

IACL National Report: The Republic of Turkey

I. SOCIAL CONTEXT

Unfortunately, official records lack any clear and comprehensive study on the religious and ethnic demographics of the Republic of Turkey. Any such record that might exist is regrettably not available for public use. Consequently, figures that one might articulate during the entire study are themselves rough estimates expressed by various sources, which might be in truth speculative in nature.

With a land area of 301,383 square miles, Turkey has an estimated population of 71.5 million people.¹ A quasi-total of the population is Muslim (99.8 percent)², with minor groups of non-Muslims present, mostly comprised of Christians and Jews. The large majority of the Muslim population adheres to the *Hanafi* school of Islam. The rest of the Muslim population is *Alevi*s, a heterodox version of Islam as considered by some, and is estimated by various actors to be between 10 to 20 million people. Tensions have existed between the *Alevi* and *Sunni* societies, and some consider *Alevism* outside of Islam.

Other religious groups are mostly concentrated in Istanbul and other large cities. As expressed above, lacking exact adherent figures we can state that these groups include approximately 65,000 Armenian Orthodox Christians, 23,000 Jews, and up to 4,000 Greek Orthodox Christians.³ Although the “Lausanne Treaty of 1923” (Lausanne Treaty herein) refers broadly to “non-Muslim minorities” without enumerating any specific group, official interpretation has since exclusively granted this special minority status to these three recognized groups. Within this context, the Bulgarian Orthodox Church, through a 1945 bilateral agreement, is considered under the ecclesiastical authority of the Greek Orthodox Ecumenical Patriarchate in Istanbul (and Greece), but the Bulgarian Orthodox Church has its own foundation.

According to the International Religious Freedom Report of 2008 released by the U.S. Department of State⁴, there are also an approximate of 500,000 Shiite Caferis; 10,000 Baha’is; 15,000 Syrian Orthodox (Syriac) Christians; 5,000 Yezidis; 3,300 Jehovah’s Witnesses; 3,000 Protestants; and a small, undetermined number of Bulgarian, Chaldean, Nestorian, Georgian, Roman Catholics, and Maronite Christians present in Turkey. Among these minority religious communities is a significant number of Iraqi refugees, including 3,000 Chaldean Christians.

II. THEORETICAL AND SCHOLARLY CONTEXT

The Turkish Republic is based on a strict legal understanding of constitutional laicism,⁵ which substantially originates from the relevant French doctrine, focusing essentially on the withdrawal of the educational and instructional domains from the sphere

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1. The population has a near to equal percentage of males and females, and 75 percent of the population live in urban areas. National Census of 2008, Turkish Institute on Statistics, www.tuik.gov.tr/PreHaberBultenleri.do?id=3992, 5 August 2009.

2. The CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>, 5 August 2009.

3. These include Greek-speaking Orthodox practitioners living in Istanbul and the Turkish islands of the Aegean and Arabic-speaking Orthodox practitioners living in the cities near Syria.

4. See Turkey, International Religious Freedom Report 2008, U. S. Department of State, <http://www.state.gov/g/drl/rls/irf/2008/108476.htm>. Herein, International Religious Freedom Report 2008.

4. See infra, Section III. Constitutional Context.

5. Id.

of religious influence.⁶ Yet, although based on the French model, its interpretation by the state apparatus has differed due to historical reasons. As underlined by the European Court of Human Rights (ECtHR herein)⁷, this historical, *sui generis* conception of laicism⁸ has been the central point of difference between the major actors in daily political life.

Within this sense, there is an ongoing debate on the laic model and its application. Defenders of an orthodox *Kemalist* interpretation are staunchly opposed to any change in the original model and consider any attempt of reform as deviation towards a *Sharia*-inspired political system. The Constitutional Court, a natural defender of this model, has clarified the importance of laicism on more than one occasion. According to the Court, its importance does not stem from its definition *sensu strictu*, but from the historical evolution of the concept and the major value that this evolution carries for the Republic.⁹

On the other hand, more West-prone liberal intellectuals are in favor of a shift from French-style laicism to Anglo-Saxon secularism. Islamist intellectuals are profoundly divided on the issue. For some, laicism is simply tantamount of atheism or paganism. Others are eager to preserve the model but require a more “religion-friendly” system. Consequently, the latter implicitly support the liberal stance. Some Islamist thinkers and politicians have proposed a model of peaceful co-existence inspired by the “Medina Agreement”, of the Prophetic period, which had given the Jewish and polytheist communities the right to live according to their own legal systems and not according to Islamic law. For these intellectuals, each religious group would be free to choose its own legal system on the basis of the “Medina Agreement Model.”¹⁰ Yet, according to the ECtHR¹¹ such a model would give ground to a plurality of legal systems, which by definition cannot conform to the necessities of democracy.

III. CONSTITUTIONAL CONTEXT

A. Historical Perspective of the Relations between State and Religion

The Ottoman Empire, the predecessor state to the Republic of Turkey, was based on a social construct according to which nationals were strictly divided under religious affiliations. For example, while Turks, Albanians, and Arabs were regulated as one single national unit (the Muslim nation), the non-Muslim communities were within themselves perceived according to their own churches; so that while the Armenians were separated as Catholic Armenians and Protestant Armenians, the Bulgarians and Romanians were seen as one single nation¹². Within this context, there existed an important legal distinction between the Muslim and non-Muslim communities. The Empire itself was based on Islam; and general civil offices, with specific exceptions foreseen, were reserved for citizens belonging to the Muslim nation.¹³

6. Tanör Bülent, 1982 Anayasasına Göre Türk Anayasa Hukuku – 2004 Değişikliklerine Göre, 6. Baskı, Beta, İstanbul, 2004, 76.

7. See *Şahin v. Turkey* [GC], no. 44774/98, Eur. Ct. H.R. 2005-XI.

8. Öktem A. E., *La Spécificité de la Laïcité Turque*, Islamochristiana, 29, 2003, 94.

9. Turkish Constitutional Court 7, E. 1989/1, K. 1989/12 March 1989.

10. For further information see MERÇİL İpek, “Le projet de ‘Pacte de Médine’, pour ‘vivre ensemble avec nos différences’” in *Les annales de l’autre Islam*, No. 6, Formes nouvelles de l’Islam en Turquie, ERISM, Paris, 1999, pp.211-220; Ugur A. , “Etat, religion et société civile en TURQUIE : La laïcité face à un projet communautariste islamiste” in *Cahiers d’études sur la méditerranée orientale et le monde turco-iranien*, No. 19, 1995, pp. 97-128; ORTAYLI İlber, “Ordre du Millet Dans l’Empire Ottomon (Structure Classique Jusqu’au 16eme Siecle)” in *Seminaire sur la racisme et l’antisemitisme*, İstanbul, 19-20 Janvier, 1995, COE, Doc. SEM/IST/95/11, 7; ORTAYLI İlber, “Non-Muslim Communities in the Ottoman Empire and in Republican Turkey” in *Revum Novorum, New Conditions of Life in a Changing World, International Colloquial İstanbul – Ankara*, March 30 – April 2 1992, Ankara, 1993, p. 181.

11. See *Refah Partisi and others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98, and 41344/98, Eur. Ct. H.R. 2003-II; *Şahin v. Turkey* [GC], supra n. 7.

12. Ortaylı I., “Osmanlı Devletinde Laiklik Hareketleri Üzerine,” in Prof. Dr. Ümit Doğanay’ın Anısına Armağan, İstanbul, 1982, 501.

