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Turkish Democracy and the Evolving Interpretation of the Principle of Secularism: The European Court of Human Rights' Perspective

Preliminary Remarks

The Republic of Turkey is not the only Muslim-majority country where secularism is a constitutional principle,[1] but is the one upon which scholars, politicians and the public have most focused.

The principle of secularism (*laiklik*) was inscribed in the Turkish Constitution in 1937. This achievement constituted the apex of the reform process led by Mustafa Kemal, known as Atatürk ("Father of the Turks").[2] Count Léon Ostrorog, legal adviser to the Ottoman Empire, defined it "one of the most considerable events that has happened in the history of the East since fourteen centuries," "a revolution that the world of Islam had never seen"[3] – and this statement still holds true.[4]

In 1978, UNESCO's General Conference adopted a resolution "[r]ecalling that the hundredth anniversary of the birth of Mustafa Kemal Atatürk, the founder of the Republic of Turkey, will be celebrated in 1981" and "[b]earing in mind that he was an exceptional

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[1] This is the case of the Constitutions of Azerbaijan (Art. 7§1), Burkina Faso (Art. 31), Chad (Art. 1), Guinea (Article 1§1), Mali (Art. 25), and Senegal (Article 1§1). See also Massimo Papa, Lorenzo Ascanio, *Shari'a* (Bologna: Il Mulino, 2014), 96.

[2] See Rossella Bottoni, *Il principio di laicità in Turchia. Profili storico-giuridici* (Milan: Vita e Pensiero, 2012), 99-161.

[3] Léon Ostrorog, *The Angora Reform. Three Lectures Delivered at the Centenary Celebrations of University College on June 27, 28 and 29, 1927* (London: University of London Press, 1927), 14 and 70.

[4] Ergun Özbudun, "Antecedents of Kemalist Secularism: Some Thoughts on The Young Turk Period," in *Modern Turkey. Continuity and Change*, ed. Ahmet Evin (Opladen: Leske Verlag, 1984), 25.

reformer in all the fields coming within UNESCO's's competence,"[5] and declared 1981 "The Year of Atatürk."[6]

Turkey is one of the few Muslim member States of the Council of Europe (CoE) and a candidate country for accession to the European Union. In the 2004 *Working Document on Issues Arising from Turkey's Membership Perspective*, the European Commission stated that

> [a]s a Moslem secular country with a functioning democracy, it is a factor for stability in the region. […] If Turkey can pursue a path of democracy that combines secularism with a Moslem social and cultural environment, it could offer a good example for other countries in the region.[7]

Further,

> [t]he successful inclusion of Turkey in the European integration process would give clear evidence to the Moslem world that their religious beliefs are compatible with the EU's values[8]

and –one may add– it would make it evident to the Western world, as well.

Such a compatibility is assessed, inter alia, on the basis of the establishment of a democratic regime characterised by a specific relation between law and religion. As known, this relation has been defined, in Europe and more broadly in the West, by the process of secularisation, which has led to the separation between the political and religious spheres.[9] This evolution has been considered so peculiar to the West that, in Max Weber's view, the history of law in this

[5] The text is available at http://unesdoc.unesco.org/images/0011/001140/114032e.pdf, 69.

[6] Jacob M. Landau, "Atatürk's Achievement: Some Considerations," in *Atatürk and the Modernization of Turkey*, ed. Jacob M. Landau (Boulder: Westview Press, 1984), xiii.

[7] The document, dated 6 October 2004, is available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/issues_paper_en.pdf, 6 and 11.

[8] Ibid., 12.

[9] See René Rémond, *Religion and Society in Modern Europe*, trans. Antonia Nevill (Oxford: Blackwell, 1999).

part of the world coincides with the history of its secularization.[10] Further, scholars such as René David have regarded secularisation of law as an element so unique to justify the classification of rather diverse legal systems –like African, Islamic, Chinese and Japanese laws– into the same category, merely on the grounds that they are all based on different concepts from those prevailing in the West.[11]

As regards Turkey, secularization of law has been regarded as epitomised by the constitutionalisation of the principle of *laiklik*. Thus, secularism was not devised as a mere criterion to regulate the relations between the State and religion(s), but it has become intrinsically linked to democracy.[12] Whereas the greatest majority of European states are regarded as democratic although they have not defined themselves as secular in their respective Constitution,[13] in the Turkish case conventional wisdom has held that democracy could only be protected, inter alia, by safeguarding the constitutional position of the principle of *laiklik*. Likewise, the current revision of the traditional understanding of secularism in Turkey, as carried out by the AKP-led government, is being seen by a large part of contemporary observers as undermining the country's democracy.[14] The fol-

[10] Silvio Ferrari, *Lo spirito dei diritti religiosi*. *Ebraismo, cristianesimo e islam a confronto* (Bologna: Il Mulino, 2002), 37.

[11] *Ibid*., 23.

[12] See Rossella Bottoni, "The Constitutional Court and the Principle of Secularism (*Laiklik*) in Turkey)," in *Diritto penale della Repubblica di Turchia. Criminal Law of the Republic of Turkey*, ed. Silvio Riondato and Rocco Alagna (Padova: Padova University Press, 2012), 75-8.

[13] Legal secularism (proclaimed by few countries) should be conceptually distinguished from substantial secularism (which must ground any contemporary democracy). The latter may be understood as an expression encompassing a number of principles and values, including the respect for freedom of conscience and for its individual and collective exercise, the prohibition of direct and indirect discrimination of individuals, the autonomy of the political sphere and the civil society as regards religious and ideological norms. See *The Universal Declaration on Secularism in the XXI Century*, subscribed by 284 scholars in about 30 countries, http://www.lemonde.fr/idees/article_interactif/2005/12/09/declaration-universelle-sur-la-laicite-au-xxie-siecle_718769_3232.html (in French in the original version).

[14] See for example Katerina Mystakidou, "The Broadening of the Islamic Grip on Turkey," *Balkan Studies* 47 (2013): 211-3.

lowing paragraphs will assess the soundness of this view by examining the European Court of Human Rights' (ECtHR) position on the link between secularism and democracy in Turkey.

The Unconditional Defense of Laiklik as the Necessary Instrument to Protect Democracy: the Refah Partisi and Leyla Şahin Cases

Turkey became a member State of the Council of Europe as early as 13 April 1950.[15] Having joined the CE only eleven months after its foundation, it took part in the drafting of the European Convention on Human Rights (ECHR). Whereas there was virtually unanimous consent on that paragraph 1 of Article 9 (right to freedom of thought, conscience and religion) should be modeled on Article 18 of the 1948 Universal Declaration of Human Rights, paragraph 2 was much debated, because countries had diverging views on which limits might be legitimately posed to religious freedom. Turkey and Sweden proposed an amendment, according to which the concerned provision "does not affect existing national laws which contain restrictive regulations concerning religious institutions and endowments or membership to certain faiths."[16]

> The Turkish members […] were concerned about a resurgence of Islamic fundamentalism in their State and wished to ensure that a wide provision for freedom of religion or belief did not undermine Turkey's attempts to 'reform and modernise' and to ensure that these efforts were not put in jeopardy by "the Moslem orders and their archaic institutions."[17]

In other words, in the Turkish case, a currently binding norm –limiting religious practice and approved "in order to prevent attempts to return to obscurantism"[18]– could not have been regarded by the

[15] See http://www.coe.int/en/web/portal/turkey.

