

## The Effects of Judicial Bodies' Interpretation Forms Of Legal Rules in Turkey on the Education Freedom in Universities<sup>1</sup>

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### Abstract:

*The freedom of conscience and belief can be defined as the freedom of people in what they wish to believe without the compulsion of political power and other people by means of laws and other means. The belief of religion that can be accepted as the natural extension of the freedom of conscience and belief is to be free in doing the requirements of the religion that the people believe in with its rituals. While it is not possible and effective to make restrictions in freedom of belief, today, there are some restrictions in some judicial systems in freedom of worship. With the principle of secularism which is settled among the principles that the alteration of which are not even be proposed, there have been some different decisions about the administrative acts that cause the violation of belief and worship freedom in the implementation of the right of education which is secured with Constitutional Law in Turkish Constitution. In this study, the effects of the incompatible decisions of administrative jurisdiction about the implementations of the administration related to the education right of students at universities, which is secured by the Fundamental Law, on the freedom of education, especially for the last ten years, will be examined.*

### Keywords:

Freedom of belief, freedom of worship, secularism, decisions of administrative jurisdiction

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## INTRODUCTION

After founded in 1920, Turkish Grand National Assembly adopted some legal arrangements in public and private law mostly by way of borrowing them from western states. Many reforms were introduced in various fields after the proclamation of the Republic. As for clothing, western civilization was adopted. In 1928, the provision declaring that the "Religion of the State is Islam" was removed from Turkish Constitution, which was followed by adding the expression "secularism" to the Constitution in 1937. Being considered by subsequent constitutions as one of the unchangeable features of the State, this principle has existed to date.

There are some discrepancies in interpretation of Constitutional provisions which are the fundamental norms in the applicable law system in Turkey. After 1995, interpreting and applying the secularism principle in different ways led to segregation throughout the country. Misunderstanding the mentioned principle and sometimes some artificial factors resulted in breach of the right to religion and conscience of the students, public officials and even the citizens on the street. The problem was exacerbated, let alone solved, after applications made for legal remedy of such breaches due to unilateral point of view of the courts. Starting from 2007, interventions to the clothing preferences of the university students came to an end as the heads of some public institutions were changed. Thanks to the actual reconciliation adopted in Turkish Grand National Assembly in 2013, the issue was off the national agenda without any amendment to the Constitution.

In this study, the consequences of judicial decisions on students and educators will be examined, especially in the last 20 years in Turkey, with reference to the court rulings on the understanding and implementation of the secularism principle concerning the clothing preferences of the individuals.

### *Constitutional Court's Stance on the Limits of Right to Education*

As for the lawsuit filed with the argument that the Law no. 3511 which states, "covering neck and hair with a cover or turban because of religious beliefs is allowed in higher education institution" is in conflict with the Constitution, in its Ruling of 07.03.1989 no. E. 1989/1, K. 1989/12, K., Constitutional Court briefly stated that, "In the secular state, the sacred religious sentiments can never be confused with the legal arrangements. Whilst arranging the clothing of women in higher education institutions counted as public institutions, whatever their appropriateness to religious necessity, they are valid because of their religious beliefs in the use of headscarves and contradict the principle of secularism by basing an arrangement in the field of public law on religious principles. Any rule that is set according to the religious rules has no legal characteristic. Legal order is a state which excludes religious order and builds and maintains its existence on law. The laws cannot be based on or bound by the religion." In this ruling, secularism was defined

as an ideology and it was underlined that principle of rule of law in a law state take its strength from secularism, and Turkish revolution makes sense with secularism.

With regard to the provision which reads, “Clothing is free in higher education institutions, as long as it is not in breach of the applicable laws” that is inserted to the Law on Higher Education Board by Law no. 3670, in its ruling of 09/04/1991 and no. E. 1990/36, K. 1991/8, K, the court underlined that “it is not contrary to freedom and autonomy that the state sets rules of order, just as it is not related to freedom and autonomy to join the classes with the clothes and covers that are not compatible with contemporary appearance, and that State affairs and politics cannot be interfered with religious sentiments as required by secularism principle” and ruled that the statement “as long as it is not in breach of the applicable laws” must be construed as, as long as it is not in breach of the Constitution which is the most powerful law, and the law amendment text was not in conflict with the Constitution by referring to its former decision of 1989. Mentioned Constitutional Court decision was defined as “dismissal with a comment” (Limoncuođlu, 2008).

The secular nature of the state requires that it does not prevent enjoying religious freedoms, but on the contrary, it helps facilitate religious freedoms by laying the ground for their fulfilment. Nevertheless, in its reasoned ruling of 7.3.1989 and no. E: 1989/1, K:1989/12, Constitutional Court interpreted secularism principle in the opposite direction where it stated that “It is unthinkable that the state power makes special contribution to religious belief in education.”. It is argued that in Western democracies, partial support to religions is not contrary to impartiality, provided that the state does not distinguish between different religions and sects (Erdođan, 2004).