13. Üçok Ç., Mumcu A., *Türk Hukuk Tarihi*, Ankara, 1981, 206-207. Another such distinction was the

On the other hand, the religious autonomy of non-Muslim communities was protected to a large extent¹⁴; and a safeguard of their rights, including cultural and religious rights, were guaranteed by the State.¹⁵ The highest administrative council in which state affairs were discussed was open to the plea of all, without distinction based on race, religion, nation, gender, or social class.¹⁶ Within the state administration, the Muslim clergy possessed prerogative, for the supreme leader of the Empire, the Sultan, also had the active duty of the protection of the Sunni public order.¹⁷ Within this framework, the advisory opinions (*fetva*) of the *Şeyhülislam* (Chief Religious Leader in the Empire) acted as a legal check and balance to the Sultan's prerogatives.¹⁸ On the lower level offices, the religious clergy formed the judiciary and made decisions according to Islamic law (*Sharia*). With the conquest of Egypt and the transfer of the Caliphate institution to the Empire, the legal character of the Empire fused more with religious identity and the Sultan, as Caliph, became the highest religious authority within the Muslim world.¹⁹

It was not until the *Tanzimat* period (the era of administrative reforms) beginning in 1839, that the Empire was influenced from Western enlightenment and the new Western human rights doctrines.²⁰ Within the framework of these reforms, major modifications to the legal understanding took place, such as equality before law for Muslims and non-Muslims and the opening of general civil service to non-Muslims. Other major aspects of the reforms were the formation of the *Nizamiye* courts, which limited the jurisdiction of the *Şer'iyeye* courts²¹; the formation of modern education institutions besides the religious *Medrasah's*²² and the adoption of the *Mecelle*, the new civil code. Nevertheless, all reforms adopted during this period did not change the fundamental religious character of the Empire *per se*. During the War of National Liberation, after World War I, the Ankara government (National Liberation Government), headed by Mustafa Kemal Atatürk, felt it necessary to clearly differentiate its own legal status from that the Empire, which was under foreign occupation. The Ankara government foresaw the formation of a new Republic and on 20 January 1921 adopted the First Constitution of the Republic. Article 3 of the Constitution declared that sovereignty resided in the Nation, thus secularizing the source of sovereignty. The Ankara government declared through decisions no. 307 and 308 the abolishment of the Sultanate and the end of the Ottoman Empire, but due to continuing foreign occupation, postponed any act that would abolish the caliphate until 1924. On the 3 March 1924 the Caliphate and the Ministry on Religion and Religious Foundations were abolished with Law no. 431. Law no. 430, on the Unification of the Educational System, the duality of laic and religious education was put to an end; and on the 8 April 1924 the unification of the Judiciary was established.²³

On the 20 April 1924 the Second Constitution was adopted. Although Article 2 of the Constitution embraced Islam as the official religion of the State, Article 80 guaranteed freedom of conscience. Later, legal reforms such as the adoption of the Law on the Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of

"*Jizye*" tax imposed on non-Muslim communities in return for exception from compulsory military service.

14. For example, after the conquest of Istanbul, the Empire guaranteed that non-Muslims would keep their places of worship and that the Greek Patriarchate and Churches would be able to deal with civil issues according to their own tradition. See Ergin O., *Türk Tarihinde Evkaf, Belediye ve Patrikhaneler*, İstanbul, 1937, cited in Dinçkol (Vural) B., 1982 *Anayasası Çerçevesinde ve Anayasa Mahkemesi Kararlarında Laiklik*, Kazancı editions, İstanbul, 1992, 27.

15. Macar E. and Gökçati. M. A., *Discussions and Recommendations on the Future of the Halkı Seminary*, Foreign Policy Analysis Series No. 3, TESEV Publications, İstanbul, 2009, 14.

16. See Versan V., *Amme İdaresi (Siyasi ve İdari Teşkilat)*, İstanbul, 1957, 189-195; cited in Dinçkol, supra n. 14 at 26.

17. Üçok, Ç., supra n. 13 at 212-216.

18. Id., 217.

19. Timur, T., *Osmanlı Devlet Düzeni*, Ankara, 1979, s.101-102. Cited in Dinçkol, supra n. 14 at 27.

20. Id., 28.

21. Id., 29.

22. Sayar, N. S., *Türkiye İmparatorluk Dönemi, Siyasi, Askeri, İdari ve Mali Olayları*, İkinci Baskı, İstanbul, 1978, 182.

23. Dinçkol, supra n. 14 at 34.

Tombs and the Abolition and Prohibition of Certain Titles on 30 November 1925, the Law on the Wearing of Hats on 28 November 1925 and the adoption of the Turkish Civil Code, the Commercial Code and Criminal Code in 1926 paved the way for the laicization of the state and society. The Constitution was amended in 1928, removing the reference to Islam as the official State religion and on the 5 February 1937, under Law No. 3115, the second article of the Constitution was amended to include laicism as a main principle of state administration. Although the constitutions of 1961 and 1982 have both included without question to this day the principle, the debate on its application, and the exercise of specific legal dispositions that incarnate the principal have been and are under constant debate in the social and political spheres.

B. *Constitutional Provisions on the Relations between State and Religion*

The principle of laicism is heavily present both in letter and spirit within the constitutional text. This presence can be observed clearly in the Preamble of the Constitution, which forms “*an integral part of the Constitution*” (Article 176/1). It recognizes that, “no protection shall be accorded to an activity contrary to...the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of laicism”²⁴ and clearly states that “there shall be no interference whatsoever by sacred religious feelings in state affairs and politics” (par.5).

As a Republic (declared so in Article 1), the Turkish State is “a democratic, laic and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble” (Article 2).

Within the context of the “Irrevocable Provisions” regime set forth in Article 4 of the Constitution, “[t]he provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic ... shall not be amended, nor shall their amendment be proposed.” In this respect, the principle of laicism, separating all religious aspects of life from state governance, is afforded legal safeguard against any constitutional initiatives that might aspire to distort its presence within the text. Taking into consideration attempts to modify indirectly the functioning of the principle, the Constitution also foresees a self-preservation clause in Article 174, with the essential intent of protecting legislation in force which incarnate *in concreto* the principle of laicism and the “Reform Laws.” Under Article 174, “No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilization and to safeguard the laic character of the Republic, and which were in force on the date of the adoption by referendum of the Constitution of Turkey.”

The laws and principles that are afforded under Article 174 are the Law on the Unification of the Educational System; the Law on the Wearing of Hats; the Law on the Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles; the Principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official, adopted with the Turkish Civil Code of 1926; the Law on the Adoption of International Numerals; the Law on the Adoption and Application of the Turkish Alphabet; the Law on the Abolition of Titles and Appellations such as *Efendi*, *Bey* or *Paşa*; and the Law on the Prohibition of the Wearing of Certain Garments.

Within the context of the above-cited constitutional dispositions and under the non-discrimination regime set forth by Article 10 of the Constitution,²⁵ the state apparatus is

24. The original text of the Constitution uses the expression “*laik*,” while official translations use the expression “secularism”. We have chosen to use the expression “laicism” to retain consistency and to avoid confusion.

25. Article 10 states that “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”

construed legal as being “religion free.”

Under the Constitution, the State also carries the legal duty to actively keep religious elements out of state administration and to direct the balance between the religious and political spheres of daily life. Within this framework, the State has an effective role in the administration of religious affairs through the Directorate of Religious Affairs, construed according to Article 136 of the Constitution.²⁶ Thus, from the constitutional perspective, even though the effects of religion are explicitly removed from the state construct on one hand, and religion itself is comprehensively dealt within the terms of the human rights regime; on the other hand, the effects of state administration are not completely removed from religious life.

Religious freedom itself is set forth clearly and comprehensively in Article 24 of the Constitution entitled “Freedom of Religion and Conscience”; foreseeing both the individual freedom and safeguards against potential clashes with the principal of laicism. According to the article:

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 14.²⁷

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.