[16] Quoted by Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), 44.

[17] *Ibid*., 43.

[18] The Turkish delegate's quotation is reported by Francesco Margiotta Broglio, *La protezione internazionale della libertà religiosa nella Convenzione europea dei diritti dell'uomo* (Milan: Giuffrè, 1967), 16, fn. 12. The English translation is mine.

ECtHR as an *illegitimate* limitation to religious freedom. In the end, this amendment was dropped, but subsequent case law would reveal that the ECtHR indeed considered that some specific forms to manifest religion in Turkey could be legitimately limited not only on the five expressly mentioned grounds (that is, public safety, protection of public order, health, morals, and the rights and freedoms of others), but also insofar as the constitutional principle of *laiklik* was liable to be breached. The ECtHR has particularly stressed that secularism is an indispensable condition for Turkish democracy and that no manifestation violating this principle may be protected by the ECHR in two notable cases: *Refah Partisi* and *Leyla Şahin*.[19]

The *Refah Partisi*, founded in 1983 and part of a coalition government between 1996 and 1997, was dissolved on 16 June 1998 by the Turkish Constitutional Court on the grounds it had become a centre of unconstitutional activities insofar as they breached the principle of *laiklik*.[20] The dissolved party applied to the ECtHR alleging a violation, inter alia, of Article 11 ECHR (right to freedom of association) but the Court (Third Section), by a strict majority of 4 votes to 3, held there had not been any breach.[21] This judgment has been widely criticised in literature.[22] Marco Ventura has defined this decision as "a 'theological' judgment in defense of secularism:"[23] the majority's reference to extra-legal arguments, ambiguous historical reconstruction, biased representation of Islam and, last but not least, the weakness of evidence have led the judges to violate themselves

[19] A detailed examination of these judgments as well as their flaws goes beyond the purposes of this essay. Here I will only examine the ECtHR's position concerning the principle of secularism and its relation with democracy in Turkey.

[20] See Bottoni, *The Constitutional Court*, 84-8.

[21] *Refah Partisi (Welfare Party) and Others v. Turkey*, application nos. 41340/98, 41342/98, 41343/98 and 41344/98, 31 July 2001.

[22] See, inter alia, Kevin Boyle, "Human Rights, Religion and Democracy: The Refah Party Case," *Essex Human Rights Review* 1 (2004): 1-16; Christian Moe, "Refah Revisited: Strasbourg's Construction of Islam," in *Islam, Europe, and Emerging Legal Issues*, ed. W. Cole Durham et al. (Farnham: Ashgate, 2012), 235-71.

[23] Marco Ventura, "Nuovi scenari nei rapporti tra diritto e religione: il ruolo della Corte Europea dei Diritti dell'Uomo," *Rivista critica del diritto privato* 20 (2002), 3: 466.

the very principles of secularism and neutrality they had been called upon to defend.

The disagreement between the majority and the minority of the Court did not concern the general principles concerning the dissolution of political parties, but their application to the case in question. All judges agreed – and so did the Turkish government and the *Refah Partisi*

> that a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles.[24]

Such principles, in the case of Turkey, include secularism, which is "undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights."[25] The Strasbourg judges' views differed as to the existence of the two above-mentioned conditions. Whereas the majority considered the violation of the principle of *laiklik* as proof of the party's intention to subvert democracy through extra-constitutional means, the minority did not share this position. The former did not reach this conclusion by developing an autonomous reasoning, but by adhering acritically to the Turkish Constitutional Court's assessment. In the judgment declaring the dissolution of the *Refah Partisi*, the constitutional judges

> pointed out that Turkish society had undergone the experience of a theocratic political regime during the Ottoman Empire and that it had founded the secular republican regime in Turkey by putting an end to theocracy. The [Strasbourg] Court accordingly finds, at this stage of its examination, that the establishment of a theocratic regime, with rules valid in the sphere of public law as well as that of private law, is not completely inconceivable in Turkey, account being taken, firstly, of its relatively

[24] *Refah Partisi (Welfare Party) and Others v. Turkey*, para. 47.
[25] *Ibid.*, para. 52.

> recent history and, secondly, of the fact that the great majority of its population are Muslims.[26]

If (only) the proclamation of the constitutional principle of *laiklik* allowed to overthrow theocracy and to establish democracy, then any attack to secularism was in itself an attack to the democratic regime. The threat of a theocracy founded on the reintroduction of *sharî'ah* and of the institution of *millet*,[27] according to the ECtHR, was "neither theoretical nor illusory, but achievable,"[28] for two reasons: firstly, the circumstance that the *Refah Party* had gained power and was in such a position as to introduce the alleged changes into the country's constitutional and legal system; secondly, the consideration "that in the past political movements based on religious fundamentalism have been able to seize political power and have had the opportunity to set up the societal model which they advocated."[29] The reference to the myth of Ottoman theocracy, regarded as an undisputed historical truth by the majority of the Court,[30] as well as the simplistic interpretation of complex concepts such as *jihad, sharî'ah* and multi-legal system thus grounded the ECtHR's conclusion that a direct link between the *Refah Partisi* and a fundamentalist movement aimed at subverting democracy existed.

In their dissenting opinion, the three minority judges –unlike the majority– refrained from defining and examining notions like secularism, theocracy, multi-legal system, *jihad*, and *sharî'ah*, and from assessing their compliance with the European system of human rights protection. By refusing to deal with issues, which properly belong to the realm of social and political scientists rather than judges, they

[26] *Ibid.*, para. 65.

[27] On *millet*, see Benjamin Braude and Bernard Lewis, eds., *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society* (London: Holmes and Meier, 1982), vols. 1 & 2; *Islam Ansiklopedisi* (Encyclopaedia of Islam) (Istanbul: Milli Eğitim Basimevi, 1940-1988), 1st ed., s.v. "millet."

[28] *Refah Partisi (Welfare Party) and Others v. Turkey*, para. 77.

