Luka Mihajlović

MILITANT SECULARISM AND OPPOSITE TRENDS – CASES OF TURKEY, FRANCE AND SERBIA

by

Luka Mihajlović

LLM SHORT THESIS
COURSE: Constitutions at Work: Comparative Perspectives
PROFESSOR: Dr Renáta Uitz
Central European University
1051 Budapest, Nador Utca 9.
Hungary

Table of Contents

Abstract

Modern day European states are secular democratic states, even if they have state churches because the political and the religious features some kind of separation in those states as well. However, with the increase of religious elements in the public sphere some states have adopted a stand of militant secularism, actively striving to remove those religious elements that they perceive as antidemocratic from the public sphere with the justification that the principle of secularism is an inherent part of their democratic order and that the state has a right to defend itself against religious elements that it perceives as antidemocratic. Good examples of states that practice militant secularism are Turkey and France. On the other hand, after the fall of communism in Eastern Europe and reintroduction of religious freedoms, the danger for secularism in this part of Europe comes from the national churches which dominate the public space and enjoy progressively stronger support of the state which leads to stifling of minority rights. The example of this trend discussed in this paper is Serbia.

Introduction

> This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.[1]

Ever since the Nazis came to power in Weimar Germany, not in an illegal, but in a legal way, through the system of democratic elections, a question has been haunting many thinkers around the world – how can a democratic state defend itself against anti-democratic actors who accept democracy until they have enough power to destroy it. Therefore, both legal theorists and constitution builders have started to think about democratic rules of self-preservation.[2] "Militant democracy is a political and legal structure aimed at preserving democracy against those who want to overturn it from within or those who openly want to destroy it from outside by utilizing democratic institutions as well as support within the population."[3]

After the fall of the Berlin Wall (it could be argued even before that) the threat of communist parties and their anti-democratic agendas disappeared in Western democratic states. Thus, the original extremist parties (National-Socialism, Fascism, Communism) with whom in mind measures of militant democracy were shaped have disappeared. It seemed that the practices of militant democracy have reached their expiry date. However, new alleged threats for democracy have emerged and so have new targets for measures of militant democracy.[4]

[1] Famous dictum of Joseph Goebbels. Cited in Gregory H Fox and Georg Nolte, 'Intolerant Democracies' (1995) 36 Harv. Int'l. LJ 1.

[2] More accurately, quite a few European states already started applying such measure in the inter-war period. See Giovanni Capoccia, *Defending Democracy: Reactions to Extremism in Interwar Europe* (Johns Hopkins Univ Press 2005).

[3] Otto Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability,' in András Sajó (ed), *Militant Democracy* (Eleven Internat Publ 2004) 47. The term 'militant democracy' was already in use in the inter-war period. It is believed that it was used for the first time by Karl Loewenstein in *Militant Democracy and Fundamental Rights I, II*.

[4] For a classification of these 'new threats' see Samuel Issacharoff, 'Fragile Democracies' (2006) 120 Harv. L. Rev. 1405; Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).

For the purposes of this paper, the most important political movements that present new challenges to democracies are political movements inspired by fundamental religion.[5] However, it is not only political parties inspired by religion that are seen as contrary to democracy. Recent years have seen an overall increase of religion in the public sphere. Migrations have changed the demographic structure of Europe radically in the past fifty years. Europe is now home to a stronger Muslim minority then before[6] and the talk of Islam in the European public space has not been as strong for 300 years and *anno domini* 1683 when the inhabitants of Vienna shouted *Hannibal ante portas!*[7] There are many politicians saying that Islam is incompatible with European values.[8] However, Islam is not the only religion that has gained strength in the public sphere in Europe. After the fall of communism, organized religion has once again become an important 'player' in the countries of Eastern Europe.

Under 'the pressure' of these events countries have taken decidedly different approaches. Some countries, like France and Turkey, adopted an assertive approach towards religion in the private sphere. They have taken upon themselves to minimize the presence of religious elements which are seen as anti-secular claiming that the principle of secularism deserves protection because it is an important part of their democratic identities. However, like in many cases throughout history, it seems that these repressive measures are mostly targeted at minorities.

[5] On fundamental religion see Gabriel A Almond, R Scott Appleby and ʿImmānû'ēl Sîwan, *Strong Religion: The Rise of Fundamentalisms around the World* (Univ of Chicago Press 2003).

[6] Numbers at 5% roughly. http://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/ (accessed April 6, 2018).

[7] *Quidquid latine dictum sit, altum viditur*. The increase in the population is not the only reason for this aversion. Some of the other factors are "terrorism – surely mistakenly and wrongly – but nonetheless defiantly committed in the name of Islam; calls for the application of elements of Islamic law in traditionally majority Christian nations; Europe's economic dependence on Middle Eastern oil; traditional differences in dress, culinary customs, and interpretations of moral propriety; political upheavals in the Middle East in primarily Islamic countries that may or may not be moving towards some form of democratic reconfiguration of these societies; nuclear tensions with Iran; and war in Afghanistan and Iraq." W. Cole Durham, Jr and David M. Kirkham, 'Introduction,' in W Cole Durham (ed), *Islam, Europe and Emerging Legal Issues* (Ashgate 2012).

[8] E.g., one of the recent statements was given by Matteo Salvini, leader of Lega Nord in Italy. Available at https://www.politico.eu/article/matteo-salvini-islam-incompatible-with-european-values/ (accessed 6 April 2018).

On the other hand, post-communist states have decided to let 'the religious' back into the public limelight. This was of course done with the justification that religious rights of groups and individuals have been 'freed' from the repression conducted under the atheistic ideology of communist regimes. If this was the only facet of these events that would not create any considerable objections, but, alas! The trend is a steady convergence of state and the strongest religious organization of the country, usually a national church. This is proving fatal for an equal enjoyment of rights by religious minorities.

This paper will proceed in the following order. In the first chapter I will be introducing the concepts of militant democracy, secularism and militant secularism. The following three chapters are reserved for country-based analyses. A strong emphasis is given to historical developments of the countries and the meanings of secularism. I have tried to make these chapters less descriptive by introducing comparisons.

In the chapter dedicated to Turkey, I argue that the main purpose of secularism in Turkey is not to produce modernity and advance democracy, but to create a strong cohesive group of citizens gathered around a single version of Islam. The discussion is based on the case of *Refah Partisi*.[9]

In the subsequent chapter where I discuss militant secularism in France I am basing my analysis on bans of ostentatious religious symbols from the public sphere. My argument is that historically, the French *laïcité* was not completely a concept of neutrality, that the enemy was the Catholic Church. However, in time, *laïcité* adopted some Christian values which makes it neutral towards Christianity, but separationist towards Islam.

In the last chapter I give my assessment of secularism in Serbia, a country which is a good example of the trend of 'sacralization' of the public sphere in post-communist countries.[10]

[9] *Case of Refah Partisi (The Welfare Party)* app. nos. 41340/98, 41342/98, 41343/98 and 41344/98 [GC] ECHR (2003)

[10] By 'sacralization' I understand a reintroduction of religious into the public field where the intention is not to promote freedom of conscience but to give sacral attributes to the state and thus increase the electoral body.

1. Introducing concepts – Militant Democracy and Secularism

Militant democracy and secularism are, taken separately, two very distinct concepts. However, in modern times they have come to develop a very strong relationship for (at least) two reasons. The first one is the rise fundamental religious movements in the world and their perceived threat to democratic states.[11] The second reason is an understanding of some constitutional democracies that secularism is a fundamental constitutional principle that is so important for those democracies that it should be 'defended' against 'religious attacks' by measures of militant democracy.

1.1. Militant democracy

Militant democracy (sometimes called fighting democracy' or 'defensive democracy')[12] is a term that refers to a state that is ready to introduce measures that are on their face illiberal, in order to protect the democratic constitutional order and values that this order entails.[13] These measures are aimed at those political actors who use democratic means (primarily the electoral arena) to access power and then destroy the democratic order. "Today, militant democracy is most commonly understood as the fight against radical movements, especially political parties and their activities."[14]

The term 'militant democracy' became known thanks to Karl Loewenstein and his essay *Militant Democracy and Fundamental Rights* published in 1937. Another influence was Karl Mannheim in his 1943 *Diagnosis of Our Time*. Loewenstein identified fascists as the main

[11] For further reading on fundamentalist religions see Fox and Nolte (n 5); Issacharoff (n 5).
[12] Jan-Werner Müller, "Militant Democracy", in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford Univ Press 2013) 1253.
[13] For further reading on militant democracy see e.g. Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II.' (1937) 31 American Political Science Review 638; Markus Thiel (ed), *The 'militant Democracy' Principle in Modern Democracies* (Ashgate 2009); Sajó, *Militant Democracy* (n 3); Issacharoff, *Fragile Democracies* (n 4).
[14] András Sajó, 'From Militant Democracy to the Preventive State' (2005) 27 Cardozo L. Rev. 2255, 2262.

enemies of democracy and argued that a state must not be passive – it must fight back. He analyzed provisions of various European states and found out that many of them have adopted preventive measures. However, these were not democratic states and they used these "restrictive measures to protect the authoritarian status quo against radicals who shared the rulers' anti-democratic mentality."[15] This shows that the measures of militant democracy can be used to defend an anti-democratic regime.[16]

The failures of the Weimar republic[17] and subsequent terrors of the Nazi regime convinced the framers of German Basic Law to adopt a 'militant' stand towards totalitarian political actors. First, article 79(3) introduced an 'eternity clause' which stipulates "that the federal and democratic nature of the German state cannot be changed *at all*, and neither can the protection of human dignity and human rights laid out in Article 1 of the Basic Law."[18] Second, the Basic Law provides the possibility of banning political parties. This is done by the Federal Constitutional Court.[19] 'Eternity clauses' and party bans are 'trademarks' of militant democracy, but there are provisions of different nature that fall into this group. Furthermore, in the early 1950s the German Constitutional Court took a stand in favor of militant democracy saying "that the Constitution entailed a 'basic decision in favor of militant democracy'

[15] András Sajó, 'Militant Democracy and Emotional Politics' (2012) 19 Constellations 562, 562.
[16] This exemplifies the most common abuse of measures of militant democracy and that is the danger that the incumbent government will use these measures to fight the political opposition.
[17] Karl Loewenstein, in his essay *Militant Democracy and Fundamental Rights I*, writes that "democracy had surrendered to National Socialism long before Hitler was "legally" appointed Chancellor of the Reich. However, it was not only the patriotic allure of the Nazis and gullibility of the German people coupled with the effects of the Versailles treaty that enabled Hitler to rise to power. Deficiencies in the text of the Constitution contributed to his rise, most notably article 76, which allowed the legislature to amend the constitution by a qualified majority. This provision expressed the view of a majoritarian democracy, in which power belongs to the majority and the very democratic system is relative. Using this provision, the government enacted the Enabling Act in 1933, which awarded the chancellor (Hitler) plenary powers which he used to rule by emergency decrees.
[18] Rosenfeld and Sajó (n 12) 1258.
[19] Associations other than political parties can be dissolved by the interior ministers. This difference seeks to remove arbitrariness from the decision-making process of dissolving political parties and it is called *Parteienprivileg*. It also constitutionally entrenches the belief that political parties are not simple associations that represent the views of the people. They are organizations needed for the proper functioning of a representative democracy.

(*streitbare Demokratie*) and in favor of a substantive understanding of democracy, a set of values that had to be defended against its declared enemies."[20]

Traditionally, militant democracy measures are aimed at political actors that want to destroy democracy completely.[21] This means that democracy is understood narrowly as a system that allows for a regular change of government (procedural democracy).[22] What is protected is the electoral system.[23] The problem with this view is that the political movements that oppose democracy understood narrowly are today largely out of political fashion.[24] For our purposes this view of interplay between democracy and measures of militant democracy is important because it could be argued that fundamentalist religious parties are the kind of political movement that opposes democracy even in this narrow view.[25] However, today the understanding is that holding regular elections is not enough for a state to be called democratic. This view is, as we have seen, supported by the Federal Constitutional Court of Germany, as well as by other courts (substantive democracy).[26]

[20] Rosenfeld and Sajó (n 12) 1259.

[21] Movements like National Socialism, Fascism, Communism (although, communist parties in the post-Cold War era have accepted the 'rules of the democratic game,' at least the minimum – a genuine electoral system.

[22] This is a procedural view of democracy, based on the views of Joseph A. Schumpeter for whom democracy is "[an] institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." In Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (1. Harper Perennial Modern Thought ed, Harper Perennial Modern Thought 2008). Cited from Fox and Nolte (n 1) 14. Apart from Fox and Nolte, this type of militant democracy is analyzed in Issacharoff, 'Fragile Democracies' (n 4).

[23] For authors that understand militant democracy in this way see Issacharoff, 'Fragile Democracies' (n 4); Fox and Nolte (n 1).

