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RELIGIOUS FREEDOM IN TURKEY: FOREIGN MODELS AND NATIONAL IDENTITY

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ABSTRACT

The regulation of religious freedom in the Republic of Turkey seems structured in a complete antithesis to the previously in force Ottoman model, which recognized a strong role for religious chiefs. The conception of secularism affirmed since the proclamation of the Turkish Republic in 1924 was based on an adaptation of the French model of laicitè *to national peculiarities, allowing State's institutions to control the demonstrations of the religious phenomenon in the public sphere. However, since the ascendance to the power of the Islamic-inspired party AKP, the Turkish version of secularism has been challenged in favor of a passive secularism based on the US model.*

The essay analyzes how foreign models influenced the definition of Turkish secularism and its reforms, even taking into account the decisions issued on freedom of religion in Turkey by the European Court of Human Rights, which often – and sometimes controversially – dealt with the topic with national institutions. Some concluding remarks finally highlight the relevance of Turkey as a case-study for the general theory on the migration of constitutional ideas.

Keywords*: assertive secularism; codes; constitutional amendments; constitutional transitions; Court of Strasbourg; foreign models; freedom of religion; migration of constitutional ideas; minority rights; Ottoman Empire; passive secularism; religious symbols; sources of law; Tanzimat; Turkey*

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TABLE OF CONTENTS

1. PRELIMINARY INTRODUCTION: A HISTORICAL OVERVIEW

The regulation of religious freedom in the Republic of Turkey is strictly linked with its Ottoman origins, because it seems structured in a complete antithesis to the Ottoman model. Composed as a multi-confessional and multi-ethnical entity, the Ottoman Empire[1] based the organization of the various groups inhabiting it through the so-called *millet* system[2], where each group managed its own internal affairs and only the religious or tribal chiefs had a direct dialogue with the Sultan. According to this system and thanks to the Koranic provision of the *dhimma*[3], even some foreign monarchs were assumed to be the chief of some groups living in Empire, whose powers and influences grew accordingly to the ratification of the capitulations[4], allowing them to interfere in the relations between the Sultan and the foreigners inhabiting the Empire. For the Islamic community (*umma*), the chief was the Sultan himself in its charge of Caliph[5].

Although each group was left free to follow its internal rules on the personal status (e.g. family law, testamentary law, etc...), everyone who lived in the Empire was subject to the law of Sultan, which took into account the *sharia* but was also based on secular rules, collected in the so-called *kanuname*. Thus, the Empire had a legal tradition merging secular and religious elements and producing *ante litteram* Codes consolidating a secular law harmonized with the *sharia* and only fictionally subject to it.

At the end of the First World War, the alliance with the Central Empires and their defeat resulted in the disbandment of the Ottoman Empire through the signature of the Moudros armistice (1918) and of the Treaty of Sévres (1920). The Treaty confirmed the creation of Mandates over territories previously part of the Empire and recognized as Turkish state only the

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[1] Turkey was the central entity and the siege of the Sultan of this vast Empire, which allowed various degrees of autonomy to the other composing entities. At the edge of its expansion, the Ottoman Empire extended from northern Africa to the borders with Persia, from the Balkans to Arabia. Progressively, and particularly because of the impact with the European colonization, the extension of the Empire has been resized until its final disbandment at the end of the First World War.

[2] On the functioning of this system, see F. PALERMO, J. WOELK, *Diritto pubblico comparato dei gruppi e delle minoranze*, CEDAM, Padua 2008, pp. 65-66.

[3] According to *dhimma*, all the "people of the book" may express their religious behaviors paying a tax, the so-called *gizya*. On this point, see C. Decaro Bonella, *Le questioni aperte: contesti e metodo*, in C. Decaro Bonella (a cura di), *Tradizioni religiose e tradizioni costituzionali. L'Islam e l'Occidente*, Carocci, Roma 2013 pp. 17-56, spec. pp. 38-41.

[4] Capitulations (*ahidname*) were signed for the first time in 1569 between Sultan Selim II and the French King Charles IX in order to recognize the role of the latter as protector of the pilgrims and of the merchants in the Holy Land. Then, these peculiar kinds of treaties indicated the privileges recognized to foreign monarchs for the protection of their subjects or of particular believers, as happened for the Russian Tsar toward orthodox believers.