[29] *Ibid.*

[30] The reference to the alleged theocratic character of the Ottoman Empire is one of the most notable examples of the inaccurate historical reconstruction of Turkey's past. See Rossella Bottoni, "The Origins of Secularism in Turkey," *Ecclesiastical Law Journal* 9.2 (2007): 175-86.

distanced themselves from the Turkish Constitutional Court's approach and evaluated the case in the light of the ECtHR's established case law:

> [t]he question which the Constitutional Court was required to determine was whether, having regard to the acts and statements of the leaders of Refah and of its members, the party had become a centre of anti-secular activity for the purposes of the Law on Political Parties. Having decided that it had, the dissolution of the party was mandated by the Law and Constitution.
>
> The question before our Court is a *different* one, namely whether the extreme measure of dissolution (a measure which was alternatively described by the Court in its earlier judgments as "radical" and "drastic") could be considered as responding to a pressing social need.[31]

In other words, the issue raised before the Court was not whether the applicants had actually violated the secular character of the Turkish Republic, but whether the measure of dissolution responded to a pressing social need and was proportionate to the legitimate aims pursued. The dissenting judges stressed that, in cases concerning the alleged violation of Article 11 ECHR, States "have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision." In the present case, they were "unpersuaded by [the majority's] reasoning," finding that "any compelling or convincing evidence" was lacking, and thus concluding that the extreme measure of dissolution was in violation of Article 11 ECHR.[32] It is worth noting that this opinion coincided with the Venice Commission's position as expressed in its *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures* of 10-11 December 1999.[33] Regrettably, none of the arguments of either the dissenting judges or the Venice Commission was endorsed by the Grand

[31] *Refah Partisi (Welfare Party) and Others v. Turkey*, joint dissenting opinion of judges Fuhrmann, Loucaides and Bratza. Emphasis added.

[32] *Ibid.*

[33] The text is available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF%282000%29001-e.

Chamber, which later confirmed –this time unanimously– that there had been no violation of the Convention.[34]

In 2005, the ECtHR (Grand Chamber) dealt again with the issue of the relation between secularism and democracy in Turkey, on the occasion of the application of Leyla Şahin, a university student alleging that the prohibition to wear the Islamic headscarf on university premises violated her rights to freedom of religion and to education (under respectively Article 9 ECHR and Article 2 of Protocol no. 1).[35] Relying on well-established case law, the Court reiterated that

> freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. […] [However] Article 9 does not protect every act motivated or inspired by a religion or belief […]. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. […][36]

Like in the *Refah Partisi* case, the ECtHR did not evaluate the legitimacy of such restrictions by exercising its own supervision, but rather by espousing the Turkish government's arguments in a rather uncritical way. In particular, as regards the principle of *laiklik*, the Strasbourg judges agreed with the Turkish Constitutional Court on that

[34] *Refah Partisi (Welfare Party) and Others v. Turkey*, application nos. 41340/98, 41342/98, 41343/98 e 41344/98, 13 February 2003.

[35] *Leyla Şahin v. Turkey*, application no. 44774/98, 10 November 2005. For a general treatment, see T. Jeremy Gunn, "Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights," *Annuaire droit et religion* 3 (2008-2009): 339-67; Tore Lindholm, "The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in Light of Leyla Sahin v. Turkey," in *Islam, Europe and Emerging Legal Issues*, ed. W. Cole Durham et al. (Farnham: Ashgate, 2012), 147-68; Jill Marshall, "Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate," *Human Rights Quarterly* 30.3 (2008): 631-54.

[36] *Leyla Şahin v. Turkey*, paras. 104-106.

> when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it.[37]

They quoted a passage of a 1989 judgment, where the constitutional judges had referred to secularism as a principle that "had acquired constitutional status by reason of the historical experience of the country and the particularities of Islam compared to other religions."[38] *Laiklik* –which prevented the State from manifesting a preference for a religion or belief in particular and guided it in its role as an impartial arbiter– was a fundamental condition for democracy, a guarantee instrument of religious freedom and equality before the law,[39] as well as

> the civil organiser of political, social and cultural life, based on national sovereignty, democracy, freedom and science. Secularism is the principle which offers the individual the possibility to affirm his or her own personality through freedom of thought and which, by the distinction it makes between politics and religious beliefs, renders freedom of conscience and religion effective.[40]

The ECtHR found this notion of secularism consistent with the values embodied in the Convention and shared Turkey's view that the protection of this principle was necessary in order to safeguard the country's democratic regime:

[37] *Ibid*., para. 115. For a convincing refutation of the 'proselytising effect' argument, see Stijn Smet, "Freedom of Religion vs. Freedom for Religion: Putting Religion Duties Back on the Map," in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, ed. Jeroen Temperman (Leiden: Brill, 2012), 113-42.

[38] *Leyla Şahin v. Turkey*, para. 39.

[39] *Ibid*., paras. 39 and 113.

[40] *Ibid*., para. 39.

> [a]n attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention.[41]

Since a religion that "imposed" a particular dress code "was perceived and presented as a set of values that were incompatible with those of contemporary society,"[42] religious freedom may not entail the right to wear the Islamic headscarf. In fact, the Grand Chamber saw "no good reason to depart from the approach taken by the Chamber," which did "not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."[43] In this perspective –grounded on the alleged existence of a relationship between the support or participation in extremist political movements and the wearing of the Islamic headscarf–, each contracting State is entitled to fight such movements, in accordance with the Convention and "based on its historical experience." Recalling its conclusions in the *Refah Partisi* judgment, the ECtHR reiterated that Turkey, in the past, had already experienced a theocratic regime and that only the proclamation of the constitutional principle of secularism had allowed the establishment of democracy. In order to defend its democratic regime, Turkey was thus entitled to prevent any manifestation of Islamic fundamentalism from weakening the secular character of the Republic.[44]

In the end, the ECtHR, by a majority of 16 votes to 17, found no violation of the Convention. Only one judge, François Tulkens, dissented. In her separate opinion, after regretting that "European supervision that must accompany the margin of appreciation and […] goes hand in hand with it […] seems quite simply to be absent from the judgment,"[45] she pointed out that the majority based its as-

[41] *Ibid*., para. 114.
[42] *Ibid*., para. 39.
[43] *Ibid*., para. 115.
[44] *Ibid*.
[45] *Ibid.*, dissenting opinion of judge Tulkens, para. 3.

sessment on two principles: secularism and equality. While subscribing unconditionally to both of them, she stressed that –in a democratic society– they should be harmonised, and not weighed one against the other.[46] *Laiklik*, in particular, is an essential condition for the protection of democracy in Turkey, but so is freedom of religion. The limitation of this right may not be justified by recalling the principle of secularism in a general and abstract way, but only by assessing a concrete conflict between them:

> [o]nly indisputable facts and reasons whose legitimacy is beyond doubt –not mere worries or fears– are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention.[47]

In the light of the *Refah Partisi* and *Leyla Şahin* cases, it may be concluded that secularism, in principle meant to protect democracy, became in practice a manifestation of the country's democratic *deficit*, insofar as the balancing test between two principles that were equally worth protecting (freedom of association vs. secularism, or freedom of religion vs. secularism) was not carried out, and one of them was made to prevail over the other one in any circumstances. At this regard, it is worth remembering that, in the above-mentioned 1989 judgment, the Constitutional Court maintained that the principle of *laiklik* could not be sacrificed "for the sake of liberties."[48]

The Flaws in the Traditional Interpretation of Laiklik: What Protection for Religious and Ideological Minorities?

