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The Gender of Constitutional Jurisprudence

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Gender Equality from a Constitutional Perspective *The Case of Turkey*

Hilal Elver

POINT OF DEPARTURE

The Modernization Project of Turkey and the Identity of Women as Political Agents

Turkey, a bridge connecting Asia and Europe, occupies the geographic border zone between two vastly different regions of the world: the East and the West. This gives Turkey a unique position, as it has cultural, social, and legal characteristics of both regions and tries to achieve the values of both in its current search for identity. This makes it difficult and puzzling to evaluate the status of women in Turkey.

Although 98 percent of its population is Muslim, Turkey has had no state religion since 1924, when the Constitution defined the country as "secular." Indeed, Turkey's commitment to Western values was so widely accepted that, after September 11, many mainstream Western media reports did not even include Turkey on their lists of Muslim countries. Many journalistic articles in the United States and elsewhere advance the view that Turkey is the only modern, democratic Muslim society, a model for the rest of the Islamic world. This interpretation is quite understandable, considering that in the early 1920s, among other reforms, Turkey changed its entire legal system from the Islamic *Shari'a* to the Continental European system, in effect adopting a Western secular order.

This abrupt transition had a strong impact on the status of Turkish women. Since the creation of the modern Turkish Republic in 1923, the ultimate aim of the founders has been to gain acceptance among the European states.¹ They perceived the process of modernization as a process of Europeanization: the adoption of European norms, attitudes, and the expectation

¹ Serif Mardin, *Turkish Modernization* [Turkish] (Istanbul: Iletisim, 1991); Bernard Lewis, *The Emergence of Modern Turkey* (London: Oxford University Press, 1961).

of European standards of living.² Within this context of modernization and Europeanization, Turkish women were granted certain rights; this was atypical for an Islamic country. Indeed, this enhanced status of women was considered a decisive criterion of Muslim modernity and compatibility with Western values.

For the founders of the Turkish state, improving women's status meant formalizing gender equality irrespective of religious tradition. These initiatives were inconsistent with the Islamic practice as enacted by the Ottomans, which had excluded women from participation in the public realm. The primary political concern of Turkish state-builders was to equalize women to men in the public domain, while overlooking inequalities in the private domain. Thus, the Turkish promotion of gender equality remained a limited undertaking related to their preoccupation with achieving modernity "for the good of the country."³

However, laws and changes in the public sphere do not necessarily control life experiences and behavioral practices. The *de facto* situation of women, a combination of domestic responsibilities and economic hardship, has made it very difficult for most women to become informed citizens, let alone socially and politically active ones. Today, while the enrollment rate of boys and girls in elementary education is equal, almost one third of adult Turkish women remain illiterate. Power and wealth (almost 75 percent of household property belongs to men) is so unequal that constitutional equality, legal rights conferred by various laws, and political rights that were given to Turkish women sometimes earlier than in many European countries, often have very little positive impact on the quality and quantity of the economic, social, and political participation of women in Turkey.

Turkish women, despite religious and cultural differences, share a similar experience of patriarchal domination with women elsewhere. This domination exists in almost every country, from the most modern to the most traditional, although to varying degrees and with differing intensities. Moreover, in Turkey, strong family ties influence the formation of values, attitudes, aspirations, and goals that have tended to weaken the position of women both inside and outside of family structure.

The legal and social norms that the founders of the Turkish state applied to women in the 1920s were considered liberal on gender equality. However, they have become controversial in the 1970s and 1980s. Women's rights organizations demanded improvements in existing domestic laws in accordance with the changing standards of "women's human rights" at the global level. After two decades of public debate about the outdated legal principles on

² Niyazi Berkes, *The Development of Secularism in Turkey* (Montreal: McGill University Press, 1964).

³ Yesim Arat, *The Patriarchal Paradox: Women Politicians in Turkey* (London: Associated University Press, 1989).

women's status, in 2002 the Turkish government complied with specific demands of the European Union by enacting a major constitutional amendment and a new Turkish Civil Code. As discussed later, these recent legal developments have provided significant changes in women's status, especially in family law. Nevertheless, it is too soon to assess if these legal improvements will actually enhance women's status, particularly in the areas of economic freedom and self determination.

Given the dramatic changes in Turkey in the early twentieth century, the major focus of this chapter will be the dilemma confronting Turkish women who are caught between Western secular and traditional Islamic identities. Turkish women suffer most from being "the focal point of intense debate between the two groups with conflicting political interests."⁴ This dilemma of identity is generated by clashing political and social forces. Inquiry here will stress the consequences of this clash in the context of constitutional jurisprudence. After a short historical background, the status of Turkish women will be examined from the perspective of the current constitutional order. The chapter will conclude with some recent developments that illustrate the crucial role being played by international law and international institutions in promoting gender equality on the domestic level.

Historical Background of the Constitutional Order

A constitutional movement was initiated during the last period of the Ottoman Empire, toward the end of the eighteenth century, as a result of Western influence when the fortunes of the Ottoman Empire began to decline. During this early period, Turkish women were neglected entirely in constitutional law. People were segregated into groups according to religious or ethnic affiliation, and within each group according to gender. Muslim women were under the domain of *Shari'a* law. Polygamy was an accepted practice in which men were permitted four wives; divorce was extremely easy for men and very difficult for women. Rural and urban women alike were subjected to the absolute authority of men by way of the state, religion, and family.

The emancipation of Turkish women began during the second half of the nineteenth century with the late Ottoman Westernization project, which led to the introduction of monogamy, free choice of female dress codes, noninterference by the police in the private lives of women, freedom of choice in matters of marriage, the admission of women to medical school, and the launching of women's magazines.

In the early 1920s, a war of independence resulted in the dissolution of the Ottoman Empire and the founding of the Turkish state. The original Constitution was announced in 1924 and remained in place until 1961. The major significance of this first period was the emphasis given to Turkish women

⁴ Sirin Tekeli, ed., *Women in Modern Turkish Society* (London: Zed Books, 1995).

as a principal means of signaling the changing values of Turkish society, essentially the shift from those of Islam to those of a Western-oriented secular state. The Turkish woman became a central agent in the changing image of the new Turkish state, epitomizing the embrace of modernity and secularism. These changes affecting the status of women were achieved only by legislation, not by providing any constitutional foundation other than the very general principle of equality before law that made no reference to either group or gender equality.⁵

During this period, the most important advance for Turkish women arose from the Turkish Civil Code of 1926, which adopted the Swiss Civil Code. An entire body of Turkish secular law replaced *Shari'a* law in one year. For its time in history, Turkish legislation concerning gender roles seemed egalitarian, especially for an Islamic country. In reality, the legislation reflected conventional gender ideology in Europe in the late nineteenth century, when gender roles were constructed around "male breadwinner – female homemaker" roles.⁶

The second Constitution of 1961 was enacted after the intervention of the Turkish armed forces overthrew a civilian government. Nevertheless, liberal and plural democracy was carefully entrenched in the new Constitution which also established the Constitutional Court in Turkey. Towards the end of the 1970s, the Turkish political system faced an increasingly serious crisis brought about by political polarization, violence, and terrorism. This instability again led to a military takeover on September 12, 1980. In 1982, the military government promulgated the present Constitution, which was subsequently amended October 3, 2001.

THE EQUALITY PRINCIPLE AND CONSTITUTIONAL LAW

In General

The Constitution of 1982 contains the standard principles found in other democratic constitutions. It defines Turkey as a unified state with a parliamentary regime that strictly adheres to secularism. The 1982 Constitution includes: the separation of powers among the legislative, executive, and judiciary; definition of the power structure; the duties and responsibilities of the three branches and other governmental institutions, including the Constitutional Court.⁷

⁵ The concept of "gender" is unknown in the Turkish language. In the Turkish context, "sex equality" or "equality between man and woman" are the options to express gender equality.

⁶ Simon Duncan, "Obstacles to a successful equal opportunities policy in the European Union" (1996) 3 *European Journal of Women's Studies* 399–423, cited in Meltem Muftuler-Bac, "Turkish Women Predicament" (1999) 22 *Women's Studies International Forum* 303–15.