In the decisions of Constitutional Court, secularism has been described as a contemporary organizer of social breakthrough, political, social and cultural life, far beyond being a legal principle. High court used the reform laws concerning the founding philosophy of the Republic as supporting benchmark norms, and some of its decisions made the impression that it considers them superior the Constitutional rules (Özkul, 2014).

Constitutional Court acknowledges limitless freedom of religion and conscience and states that any worship which go beyond the spiritual life of an individual and affect social life can be restricted (Özbudun, 2004). It is necessary that those who participate in religious rituals and ceremonies have not intended to overthrow the secular republic so that this freedom can be regarded as a fundamental right. It abolishes the opportunity to use of any civil or political right supporting, either individually or collectively, any political program which is inspired by religion or includes religious concepts, and it provides no ground for referring to any religious values and symbols during political activities (Erdođan, 2004).

Clothing is not just a formal look, it is a way of reflecting personality. The Constitutional Court admits that the issue of clothing is limited to the principles of the Turkish Revolution and Atatürk, and thus is not related to freedom of conscience. It recognizes that it is not possible to argue that wearing a turban, which is contrary to the secularism principle and secular educational rules of the Constitution, is a "democratic right" (Limoncuoğlu, 2008).

### *Stance of European Court of Human Rights*

The European Convention on Human Rights (ECHR), to which Turkey is a party, states that no one can be deprived of his right to education, everyone has freedom of thought, conscience and religion. This right also includes freedom to express one's religion or faith by way of worship, teaching, practice and rites, either alone or together, along with the freedom of changing religion or faith. There is a provision which reads, "freedom to express one's religion or faith can only be restricted, in a democratic society, by law and compulsory measures with the aim of ensuring public order, public health or ethics or others' rights and freedoms."

European Court of Human Rights (ECtHR) found that banning turban in universities to be in conformity with ECHR. Leyla Şahin, a student of the Istanbul University Cerrahpaşa Medical School, was not able to take part in lectures and exams, nor be enrolled in the university due to wearing a turban, and her lawsuits against these acts turned no result in domestic law. The student took the issue to ECtHR and argued that such practice was in conflict with some rights governed in ECHR, namely protection of private life and family life, freedom of thought, conscience and religion, freedom of expression, prohibition of discrimination and right to education. During its examination, ECtHR acknowledged that the intervention had legitimate aims for the protection of the rights and freedoms of others and public order, pointing to the existence of a legally prescribed interference in a right protected at the ECHR, and stated that the ban was necessary in a democratic society. The rationale of the decision which reads, "In democratic societies where a considerable number of religions coexist in one and the same population, it may be necessary to limit the freedom of the individuals to show their religion or belief, in order to reconcile the interests of various groups and ensure that everybody's beliefs are respected" is interesting. ECtHR underlined the rightfulness of such restriction in a democratic society in its following evaluation: "There are extremist political movements in Turkey trying to impose their religious symbols and a society concept based on religious dogmas on the whole society, and the parties may take attitudes based on historical experience against such political movements in accordance with the contractual provisions..." and it concluded that such practice was not in conflict with ECHR.

### *Administrative Judiciary's Stance*

As for making decisions on clothing, it may be said that administrative judiciary refer to the decisions made by Constitutional Court, and the decisions of administrative judiciary are, in essence, in the same direction as those of Constitutional Court. The decisions made by administrative judiciary may be divided into two in terms of the public officials benefiting or wishing to benefit from education service and those working in the education services.

#### *Stance of the administrative judiciary on students regarding their clothing*

Article 4 of Higher Education Law no 2547 which governs higher education in Turkey states that the purpose of higher education is to raise the students in line with the Ataturk's Reforms and Principles, as citizens of Ataturk Nationalism. In Article 5 of the mentioned law, furnishing the students with the awareness to serve Ataturk nationalism in line with the said principles is listed among "main principles" of higher education.

In her lawsuit petition, the plaintiff who is even not yet sure whether or not she will be a graduate student but wants to become a student and who has graduated from the faculty of theology and thus entering the Postgraduate Education Entrance Examination argued that she abided by the rules taught to them throughout her education and wore a headscarf, entering the exam would not change her legal status, and prohibiting wearing a headscarf was illegal. 8th Chamber of Council of State stated in its decision of 27.09.2005 no. 2004/867 E., 2005/3796 K., "In the preamble of 1982 Constitution, commitment to Ataturk's Principles and Reforms and secularism is adopted as a principle; in article 2, it is stated that Republic of Turkey is a democratic, secular and social state of law built on the fundamental values stated in the preamble. In article 42 of the Constitution, it is set as a rule that such principles are also valid for education, and it is stated that freedom of education will not relieve the duty of loyalty to the Constitution.