The thesis that secularism was the guarantor of democracy against Islamic fundamentalism has long and strongly been supported, not last by the ECtHR. In the *Refah Partisi* decision, the Strasbourg judges agreed with the Turkish Constitutional Court, which –in the judgement

[46] *Ibid*., para. 4.
[47] *Ibid*., para. 5.
[48] Quoted by Zühtü Arslan, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court," *Critique: Critical Middle Eastern Studies* 11.1 (2002): 16-7.

declaring the dissolution of the party in 1998– stated that the principle of *laiklik* had not only been the instrument of the transition to democracy, but was also the philosophical essence of life in Turkey,[49]

> the impetus which enabled the Turkish Republic to move on from Ummah [*ümmet* – the Muslim religious community] to the nation. With adherence to the principle of secularism, values based on reason and science replaced dogmatic values. […] Persons of different beliefs, desiring to live together, were encouraged to do so by the State's egalitarian attitude towards them.[50]

However, in the light of the treatment Turkey has reserved to religious and ideological minorities[51] since its foundation, it may hardly be concluded that secularism has indeed grounded this egalitarian attitude. The major shortcoming of the thesis, according to which secularism in the post-Kemalist age –before AKP's emergence– was a stronghold of democracy against Islamic fundamentalism, is the inability to explain why the same principle has regularly been invoked also to restrict non-Muslims' religious freedom,[52] to negate the right

[49] *Refah Partisi (Welfare Party) and Others v. Turkey*, 2003, para. 40.

[50] *Ibid.*

[51] For the purposes of this paper, 'minority' should be understood in the broadest sense of the term, that is, as individuals or groups manifesting a religion or a belief different from those of the majority of the Turkish population. This term is not used in a negative or dismissive meaning, and is not meant to contextualize this issue in the legal framework of minority/collective rights. On the questions raised by the use of the term 'minority' in the Turkish context, see Elizabeth Shakman Hurd, "Alevis under the Law: The Politics of Religious Freedom in Turkey," *Journal of Law and Religion* 29.3 (2014): 416-35.

[52] See, inter alia, US Department of State, *International Religious Freedom Report for 2014. Turkey*, http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm; Parliamentary Assembly of the Council of Europe, *Resolution 1704 (2010) Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (eastern Greece)*, 27 January 2010, http://assembly.coe.int; Venice Commission, *Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patricarchate of Istanbul to use the adjective "Ecumenical" adopted by the Venice Commission at its 82nd Plenary Session*, 12-13 March 2010, http://www.venice.coe.int. A large body of literature has dealt with this issue, as well, including Alexis Alexandris, *The Greek Minority of Istanbul and Greek-Turkish Relations 1918-1974* (Athens:

to manifest forms of religiosity different from Sunnism to members of *tarikat* (Sufi brotherhoods) and Alevis[53] and, lastly, to limit the expression of atheists' and agnostics' opinions.

The scarce protection offered to religious and ideological minorities may ground the assertion that secularism, as understood by the guardians of Kemalist heritage, has not simply forbidden what were regarded as illegitimate manifestations of the rights to religion, thought and association (such as the activity of religiously-oriented political parties and the wearing of the Islamic headscarf). It has also prohibited all cultural expressions and identitary manifestations that could not be assimilated in the official notion of national identity, that is, the *Homo Kemalicus*:[54] an ethnic Turk and Sunni Muslim, not attached to religious, allegedly archaic practices.

As I have argued elsewhere, secularism has always had a strong link with nationalism, which is a fundamental interpretative key to ap-

Centre for Asia Minor Studies, 1992); Samim Akgönul, *Les grecs de Turquie. Processus d'extinction d'une minorité de l'âge de l'Etat-nation a l'âge de la mondialisation (1923-2001)* (Louvain-la-Neuve: Académia Bruylant, 2004); Samim Akgönul, ed., *Reciprocity. Greek and Turkish Minorities. Law, Religion and Politics* (Istanbul: Istanbul Bilgi University Press, 2008); Dilek Kurban and Kezban Hatemi, *The Story of an Alien(ation): Real Estate Ownership Problems of Non-Muslim Foundations and Communities in Turkey* (Istanbul: Tesev Publications, 2009); Rossella Bottoni, "Turkey's Religious Minorities and the Issue of Church Property: Expropriation and Restitution in National Law and Strasbourg Case Law," in *Restitutions of Church Property*, ed. Michaela Moravčíková (Bratislava: Institute for Church-State Relations, 2010), 7-21; Idem, "The Legal Treatment of Religious Minorities: Non-Muslims in Turkey and Muslims in Germany," in *Religion, Identity and Politics: Germany and Turkey in Interaction*, ed. Haldun Gülalp and Günter Seufert (London: Routledge, 2013), 120-6.

[53] On Alevis see Tord Olsson et al., eds., *Alevi Identity. Cultural, Religious and Social Perspectives* (Istanbul: Numune Matbaası, 1998); David Shankland, *The Alevis in Turkey. The Emergence of a Secular Islamic Tradition* (London: Routledge, 2003); Paul Joseph White and Joost Jongerden, eds., *Turkey's Alevi Enigma. A Comprehensive Overview* (Leiden: Brill, 2003); Elise Massicard, *The Alevis in Turkey and Europe: Identity and Managing Territorial Diversity* (London: Routledge, 2013).

[54] The expression has been coined by M. Hakan Yavuz and John L. Esposito, eds., *Turkish Islam and Secular State* (Syracuse: Syracuse University Press, 2003).

preciate Turkey's official position towards religion. The strenuous defense of Kemalism has not led to prohibit all Islamic visible symbols, as breaching the principle of *laiklik*,[55] but rather to forbid only those inconsistent with the paradigm of the *Homo Kemalicus*:

> Kemalist Turkey, while strongly discouraging the use of [the headscarf] because it conveyed the image of an uncivilised and backward country, basically confirmed the Ottoman flag, composed of a white crescent and star. The crescent is an Islamic symbol, too, but the popular imagery does not associate it to some form of 'evil', as it is proved, inter alia, by the circumstance that it was chosen as the sign corresponding to the Red Cross, a movement originated to solve the humanitarian issue on battlefields. The close link between secularism and nationalism in Turkey explains why the wearing of the headscarf has been limited or prohibited for a long time, whereas

[55] An example of this assumption is offered by Smet, "Freedom of Religion vs. Freedom for Religion," when referring to the ECtHR's assessment in the *Leyla Şahin* case: "the Court firstly accepted the Turkish conception of secularism, which entails banning all religious symbols from the entire public sphere, confirming that it was consistent with the values underpinning the Convention" (p. 125). The same author has pointed out that in "the more recent jurisprudence […] [m]ost notably, in *Ahmet Arslan v. Turkey* […] [t]he Court […] certainly does not support a militant version of secularism that would ban all religious symbols from the entire public sphere, at least not when it concerns the public space" (*ibid*.). This essay does not contend that the ECtHR's validation of the Turkish notion of secularism *aimed* to support a strict prohibition of (all) religious symbols in the public space (which in any case does not correspond to Turkey's legal and social reality). Here it is submitted that such validation was instrumental to assert the existence of a close relation between secularism and democracy in Turkey, by *means* of supporting the ban of (only those) religious symbols inconsistent with the official notion of national identity – based on the *Homo Kemalicus* ideal-type. The foundation of the Republic of Turkey, in posterity's imagery, consisted in a revolution regenerating Turkish society as a modern, secular, and civilisation-oriented nation. The preamble of the Constitution still confirms Turkey's determination "to attain the standards of contemporary civilization as an honourable member with equal rights of the family of world nation," while remaining "in line with the concept of nationalism introduced by the founder of the Republic of Turkey, Atatürk, the immortal leader and the unrivalled hero, and his reforms and principles."