⁷ For the full text of the Constitution, see *Constitution of the Republic of Turkey, 1982*, online: Republic of Turkey, Ministry of Foreign Affairs <www.mfa.gov.tr/grupe/ca/cag/1142> (date accessed: September 10, 2001) (hereinafter *1982 Constitution*).

With regard to constitutional review, Turkey relies on a centralized model, sometimes called the "European" model, which is characterized by the existence of a special court with exclusive jurisdiction over constitutional rulings. The basic function of the Constitutional Court is to ensure that legislative power is exercised in conformity with the Constitution. If the Court declares that a law is unconstitutional, that law is annulled. Therefore, the review exercised by the Constitutional Court is a "correcting" review. The Turkish Constitution gives dissenting rights to members of the national legislature: the right to challenge the constitutional validity of laws on an "abstract" basis. In Turkey, constitutional issues are generally raised by a public authority like the executive branch, a major political party, a parliamentary majority, or a lower court (lower courts are not empowered to decide constitutional issues). Individuals cannot challenge the constitutionality of laws. These procedural features remain basically the same in the Constitutions of 1961 and 1982.

According to Article 146 of the Constitution, the Constitutional Court is composed of eleven regular and four substitute members appointed by the President of the Republic for a time-limited term. Currently, one of the eleven regular members and two of the four substitutes are female.

The Constitution of 1982 has a significant democratic deficit, arising from the intervention of the military in the democratic process. The rationale for this intervention was to strengthen the political power of the state rather than to promote liberty and safeguard democracy.⁸ The Constitution of 1982 failed to establish satisfactory democratic protections for the exercise of human rights. During the European Union (EU) membership negotiations, therefore, the major issues included the improvement of human rights protection and the inclusion of democratic institutions in the Constitution. The resulting amendments to the Constitution provide comprehensive protection of individual human rights, particularly in the areas of civil and political rights.

Gender Equality in the Constitution of 1982, and the New Constitutional Amendment of 2001

Article 10 of the 1982 Constitution, entitled "equality before law," is similar to its predecessor the Constitution of 1961, granting a nongender specific, abstract, and formal notion of equality: "All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such consideration."⁹

Besides the general equality principle of Article 10 and the protection of the family contained in Article 41, there are some provisions on rights

⁸ Tahsin Fendoglu, "Liberty and Turkish Constitution of 1982," online: University of Dicle <www.dicle.edu/tr> (date accessed: September 10, 2001).

⁹ 1982 Constitution, *supra* note 7.

and responsibility of individuals which can be used to support women's rights. These include: Article 12, entitled "on the nature of fundamental rights"; Article 17, on personal inviolability, material, and spiritual integrity; Articles 49 and 50, on the right and responsibility to work; Article 55, on the minimum wage; and other provisions, such as Articles 60 and 70, related to working conditions.

The recent constitutional amendment was adopted in response to the Council of Europe's suggestions to the Turkish government in December 1999. The major aim is to reform the Turkish constitutional order and related legislation to the extent that they are not compatible with the established democratic principles of the European Community. One of the specific demands of the Council of Europe was to change the existing equality principle of the Constitution so as to give more leverage to gender specific claims. The new amendment, however, instead of changing the text of Article 10 in the direction of gender specific language, added a sentence to Article 41 dealing with the protection of the family: "The family is the foundation of Turkish society and is based on equality between wife and husband. The State shall take the necessary measures and establish the necessary organization to ensure the peace and welfare of the family, especially the protection of the mother and the children, and family planning education."¹⁰ The new amendment did not affect other above mentioned constitutional provisions indirectly relating to women's rights.

The new amendment's cosmetic change was a big disappointment for women's organizations and civil society at large. According to their argument, this version of equality does not treat a woman as an independent individual but seems to support the patriarchal philosophy of traditional Turkey. It considers equality between men and women only in marriage. Thus, the new amendment fails to provide gender equality compatible with international standards. The success or failure of the new version of equality, what can be called "conditional gender equality," very much depends on future Constitutional jurisprudence. If the Constitutional Court were to take a progressive attitude when interpreting the new version of equality, it could be transformed into a wider gender specific equality not limited to implementation in the family environment. It is too soon to make a judgment about how this new constitutional provision will be shaped and interpreted by the Court.

Gender Equality in Constitutional Jurisprudence

Since the establishment of the Court in 1961, its jurisprudence has followed the mainstream political and social view in Turkey, which is based on the

¹⁰ *The Amendment of the Constitution of the Republic of Turkey, Nr 4709, 3 October 2001, art. 17.*

principles of Atatürk, which favor a nationalist, secularist, and Western-oriented structure. The Court's view on women's issues is similar, with one exception.¹¹ The Court acts as protectively as possible of women if the issue fits within the traditional understanding of patriarchal Turkish society, yet acts as conservatively as possible if the issue is related to women's status as an individual and if the identity of women threatens family values. Nevertheless, during the last decade, the Court has gradually softened its approach by moving toward a more egalitarian approach. It seems to have been influenced by the feminist movement in Turkey, and by women's rights principles of a universalist nature present in international agreements. However, the Court's egalitarian approach has not been consistent.

According to the Constitutional Court, "the principle of equality in art. 10 provides equal treatment to people who are of legally equal status and allows differential treatment of those who are in different statuses."¹² Equality before the law thus does not mean that every person will be treated equally if they have a different status. This view can be expressed as: "equals be treated equally and nonequals be treated according to their differences." The Court interprets the equality principle in an absolute manner such that:

Rules cannot be implemented differently for people because of their differences of language, ethnicity, color, sex, political, philosophical, and religious belief. The Constitution will not allow privileges and discrimination among people who belong to equal status. Therefore, lawful discrimination will not be considered as a violation of the equality principle. The aim of the Constitution is to provide legal equality but not operational equality.¹³

In relation to gender equality, the Constitutional Court affirms that the principle of equal rights before law must be interpreted as conferring gender equality while seeking to "respect women's objective biological and functional differences from men."¹⁴ This view leads the Constitutional Court to the conclusion that if biological and functional differences create a differentiated behavior or privilege for one party only, such an interpretation is not constitutionally acceptable. Nevertheless, many of the Constitutional Court decisions on gender equality interpret this principle in such a way as to limit women's rights rather than to affirm them.

¹¹ Even though the members of the Court are new, the gender provisions remained the same in the 1961 and 1982 Constitutions. In principle, the Court is bound by previous decisions; thus the cases decided under the 1961 Constitution are still considered relevant under the 1982 Constitution. Nevertheless, as will be discussed further, in the late 1990s judicial interpretation became more progressive and egalitarian with the influence of new international commitments, such as the ratification of CEDAW.

¹² E. 1995/22, K. 1995/37, T. 15. 8. 1995, T. 15.8.1995, *Journal of the Constitutional Court* (hereinafter JCC) 1996 at 54-55.

¹³ E. 1996/10, K.1996/40, T. 22.10.1996, *Official Gazette* 23147 at 20.

¹⁴ E. 1996/10, *ibid.*, at 24.

The Court's interpretation of the equality principle has been criticized by women's rights scholars, especially from the perspective of the European Convention on Human Rights, to which Turkey has been a party since 1949. According to their argument, the "absolute implementation of equality principle" works only among equals; in the case of gender equality, only among individuals of the same gender.¹⁵ The classical interpretation of the equality principle does not always maintain equal status between biologically different groups. Although an absolute or mechanical interpretation of the equality principle would maintain equal opportunity and rights and equal freedoms for men and women, issues specifically related to women such as abortion, sexual harassment, rape, domestic violence, pregnancy, birth control, and motherhood, require a different approach than one based on the absolute interpretation of the equality principle. To maintain equality for these issues, it is necessary to pursue either the relative interpretation of equality or to have a gender-specific equality principle. According to the one female member of the Constitutional Court, however, not having a specific gender equality principle in the Constitution should not be a barrier to a gender specific interpretation.¹⁶

Accepting this general view, several decisions of the court relating to the status of women in the family environment, the status of women in the work place, civic duties, religious freedom, and women's sexuality will be discussed in the next section.