[24] "[F]ew contemporary parties or movements openly advocate a nondemocratic mode of rule… [U]sually [they] claim that their (authoritarian) tutelage will eventually lead to some culturally appropriate kind of democracy." See Phillipe C. Schmitter, 'Dangers and Dilemmas of Democracy,' in Larry J Diamond (ed), *The Global Resurgence of Democracy* (2. [print], Johns Hopkins University Press 1994) 77. Cited from Gur Bligh, 'Defending Democracy: A New Understanding of the Party- Banning Phenomenon' 46 61, 1335. (n 80)

[25] Nancy L Rosenblum, 'Banning Parties: Religious and Ethnic Partisanship in Multicultural Democracies' (2007) 1 Law & Ethics of Human Rights 22–23

[26] Talking about the plurality of legal systems, ECtHR said (citing the Chamber) in *Refah Partisi and others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 119, ECHR 2003 that "such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy." In the same judgement, the Court writes "that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention." (§ 123). This means that the Court is taking a substantive view – there are some values that democracy entails, it is not simply a process. The German Federal Constitutional Court, in the Socialist Reich Party Case gave its own substantive version of democracy. It held that democracy "consists of a series of principles, including respect for human rights, popular sovereignty, separation of powers, responsibility of government, lawfulness of

Most common legal measures (some of constitutional level, some of sub-constitutional level) that fall into the category of militant democracy are: party bans,[27] eternity clauses,[28] provision that require political loyalty from civil servants,[29] hate speech provisions,[30] banning the public display of certain symbols.[31] This subchapter is based primarily on party bans.

All of these legal measures place restrictions on individual rights and on the democratic process.[32] A democratic state becomes intolerant to actors that are perceived as anti-democratic ('the intolerants') which creates a paradox – a state restricts fundamental human rights, one of the cornerstones of democracy, with the aim to protect democracy itself. This paradox is a strong constitutional argument used to call militant democracy into question.[33] There are arguments that the democratic process and democratic institutions will, in the end, root out anti-democratic ideas.[34] For others, there is no paradox because there is no state obligation to tolerate actors that do not accept tolerance, one of the cornerstones of constitutional democracies.[35] Whether there is a paradox or not the reality is that states often restrict rights of

administration, independence of the judiciary, and a multiparty system based upon equality of opportunities for all political parties." Cited from Bligh (n 24) 1347.

[27] Article 21 of the German Basic Law

[28] Article 4 of the Turkish Constitution

[29] See *Glasenapp v. Germany* 9 EHRR 25 (1986) or *Civil Service Commission v. National Association of Letter Carriers* 413 U.S. 548 (1973)

[30] Article 49 of the Constitution of Serbia

[31] See *Vajnai v. Hungary* application no. 33629/06 (2008)

[32] Sajó, 'Militant Democracy and Emotional Politics' (n 15) 562.

[33] See, for example, Issacharoff, 'Fragile Democracies' (n 4) 1406. "When stripped down to their essentials, all definitions of democracy rest ultimately on the primacy of electoral choice and the presumptive claim of the majority to rule. The removal of certain political views from the electoral arena limits the choices that are permitted to the citizenry and thus calls into question the legitimacy of the entire democratic enterprise." My opinion is that democratic legitimacy may be called into question even if the removed point of view was not part of the electoral arena if it was part of the political process in a broader sense (public sphere), because freedom of expression is one of the pillars of democracy (if democracy is not only a procedure to choose our governors). Also, "[t]he presence of anti-democratic ideologies thus presents a dilemma: to suppress such movements infringes upon democracy's bedrock principle, but to allow them endangers the survival of the very system institutionalizing the principle of tolerance." Fox and Nolte (n 1) 14.

[34] For example, Rawles writes that the institutions should be trusted most of the time – if they are stable, they will ensure liberty. However, even Rawles agrees that the obligation to tolerate is not unlimited. Suppression is justified only when "the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger." See John Rawls, *A Theory of Justice* (Oxford University Press 1973) 219–220.

[35] Writers who defend measures of militant democracy find their support in writings of John Stuart Mill where he says that "[t]he principle of freedom cannot require that he should be free not to be free." John Stuart Mill and Gertrude Himmelfarb, *On Liberty* (Repr, Penguin Books 1985). Cited from Gur Bligh, 'Defending Democracy: A New Understanding of the Party- Banning Phenomenon'(2013) 46 Vand. J. Transnat'l L. 1321, 1328. Also, the

individuals and groups justifying such restrictions as needed to protect the democratic order. The question then is how far can a state go with the measures of militant democracy while continuing to be democratic?[36] "The militant democracy argument is therefore not trivial because it abandons familiar liberal argumentation and inclines towards a proposition that in particular cases it is better to restrict liberty in the first place, rather than the powers of the government in general."[37] We must not forget that one of the ideas of constitutional democracy is a limited government.

Furthermore, the measures of militant democracy are very prone to abuse, since they ultimately rely on an idea that some views are not welcome in a democratic society. The most common abuses of these measures are instances where the government wishes to 'legally' destroy the opposition[38] or instances where certain views are suppressed because they run contrary to the ruling ideology.[39]

1.2. Secularism

In the previous subchapter I introduced the concept of militant democracy. Before proceeding to the discussion of how militant democracy and secularism come together, it is important to introduce the concept of secularism itself.

Secularism is an institution of constitutional law, but also a political philosophy. In a legal sense, in a very generalized way, secularism means a separation of church[40] and state.

writings of Karl Popper "We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant." Karl Popper, *The Open Society and Its Enemies* (1. Aufl, Routledge 2002). Cited from Bligh (n 24) 1329. One of the first to advocate that there is no obligation to tolerate the intolerant in a pluralistic society was John Locke, while writing on religious tolerance and freedom of religion. See John Horton (ed), *John Locke: A Letter Concerning Toleration in Focus* (Routledge 1991).

[36] Fox and Nolte (n 1) 1.

[37] Javid Gadirov, 'The Principles of Legal Pluralism and Militant Democracy,' in Durham (n 7) 278.

[38] There are many examples in the interwar period. See Capoccia (n 2).

[39] It could be argued that Smith Act cases fall into this category.

[40] Church will be used to denote organizations that run or govern religious life and are constituted according to the tenets of a religion.

However, this separation must not be understood in an absolute way.[41] Looking at different constitutional provisions of secular states, it is still unclear what secularism actually means. For example, two constitutional provisions that are often compared are those of France and the United States.[42]

> France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. […].[43]

and

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; […].[44]

After reading these two provisions it is evident that the main aim of these two provisions is not the same. While the main preoccupation of the French is to ensure equality of all citizens and a reason-based driven polity by ensuring that the people are free from religion, the Founding Fathers were more interested in ensuring that every citizen is free to express his or her religious beliefs by ensuring that there is no state religion and through the subsequent 'free expression' clause. These examples tell us two things. First, 'the secularism' does not exist. There are different secularisms in different states and the meaning of secularism in a state is often tied to a specific historical experience of a particular state. And because of that, second, we do not actually know what secularism means.[45]

[41] Even in France where secularism is sometimes understood as this 'wall of separation' between state and church activities, this is not true. An example is Alsace-Moselle, a region in France where the Law of 1905 on the separation of the churches and the state is not in force and where there is religious instruction in public schools.
[42] T Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France' [2004] BYU L. Rev. 419.
[43] Article of the French constitution of 1958.
[44] First amendment to the constitution of United States of America.
[45] Jacques Berlinerblau, 'Introduction: Secularism and Its Confusions,' in Jacques Berlinerblau, Sarah Fainberg and Aurora Nou (eds), *Secularism on the Edge: Rethinking Church-State Relations in the United States, France, and Israel* (1. ed, Palgrave Macmillan 2014) 6.

Following Ahmet T. Kuru and Alfred Stepan[46] we can classify variations of secularism in two groups. Alfred Stepan developed the *separationist* model (e.g., the United States, France Turkey) and the *respect all, support all* model (e.g. India, Indonesia and Senegal).[47] Ahmet T. Kuru develops the distinction between assertive secularism (the state plays an active role in excluding religion from the public sphere – Turkey and France) and passive secularism (state allows public visibility of religion – United States).[48]

Usually, the concept of secularism (in Europe) is related to the period of Enlightenment. This historical period produced invaluable additions to philosophical thought, which turned its attention away from God and transcendental truths and affirmed the importance of reason and of a human individual. "Secularism assumes that – as far as law goes – humans are capable of testing their experience without reference to transcendental concepts and concerns."[49]

Yet, the history of secularism in the West does not begin with Enlightenment. The roots can be found in the confrontation between the Vatican and European Kingdoms over who rules the 'subjects of God' in this (temporal) world.[50] In the end, the idea of 'Two Kingdoms' prevailed.[51] However, these two Kingdoms do not stand opposed to each other. They are complimentary. One rules a person's body, the other judges his or her soul. A true separation of church and state could only be accomplished when the Vatican lost a lot of power in Europe, after the Napoleonic wars. Even though the origins of secularism lie in the philosophical

[46] See Ahmet T. Kuru, Alfred Stepan, '*Laïcité* as an "Ideal Type" and a Continuum: Comparing Turkey, France and Senegal,' in Ahmet T Kuru and Alfred C Stepan (eds), *Democracy, Islam, and Secularism in Turkey* (Columbia University Press 2012).
[47] Alfred Stepan, 'The Multiple Secularisms of Modern Democracies and Autocracies,' in Craig J Calhoun, Mark Juergensmeyer and Jonathan VanAntwerpen (eds), *Rethinking Secularism* (Univ Press 2011). Cited from Kuru and Stepan (n 46) 95.
[48] See Ahmet T Kuru, *Secularism and State Policies toward Religion: The United States, France, and Turkey* (Cambridge University Press 2009). Cited from Kuru and Stepan (n 46) 95–96.
[49] A Sajo, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 International Journal of Constitutional Law 605, 608.
[50] It is a question of sovereignty.
[51] The state has the monopoly of force – the state punishes and maintains order. But the Church regulates its own structure and the way religion is practiced. In the end, the soul of every man is ruled by God (Church).

thought of the West, secularism is not a 'Western' phenomenon – best examples for this would be Turkey and India.[52]

The principle of secularism is most commonly attributed to modern liberal democratic states.[53] It was also thought that the meaning of secularism is defined – a story of neutrality and universality.[54] However, under challenges of religious movements and actors, "[s]ecularism has increasingly lost its largely taken for granted status as shared public discourse and space […]."[55] Furthermore, in most liberal democracies, the principle is not expressly recognized in the constitutional text or jurisprudence.[56] "Secularization may be operating at a social or cultural level, but this is not the same as public institutions becoming secular and operating under secular guidance."[57] That begs the question – is secularism even a constitutional principle,[58] and if it is, what does it do?

According to Jean Baubérot, secularism has two main purposes. "The first is to guarantee freedom of conscience, as a public liberty, for all convictions, including religions. The second is the civil equality of all citizens before the law."[59] However, freedom of belief (conscience) can exist in states with varying church-state relationships.[60] The problem here is, of course,

[52] It is important to note that even though secularism of western democracies, especially that of France and the United States, has strongly influenced secularisms in these countries, they are not "mere replicas of Western secularism." Linell Elizabeth Cady and Elizabeth Shakman Hurd (eds), *Comparative Secularisms in a Global Age* (Palgrave Macmillan 2010) 7.

[53] "Throughout most of the twentieth century the conventional understanding has been that modern democracies are secular democracies, with little attention devoted to parsing the competing strains and dissenting elements of various forms of secularism." ibid 4. However, Nilüfer Göle writes in the same volume that "[s]ecularism can foster liberal pluralism or authoritarian nationalism; it depends on the trajectories of the nation-building process." ibid 44. This can be seen from the examples of nation-building processes in France and Turkey.

[54] "The feature story has been the clean and principled divide between the secular public and the private religious […]." Cady and Hurd (n 52) 4.

[55] ibid 5.

[56] Sajo (n 49) 617; Veit Bader, 'Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism-A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on Secularism' (2010) 6 Utrecht L. Rev. 8, 9.

[57] Sajo (n 49) 609.

[58] In three jurisdictions that are the focus of this paper, secularism is undoubtedly entrenched in the constitution. Still, the question is important since it casts doubt on the choice these countries have made by introducing secularism into the constitution. The question is even more interesting if secularism is being 'promoted' militantly.

[59] A Conversation between Jean Baubérot and Sarah Fainberg, 'French *Laïcité*: What Does It Stand for?' in Berlinerblau, Fainberg and Nou (n 45) 86.

[60] W Cole Durham and Brett G Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Aspen Publishers 2010) 114.

that it is true that freedom of religious expression does exist in, let us say, theocratic state, but it is limited to one religious group (or more, in a country that recognizes a set of religions e.g. France before the 1905 law). This means that secularism works in two ways. First, for the state it is an obligation to be neutral which allows for equality. However, neutrality of the state does not automatically presuppose a public space where no religious elements are allowed. The reason for this is when it comes to groups and individuals, secularism also means freedom of conscience.[61]

1.3.Militant Secularism

Militant democracy and secularism come together when the measures of militant democracy are used to restrict the rights of groups or individuals who are perceived as a threat to state proclaimed secularism (in our cases, secularism is constitutionally entrenched). The most common measures of militant secularism are bans of religious parties (e.g. *Refah Partisi* in Turkey), prohibition of displaying certain religious symbols in the public sphere (e.g. law 2004-228 of 15 March 2004 in France[62]) and the case when secularism is an unamendable feature of the constitution.

