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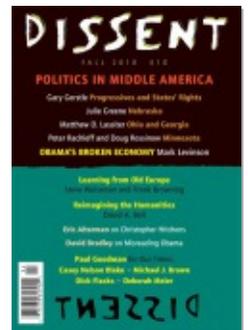
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Turkey's Constitutional Zigzags

Seyla Benhabib

TURKEY IS UNIQUE among contemporary Muslim societies. Modern Turkey emerged as a nation-state after the collapse of the Ottoman Empire and the abolition of the Caliphate in 1924 and has been a republic since 1923. Discarding the theological trappings of the Ottoman state, where the sultan was also the caliph, Turkey opted for the privatization of the Muslim faith, along the lines of liberalism and republican secularism (*laiklik*). The revolutionary ideology of the founders of the modern Turkish republic, Kemalism, was also a *dirigiste* ideology, granting the state a great deal of control over religious affairs and, for that matter, over the economy and civil society. Religion became a matter of private faith, and the state removed the theological vocabulary from its own proceedings, all the while acknowledging that Islam was the *official* religion of this society. The Turkish model of *laïcité* is unique in that the state continues to direct religious affairs: the thousands of Muslim clerics who serve in mosques are educated in state-sponsored institutions of higher learning. In the last three decades, however, this peculiar Turkish model has become destabilized, and the sociological firewalls that the Turkish republic tried to erect between state and religion have turned out not to be as thick as the Kemalist revolutionaries imagined.

The ensuing difficulties are nicely suggested by a question recently posed by Jürgen Habermas: “How should we see ourselves as members of a post-secular society and what must we reciprocally expect from one another in order to ensure that in firmly entrenched nation states, social relations remain civil despite the growth of a plurality of cultures and

religious world views?” Habermas asks this question with an eye to the conflict between European societies and their Muslim residents and citizens. In Turkey, where the majority of the population is Muslim but where a modern constitutional understanding of citizenship and civil rights is institutionalized, the question requires a nuanced response. I will try to respond by reexamining the “headscarf ban” and the legislative struggles surrounding it.

In February of 2008, the ruling Turkish party, the AKP (Justice and Development Party), decided to reform the law that banned the wearing of headscarves and turbans in institutions of higher learning in Turkey. In June of 2008, the Turkish Constitutional Court overturned the new legislation, arguing that it was subversive of the secular nature of the Turkish state.* Opponents of the AKP tried to have the party at large banned for attempting to subvert the secular nature of the Turkish state as well. Contrary to many fears and expectations, the Court declared in August 2008 that the AKP would not be shut down, but would be fined for actions contrary to the *laik* (secular) constitutional order. Despite this delicate compromise, it is worth looking at the legislative decision to permit the wearing of the headscarf.

Initially, the decision to reform Articles 10 and 42 of Turkey's Basic Law (*Anayasa*) or Constitution included another motion to reform the notorious Article 301, which prohibits “insult-

*As sociologist Faruk Birttek points out, the parliamentary vote to reverse the ban on the wearing of the headscarf, *strictu sensu*, contradicts the Supplement 17 to the Legislation known as *YOK Kanunu*, that is, the Law of the Council of Higher Education. It is this clause that must be rescinded in order for the wearing of the headscarf to become fully legal, and this was never the case. So from a legal point of view, there was a lot of confusion about the meaning of the AKP-sponsored new law. See Interview with Faruk Birttek in *TARAF* by Nese Duzel. www.taraf.com.tr/Detay.asp?yazar=7&yz=21, accessed June 29, 2008.

ing Turkishness,” and which was used by many nationalist and ultranationalist prosecutors to bring charges against liberal writers and intellectuals. This proposal was dropped, which means that one of the most antidemocratic and antiliberal articles of the Turkish Constitution remains in place. At the legislative level, the alterations introduced into Articles 10 and 42 seemed quite minor. But they were not.