[5] Mehmet I used the attribution of Caliph for the first time in 1421, self-attributing the title aiming at consolidating his Islamic legitimacy during a period signed by revolts inspired by religious leaders in the Balkans and in the island of Chio. (cfr. K. KREISER, C.K. NEUMANN (ed.), *Turchia. Porta d'Oriente*, Beit, Trieste 2013, p. 66).

central Anatolian region. The reaction of the army, led by Mustafa Kemal, was a "liberation war", ended with the proclamation of the Republic of Turkey with its current boarders (29 October 1923) as established with the Treaty of Lausanne (24 July 1924) and justified by a supposed ethnical and religious homogeneity, based on the existence of a consistent Muslim majority of the population[6]. Consequently, the Sultan was removed but he temporarily maintained the charge of Caliph according to the constitutional recognition of Islam as a founding element of the Republic aiming at maintaining social stability. Between 1920 and 1924, the nationalistic forces passed several acts based on shariatic provisions, forbidding the production, the import, the selling and the consumption of alcohols and recognizing Friday as the holy day. Furthermore, art. 2 of the 1924 Constitution defined Islam as the religion of the state and confirmed the protections granted to the Caliph. This charge was definitively abolished on 2 March 1924, right before the closure of the dervish cloisters on 13 December 1925 and the abrogation of art. 2 Const. on 10 April 1928. Finally, on 5 February 1937, a constitutional reform introduced the principle of secularism in the Constitution as a founding principle of the Republic, as it is currently according to the 1982 Constitution[7]. Even though the role of Islam was controversial until the 1937 constitutional amendment, the 1924 Constitution established freedom of religion (art. 75) and, completely abolishing any distinction among religious beliefs and consequently ignoring the shariatic principle of the *dhimma*, stated «No one may be molested on account of his religion, his sect, his ritual or his philosophic conviction». The constitutional texts approved afterwards maintained the same approach: art. 19 of 1961 Constitution and art. 24 of 1982 Constitution provide for the protection of the freedom of religion until the expressions of worship do not infringe public order or endanger public health or safety.

The secular tradition established and consolidated through the mentioned constitutional provisions has often been challenged by the emergence of Islam-inspired parties, which unsuccessfully tried to restore a sort of prominence of Islam. Since 2002, the AKP (*Adalet ve Kalkınma Partisi* – Justice and Development Party), ascended to power with a great popular support, is trying to redesign Turkish secularism according to its vision of a democratic legal

[6] The Treaty, signed on 24 July 1923 between Turkey and the winning powers of the war, concluded the war with Greece and regulated the "population exchange" between the two countries. Furthermore, the treaty defined the current borders of Turkey, put an end to the Capitulations regime and provided for the rights of non-Muslim minorities living in Turkey. It completely disregarded the existence of Muslim minorities, therefore lacking to provide any form of protection for the ethnical and the religious identity of Kurds, Alevis, Yazidis and Doenme. On the evolution from Sévres to Lausanne and on the content of this treaty, see F.L. GRASSI, *Sévres e Losanna. Condanne esplicite, condanne silenziose*, in M. RUOCCO (ed.), *Pace e guerra in Medio Oriente in età moderna e contemporanea*, Congedo, Galatina 2008, I, pp. 195-205.

[7] Since the collapse of the Ottoman Empire, Turkey approved four Constitutions. The first one, very brief and approved during the liberation war, was the 1921 Manifesto, followed by a more articulated text in 1924. Then, because of coups d'état, the 1961 and the 1982 Constitution were approved by Constitutional referendums.

system inspired by Islamic values. In fact, the current Government seems to prefer the US passive secularism to the French assertive model on which Turkish secularism was based at the time of its definition. Furthermore, conveying a Reconciliation Commission[8] to draft the first Turkish civilian Constitution, AKP strongly relied on the German conception of human dignity to ensure the protection of human rights and, specifically considering the topic discussed here, the guarantee of religious freedom to all the groups inhabiting Turkey.

Thus, foreign models have always had a fundamental role as sources of inspiration for the Turkish legal system during the constitution-making moments, even though the considered models have been adapted to the characteristics of the population and to the aims that political leaders wanted to pursue in their attempt to modernize the country.

In this essay, the role and the influence of foreign models is considered since their progressive transposition in the Turkish legal system with the codification occurred during the Ottoman era; it also discusses the establishment of secularism as a pillar of the Republic and the reforms introduced by AKP. The actors and the reasons for the migration of constitutional ideas are discussed as well.

2. THE MIGRATION OF CONSTITUTIONAL IDEAS IN TURKEY

2.1 The evolution of the sources of law: from the *Kanuname* to the Codes

All along the Ottoman era, Sultans had to lead a huge Empire having as source of inspiration for the law the rules provided in the Koran and elaborated in the *sharia*. These sources, however, were not able to cover all the aspect of law and so Sultans progressively elaborated rules and norms to fill in the gaps, which were collected in some *ante litteram* codes called *kanuname*. They could represent a first introduction of non-religious and secular elements in the law of the Empire and allowed for the confrontation of the Ottoman legislators with foreign European models when they tried to modernize a collapsing Empire.

This particularly happened during the XIX century, when the Sultan, in the attempt to reduce the malcontent of the population for the backward condition of the Empire, started the

[8] The Reconciliation Commission started to work on 19 October 2011, with the aim to provide for the first civilian Constitution, drafted through a long period of auditions with the population and to be finally approved by the Great National Assembly and then by a referendum. In 2013, the Commission indefinitely suspended its meetings.

