employers to justify clothing guidelines (if any) or give precedence to employers' intentions to create a religiously neutral workplace. Taking into consideration the general approach of the high courts on the question of religious outfits, that if disputes over dresses come before the courts, the courts will most likely rule in favor of "contemporary" intentions/outfits. Turkey needs to find its own fact and culture dependent solutions to all these problems.