> the use of other Islamic signs has not: the crescent is still displayed on one of the most important symbols of nationhood, whose form even enjoys constitutional protection.[56]

Even before the AKP consolidated its power, the ambiguous role of the principle of *laiklik* –guarantor of democracy or expression of its flaws?– has been apparent in some ECtHR judgments related to individuals expressing religious or ideological views different from those of Turkeys' majority. The most significant case has concerned İ. A., an editor charged with blasphemy against God, the Religion, the Prophet and the Holy Book through the publication of a novel by Abdullah Rıza Ergüven entitled *Yasak Tümceler* ("The forbidden phrases").[57] Two passages were regarded as especially offensive: according to the author, "God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal."[58]

Before the Court, Turkey maintained that Muslims' religious feelings had been offended and that "criticism of Islam in the book had fallen short of the level of responsibility to be expected of criticism in a country where the majority of the population were Muslim."[59] In doing so, it reversed the position it had inflexibly defended in the *Refah Partisi* and *Leyla Şahin* cases where, as seen, it had submitted that, in a country like Turkey where the great majority of the population belong to Islam, measures taken to prevent pressure on those who belong to another religion or do not belong to any were justified under Article 9 paragraph 2 ECHR.[60] In the *İ. A*. case, Turkish government did not consider the protection of minority or unconventional opinions in religious matters as a sufficient reason to justify

[56] Rossella Bottoni, "Legal, Political and Social Obstacles for Headscarved Women Working at State Institutions in Turkey," *Religion and Human Rights* 8 (2013): 186.

[57] ECtHR, *İ. A. v. Turkey*, application no. 42571/98, 13 September 2005.

[58] *Ibid.*, para. 13.

[59] *Ibid.*, para. 20.

[60] *Refah Partisi (Welfare Party) and Others v. Turkey*, 2003, para. 95; *Leyla Şahin v. Turkey*, para. 111.

the limitation of the majority's religious freedom, but it rather asserted that the right of the Muslim majority of the population to the respect for their religious feelings constituted a legitimate limitation of an editor's right to publish an atheistically-oriented book.

Even more interesting is the ECtHR's assessment. By a strict majority of 4 votes to 3, the Court held that the Convention had not been violated. In supporting this conclusion, it went even further than the Turkish government by invoking the principle of *laiklik*:

> Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks.[61]

The place reserved to secularism in the Turkish context according to the above passage is even more puzzling when one recalls the rather different ideological framework where it was placed in the *Refah Partisi* and *Leyla Şahin* cases. Especially in the latter case – and in others concerning the wearing of the Islamic headscarf[62]– the principle of *laiklik* had always justified as legitimate the limitation of the Muslim majority's right to religious freedom. By contrast, in the *İ. A.* case, it was invoked to protect a particular aspect of this freedom, that is, the right not to have one's religious feelings offended. This use of the *laiklik* argument seems inconsistent not only with the

[61] *İ. A. v. Turkey*, para. 29.

[62] CtEDU, *Şenay Karaduman v. Turkey*, application no. 16278/90, and *Lamiye Bulut v. Turkey*, application no. 18783/91, 3 May 1993; *Köse and 93 Others v. Turkey*, application no. 26625/02, 24 January 2006; *Kurtulmuş v. Turkey*, application no. 65500/01, 24 January 2006; *Merve Kavakçı v. Turkey*, application no. 71907/01, 5 April 2007. See also Emre Öktem, "La Turquie et les dimensions internationales de la liberté religieuse," *Quaderni di diritto e politica ecclesiastica* 1 (2002): 267-71; Amy R. Jackson and Dorota A. Gozdecka, "Caught Between Different Legal Pluralisms: Women Who Wear Islamic Dress as the Religious 'Other' in European Rights Discourses," *Journal of Legal Pluralism* 64 (2011): 94-9; Saïla Ouald Chaib, "Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights," in *A Test of Faith?: Religious Diversity and Accommodation in the European Workplace*, ed. Katayoun Alidadi et al. (London: Routledge, 2012), 46-9.

ECtHR's case law, but also with the official notion propagated by the Turkish government.

It may correctly be noted that the secular character of a legal system in itself is not incompatible with the existence of laws protecting the population's religious feelings or regulating specific aspects of the exercise of the right to religious freedom. Nonetheless, the fact that, in Turkey, provisions prohibiting the contempt of God as well as one of the prophets or one of the holy books are legally binding does not seem entirely consistent with the notion of *laiklik*, as elaborated in the Turkish Constitutional Court's and the ECtHR's case law concerning the dissolution of religiously-oriented political parties and the wearing of the Islamic headscarf. As seen, the ECtHR agreed with the constitutional judges on the definition of secularism as the "philosophical essence of life in Turkey"[63] and as the "principle which offers the individual the possibility to affirm his or her own personality through freedom of thought."[64] However, the invocation of secularism –in order to assert that the expression of atheistic opinions is illegitimate– raises strong doubts as to the extent to which this principle effectively protects the manifestation of heterodox views in religious matters. As stated by the three minority judges in their dissenting opinion, "a democratic society is not a theocratic society."[65]

In other cases, the ECtHR has proved more sympathetic to individuals and groups having a religion or belief different from that of the majority of the population in Turkey.[66] This has especially been

[63] *Refah Partisi (Welfare Party) and Others v. Turkey*, 2003, para. 40.

[64] *Leyla Şahin v. Turkey*, para. 39.

[65] *İ. A. v. Turkey*, joint dissenting opinion of judges Costa, Cabral Barreto and Jungwiert, para. 5.