Tanzimat (1839-1876), a period of reforms during which the Sultan octroyed a Constitution providing for the convocation of an Assembly elected by the people as a consultative body. The modernizing wave interested also the *kanuname* that the Sultan tried to modernize looking at the Napoleonic codes[9].

Firstly, in 1850, the Sultan repealed the Penal Code in favor of a new Code mixing the French model with the Islamic principles and rules disciplining crimes and punishments. This approach configured a dualism in the sources of law which was repeated even in the Civil Code (*Mecelle*), approved in 1876, where the secular law was considered only to regulate the matters ignored by Islamic rules. Although these Codes cannot be considered as purely secular ones, they are noteworthy as they introduce a significant innovation in the drafting as well as in the content of the Ottoman codes, allowing some scholars to define them as an Islamic pendant of the Napoleonic Code[10].

After the proclamation of the Republic, the reference to foreign models in Turkish Codes is more evident, even because their transposition seemed a good solution to find an agreement among Turkish scholars, which were unable to draft an "independent" Code when Atatürk[11] asked them to do so. In fact, soon after the proclamation of the Republic, he asked to the Attorney General, Mahmut Esad Bey, to establish a Commission entitled to draft a Civil Code, which eventually failed its duty. Thus, in 1926, the Great National Assembly approved a Civil Code repealing every element deriving from the religious tradition and transposing the Swiss Civil Code of 1912. Similarly, in 1927, the Assembly passed a Code of Civil Procedure transposing the one in force in the Swiss Canton of Neuenburg.

Although both Codes seems to slavishly transpose the dispositions of their Swiss homologues, at a deeper glance it is possible to observe that they were carefully adapted to national peculiarities. The most evident case concerned the rules on civil marriage. If the Swiss legislator disciplined even religious marriages, the Turkish one recognized only the civil marriage celebrated by a State's official, denying any recognition to religious marriages. To avoid adulterating the secular setting it wished to consolidate, the Turkish legislator adopted the same

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[9] On this, see A. RUBIN, *Legal Borrowing and Its Impact on the Ottoman Legal Culture in the Late Nineteenth Century*, (2007) 2 *Continuity and Changes* 279-303.

[10] P. DUMONT, *Il periodo dei Tanzimat*, in R. MANTRAN (ed.), *Storia dell'Impero ottomano*, Argo, Lecce 2011, pp. 495-561, spec. p. 513.

[11] This is the surname that the Great National Assembly attributed to Mustafa Kemal, the founding father of the Turkish Republic and its first President. In fact, surnames, ignored during the Ottoman period, where introduced by the Act on surnames of 21 June 1924, at the beginning of the Republican era. Concerning Mustafa Kemal, the evolution of his name could be interesting. His parents called him as Mustafa and he obtained the attribution of Kemal (perfection) during the first years of his military carrier. Then, when the said Act on surnames passed, he chose Kemal as his first name and welcomed the surname attributed by the Assembly, which literary means "father of Turks" (cfr. F.L. GRASSI, *Atatürk*, Salerno editrice, Roma, 2009, *passim*).

approach even for some issues concerning family law: for instance, the marital regime of the communion of goods was repealed in favor of the separation, aiming to confirm the governmental support to female emancipation. On the contrary, the previously existing national customs and practices were deeply considered for the definition of the rules concerning the divorce, the formalities to adduce the abandonment of the marital home and the inheritance of widows, which were disciplined taking into account the traditional structure of Turkish families of the time[12].

A brief digression on the reforms of the Codes introduced at the beginning of the XXI century allows underlining that even when the reference to foreign models is no more necessary to modernize the country, they remain a relevant source of reference, always to be balanced with national peculiarities. Thus, the Commission drafting the 2000 reform of the Civil Code considered the modifications progressively occurred to the Swiss Code originally transposed, but at the same time looked at the other European Codes and took into account the international treaties Turkey ratified as well as the supranational rules produced by the Council of Europe and by European Union.