Article 10 concerns “Equality Before the Law” and proclaims, “Everyone, regardless of distinctions of language, race, color, gender, political belief, philosophical conviction, religion, ethnicity and like grounds, is equal in the eyes of the law.” In addition, “Women and men possess equal rights. The state is responsible to ensure that this equality becomes effective.” The changes come in the fourth paragraph of the Article, which in its older version read, “Organs of the state and administrative authorities are obliged to act according to the principles of equality before the law in all their transactions.” The new version reads, “Organs of the state and administrative authorities are obliged to act according to the principle of equality before the law in all their transactions and *in all activities pertaining to the provision of public services*” (my emphasis). The Turkish Parliament thus upheld the principle of nondiscrimination, reaffirming that gender discrimination was against the law and also that discrimination on the basis of language and ethnicity as well was illegal. The state should not deny girls and women wearing headscarves (the hijab) access to universities since these are public institutions. Within the Turkish context, where approximately fifteen million Kurds live in the country and speak their own languages as well as Turkish, this parliamentary re-affirmation had multiple meanings. If some deputies of the AKP and others hoped that Turkey one day would adopt Sharia law, introducing the inequality of the sexes, they would now have their own legislative actions to contend with. Ironically, the egalitarian and civic-republican legacies of the Turkish Kemalist tradition led the Parliament, with its AKP majority, to formulate a resounding restatement of the principle of nondiscrimination for all Turkish citizens in the eyes of the law and in the procurement of public services.

BUT THE LAW was ambiguous as to whether the *providers* as well as the *receivers* of public services would benefit from nondiscrimination. Did the law intend to protect only religious women against discrimination in *receiving* educational, medical, and other services or did it also intend to protect those who *provide* such services from discrimination? The difference between the two is enormous. If the law protects the providers of public services, then teachers, government officials, doctors, attorneys, and, indeed, the president’s own wife would be able to wear the headscarf in their official capacity and in the performance of official functions.

From a moral standpoint, one could argue that any distinction between *receivers* and *providers* of public services is indefensible. What matters is that the state protect the individual’s freedom of conscience and rightful claim not to be discriminated against on account of his or her faith. One may poignantly recall in this context the case of Fereshta Ludin, the Afghani German history teacher who was banned by the Baden-Wuerttemberg legislature from teaching with her head covered.* Can such an action be supported with good reasons? In the Turkish case, it is often asserted that in the public sphere *laïcité*, understood as the strict banning of sectarian religious symbols in the provision of state services, must be upheld. The German legislators reasoned likewise in the Ludin case: a woman wearing the headscarf, it was said, could not represent adequately and convey to her students the values of the German republic.

The reformed Article 10 had other ramifications as well: if discrimination on the grounds of religious belief is against Turkish law, does this mean that a Jewish student attending a Turkish university wearing a *yarmulke* or a Christian student wearing a cross are protected just as Turkish girls wearing the headscarf are? And if not, why not?

And what about the longstanding practice of barring non-Muslim Turkish citizens from working in many governmental administrative

*For a discussion of the Fereshta Ludin case, see my *The Rights of Others: Aliens, Citizens and Residents* (Cambridge University Press, 2004), ch. 5.

posts? So far, such cases have not been brought before Turkish courts, but they could be. In short, Article 10 permits many unexpected iterations that go well beyond the sole intention of lifting the ban on the scarf.

The legislative revision of Article 42 of the Basic Law, which pertains to “The Right of Education and Instruction,” was more straightforward, although this Article is riven by many clauses of ambivalent, and even repressive, political import. It reads, “No language other than Turkish can be taught. . . in any institutions of learning and instruction as a mother tongue.” This is a militant assertion of the “homogeneity” of the *ethnos* upon which the *demos*, the political nation, is based. It reveals the tension between the *demos* of the Turkish republic, which consists of Turkish citizens, regardless of religion, ethnicity, creed, and color and the imaginary unity and supposed homogeneity of the *ethnos*, a nation that is supposed to have no other mother language than Turkish. The reforms of February 10, 2008, left the gist of this article untouched. Legislators simply added, “No one can be denied their right to attain higher learning on the basis of reasons not clearly formulated in writing by law. The limits of the exercise of this right are determined by law.” This clause aimed to censure instructors, professors, and administrators who took it upon themselves to ban women and girls wearing the headscarf from entering these institutions or sitting for their exams with their heads covered. But even after the legislation was passed, such incidents did not stop. Even local officials in public health care clinics were reported to have refused to take care of women wearing the hijab.

WE COULD SAY that all this is now ancient history, given that both amendments were rescinded and the status quo ante reestablished by the Turkish Constitutional Court. But it is important to note that between February 2008, when the new legislation was passed, and June 2008, when it was overturned, Turkey missed the chance to create a new *demos* and a new political identity for a truly pluralistic society. It missed the chance to recognize the cleavage between observant and nonobservant Muslims as only one,

and by no means the principal one, among the many differences and divisions in Turkish society.