[66] As regards the expression of atheistic opinions, see ECtHR, *Aydın Tatlav v. Turkey*, application no. 50692/99, 2 May 2006. More generally, it is worth remembering that Turkey is the respondent State against which the ECtHR has found the greatest number of violations of Article 10 (freedom of expression). Violations of Article 10 in the years 1959-2015 amount to 619. Of these, 258 violations have been committed by Turkey. The second position is shared by Austria and France, each with 34 violations (source: http://www.echr.coe.int/Documents/Stats_violation_2015_ENG.pdf).

the case of Alevis. For example, the provision of a compulsory religious teaching based on the Sunni version of Islam,[67] without being possible for an Alevi father to obtain for her daughter an exemption from attendance, has been unanimously regarded as a breach of Article 2 of Protocol no. 1 (right of parents to ensure education of their children in conformity with their own religious and philosophical convictions). In this case, the Court has discarded the argument put forward by the Turkish government, according to which the concerned "syllabus, drawn up by the Ministry of Education and not by the religious authorities, complied with the principle of secularism,"[68] and has concluded that it does not "meet the criteria of objectivity and pluralism."[69]

One word of caution should be nevertheless made: the allegations grounding the application lodged by Alevi individuals or groups may not be regarded as representative of the religious or cultural needs expressed by the entire Alevi population in the country. Alevism –a

[67] This is a complex issue whose detailed treatment goes beyond the purposes of this essay. For an in-depth analysis, see Elisabeth Özdalga, "Education in the Name of 'Order and Progress.' Reflections on the Recent Eight Year Obligatory School Reform in Turkey," *The Muslim World* 89 (1999): 414-38; Faruk Bilici, "L'Etat turc à la recherche de la cohésion nationale par l'éducation religieuse," *Cahiers d'études sur la mediterranée orientale et le monde turco-iranien* 6 (1988): 129-59; Buket Türkmen, "A Transformed Kemalist Islam or a New Islamic Civic Morality? A Study of 'Religious Culture and Morality' Textbooks in the Turkish High School Curricula," *Comparative Studies of South Asia, Africa and the Middle East* 29.3 (2009): 381-97; Sam Kaplan, "Religious Nationalism: A Textbook Case from Turkey," *Comparative Studies of South Asia, Africa and the Middle East* 25.3 (2005): 665-76.

[68] *Hasan and Eylem Zengin v. Turkey*, application no. 1448/04, 9 October 2007, para. 41.

[69] *Ibid.*, para 70. For further reading on the judgment, see Olgun Akbulut, and Zeynep Oya Usal, "Parental Religious Rights vs. Compulsory Religious Education in Turkey," *International Journal on Minority and Group Rights* 15 (2008): 451-3. See also the subsequent case *Mansur Yalçın and Others v. Turkey,* application no. 21163/11, 16 September 2014; Özgür H. Çınar, "An Unsolved Issue: Religious Education in International Human Rights Law and the Case of Turkey," in *Freedom of Religion and Belief in Turkey*, ed. Özgür Çinar and Mine Yildirim (Cambridge: Cambridge Scholars Publishing, 2014), 193-201; Mine Yıldırım, "Turkey: Will schools respect parents' and pupils' freedom of religion or belief?," accessed 17 November 2015, http://www.forum18.org/archive.php?article_id=2121.

label encompassing 20 to 25 million people in Turkey[70]– is variously defined in religious, political or ethnic terms,[71] and is regarded by Alevis themselves as having quite diverse meanings:

> [w]hile most Alevis regard Alevism as a non-Sunni variant of Islam, some claim that Alevism is not part of Islamic tradition, and others insist that it is not a religion at all.[72]

For the purposes of this paper, the treatment of Alevis as a "religious minority" should be thus regarded as merely grounded on the consideration that individuals or groups defining themselves as Alevi have complained that their religious demands (different from those of the majority of the population and not necessarily shared by other individuals or groups who also regard themselves as Alevi) have not been satisfied according to the requirements of a democratic regime.

Reconsidering the Relation between Secularism and Democracy: the Ahmet Arslan Case

The turning point in the ECtHR's case law is marked by the *Ahmet Arslan* case,[73] where the European supervision has been reasserted and the respondent State's margin of appreciation has been reduced. Ahmet Arslan and other 126 persons were convicted for wearing the religious garments typical of their *tarikat* in the streets of Ankara as well as before the Turkish court, in breach of Law no. 671 of 1925 on the wearing of hats, which forbids the wearing of any other headgear, and of Law no. 2596 of 1934 on the prohibition of the wearing of certain garments, including religious ones in places open to the

[70] US Department of State, *International Religious Freedom Report for 2014. Turkey*, http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm.

[71] Shakman Hurd, "Alevis under the Law," 419.

[72] *Ibid*., 418. See also p. 421: "some of these [Alevi] advocates began to lobby in favour of recognition of Alevism as a minority sect or religion understood as either a variation of Islam or, less frequently, as distinct from Islam altogether. […] Alevi representatives are also divided over the advantages and drawbacks of being classified as a minority religion or ethnicity."

[73] ECtHR, *Ahmet Arslan and Others v. Turkey*, application no. 41135/98, 23 February 2010.

public outside religious ceremonies. Both laws belong to a group of legal measures to which Article 174 of the Constitution affords special protection:

> 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 *secular* character of the Republic, and whose provisions were in force on the date of the adoption of the Constitution by referendum.[74]

The 127 members of the *tarikat* applied to the ECtHR alleging that their right to manifest religious freedom by wearing religious garments had been violated. Before the Court, the Turkish government explained the role played by the Revolutionary Laws, which include the two above-mentioned laws, in the foundation and protection of a democratic regime, and contended that their main purpose was the defense of the Republic of Turkey's secular character.[75] It stressed that the applicants' "appearance before the court in the traditional garments of their sect, which aimed at establishing a *sharî'ah*-based order in replacement for the current democratic regime,"[76] had been particularly grave: the applicants lacked respect owed to judges and, instead of uncovering their heads, they preferred to carry on their propaganda and to disturb the court hearing. The impugned measure pursued the aim of safeguarding the secular and democratic principles, as well as of protecting public order, public safety and the rights and freedoms of others.[77] Lastly, the Turkish government challenged the applicants' thesis, according to which the two concerned laws, adopted about 60 years earlier, were no longer applied.[78]

[74] The official English translation is available at https://global.tbmm.gov.tr/docs/constitution_en.pdf. Emphasis added.

[75] *Ahmet Arslan and Others v. Turkey*, para. 26.

[76] *Ibid*., para. 27. In French in the original version of the judgment. Here and hereinafter the English translation is mine.

[77] *Ibid.*, paras. 28-29.

[78] *Ibid*., paras. 41 and 47.

It is worth noting that no mention was made of a third Revolutionary Law, also protected by Article 174 of the Constitution: Law no. 677 of 1925, 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, which made *tarikat* illegal. The fact that the applicants belonged to an association still formally illegal might have constituted a further ground of violation of the principle of *laiklik*, but in fact –as will be mentioned later– this law no longer finds application.

The ECtHR confirmed the importance of secularism in the country's democratic regime and accepted that the concerned limitation, insofar as they aimed at guaranteeing the respect for the secular and democratic principles, pursued the legitimate aims of protecting public security, public order and the rights and freedoms of others.[79] Nonetheless, by a majority of 6 votes to 1, it held that there had been a breach of the applicants' right under Article 9 ECHR. This conclusion has reverted the traditional position according to which "[a]n attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention."[80]

The majority grounded its conclusion on two features distinguishing the applicants' case from those where the Court had regarded the limitation of the right to wear a religious symbol (namely, the Islamic headscarf) as legitimate. Firstly, the applicants were private citizens, and not employed at public institutions.[81] Secondly, unlike Leyla Şahin, they wore their distinctive garments in streets and squares: "thus the point is not the regulation of the wearing of religious symbols in public institutions, where the respect of neutrality for beliefs can take priority over the free exercise of the right to manifest religion."[82] No mention though was made to the fact that religious garments had been worn also in court – a circumstance to which

[79] *Ibid.*, para. 43.
[80] *Leyla Şahin v. Turkey*, para. 114.
[81] *Ahmet Arslan and Others v. Turkey*, para. 48.
[82] *Ibid.*, para. 49.

the Turkish government had attached some importance.[83] This is not to say that the ECtHR should have shared the respondent State's position. Nonetheless, the different evaluation given to religious garments –the Islamic headscarf and the *tarikat*'s attire– is striking: whereas the Turkish government linked both of them to a propaganda movement aimed at overthrowing democracy and establishing theocracy, the ECtHR in the latter case implicitly considered that the threat of Islamic fundamentalism was not actual. Further, the fact that the majority explained its reasons in few paragraphs, dropping or dismissing Turkey's arguments in a speedy fashion,[84] may support the hypothesis that the ECtHR tried to correct some of the trends emerged in previous cases, that is, the recognition of an excessive margin of appreciation to the respondent State and the lack of European supervision.