One the threats against which the measures of militant secularism are applied in modern states are political parties inspired by fundamentalist religion. There are at least two similarities between political movements inspired by fundamentalist religion[63] and communist and fascist political parties. I am making this comparison because communist and fascist political parties are the perfect example of enemies of militant democracy. The first similarity is that both groups of political parties use the 'emotional politics' method to mobilize the masses.[64] "The

[61] Jean Baubérot in Berlinerblau, Fainberg and Nou (n 45) 109.
[62] Law No. 2004-228 of Mar. 15, 2004, J.O., Mar. 17, 2004, at 5190 (hereinafter Law No. 2004-228).
[63] See Almond, Appleby and Sîwan (n 5).
[64] What is more devious is that these movements do it under the guise of freedom of religion, especially the freedom to freely practice one's religion and the freedom to live according to tenets of a specific religion. If they are even more devious, they do it under the pretext of freedom of expression.

aversion towards religion can be partly explained by the tendency of certain totalitarian movements to use religious sentiments as part of their political arsenal, often supplanting new meaning to age-old notions […].”[65] It was Karl Loewenstein who recognized that extremist parties of his time are so successful in winning power through the electoral process because they mobilize the electoral body on an emotional level. The second similarity is that these movements generally aim at using the electoral system to access power and then to destroy democracy (as a whole).[66] Even if they do not propagate abolishment of the electoral system, they are usually opposed to some principles that are seen as fundamental for a democracy.[67]

However, there are problems with using militant democracy to act against modern emotional politics.[68] First, religious organizations might use emotional politics to create an *identity*, but, at the same time, might not strive to achieve power through elections.[69] Of course, the problem here is that such ‘emotionalism’ creates a mindset “impenetrable to values of democracy, even if it does not necessarily advocate violent action.”[70] Second, dissolving a religiously motivated organization rests on incompatibility of that belief (ideology) with values of democracy. This means that there is discrimination among groups of believers.[71] Third, “non-violent, strong religion-motivated activities are prima facie protected by the constitutional system […] which makes preventive restrictions on religiously motivated political and public action particularly problematic.”[72] Lastly, one could claim that religiously

[65] Durham (n 7) 278.
[66] For example, Gur Bligh identifies fundamentalist religious parties as the only political movements today that openly challenges democracy on an ideological ground, similarly to fascist and communist parties. Bligh (n 24) 1336. In turn, this means that restricting the rights of these movements might be easier to justify.
[67] For example, the ECtHR found in its judgment concerning the dissolution of Refah Partisi in Turkey, that introducing a plurality of legal systems would infringe “the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy.” *Refah Partisi (The Welfare Party) and others v Turkey*, no. 41340/98, § 119, ECHR (2003) (citing a Chamber judgement from 2001)
[68] These would movements that use religious beliefs or ethnicity to create group identities.
[69] Militant democracy measures are use when exchange of opinions and rules of procedural democracy fail at preventing radical political movements obtaining power.
[70] Sajó, ‘Militant Democracy and Emotional Politics’ (n 15) 566.
[71] Or at least different treatment.
[72] Sajó, ‘Militant Democracy and Emotional Politics’ (n 15) 568.

motivated political action is a part of freedom to exercise one's religion as well as freedom of expression.

Another problem with measures of militant secularism is in the object of the protection – secularism and its relationship with the nature of measures of militant democracy. First of all, as we have established, secularism is a principle that does not have a universal meaning. Its meaning varies from country to country. Furthermore, if we accept to use measures of militant democracy against anti-secular actors, we have to accept that secularism is a concept that is inherently democratic[73] or at least accept that secularism is an intrinsic value of some democracies. However, further problems arise when we put the two concepts together. It is true that secularism has no universal meaning, but I think it is safe to say that secularism as a concept of constitutional democracies should at least strive to create a space which accommodates plurality of opinions with the goal of strengthening equality of all individuals.[74] However, this stands opposed to the nature of measure of militant secularism – here the state is saying 'I know what is right and I have the right to protect it.' By using the measures of militant democracy (secularism) the state reserves the right to interpret what is constitutional and what is democratic – there is clear conflict with an idea of plurality of opinions.

As the analysis in the following chapters will demonstrate, the idea of militant secularism is sometimes at odds with the idea of a pluralistic society. However, that does not mean that militant secularism is in itself irreconcilable with the democratic state. In my opinion it might occasionally be necessary to adopt a more 'aggressive' approach, as in the case of Serbia.

[73] This is impossible for two reasons. First, there is no universal understanding of the concept of secularism. Second, there are countries which are not secular (at least on a constitutional level), but are democratic e.g. the United Kingdom.

[74] See Javid Gadirov, 'The Principles of Legal Pluralism and Militant Democracy,' in Berlinerblau, Fainberg and Nou (n 45) 273.

2. Turkey

Alongside France, Turkey is probably the best example of a country where the principle of secularism has acquired a revered status. However, as we shall see, unlike in France where *laïcité* enjoys the support of the vast majority of citizens, Turkey's version of secularism (*laiklik*) is not as popular among 'the people'. This chapter will proceed in the following order. First, I will give a historical introduction for the concept of Turkish secularism because many of the arguments I make are based on historical facts. Later I will give an overview of relevant constitutional provisions featuring militant secularism and then focus on the case of the dissolution of *Refah Partisi*. That means I will discuss Turkish militant secularism through a lens of banning religious parties.

2.1. Historical Introduction

> [S]ecularism has separated religiosity and scientific thought and speeded up the march toward civilization. In fact, secularism cannot be narrowed down to the separation of religion and state affairs. It is milieu of civilization, freedom and modernity whose dimensions are broader and whose scope is larger. It is Turkey's philosophy of modernization, its method of living humanly. It is the ideal of humanity… The dominant and effective power in the state is reason and science, not religious rules and injunctions.[75]

"Secular state cannot be impaired for the sake of liberties."[76]

I think these two opinions paint the picture of Turkish militant secularism fairly well. This secularism is a product of a historical and ideological struggle that ended in 1937 when the principle of secularism was enshrined in the constitution.[77] Reading the opinion of TCC gives an impression that secularism creates a space in which religion has no role – it has nothing

[75] Constitutional Court decision, E. 1989/1, K. 1989/12, 7 March 1989. Cited from Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey* (Central European Univ Press 2009) 106.
[76] Thiel (n 13) 288. This is also an opinion given by TCC in the *Headscarf I* case.
[77] Here I am following Ahmet T. Kuru and Alfred Stepan. See Ahmet T Kuru, 'Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion' (2007) 59 World Politics 568; Kuru and Stepan (n 46).

to offer and it is not welcome, and this space has to be kept 'clean.' This is not true. Unlike in France where secularism is a kind of civil religion, in Turkey, religion is put under the tutelage of the state and the state promotes a refined version of (Sunni) Islam. Our imminent point of interest is to see how did Turkey (the Turkish courts, more precisely) come to this understanding of secularism.

I think it is of significant importance to analyze historical events that preceded the introduction of secularism to understand: first, why do states introduce secularism as a constitutional principle and second, why is it (not) part of the militant democracy package of provisions.[78] This is also the opinion of TCC – "[b]earing a special importance for Turkey because of its different historical evolution, secularism is a principle which is adopted and protected by the Constitution."[79]

Our story starts in the second part of 19th century, with the effort to modernize ('westernize') the state.[80] The major driving force behind this attempt was a secret society named 'Young Ottomans'.[81] The intellectual inheritors of these westernizers, who brought about creation of the Republic of Turkey, were the 'Kemalists' led by Mustafa Kemal Ataturk.[82] Even though the western educated elites of the Ottoman period saw traditional Islam as an impediment on the road to modernity.[83]

[78] ECtHR, for example, recognized the importance of a historical experience when it comes to fundamental religious movements. "The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society which they had in mind. […] each Contracting State may oppose such political movements in light of its historical experience." *Refah (2003)* § 124.

[79] The TCC's rulings on the *Refah Partisi* case on January 16, 1997, no. 1998/1. Cited from M Hakan Yavuz, *Secularism and Muslim Democracy in Turkey* (Cambridge University Press 2009) 156.

[80] The reforms of the Ottoman empire actually 'kicked off' during the reign of Selim III. However, it was the Kemalists who undertook a project of complete societal change. Gary Jeffrey Jacobsohn classifies the Turkish Republican Constitutions as 'reformative' – "one whose identity is in large measure defined by its commitment to reshape key structures of the social order. It is these structures that need to be confronted as threats to the new order envisioned in the constitutional experiment." Gary J Jacobsohn, *Constitutional Identity* (Harvard Univ Press 2010) 216.

[81] After 1908 a political party – 'Young Turks'

[82] The Republican People's Party

[83] This is a very simplified version of historical events. "[…] one should not think that the historical genealogy of the secular in Turkey starts with Atatürk Republicanism; some aspects of the secular are part of the Ottoman State

Before the introduction of principle of secularism to the constitution in 1937, the republican government enacted a set of laws with the intention to put religion under state control.[84] State control of religion is possibly the landmark feature of Turkish secularism – this feature differentiates Turkish secularism from the Western ideal of 'the wall of separation between the political and religious spheres.'[85] This version of secularism is based on the arrangements present in the Ottoman period. Unlike the West, there was no clear divide between 'earthly' and 'spiritual' powers.[86]

'Kemalists' saw Islam as an obstacle for the modernization of the state. Following that logic, secularism (as a principle of state which confines religious elements to the private sphere) was seen as an obligatory accompanying element of modernization – "[…] there is a strong belief that secularism is the *sine qua non* for democracy."[87] This means that certain state affairs were conceptualized separate from Islam (e.g. law and education). At the same time, however, the state created institutions to promote its own version of Islam.[88]

tradition and Islamic historical legacy." Nilüfer Göle, 'Manifestations of the Religious-Secular Divide: Self, State, and the Public Sphere in Cady and Hurd (n 52) 52. (n 5)

[84] See Thiel (n 13) 278. Known as modernization (reform) laws. According to Hakan Yavuz, Turkish project of state control of religious institutions and expression is what makes the Turkish model different from the French. See Yavuz (n 79) 146. Furthermore, article 174 of the Constitution states that "[n]o provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws […]."

[85] "In Turkey's laicist politics, the ideal has always been significant integration, not separation." Andrew Davison, 'Hermeneutics and the Politics of Secularism,' in Cady and Hurd (n 52) 25. Also here is a more radical view. "[…] the two [are] inseparably linked, with religion permeating the whole of social and political life. This view imagines neither secularism within Islam nor the demise of Islam when secularism sets in." Cited from Ümit Cizre, 'A New Politics of Engagement: The Turkish Military, Society, and the AKP,' in Kuru and Stepan (n 46) 132.

[86] In the Ottoman period the Sultan was also the Caliph, leader of the Muslim community.

[87] Yavuz (n 79) 151. However, some authors argue that secularism was introduced only to foster modernization and to support the building of the nation-state. In views of Ann Elizabeth Mayer, "[w]orries about Islamic law crippling democracy were not a preoccupation of those laying down the foundations of Turkish *laiklik* in the 1920s." Durham (n 7) 211. This is also an observation of Christian Moe in the same volume.

[88] Through the General Directorate of Religious Affairs (which is established by article 136 of the Constitution) "the state contains established relations of what are constituted as oversight, interpretation, service, and supervision for the teaching, training, and employment of all religious personnel and, through the offices of the mosques and publishing houses of the Directorate of Religious Affairs, the promotion and publication of a State Islam. The state also provides forms of religious instruction within its national educational system (under the education ministry) and in the military, for cadets and officers." Cady and Hurd (n 52) 35. This 'separation and integration' ideal is well exemplified by the common understanding that "[…] the Director of Religious Affairs […] may properly engage in promoting or pronouncing on religion within a broader institutional framework that ensures its separation in other ways." ibid 37.

However, this does not explain why does secularism feature in militant democracy provisions. Following Ahmet T. Kuru, it is a historical setting preceding the adoption of secularism that has a great influence, namely the existence of a monarchical regime in marriage with hegemonic religion.[89] In this way, Islam is seen as an 'extension' of the Ottoman monarchical rule – if religion is left to freely 'roam' the public space that might bring about the resurgence of the *ancien régime*.[90] Turkish secularism was, and is, a project of societal change, but it has also served the republican elite to consolidate power after the revolution.[91]

A few more words before moving on to legal analysis. Turkish secularism, unlike French, has been introduced in an authoritarian way.[92] The reason behind this is the fact that a majority of Turkish citizens are observant (Sunni) Muslims who oppose secularism endorsed by the courts. We need only inspect election results – 'Kemalist' parties have never won a majority through democratic elections.[93] However, until the AK party (Justice and Development Party) government, whenever the Kemalist elites[94] felt that the secular structure of the state was in danger they prevented future change either through military coups or through the courts. The future of secularism as understood since the founding days of the republic is under question since both methods of 'getting rid of' AKP failed.[95] Although history and ideology formed an immense part in creating the Turkish secularism, its meaning is open to change.[96]

[89] Kuru (n 77) 572.
[90] This setting is very similar to France and it produced anti-clerical sentiments in both countries.
[91] "Secularism in Turkey, that is variously named Kemalism or *laiklik* in Turkish, has been a largely top-down political project of remaking religion coinciding with the formation of the nation-state that has sought, with varying degrees of success, to impose a separationist model of a secular state in tandem with an official heavily regulated version of state (Sunni) Islam." Cady and Hurd (n 52) 16. The secularism project also had a personal element. During World War 1, Sheikh Ul Islam, the top religious authority, called for Mustafa Kemal Ataturk to be killed. See Ann Elizabeth Mayer, 'The Dubious Foundations of the *Refah* Decision,' in Durham (n 7) 211.
[92] Through a single party system from 1923 to 1946 and later though military coups and judicial activism.
[93] Kuru and Stepan (n 46) 109.
[94] According to Sinan Ciddi, 'Kemalist advocacy in a post-Kemalist era?' in Cizre Ü (ed), *The Turkish AK Party and Its Leader: Criticism, Opposition and Dissent* (Routledge 2016) 25. There are also several vocal civil society organizations with the agenda to promote Kemalism ideas. See same volume pp. 28-33
[95] The dissolution case failed by one vote in 2008 and a military coup was crushed in 2016.
[96] Following the western thought, secularization (seen as removal of religion from politics) is an inherent part of a linear historical progression which is seen as positive and progressive. See Yavuz (n 79) 145. My opinion is that this expectation is as much false for 'western' states as it is for Islamic democratic states, or we have not yet arrived at that point in the historical continuum (if we accept to understand history as a line along which societies

2.2. Analysis of legal provisions

Preamble of the Constitution plays an important part in the interpretation of the Constitution. Paragraph 8 of the Preamble states "[w]ith these *ideas, beliefs* and *resolutions* to be interpreted and implemented accordingly […]." Although most of these ideas are "put into more concrete terms" by other provisions of the Constitution, they are, ironically, "non-ideological and available for objective methods of constitutional interpretation."[97] For us, the most important is paragraph 5 which states:

> [t]hat no protection shall be accorded to an activity contrary to […] the nationalism, principles, reforms and civilizationism of Ataturk *and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism*;

This provision mirrors the opinion of TCC regarding secularism, namely, that state and politics are completely separated from religion.