Women in the Family. In the early 1960s, the Court's jurisprudence was mainly devoted to reviewing several discriminatory provisions in the Turkish Civil Code of 1926, the Criminal Code, and several other legal codes. Even though the former Turkish Civil Code seemed radically progressive in 1926, by the end of the 1980s there were articles (declaring the husband the head of the family, obliging him to be a provider for the family, expecting the wife to be his helper) that needed to be revised to reflect more modern attitudes.¹⁷

The Court has decreed an affirmative treatment for protected categories in several of its decisions relating to women's status in the family, stating that "positive discrimination or affirmative action for women is not a violation of the equality principle due to her special position in the family as a wife, and

¹⁵ "Sexual Equality in the European Convention of Human Rights, A Survey of Case-Law," Council of Europe, EF (89) 3, cited in Aysel Celikel, "Interpretation of Equality Principle" [Turkish] (1989) 19 *Bulletin of International Law* 92-9.

¹⁶ Fulya Kantarcioglu, "Gender Equality from the Perspective of Constitutional Court Decisions" [Turkish] in *Symposium on Gender Equality*, (Izmir: Adalet Press, May, 1998), at 55.

¹⁷ For discussion of the old version of the Turkish Civil Code and its discriminatory provisions, see Hilal Elver, "Women Issues in Turkey" (1997) 1 *Mediterranean Journal of Human Rights* 185-202.

especially as a mother."¹⁸ A decision dealing with the *Retirement Fund Law* is an example of the legal protection afforded to female children. Article 74 of this law distinguishes male and female children in identifying the principal beneficiary of their parents' retirement salary. Female children are eligible unless they are married, but male children must be disabled or under the age of twenty-one in order to qualify as the principal beneficiary. The lower court applied to the Constitutional Court to abolish this provision, contending that it violated the equality principle of the Constitution. The Constitutional Court, however, stated that:

art. 74 did not discriminate against male children by not giving them equal financial support unconditionally, as it did for female children. Despite equality before the law being a fundamental principle of our constitutional order, due to economic disempowerment, lack of education and traditional values, it is necessary to support women's status in society through affirmative jurisprudence and legislation. Such protective measures do not create discriminatory rules in favor of women; on the contrary, they overcome long time inequality.¹⁹

The decision was not unanimous, and several members of the court took the view that the provision of the *Retirement Fund Law* did violate Article 10 of the Constitution.

Although the Constitutional Court is willing to protect women in the traditional family environment, it does not find any violation to the equality principle in relation to the Civil Code's provision dealing with a husband's leadership role in the family. For many years, the Constitutional Court supported this provision of the Turkish Civil Code of 1926, arguing that: "the family as a small social group needs a leader to maintain sustainable order. The husband acts cooperatively with the wife to establish order over children. This is a suitable social standard based on Turkish tradition and does not violate the equality principle."²⁰ The new Constitutional amendment to Article 41 denies the husband's leadership in the family circle, but confirms at the same time that Turkish society is still willing to affirm women's rights in an equal manner only in the family environment as a "wife" or "mother," not as an individual person.

Women in the Family. Adultery. The most significant instances of discrimination against women in family settings involve adultery. Until very recently, adultery was a criminal offense in the Turkish Criminal Code, because it was considered a threat against family unity. Article 440 of the Criminal Code defines adultery by women as sexual relations between a married woman and a man other than her husband. Under Article 441, in contrast, adultery

¹⁸ Zafer Goren, "Equal Rights for Different Sexes in Turkish-German - Swiss Laws" [Turkish] (Izmir: D.E.U. Law School Press, 1998) at 9.

¹⁹ E. 1996/10, *supra* note 13 at. 22.

²⁰ E. 1989/7 K.1989/23, JCC 1991 55-73.

by men requires the additional proof that a married man is not only having sexual relations, but is openly living with another woman.

Lower courts applied several times to the Constitutional Court to equalize male and female adultery, arguing that the provisions of the Criminal Code violate the country's constitutional principle of equality before law.²¹ The way in which adultery was treated in the Criminal Code appeared to be a clear violation of gender equality, if not violation of freedom and right to privacy. The time, though, was not ripe in 1960s and 1970s for such an assessment. It took quite a long time to put the adultery discussion on the public agenda, and even longer to persuade the Constitutional Court to conclude that the provisions of Criminal Code were a major violation of gender equality. In late 1980s and 1990s, liberal women's organizations called attention to this issue and seized every possible opportunity to raise it in the public arena. Several bills were proposed in Parliament, not to eliminate adultery entirely as a crime but to define adultery the same way for women and men. None of these efforts at reform succeeded.

Finally, and not surprisingly, it was the male provision rather than the female one that the Constitutional Court declared unconstitutional in 1996. It was not very difficult for the court to find gender discrimination, stating that:

The equality principle means that woman and man in similar status have the same rights before the law. Sex cannot be used as a tool of inequality before law, and sexual differences cannot give any privilege over the other gender. . . . Providing different conditionality between husband and wife relating to the same crime gives the husband a privileged position over his wife before the law. There is no difference between wife and husband with regard to loyalty in marriage. Not to punish husband because of his simple adultery (it is considered one time sexual intercourse), creates a privilege that is not acceptable according to a civilized understanding of gender equality. Of course, legislators might consider abolishing rules that make adultery a criminal activity or might change conditions to adjust to new developments in the society. However, legislators cannot violate the principle of equality that gives equal status to the wife and husband in marriage.²²

Since this decision, male adulterers have faced no legal punishment. The legislators had a year to replace the annulled article with a new one. During this period, they were expected to enact a new law for male adulterers that imitated the definition of adultery for women. However, a new debate arose on the proposed changes. Feminist organizations and liberals advocated the abolition of Article 440, or equalization of the conditions for women and men. Conservatives and Islamists insisted that adultery should be a criminal offense for both women and men, arguing that adultery was a threat to the family. At the time, the Islamist Welfare Party of Turkey was in control

²¹ E. 1967/12, K. 1967/52; JCC 1968 at 46; E. 1968/13, K. 1968/56, JCC 1969 at 34.

²² E. 1996/13, K. 1996/34 (1996), 7-12 *Official Gazette* No.22860 at 249-51.

of the government and the issue of family values had acquired increased importance. Some women also were in favor of a stricter punishment for men making it equal to the punishment for adultery imposed on women rather than abolishing both articles.

However, no law was passed that made adultery a crime only for women. Finally, on 23 June 2000, the Constitutional Court annulled Article 441, under which women found guilty of committing adultery faced a prison sentence of up to three years. The decision was supported by a vote of nine to two. Most women's groups welcomed the Court ruling as long overdue.

Women's Professional Development. Despite the fact that gender equality in the workplace is affirmed as a general principle of constitutional order, there are provisions in various laws that violate this principle, such as Article 6 of the Turkish Civil Service Code. In 1963, the Constitutional Court was asked to decide whether this provision violated the equality principle. Article 6 provides that "women might be hired in government offices as civil servants. The condition of jobs and positions available for women may be regulated by each Ministry's specific legislation."²³ The lower court found that Article 6 violated the constitutional equality principle. The Constitutional Court disagreed, stating:

Due to biological differences between men and women, a specific government body might consider that some jobs are unsuitable for women. To maintain a proper and consistent public service, the government should be free to make the necessary evaluations when considering hiring women for certain types of jobs, if these jobs are not suitable for women's bodies. Therefore art. 6 cannot be considered as a violation of the equality principle.²⁴

The Court in this decision clearly exhibited its view that equality between women and men is not based on gender but on biological differences. This view can be challenged on the grounds that the Constitutional Court gives government bodies the power to interpret the provision in a discriminatory manner against women in specific cases and to implement it inconsistently. Moreover, the decision also supports the traditional societal understanding that certain types of jobs are unsuitable for women. This decision was a prototype for several other rulings on this issue, and fully expressive of the Court's view in the 1960s. Nevertheless, the decision was not unanimous. The dissenting opinion took the position that Article 6 of the Turkish Civil Service Code was discriminatory against women and therefore unconstitutional.

As manifested in several decisions of the Constitutional Court, the conservative understanding of "women's role in the society" creates an opportunity

²³ *The Turkish Civil Service Law*, Nr. 788, 18 March 1926.