In parallel to those provisions which are included in the Constitution and which reflect general will of the Republic of Turkey, it is stated in article 4 of Higher Education Law no 2547 that; the purpose of higher education is to educate the students as citizens of Ataturk nationalism in line with Atatürk's Reforms and Principles. In Article 5 of the mentioned law, furnishing the students with the awareness to serve Ataturk nationalism in line with the said principles is listed among "main principles" of higher education. The statement in the Guide for Postgraduate Education Entrance Examination prepared in the framework of such arrangements which reads, "The candidate will not be allowed to take the exam unless she is bareheaded and her/his clothing is in line with the applicable legislation. The exam of the candidates wearing headscarves will be considered invalid even if they have taken the exam" is clearly not unlawful. The court ruled dismissal of the case by stating, "Besides, it is obvious that the provision in the guideline is required by a

legal obligation in that the candidate can easily be recognized and the parallelism with the identity to be arranged in the future can be achieved.”

*In terms of public officials working in education services*

When the public official who was appointed as the Kindergarten manager of another school when she was working as a primary school teacher went to see the school he was just appointed to and to take the office, she was not allowed to the school since she had a photo on her id wearing headscarf, and she was not allowed to take the office as manager. Moreover, an inquiry has been filed and a disciplinary penalty was imposed following the report prepared as a result of the investigation. In addition, she lost the manager position and was appointed as a teacher to another place in the province. In her statements taken during the inquiry launched against her, the plaintiff teacher expressed that she was not wearing headscarf in the school where she works, but the witnesses stated that she covered her head from time to time when she was coming to and leaving the school.

In its decision of 26.10.2005 no. 2004/4051 E., 2005/3366 K., 2nd Chamber of Council of State stated that; according to article 176 of the Constitution, the Preamble which includes fundamental views and principles that the Constitution is based on falls under the scope of the Constitution, and the said preamble is a source which sets out the purpose and direction of the Constitutional articles as it includes fundamental views and principles that the Constitution is based on. In the preamble of the Constitution, it is stated that, in line with the reforms and principles introduced by Ataturk; no thought or idea shall be protected against Ataturk's reforms and principles as well as civilizationism, and that sacred religious feelings shall absolutely not be involved in state affairs and politics, as required by the principle of secularism; every Turkish citizen has an innate right and power, to lead an honorable life and to improve his/her material and spiritual wellbeing in a civilized order and the rule of law, the letter and spirit of the Constitution must also be respected in this respect and it must be interpreted and implemented with an absolute loyalty.

An order which is based on “contemporary education principles” stipulated in article 130 of the Constitution cannot be an environment where principle of secularism is ignored. It is unthinkable that this article, which prohibits any act against existence and independence of the State, integrity and indivisibility of the country, to exclude secularism considering its contribution to nationalism, independence and national integrity. The individuals who will participate in any scientific study steered by logic and observation should be raised by ensuring that they are not faced with any factor other than scientific requirements. An education shaped by scientific requests is only possible by keeping it away from dogmas and any effect in conflict with science. It is unquestionable that education will be performed in line with the reforms and principles of Ataturk and the contemporary science and education principles under the supervision and inspection of

the State, and no education institution in conflict with the mentioned principles can be opened.

On the other hand, article 2 of National Education Law no 1739 sets out the overall objective of Turkish National Education as to ensure that all individuals of Turkish Nation are the citizens who are committed to the reforms and principles of Ataturk as well as Ataturk's nationalism as referred to in the Constitution and who assume and fulfil their duties and responsibilities towards the Republic of Turkey, a democratic, secular and social state of law based on human rights and the fundamental principles referred to in preamble of the Constitution.

It is obvious that during providing education service the public officials working in a education-related field must avoid any act and behavior which may be in conflict with these fundamental principles included in the legal arrangements referred to and explained above, since the educators influence the students not only with their knowledge and manners and behaviors but also with their look.

Accordingly, although it is stated that the plaintiff is not wearing headscarf while she was at school, it is also stated that she sometimes wears headscarf at, coming to or leaving school, and considering that the plaintiff was already imposed two disciplinary punishments for similar behaviors before (otherwise this offence would fall under the scope of remission of disciplinary punishment) and that the students of the school where she was appointed as the manager are too young to make a rational evaluation and inference; the plaintiff who should be setting a good example both in education environment and outside of it which education is reflected on somehow violated these fundamental principles included in the legal arrangements referred to and explained above, even though only when coming to and leaving the school. Therefore, the court has ruled that the transaction which orders her appointment as manager to be annulled and to remove her from her older school at city center and appointing her as child development teacher in a village school is not illegal, nor is it in conflict with public benefit and the requirements of public service.

