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The Headscarf Ban: A Quest for Solutions

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Summary
Female students with headscarf are currently prevented to enter the university in Turkey although there is no legal ground for such a ban. The ongoing controversy about the type of clothing for female students at the higher education institutions has become more intensified since the recent constitutional change in February 2008 to lift the *de facto* headscarf ban. The debate over this question revolves around whether headscarf is a religious attire or a political symbol, whether it should be banned to protect the secular foundations of the state or conversely allowed on the basis of individual freedom of religion as a corollary of secularism. The solution lies in the implementation of constitutional amendments without a further delay.

I.

The controversies with regard to wearing the headscarf in Turkey emerged for the first time at the end of the 1960s, as a result of an attempt to prevent a student with a headscarf from attending the university. Debates continued, off an on, through the 1970s, as attempts to demand the right to wear the headscarf were met with attempts to prevent it. One should remark that these squirmishes were very few in quantity, and were not assessed within the legal framework that has lately been brought to bear on the peculiarities of the issue.

It was only after the 12 September 1980 military coup that the headscarf ban spread out and moved onto a legal platform. The attire of students at elementary and high schools were described by way of a regulation dated 22 July 1981; it was stipulated thereby that female students' head be uncovered. Even though a good many of the provisions of this Regulation, including a provision mentioning the length of skirts of female students are still technically in force, they are not universally practiced. A subsequent regulation dated 16 July 1982 specified the clothing and appearances of personnel working at public institutions; the rule that female civil servants' head must be uncovered was again written. The provisions set out in this Regulation are also still in force; they regulate the clothing and appearance of male and female civil servants in a military-like fashion, and are not observed – save in the case of the headscarf ban provision. In spite of the fact that these regulations contain a lot of detailed provisions, ranging from hairstyle to the length of nails, from the model of

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shoes to the length of skirts, and from moustaches to the painted shoes of males, they are not observed.

It was only after the establishment of the Higher Education Board (Yüksek Öğretim Kurulu (YÖK)) that the headscarf problem was discussed at the university level. At the beginning of 1982, an attempt was made to dispute the restriction of headscarves for university students. At that time, the first attempts were made to differentiate the headscarf from the turban. In 1984, the YÖK issued a circular stating that the headscarf should be banned but that the turban, which was said to be a modern form of tying, might be freely worn. At the beginning of the 1980s, ironically, it was perceived that the "headscarf is a political symbol, whereas the turban is innocent"; at the beginnings of the 1990s, conversely, it was conceived that the "headscarf is innocent whereas the turban is a political symbol". What seems to have influenced this kind of change in perception appears to be the ongoing difficulty of maintaining an anti-headscarf policy, when the headscarf continues to be worn by the majority of women living in Turkey who feel sympathy for it, versus the ease of denigrating a foreign word like turban.

In the second half of the 1980s, even though the headscarf, strictly speaking, was not banned at the universities, it became a troublesome piece of clothing within the terms of some decisions and regulations. Nevertheless, one should stress that students wearing the headscarf did in fact attend universities in the 1980s; no ban practice taking their right to education from their hands came to the fore at that time.

With a view to correcting varying attitudes of relevant universities towards the headscarf, and thereby render headscarf allowance a matter of law, a legal formulation was passed in 1988. The provision was challenged before the Constitutional Court, however; the Court overruled the provision based on its unconstitutionality. According to the Court, allowing students to cover their heads on religious grounds is against the principle of laicity set forth in the Constitution; a secular state cannot introduce a legal measure taking into account religious convictions.

Since this decision, the issue has become ever more complicated. In 1990, Law 3670 passed with a special provision, stating that "dress is not subject to any prohibition in institutions of higher education, provided that it is not forbidden by law." In light of this new provision, known as Supplementary Article 17 of the Higher Education Board, another appeal was made to the Constitutional Court; but the Court did not declare it as unconstitutional and refused the action for annulment. All the same, by interpreting the meaning of the provision in a different way, it stated that the freedom of clothing does not include wearing the headscarf. It is known that this kind of decision, coined as "interpretative refusal," is not recognised in the Turkish constitutional system and is, in fact, against the Constitution.

The last legislative attempt and the decision of the Constitutional Court assuaged the debates on the subject and headscarf was allowed for a long time at the universities. From 1989-1998, students covering their heads attended universities without facing any problem.