²⁴ E. 1963/148, K. 1963/256, T. 25. 10. 1963, JCC 1963 at 459.

to exclude women from nontraditional job sectors. According to Article 50 of the Constitution, "no one can be employed in jobs that are unsuitable, given her or his age, sex and physical capacity."²⁵ The interpretation of this language not only compares women's status to that of minors and physically and mentally challenged people; it discriminates against women by effectively limiting them to "traditional female jobs," excluding them from jobs that "traditionally belong to men," such as bus or truck drivers, or heavy factory jobs. Surprisingly, such discrimination has been celebrated by the female member of the Constitutional Court.²⁶

The Constitutional Court adopted a more egalitarian outlook in response to the 1980s feminist movement in Turkey. In the 1990s, the first female judge had been appointed to the Court. One of the most celebrated judgments of the Court was decided in this period. For a long time, women's organizations had lobbied against the discriminatory provisions of the Turkish Civil Code, especially Article 159, which grants the husband the right to exercise control over the wife's professional or artistic activities. The Court voided this outdated provision in a decision concluding that "art. 159 of the Civil Code is not compatible with the equality principle of the Constitution that provides equal rights between man and women."²⁷ Besides the equality principle, the Court also referred to the right and responsibility to work in Article 49, stating that "Women, like men, have the right to choose freely their own profession and work place. There is no difference between men and women in terms of the right and responsibility to work freely." Moreover, in this decision, the Constitutional Court referred to major international law documents, the Universal Declaration of Human Rights, the European Human Rights Convention, and the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). Furthermore, the Court declared:

The Court does not rely on international law principles as a major source in evaluating the compatibility of the particular legislation to the Constitution in domestic law. However, these international law principles that reject sex discrimination and inequality between men and women, are not different from the equality principle in art. 10 of the Constitution. The equality principle is the major foundation of universally accepted human rights. It must be interpreted in each human rights case as an implementation of abstract equality in concrete circumstances. The list of human rights and responsibilities has expanded over the years depending on the development of human values. Therefore, each of these particular rights will involve the concrete implementation of abstract equality principles.²⁸

²⁵ 1982 Constitution, *supra* note 7, art. 50, "Working Conditions and Right to Rest and Leisure: Minors, women, and persons with physical or mental disabilities shall enjoy special protection with regard to working conditions."

²⁶ Kantarcioglu, "Gender Equality," *supra* note 16, at 55.

²⁷ E. 1990/30, K. 1990/31, T. 29. 11. 1990, JCC 1991 27/1 249-271.

²⁸ E. 1996/15, K. 1996/34, T. 23. 9. 1996, *Official Gazette* 1996 27.12. Nr. 22860 at 250-251.

With this decision, the Court actually encourages legislators to adopt and adjust the domestic legal order so that it becomes harmonious with universally accepted international human rights principles.

Women's Civic Duties. Participation in the military service is a civic duty imposed by the state. It has been expressed in Article 72 of the Turkish Constitution in nondiscriminatory language. In reality, women have only very limited access to the military, which is traditionally considered a domain reserved for men. There are only a few professional women such as doctors and engineers who work as military officers in the Turkish military. The Constitutional Court's decision on the duty to serve in the military illustrates this limited access approach. According to the Court:

art. 72 (formerly art. 60 of the constitution of 1961) of the Constitution after saying that the military service is a right and duty for all Turks, states that the duty of military service will be regulated by specific law. This duty might be different for men and women, due to the special needs and nature of military service. Therefore, regulations that give a different right and responsibility to men and women can not be considered as violation of art. 60 specifically, and of art. 10's equality principle generally.²⁹

However, in 1965, the Constitutional Court had rejected the demand from the lower court to void Article 15 of the *Village Code* that obliges all village inhabitants to engage in mandatory public service.³⁰ The lower court argued that mandatory service for villagers violates the Constitution, which protects children, youth, and women from any duty to take on nonsuitable jobs. The Constitutional Court took a different view, concluding that:

According to the Constitution, nobody can be forced to work if it is not suitable given her/his age, physical capacity, and sex. However, this article has to be interpreted rather narrowly such that it is applicable only to labor law, in other words, contractual private works, but not to the obligations of public service such as it is defined in Village Law.³¹

The court did not follow its traditional protective approach to women and children, but took a position in favor of public service at the expense of them. The Court was again not unanimous. The dissenting opinion pointed out that the Constitution protects youth, children, and women against all forms of exploitation.

Also, one of the earlier decisions of the Court in 1963 involved art. 165 of the *Procedural Rules of Military Tribunal Act*. This article concerned the possibility of prohibiting "women" from appearing in open court hearings

²⁹ E. 1966/181, K. 1966/3, T. 3.1.1966, JCC 1997 at 151-153.

³⁰ Mandatory service under the *Village Law* includes basically all infrastructural jobs for village common property, such as building roads and water systems.

³¹ E. 1963/198, K.1965/1, T. 5. 1. 1965, JCC 1966 at 10.

before military tribunals. The Constitutional Court decided to delete the word "women" from the provision, stating that:

art. 135 of the Constitution provides for open court hearings unless entire or partial openness violates the general ethic and public order. An open court hearing is one of the fundamental rights of due process of individuals. Moreover, this due process right is protected by art. 10 of the Universal Declaration of Human Rights. Women and men have equal rights according to the Constitution. The Court did not find any justification to deny such rights to women.³²

This decision is an important one, because it shows the Court's commitment not only to the equality principle, but also to universal human rights principles as early as the 1960s.

Gender Equality and Religious Struggles. The battle over the headscarf worn by religiously devout women provides a symbolic and illustrative basis for evaluating the religious freedom, secularism, gender equality, and identity of women in Turkish society. Therefore, it will be discussed in a more detailed manner than other constitutional debates. In the 1980s, starting with the Iranian Revolution, when political Islam gained influence in the Middle East and Turkey, Turkish women became the victim of an image war between Islamic fundamentalists and secular fundamentalists that revolved around the issue of the headscarf. Female students have been expelled from universities. As well, professional women have lost their jobs because of the state's rather inconsistent policy toward dress-code regulation.

The revival of Islam, including in Turkey, gave rise to a new feminist movement during the course of last two decades.³³ Most Muslim feminists took the path of criticizing some Western feminist views, particularly the idea of rescuing women from the Islamic world, and searched for an alternative approach to women's issues that would fit within the realm of Islam. In the 1980s, the military regime in Turkey was determined to "sterilize" society and eliminate the polarized ideologies of the pre-coup period. In an effort to restrain radical leftist ideologies, the state relied on religion and adopted certain education policies that increased the time and resources spent on religious education in public schools. In this political environment, the Islamist

³² E. 1963/143, K. 1963/167, T. 26. 6. 1963, JCC 1964 I at 347.

³³ Publications on this issue include: Chandra Talpeta Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Chandra Talpeta Mohanty, ed., *Third World Woman and the Politics of Feminism* (Bloomington: Indiana University Press, 1991) 51-81; Azizah al-Hibri, "Islam, Law and Custom: Redefining Muslim Women's Rights" (1997) 12:1 *American University Journal of International Law & Policy* at 11; Haifa A. Jawad, *The Rights of Women in Islam: An Authentic Approach* (New York: St. Martin Press, 1998). For a more general view, see Ruth Roded, ed., *Women in Islam and Middle East: A Reader* (London: I. B. Tauris Publishers, 1999); Herbert L. Bodman and Nayereh Tohidi, eds. *Women in Muslim Societies: Diversity within Unity* (Boulder, CO: Lynne Rienner Publishers, 1998).

groups distanced themselves from right-wing political parties and developed their own autonomous discourse.³⁴

The discussion of headscarves in Turkey created a heated political debate not only between secularists and Islamists, but also among all other social and political groups. It is a rather tricky issue from the legal point of view, and it is a very important debate from a political perspective. It bears directly on democracy, human rights, religious freedom, and women's rights. Religious groups, a minority of liberals, and some feminists argued that female students should be allowed into universities with their headscarves contending that this was a matter of civil rights. Denying the right to wear headscarves in universities was seen as antidemocratic, authoritarian, and unjust. Those against the headscarf argued the contrary. If headscarves were allowed, their status as an Islamic symbol would make it impossible to reconcile with the secular identity of Turkey.³⁵

Besides public debates among various groups of intellectuals, the headscarf issue has become a major official undertaking in Turkey. The government adopted an ambivalent approach to the issue, depending on which way the political winds were blowing. Sometimes it followed a strict secular view, punishing students and professionals, and even expelling them from universities and public jobs. At other times, depending on the political power of Islamic parties, enforcement mechanisms were flexibly interpreted, allowing women to wear headscarves.³⁶

During the military regime (between 1980 and 1983) the notoriously secular Turkish military issued a series of regulations to prohibit headscarves in schools and public institutions. Nevertheless, even the secular military sent mixed messages to the Turkish people by making religious education mandatory in the new Constitution of 1982, with the rationale of protecting

³⁴ Aynur Ilyasoglu, "Islamist Women in Turkey: Their Identity and Self-Image" in Zehra Arat, ed., *Deconstructing Images of the Turkish Women* (New York: St. Martin Press, 1997) at 243-50.