Article 24 explicitly protects the *forum internum* of the freedom of religion, belief, and conscience from all kind of interventions. However, it allows through direct reference to the “abuse of rights” clause in Article 14 the limitation of the *forum externum*, those aspects of the freedom that surpass the individual domain and manifests in social life. Within this respect, it is possible to restrict the freedom for the protection of public order, public safety, public interest, and laicism.

Beyond Article 24, issues that might relate to the freedom of religion might be also protected indirectly through other fundamental human rights, such as the right to the privacy of individual life (Article 20), the right to the inviolability of the domicile (Article 21), the freedom of communication (Article 22), freedom of movement (Article 23), freedom of thought and opinion (Article 25), freedom of expression and dissemination of thought (Article 26), freedom of the press (Article 28), freedom of association (Article 33) and assembly (Article 34).

However, as can be expected, this protection through exercise of various rights and

(par.1). It also affirms the obligation of the state “to ensure that this equality exists in practice” (par. 2); and expresses that all State organs and administrative authorities must “act in compliance with the principle of equality before the law in all their proceedings” (par. 3).

26. See *infra*, Section IV B.

27. Article 14 (Prohibition of Abuse of Fundamental Rights and Freedoms): “None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republics based upon human rights.

No Provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law.”

freedoms is also subject to the various restrictions detailed within each specific provision. In any case, the “abuse of rights” clause under Article 14 can be used as a mean of restriction.

Another important provision relevant for the practice of the freedom of religion is the “right and duty of training and education” stipulated in Article 42 of the Constitution. According to Article 42, all have the right and freedom of not being “deprived of the right of learning and education” (par. 1), the scope of which is defined and regulated by law (par. 2). Under paragraph 3 of the article, “Training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state.”²⁸ Paragraph 4 foresees the duty of loyalty to the Constitution to individuals during the practice of the right and the last paragraph of the article stipulates that in all circumstances, “the provisions of international treaties are reserved.” However, it must be noted at this point that in practice – in order to protect the Unitarian educational system – Turkey has adopted reservations to the provisions of international treaties that deal with right to education. For example, Turkey placed during the adoption of Protocol No. I to the European Convention on Human Rights, in 10 March 1954, a reservation through Article 3 of Law No. 6366 according to which “[t]he second article of the Additional Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms cannot breach the provisions of Law No. 430 adopted in 3 March 1924 on the Unification of the Educational System.”²⁹

C. *Specific Points*

Beyond the constitutional norms cited above, more specific issues dealing with the constitutional and legal framework of the regulation of the relation between the State and religion, as well as current issues concerning education, autonomy, and actual areas of conflict are discussed in detail throughout the various headings in this Report.

IV. LEGAL CONTEXT

D. *Laws and Case Law on Religion and Religious Freedom*

The main legal context on the relations between the State and religion is detailed within the Constitution itself and has been briefly described above. Due to the heavy presence of the principle of laicism within the Constitutional text and it being a founding characteristic of the State, it is directly and indirectly present in all legislation. In cases in which specific provisions have no reference to laicism directly or indirectly, the judiciary has chosen to interpret norms within the confines of a laic legal understanding. For example, the second section of Chapter II of Book Two (arts. 175-178) of the Former Penal Code was reserved to offences against the freedom of religion and criminalized the violation of the freedom of religion (Article 175), attacks on holy religious relics and clergy (Article 176), attacks on places of worship and cemeteries (Article 177) and insulting the dead (Article 178). The Constitutional Court expressed that the protected legal interest within these provisions was not religion *per se* but the religious feelings and convictions of the person.³⁰

In addition to that of the Constitutional Court, the jurisprudence of all judicial bodies and especially that of the High Administrative Court (*Danıştay*) refers to the Constitutional Provisions on laicism extensively while dealing with state administration

28. Paragraph 4 of the article.

29. Official Gazette, 19 March 1954, n.8662.

30. The New Criminal Code does not contain a separate section for Offences against the Freedom of Religion, but the aforementioned clauses are dispersed within the Code in various different sections and have been updated to be in line with the European Convention on Human Rights.

30.Turkish Constitutional Court Judgment, E: 1970/ , K: 1971/765321 October 1971.

and the exercise of individual rights and freedoms.

For the Constitutional Court, laicism contains these essential elements³¹:

a) The Adoption of the principal that religion should not be sovereign and effective in State affairs,

b) Religion should be constitutionally protected, recognizing that the area of religion which deals with the spiritual life of individuals should be, without discrimination, an unrestricted freedom,

c) Restrictions should be accepted in order to protect public order safety and interests and prohibit the abuse of religion for the aspects of religion, which exceed individuals' spiritual life, affect their social acts and behaviors,

d) Recognize to the State, as the protector of public order and rights, the competence of supervision over religious rights and freedoms....

Within this understanding, all state authorities, under the primary obligation of non-discrimination in all their acts, also possess the legal capacity of protecting the principle of laicism; if necessary through active interventionism on the external manifestation of the freedom of religion.

E. State Organs on Religious Affairs

Under Article 136 of the Constitution, the Directorate of Religious Affairs (*Diyânet İşleri Başkanlığı*), a public entity under the Prime Ministry, "shall exercise its duties prescribed in its particular law, in accordance with the principles of laicism, removed from all political views and ideas, and aiming at national solidarity and integrity." Within this framework, the Directorate constitutes the main spiritual authority for the Muslim community, but enjoys no autonomy. Beyond the Directorate, the Muslim population does not possess any other form of overall legally recognized organization. Within this respect and according to Law No. 633 concerning the "Foundation and Duties of the Directorate on Religious Affairs," the Directorate has the duty to "[a]dminister affairs related to the beliefs, worship and moral ground of the Islam Religion, to enlighten the community about religion and to govern places of worship" (Article 1).

The Presidency of the Directorate, a government appointee, is responsible for all decisions regarding the appointment of "*imams*" and "*muftis*"; the latter being charged with the administration of religion within defined districts such as large towns, cities, and other administrative units while the prior are only in charge of particular mosques. With regards to status, these personnel are government employed. The Directorate also appoints *imams* in prisons and hospitals, but in practice these personnel have a limited role in function such as conducting funeral ceremonies. In non-Muslim religious hospitals and other institutions, priests and rabbis are free to offer their own spiritual service to their own communities. They are usually nominated by their own churches or synagogues. Within the army, *imams* and other religious staff do not possess any active role.

The Directorate, financed through the central budget, has seen over the few years a massive increase in its annual share. With a total budget of 2,291,550,016 TRY foreseen in 2010, compared to a budget of 1,015,172,959 in 2004; the Directorate's total spending accounts for near 4-4.5 percent of the general budget, surpassing the share of many other state agencies.³²

One major problem that derives from this is due to the heavily Sunni-Islam oriented construct of the Directorate; for, in official practice, the Directorate only provides services to the Sunni Muslim community and finances the *imam*'s and mosques of this denomination. While, Alevi have argued relentlessly that their places of worship, the *Cemevis*, should be given official status³³ and that they also should be represented within

31.Id.

32. See Erdoğan M., Yenigün E., Türkiye'de Sosyal Bütçe, TESEV, İstanbul 2008.

33. Alevi intellectuals, as well as some segments of the laic society, have argued that either the Directorate should include Alevi representation or the formation of a separate Alevi body. See Uğur A., "L'ordalie de la démocratie en Turquie, le Projet "Communautaire Islamique" d'Ali Bulaç et Laïcité", in Cemoti (Cahiers

the Directorate. The State has gradually refused the requests, alleging such requests do not conform to the laws in force.³⁴ Similarly, non-Muslim communities are not represented within the Directorate and are not directly associated to the State. They possess under the Lausanne Treaty, a certain and relative degree of autonomy, organized under communities and foundations.³⁵

F. *Bilateral Relations between the State and Religious Communities*

From the legal point of view, there are no bilateral relations between the State and religious communities. Such communities do not possess any legal personality *per se*;³⁶ and, as discussed above, the State has been stripped constitutionally of any kind of religious affiliation whatsoever. Thus, any sort of formal relations between State entities and religious communities are not to be based on a legal foundation. Nonetheless, it is a widely known and a much controversial fact that *in concreto*, informal relations exist between religious communities, state entities and most – if not all – political actors.