The separate opinions attached to the judgment are equally worth mentioning, because they highlight the uncertainties around the redefinition of the link between secularism and democracy in the ECtHR's perspective. In his concurring opinion judge Sajó, "out of respect for secular Turkey's constitutional system, and in order to avoid any misunderstandings," found it necessary to explain why he regarded this decision as "entirely consistent with secularism, which is a fundamental constitutional value of Turkey" (but which he no longer defined as the guarantor of democracy). One of the reasons is that the government had not demonstrated that the impugned limitation answered a pressing social need. In fact, the procedure against the applicants under Article 7 of Law no. 3713 on fighting terrorism, on the grounds that their way to manifest religion pursued fundamentalist aims, did not lead to convictions.

By contrast, in dissenting judge Popovic's view, the majority failed to contextualize the case in the country's "remarkably complex context of social life," which justified a wide margin of appreciation:

[83] *Ibid.*, paras. 9, 11, 27, 28, 30 and 33.

[84] For a critique of the Court's reasoning, see Jean-François Flauss, "Actualité de la Convention européenne des droits de l'homme (septembre 2009-février 2010)," accessed 2010, http://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/JANVIER2012/AJDA2010-997.pdf (where the author espouses the dissenting judge's conclusions though).

"[t]he respondent State enjoys a margin of appreciation which proves to be indispensable to maintain the regime of constitutional democracy in force." After recalling the *Leyla Şahin* case's conclusions – where the ECtHR asserted that Article 9 ECHR "does not protect every act motivated or inspired by a religion or belief,"[85] and that "the principle of secularism, as elucidated by the Constitutional Court […] is the paramount consideration underlying the ban on the wearing of religious symbols in universities"[86]– the minority judge stated that Article 174 of the Turkish Constitution had made Revolutionary Laws "untouchable," and that this provision –in the light of the abovementioned case law– was consistent with the ECHR's system of protection of human rights.

"New Turkey," new secularism and old nationalism: the İzzetin Doğan Case

AKP's rise to power has led to a redefinition of (some of) Turkey's fundamental values and to the creation of what has been called a "new Turkey," which is believed to be substituting the "original" new Turkey established by Atatürk in replacement for the Ottoman Empire.[87] Whereas reform efforts at least until 2008 have generally been regarded as attempts to reinforce democracy –with the confrontation between the AKP and the guardians of the Kemalist heritage aptly described by Kuru in the interpretative framework of passive and active secularists[88]–, the last few years have been rather characterized by an involution usually depicted as authoritarian and Islamist.

In my view, these developments should not lead to regret the times when the Kemalist notion of secularism was strictly enforced.

[85] *Leyla Şahin v. Turkey*, para. 105.

[86] *Ibid.*, para. 116.

[87] See for example Toni Alaranta, *Turkey under the AKP. A Critical Evaluation from the Perspective of Turkey's EU Negotiations*, accessed 2015, http://www.fiia.fi/assets/publications/wp84.pdf, where the author evaluates "the AKP's attempt to destroy what its leadership asserts is the old Kemalist regime and replace it with a 'New Turkey'" (p. 4).

[88] Ahmet T. Kuru, *Secularism and State Policies Towards Religion. The United States, France, and Turkey* (Cambridge: Cambridge University Press, 2009), 168 ff.

Even before the AKP consolidated its power, Turkey was repeatedly urged to improve its record on protection of human rights (including freedom of thought, conscience and religion), and it was generally agreed that the strengthening of the country's democracy could hardly be accomplished without a revision of Kemalism. According to the European Parliament's 2003 report on Turkey's accession to the European Union,

> the underlying philosophy of the Turkish State comprises elements such as nationalism, an important role for the army, and a rigid attitude to religion, which are hard to reconcile with the founding values of the European Union, and has to be adapted in order to enable a less rigid and more open-minded cultural and regional diversity as well as a modern and tolerant concept of the nation State;
>
> […] a relaxed attitude to Islam and to religion in general will counteract the rise of antidemocratic movements such as intolerant and violent religious extremism; […]
>
> The transformation of a state based on Kemalist ideas […] into an EU Member State, accepting and sharing the political values we set so much store by in the Union, will be a long drawn-out job.[89]

In this context, even some of the most contested measures –like the adoption of Regulation no. 5443 of 4 October 2013, which has allowed with few exceptions women working at State institutions to wear the headscarf if they wish so[90]–, may be regarded as attempts to address the inconsistency of the process of social, political, cultural and religious pluralisation, which characterised post-Kemalist Tur-

[89] Arie M. Oostlander, *Report on Turkey's application for membership of the European Union (COM(2002) 700–C5-0104/2003–2000/2014(COS))*, accessed 20 May 2003, http://www.europarl.europa.eu.

[90] See Rossella Bottoni, "The Headscarf Issue at State Institutions in Turkey: From the Kemalist Age to Recent Developments," in *Freedom of Religion and Belief in Turkey*, ed. Özgür Çinar and Mine Yildirim (Cambridge: Cambridge Scholars Publishing, 2014), 127-8.

key. Unfortunately, in this much-needed process of revision, shadows have overridden lights. After the resolution of one of the most sensitive issues of the last decades, the scarce progress made to raise the standards of protection of the rights of all segments of Turkish society as well as the political community (and not only the AKP's supporters) has become even more apparent.

It may be argued that one of the major limits to Turkey's democratisation is not so much the revision of the notion of the constitutional principle of *laiklik*[91] –which, in my view, required in any case a revision because in the past it served as a guarantor of the Kemalist version of democracy, rather than of democracy as based on the unconditional recognition of human rights–, as the steady preservation of the Turkish tradition of authoritarian modernisation and the insufficient revision of the most assimilationist contents of Kemalism: first of all, the principle of nationalism and the related idea that any individuals and groups not fitting into the national ideal-type are second-class Turkish citizens. The *İzzetin Doğan*, which the ECtHR has recently examined,[92] may help to illustrate this argument.