Civil society in Turkey today shows unprecedented effervescence and self-examination. Atrocities committed against the Ottoman Armenians in 1915; repressive measures directed at the non-Muslims with the passing of the so-called *Varlık Vergisi*, which redistributed the wealth of Jews, Greeks, and Armenians primarily to the nascent Turkish bourgeoisie; the repressive Kemalist ideology of the ruling elites; and the origins of the Kurdish problem, which goes back to the compromises reached between these very Kemalist elites and Kurdish feudal landlords—all these topics are being examined by the media, by newspapers, by works of art and theater, and in contemporary scholarship. Seen against this background, the headscarf debate essentially centers around the pluralization of identities in a postnationalist and democratic society. It is not about regression to an Islamist republic, as many secularists claim. The Kemalist elites—the army, the civil bureaucracy, teachers, lawyers, engineers, and doctors—look upon these developments as *failures* of the republican experiment. On the contrary, they are manifestations of its success. Whereas Kemalist republican ideology, despite its Enlightenment pretensions, equates citizenship with ethnic Turkish and religious Muslim identity, today we see not only the proliferation of ethnicities but also the reclaiming of different ways of being Muslim. It is not only the right to wear the headscarf that must be defended but also the right of any Muslim girl or woman *not* to wear the hijab if she so chooses and, likewise, the right of any Muslim person who so chooses *not* to observe mandatory fasting during Ramadan that must be asserted. But neither the ruling AKP nor the oppositional Republican People’s Party (CHP) show themselves to be deep democrats in this sense. It is also quite possible that had the Turkish Constitutional Court decided to accept the new legislation as constitutional, the AKP would have seen a green light to ban the public drinking of alcohol, to impose further restrictions on the dress habits of nonobservant Muslim Turkish women, and to demand that all Muslims fast during Ramadan. In other

words, the public face of Turkish civil society could have come to resemble that of Saudi Arabia and Malaysia rather than that of Israel or Canada, countries in which religious groups enjoy great freedoms and some degree of self-government in many areas of civil and political life.

In the weeks following the reform of the headscarf ban, a group of nearly eight hundred women wearing the headscarf signed a petition stating, "If freedom of expression is at stake, nothing can be considered a detail. We are not yet free." These women took aim at what they call "repressive governmentality"; they demanded the abolition of the Turkish Council on Higher Education (YOK); they wanted assurances that the rights of Alevis (a dissident Muslim sect) would be protected, that there would be a solution to the Kurdish problem, and that Article 301 would be abolished. The right to wear the headscarf was seen in the context of broadening civil rights for other groups.

IN *ANOTHER COSMOPOLITANISM*, I introduced the term "democratic iterations" to analyze contentious processes of struggle. Democratic iterations are linguistic, legal, cultural, and political repetitions in transformation. They not only change established understandings but also successively transform what once was the valid or established view of an authoritative precedent. Democratic iterations are open ended. Thus, in the Turkish context, the legal reforms, even though they were overturned, could have led to a heightened debate about the illegality as well as the immorality of all forms of discrimination in the public sphere—just as they could have led to increasingly repressive measures against nonobservant Muslims and, maybe, non-Muslims in general.

Democratic iterations can lead to "jurisgenerative politics," which takes place when a democratic people that considers itself bound by certain guiding norms and principles reappropriates and reinterprets them to expand the arc of equality and freedom, thus showing itself to be not only the subject but also the author of the laws. On the one hand, rights claims such as freedom of conscience and equality before the law, which frame demo-

cratic politics, must be viewed as transcending the specific enactments of democratic majorities. On the other hand, such democratic majorities *re-iterate* these principles and incorporate them into democratic processes through legislation, argument, contestation, revision, and rejection. Jurisgenerative politics results in the augmentation of the meaning of rights claims and in the growth of the political authority of actors who make these rights their own by democratically deploying them.

In some cases, of course, no normative learning may take place at all, but only strategic bargaining among the parties; in other cases, the political process may simply run into the sandbanks of legalism; or a popular majority may trample upon the rights of minorities in the name of some totalizing discourse of fear and war.

In contemporary Turkey, the headscarf debate is only the beginning of a transition heralding the pluralization and flexibility of the repressive Turkish nationalism that has dominated the country since the founding of the republic. In this process not only the confrontation with religious Islam but also the fate of the Armenian, Greek, Jewish, and Assyrian populations in the Turkish republic have been opened for political discussion.

In conclusion then, and in response to Habermas's question, the most significant development in politics today concerns the unsettling of the identity of the democratic people, the *demos*, as a result of the rise of deterritorialized religious movements, including but not restricted to political Islam. This development calls into question the relation of the *demos* to the nation, when understood as an *ethnos*, and places on the agenda the transformation of repressive understandings of both ethnicity and religion so as to allow for a larger, more inclusive democracy. ●

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