Within this respect, the influence of religious communities – mostly Hanefi Sunni brotherhoods – is widely observed in day-to-day state administration and has become a focal point in the political debate surrounding the effective practice of laicism. To cite just one example, the Prime Minister and the Chairman of the leading Welfare Party (*Refah Partisi*) *Necmettin Erbakan*, known for his pro-Islam affiliations, held a Ramadan dinner in 1997 at the official Prime Ministry Residence to which leaders of well-known religious sects and brotherhoods attended, most in religious clothing. This occasion, interpreted as an official recognition and approval the existence of these religious groups, was to be used later by the Constitutional Court in its judgment on the dissolution of the Party.³⁷ It functioned as supporting evidence illustrating that the Party had become a hub of activities that opposed the fundamental principles of the Laic Republic.

V. THE STATE AND RELIGIOUS AUTONOMY

As mentioned above, the Muslim community is legally under the spiritual authority of the Directorate of Religious Affairs and lacks any kind of autonomy or form of overall organization apart from it. Yet, Islamic communities, usually known as brotherhoods, have always occupied an important place within Turkish social and political life; as they used to during the Ottoman Empire. For even though the *Kemalist* Revolution, with its principles based on the French bourgeois revolution, had suppressed and sequestered the funds of such organizations³⁸, they have remained present, largely operating through closely knit communities and have become after the 1950s important voter basis for right-wing conservative political parties.

On the other hand, non-Muslim communities enjoy certain autonomy as defined by the Lausanne Treaty, which is considered the international birth certificate of the Republic. The Treaty provisions on minorities are in fact in line with similar treaties concluded during the era of the League of Nations³⁹; the only exception being that the

d'études sur la Méditerranée Orientale et le monde Turco-Iranien, no. 19, 1995, Laïcités en France et en Turquie, 110.

34. Judgment of 12 January 2008, 6th Administrative Court of Ankara. See also Massicard E., *L'autre Turquie, Le Mouvement Aleviste et Ses Territoires*, PUF, Paris, 2005.

35. *Infra*, Section V. The State and Religious Autonomy.

36. Law No. 677 of 30 November 1925, is one of the protected Reform Laws and abolishes all Muslim dervish lodges and prohibits all religious brotherhoods and honorary religious titles (e.g., Sheikh, dervish, and *dede*) under severe penalty.

37. Turkish Constitutional Court Judgement, 16.01.1998, E. 1997/1, K.1998/1. The Court's judgment was to be found not in violation of the European Convention on Human Rights by the ECtHR. See Case of *Refah Partisi and Others v. Turkey*, supra n. 11.

38. See Batur, Y. M. & Öktem, E., "Note-Arrêt I. A. contre Turquie devant la Cour européenne des droits de l'homme" in *Droit et religions*, Annuaire, Vol. 2(Tome II) Année 2006-2007, 748.

39. For the "model" Polish treaty, see *Traité concernant la reconnaissance de l'indépendance de la Pologne et la protection des minorités*, signé à Versailles le 28 juin 1919, in *Droit international et Histoire diplomatique*,

provisions in the Lausanne Treaty provide guarantees only for non-Muslim minorities.⁴⁰ Section III (Protection of Minorities-Article 37-45) of the Treaty is based on two principles: equality and non-discrimination. The first principle is implemented through Articles 38 and 39 (negative rights) and the latter, through Articles 40-43 (positive rights).⁴¹ According to Article 44, these provisions constitute obligations of international interest and are placed under the guarantee of the League of Nations system.

Non-Muslim minorities are organized into foundations, which constitute the only legal non-Muslim entity. These religious minorities established under the Lausanne Treaty and their affiliated churches, monasteries, and religious schools are regulated by a separate government agency: the Directorate of Foundations (*Vakıflar Genel Müdürlüğü*).⁴² The Directorate has the power of approval for the entire operation of all churches, monasteries, synagogues, minority schools, hospitals, and orphanages.

Because they are required to be established in the form of foundations, the religious leadership organs of religious minorities (e.g., Greek and Armenian Patriarchates and Chief-Rabbinate) do not possess legal personality *per se*. This lack of legal status has been interpreted as a variety of passive personality and has given rise to a number of paradoxical situations. For example, the Patriarchates were not able to resort to any legal procedures before domestic courts because they enjoyed no *locus standi*; whilst administrative authorities had the possibility to lodge cases against them. A recent judgment by the ECtHR⁴³ – in which it not only admitted a request⁴⁴ lodged by the Greek Patriarchate, but also concluded that the right of property had been breached due to the confiscation of an orphanage belonging to the Patriarchate – seems to bring a new dimension to this issue. Another issue related to the Greek Patriarchate involves its ecumenical status. It has been government policy not to recognize the ecumenical status of the Greek Orthodox Patriarch. Instead, it has been preferred to acknowledge him only as the head of the country's Greek Orthodox community. It has been often asserted publicly by high-level members of government that the use of the term “ecumenical” in reference to the Patriarch is in fact a clear violation of the Lausanne Treaty. However, again, the above cited judgment seems to be particularly consequential, because it is affirmed within the judgment that the Ecumenical Patriarchate is an orthodox church established in Istanbul, enjoying honorary primacy and a role of initiative and coordination over the entire orthodox world.⁴⁵

The non-Muslim minority foundations have also been facing difficulties regarding their property. Since the Lausanne Treaty entered into force, the judiciary and administrative authorities have adopted a narrow interpretation of the minority provisions. This has impeded the minority foundations to acquire any property other than those listed in their respective 1936 declarations.⁴⁶ Within the context of the legal “harmonization packages” adopted within the European Union accession process, a number of laws have been promulgated in order to allow and facilitate the acquisition of property for such foundations.

One such legislation is Law No. 5735 on Foundations, dated 20 February 2008. This new law does comprise of favorable provisions for the solution of property issues of these minority foundations.⁴⁷ These provisions facilitate the return of properties of foundations

Documents choisis par C. A. Colliard et A. Manin, Tome II Europe, éd. Montchrétien, Paris, 1970, 62.

40. See Mandelstam, A., “La protection des minorités” in *Recueil des cours de l'Académie de droit international*, tome 1, 1923, 418; RECHID Ahmed, “Les droits minoritaires en Turquie dans le passé et le présent” in *Revue générale de droit international public*, tome XLII, 1935, 299.

41. Cf. Akgönül, S., “Les Grecs d'Istanbul” in *Mésogeios - Méditerranée*, 6 (1999), 66.

42. The Directorate's competence is not limited with non-Muslim foundations, but rather includes all foundations.

43. See, *Case of Fener Rum Patrikligi (Patriarcat Oecumenique) v. Turkey*, no. 14340/05, Eur. Ct. H.R., 2008. Text in French.

44. ECtHR, App. No.14340/05, Admissibility decision, 12 June 2007, text in French.

45. *Case of Fener Rum Patrikligi (Patriarcat Oecumenique) v. Turkey*, supra n. 43.