Dissolution of political parties is, probably, the most controversial set of provisions in the militant democracy 'toolbox'.[98] A dissolution is even more problematic if the dissolved

move). See Alfred Stepan, *Arguing Comparative Politics* (Oxford Univ Press 2001) 213–253. Cited from Yavuz (n 79) 147–148.

[97] Thiel (n 13) 265. A problem regarding these provisions is that when judicially applied, it is easy to call into question the constitutional authority of the decision. "Ideological reflections in the Preamble are still seen as 'political favoring of the state' which aims at establishing a state mandated society and enhancing sociocultural as well as ideological homogeneity." See ibid 266–267.

[98] First, because of the interference with freedom of association and freedom of expression. Second, because of the status political parties enjoy in a democratic society. For example, article 68(2) of the Turkish Constitution states that "[p]olitical parties are indispensable elements of democratic political life." Or, perhaps more famously, article 21(1) of Germany's Basic Law – "Political parties shall participate in the formation of the political will of the people." In *Case of United Communist Party of Turkey and Others v. Turkey* [GC] app. No. 19392/92 ECHR (1998) in §25 it is said "that political parties are a form of association essential to the proper functioning of democracy" and in §31 that "[i]n view of the role played by political parties, such measures affect both freedom of association and, consequently, democracy in the State concerned." Furthermore, in §42 the Court has stressed that "[t]he protection of opinions and the freedom to express them [Article 10 of the Convention] is one of the objectives of the freedoms of assembly and association" and in §43 that this "applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy." On the importance of freedom of speech for democracy, in *Ceylan v. Turkey* 30 EHRR 73 (2000) the Court has said in §32(i) "[f]reedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress […]." Cited from Norman Dorsen and others, *Comparative Constitutionalism: Cases and Materials* (Third edition, West Academic Publishing 2016) 1018.

party is a major party in the parliament.[99] In the Turkish constitution this is regulated by articles 68 and 69. Article 68(4) states that:

> "[t]he statutes and programs, as well as the activities of political parties shall not be contrary to […] the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, not shall they incite citizens to crime."

Political parties' dissolution cases are decided by TCC.[100] Both the statute and program and the activities of political parties can be the reason for the dissolution. Article 69(5) states:

> [t]he permanent dissolution of a political party shall be decided when it is established that the statute and program of the political party violate the provisions of the fourth paragraph of Article 68;

while article 69(6) stipulates:

> The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a center for the execution of such activities.

In the same article, the Constitution defines which conducts amount to becoming 'a center of unconstitutional activities.' This means that when the conditions are met, TCC has to dissolve the party. These provisions have been criticized as 'too militant' because they make it hard for the Court to apply a more rigorous test e.g. 'clear and present danger' test applied by the USSC.[101]

The Turkish constitution makes certain provisions of the Constitution unamendable. This resonates well with a view that Turkey is a "militant substantive democrac[y] where an 'unalterable core' of constitution aims to protect the democratic regime from its internal opponents."[102]

[99] As we will see from the *Refah* case.
[100] Article 69(4) of the Turkish constitution.
[101] See Thiel (n 13) 295–296.
[102] ibid 264.

The unamendable core of the Constitution is found in articles 2 and 4. Article 2 states that "[t]he Republic of Turkey is a democratic, secular and social state governed by rule of law […]," whereas article 4 says "[t]he provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provision of Article 3 shall not be amended, not shall their amendment be proposed." Furthermore, "the [C]ourt held that the principles set forth in the Preamble belong to the irrevocable principles of the republic."[103] Article 14 represents the concept of prohibition of abuse of rights.

> "None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to […] endanger the existence of the democratic and secular order of the Republic based on human rights.[104]

During the 1995 amendment negotiating, *Refah Partisi* insisted on the repeal of article 24(5)[105] which states that

> [n]o one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.

It can be argued that article 136, which provides for the Presidency (Directorate) of Religious Affairs also belongs in the 'toolbox' of militant secularism.[106] This article stipulates that

> [t]he Presidency of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity.

[103] ibid 267.
[104] "As a general misuse clause, article 14 establishes a constitutional ground for militant laws sanctioning 'activities' against unitary, democratic and secular state based on human rights." Cited in ibid 280. Compare grounds of abuse with article 17 of ECHR.
[105] *Refah Partisi* "believed this paragraph was the source of discriminatory and 'oppressive' practices against devout Muslims, including the ban on wearing turbans and growing beards for students, civil servants, and even such free professionals as lawyers and engineers." Cited from Özbudun and Gençkaya (n 75) 36. Furthermore, "this norm has been treated negatively in constitutional writing as a norm excluding religion from social order and politics." See Thiel (n 13) 288.
[106] Andrew Davison writes that "[o]ne constitutive purpose of the Directorate of Religious Affairs is to ensure that the state's religion does not interfere in other state affairs." Cady and Hurd (n 52) 36.

The importance of this article comes from the commitment of the framers to give the principle of secularism a role in promoting national solidarity and integrity. "The *Diyanet*, as the major instrument of the state to regulate religion, constitutes the major practical contradiction to Turkey's theoretical 'separationism' between religion and the state. Due to the dominance of assertive secularist ideology [active at removing religion from the public sphere] in Turkey, the state pursues a policy to exclude Islam from the public sphere by confining it to *Diyanet*-run mosques."[107]

2.3. Case-law

For the analysis of militant secularism, the most important Turkish case is probably the *Refah Partisi* (Welfare Party) case. The dissolution of Refah by TCC[108] attracted massive attention, especially after the European Court of Human Rights (ECtHR) judgment.[109]

Refah was dissolved on 16 January 1998 by TCC "on the ground that it had become a center of activities contrary to the principle of secularism."[110] On July 10, 2001, a Chamber of ECtHR found that there was no violation of Article 11 of ECHR. This decision was upheld by a Grand Chamber of 17 judges. There were no dissents, but the judgement featured two important concurring opinions.

[107] Kuru and Stepan (n 46) 97.
[108] The TCC's ruling on January 16, 1997, no. 1998/1.
[109] *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. Nos. 41340/98, 41342/98, 41343/98 and 41344/98 ECHR (2001), hereinafter *Refah (1); Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], app. Nos. 41340/98, 41342/98, 41343/98 and 41344/98 ECHR (2003), hereinafter, *Refah (2)*.
[110] *Refah (1)* §23. The Turkish Constitutional Court based its decision on sections 101(b) and 103(1) of Law no. 2820 on the regulation of political parties. The Court observed that "[u]nder a secular regime religion, which is a specific social institution, can have no authority over the constitution and governance of the state. […] Conferring on the State the right to supervise and oversee religious matters cannot be regarded as interference contrary to the requirements of democratic society. […] Secularism, which is also the instrument of the transition to democracy, is the philosophical essence of life in Turkey. Within a secular State religious feelings simply cannot be associated with politics, public affairs and legislative provisions." *Refah (2)* §40 (citing TCC's ruling).

The opinion of TCC was that secularism is an inherent feature of modernization and democracy. The ECtHR 'buys' the argument about democracy[111], saying that owing to a specifical historical background, secularism is an important feature of democracy in Turkey.[112] It is undeniable that secularism and the formation of Republican Turkey coincided in time. However, I see at least two problems with the statement that secularism is historically a part of Turkish democratic process.

First, we have to ask, what is the nature of the polity introduced by the Constitution of 1923. Was it really a democracy? Four our purposes, I think it is sufficient to note that Turkey was a single party state until the general elections in 1946. At that point, secularism was a fundamental constitutional principle for almost ten years, but it had been a guiding principle of Kemalism since the very beginning. It is clear that a principle which is defended as fundamental value of Turkish democracy existed for a long period of time before the very minimum of democracy – a multi-party system with regular and fair elections – was introduced.

The second issue with the historical explanation has to do with the objective secularism served in the early stages of the Turkish Republic. Secularism was seen as a necessity in the modernization of Turkey, following the Western model. However, this process "[…] has been an authoritarian, top-down style of modernization […]."[113] Furthermore, it could be argued that after alleged genocides that happened on Turkish soil[114] and forced population exchanges[115], secularism played an important role in strengthening national unity and indivisibility of the Turkish state by excluding religious minorities that had been left in Turkey from the public

[111] It is probably clear by now, but repeating that ECtHR accepts a substantive view of democracy might be helpful.
[112] "The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society which they had in mind. […] each Contracting State may oppose such political movements in the light of its historical experience. […] Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey […]." *Refah (2)* §124-125
[113] Christian Moe, '*Refah* Revisited: Strasbourg's Construction of Islam,' in Durham (n 7) 238.
[114] For example, Armenian or Greek.
[115] For example, 1923 population exchange between Greece and Turkey

sphere (most importantly, Alevi Muslims).[116] Consequently, it can be argued that secularism had a greater influence on some features of the state other than democracy.

Another argument that can be made against the professed importance of secularism for democracy in Turkey is that the party ban was just another tool to preserve the status quo.[117] This might become clearer if observed together with previous party bans[118] targeting mostly Kurdish political parties.[119] In the cases examined before ECtHR, the Court found a violation of Article 11 of ECHR. Furthermore, it can be argued that the evidence presented to the Court in favor of a ban was less compelling in *Refah* than in the previous cases.[120] Keep in mind that in the *United Communist Party of Turkey Case* the Court said that "[…] it cannot be ruled out that a party's political program may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the program must be compared with the party's actions and the positions it defends."[121] It is clear that a party cannot be dissolved on the basis of its actions or its statute alone. What these parties have in common is that they challenge the official tenets of Kemalist ideology (secularism and national unity, integrity of the state) and for that, they are suppressed.

A question remains why does ECtHR find violations when it is dealing with separatist parties, but not when it comes to religiously inspired parties? I think answering this question is possible only after an inquiry into how do the Courts (TCC and ECtHR) view the relationship

[116] Another political reason for the introduction of secularism was the fact that high religious authorities of the Ottoman period were siding with the Allied forces (France, United Kingdom, Italy) during the Turkish War of Independence.
[117] "Experience suggests that the Turkish establishment will find a pretext to dissolve any party that presents a serious challenge to the status quo." Durham (n 7) 212.
[118] Before *Refah*, the Turkish Constitutional Court dissolved 14 political parties. ibid 236.
[119] Three of these cases have been examined by ECtHR. *United Communist Party of Turkey and Others v. Turkey* App. No. 19392/92, 30 January 1998; *Socialist Party and Others v. Turkey* App. Nos. 20/1997/804/1007, 25 May 1998; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, App. No. 23885/94, 8 December 1999.
[120] Christian Moe writes that "[a]t no point had *Refah* proposed legislation or taken other palpable initiatives to bring about the "theocratic order" that the Court concludes they envisioned. Indeed, their statutes and party program contained no such proposals, and so were not presented as evidence – unlike the three previous cases before the Court. Nor had any evidence been uncovered of a criminal conspiracy to seize power and suspend the Constitution. The evidence consisted exclusively of scattered statements and symbolic public acts by party members of various standing over a six-year period.
[121] *Case of the United Communist Party of Turkey and others v. Turkey* app. no. 19392/92, [GC] ECHR (1998)

between democracy, on the one hand, and Islam and Sharia law, on the other. From the decision it is clear that ECtHR finds that a regime based on *Sharia* is incompatible with the Convention, but what is more important for us is that such a regime is also incompatible with democracy.[122]

The Court rejects *Sharia* for two reasons. The view of the Court is that *Sharia* "intervenes in all spheres of private and public life in accordance with religious precepts." This means that the Court understand Sharia in a fundamentalist way, as a total social system. The Court finds another reason in the fact that Sharia law is "stable and invariable."[123] Without analyzing these two alleged features of Sharia (that is not the point of this paper), I find it odd that the Court gives such unadulterated statements about the essence of a law system on which the members of the Court are not experts.