2.2 *Laiklik*: secularism as a fundamental pillar of the Republic

If the Codes introduced a secular approach in the ordinary legislation, at the constitutional level the mentioned abrogation of the provision stating Islam as the religion of the State opened to a constitutional revolution leading Turkey to pursue an assertive secularism based on the French model of *laïcité.* According to this model, introduced with the 9 December 1905 Act on the separation between State and Church, religion pertains only to the private sphere of the individual life and all its demonstrations, particularly its symbols, have to be excluded from public life. However, in Turkey assertive secularism is adapted to the traditions of the country and to the need of further consolidating the unity of the people after the end of the Empire, which allows to distinguish it from its French origin and to call it *laiklik.*

Considering the belonging to Islam of Sunnis as well as of Kurds and Alevis, Atatürk did not hesitate to affirm, in a famous maxim, «as we are all Turks and Muslim, we may be all laics». Therefore, on one side, the provision of secularism represented a means to deny the internal pluralism of the newborn Republic, giving direct application to the peculiar conception of

[12] For further details, see E. ÖZUNAY, *Legal Culture and Legal Transplants. Turkish National Report,* in J.A. SANCHEZ CORDERO (ed.), *Legal Culture and Legal Transplants. XVIII International Congress of Comparative Law,* (2011) 2 *ISAIDAT Law Review* 8-10.

minority affirmed with the Treaty of Lausanne; on the other side, the unofficial and implicit role recognized to Islam allowed policy-makers to continue to use the majoritarian religion to strengthen social cohesion. The kind of Islam Turkish leaders wanted to perpetuate, however, was a moderate one, far from any kind of fundamentalism. For this reason, they decided to establish specific institutions entitled to control public demonstrations of the Islamic faith and to manage the relations with the recognized religious minorities. Thus, the Department for Religious Affairs is entitled to nominate, pay and destitute *imam* and *muezzin* and to control their public speeches. Furthermore, a General Direction for the Foundations controls Muslim foundations and their properties as well as all the non-Muslim foundations, which suffered specific discriminations, analyzed later on.

The attempt to protect *laiklik* is evident even in the rules concerning political parties, which the Constitutional Court may ban (art. 69, 1982 Const.) if their programs do not respect secularism or if their statutes, programs or activities may endanger human rights, the independence of the Republic, the principle of equality or the rule of law, as well as national and territorial integrity. The Act n. 2820 of 22 April 1983 adds that the Constitutional Court may ban all the parties using the adjective "communist", "anarchist", "theocratic", "fascist" or "nazi" in their denomination. Therefore, Turkey is configured as a protected democracy, following the German model that has been transposed but adapted to the national aims. In fact, art. 21 of the German Fundamental Law considers as unconstitutional the parties whose political aims or whose members' behaviors may endanger the legal order or the existence of the German Federal Republic.

It is evident that both in the cases of Turkey and in that of Germany, legal systems provide for a militant democracy, even though its application seems to be more extensive in Turkey than in Germany, as demonstrated not only by the relevant legislative provisions, but also by the frequency of the Turkish Court's rulings on political parties' bans. In fact, the Turkish Constitutional Court banned – together with several Kurdish parties accused of endangering national and territorial integrity – all the political parties accused to violate the principle of secularism[13]. The dialogue with the supranational level on this topic is also noteworthy. The Wellness Party, banned in 1998, appealed to the Court of Strasbourg for a violation of art. 11 ECHR on the freedom of association, allowing the Court to issue a judgment representing an *unicum* in the Strasbourg case-law. It is the only case where the Court justifies the ban considering it consistent with the aim to protect democratic values, on which the European Convention on

[13] These are the cases of the Party for National Order, banned in 1971, of the Quiet Party, banned in 1983, of the Wellness Party, banned in 1998, and of the Virtue Party, banned in 2001.

Human Rights (ECHR) and the Turkish legal system lay on[14], endangered by the attempt of the Wellness Party to establish a shariatic regime. Thus, the kind of secularism established in Turkey seemed to be consistent with the European standards and with the freedom of expression and association as stated in the ECHR.

As said, since 2002, *laiklik* has been challenged by AKP, which pursue an approach inspired to the US model of passive secularism, where the State is neutral to the religious phenomenon both in the private and the public sphere.

2.3 *The AKP Government's reforms*

After its victory at the general election in 2002, AKP started a period of reforms that is slowly changing the pillars of Turkish legal system. In order to understand the reforms introduced in field of freedom of religion, it is necessary to preliminary consider the political origin of this party.

Officially, AKP was founded on 14 August 2001 by the so-called innovators of the banned Wellness party, led by Recep Tayip Erdoğan and Abdullah Gül. They propose a political program based on the liberal right-wing ideology[15], inspired to Islamic principles but excluding the rhetorical figures of all the previously established religious parties. In fact, AKP prefers to refer to the political thinkers of the Western tradition, and specifically to the German and Italian Christian-democrats[16], rather than to the classical Islamic thinkers, such as Hasan Al-Banna or Sayyid Qutb. AKP members, which define themselves as supporters of the democratic conservatism[17] rather than inspired by political Islam and which prefer to avoid any reference to the religion for their political belonging, often underline these differences with the previous religious parties. Furthermore, AKP seems to support democracy and Western values, conceiving them as useful tools to counterbalance the rigid secular tradition of the country, and its members prefer to support a moderate vision of Islam respectful of the democratic values[18]. However, the approval of acts

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[14] Grand Chambre, *Refah Partisi v. Turkey*, 13 February 2003, n. 41340-41344-98.