46. See *infra*, fn. 48.

47. For an in-depth analysis see Öktem, E., “Statut juridique des fondations des communautés non-

expropriated as the result of the judicial practice that stemmed from the 1974 jurisprudence of the Court of Cassation (*Yargıtay*).⁴⁸ However, it does not account for properties that have been sold to third parties or to those expropriated when the associated foundations had been taken under government control, which due to the community's small population, *in concreto* applies to the majority of expropriated Greek Orthodox properties. Thus, insufficient to repair true material past losses suffered by these foundations, it would not be too artificial if we anticipate that the ECtHR will find more continuing violations of the right to property.⁴⁹

VI. RELIGION AND THE AUTONOMY OF THE STATE

Even though the overwhelming majority of the population in Turkey is deemed to be Muslim, the affiliations of all Muslims are not homogeneous. For instance, there is a strong *Alevi* presence in Turkey.⁵⁰ *Alevism* is a branch of Islam with deep roots within Turkish society and the history. It represents one of the most prevalent faiths actively practiced within the boundaries of the Turkey. Although it comprises of many similarities with the Shiite faith, *Alevism* does not embrace all Shiite traditions and rites.

Beyond the Shiite teachings, *Alevism* has been influenced by certain pre-Islamic beliefs and Christian heresies, such as “dualist Paulicianism,” as well as by the great Sufis of the 12th and 14th centuries. Its religious practices differ in certain aspects from those teachings uttered by the Sunni schools, such as the practice of prayer, fasting, and pilgrimage. In particular, *Alevi*s do not practice the daily prayers as the Sunnis do, but instead express their devotion through religious songs and dances (*semah*). Similarly they do not attend mosques, but meet regularly in their own places of worship called the *cemevi* (meeting and worship rooms).⁵¹

The intransigent secularist legal system presupposes a perfect neutrality of the State vis-à-vis these various denominations. However, the state apparatus and the political discourse have both been progressively soaked by Sunnite Islam. *Alevi*s have traditionally supported the *Kemalist* Republic because only through the Republic have they had an equal footing with Sunnis. Ironically, today, the State almost completely ignores the *Alevi* identity. *Alevi*s are not represented in the Directorate of Religious Affairs, and adherents have sometimes faced difficulties in civil employment.

Because *Alevi*s cannot create separate legal entities of religious character, they have come to organize within their communities through folkloric associations in order to obtain collective rights and to establish prayer houses. Some municipalities have granted *Alevi* communities buildings or lands to be used for prayer homes, but no uniform practice can be observed.

Numerous requests by *Alevi* associations and foundations to local authorities (e.g., municipalities, governorships, and ministries) to this respect (obtaining approval for the construction of *Alevi* prayer homes necessary for the performance of their religious rituals such as the *Semah*) have received as we see fit to put it. Aristotelian replies: “Muslims go

musulmanes en Turquie – la nouvelle loi sur les fondations,” in *Quaderni di diritto e di politica ecclesiastica*, Milano, 2008/2.

48. Through its judgment of 8 May, 1974, the Court of Cassation decided that the declarations of these foundations in 1936 should be considered as constitutive, and thus without an explicit clause within these declarations on the possibility to acquire new properties, the properties of these foundations should be presumed to be limited to only those enumerated within the declarations.

49. Previous jurisprudence of the ECtHR on the subject include, but are not limited to *Fener Rum Erkek Lisesi Vakfı v. Turkey*, no. 34478/97, Eur. Ct. H.R. 2007, text in French; *Yedikule Surp Pırgıç Ermeni Hastanesi Vakfı v. Turkey*, no. 36165/02, Eur. Ct. H.R., 2008, text in French; *Samatya Surp Kevork Ermeni Kilisei, Mektebi ve Mezarlığı Vakfı Yönetim Kurulu v. Turkey*, no. 1480/03, Eur. Ct. H.R., 2008, text in French.

50. *Alevi* leaders declare an approximate of 30 million adherents, while a figure of 12-15 *Alevi*s is more probable when international statistics are taken into account.

51. For more information on *Alevism* see Melikoff I., Hadji B.: *Un Mythe et Ses Avatars: Genèse et Evolution du Soufisme Populaire en Turque*, *Islamic History and Civilization Studies and Texts*, v. 20, Brill, 1998.

to the Mosque; since *Alevi*s are Muslim, they should go to the Mosque.”It is clear that such an approach is hardly compatible with the principles established by the jurisprudence of the ECtHR, which requires non-discrimination and state neutrality towards different denominations and prohibits state intervention into the internal affairs of religious communities.⁵²

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

The legal regulation of religion, especially its *forum externum* has been interpreted by the State as a *sine qua non* for the healthy function of the system. Unlike secular systems that adopt religious neutrality and the principle of non-intervention in their practices, the laic State feels it necessary for the proper function of government and democracy to intervene actively in religious and social relations. In the case of Turkey, as underlined by the Constitutional Court, this is due to the historical evolution of Turkish laicism, its relation with Islam, and the Republican order. As stated by the Court in its *Refah* Judgment of 1998⁵³:

The exercise of laicism in Turkey is different from the exercise of laicism in some western countries. It is natural that the principle of laicism is inspired by the conditions of each country and by the characteristics of each religion, and that the conformity or non-conformity between these conditions and characteristics project themselves on to the understanding of laicism creating different qualities and practices. In spite of the classic definition of laicism as the separation of religious and state affairs, due to the differences between the Islamic and Christian religions characteristics, the situations and results in our country and in western countries have differed. The adoption of the same understanding and level of practice of laicism in countries with a total different understanding of religious and religion understanding cannot be expected. This situation is due to the contract between the conditions and rules. Moreover, the laicism understanding in western countries embracing the same religion has differed. It has also been possible to interpret the concept of laicism differently, not only in different countries, but also in different eras, by different segments according to their own understandings and their political choices. Not only as a philosophical concept, but as an institution which has gained a legal character through laws, laicism is effected by the religious, social and political conditions of the country that it is practiced. Laicism which carries importance for Turkey due to the difference of the historical evolution, is a principle adopted and protected by the Constitution.

From this perspective, the State is active in intervening in the social evolution of religion and its relation with the State and individuals and between individuals. As expressed by some, state regulation of social norms is not only limited through education but also through religion.⁵⁴

VIII. STATE FINANCIAL SUPPORT FOR RELIGION

As cited above, although the State has no official religion and state aid to religion is legally non-existent, the Islamic “clergy” of the Sunni community are state-employed and under the supervision of the Directorate of Religious Affairs.⁵⁵ On the other hand, non-Sunni Muslim communities and non-official Sunni brotherhoods and sects do not get a

52. See *Serif v. Greece* [GC], no. 38178/97, § 45, Eur. Ct. H.R., 1999; *Hasan ve Chaush v. Bulgaria* [GC], no. 30985/96 Eur. Ct. H.R., 2000, § 86; *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 115, 123, Eur. Ct. H.R. 2001.

53. Turkish Constitutional Court, Judgment of 16.01.1998, E. 1997/1, K.1998/1.

54. Uğur, A., *supra* n. 33 at 101.

55. See *supra* Heading IV B, *State Organs on Religious Affairs*.

share from the general budget or any official state aid. This is also true for all non-Muslim communities. These groups tend to rely heavily on their members for the expenses of their religious activities, including the salaries of the personnel. While it is true that a state may provide a specific denomination financial aid, either directly or indirectly through the exemption of taxes,⁵⁶ these practices in Turkey has been criticized largely by non-Sunni groups.