Now I want to look at the relationship between Turkish militant secularism and democracy as a process. By process here I understand deliberation[124] and the procedure of choosing the governors. The dissolution of *Refah* by the TCC came after the court concluded that owing to the strength of the party in the parliament there is a real opportunity that the party will introduce a plurality of legal systems and *Sharia* law. However, the party never actually had any plan of legislative action to introduce these concepts, nor can evidence for this claim be found in the statute of the party. The ban was based on various statements made by party of officials of different rank over a period of 6 years.[125] Hence, the main reason for the ban was

[122] This is problematic in my view. First of all, I think the Court basically equates a system compatible with the Convention with a democratic system. In paragraph 98, the Court writes that a change in the law or the legal and constitutional structures of the State must be compatible with fundamental democratic principles. Judge Ress rightly notes in his concurring opinion that "[…] it cannot be interpreted to the effect that any campaign to change rights and freedoms recognized in a democracy amount to a situation where a political party would lose protection. In this respect also all depends on the specific rights and freedoms which a political party aims to change and furthermore what kind of change or modification is envisaged." The second issue I find with this incompatibility of *Sharia* with democracy is the fact that the Court never really gives a precise definition of democracy (which I think is not even possible).

[123] *Refah (2)* § 123

[124] Here I am following Günter Frankenberg. "Deliberation is introduced as a device for people to develop, discover, and articulate their proper interests, needs, and preferences through a process of discussion, thus trying to solve the problem of 'enduring disagreement' and group polarization." Günter Frankenberg, 'Democracy,' in Rosenfeld and Sajó (n 12) 255.

[125] ECtHR writes "that those acts and speeches [of various party officials] revealed Refah's long-term policy of setting up a regime based on sharia […]." *Refah (2)* § 132.

the fact that members of the *Refah* party tried to express their opinions about the status of Islam in Turkey. Taking into account the incredible importance of freedom of expression and deliberation for democracy, it can be argued that protecting the principle of secularism using the provisions of militant democracy resulted in removing certain opinions from the political discourse. In my opinion this is a blow for democracy and constitutionalism.[126]

The other issue deals with how Turkish militant secularism interacts with the electoral system and representation of the people. My stand is that the effort made by Turkish authorities over the years to secure the principle of secularism 'at all costs' has done harm to these processes. A good example for this would be three military interventions (in 1960, 1971 and 1980) undertaken with the aim to safeguard the fundamental principles of state, inter alia, secularism.[127] Although the military left power after each coup, it is undeniable that these overthrows of government did disrupt the democratic flow of governmental change. However, the greater problem for democracy is disenfranchisement. When *Refah* was dissolved only six leaders of the party were banned from political party activities, for five years. The party went peacefully, and its replacement was established *(Fazilet Partisi*). However, due to internal reasons, this party did not pursue the same policies as *Refah*. The voters who voted for *Refah* had to settle for something else.[128]

[126] Consider "[…] there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest […]." *Ceylan v. Turkey* ECHR 30 EHRR 73 (2000), cited from Dorsen and others (n 98) 1018.

[127] These military interventions become even more problematic when we realize that they have not succeeded in accomplishing the goals that were set. For example, the third intervention "did not roll back the gains made for Islam. Rather, it reinforced them […]." See Durham (n 7) 240.

[128] Two remarks here. First, the problem of disenfranchisement is greater bearing in mind that *Refah* was the leader of a coalition government with approximately 22% of votes. Second, while it is true that political parties are no longer regarded as associations that simply represent the interests of the people that have voted for the party, but also as an essential part of the democratic machinery (proof for this is the fact that political parties feature in constitutional provisions of various constitutions e.g. Germany, Turkey. In Germany, the provisions dealing with political parties are located in the part regulating the Federation and the Lander. Also see *Socialist Reich Party Case* on how the Federal Constitutional Court of Germany sees political parties in regard to these issues) their representative function is undeniable.

The historical interpretation of Turkish secularism tells us that *Refah* never stood a chance. The idea of legal pluralism is in direct conflict with the idea of Turkish secularism which aims to put Islam under state's tutelage. A system of plural legal orders might or might not be in conflict with the modern liberal state, but my opinion is that the true reason behind the *Refah* ban is the danger such a system poses for the cohesion of the Turkish state under one religion.

What will the future bring for Turkish secularism under the rule of AKP, a political party that is deeply rooted in the traditional Sunni interpretation of Islam and what does this mean for religious minorities in Turkey, especially Alevi Muslims, on the one hand and 'secularists' on the other? So far, the signs are not promising.[129]

[129] For example, Alevi places of worship, *cemevis*, have not yet been recognized as official places of worship. This means that the money that Diyanet spends on construction and maintance of mosques is used only on Sunni buildings. https://www.nytimes.com/2017/07/22/world/europe/alevi-minority-turkey-recep-tayyip-erdogan.html (accessed April 6, 2018)

3. France

French secularism has historically been the most important influence for the Turkish revolutionaries in introducing their own concept of secularism. Although there are many differences between Turkey and France concerning the evolution of meaning of secularism, both concepts were introduced in period filled with conflict, during a radical regime change, where a very powerful organized religion dominated society during the old regime. This chapter will unlike the previous focus on another aspect of militant secularism – prohibition of religious symbols in the public sphere.

3.1. Historical introduction

> Is it not time, Mr. Prime Minister, to reaffirm forcefully the idea, which really is quite simple, that *laïcité* is the first sentinel and the ultimate bulwark of the unity of the nation? It appears essential to me to preserve the law of 1905 and its fundamental principles.[130]

The biggest issue of French *laïcité*[131] today is the question of state control over religious symbols in the public sphere. Before the discussion about modern laws (Law No. 2004-228[132] and Law No. 2010-1192[133]) it is important to get familiar with the history of *laïcité*.[134]

[130] Question by Deputy François Baroin to Prime Minister Raffarin. Débats parlementaires, Journal Officiel de la République Française, 2d Sess., Apr. 29, 2003, at 3212. Cited from Gunn (n 42) 459–460.

[131] There have been numerous works dealing with French *laïcité*. See Jean Baubérot, *Histoire de la laïcité en France* (Presses universitaires de France 2013); Jean Baubérot, *Laïcité 1905-2005, Entre Passion et Raison* (Seuil 2004); Guy Bedouelle and Jean-Paul Costa, *Les Laïcités à La Française* (1re éd, Presses universitaires de France 1998); Henri Pena-Ruiz, *Qu'est-ce que la laïcité?* (Gallimard 2003); Emile Poulat, *Notre Laïcité Publique: 'La France Est Une République Laïque' (Constitutions de 1946 et 1958)* (Berg international 2003).

[132] Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977&dateTexte=20180402. Accessed 2 April 2018.

[133] LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public 2010 (2010-1192). https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&dateTexte=20180402. Accessed 2 April 2018.

[134] "The first theoretical definition of French *laïcité* was given by philosopher Ferdinand Buisson. […] According to Buisson *laïcité* is the result of a historical process in which the public institutions freed themselves from the power of religion." Jean Baubérot, 'Laïcité and Freedom of Conscience in Pluricultural France,' in Berlinerblau, Fainberg and Nou (n 45) 103.

When talking about French *laïcité* we encounter the same problem as when trying to define secularism in general – "[t]here is no firm definition of *laïcité*: neither officially established nor generally accepted."[135] Nevertheless, "officials, politicians, scholars and citizens are often extravagant in their praise of the term."[136] According to a speech given in December 2003 by President Jacques Chirac *laïcité* is a principle to which citizens should be faithful, it is the 'pillar' of French Constitution, without it there is no basic right of belief, it promotes tolerance etc.[137] In constitutional terms, it is a doctrine that is not only compatible, but also complements constitutional norms of equality, neutrality, and tolerance.[138] Another example are words of a former Socialist Prime Minister Laurent Fabius. "There are three legs: *laïcité*, Republic, school; these are the three legs on which we stand."[139]

However, looking at historical facts, French secularism[140] is not as unifying and cohesive as some would like to depict it. As a constitutional feature, secularism was entrenched in the 1946 Constitution (art. 1). The current Constitution of 1958 proclaims in article 2 that "France is an indivisible, lay (laic), democratic, and social Republic. It ensures equality before the law for all citizens, without distinction as to origin, race, or religion. It respects all beliefs."[141] Nonetheless, just like in Turkey, the idea of secularism preceded its introduction as a constitutional principle.

[135] Poulat (n 131) 116. Cited from Gunn (n 42) 420.
[136] Gunn (n 42) 428.
[137] See ibid 428–429. Also see 'Chirac on the Secular Society' (18 December 2003) <http://news.bbc.co.uk/2/hi/europe/3330679.stm> accessed 1 April 2018.
[138] In words of Henri Peña-Ruiz *laïcité* is "a principle of union of the population grounded on values, or requirements, that ensure that no one will be the victim of pressures on his or her conscience, or of discriminations because of his or her spiritual choices." Henri Peña-Ruiz, '*Laïcité* and the Idea of the Republic: The Principles of Universal Emancipation,' in Berlinerblau, Fainberg and Nou (n 45) 95.
[139] 'Le Principe Émancipateur et Unificateur de La Laïcité, Par Laurent Fabius (Congrès de Dijon - 17 Mai 2003)' <http://miroirs.ironie.org/socialisme/www.psinfo.net/entretiens/fabius/laicite.html> accessed 1 April 2018. This statement also gives clues as to why issues of French secularism arise so often in school setting.
[140] Henceforth, I will use the term secularism instead of *laïcité*. According to one of great authorities on the topic, Jean Baubérot, this is the correct translation. See Berlinerblau, Fainberg and Nou (n 45) 86.
[141] For the French chapter I have used the chapter 'Constitutional texts' in John Bell, *French Constitutional Law* (Reprinted, Clarendon 2001) 245–269.

There are two historical periods in which the meaning of *laïcité* evolved – the years following the Revolution of 1789[142] and the years 1879 to 1905.[143] The common feature of these two periods important for secularism is the antagonistic sentiment towards the Catholic Church.[144] The years succeeding the Revolution were for formative for France as we know it today and so they were for secularism. The imposition of secularism was first pursued through laws enacted by the Constituent Assembly.[145] The effect of these measures was that many of the clergy fled the country or were imprisoned.[146] Later, the Catholic Church was repressed by the Jacobin Terror.[147] All these measures created a contrast between state (revolution) and religion and presented people with a difficult choice.[148] You could either be a Catholic or French.[149]

During the reign of Napoleon III, the Catholic Church regained some of its privileged status it enjoyed during the *ancien régime*.[150] After the defeat to Prussia and the creation of the Third French Republic, the Catholic Church was once again an 'enemy.'[151] Laws adopted

[142] For further insights on how the revolution influenced church-state in France see John MacManners, *The French Revolution and the Church* (Greenwood Pr 1982).
[143] This does not mean that the meaning of secularism in France remained static between those two periods or after. However, these years have been formative for today's understanding of secularism in France.
[144] "[D]uring these formative periods, *laïcité* did not embody the high principles of tolerance, neutrality, and equality; rather, it emerged from periods of conflict and hostility, most of which targeted the Roman Catholic Church." In Gunn (n 42) 433. Other scholars have also identified that secularism in France emerged from periods marred by conflicts. See Poulat (n 131). The conflict with the Catholic Church was not the only 'religious struggle' formative of French secularism. Over the centuries, France has been plagued by many religious conflicts. See Jean Baubérot in Berlinerblau, Fainberg and Nou (n 45) 104.
[145] Treilhard Decree – "dissolved all existing monastic vows, ordered those living under such vows to disperse, forbade any future religious vows, and dissolved all religious congregations with the proviso that they would never be able to reconstitute themselves." 46 Le Moniteur Universel 184 (Feb. 15, 1790), reprinted in Bernard Jeuffroy (ed), *Liberté Religieuse et Régimes Des Cultes En Droit Français: Textes, Pratique Administrative, Jurisprudence* (Éd du Cerf 1996) 964 cited from Gunn (n 55) 434; Civil Constitution of the Clergy – members of the clergy are elected by popular vote, they have to take an oath of loyalty to the state and their salaries are paid by the state. 194 Le Moniteir Universel 797-98 (July 13, 1790).
[146] MacManners (n 142) 106. Cited from Gunn (n 42) 436.
[147] However, the Jacobin revolutionaries added both Jews and Protestants to the list of enemies of the *patrie*. Patrice Higonnet, *Goodness beyond Virtue: Jacobins during the French Revolution* (Harvard University Press 1998) 235. Cited from Gunn (n 42) 437.
[148] Nigel Aston, *Religion and Revolution in France, 1780-1804* (Catholic Univ of America Press 2000) 162. Cited from Gunn (n 42) 439.
[149] Gunn (n 42) 439.
[150] During this period the Church "embarked on a policy of persecution of its enemies […]." Theodore Zeldin, *France: 1848 - 1945. ... Anxiety and Hypocrisy* (Clarendon Pr 1981) 262. Cited from Gunn (n 42) 436.
[151] "Between 1880 and 1905, more than two dozen laws were promulgated that promoted *laïcité* in ways ranging from placing civil disabilities on those who had received a religious education to preventing religious

during this period that are most important to understand French secularism are three education laws (1881-1886), Law on Associations[152] and Law on the Separation of Churches and the State.[153] The Law on Associations required religious organizations to apply for parliamentary authorization, otherwise the association would be subject to confiscation.[154] Following the adoption of Law of 1905, all religious property that had been acquired or built prior to 1905 was expropriated and the Concordat of 1801 was revoked.[155] Furthermore, "all religious associations were required to reregister with the state, but Catholic churches refused to do so under the 1905 law, leaving them without a formal legal status until after World War I."[156]

The point of this introduction is to strengthen the argument about the true nature of French secularism, but also to fully understanding the meanings of *laïcité*.[157] The public space and politics are envisaged as reason driven. In words of Professor Andras Sajo

> [s]ecularism as an institutional arrangement provides protection to a reason-based polity against a social '(dis)order' that is based on dictates of religious doctrine and heated passions. When constitutional law insists on secularism, it insists on the possibility of a reason-based political society.[158]

Or

manifestations in streets during funeral processions." Poulat (n 131) 88–89. "The spirit of *laïcité* could act with the same intolerance that it accused others of exemplifying." This refers to the Catholic Church. ibid 25. Cited from Gunn (n 42) 440.