[15] However, AKP members prefer to avoid the adjective "liberal" to identify their political belief as the Turkish tradition tends to associate it with a permissive attitude. (cfr. W. HALE, E. ÖZBUDUN, *Islamic, Democracy and Liberalism in Turkey*. *The Case of the AKP*, Routledge, London-New York 2010, p. 24).

[16] Cfr. Ö. ÇAHA, *Turkish Election of November 2002 and the Rise of "Moderate" Political Islam*, in (2003) 2 *Alternatives. Turkish Journal of international relations* 95-116.

[17] See H. TURUNC, *Islamicist or Democratic? The AKP's Search for Identity in Turkish Politics*, in (2007) 15 *Journal of Contemporary European Studies* 79-91.

[18] See the programmatic platforms *Herşey Türkiye Için (*Everything for Turkey) and *Nice Ak Yillara* (Toward many shining years) proposed by AKP in 2002 and in 2007.

aiming at controlling alcohol and tobacco consumption as well as the act passed to let women wear the veil in public offices have been considered by the opposition parties, and particularly by the kemalist wing, as a means to implement a *hidden agenda* aimed at introducing *sharia* in Turkey[19].

Whatever AKP motivations are, it intervened with several acts affecting not only Muslims but also non-Muslim minorities reducing the discriminations they suffered because of *laiklik*. As mentioned, according to the provisions of the Treaty of Lausanne in the field of non-Muslim minorities' protection, the exercise of their religious rights was organized through religious foundations strongly controlled by the State, which seem to reproduce the role that religious chiefs had according to the *millet* system in the Ottoman Empire. Particularly the status of these foundations and the management of their properties represent a very controversial question, which AKP tried to solve.

According to the interpretation of art. 39 of the Treaty of Lausanne issued by the Council of State in 1974, all the properties acquired by non-Muslim foundations after the 1936 census are illegally detained. After a long struggle directly involving the Strasbourg Court of the Council of Europe[20] and highlighting the discriminative status attributed to non-Muslim foundations, AKP Government approved the Acts n. 4771 of August 2002 and n. 4778 of January 2003, allowing these foundations to legally detain and manage goods and properties. However, the Acts did not completely solve the question because the recognition of the right to enjoy of the said goods and properties is subject to heavy bureaucratic procedures and to the authorization of the General Direction for Foundation. Moreover, the Acts do not intervene on the most sensitive issue, concerning the possibility that non-Muslim foundations obtain the restitution of their expropriated goods and assets or a fair indemnity for them. Aiming to solve even this question, in November 2006 AKP Government approved an Act allowing for the restitution of the properties confiscated. Even if the Act was vetoed by the then President of the Republic Sezer, it was finally approved

[19] On this, see the reflections proposed in the essays collected in B. YEŞILADA, B. RUBIN, *Islamization of Turkey under AKP Rule*, Routledge, London 2011. However, the existence of a *hidden agenda* has not been proved and the decision of the Constitutional Court not to ban the party seems to contravene the position of the political opposition.

[20] After the presentation of the appeal, Turkey amicably settled the disputes in the cases: *Institut de Prêtres Français v. Turkey*, 14 March 2001, n. 26308/95; *Yedikule Surp Pırgış Ermeni Hastanesi Vafkı v. Turkey*, 26 June 2006, n. 50147/99 and n. 51207/99, and 4 December 2007, n. 31441/02. On the contrary, the Court decided the case *Fener Rum Lisesi Vakfı v. Turkey*, 9 January 2007, n. 34478/97, clearly recognizing the violation of the right to property of the foundation and imposed to Turkey the restitution of the expropriated properties and the payment of a restoration indemnity of 890.000 euros.

after the 2007 election of Gül to the Presidency[21]. The Act, however, do not provide for any indemnity for the properties no longer returnable or that are no more part of the State estate[22].

AKP tries to intervene even in the discipline strongly discriminating Muslim minorities. This is particularly the case of Alevis[23], whose religious tradition has been considered for long time as a mere folkloristic expression and has been ignored even by the programs for teaching religion, which exclusively taught Sunni Islam. Even in this case a judgment of the Strasbourg Court[24] started the change and, in 2007, the Minister for Education introduced Alevism in the program of religion traditions.

Notwithstanding the mentioned reforms, the strongest battle of the AKP era concerns the reintroduction of Islamic religious symbols in the public sphere. The question has its origin far before the ascendance to the power of this party and derives from the prohibition to wear Islamic symbols, and particularly the veil, in public places, such as schools or public offices, introduced during the first years of the Republic and perpetrated after each constitutional change.