IX. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

In general, the laic legal system recognizes the exclusive jurisdiction of civil courts. Religious courts or similar institutions do not exist and acts performed according to religious law are not accorded legal effect. Nevertheless, the system also recognizes in theory officially recognized non-Muslim communities derogation from the general procedures. By virtue of Article 43 of the Lausanne Treaty, the government undertook the obligation to adopt all necessary measures for the regulation of the family or personal statuses of non-Muslim minorities according to the customs of these groups. These measures were to be elaborated by a mixed commission, composed equally of representatives from the government and of the relevant minority groups. But, by late May in 1925 whilst the National Assembly actively being discussed the reception of the Swiss Civil Code, the Jewish Community of Turkey declared to the Ministry of Justice that the reception of the Code would render any regulation providing a special status for Jews unnecessary.⁵⁷ On the 15 September 1925, a group of Jewish elite met at the Chief-Rabbinate in order to notify officially to the Ministry of Justice that the Jewish community in Turkey had renounced the rights recognized under Article 42, al. 1 and 2 of the Lausanne Treaty. The chain reaction generated by this initiative forced both the Armenian and Greek communities in Turkey to put a stop to their own works on the elaboration of special provisions.⁵⁸

Within this context, there is presently a uniform and exclusive civil legal system in force in Turkey, which confers no legal validity to religious acts – be they Muslim or non-Muslim. However, the validity of the declarations put forth by these minority communities in 1925 is highly debatable from a strict legal perspective. For, it can at least be discussed in theory if a group of individuals can renounce, without any temporal restriction and with effects on future generations, rights recognized through an international treaty concluded between States.

X. RELIGIOUS EDUCATION OF THE YOUTH

A. *The Operation of Schools*

The Turkish education system was laicized with the adoption of Law No. 430 on the Unification of the Educational System. This legislation brought all educational institutions under the sole authority of the Ministry of Education. With the inclusion of Article 4 of the Law, which foresees the foundation of theology faculties in universities and vocational religious high schools to train religious personnel, *Madrasahs* and other religious educational institutions became obsolete. This law, which is still in force today, is protected under Article 174 of the Constitution and forms the moral and material basis of the Turkish educational system.

The Fundamental Law on National Education (Law No. 1739) refers directly to laicism in Articles 2, 10, and 12, stating the principal as being one of the major aims of

56. *Iglesia Bautista 'el Salvador' and Ortega Moratilla v. Spain*, no. 17522/90, 11 January 1992, DR 72, 258-259.

57. Bilsel, C., "Medeni Kanun ve Lozan Muahedesi," in *Medeni Kanunun XV. Yıl dönümü için*, Kenan matbaası, İstanbul, 1944, 43.

58. Bali, R. N., *Cumhuriyet Yıllarında Türkiye Yahudileri-Bir Türkleştirme Serüveni*, (1923-1945) 3rd edition, İletişim, İstanbul, 2000, 64-65.

national education and governing its overall function. Yet, Article 32 of the Law also foresees the formation of vocational religious high schools (*İmam-Hatip Lisesi*) in order to train the necessary religious personnel.

These religious high schools were granted more and more importance in the education system during the last decades due to the perception of these schools by right-wing political parties as a future basis of conservative votes. The laic state establishment, and especially the National Security Council, dominated by the presence of the Military establishment introduced measures in February 1997 to contain the rise in religious fundamentalism. One such measure was the introduction of compulsory eight year laic education.

These measures were also known as the “28 February Process,” which has been perceived by some to be a “covert-coup” in nature. They not only started the dissolution process of the pro-Islamist *Refah* Party Government, but also initiated the closure of the secondary school divisions of these high schools. Thus, it is now only possible for students to pursue education in these schools after completing eight years of compulsory laic education. The problems of the necessity of these high schools and the situation of their graduates are still important issues discussed within the public sphere.⁵⁹ Beyond the official school system, there is no restriction on private religious instruction.

Another important issue relating to religion and laicism in the education system deals with the compulsory religion classes. Religious education is probably the area where the dichotomy between written law and actual practice is most flagrant. From the legal perspective, under the secular education system, Muslim religious communities do not have the right to found private schools with recognized curricula and diplomas. Yet, in practice, it is widely known that a broad range of Muslim groups⁶⁰ have been able to operate their own private educational institutions that have been, at least on paper, adapted to the central education system.

Concerning non-Muslim religious communities, only officially recognized religious minorities may operate schools; and in any case they fall under the supervision of the Ministry of Education. The curriculum of these schools includes Greek Orthodox, Armenian Orthodox, and Jewish instruction. However, regulations have made it somewhat difficult for non-Muslims to register and attend these schools. The affiliation of a child’s mother or father to a minority community is reportedly checked by the Ministry of Education before the child could enroll in such a school; and moreover, non-Muslim minorities that are not officially recognized do not have the right to operate schools of their own.⁶¹

B. Courses on Religion

The central education system includes mandatory courses on religious culture and ethical education within the primary and secondary school levels, as laid down in Article 24 of the Constitution. The initial purpose of this provision was to provide a general religious culture to all students of all beliefs under the laic model of the State and, if properly applied, could be considered beneficial for social harmony and solidarity. However, in practice, these courses have undergone a progressive transformation towards becoming an Islamic catechism, in its Sunnite version, including such practices as Koranic memorization. The Ministry of Education has been indifferent and unresponsive

59. One such issue relates to the co-efficient applied to the graduates of technical high schools during university entry exams. If students apply to educational programs not related to their technical education, they receive a limited co-efficient, which restricts their chances of entry. It has been argued by conservative groups that this gives rise to discrimination in the access to education, while laic segments of the society clearly see these high schools as a threat and question the necessity of such a great number of these schools. Just so that the dialects are better understood, a simplified version of the main public argument is: “These schools are meant to prepare *Imams*; but there are more graduates than there are mosques”. Is this a quote?

60. These groups range from traditional religious orders such as the “*Naqshbendiye*” to the more religious networks such as the “*Fethullah Gülen*” community.

61. Also see International Religious Freedom Report 2008.

to what has become a blatant inconsistency in the laic educational system. For example, it was recognized with a decision adopted on 3 October 1986 by the “Supreme Council of Education and Instruction” of the Ministry of Education that Christian and Jewish students, though expected to attend these courses, could be exempted from the memorization of Muslim prayers and the instructions on the fulfillments of Islam’s basic requirements.⁶²

On July 1990, another decision exempted children “of Turkish nationality who belong to the Christian or Jewish religion” from religious culture and ethics lessons altogether. This is a tacit recognition that students of Muslim origin are obliged to perform such practice, regardless of their denomination or personal convictions. From the legal perspective, this decision is in itself contrary to Article 24, which dictates the compulsory nature of teaching religious culture and moral education in primary and secondary schools. Yet, it is interesting to observe that until now, no steps have been taken to bring the aforementioned decisions before administrative jurisdictions. Rather, the legal struggle was conducted against the content of religious education.

The issue was brought before the ECtHR by an *Alevi* student and her father. In *Hasan and Eylem Zengin v. Turkey*,⁶³ the ECtHR held unanimously that there had been a violation of the right to education guaranteed by Article 2 of Protocol No. 1 of the European Convention on Human Rights. The Court found that the syllabus and textbooks for teaching in primary schools and the first cycle of secondary schools gave a decisively greater priority to knowledge of Islam than that of other religions and philosophies. In addition, the textbooks not only gave a general overview of religions, but provided specific instructions on the major principles of the Sunnite Muslim faith, including its cultural rites such as the profession of faith, the five daily prayers, the Ramadan, the Pilgrimage, concepts of angels and invisible creatures, and belief in a world after death. Meanwhile, pupils received no teachings on the confessional or ritual specifics of the *Alevi* faith, although its followers represented a large proportion of the Turkish population. Although information with regards to the *Alevi* faith was taught in the ninth grade, the ECtHR accepted the claims put forth of the applicants. The applicants argued successfully that the instructions on the life and philosophy of the two great Sufis, who had had a major impact on the *Alevi* movement, were taught at an extremely late stage of children’s education, making it insufficient compensation for the shortcomings of the primary and secondary school religious teaching.