³⁵ Yesim Arat, "Islamist Women, Their Headscarves and Democracy in Turkey" *International Social Science Review* (2001) at 34. The compatibility between Islam and the secular democratic regime in Turkey has created a popular discussion among intellectuals as a very vexing question. While some have argued that the rise of Islamist activism is not a threat to secularism in Turkey (see Binnaç Toprak, "Islam and the State in Turkey" in *Turkey: Political, Social and Economic Challenges in the 1990's* [Leiden: E. J. Brill, 1995]); others have seen it differently (see Haldun Gülalp, "The Poverty of Democracy in Turkey: The Refah Party Episode" [Fall 1999] *New Perspective on Turkey* 35-59). Much engaging work has been done on how Islam can offer an alternative modernity in Turkey (see Nilufer Göle, *The Forbidden Modern* [Ann Arbor: University of Michigan Press, 1996]; "Snapshots of Islamic Modernities" [Winter 2000] *Daedalus*; Aynur Ilyasoglu, *Covered Identity*, [Turkish] (Istanbul: Metis Press, 1994)).

³⁶ For instance, the Islamist Welfare Party received a majority (21.4 percent) of the vote in December 1995, and for the first time in Republican history, held power from July 1996 to June 1997. During this period, the government did not implement strict regulations at universities. The party was abolished with the Constitutional Court's ruling in January 1998.

the Turkish society from the influence of leftist ideologies in a cold war setting. Against mounting pressure from Islamist groups and women with headscarves who protested the decision, in 1984 the Council of Higher Education allowed women at universities to cover their hair with a "turban" that the authorities deemed to be more in line with contemporary dress codes than the larger headscarf.³⁷ This regulation was challenged by the opposition parties, the secularists, and the judiciary.

The headscarf was declared unlawful in the universities by the Higher Court of the Administration (Council of State), despite some earlier, more favorable, lower court decisions. The government then issued an additional regulation in favor of the headscarf. In 1987, the Council of State again rejected the particular article of the Council of Higher Education Law, and the banning of the turban was upheld. Finally, the Constitutional Court found the article that allowed use of the turban in universities to be unconstitutional and annulled it in 7 March 1989.³⁸ In the face of strong hostility toward Islamic parties in 1998, the Constitutional Court considered the constitutionality of the Islamist Welfare Party. In this ruling, which abolished the Welfare Party, the ban on the turban was once again reviewed, and the decision concluded that the wearing of a turban was unconstitutional.³⁹

In 1999, a headscarf confrontation took place in the Turkish Parliament. Even elected representatives are subject to the ban. When Merve Kavakçı, elected as a new Islamic party deputy (Virtue Party), entered the Grand National Assembly wearing a headscarf, there was pandemonium as other deputies beat on desktops and called for her to get out. The Prime Minister denounced Ms. Kavakçı in very strong terms and called a recess. Media close to the state interpreted Ms. Kavakçı's act as a political attack on democracy and secularism. The incident triggered a move for abolition of the Virtue Party by the Constitutional Court.⁴⁰ The Turkish Council of Ministers took away her citizenship because she had breached the *Turkish Citizenship Law*, and she is no longer able to represent her constituency in Parliament.

Following the Court's decision, in 2000, more than three-hundred primary and secondary school teachers were dismissed by the Ministry of Education for defying the dress code by wearing a headscarf.⁴¹

³⁷ Arat, "Islamist Women," *supra* note 35.

³⁸ Only one member dissented from the opinion. See the Constitutional Court Decision: E. 1989/1, K. 1989/12, T. 7. 3. 1989, JCC 1991 at 25.

³⁹ E. 1997/1, K 1998/1, T. 1.16, 1998, JCC 1999 at 31.

⁴⁰ Nr. 1999/2, 2001/2 K., T. 22.6.2001.

⁴¹ Regarding the dismissals, the Minister declared, "This is a crime, the punishment of which is dismissal from the civil service. Everybody must comply with this rule. If they don't they have no place among us": *Turkish Daily News*, Feb. 11, 2000. On May 31, 2000, the Istanbul Faith Primary Court sentenced Nuray Canan Bezirgan to six months' imprisonment for "obstructing the education of others" because she wore a headscarf during an examination at the Health Services Vocational Institute of Istanbul University. The sentence was later

During the headscarf battle, both sides of the conflict defended their arguments from their own perspectives. The women who demanded to be allowed to wear their headscarves at universities argued that any prohibition violated both their freedom of religious expression, as guaranteed in Article 24 of the 1982 Constitution, and the prohibition of discrimination before the law based on religious belief or differences in language, ethnicity, and sex, found in Article 10. The prohibition of headscarves, it was further claimed, obstructed their right to education as protected in Article 42.

Against these arguments, the state has made its own case, both through the decisions of the Council of State and the Constitutional Court. The Council of State has supported the prohibition of headscarves by stating that a "headscarf rather than being an innocent custom, has become a symbol of a world view opposed to the fundamental principles of the Republic and opposed to women's liberation."⁴² The decisions, both of the Council of State and the Constitutional Court, mainly focused on four arguments: (1) headscarves restrict women's liberties; (2) headscarves in universities create an impression of unequal treatment before law; (3) headscarves are a symbol of opposition to the fundamental principles of the Republic (namely secularism); and (4) it is necessary to limit religious freedoms because a threat exists that the state would become organized according to the dictates of Islam.

From the perspective of women's rights and gender equality, the first two arguments have to be elaborated further. With regard to the first argument, Yesim Arat writes that:

Women who cover their heads do not share the individualistic perceptions of liberty that liberal women or men share. Their personal or individual perceptions of liberty are predicated upon the communitarian Islamic norms which dictate, they argue, women to cover their heads. They exercise their free choice if they can cover their heads in universities. By banning the headscarf, the state is authoritatively imposing its own understanding of women's liberties on a group who does not share the same understanding.⁴³

The Constitutional Court in its decision does not even address this argument properly. It rejects such liberty entirely, due to its alleged incompatibility with the principles of Ataturk and the Turkish revolution, which was based on the aim of "reaching [a] contemporary level of civilization."⁴⁴ Using a headscarf is not considered as part of the dress-style that "civilized countries follow." Thus, it cannot be considered either as a matter of civil liberty or rights. Moreover, the Court argues that the headscarf is a symbol of particular religious view that supports *Shari'a* law, which is a danger

converted to a fine, but she faces several similar charges that will result in her imprisonment if convicted: *Milliyet, Turkish Daily News*, July 15, 2000.

⁴² *The Decision of the Council of State*, 8th Session, E. 1984/636, K. 1984/1574, Dec. 13, 1984.

⁴³ Arat, "Islamist Women," *supra* note 35.