At the beginning, the main forum where the opposition of the people to the provisions forbidding the veil expressed itself was the Court of Strasbourg, which deeply discussed the issues in the famous *Leyla Şahin*[25] case[26]. Since its election in 2002, AKP became the patron of bills trying to introduce the right to wear the veil, but they were always strongly opposed in the Great National Assembly or annulled by the Constitutional Court. The most recent case is the approval of the Constitutional Act n. 5735 of 9 February 2008, which modifies articles 10 and 42 of the Constitution, concerning the rights to equality and to education, in order to allow the veil in universities. The Act has been approved with a strong majority in the Assembly (441 votes in favor, 103 votes against) but the opposition appealed to the Constitutional Court, which considered the Act non-consistent with the Constitution being a surreptitious attempt to modify the Turkish conception of secularism. Although AKP did not propose any other bill to allow the

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[21] Cfr. Act n. 5737 of 20 February 2008.

[22] See D. KURBAN, *The Draft Law on Foundation does not Solve the Problem of Non-Muslim Foundations*, TESEV, Ankara 2007.

[23] This community probably originated from the persecution of Turkmens decided by Sultan Selim I during the war with Safavid Iranians occurred in his reign (1512-1520). To escape the persecutions, Turkmens took refuge in the impervious Anatolian region, where they developed a syncretistic form of the Shiite Islam, basis of the Anatolian Alevism progressively detached form orthodox Shiism. (cfr. K. KREISER, C.K. NEUMANN (ed.), p. 84).

[24] *Hasan and Eylem Zengi v. Turkey*, 9 October 2007, n. 1448/04.

[25] Grand Chambre, *Leyla Şahin v. Turkey*, 10 November 2005, n. 44774/98. The appellant was a student at the Istanbul University that was prevented to access to some exams and to some classes because she wore the veil notwithstanding a decree of the Rector forbidding it in the University. The Court affirmed that the prohibition of the veil is consistent with the aim to avoid Islamic radicalism and that the interference of the State in the right of the student to express her religious belonging was justified by the aim to protect the democratic order.

[26] The same issue was raised also in other cases but the Court considered them not admissible (cfr. *T. v. Turkey*, 25 February 1991, n. 1557/89; *Karaduman v. Turkey*, 3 May 1993, n. 16278/90; *Bulut v. Turkey*, 3 May 1993, n. 18783/91) or did not discuss deeply the point of the relation between State and religion (cfr. *Dahlab v. Turkey*, 15 February 2001, n. 42393/98; *Kurtulumuş v. Turkey*, 24 January 2006, n. 65500/01).

veil in universities, on 20 September 2013 a bill passed allowing women to wear the veil in public offices, with the only exception of the employees in the army and in the Judiciary.

AKP also intervened in the field of the political parties ban, passing an Act in 2007 allowing the Constitutional Court to use progressive measures to punish political parties. In particular, the Court may decide to preclude, completely or just partially, the access to public funds for those parties found guilty of contrasting the constitutionally granted principle of secularism. This new provision was concretely applied in that same year, when the Court had to decide on the request to ban AKP. The Court, demonstrating a new approach to the question and possibly a will not to interfere in the democratic choice of the people, decided to issue only a suspension in the access to public funds because of some references to the *sharia* by some AKP members. Even though this provision does not eliminate the possibility of a condemnation for religious reasons, it may be considered as another means used by AKP to soften the attitude of the Turkish legal system toward the religious inspiration of the political action.

A further and more comprehensive attempt to change the conception of secularism has been probably done during the meeting of the Reconciliation Commission entitled to draft a new Constitution. Even though the content of the debates was not public and some information were communicated only through the interviews released by its members, the attempt to draft a new Constitution represents a major task for AKP since its first election. Concerning religious freedom, the most relevant element should have been the introduction of a provision on human dignity, fashioned according to the German definition. However, due to the suspension of the Commission's meetings – probably because of the lack of an agreement among its members and their subsequent absenteeism from the meetings[27] – the conception of secularism remains fundamentally based on the Turkish interpretation of the French model and the AKP vision for an US model's transposition shines only through some Acts, currently lacking of a coherent approach. The recent election (august 2014) of the former Prime Minister Erdoğan to the Presidency of the Republic will probably boost a new wave of reforms.

2.4 *How and why constitutional ideas migrate in Turkey*

The previous paragraphs show how the influence of foreign models in Turkey has been based on a voluntary reception rather than on an imposition. Actually, Turkish legislators

[27] The rules of procedures of the Commission establish that the lack of the legal number at two subsequent meetings must necessarily result in the dissolution of the Commission.

considered all the models at disposal and chose the one seeming easier to adapt to national identity. The reason for this freedom in the choice of models can be found in the history of the country that never knew the condition of colony or the presence of an invading army on its territory since the proclamation of the Republic and which inherited from the Ottoman period the imperial grandeur, which did not allow to passively receive foreign models.