The ECtHR came to the conclusion that the religious culture and ethics courses in Turkey could not be considered to meet the criteria of objectivity and pluralism necessary for education in a democratic society and for the development of pupils’ religious critical thought. The ECtHR also criticized the existence of appropriate measures in the Turkish educational system that would ensure respect for parent’s convictions. State officials have expressed explicitly that the ECtHR decision on religious courses would not be binding on their own understanding and practice⁶⁴. In a speech, the President of the Directorate on Religious Affairs went so far as to criticize blatantly a High Administrative Court judgment that reinstated the ECtHR’s jurisprudence on the issue. He expressed that the judges had not only re-expressed the faulty rationale of the ECtHR, but that when it comes to religious education the reference point should be the Directorate because it had the competence and knowledge concerning the issue.⁶⁵

This argument virtually promotes the Directorate’s status to the *de facto* “chief religious authority” within the State apparatus and is in clear violation of the laicism foreseen by the Constitution. Indeed, under this vision, as a Sunni-Muslim dominated structure, the Directorate *de facto* incorporates discriminatory state practice and casts

62. Dinçkol, *supra* n. 14 at 143.

63. *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, Eur. Ct. H.R. 2007.

64. Regrettably, according to the Ministry of Education, no entity including the European Union has the competence to force measures on the State when it comes to religious education. KOTAN Betül, *Radikal* Newspaper, 11 October 2007.

65. *Milliyet* Newspaper, 7 March 2008.

doubt on the non-religious character of the State.

C. Restrictions on Training Non-Muslim Religious Teaching Staff

A major problem for the educational rights for non-Muslim minorities is the education of the clergy. The Jewish community seems to be satisfied with sending young rabbis to Israel for religious instruction. The Christian communities suffer from the lack of any active seminary. The Government has been long proposing to open a department of Christian Theology within an existing faculty of theology to train Christian clergy. While the Armenian Patriarchate seems eager to accept this proposal, the Greek Patriarchate is hostile to any solution other than the re-opening of the *Halki* seminary on the island of *Heybeli* in the Sea of Marmara. The seminary was closed in 1971 after the Patriarchate, in order to avoid being administered by the State, chose not to comply with a state requirement to nationalize⁶⁶. The possibility and the modalities of the re-opening are highly debated subjects in contemporary politics and have international implications⁶⁷: once opened, the Seminary will train not only the young priests of the Turkish Greek community, but also novices coming from all over the Orthodox world. Such a center of gravity could easily shift the balance of power between Orthodox ecclesiastical authorities.

XI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Although the use of religious symbols in public places is not restricted in general for individuals, specific limitations do exist for public employees, some categories of individuals and during the provision of public services.

D. Freedom to Wear Religious Symbols in Public Places

There exists no constitutional provision prohibiting the use of religious symbols by individuals in the private sphere of daily life. Individuals may freely use religious symbols both in the street and in the enjoyment of public services, as long as this use is not deemed contrary to the prohibition on the abuse of right provision under Article 14 of the Constitution.

1. General Restrictions

Beyond the Constitution, there are two general laws prohibiting the use of certain religious symbols for individuals. First, Law No. 671, on the Wearing of Hats, prohibits the use of traditional and religious headwear such as the *fes* and *turban* by individuals. It was adopted in 1925 in order to modernize the society and to breach the relation with the past. This law, although still in force and protected under Article 174 of the Constitution, has become null and void in practice. Second, Law No. 2596, on the Prohibition on the Wearing of Certain Garments of 1934, is still in force; and similar to Law No. 671, has constitutional protection under Article 174. Under Article 1 of Law No. 2596, clergy, of whatever denomination, cannot use religious clothing outside of places of worship and rituals. Any such use requires government approval. This legislation is practiced.

Beyond these two general laws, the sole limitation on the use of religious symbols in public involves the domain of education and the use of these symbols by public employees. The legal limitation of the use of religious symbols in education institutions may be divided into two categories: higher education and primary and secondary education. These two categories will be addressed separately due to the different legal background of the limitations in force. Similarly, the limitations brought to public

66. See International Religious Freedom Report 2008.

67. In a historical address given at the Turkish Parliament on 6 April 2009, the President of the United States of America, Barack Obama did not hesitate to raise this issue. For the text of the speech see http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/06_04_09_obamaspeech.pdf.

employees within the framework of institutional use of religious Symbols in public facilities will be addressed. Except for the restrictions cited above and detailed below, religious symbols may be used freely by individuals in other public spaces such as hospitals and court rooms.

2. Use of Religious Symbols in Primary and Secondary Schools

The main legislation concerning the limitation of religious symbols in primary and secondary schools is the regulation on the “Attire of Staff and Students in Schools Subject to the Ministry of National Education and Other Ministries” of 7 December 1981. The regulation provides a detailed description with regards to the uniforms and attire to be used by students in various types of primary and secondary educational institutions. Within the context of the regulation, no religious symbol whatsoever can be used during education. The only exception foreseen by the regulation concerns attire at vocational religious high schools. Under Article 12 of the regulation, only during courses on the Koran may female students cover their hair with an Islamic veil.

3. Use of Religious Symbols in Higher Education Establishments⁶⁸

The use of religious symbols in higher education establishments has become a complex problem in Turkey with many paradigms. For example, there exists an operational ban on religious clothing in higher educational establishments that is based on a complex legal matrix of constitutional interpretation. This ban is applied especially to clothing that shows heavy Islamic affiliation, such as the Islamic veil. From the legal point of view, there exists no constitutional disposition or law that brings such a prohibition. The prohibition started through various regulations and circulars adopted by different universities in reaction to the proliferation of the use of religious symbols by students. These acts were not only perceived as the exercise of the freedom of religion but also were deemed to represent the deepening organization of political Islam. The state establishment perceiving this rise as a threat to the laic state proceeded a ban on the wearing of religious symbols in classes and exams. There was great concern that after graduation these students would continue to demand for the right to use such attire while in public employment.

The growing debate around the issue forced the National Assembly to adopt Law No. 3511 in 1989, which inserted additional Article 16 to Law No. 2547 on Higher Education. Article 16 stipulated that “[w]ithin higher education establishments, classrooms, laboratories, clinics, and polyclinics and in corridors it is obligatory to be in modern clothing and looks. The closing of the neck and hair with a cloth or with a turban due to religious reasons is unrestricted”. The legislation was taken to the Constitutional Court, which annulled the Law on 7 March 1989, finding it contrary to the Preamble and Articles 2, 10, 24, and 174 of the Constitution.⁶⁹

To bypass this judgment, the National Assembly adopted in 1990 Law No. 3670, inserting additional Article 17 into the Higher Education Law and bringing a general amnesty for students sanctioned because of the use of religious symbols. Under additional Article 17, “[w]ithout being contrary to legislation in force, clothing and attire is unrestricted in higher education establishments”. Lacking a clear prohibition in the Constitution, this simple provision would allow the use of religious clothing and attire in higher education establishments. Again, the legislation was taken before the Constitutional Court. This time it found, naturally, that the law in question was not

68. For a brief but more developed work on this issue see UZUN Mehmet Cengiz, “The Turkish Constitutional Court and The Use of Religious Symbols in Higher Education Establishments: The Case of 5 June 2008.” Working Paper, International Association of Law Schools Conference on Constitutional Law, September 11-12, 2009, Hosted by American University Washington College of Law, Georgetown University Law Center, Washington DC, <http://www.ialsnet.org/meetings/constit/papers/MasterBookletConLaw.pdf>.

69. Turkish Constitutional Court, Judgment of 7 March 1989, E: 1989/1 K: 1989/12.

contrary in letter to the Constitution.⁷⁰ However, the reasoning of the Court directly forced an interpretative restriction on the executive branch. Under Article 153 of the Constitution, “[t]he Constitutional Court Judgments... are binding on the legislature, executive and judiciary, administrative offices, natural and legal persons”. Within this perspective, because additional Article 17 contained the clause “without being contrary to legislation in force” it also included the principals set forth in the Constitution and the Court’s jurisprudence. In view of the fact that the Court’s jurisprudence of 1989 was clear on the issue, the freedom brought through additional Article 17 could only be construed “as not including the closing of the neck and hair with a cloth or turban due to religious beliefs.”