⁴⁴ E. 1990/ 36, K. 1991/8 in JCC (1993) at 285.

for the generality of women rights, thus suggesting that women have to be protected against their free will for the sake of state official ideology.⁴⁵

The Court has decided that demands relating to the headscarf were against the principle of equal treatment before the law as well as the principle of religious freedom. Allowing the headscarf to be worn would be a privilege given only to Islamist students, but it also would produce unequal treatment by differentiating them from others:

Religion is not a condition to have privileges before the law. To give permission to the headscarf, which is considered as religious dress, goes against the principle of equality, because it goes against secularism. Even if other religious dress is permitted it is still a violation of the principle of secularism. Allowing students to wear headscarves is a forced action rather than giving a freedom. Forcing people to dress in a specific way will result in an unequal position among people who belong to the same or different religions.⁴⁶

The Court argues that wearing a headscarf goes against secularism, which prevails over civil liberties. Moreover, the equality principle is not considered prior to the secularism principle in the Constitution. The Court failed to address any of the arguments related to sex discrimination in the headscarf case, ignoring the fact that religious men and women were treated unequally in universities. Men who share the same beliefs with women and think that women's headscarves are a dictate of religion are admitted to universities and public offices since they have no specific religious dress code, and their heads are uncovered. Consequently women are treated unequally before law, not only because they give expression to their religious beliefs or act by them, but because they are women. In other words, despite the Court's argument that the use of the headscarf actually restricts women's rights, the Court's decision to expel female students from universities limits their professional and educational opportunities, creating unequal treatment between male and female believers. Religious discrimination is confounded with gender discrimination.

The headscarf issue brings religious belief out of the private sphere, where it belongs in a secular state, into the public sphere. In other words, the religious duty of Muslim women challenges their public participation in ways that religious men have never had to face. Moreover, the practices of the state and the Constitutional Court pit religious women against secular women and religious men. First of all, it is necessary to define "Islamist women," a category that is far from being homogenous in Turkey. The majority of traditional Turkish women are devout Muslims, but without any involvement in

⁴⁵ In Yesim Arat's interview with Islamist women, those who believed there was nothing wrong with Islamic law actually thought that when that law was implemented as it should be, many *Shari'a* Law principles, including polygamy, would not violate universal women's rights. Arat, "Islamist Women," *supra* note 35.

⁴⁶ E. 1997/1, *supra* note 39.

political Islam. According to recent surveys, about 15.7 percent of women in Turkey cover their heads with Islamic headscarves, and 53.4 percent cover their heads in a more traditional style. Only 27.3 percent say that they do not cover their heads.⁴⁷ Many women with headscarves do not seem to have thought through the implications of Islamic law which dictate them to cover their heads. If they have, they have thought of it only in very liberal terms.⁴⁸

Given the results of these surveys – that the majority of Muslim women in Turkey wear a headscarf for purely traditional and religious reasons without any political agenda – it is difficult to approve of the Constitutional Court's decision, which essentializes female students by regarding them all as political followers of Islam. Beyond this, Islamist women should be given a legitimate right to pursue their own political agenda, as men do, as this would be respectful of the democratic and legal order.

The headscarf dispute also reached the European Human Rights Commission (EHRC) when one of the Turkish universities refused to give diplomas to female students who were wearing headscarves. In 1993, two female students applied to the EHRC as a last resort, claiming violations of the right to education and of the equality principle.⁴⁹ The decision of the EHRC simply followed the decision of the Turkish Constitutional Court, to the extent that it maintained the right of a secular state to restrict religious practices if consistent with citizens' right to equal treatment and religious freedom.

According to the decision of the EHRC:

A student who chooses to attend a secular university, should accept the regulations of the university. These regulations provide a system to allow for students from different beliefs to coexist. Particularly in countries where the vast majority of the population belongs to a particular religion, exhibition of the rituals and symbols of this religion without regard to any restrictions of place and form can cause pressure on students who do not practice this religion or instead, belong to other religions.⁵⁰

It was further argued that being a student in a secular university involved, by its nature, the acceptance of certain behavioral rules instituted to establish

⁴⁷ Ilyas Çarkođlu and Zerrin Toprak, *Religion, Society and Politics in Turkey* (Istanbul: TESAV, 2000) at 22.

⁴⁸ Public opinion surveys also point to this contradiction of defending the Islamic Law and opposing its traditional readings regarding individual dictates. In a survey conducted in 1999 with a representative sample of the Turkish electorate, 21.2 percent responded positively to a question which asked if they want to have religious state based on the *Shari'a*. Further probes showed that this understanding of *Shari'a* was very liberal, if not idiosyncratic or Turkish. On the issue of adultery, for example, only 1.4 percent thought that the guilty should be punished according to the Koranic dictates of the death penalty. Çarkođlu and Toprak, *Religion*, *ibid.*, at 16-17.

⁴⁹ *Lamia Karabulut and Senay Karaduman v. Turkish Government*, Admissibility decision on application No. 18783/91, May 3, 1993 (3. 5. 1993), cited in *Cumhuriyet*, September 15, 1994.

⁵⁰ EHRC Admissibility Decision on application No. 18783/91, May 3, 1993.

respect for the rights and freedoms of others. On this basis, the Commission decided that:

Secular universities while they issue regulations on dress codes, they might consider to protect public order at universities against fundamentalist interventions. Therefore, there is no illegality of having dress-code regulations at secular universities, implementing and enforcing it. The plaintiff's argument on violation of the Human Rights Convention art. 27, paragraph 2 has been rejected.⁵¹

The Turkish educational establishment used the admissibility decision of EHRC, given the considerable prestige and authority of the Council of Europe, to justify the ban. An evaluation of legal issues relating to the ban, believed to have been prepared by the Council for Higher Education (YOK) and circulated to university rectors, as well as a statement by the Turkish Prime Minister's Office High Coordinating Council for Human Rights, refer to and summarize the admissibility decision in this case.⁵²

The Commission's admissibility decision might be criticized on several grounds. First of all, the decision relies on "the student's choice of a secular institution" in Turkey but there are no religious schools offering professional education. Second, the argument that "using religious symbols by some students jeopardizes other students' position if they do not follow the same symbols" is unconvincing with respect to Turkey. There is not a single instance in which students who wear headscarves act to make other Muslim students uncomfortable due to their nonobservance of religious dress. At present, the opposite is true in Turkey. Third, the EHRC, instead of dealing with the issues of religious freedom, secularism, and gender equality, simply followed the decision of Turkish Constitutional Court. This was a disappointment for feminists, Islamists, and liberals, all of whom felt that the Commission failed to deal correctly with gender perspectives. There was no argument in the decision about unequal treatment between male and female students in terms of representing their religious beliefs or practicing their religion. The decision, however, was consistent with the Commission's other decision on the abolition of the Islamic party, supporting the actions of the Turkish government and the Constitutional Court.

These developments convinced a large portion of the Turkish public opinion that the EHRC's decision was biased against Islamist values in Europe and in Turkey, and that it had acted politically, rather than legally. In many other cases however, especially on minority rights and due process principles, the EHRC has taken a very strong position against the Turkish government. It is possible to conclude that the Commission acted on its view of Islam and

⁵¹ *Ibid.*

⁵² Human Rights Watch, "Combating Restrictions on the Headscarf" online: Human Rights Watch Web site <<http://www.hrw.org/reports/2000/turkey2>> (date accessed: April 12, 2002).

secularism rather than evaluating the issue from the perspective of gender equality.⁵³

Women's Sexual Indemnity and Sexual and Marital Autonomy. One of the major structural defects of the Turkish Criminal Code related to gender equality is the way in which sexual crimes are situated in the Code. Such crimes are considered "crimes against public order, and family structure" instead of "crimes against individuals."⁵⁴ This shows all too clearly how the Turkish Criminal Code treats women. The legal reasoning used reflects partly the Code's Italian origin and partly the patriarchal structure of Turkish society.⁵⁵

The designation of sex crimes as violations of community or family morality has two consequences. First, it identifies the community and "not the individual woman" as the party that suffers the consequent harm. Second, the investigation and prosecution of sex crimes stress not the physical harm to the woman but rather her honor and thus the public decency and family order that may have been compromised. The law even provides a remedy for the perceived harm of lost honor by creating an incentive – suspension of criminal prosecution – for a man charged with certain crimes who marries his "victim" and thus supposedly minimizes her loss of honor. By giving this opportunity to perpetrators of sexual crimes, the Turkish Criminal Code punishes the "victim" by obliging her to marry him, rather than apprehending him as a "criminal." The Criminal Code differentiates criminality according to the victim's biological and legal status. For instance, sex crimes committed against nonvirgins are perceived as less serious offenses than those committed against virgins because the potential damage to family order is regarded as less grave. By the same logic, Article 430 of the Criminal Code imposes a reduced penalty on men who kidnap a girl or woman for the purpose of marriage (even if the marriage is done without the victim's

⁵³ The admissibility decision was made 10 years ago by the European Commission of Human Rights, which has now been effectively replaced by the full-time European Court of Human Rights. At least two new applications have been made to the ECHR by women excluded from their studies, including the wife of the current Minister of Foreign Affairs, but no decisions have yet been reached in these cases: *Tekin v. Turkey* No. 41556/98 (the first hearing was in November 2002).