After "the post-modern coup" of 28 February 1997, the issue surfaced once again. Article 13 of the well-known Decisions of the National Security Board (MGK) provides that "clothing practices that emerged against the laws and will direct Turkey to an outdated appearance must be prevented and the laws and the decisions of the Constitutional Court in this regard must be diligently observed". Almost one year later, the Constitutional Court, in its decision on the dissolution of the Welfare Party (RP) showed, inter alia, the support of the party concerning freedom to wear the headscarf as a ground for dissolution. A couple of days after the publication of this decision, while the headscarf remained completely free at the universities, a retired General Staff Colonel gave a briefing to rectors and judges as to how the headscarf should be banned. Soon after the briefing, the Committee of Rectors, which has become one of the indispensable actors of Turkish political life, issued a declaration titled "The Relevant Legislation on Clothing in Higher Education Institutions and Legal Appraisals". This declaration contains explanations that were most probably prepared at the briefing. So far as the declaration is concerned, the headscarf is banned at the universities. After the declaration of the Committee of Rectors, rectors attending the briefing began putting the ban into effect.

As there was no legal basis whatsoever for implementing the headscarf ban at universities, the first applications made to administrative courts in various cities were accepted and practices relating to the bans were declared against the law. However, disciplinary procedures were initiated against those judges who adjudicated that the ban is against the law. Pending cases were taken back from the hands of these judges who were punished later. Stretching from Edirne to Van provinces, a number of judges were punished for the sole reason that they found the headscarf ban to be against the law. At the end of this process, judges were "convinced" that the headscarf ban was correct. Accordingly, within a period of three years, the headscarf ban was implemented as a de facto situation through force and compulsion.

II.

The first discussion about the headscarf ban involves the question of whether or not there is a legal ground for the ban.

The actors of the 28 February "coup" claimed that the basis for the ban rests on the decisions of the Constitutional Court. According to them, the headscarf issue is not a matter of rights and freedoms, but rather an issue of a political symbol. Others argue that there is no legal ground for such a ban; in view of the fact that headscarf is a religious necessity, the freedom to wear it is connected to the freedom of religion, and should therefore rest securely as a fundamental right and freedom. Given the deeper principle in play, they continue, the decision of the Constitutional Court would not be sufficient for the implementation of the headscarf ban. Moreover, they point out that the decision of the Constitutional Court, which is held up as the legal ground for the ban, was delivered in 1991; the fact that this decision was neither understood nor implemented as a ban until 1998 indicates that the headscarf ban, as a de facto situation, emerged out of oppression rather than from legal grounds.

Within this period, the ban practices were taken to courts. Thousands of students who were the victims of these practices filed court applications. While some of these applications were settled in favour of the students, as time passed, however, cases were appealed to the Council of State, as a supreme court, which upheld the legality of the bans. Legal processes were extended to the European Court of Human Rights (ECHR). However, at the end of protracting cases, the ECHR took the pro-libertarian quarters by surprise by concluding that the ban in Turkey did not violate the European Convention on Human Rights. According to the ECHR, banning the headscarf at Turkish universities is not against freedom of religion; such a ban could be acceptable under the prevailing conditions in Turkey. In this regard, the Turkish state has the right of discretion (margin of appreciation) and authority; when it deems necessary, it can have recourse to banning.

As these legal processes reached their end, another debate was started and is still going on. Those who hold the view that the headscarf ban is correct and necessary, claim that the ban emerged out of the prerequisite of laicity and cannot, therefore, ever be lifted. According to this group, the Constitutional Court based the headscarf ban on the principle of laicity laid down in the Constitution; as to laicity, it is one of the irrevocable principles. Lifting the headscarf ban is thus tantamount to amending the principle of laicity, which is not possible from the legal viewpoint. As a matter of fact, they point out, the ECHR, too, decided that the ban is correct. The headscarf ban, they conclude, rests on the decision of supreme courts, that is, judicial decisions. As to judicial decisions, they can be changed only and solely through judicial decisions; they cannot be altered through a new legal provision.

As for those who advocate the view that the headscarf ban needs to be lifted, they argue that lifting the headscarf ban is not against the principle of laicity laid down in the Constitution; on the contrary, it is a reflection of freedom of religion and a corollary of laicity. The decision of the Constitutional Court is no more than merely an interpretation; it is not grounded on clear provisions of the Constitution. As for the ECHR, it did not rule that the ban is necessary; it has only stated that such a ban is possible. Should Turkey lift the ban, the ECHR would find this just as correct from the legal viewpoint. Additionally, judicial decisions are given in accordance with legal rules; legal rules may not be constituted in accordance with judicial decisions. An amendment made in the laws and the Constitution is meant to bind all of the judiciary and on top of that the Constitutional Court. For all of these reasons, it is possible to lift the ban.

III.