Furthermore, the establishment of a clear nexus between modernization and westernization, which justifies the attention for the models of the Western legal culture and the disregard of Eastern models, depended on the education of leaders and legal scholars. Since the *Tanzimat*, the attempt to facilitate the dialogue in the international arenas providing legal scholars for a complete knowledge of foreign legal systems led to the introduction of secular educational programs progressively marginalizing the teaching of shariatic precepts in favor of the secular law. This new attitude encouraged Turkish legal scholars to spend some periods of education abroad and, once back home, to discuss the foreign legal systems as possible alternatives for the national one, thus becoming a valid tool for the migration of legal ideas. In this period, the attendance of Turkish scholars in the universities' classes of European countries, such as France or Germany, became increasingly frequent as well as the decrees of the Sultans to modernize the educational system. It is noteworthy, in 1868, the foundation of the Sultan School at Galatasaray (Istanbul), whose educational programs were based on the French model and taught in French. This was just the first example of several schools established in the Empire where particularly French, German, Swiss and Italian professors were called to teach.

If the main carrier for the migration of constitutional ideas was established during the Ottoman era, the role of the so-called academic formant[28] was strengthened during Kemalism[29]. Then, the Act n. 430 of 3 March 1924 abolished religious schools and the decree n. 1353 of 1 November 1928 introduced the Latin alphabetic system instead of Arabic one the previously in force. These two acts represented a very relevant step to secularize the country, stating a clear distinction between the public, and secular, sphere, and the private one; they also represented a means of modernization, facilitating the contacts between Turkish and European scholars. During the first decade of the Republican age, the French educational model continued to be followed, sided by the German one, which implemented its relevance during Thirties, when the professors

[28] On the concept of formants, see R. SACCO, *Legal Formants: a Dynamic Approach to Comparative Law*, in (1991) 39 *The American Journal of Comparative Law* 1-34.

[29] On the relation between European and Turkish academics during the XX century, see C. RUMPF, *The Importance of Legislative History Materials in the Interpretation of Statutes in Turkey*, (1993) 19 *North Carolina Journal of International Law and Commercial Regulation* 267-292, spec. p. 271, where the Author highlights that Turkish legal scholars' *cursus studiorum* was progressively structured according to the European model and mainly to the French one.

exiled by the Nazi Government found protection in Turkish universities or as consultants of the Ministers[30]. After the end of the Second World War, educational programs were progressively adapted to the European and US ones and, nowadays, legal scholars are provided with a deep education in international law, with a specific attention to human rights[31].

Thus, legal scholars seem to be the main actor of the migration of constitutional ideas. Because of their consistent involvement in the political life of the country, they often represent the stimulus for the comparative approach also during the meeting of the Great National Assembly, which frequently has to intervene in the field of human rights' protection to modify those constitutional and legislative provisions leading to a condemn by the Court of Strasbourg. However, the Court does not indicate a specific model to follow to remove systemic violations of rights through the introduction of new provisions and, once again, the reception of foreign models in Turkey appears to be voluntary and free from any external imposition.

The activism in the comparative approach of scholars and legislators is strongly counterbalanced by judges. Turkish Courts tends to be unwilling to quote foreign precedents or to consider foreign and supranational Courts' judgment in their case-law, probably because of the synthetic kind of judgments they write according to the civil law model of issuing courts' decisions, probably because of the ideological attitude of the judges, willing to maintain a nation-based decision-making system. This second assumption may be confirmed by the difference between the reports written by judges' rapporteurs and the final judgments issued, as the formers strongly consider and quote foreign and supranational decisions and rules, while the latters seem to ignore them[32].

Understood who the main actors of the migration of legal ideas are and how they have been educated, it is possible to analyze why they choose some specific models: these agents are aware of the models and of their functioning because of their education and they consider the models modern and able to introduce in Turkey the legal innovations needed to support the country's development.

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[30] See A. REISMAN, *Turkey's Modernization: Refugees from Nazism and Atatürk's Vision*, New Academia Publishers, Washington 2006.

[31] For further information on the education and the selection of Turkish legal scholars, see A.C. TUNCAY, *The Three Most Important Features of Turkey's Legal System Than Others Should Know*, in *Learning from Each Other: Enriching the Law School Curriculum in and Interrelated World*, IALS Conference, 17-19 October 2007, www.ialsnet.org, pp. 241-247, spec. pp. 246-247.

[32] The Constitutional Court Secretary-General and two rapporteurs of the Court expressed these positions during an interview I realized in December 2009. For some references in the legal doctrine, see F. TÜRKMEN, *The European Union and Democratization in Turkey. The Role of the Elites*, in (2008) 30 *Human Rights Quarterly* 146-163.

Narrowly looking at the religious freedom issue, it is possible to highlight that the origin of secularism may remount to the non-religious provisions introduced in the *kanuname*, which opened the way for the definitive repeal of the dualism of the sources of law through the transposition of foreign Codes at the beginning of the Republican period. Moreover, this transposition led to the definition of a legal tradition based only on secular rules, defining a solid separation between the State and the religious traditions.