⁵⁴ Articles 414–470 of the Turkish *Criminal Code* are not compatible with the equality principle of the Turkish Constitution.

⁵⁵ The Italian Government changed the *Criminal Code* in 1996, replacing rape crimes from the Chapter on "Crimes against Public Order," to the one on "Crimes against Individuals." The joint campaign has been organized by Italian feminists and conservative politicians, including the grandson of Benito Mussolini, Alessandro Mussolini. For the Turkish case, see: Y. Unver, "Changing Structure of the Criminal Law related to Sex Crimes against Women and the Case of Turkey" [Turkish] in *Adalet Yuksek Okulu 20.Yil Armagani* (Istanbul: Adalet Press, 2001) 293–324; Bertil Cetinkaya-Oder, "A Case Study on Protection of Human Dignity and Violation against Women" [Turkish] in *Bulletin of International Law* (2001) 19–20 577–602.

consent).⁵⁶ Article 429 of the Code applies double standards according to the victim's marital status in cases of kidnapping. As such, basic principles of human rights are violated. These provisions have never been challenged by the Constitutional Court, despite endless discussions organized by women's rights groups.

Similar discriminatory rules also can be found in the treatment of rape crimes. Article 438 provided reduced penalties for a man convicted of rape and abduction whenever the victim was shown to be a prostitute.⁵⁷ This article was challenged in the Constitutional Court, but the Court rejected the claim on the grounds that "dishonest women, i.e., a prostitute, should not be treated the same as honest women."⁵⁸ After much public debate, the Turkish Parliament in 1989 repealed the provision.⁵⁹ As this shows, the Constitutional Court's interpretation of the equality principle is extremely conservative with respect to women's sexuality. None of these criminal provisions that directly and strongly challenge the equality principle specifically, and fundamental principles of human rights generally, have ever been placed in jeopardy by the Constitutional Court.

Finally, there is no prohibition of intramarital rape in the Turkish Criminal Code. The law distinguishes between rape inside and outside of marriage. A woman can file for divorce if she is compelled to engage in sexual relations by the use of physical force; she can also claim compensation. However, the courts regard marriage as an institution that provides people with a means to fulfill their sexual needs within the law. The law enforcement mechanism and judicial authorities do not accept the idea that rape can occur in marriage, so the criminal law is not applied in such cases.⁶⁰ It is strongly argued by

⁵⁶ In traditional Turkish rural life, kidnapping is a social phenomenon against "arranged marriage," and an escape from the paying of a "dowry." As a general practice in Turkey, kidnapping a girl is a way of getting forced permission from the family for marriage by reason of protecting its "family honor."

⁵⁷ *Turkish Criminal Code*, No. 713 (1926), online: webpage of the Turkish Grand National Assembly Web site <www.tbmm.gov.tr/kanunlar/k713.html>.

⁵⁸ E. 1988/4, K.1989/3, T. 12.1.1989.

⁵⁹ The Turkish National Assembly banned this article in *The Amendment of Articles of Turkish Criminal Code*, nr. 3670, art. 28.

⁶⁰ A recent book on modern Turkey includes a commentary on sexual violence as part of an interview with the public prosecutor of a rural town:

90% of the sex crimes are between men and women; 10% percent may be men and men. But I've only heard of only one incident where a man has raped another man. The aim of our rapists is to marry, you see. . . . There are times when people just want to satisfy their sexual desire, but more that 60 percent of the rape cases have the aim of marrying. For instance, a man took a woman, and the woman wanted it a bit, but she is too young, the man has to go to prison. That's the law: You go to prison for under-age sex. . . . If a man has kidnapped a woman, and then he marries her, and that is approved of by the parents, then it's OK. But if they divorce within five years then he is arrested for kidnapping. I think it's unfair. Of course, I could not say such things in court or I would be considered biased. . . . There

women's rights organizations that excluding intra-marital rape from criminal responsibility is against the Constitutional principle of "protection of material and spiritual wellbeing of individuals."⁶¹ The same silence of the Turkish legal system also exists with respect to sexual harassment in the work place. There has been no constitutional challenge related to sexual harassment or rape in marriage simply because there is a legal gap in the system, and the legislature has no desire to deal with issues that directly relate to women's sexuality.

CONCLUSION

The role of the Constitutional Court in gender issues has an interesting pattern in Turkey. Artificial legal rights conferred on women as part of the modernization project are in tension with the patriarchal values of Turkish society and women's very limited role in public life, which reflects the traditional beliefs and practices of Islam. These mixed messages given to the Constitutional Court have allowed it to produce an inconsistent jurisprudence. For a long time, the Constitutional Court adhered to a conservative jurisprudence, the *status quo* interpretation of the equality principle of reluctantly giving women an equal position that was more advanced than in the existing legal system. In this period, the outdated status of Turkish women, especially in the family environment as provided by the Civil Code of 1926, was interpreted by the Court as "being in harmony with the fundamental values of Turkish society and tradition."⁶² Legislative bodies, however, appeared to be more forthcoming, changing outdated norms in the legal system and influencing the political environment at the domestic and international levels.⁶³

However, in the early 1990s, when Muslim women mounted challenges in court by asserting their right to wear headscarves, the Court did not

is, of course, wife beating, but this doesn't get reported, because women tend to accept it in families of lower culture. Tim Kelsey Dervish, *The Invention of Modern Turkey* (London: Hamis' Hamilton, 1996) at 187.

As illustrated in this interview, the attitude of the public prosecutor represents the mainstream understanding of the educated male in Turkey. Many unjust consequences of the legal system towards men are well-accepted, but women's suffering as victims of horrible crimes are never mentioned.

⁶¹ 1982 Constitution, *supra* note 7, art.17: "Everyone has the right to life and the right to protect and develop his material and spiritual integrity."

⁶² Goren, "Equal Rights for Different Sexes," *supra* note 18, at 83.

⁶³ Civil Code, art. 153/1, which states that a woman must assume her husband's name upon marriage. Legal activists have been trying unsuccessfully to get the Constitutional Court to annul this provision on the ground that it violates Article 10. The action came from the Parliament, as May of 1997. Women may retain their birth names following marriage if they wish to do so. Another amendment has been issued to the *Income Tax Law* in 1998. Women can now independently declare their income as individual taxpayers.

hesitate to abandon its established practice of supporting traditional Turkish values and excluded such female students from universities. The Court, along with the majority of the political and military leadership, adhered to a strong secular view, contending that the equality principle and the right to education do not ever take precedence over the secularist commitments of Turkey.

Turkey is considered by many commentators to be one of the few relatively democratic countries in the Islamic Middle East. However, military interventions and their impact upon the constitutional order and human rights have made it impossible for Turkish citizens to enjoy fully the universal values associated with legal protections. This "censored democracy" flourished especially in 1980s. The 1982 Constitution forbade political associations of youth, women, and other groups, reducing the relevance of citizen action in Turkey. However, women's organizations benefited from these limitations in the long run, as they were treated as "less dangerous" by the military than leftist movements. The emergence of feminist movements in this politically sterilized environment of the 1980s is a good example of the possibilities of such policy in Turkey.⁶⁴

On an official level, the benevolent attitude of the Turkish government to women's issues is also expressed in foreign policy. Turkey actively participated during 1979 in the drafting of CEDAW, signing and later ratifying the treaty in 1985 (although with reservations).⁶⁵ CEDAW was regarded as 'compatible' with Turkey's existing commitment to gender equality, reflecting the Republic's secular and modernist orientation. Considering that Turkey has not ratified some of the most important international human rights treaties (e.g., the Racial Discrimination Convention, the two International Covenants on Civil and Political Rights and Economic and Social Rights, respectively, and more recently the International Criminal Court), its willingness to support CEDAW can be interpreted as Turkey's pride in its record on women's rights. This support for CEDAW could be attributed to the state's strong commitment to, as well as greater confidence in, its record in the area of women's rights.⁶⁶

In the Turkish context, the use of CEDAW by state forces, including legal-judicial bodies, has been particularly significant. Since ratification, several legislative and judicial actions have made use of the Convention by referring

⁶⁴ In this period, women's NGOs attempted to get the military government to legalize abortion, which it did in 1983, and to ratify CEDAW, which it did not do until a few years later.