[152] Law on the Contract of Association of July 1, 1901, J.O. July 2, 4025 (hereinafter 1901 Law). For the amended version see 'Loi Du 1er Juillet 1901 Relative Au Contrat d'association | Legifrance' <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069570> accessed 1 April 2018.

[153] Law on the Separation of Churches and the State of Dec. 9, 1905, J.O. Dec. 11, 1905, 7205 (hereinafter 1905 Law). For the amended version see Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000508749 accessed April 1, 2018.

[154] Articles 13 through 18 of the original law. "During the next four years, as parliament refused to enact laws authorizing the congregations, hundreds were closed and several thousand monks and nuns sought exile outside of France." Gunn (n 42) 440–441.

[155] ibid 441.

[156] John McManners and Church Historical Society (Gt. Brit.), *Church and State in France, 1870-1914* (SPCK for the Church Historical Society 1972) 152–153. Cited from Gunn (n 42) 441.

[157] "To understand the history of *laïcité* is to understand the richness of its meanings." Stasi report (n 158) at 10.

[158] A Sajo, 'Constitutionalism and Secularism: The Need for Public Reason' 30 Cardozo L. Rev. 2401, 2401. Sajo gives this explanation for secularism as an institutional arrangement in general, however, I think it captures the French model.

> Secularity is not just the religious neutrality of the state. It is also, and indivisibly, the state's strictly nonreligious character.[159]

Unlike e.g. the model of the United States where the preoccupation is free exercise of religion, the French model is more concerned with keeping the political sphere religion free.[160] It might seem that this is similar to the Turkish model, but this similarity is only superficial. The true idea behind the Turkish secularism is to ensure that the state version of Islam prevails. Furthermore, it is important to understand the confrontational nature of French secularism. By using the word confrontational I want to describe the circumstances surrounding the process of creation of French secularism. It is, among other things, a concept that was used by the state to expand its power at the expense of organized religion, especially the Catholic Church. This is important to fully understand the skepticism of the French towards religions in the public sphere.[161]

3.2. Analysis of legal provisions and case law

The most important constitutional provision regarding secularism must be article 1 of the 1958 constitution which proclaims that

> France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. […].

From the very fact that the proclamation of 'French secular Republic' is done in the first article of the constitution signifies the importance of the principle of secularism for the French state. The principle of secularism was first constitutionally entrenched in article 1 of the 1946

[159] Berlinerblau, Fainberg and Nou (n 45) 100.
[160] It is fair to say that this goes both ways, meaning that the religious is emancipated from the political.
[161] Jean Baubérot argues that the narrative of laïcité is characterized by emancipation from religion.

Constitution, however, secularism as a legal rule and practice preceded constitutional proclamation.

"The secular recasting of the state was initiated in France with the Jules Ferry Laws, which established free education in 1881 and mandatory, *laïque* education in 1882; the 1886 Goblet Law, which extended the 1882 law; and the December 9, 1905 Law on the Separation of the Churches and State.

> Article 1: The Republic shall ensure freedom of conscience. It shall guarantee free participation of in religious worship, subject only to the restrictions laid down hereinafter in the interests of public order.
>
> Article 2: The Republic may not recognize, pay stipends to or subsidize and religious denomination. Consequently, from 1 January in the year following promulgation of the Act all expenditure relating to participation in worship shall be removed from the State, region, and municipality budgets.[162]

Before 1905, French law recognized certain religions (Catholicism, Lutheran and Reformed Protestantism, and Judaism), however, after the 1905 law the French system is a system of strict nonrecognition.[163] The idea of this provision is to give equal status to all spiritual choices. "The 1905 law does not just stipulate that all churches are henceforth legally equal. It extends this equality to all spiritual choices, whether religious or not, by dispossessing the churches of any public law status."[164] Compare this with the solution in Turkey. Turkey also pursues a policy of strict separation of church and state. However, the contradiction to this proclamation is the control it exerts over religion through the Directorate of Religious Affairs. Also, this legal choice is in strict contrast with the Serbian solution, where seven religious organizations are recognized by state law and because of that enjoy privileges.

[162] Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat. (n 153).
[163] This is not true for the region of Alsace-Moselle. I have discussed this exception in paper I submitted as a part of exam obligations for the course 'French Constitutional Law and Its Influence Abroad.'
[164] Berlinerblau, Fainberg and Nou (n 45) 101.

3.2.1. *Laïcité* in schools

The most revealing examples of militant secularism in France has to do with display of religious symbols in the public sphere. More specifically, in France, a great number of issues involving *laïcité* have been confronted in schools.[165] The reason for this is that the schools are there to teach civic and moral values, the nation's values and history. In words of the French, to create patriots.[166] In the eyes of many French, laïcité is part of French identity.

The most important in event in this 'struggle' is the adoption of Law No. 2004-228 and later Law No. 2010-1192. The story, however, starts with a formal opinion (*avis*) of the *Conseil d'État* (the Council of State) on whether the wearing of religious clothing in public schools could be reconciled with the doctrine of French secularism.[167] The Council said that "[t]he wearing of signs by students in which they wish to express their membership in a religion is not by itself incompatible with the principle of *laïcité*," however, the Council "cautioned […] that students could be prevented from wearing religious attire if they attempted to propagandize others or to disrupt school activities."[168] In the event which preceded the opinion, three Muslim girls were temporarily barred from attending public schools because they insisted on wearing an Islamic headscarf. The Council advised that issues of religious clothing in schools be decided by school officials on case-by-case basis. In the following years local state officials tried to prohibit Muslim girls from wearing headscarves. Many of these cases were decided by the Council of State and a vast majority of the decisions were against public officials.[169] This was a victory for constitutionalism and democracy for two reasons. First, proselytism of

[165] Pierre Nora (ed), *Realms of Memory: Rethinking the French Past. 1: Conflicts and Divisions* (Engl language ed, Columbia Univ Press 1996) 154–156, 169.
[166] The 'greatest function' of the French school was not academic training, but the teaching of patriotism. Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France ; 1870 - 1914* (Nachdr, Stanford Univ Press 1976) 332. Furthermore, "Theodore Zeldin argues that in France 'universal education and the republic became inextricably identified with each other.'" Zeldin (n 150) 199. Cited from Gunn (n 42) 453.
[167] Avis du Conseil d'État No. 346893 (Nov. 27, 1989).
[168] Gunn (n 42) 455.
[169] Francis Messner (ed), *Traité de droit français des religions* (Litec 2003) 1135–1138. Cited from Gunn (n 42) 457. When the Council rendered the decisions against the girls, it did so on the grounds that they had been unduly provocative.

religion was to be determined upon the behavior of students, and not on the ostentatious attributes of clothing itself. Second, a strict version of *laïcité* lost a battle against the right of young Muslim girls to express their beliefs through wearing specific clothes. However, this would turn out to be a calm before the storm.

Although many officials were not happy with this decision of the Council, the issue of headscarves was not 'a big thing' until 2003 when "several prominent members of the National Assembly, including former ministers, had proposed that a law governing headscarves in schools be enacted and the Parliament had begun its own investigation and analysis."[170] On July 3 President Chirac issued a decree creating a commission charged with analyzing the application of principle of *laïcité* in the Republic (Stasi Commission). The commission came up with a report by the end of the year.[171] The one recommendation which the government followed was the recommendation to ban "clothing and signs manifesting religious or political affiliation from public schools."[172] Law of 2004 banned ostentatious religious signs in state schools. The biggest change (for the worst) was that '[o]stentatious was no longer determined by the pupil's behavior, but rather by religious sign itself."[173]

Even though the 2004 law can be criticized it was conceptualized to be applied only to public schools in order to protect young Muslim girls from coercion and to preserve public order. In other words, it was not a blanket ban. For example, the *Haute Autorité de Lutte* contre *le Discriminations et pour l'Égalite* (HALDE) prevented any extension of the 2004 law.[174] However, in the following years HALDE was abolished and another institution became an authority for the official proposals concerning *laïcité – Haut Conseil à l'Intégration*.

[170] Gunn (n 42) 461–462.
[171] Rapport au President de la Republique (Stasi report). Downloaded from http://www.ladocumentationfrancaise.fr/rapports-publics/034000725/index.shtml#book_presentation 2 April 2018.
[172] Stasi report (n 158) at 68. Cited from Gunn (n 42) 462. However, the authorities did not even follow this recommendation in its entirety, enacting a law which bans religious symbols, but says nothing about symbols of political affiliation.
[173] Jean Baubérot in Berlinerblau, Fainberg and Nou (n 45) 108.
[174] ibid.

"Therefore, *laïcité* became separate from the fight against discrimination, and it was portrayed primarily as an issue regarding immigrants and their children more so than native-born French."[175]

3.2.2. Laïcité in the streets

In 2010 a law was adopted that banned the full veil in the public space.[176] The wording of the statute was neutrally phrased, but it is clear that the primary target of the legislation to prohibit public wearing of the Islamic *burqa* (full body covering) and the *niqab* (face veil). It was voted without any reference to *laïcité* and was justified by a threat to 'public order.' The justification of 'public safety' loses sway if we know that only a very small number of women was affected.[177] Here lies the preventive nature of the act. In an explanatory memorandum accompanying the bill it is written that "[e]ven though the phenomenon at present remains marginal, the wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic." This means that the danger at the time of the adoption of the statute is not considerable. How immediate must the danger be?[178]

In 2011 the law came under scrutiny of ECtHR in the case *S.A.S. v. France*.[179] The applicant was a Muslim woman, a French national, by her own words a devout Muslim. She alleged that the ban on full-face veil in public violates Articles 3, 8, 9, 10 and 11 of the Convention, taken separately and in conjunction with Article 14 of the Convention (§ 3). The Court decided the case under Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) taken separately and together with Article 14 (prohibition of discrimination). The Court found no violations.

[175] ibid.
[176] LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (n 133).
[177] By the end of 2009 it was about 1900 women. This is the figure given by a parliamentary commission of the French National Assembly tasked with drafting a report on 'the wearing of the full-face veil on national territory.' Cited from *S.A.S.* §16;
[178] The Court talks about an 'immediate and tangible' danger in *Refah* §110
[179] *Case of S.A.S. v. France* app. no. 43835/11, [GC] ECHR (2014)

A National Assembly commission assessed the compliance of full-face veils with French constitutional principles and found that it is at odds with values of the Republic, not only secularism, but also an infringement of the principle of liberty and gender equality identifying the veil as a form of subservience. The commission also wrote that full-face veils are a "flagrant infringement of the French principle of living together (*le 'vivre ensemble'*)."[180]

Contrary to this opinion, the National Advisory Commission on Human Rights issued an opinion saying that such a restriction could not be justified under the principle of secularity (because it is not for the state to determine what fell within the realm of religion) nor under the principle of public order because the restriction is too broad. "[p]ublic order could justify a prohibition only if it were limited in space and time."[181] This view is comparable to that of the USSC – the government cannot regulate the content of speech, but it can place reasonable time, place and manner restrictions on speech for the public safety.[182] Looking through the lens of this test, we see considerable differences in restrictions the 2004 and 2010 law. However, that does not mean that the 2004 law would pass this test. Unlike the USSC, the NACHR does not suggest that restrictions be reasonable.

When asked to give its opinion about the ban, the Council of State that a blanket ban would be unconstitutional. It however wrote that a "provision stipulating that it was forbidden to wear any garment or accessory that had the effect of hiding the face in such a way as to preclude identification, either to safeguard public order where it was under threat, or where identification appeared necessary for access to or movement within certain places, or for the purpose of certain formalities."[183]

The main argument of the Government to support the ban is the requirement of 'living together.' According to the explanatory memorandum contained in the law 2010-1192 this

[180] *S.A.S.* §17
[181] *S.A.S.* §18
[182] *Cox v. New Hampshire* 312 U.S. 569 (1941)
[183] *S.A.S.* §23

concept includes: "rules that are essential to the Republican social covenant, on which [the French] society is founded; […] a minimum requirement of civility that is necessary for social interaction; […] the principle of respect for the dignity of the person […] but also the dignity of others who share the same public space and who are thus treated as individuals from whom one must be protected by the refusal of any exchange, even if only visual; […] equality of men and women."[184] The Constitutional Council (*Conseil constitutionnel*) decided that the statute is constitutional.[185]

The Court accepts the 'living together' (as part of the protection of the rights and freedoms of others) argument as legitimate aim for interference with the rights of the applicant. What I find the most striking is that the Court basically accepts that the majority in a society can determine certain societal rules because they, well, do not like something. "Furthermore, admittedly, as the applicant pointed out, by prohibiting everyone from wearing clothing designed to conceal the face in public places, the respondent State has to a certain extent restricted the reach of pluralism, since the ban prevents certain women from expressing their personality and their beliefs by wearing full-face veil in public. However, for their part, the Government indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of 'living together'. From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society […]. It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society."[186] The Court is basically saying the following. A democratic society needs to be

[184] *S.A.S.* §25
[185] Decision of 7 October 2010 (no. 2010-613 DC)
[186] *S.A.S.* §153

pluralistic, tolerant and broadminded. However, if some differences of the minorities make majorities *intolerant and narrow minded* they can choose to remove what irks them so that everyone becomes tolerant and broadminded again.