Today, this interpretation of the Court is still the main reference for higher education establishments; and the prohibition on religious symbols, especially the Islamic veil, is actively exercised. In 2008, the National Assembly tried to amend the Constitution directly in order to force a constitutional interpretation on the Court. Law No. 5735 adopted by a vast majority foresaw a two step formula to the equation. First, the phrase “and in all enjoyment of public services” would be added to the Article 10/4 of the constitution, amending the text to read “State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings and in all enjoyment of public services”. Because education is a right under Article 42 of the Constitution, civil employees would not be able to discriminate due to attire during its enjoyment. The second step involved inserting the provision “No one can be denied, for any reason at all, the right to higher education in cases not openly stipulated by law. The limitations of the use of this right are defined by law” after paragraph 6 in Article 42. Hence, the Court would have to re-examine its own jurisprudence in face of the non-existent “openly stipulated law” and higher education establishments would have to annul their own circulars prohibiting the use of religious symbols.

The issue of Law No. 5735 as an amendment to the Constitution was taken to the Court, which, amidst vast public debate on jurisdictional issues, annulled the law, finding it contrary to the Constitution.⁷¹ Although under Article 148/1 of the Constitution “Constitutional amendments shall be examined and verified only with regard to their form...”, the Court cited its own jurisprudence,⁷² in which it had already stated that “no law can be proposed or adopted which aim to change these principles [laid down in Article 2] through direct or indirect amendments to them or to other provisions of the Constitution. Any law adopted contrary to these conditions cannot at all effect and amend present provisions of the Constitution nor bring a Constitutional rule.”

Having bypassed the jurisdictional problem through jurisprudence,⁷³ the Court found that the proposed constitutional amendments had the main aim of un-restricting religious symbols in higher education institutions without eliminating public fears, foreseeing safeguards against abuses and inputting measures necessary for the protection of third party rights. According to the Court, the unlimited use of the religious symbols would create pressure on non-believers and on Muslim females and would also damage state neutrality by opening a pathway for religion to be used for political purposes. According to the Court, in light of both its own and the ECtHR’s standing jurisprudence,⁷⁴ the

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

71. Turkish Constitutional Court, Judgment of 5 June 2008, K: 2008/116, E: 2008/16.

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

73. Some of its judgments accepting its jurisdiction on constitutional amendments are 16 June 1970, K:1970/31; 13 April 1971, K: 1971/37; 15 April 1975, K: 1975/87; 23 March 1976, K: 1976/19; 12 October 1976, K: 1976/46; 27 January 1977, K: 1977/4; 27 September 1977, K: 1977/117.

74. *Dahlab v. Switzerland*, NO. 42393/98, Eur. Ct. H.R. 2001; *Refah Partisi and others v. Turkey*, supra n. 11; *Şahin v. Turkey*, supra n. 7. Especially the *Şahin* jurisprudence has been criticized by some due to the extensive interpretation of the margin of appreciation doctrine, withdrawing European supervision from the relation between state and religion. See Bennoune, K., “Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women’s Equality under International Law,” in *Columbia Journal of Transnational Law* 2007, 45, n. 2, 381; Bottoni, R., “The Origins of Secularism in Turkey,” in *The Ecclesiastical Law Journal* 2007, 9, 176.

proposed amendment could not be proposed under Article 4 of the Constitution. Thus, today, the operative ban on the use of “expressive” religious symbols such as the Islamic veil in higher education establishments is still applied.

E. Institutional Use of Religious Symbols in Public Facilities

In the public sphere, under additional Article 19 of Law No. 657 on Public Employees, public employees must observe the rules of attire regulated under laws and regulations. To this end, under Article 1 of the “Regulation on the Clothing and Attire of Staff Working in Public Establishments and Institutions” of 25 October 1982, public employees must dress in conformity with the reforms and principles of Atatürk’s Revolution. The regulation stipulates in great detail the attire and garments that public employees, both male and female, may wear and use during their public work. Within this respect, public employees cannot wear or use any sort of clothing (including clothing, jewelry, veils, and other objects) that may comprise religious meanings. However, emblems or badges of the establishment or of schools may be worn. Under Article 15 of the regulation, the attire of the Directorate of Religious Affairs staff is to be decided by the Directorate and the Prime Ministry, as long as no conflict exists with Law No.2596 on the “Restriction of the Use of Certain Garments.” Within this sense, the use of religious symbols by the staff of any establishment or institution that provides public service is restricted. For example, under Article 6 and 7 of the regulation on the “Attire of Staff and Students in School’s Subject to the Ministry of National Education and Other Ministry’s” of 7 December 1981, all staff, including temporary staff, must abide by the regulations set forth by the “Regulation on the Clothing and Attire of Staff Working in Public Establishments and Institutions.” Similarly, other professionals who provide civil service, such as lawyers, judges, and prosecutors, cannot use religious symbols during work.

XII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Even though under Article 26 of the Constitution “[e]veryone has the right to express and disseminate this thoughts and opinion by speech, in writing or in picture or through other media, individually or collectively”, this right “may be restricted for the purposes of protecting... the reputation and rights and private and family life of others,” or if it is used in violation of the abuse of rights regime under Article 14 of the Constitution. In this context, paragraphs 3 and 4 of Article 175 of the Former Penal Code sanctioned the crime of blasphemy. According to the article,

Whoever blasphemes against God, a religion, a prophet, a denomination or a sacred book (...) or vilipends or outrages any person because of his beliefs or the fulfillment of his religious duties (...) shall be imprisoned for 6 months to a year and be punished by a fine of 5 000 to 25 000 Turkish liras.

The secondary penalty attached to the crime defined at the 3rd paragraph shall be doubled in case the crime is committed by publication...

Subsequent to the adoption of the Constitution of 1982, Law No. 3255 amended the article on 9 January 1986 so that it only protected “celestial” (monotheistic-abrahamic) religions against the crime of blasphemy. The amendment was deemed contrary to the Constitution by the Constitutional Court.⁷⁵ The Court found that the discriminatory character of the article, which differentiated between believers of celestial and non-celestial religions, violated the principle of equality laid down in Article 10 of the Constitution and it was incompatible with the principles of the laic Republic (Article 2) and the freedom of religion (Article 24). On the other hand, the Court of Cassation had already adopted a restrictive interpretation of Article 175 of the Penal Code. According to this interpretation, as far as the expression did not directly target the sacred values of the individual as such, but rather was directed towards “the God, the Holy Book, the Prophet”

75. Turkish Constitutional Court, Judgment of 4 November 1986, K: 1986/26, E: 1986/11.

of the victim, the moral element required by the article was esteemed to be inexistent. It is for this reason that jurisprudence relating to Article 175 is quite scarce.

Within the framework of the European Union accession process, and the reforms implemented for this end, Turkey adopted Law No.5237 (also known as the New Penal Code) on 26 September 2004, entering into force on 1 June 2005. Unlike the Former Penal Code, which framed blasphemy under crimes against the freedom of religion, the problem of blasphemy is treated under the provisions devoted to “Crimes against honor” as an aggravated form of insult, specified in Section 8 of the second chapter of the second book. Paragraph b and e of Article 125 foresee a sentence of up to a year of imprisonment for the crime of insult when “the crime is committed against a person because of the expression and the diffusion of his ideas or his religious, social, political and philosophical beliefs or the change of these latter, or his behavior according to the requirements of a religion”; or when “the crime is committed by reference to the values considered as sacred by the religion that the victim belongs to.”