In its decision of 2.5.2005 no. 2004/4552 E., 2005/1547 K., 2nd Chamber of Council of State stated, with regard to a lawsuit filed by a teacher working in an Imam-preacher high school, that; the plaintiff teacher not assisting the school management in ensuring that the By-law on Clothing of the Officials and Students at the Schools Affiliated to Ministry of National Education and Other Ministries is respected, the public official working in an educated-related field not providing due assistance to the change occurred in mixed education regarding their clothing, i.e. the female students in Imam-preacher high school removing their headscarves, their any attitude which may violate secularism principle would result in administrative and forensic liability.

## CURRENT SITUATION

In Turkey, general regulatory transactions on the clothing of the students and the women working in education-related fields and in other public institutions and organizations are governed in by-laws. According to article 5 of 'the By-law on Clothing of the Personnel Working in Public Institutions and Organizations' set by the National Security Council following the coup in 1980, the women working in public sector is obliged to be bareheaded at all times.

Starting from 2007, interventions to the clothing preferences of the university students came to an end at different times at different universities, as the heads of some public institutions were changed. However, radical change started in 2013. Thanks to the actual reconciliation adopted in Turkish Grand National Assembly in 2013, the by-laws with no power of law which restrict fundamental rights and freedoms regarding freedom of faith and worship were amended, without any amendment to the Constitution. Therefore, the issue was off the country's agenda.

By-law on Clothing of the Personnel Working in Public Institutions and Organizations of 25.10.1982 was amended in 2013, and the public officials, except for those working in security services, judges, prosecutors, Turkish Armed Forces, and those working in education institutions were allowed to wear headscarves because of their religious believes. On the other hand, the By-law on Clothing of the Officials and Students at the Schools Affiliated to Ministry of National Education and Other Ministries which was effected by the Decision of Council of Ministers of 22/7/1981 no. 8/3349, which governs the clothing of students was abolished. In addition, Council of Higher Education abolished any arrangement which restricts the persons covering their heads because of their religious believes. Thus, it may be argued that it was not until 2013 when the principle of secularism referred to in Constitution is implemented with its true meaning, except for some exceptional duties. However, the Constitution was not amended despite these changes. Therefore, there is no guarantee that this issue will not come up in the future. In brief, 5 years ago, disciplinary procedure was initiated against the student joining the classes wearing headscarf or the professors allowing them were subject to disciplinary sanctions, today disciplinary and criminal procedures are launched and punishments are imposed against the professors who are not willing to allow the students wearing headscarves to their classes. What is contradictory is the limitations on the restrictions on the fundamental rights and freedoms in Constitution is only possible by law, whereas the restrictions on the freedom of faith and worship is made by the regulatory transaction of the executive body having the power of by-law and the transactions of the administration implementing such restrictions are considered legal by the judicial bodies.

## CONCLUSION

In Turkey, official interpretation of secularism does not provide any assurance in favour of the individuals, especially those made by the Constitutional Court, and an ideological meaning, rather than a legal meaning, is attributed to the term secular republic. In other words, secularism which should secure human rights constitutes the mainstay of the hierarchical understanding built on human rights. In Turkey, secularism has been interpreted as an ideology which legitimizes government control over religious life by means of judicial bodies. Enjoying fundamental rights has been considered as a potential threatening government authority. Turkish Constitutional system is clearly different from western constitutional democracies which are based on universal principles of human rights in such that it prefers State over free individual. Hence, Constitution of 1982 envisages a limited democracy which is based on the principles set out in the Constitution.

In its decisions, Constitutional Court interprets any arrangement offering freedom in clothing as allowing wearing headscarf for religious reasons and regards an arrangement in the field of public law as a violation of secularism principle based on religious principles. Whereas legal order is a state which also respects religious rules, not a state that excludes religious order.

ECtHR is mistaken to believe that the women of a country 99% of whose population is Muslim wear headscarves to show their religious faith, not because they listen to the voice of their conscience. Moreover, the Court recognizes the likely indeterminate oppression on other elements of religious diversity over the preferences of the persons covering their head.

The comment by the Council of State, where it is stated that the reason for the individuals covering their heads in universities to prefer such clothing is because they are under the influence of the traditions, should be considered a compulsion and discrimination to read people's minds.

There is no arrangement in any article of the Constitution which allows restriction of right to education due to wearing headscarf. By-laws restricting religious freedoms are also in conflict with the Constitutional provision which stipulates that fundamental rights and freedoms can only be restricted by law.

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