The Court accepted that France had a wide margin of appreciation and in a few sentences deferred to the choice of the majority in the French parliament. "In such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of domestic policy-maker should be given special weight."[187]

However, it was clear that the statute was strongly related to the idea of *laïcité*. It seems that at this point French secularism is gaining a Christian identity. A good example of this would be a statement given by President Nicolas Sarkozy during a visit to the Pope, where he said that religious morality is better than secular morals.[188] It is not hard to imagine to which religion the President was referring. I think another example from history might support this argument. "[…] before Vatican II, all the Catholic monks, nuns, and priests would wear specific clothes in the public space. Many of them (but not all!) stopped wearing those clothes in the 1960s, but it was their own decision, and the secular state had nothing to do with it. This wasn't a requirement of *laïcité*."[189] Why was not this approach used to Muslim clothing? There is certainly something about Islam and its symbols that makes some French uneasy. "A common feature of prejudicial stereotypes about Muslims is the notion that their Islamic culture makes them hostile to democracy."[190] One example would be various obstacles Muslims have

[187] *S.A.S.* §154
[188] See Jean Baubérot, *La laïcité expliquée à M. Sarkozy: et à ceux qui écrivent ses discours* (Albin Michel 2008).
[189] Berlinerblau, Fainberg and Nou (n 45) 87.
[190] Durham (n 7) 222.

faced when they try to construct Mosques.[191] "A common feature of prejudicial stereotypes about Muslims is the notion that their Islamic culture makes them hostile to democracy."[192] It seems that the old enemy – the Catholic Church – has been replaced by a new one – 'the Muslim world.'

[191] Kuru and Stepan (n 46) 97.
[192] Durham (n 7) 222.

4. Serbia

The story of secularism in Serbia is very different from Turkey in France in many respects. After the fall of communism religion and especially Serbian Orthodox Church has gained importance in the public discourse. Various laws have been adopted to strengthen this process. This chapter aims to give a different perspective regarding the trend of secularization – what I see as 'resacralization' of the public sphere. However, this reintroduction of religious elements into the public sphere does not advance constitutionalism and democracy. In my view it is practice which is used to strengthen the electoral power of the party that supports the Serbian Orthodox Church. This practice is also very dangerous because it reinforces nationalistic sentiments.

4.1. Historical introduction

> We are hoping and praying to God to give the power and strength to the president of Republic of Serbia, Aleksandar Vučić, to resist the fierce winds of our time, having faith that our Lord will not forget us.[193]

The first constitution to introduce secular elements was the Constitution of the Socialist Federal Republic of Yugoslavia of 1974. In article 174 this constitution proclaimed that "[r]eligious communities shall be separated from the State and shall be free in the conduct of religious affairs and performance of religious rites." As can be seen, in proclaiming that religious communities are separate from the state, the constitution does not mention freedom of religion as a belief or exercise. It is fair to understand this provision as a kind of hostile separation between religion and state. Put simply, the religion did not have any claim in the public sphere. Secularism in socialist (communist) Yugoslavia "was an ideological, rather than

[193] Speech given by the Serbian Patriarch Irinej in Banja Luka, while giving a public service of God (liturgy) on the Day of Republika Srpska. Available at http://www.rts.rs/page/stories/ci/story/124/drustvo/2997621/patrijarh-irinej-blagodarimo-gospodu-na-vucicu.html (accessed 5 April 2018). The speech had to do with an upcoming part of Kosovo talks. In Serbian press it was seen as a kind of pressure on the government before the upcoming talks.

a legal, theoretical, or academic, matter, which was understood one-sidedly as a plain justification to remove all elements of religious life out of the public sphere."[194] "Any comprehensive or dissonant discussion on the legal position of churches and religious communities, the importance of religion and religious feelings, or claims for right to religious freedom [of] expression [were] usually labeled without hesitation as conservative, anachronistic, clerical, and contrary to socialist values."[195] Put simply both believers and religious organizations were repressed.[196]

Even though a multiparty system was introduced by the 1992 Constitution, the reign of Milosevic was still 'communist' in many aspects. That is why the issue of secularity was not discussed until the (belated) fall of communism in 2000. After this event and until the constitutional proclamation of secularism in 2006 (current constitution) religion went through a process of revival.[197] The first 'public area' where religion was re-introduced was primary[198]

[194] Sima Avramovic, 'Understanding Secularism in a Post-Communist State : Case of Serbia', in Donlu Thayer, Javier Martínez Torrón and W Cole Durham (eds), *Religion and the Secular State: National Reports = La Religion et l'État Laïque ; Rapports Nationaux* (Servicio de Publicaciones de la Facultad de Derecho de la Universidad Complutense de Madrid 2015) 599.

[195] ibid.

[196] Good examples of this were constant discriminatory practices against the clergy and confiscation of church property.

[197] New believers, intensification of religious practice, an increase of social impact of religious actors in the media. According to the census of 2011, out of total number of 7,186.862 inhabitants, religious structure of Serbia is as follows:

Orthodox Christians 6,079.396 – 84,59
Catholics 356.957 – 4,96
Muslims 222.828 – 3,10
Protestants 71.284 – 0,99
Other Christian religions 3.211 – 0,04
Jews 578 – 0,01
Oriental cults 1.237 – 0,02
Other religions 1.776 – 0,02
Agnostics 4.010 – 0,06
Atheists 80.053 – 1,11
Unanswered 220.735 – 3,07
Unknown 99.714 – 1,38

Available at http://pod2.stat.gov.rs/ObjavljenePublikacije/G2015/pdf/G20154001.pdf (accessed 5 April 2018).

[198] Religious instruction in primary schools was introduced by Law on amending the Law on Elementary School (Official Gazette of the Republic of Serbia, No. 22/2002 of 26 April 2002). The statute in force is Zakon o osnovnom obrazovanju i vaspitanju [Law on primary education] (Official Gazette of the Republic of Serbia, No. 55/2013 and 101/2017). Available at https://www.paragraf.rs/propisi/zakon_o_osnovnom_obrazovanju_i_vaspitanju.html (accessed 4 April 2018).

and secondary[199] public education and this is where the first 'battle for secularism' was fought.[200] The constitutionality of these laws was challenged before the Constitutional Court of Serbia. On 4 November 2003 the court ruled that religious instruction in public schools as provided by these laws was not contrary to the constitution.[201]

The main idea of the authors that support religious education in public schools[202] is the fact that young people in Serbia would be better off with a proper knowledge of religion because, owing to their communist (atheistic) upbringing parents of young children do not possess required knowledge of religion and they are often prejudiced towards other religions. Thus, religious education would help in creating a tolerant religious identity in young people. I believe this is a legitimate goal of religious education in a democratic society. Nevertheless, the problem with this argument is that religious education in Serbia is mostly concerned with confessional matters.[203]

The constitution of 2006 in article 11 proclaimed the principle of secularism. "The Republic of Serbia is a secular state. Churches and religious communities shall be separated from the state. No religion may be established as state or mandatory religion." This was a change of tone after the reintroduction of religious education to public schools' curricula and

[199] Religious instruction in secondary schools was introduced by Law on amending the Law on High School (Official Gazette of the Republic of Serbia, No. 23/2002 of 9 May 2002). The statute in force is Zakon o srednjem obrazovanju i vaspitanju [Law on secondary education] (Official gazette of the Republic of Serbia, No. 55/2013 and 101/2017). Available at https://www.paragraf.rs/propisi/zakon_o_srednjem_obrazovanju_i_vaspitanju.html (accessed 4 April 2018).

[200] The issue of religious education in public schools was a topic that attracted much attention and there is plenty of academic writing on the topic. For more see M. Draškić, "Pravo deteta na slobodu veroispovesti u školi" [Right of children to religious freedom in the school], *Anali Pravnog fakulteta u Beogradu – Annals of the Faculty of Law in Belgrade (Anali PFB)* 1-4/2001, 511–23; S. Avramović, "Pravo na versku nastavu u našem i uporednom pravu" [Right to religious instruction in our and Comparative Law], *Anali PFB* 2005/1, 46-64; S. Avramović, "Right to Religious Instructions in Public Schools," *Annals of the Faculty of Law in Belgrade – International Edition* 1/2006, 4–17; M. Draškić, "O veronauci u državnim školama, drugi put" [On religious teaching in public schools, the second time], *Anali PFB* 2006/1, 135–51; S. Avramović, "Constitutionality of Religious Instructions in Public Schools – Res judicata," *Annals of the Faculty of Law in Belgrade – International Edition* 2/2007, 181–87.

[201] The ruling was published in the Official Gazette of the Republic of Serbia, 119/03 of 4 December 2003.

[202] See Sima Avramovic, 'Religious Education in Public Schools and Religious Identity in Post-Communist Serbia' (2016) 64 Anali Pravnog fakulteta u Beogradu 25.

[203] ibid 46.

later, in 2006, restitution of church property. This inevitably triggered a reaction from various parts of society. Many NGOs and known intellectuals criticized this process of reintroduction of religion, accusing the government of starting a process of 'clericalization' of the society.[204]

The biggest issue involving secularism after it was constitutionally entrenched happened in 2006 with the adoption of Law on Churches and Religious Communities.[205] The law recognized seven traditional churches and religious communities: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church, the Reformed Christian Church, the Evangelical Christian Church, the Islamic community, and the Jewish community. Other religious communities go through a different registration procedure. The adoption of this law triggered another case before the Constitutional Court. In 2013 the Court ruled that the statute is in accordance with the Constitution.[206]

4.2. Analysis of legal provisions and case law

4.2.1. Law on Churches and Religious Communities

Article 11 of the Constitution of Serbia provides that "[t]he Republic of Serbia is a secular state. Churches and religious communities shall be separated from the state. No religion may be established as state or mandatory religion." Thus, secularity in constitutional terms in Serbia consists of state-church separation and a non-establishement clause.

For the understanding of secularism in Serbia it is best to start with Case No. ИУз – 455/2011 in which the Constitutional Court of Serbia ruled that the distinction the law[207] makes between seven traditional churches and religious communities and confessional religious

[204] Thayer, Martínez Torrón and Durham (n 194) 601.
[205] Zakon o crkvama i verskim zajednicama (Official Gazette of the Republic of Serbia 36/2006). Available at https://www.paragraf.rs/propisi/zakon_o_crkvama_i_verskim_zajednicama.html (accessed 5 April 2018).
[206] Case No. ИУз – 455/2011. Available at http://www.ustavni.sud.rs
[207] Law on Churches and Religious Communities

communities is constitutional.[208] The main arguments of the claimants is that this legal solution gives privileges to the selected religions – this is discriminatory and creates possibilities for establishing a state religion.[209] Worth keeping in mind here is article 44 § 1 which proclaims that "[c]hurches and religious communities are equal and separated from the state" and article 43 § 4. "Freedom of manifesting religion or beliefs may be restricted by law only if that is necessary in a democratic society to protect lives and health of people, morals of democratic society, freedoms and rights guaranteed by the Constitution, public safety and order, or to prevent inciting of religious, national, and racial hatred."

What is peculiar here is the criteria for the classification – traditional churches and religious communities are those religious organizations which have acquired a legal status by laws enacted before 1941. The Constitutional Court buys this terminological distinction – it is not unconstitutional to give a different name to religious organization which have existed "for a few thousands of years."[210] What is even more astonishing, the court goes on to call this system "different, but equal" which is terrifyingly reminiscent of 'separate but equal.'

However, the main issue did not arise because of differences in nomenclature, but because the law provides a different registration procedure for two different religious communities.[211] As Judge Marija Draškić concisely argues in her dissenting opinion, the

[208] Art. 10: "Traditional Churches are those which have had a historical continuity within Serbia for many centuries and which have acquired the status of a legal person in accordance with particular acts, that is: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church (a.c.), the Christian Reformed Church and the Evangelical Christian Church (a.c.). Traditional religious communities are those which had a historical continuity within Serbia for many centuries and which have acquired the status of a legal person in accordance particular acts, that is: the Islamic Religious Community and the Jewish Religious Community." Art. 11: "Confessional communities are all those Churches and religious communities whose legal position was regulated on the grounds of notification in accordance with the Law on Legal Position of Religious Communities ("The Official Gazette of the Federal National Republic of Yugoslavia," No. 22/1953) and with the Law on Legal Position of Religious Communities ("The Official Gazette of the Socialist Republic of Serbia, "No. 44/1977)."

[209] "[t]he state takes burden of financing religious education in public schools for selected religions, grants them tax exemption, creates differences in the registration procedure […]." Thayer, Martínez Torrón and Durham (n 194) 605.

[210] How many of the traditional churches and religious communities have existed for so long? Another peculiarity – the law says 'several centuries.'

[211] According to a US Department of State report on religious freedom in Serbia, in 2016, there are 17 'nontraditional' religious groups that are registered. Available at https://www.state.gov/documents/organization/269108.pdf (accessed 6 April 2018).

traditional churches need only to go through a process of informing (notifying) relevant state authorities in order to acquire legal status (formal procedure). On the other hand, all the other religious communities need to produce a great number of documents (financing, number of followers, *information about the religious teaching*) and their request is resolved in an administrative procedure (they need an authorization). The communities do not need to register, however, if they do not, they do not receive certain state benefits (health insurance plans, tax exemptions) and *they cannot build places of worship.* The Constitutional Court upheld all the provisions of the law.