Izzetin Doğan and other 202 Alevi individuals lodged an application alleging that the Turkish authorities' refusal to accommodate their requests –concerning the recognition of the services connected to the practice of the Alevi faith as public service and of Alevi religious leaders as civil servants, the recognition of Alevi places of worship and the provision of public funding–, amounted to a violation of Articles 9 and 14 ECHR. The ECtHR found a violation of Article 9 by 12 votes to 5, and of Article 14 taken in conjunction with Article 9 by 16 votes to 1. An in-depth treatment of this case goes beyond the purposes of this essay: the complexity of the issues

[91] Despite occasional statements on the need to remove the secularism clause from the Constitution, no serious step in that direction has yet been taken. Most recently, see "Parliament speaker's call to remove secularism from Turkey's constitution sparks outrage," and "President Erdoğan defends secularism after remarks by parliament speaker," http://www.hurriyetdailynews.com, accessed 26 and 27 April 2016 respectively.

[92] ECtHR, *Izzetin Doğan and Others v. Turkey*, application no. 62649/10, 26 April 2016.

raised[93] is well exemplified by the four attached opinions: one partly dissenting and partly concurring, two dissenting, and one statement. Here I will confine my analysis to the role of the principle of secularism in the ECtHR's assessment.

As a preliminary remark, it should be noted that no statement on the need to protect the principle of *laiklik* as an indispensable condition to safeguard democracy in Turkey was made either by the Turkish government or the ECtHR. The discussion around secularism revolved around the orientation of the Religious Affairs Department (RAD), perceived by the applicants as promoting a Sunni (Hanafi) version of Islam, despite being bound by Article 136 of the Constitution to "exercise its duties prescribed in its particular law, in accordance with the principle of secularism."[94] During the exhaustion of national remedies, the Prime Minister's Legal Department recalled the above-mentioned Law no. 677 of 1925, claiming that it was "impossible to offer a service to banned Sufi orders (*tarikat*) [as the applicants were regarded]; this would also be contrary to the principle of secularism"[95] (although Turkish government before the ECtHR would specify that the law was no longer applied).[96] The Administrative Court also reasoned that "the provision of a public service to all interpretations of Islam […] would [pose] a risk […] of breaching the principle of State secularism by upsetting the balance to be struck between religious and legislative rule-making, and of exacerbating different forms of belief."[97]

The ECtHR firstly noted that, according to the Turkish Constitutional Court, the establishment of the RAD was consistent with the principle of secularism. The compatibility between the secular nature of the Turkish State and the provision of Islamic religious service as public service was explained as follows:

[93] Not last are the questions of what Alevism is, who Alevis are, who represent them and what their request are. See Shakman Hurd, "Alevis under the Law," 418.

[94] *Izzetin Doğan and Others v. Turkey*, paras. 10, 12 and 58.

[95] *Ibid.*, para. 13.

[96] *Ibid.*, para. 84.

[97] *Ibid*., para. 14.

> the existence of a clergy and a religious service in the Catholic religion, and the acceptance by Catholics of the Pope as spiritual leader, had played an important role in that conception of secularism. However, in the Muslim religion there was no clergy and the staff responsible for places of worship had no spiritual power. […] it was only in Christian countries that a separation could be imagined between religious functionaries and the State. In the Constitutional Court's view, the principle of secularism sought to promote the progress of the Turkish nation and did not allow the creation of religious movements pursuing aims that were incompatible with that purpose.[98]

As already noted, no mention was made of the existence of a link between secularism and democracy. When finding a violation of Article 9 ECHR, the Court did make the standard remarks on the guarantee of secularism as enshrined in Article 2 of the Constitution,[99] but it did not ground its conclusions on the evaluation of whether the impugned measures complied or not with the official notion of *laiklik*. Conversely, in the assessment of the violation of Article 14 ECHR, the Court reiterated the importance of the principle of secularism in Turkey's constitutional system (but without linking it to its democratic regime, too)[100] and recognised that the country's constitutional secular model was consistent with the Convention.[101] At the same time, it stated that

> in the present case it fails to see why the preservation of the secular nature of the State –the legitimate aim invoked by the national courts– should necessitate denying the religious nature of the Alevi faith and excluding it almost entirely from the benefits of the religious public service.[102]

[98] *Ibid.*, para. 15.
[99] *Ibid*., para. 51.
[100] *Ibid.*, para. 167.
[101] *Ibid*., para. 175.
[102] *Ibid.*, para. 181.

For the purposes of this essay –grounded on the assumptions that secularism has always played an ambiguous role in the promotion of Turkey's democracy and that the failed revision of the principle of nationalism should be matter of greater concern than the current re-interpretation of that of *laiklik*– the separate opinion attached by the three judges, who only found a violation of Article 14 read in conjunction with Article 9 ECHR, is especially interesting. In their views, the real issue was not a comparison between those who benefit of the RAD's services and the applicants (who do not), but one between the applicants and all other segments of society who also do not use such services, such as Shia Muslims, Jews, Catholics, Orthodox Christians, Protestants and so on.[103] If the majority compares the applicants with Sunni Muslims, then it implicitly requires that the RAD should offer services to persons of any belief, but this reasoning would bring too far.[104] Consequently, the three judges suggested that the Turkish government had based its defence on a wrong argument: instead of stressing the compliance of the RAD with the principle of secularism, it should have admitted that the Sunni (Hanafi) version of Islam is favoured and promoted. If Turkey had recognised the privileged position of Sunni Islam, then –based on the ECtHR's case law, according to which a country in principle is entitled to grant a special and privileged position to one religion– it could have maintained that the offer of public services only to users belonging to this religion constituted a legitimate and objective ground for the difference of treatment between the former and those who have a different faith (including the applicants). By contrast, based on Turkey's submission –that is, the denial of the fact that the RAD promotes a Sunni (Hanafi) version of Islam and the insistence instead that it offers services available to all Muslims– the Court could only conclude that the provision prohibiting discrimination on religious grounds had been violated:

[103] *Ibid.*, joint partly dissenting and partly concurring opinion of Judges Villiger, Keller and Kjølbro, para. 21.

[104] *Ibid.*, para. 22.

> By not recognising the privileged position of the Sunni interpretation of Islam as supported by the RAD and its *de facto* status as a "State religion" in Turkey, the Government fail to put forward arguments which, in our view, suffice to provide an objective and reasonable justification for a difference in treatment between Muslims benefiting from the service provided by the RAD and other Muslims (or other religious groups for that matter) […]. Thus, for example, when the Government argue that the services of the RAD are for all Muslims, including Alevis, and that they are "supra-denominational" […], they do not adequately recognise and address the fact that the services are of little or no use to persons who do not adhere to the Sunni interpretation of Islam as supported by the RAD.[105]

In conclusion, according to this reconstruction –which seems more convincing than that provided by the majority– the recognition of a privileged position to Sunni (Hanafi) Islam would be consistent with the secular constitutional system of Turkey as well as with the values underpinning the Convention; the assimilation of elements who self-declare as different into a homogenising category of identity[106] is not.

[105] *Ibid.*, para. 24.

[106] In this case religiously-identified, but the same would apply to cultural, ethnic, linguistic or other national characteristics.