Even though the State/religion relationship established in Turkey is often assimilated to the French model, the abovementioned adaptations to national peculiarities demonstrated that Turkey, even looking at the French model to define its secularism, did not realize a mere legal transplant but adapted a foreign model to its national identity, creating a Turkish own model. At a careful look, the two models differ ever since their historical origins. *Laïcité* consolidated thanks to the process for the creation of independent States and moreover thanks to the principles of the 1789 Revolution, while Turkey had to quickly acquire a dynamic that was completely absent in the conception of *umma islamiya*[33] of the Empire. The historical distance produced also a different consciousness of the relation between state and religion: in France, the state intervenes to relegate religion in the private sphere; in Turkey, secularism is based on the rigid control of state over religion. This probably derives from the legislative attitude of Islam, progressively disappeared in Christianity, which the Turkish founding fathers aimed at controlling in order to avoid religious radicalism and to promote a progressive and modern vision of Islam.

However, the constant presence of political forces challenging the model and the continuing favor for AKP expressed by the people demonstrate the inadequacy of *laiklik* to effectively manage the State/religion relationship in the country and seem to justify the attempt of the ruling party to introduce some reforms to redraft Turkish secularism. As said, besides the US model, AKP is also using the German definition of human dignity, which spread all over Europe thanks to the Strasbourg Court, trying to change the Turkish approach to religious issues in order to extend the protection of minorities and the freedom of demonstration of the religious belonging for the Muslim majority.

The different approach of AKP does not (still) result in a total change of the discipline of the State/religion relation and the constitutional provision considering secularism as a founding principle of the State is still in force, even though the party has been the patron of a series of legislative interventions, which are slowing changing the Turkish attitude toward religion.

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[33] The noun indicates the community of Muslim believers, which is not signed by boundaries and which includes all the people that decide to be Muslim. For further elements on this, see C. DECARO BONELLA (ed.), *Tradizioni religiose e tradizioni costituzionali. L'Islam e l'Occidente*, Carocci, Roma 2013.

3. CONCLUDING REMARKS ON CONSTITUTIONAL IDEAS MIGRATION IN TURKEY

The Turkish experience demonstrates that the migration of constitutional ideas, which the doctrine often couples with transjudicialism, may be driven through the academic and the legislative formants as effectively as through the judicial one. Furthermore, the Turkish case shows that it is no more possible to distinguish between horizontal and vertical cross-fertilization, because all the countries involved in the European supranational level, mixing the Strasbourg and the Luxemburg *aquis*, consider foreign models through the lens of the common constitutional heritage that both supranational organizations contributed to create.

The reflection on the common heritage does not have to be misleading, as it does not imply the complete legal homogeneity among the involved countries, which, as Turkey does, refers to a common legal culture adapting it to national identity attempting to avoid unfruitful rejections. This attitude, however, is not a confirmation of Montesquieu's idea according to which each country has its own rules inadaptable to other countries[34], but may introduce a reflection on the difference between civilization and culture. As branches over the same tree, the various cultures of the Western civilization share the same roots (the common heritage of the Western legal culture), but each one has its own grafting point in the main trunk (the adaptation of the law to national tradition) and its own development toward the sun (the autonomous development of the transposed provisions).

Thus, looking at the situation of the protection of religious freedom in Turkey, it is probably the need to find a more solid graft on the trunk of the protection of human rights in its religious freedom declination that induces the current Government to push for specific reforms. Effectively, a concrete change of the approach to religious issues seems to be necessary in a country that hides behind the façade of a homogeneous population the existence of several minorities with a precise religious and ethical identity. The provisions of the Treaty of Lausanne, which appeared as a deformation of the international law already at the moment of its ratification,

[34] Cfr. C-L. DE SECONDAT., Baron de Montesquieu, *The Spirit of the Laws*, Cambridge University Press, Cambridge, 1989 (1st ed. 1748).

are now completely outdated and a new discipline of the field, free from the syndrome of Sévres[35] and from the fear that a broad recognition of pluralism may endanger national and territorial integrity, has to be introduced. In this attempt to introduce a better mechanism of rights' protection, foreign models may be a useful mirror to steer the legislators.

[35] It is the fear of the loss of territorial integrity characterizing Republican Turkey after the signing of the Treaty of Sévres in 1920, because it drastically reduced the boarders of the Ottoman Empire leaving to Turkey only the central Anatolian territories. Although the effects of this treaty were replaced by the signing of the Treaty of Lausanne (1923), the fear of a territorial resizing continued to obsess Turkish decision-makers, which strongly denied the existence of any kind of minority different from those individuated at Lausanne with the clear aim to ignore any possible autonomic claim.

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