⁶⁵ The delay of ratification has been largely attributed to the presence of military rule during this period. The civil Government's interest in ratifying CEDAW in 1984, which occurred during a period in which Turkey ratified several international and regional human rights instruments and pursued a clear policy of political and economic integration with the West, can be seen as part of the government's overall strategy of liberalization.

⁶⁶ Feride Acar, "Turkey: the First CEDAW Impact Study 2001," online: CEDAW Web site <<http://www.cedaw.org>> (date accessed: May 16, 2002).

to it in legal texts of a critical nature.⁶⁷ Among these, several can be noted. The *Domestic Violence Act*⁶⁸ promulgated in 1998 was influenced by CEDAW. In addition, the Parliamentary Commission, which was convened in December 1997 to inquire into women's status and determine the measures needed to ensure the full implementation of CEDAW in Turkey, was explicitly directed toward investigating what should be done to make it possible to withdraw the outstanding reservations. Finally, the Constitutional Court has, in recent years, made four very salient decisions pertaining to legal equality of men and women. As discussed earlier, in two of these decisions, the Court has specifically and extensively referred to CEDAW.⁶⁹

Parallel to its international commitment within the UN frame, during the late 1990s, Turkey made a vigorous effort to reform its domestic legal system in every area, especially regarding human rights, so that it might qualify for membership in the EU. The Turkish experience illustrates the crucial role played by international law and international institutions in promoting human rights, including gender equality, on a domestic level. From the earliest stages of the EU, Turkey has sought to become a member, regarding EU membership as a confirmation of its contemporary values and consistent with the founding philosophy of Turkish state.

As is generally known, the relationship between the EU and Turkey has been a long roller coaster ride because of various EU concerns relating to economic, political, social, cultural, religious, and legal matters. Turkey's application for membership in the European Union is being evaluated on the basis of a series of conditions that seek Turkish compliance with well-established international human rights norms, alongside an insistence on Turkish harmonization with EU economic and monetary policies. Because the economic harmonization requirements are rarely invoked as the main stumbling block to Turkish accession, and have been treated flexibly in the cases of other states, human rights conditions would seem to pose the main obstacle to Turkish membership. In recent months, the Turkish parliament has engaged in a feverish pace of legislative activity to make the necessary changes in the Constitution and other legislation to follow specific suggestions given by the European Council in Helsinki on December 1999. In 2000,

⁶⁷ Ibid.

⁶⁸ *Family Protection Act*, no. 4320.

⁶⁹ One of these decisions pertained to Article 159 of the Civil Code, which had required a husband's permission for his wife's professional activity. See: Constitutional Court Decision E. 1990/30, K.1990/31, T. 29. 11. 1990, JCC 1992 2701 249-271. Also, Articles 441 and 440 of the Turkish Penal Code defined adultery of husbands and wives on different grounds; this was annulled by the Constitutional Court in December 27, 1996. This decision made extensive reference to CEDAW as a ratified international treaty which national legislation should adopt. See the Constitutional Court Decision E.1996/15, K.1996/34, T. 23.9.1996, *Official Gazette* 7.12. 1996 No.22860 at 249-51.

Turkey received another inquiry from the EU, known as "*Copenhagen acquis communautaire*," that basically demanded that the whole body of EU legislation be introduced into the Turkish legislative and constitutional order or that the latter be harmonized with the former.

During the last two years, a fast-track effort of the Turkish Parliament, especially on gender equality concerns, became one of the most discussed areas of human rights, with substantive progress being made. Some areas of human rights remain problematic in Turkey, including the cultural rights of ethnic minorities, prison conditions, military courts, law enforcement abuses, and due process principles. At the same time, the Parliament did not hesitate to change the entire Turkish Civil Code, giving Turkish women a more equal status that seems comparable with European standards. In family law, for instance, women's status was significantly improved by amendments including a progressive and egalitarian joint property regime in marriage.⁷⁰ In furtherance of the harmonization project with the EU, the Turkish Government in 2000 withdrew many of its reservations to CEDAW.⁷¹ Finally, as part of the legal reform package, the outrageous and outdated criminal law provisions are being discussed in the Turkish Parliament.

As discussed earlier, the Constitutional amendment of 2001 reformulated the equality principle as suggested by the EU, but with a Turkish touch. Article 41 of the Constitution has been amended to establish the principle of equality between spouses as a basis for the family.⁷² Feminist organizations have now started a campaign to have Turkey adopt a gender specific equality principle. The political atmosphere is very receptive to such a demand, given the combination of EU pressure on the Turkish legislature and global fears of political Islam after September 11.

It can be concluded that in the Turkish case, state agencies and the upper court have been more sensitive to international commitments than to domestic politics. This pattern can be explained partly by the general ineffectiveness of the Turkish civil society movement, which is itself explained by the depolitization efforts of military governments, dysfunctional

⁷⁰ The new regime gives women property rights equal to those of their husbands on divorce. However, at the last minute, the Turkish parliament limited the implementation of this new property regime with the nonretroactive interim provision that excluded seventeen million Turkish women who are already married. Women's NGOs in Turkey are now mobilizing ordinary courts to apply to the constitutional court in any divorce case to abolish the interim provision on the ground of inequality.

⁷¹ Turkey's reservations to Article 25(2) and (4), 16(c), (d), (f), and (g) of CEDAW have been lifted. Turkey has not withdrawn its reservation to Article 29, and the declaration on Article 9 also remains.

⁷² With this new amendment, another long time discriminatory provision has been abandoned. Article 66 of the Constitution no longer discriminates on the basis of gender in the case of a foreign parent with respect to Turkish citizenship.

political parties, and the limited human rights protection provided by the Constitution. Until now, the official commitments to women's rights have resulted in a dual status for Turkish women. Urban, well-educated, middle-class women in Turkey are not treated very differently than Western women both legally and factually. However, women in Anatolia, in small towns, and in rural areas continue to suffer under a patriarchal order, internal ethnic and religious pressures, traditional family structure, and most importantly, economic hardships. During the last several years, Turkey has been victimized overall by its neoliberal commitment to the global economy. The negative effects of globalization on Turkey have become unbearable for such vulnerable groups as minorities, the poor, women, and children. The majority of women in Turkey are indifferent about equal rights, while urban feminists stress equality. Domestic violence, honor killings, polygamy in rural areas, unpaid agricultural work, illiteracy, patriarchal domination, and a voiceless presence in extended family structure have generated a new social phenomenon in Turkey: a rising tide of suicide by women. Given this negative picture of the conditions affecting the majority of Turkish women, it is unclear whether recent international commitments and changes in the legal order will be able to produce hope and progress as a whole in the years ahead.

Suggested Readings

Books

- Feride Acar and Ayse Gunes Ayata, eds., *Gender and Identity Construction: Women of Central Asia, Caucasus, and Turkey* (Boston: Brill, 2000).
- Canan Arin, *The Legal Status of Women in Turkey* (Istanbul: Women for Women's Human Rights, 1996).
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- Ergun Ozbudun, *Contemporary Turkish Politics: Challenges to Democratic Consolidation* (Boulder, CO: Lynne Rienner Publishers, 2000).
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- Atilla Ozer, *Comparative Study on Two Constitutions: 1961 and 1982* [Turkish] (Istanbul: Bilim Yayinlari, 1984).
- Ayse Saktanber, *Living Islam: Women and Islamic Politics in Turkey* (London: I. B. Tauris, 2000).
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Online Resources

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