Rather than a merely legal issue, the headscarf ban at Turkish universities has become a symbolic political debate between the quarters adhering to central and leftist interpretations of the Kemalist ideology that organised the military coups, and other quarters who represent the overwhelming majority. The basis of this debate rests on the aim of shaping the public by the State in every respect including religion and clothing. The fact that the headscarf ban issue flared up during military interventions such as those of 12 September and 28 February, and that discussions have veered toward lifting the ban after the normalisation of democratic political life, give an idea as to the origin of the ban. Even if we look at it from a

chronological standpoint, it can be seen that there is a decorrelation between democratisation and the headscarf ban; while democratisation is weakening, the ban emerges; while democratisation is on the increase, the tendency towards the ban fades away.

After the 22 July 2007 elections, during which the impacts of the 28 February process were significantly on the wane, discussions towards lifting the headscarf ban started afresh. After the election of the President, the discussions regarding a new constitution paved the way for strong feelings in public opinion about the need for expanding rights and freedoms. Considering that the preparation of the new constitution will take some time, the Justice and Development Party (AKP) and the Nationalist Movement Party (MHP) gave preference to first seeking a solution, long-awaited by their electors, to the headscarf ban issue.

One can appreciate why both political parties agreed on a constitutional amendment rather than a legislative amendment for the resolution of the ban. As we have seen, the headscarf ban was grounded on a decision of the Constitutional Court by practitioners. It is not possible to dismiss this ground by way of a legislative amendment. This is due to the fact that the Constitutional Court will either declare the unconstitutionality of the law-to-be-enacted and annul it, or by interpreting it (as it has done in the past) in such a way as to maintain the ban and make the law dysfunctional. In view of this situation, finding a solution requires bypassing the previous decision and the attitude of the Constitutional Court. This could only be achieved by a constitutional amendment. The formula of a constitutional amendment therefore appears to be the most correct and promising formula for a solution.

With that said, one can also appreciate the severe opposition of certain groups against attempts to lift the headscarf ban. As it is not possible to account for the continuance of the ban at the universities in a logical way, those opposed to liberty try to cause turmoil and affect the public mood by claiming that, if permitted at the university level, the headscarf could also be permitted for civil servants and for high school students, or by bringing up the likelihood that students who do not cover their heads may be oppressed. In such an environment, the AK Party and the MHP in favour of a solution had to make public assurances that the headscarf ban would only be lifted at the universities.

Even though the headscarf ban issue has been debated for a long time, it has only become clear recently that in terms of both the preparations concerning the issue in regard to public opinion, and the political parties which took the first steps for the solution, are not sufficient. The amendment made in Article 10 of the Constitution, which was proposed by the MHP and approved by the Parliament, is a kind of explanation of the principle of equality before the law. Objectively speaking, despite the fact that the amendment appears to be useful for finding a solution in terms of legal theory, it is not a formula that will undo the stalemate in Turkey. It is doubtful whether the provision in Article 42 of the Constitution, suggested by AKP, could alone be influential in finding a solution. That clothing is free has not been written in Article 42 for understandable reasons; rather it has been pointed out that restrictions in universities could only be described by law, and made clearly interpretable in the same manner. When taking into account the previous approaches of the Constitutional

Court, one would be of the conviction that every possibility will be insufficient for the resolution of the issue – save provisions with clear wording.

The fact that both parties, having agreed on the solution, refrained from writing unambiguously in the Constitution that the headscarf is free, with the justification that they could not find the correct articles on which the amendment should be made, points to the ongoing difficulty surrounding the issue. For example, as Articles 10 and 42 of the Constitution, which regulate fundamental rights, contain provisions of a general nature, wide interpretation of an unrestricted liberty inserted into these articles would cover civil servants and students at high schools, or even provide a constitutional ground for a restriction on civil servants and students at high schools. On the other hand, if a provision indicating the freedom of clothing and appearance were added to Article 130 of the Constitution, which regulates higher education, these kinds of concerns would disappear, and the Constitutional Court would have been given confined space for interpretation. The correct place for solution was Article 130 of the Constitution.

IV.

Among the possibilities mentioned above, it is necessary to consider what sort of results one might run into should the steps taken to solve the headscarf ban be brought before the Constitutional Court.

According to the 1982 Constitution, the Constitutional Court can only verify constitutional amendments as to form. In the 1960s and 1970s, the Constitutional Court had also reviewed constitutional amendments as to content, and even maintained its attitude when there was a restriction as to content. However, while the 1982 Constitution introduced the restriction that consideration as to form alone is vested in the Court; it also described what 'consideration as to form' means. Thereby, the leeway that the Constitutional Court may take into account the content of constitutional amendments has been completely blocked. An attempt by the Turkish Constitutional Court to review the constitutionality of amendments made in Article 10 and 42 of the Constitution, which the Turkish Grand National Assembly passed, in terms of content such as laicity, would therefore amount to a blatant violation of the Constitution. We see no possibility that the Constitutional Court would dare to take this route.