In discussing the constitutionality of one of the articles of the challenged law, the court gives its interpretation of the principle of secularism. "Secularism does not mean an absolute division of church and state. It is a relationship of separation and co-operation. […] It is the opinion of this Court that the 2006 Constitution has not adopted a system of strict separation of church and state. […] [That means that] church and state cooperate on some common tasks e.g. state subsidies of religious organizations and religious education in public schools."[212] It is clear that this version of secularism is very different from French *laïcité* which does not allow for state subsidy of religion or religious education in public schools,[213] and from the Turkish model because seven 'recognized' religions can offer religious education. However, because of the dominance of Orthodox Christianity, only schools in regions with strong religious minorities will offer 'genuine' religious education of another faith.[214]

[212] Page 13 of the decision. Here is another definition of secular given by the Constitutional Court of Serbia. "Secular does not mean anti-religious. It signifies an idea that there is no state church and that there is no state identification with a particular religion nor religion in general and that the state does not interfere with the activities of religious communities in an exceeding manner." (page 42) However, Judge Marija Draškić, in her dissenting opinion, first argues that the Constitution of 2006 made a decision in favor of a strict separation of church and state and then gives arguments why the explanation given by the court is untenable – the Court supports the idea of a cooperative separation by invoking various statutes that are themselves under suspicion of being in violation of Article 11 of the Constitution.

[213] Alsace-Moselle is the exception.

[214] From my personal experience in high school, religious education of faiths other than Orthodox Christianity was given by an Orthodox priest. According to the Ministry of Education data in 2004 there were approximately 1500 teachers altogether (1200 Orthodox, over 200 Catholic, 50 Slovak Evangelical, 40 Muslim, 19 Reformed Church, 5 Evangelical Christian Church of Augsburg Confession, one Jewish).

Furthermore, the Constitutional Court has in the same decision asserted that conducting religious rights in public spaces does not violate the principle of secularism and that this space does not lose its secular character. (page 38 of the decision)

4.2.2. Orthodox Serbia

In my opinion the motives behind the law on Churches and Religious Communities and this differentiation in registration of religious communities that it introduces is twofold. The first one is to give a dominant position to the Serbian Orthodox Church. It is true that SOC is only one of seven 'recognized religions'. However, apart from Catholics and Muslims, other traditional religious communities are negligible in size. The other motive is to make it harder for members of religious communities that gained legal status during the socialist Yugoslavia to enjoy their rights of freedom of conscience and association.[215] One of blatant examples is that "[t]he government continued its policy of not providing access to religious services for members of the armed forces who were adherents of religions other than the seven traditional ones."[216]

While it is true that the Serbian Orthodox Church is not the only religious community with a 'privileged' status, my opinion is that because of the close cooperation between the Church and state and the fact that a vast majority of population is of Orthodox faith, it is given a 'super privileged' position. In my view, this is very similar (in consequences) to the legal regime that existed in France under the 1801 Concordat, where the Catholic Church was not the only recognized religion, but because of its power and influence the legal recognition of other communities mattered less. There are several problems with these practices and democracy.

[215] This is very evident when we analyze the justification given by the legislative committee of the National Assembly. According to this committee this dual system of registration is justified by the fact that the traditional churches have existed for many centuries and have gained legal status according to laws enacted in *Kingdom of Serbia or Kingdom of Yugoslavia (SCS)*. This argument of legal continuity does not cover more than 50 years of socialist rule.

[216] US Department of State report (see n 203)

First, by making itself very close with the Church, the State is trying to achieve a 'sacral' character. This is exemplified by various state sponsored projects in the past couple of years.[217] The state is trying to create an image of a successor of a Byzantine medieval kingdom.[218] The consequences of these actions probably will not be as severe as to put in doubt the democratic nature of the state, however, on a symbolic level, they are frightening. The other problem is, as I have already mentioned, the possibility that this legal regime might stifle the religious minorities.

The main problem with the reintroduction of secularism in Serbia is that it has mainly served the political parties to increase their electoral bodies by appealing to the religious feelings of the people. Reintroduction of religion has reinforced a kind of 'emotional politics' – a feature that Karl Loewenstein recognized as the main appeal of extremist parties.[219] This is possible due to the fact that religion serves as kind of community glue. "Due to the long ignorance of religion during the communist era, religious identity of an average citizen is mostly *intuitive, perceptive, historical, inherited and basically formal*, as a kind of 'collective ideal.'[220] Religious identity of about 85% of the Serbian population with Orthodox background is often based upon the religious tradition, ethnicity and culture."[221] This basically means that you are Serbian if you are Orthodox and if you are not Orthodox you are not Serbian. This produces a danger for a community of equal citizens. Thus, the goals that constitutional secularism strives towards have not been served adequately – equality of individuals and freedom of conscience. Thus, a re-examination of the concept of secularism is needed in Serbia.

[217] For example, a state funded project to build a 15m high statue of Stefan Nemanja, the founder of medieval Serbian state. The statue will feature two of his most important legacies Studenica and Hilandar (both monasteries). http://rs.n1info.com/a375008/Vesti/Spomenik-Stefanu-Nemanji.html (accessed 6 April 2018).

[218] Contrary to Roman Law, Byzantine legal sources (especially from the later period of the empire) contained both secular and religious rules. Furthermore, the authority of the law (*legis vigor*) changed from the Emperor to God.

[219] Loewenstein (n 13).

[220] See Émile Durkheim, *The Elementary Forms of Religious Life* (Oxford Univ Press 2001) 318.

[221] Avramovic (n 202) 47.

Conclusion

> The only freedom which deserves the name is that of pursuing our own good, in our own way, so long as we do no attempt to deprive others of theirs, or impede their efforts to obtain it. – John Stuart Mill

The aim of this paper was to inquire into the values of secularism in modern European democratic states and whether this principle is really as essential to constitutional democratic states as to allow state actions that wish to remove certain religious elements from the public sphere.

Throughout the paper I have given a lot of importance to historical events that have shaped the understanding of secularism in Turkey, France and Serbia. I have come to the conclusion that there is no universal definition of secularism and that a lot depends on specific historical experiences.

In Turkey, secularism is depicted in utopian terms, as a principle that essential for the modernization and democratization of Turkey. By examining the specific historical experience, I have come to an understanding that secularism is instead a principle essential for the formation of the Turkish nation-state by creating a cohesive community around a single version of Islam which is propagated by the state. The main problem of this version of secularism from the standpoint of constitutionalism and democracy is that it stifles religious minorities for the sake of peace. However, it is possible that the version of militant secularism that has been imposed by the 'elites' for almost a hundred of years is at its turning point.

Laïcité in France is seen one of the founding principles of the Republic and essential for achieving equality and liberty of all individuals. While it is probably true that French secularism is part of the French democratic identity, I have tried to show owing to its separationist past and confrontational relationship with the Catholic Church, it has found a new enemy – the Muslim community living in France. I am afraid if it continues to develop along these lines, *laïcité* might betray the values it really stands for – pluralism and tolerance.

I have included Serbia to show how the reintroduction of the religion to the public sphere in a secular post-communist state creates problems for constitutionalism and the protection of minorities. This is due to the fact that religion in Serbia is not really about freedom of conscience, but more about a collective religious identity which is then used by political parties to political ends. This is why I recommend a re-assessment of the principle of secularism in Serbian constitutional law.

Bibliography

Almond GA, Appleby RS and Sîwan ʿImmānû'ēl, *Strong Religion: The Rise of Fundamentalisms around the World* (Univ of Chicago Press 2003)

Aston N, *Religion and Revolution in France, 1780-1804* (Catholic Univ of America Press 2000)

Avramovic S, 'Religious Education in Public Schools and Religious Identity in Post-Communist Serbia' (2016) 64 Anali Pravnog fakulteta u Beogradu 25

Bader V, 'Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism-A Critical Reading of Some Turkish, ECtHR and Indian Supreme Court Cases on Secularism' (2010) 6 Utrecht L. Rev. 8

Baubérot J, *Laïcité 1905-2005, Entre Passion et Raison* (Seuil 2004)

——, *La laïcité expliquée à M. Sarkozy: et à ceux qui écrivent ses discours* (Albin Michel 2008)

——, *Histoire de la laïcité en France* (Presses universitaires de France 2013)

Bedouelle G and Costa J-P, *Les Laïcités à La Française* (1re éd, Presses universitaires de France 1998)

Bell J, *French Constitutional Law* (Reprinted, Clarendon 2001)

Berlinerblau J, Fainberg S and Nou A (eds), *Secularism on the Edge: Rethinking Church-State Relations in the United States, France, and Israel* (1. ed, Palgrave Macmillan 2014)

Bligh G, 'Defending Democracy: A New Understanding of the Party- Banning Phenomenon' 46 61

Cady LE and Hurd ES (eds), *Comparative Secularisms in a Global Age* (Palgrave Macmillan 2010)

Calhoun CJ, Juergensmeyer M and VanAntwerpen J (eds), *Rethinking Secularism* (Univ Press 2011)

Capoccia G, *Defending Democracy: Reactions to Extremism in Interwar Europe* (Johns Hopkins Univ Press 2005)

Diamond LJ (ed), *The Global Resurgence of Democracy* (2. [print], Johns Hopkins University Press 1994)

Dorsen N and others, *Comparative Constitutionalism: Cases and Materials* (Third edition, West Academic Publishing 2016)

Durham WC (ed), *Islam, Europe and Emerging Legal Issues* (Ashgate 2012)

Durham WC and Scharffs BG, *Law and Religion: National, International, and Comparative Perspectives* (Aspen Publishers 2010)

Durkheim É, *The Elementary Forms of Religious Life* (Oxford Univ Press 2001)

Fox GH and Nolte G, 'Intolerant Democracies' (1995) 36 Harv. Int'l. LJ 1

Gunn TJ, 'Religious Freedom and Laïcité: A Comparison of the United States and France' [2004] BYU L. Rev. 419

Higonnet P, *Goodness beyond Virtue: Jacobins during the French Revolution* (Harvard University Press 1998)

Horton J (ed), *John Locke: A Letter Concerning Toleration in Focus* (Routledge 1991)

Issacharoff S, 'Fragile Democracies' (2006) 120 Harv. L. Rev. 1405

——, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015)

Jacobsohn GJ, *Constitutional Identity* (Harvard Univ Press 2010)

Jeuffroy B (ed), *Liberté Religieuse et Régimes Des Cultes En Droit Français: Textes, Pratique Administrative, Jurisprudence* (Éd du Cerf 1996)

Kuru AT, 'Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion' (2007) 59 World Politics 568

——, *Secularism and State Policies toward Religion: The United States, France, and Turkey* (Cambridge University Press 2009)

Kuru AT and Stepan AC (eds), *Democracy, Islam, and Secularism in Turkey* (Columbia University Press 2012)

Loewenstein K, 'Militant Democracy and Fundamental Rights, II.' (1937) 31 American Political Science Review 638

MacManners J, *The French Revolution and the Church* (Greenwood Pr 1982)

McManners J and Church Historical Society (Gt. Brit.), *Church and State in France, 1870-1914* (SPCK for the Church Historical Society 1972)

Messner F (ed), *Traité de droit français des religions* (Litec 2003)

Mill JS and Himmelfarb G, *On Liberty* (Repr, Penguin Books 1985)

Nora P (ed), *Realms of Memory: Rethinking the French Past. 1: Conflicts and Divisions* (Engl language ed, Columbia Univ Press 1996)

Özbudun E and Gençkaya ÖF, *Democratization and the Politics of Constitution-Making in Turkey* (Central European Univ Press 2009)

Pena-Ruiz H, *Qu'est-ce que la laïcité?* (Gallimard 2003)

Popper K, *The Open Society and Its Enemies* (1. Aufl, Routledge 2002)

Poulat E, *Notre Laïcité Publique: 'La France Est Une République Laïque' (Constitutions de 1946 et 1958)* (Berg international 2003)

Rawls J, *A Theory of Justice* (Oxford University Press 1973)

Rosenblum NL, 'Banning Parties: Religious and Ethnic Partisanship in Multicultural Democracies' (2007) 1 Law & Ethics of Human Rights

Rosenfeld M and Sajó A (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford Univ Press 2013)

Sajó A (ed), *Militant Democracy* (Eleven Internat Publ 2004)

——, 'From Militant Democracy to the Preventive State' (2005) 27 Cardozo L. Rev. 2255

Sajo A, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 International Journal of Constitutional Law 605

Sajó A, 'Militant Democracy and Emotional Politics' (2012) 19 Constellations 562

Sajo A, 'Constitutionalism and Secularism: The Need for Public Reason' 30 Cardozo L. Rev. 2401

Schumpeter JA, *Capitalism, Socialism and Democracy* (1. Harper Perennial Modern Thought ed, Harper Perennial Modern Thought 2008)

Stepan A, *Arguing Comparative Politics* (Oxford Univ Press 2001)

Thayer D, Martínez Torrón J and Durham WC (eds), *Religion and the Secular State: National Reports = La Religion et l'État Laïque ; Rapports Nationaux* (Servicio de Publicaciones de la Facultad de Derecho de la Universidad Complutense de Madrid 2015)

Thiel M (ed), *The 'militant Democracy' Principle in Modern Democracies* (Ashgate 2009)

Weber E, *Peasants into Frenchmen: The Modernization of Rural France ; 1870 - 1914* (Nachdr, Stanford Univ Press 1976)

Yavuz MH, *Secularism and Muslim Democracy in Turkey* (Cambridge University Press 2009)

Zeldin T, *France: 1848 - 1945. ... Anxiety and Hypocrisy* (Clarendon Pr 1981)