However, will it be possible to lift the headscarf ban with a constitutional amendment? Despite the suspicions we mentioned above, as far as we are concerned, it is necessary to directly implement the amendment made in Article 42 of the Constitution. While some provisions of the Constitution are not directly applicable, and require the enactment of a law to show its implementation, some provisions are directly applicable. One example, concerning the direct applicability of the Constitution may be found in an amendment made in 2001. A provision was added to Article 38 of the Constitution saying that 'No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.' At that time, in Turkish law, according to the Cheque Law, it was possible to convict someone for issuing an uncovered cheque, for which the sentence is imprisonment. Even though there

was a provision in the Cheque Law stipulating the imprisonment sentence, the constitutional provision was applied.It is necessary that some of the provisions made in the Constitution should have a direct effect and be applied in a similar vein. The amendment made in Article 42 envisages that restrictions of the right to higher education should be defined by law and be clearly expressed. Hence, it discards the interpretation-oriented decision of the Constitutional Court that provides the basis for the ban in force. The new provision in Article 42 of the Constitution provides that restrictions should be defined by law, and lifts the limitations ushered in by the decision of the Constitutional Court. In doing so, it eliminates restrictions made by way of interpretations while necessitating they should be made explicitly. For this reason, it is necessary that constitutional amendments should be directly applicable and the headscarf ban cease to have force.

Nevertheless, it is estimated that the constitutional amendments may be interpreted in a different manner by those who oppose the termination of the headscarf ban, and that the banning practice may be maintained at a significant number of universities. In this case, there will be two choices: The first of these is to amend Supplementary Article 17 of the Higher Education Law numbered 2547. Such an amendment would, on the one hand, force universities to practice the freedom; on the other hand, it is probable that the issue of the amendment would then be taken to the Constitutional Court. The involvement of the Constitutional Court in this matter would not only come to the fore via an amendment to Supplementary Article 17. Upon termination of the headscarf ban, cases could also be taken to the Constitutional Court, [through concrete norm review], subsequent to lawsuits being filed before the administrative courts and the Council of State. Legal rules (circulars and other acts) that form the basis of the freedom practices could be associated with the present wording of Supplementary Article 17 and taken to the Constitutional Court; thereby it is possible that the Constitutional Court could review the constitutional amendments. Hence, it is necessary to suspend, for some time, the amendment to be made to Supplementary Article 17 of the Higher Education Law at least until its implementation is observed.

At any rate, it is important that the Constitutional Court take the matter in hand and adopt an attitude in terms of continuance and termination of the headscarf ban. This possibility should definitely be taken into account. The process of constitutional amendments, which has kept Turkish public opinion busy, has led to serious debates and increased tensions, is bound to be concluded with a happy ending. Thus, it is essential to strive for implementing the constitutional amendments directly. If one fails to get results on this front, one should try to ameliorate the practice through circulars to be prepared by the YÖK. One must not forget the fact, however, that circulars could ultimately be taken to the Council of State and be annulled. We are of the opinion that if such circulars are annulled, at that time a legislative amendment could be considered. When faced with the situation that when the Constitutional Court interprets the constitutional amendment liberty is taken away, demand should increase for clearer provisions and a formula that would restrict the decisions of the Constitutional Court in regard to the new constitution.

Strictly speaking, a complete and correct solution of the headscarf ban hinges upon adding a new provision to Article 24 of the Constitution to the effect that clothing is a matter of

liberty. If lawmakers hesitate to go ahead with this ideal solution, it will become compulsory to say, in Article 130 of the Constitution, that clothing is a matter of liberty at universities. To overcome the political and ideological mind-set of the high judicial bureaucracy in Turkey is an absolute must and there are means to this end. Without such a surmounting, Turkey's capacity for finding a political solution will be subject to debate. Let us think from this viewpoint: if a political synergy and unity, which has the power to rewrite the Constitution, let alone amend it, in an attempt to solve a societal problem, whose resolution is backed by more then 80 percent of the people, fails to solve it, this failure will likely result in a state of non-confidence not only toward this political synergy or toward the political parties involved, but also and more broadly, toward the ability of political process to find solutions. No one has the right to cause the emergence of such an outcome. In this context, especially politicians should act wisely and responsibly taking legal and political implications of their decisions into account. Otherwise, not only do they lose face but also, in the long run, undermine the political life of the country, the power of politics to find solutions, and the hope needed to do this.