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# Rethinking What is Necessary in a Democratic Society: Militant Democracy and the Turkish State

*Kathleen Cavanaugh\** & *Edel Hughes\*\**

## ABSTRACT

Questions relating to contemporary understandings of democracy continue to preoccupy the academic landscape, from politics to law—how does one define democracy; is it necessary to recalibrate the concept of democracy to meet the exigencies of the current global security “crisis” and, following from this, how does one understand (and control) the democratic relationship of representation and accountability between citizen and state? Although those writing on the recalibration of democratic theory come from different points of departure, they often arrive at a similar conclusion; namely that this global era poses significant challenges to contemporary understandings of

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democracy. This article identifies and focuses on one challenge posed by the concept of “militant” democracy against the backdrop of the Turkish case.

*There is hardly a better way to avoid discussion than by releasing an argument from the control of the present and by saying that only the future will reveal its merits.*

Hannah Arendt

## I. INTRODUCTION

Questions regarding contemporary understandings of democracy continue to preoccupy the academic landscape, from politics to law—how does one define democracy; is it necessary to recalibrate the concept of democracy to meet the exigencies of the current global security “crisis” and following from this, how does one understand (and control) the democratic relationship of representation and accountability between citizen and state? These debates give rise to yet other questions that, although not particularly new, have taken on weight in the current global context. Are democracy and secularism inextricably linked; in what circumstances can a “democratic” state engage lawfully in essentially undemocratic practices and what is the correct balance between security and rights? For lawyers, legal academics, and political scientists, the answers to these questions shape how a “democratic” state’s performance is evaluated and push the boundaries of what is considered “necessary in a democratic society.”<sup>1</sup>

Although those writing on the recalibration of democratic theory come from different points of departure—from those that situate their analysis within the new modes of power that have arisen through globalization, to those that focus on the role of law in the securitization of the global landscape—they often arrive at a similar conclusion; namely that this global era poses significant challenges to contemporary understandings of democracy.<sup>2</sup> This article identifies and focuses on one challenge posed by the concept of “militant” democracy, defined as a form of constitutional democracy

1. This is a term often employed in the jurisprudence of the European Court of Human Rights which, in that context, has come to refer to the requirement that any interference with a right corresponds to a “pressing social need” and, in particular, that the interference is proportionate to the legitimate aim pursued. See *Handyside v. United Kingdom*, Judgment of 7 Dec. 1976, Series A No.24 (1979–80) 1 EHRR 737, ¶ 45.
2. Adam Przeworski & Covadonga Meseguer Yebra, *Globalization and Democracy*, in *GLOBALIZATION AND EGALITARIAN REDISTRIBUTION* (Pranab Bardhan, Samuel Bowles & Michael Wallerstein eds., 2006); Richard Jackson, *Security, Democracy, and the Rhetoric of Counter-Terrorism*, 2 *DEMOCRACY & SECURITY* 147 (2005); PAUL ALMEIDA, *MOBILIZING DEMOCRACY: GLOBALIZATION AND CITIZEN PROTEST* (2014); STEPHEN J. ROSOW & JIM GEORGE, *GLOBALIZATION AND DEMOCRACY* (2014).

authorized to protect civil and political freedom by preemptively restricting its exercise. Militant democracy includes a number of techniques engaged to (ostensibly) secure democratic perimeters and prevent the so called “Trojan horse” from entering the public square. These include the vestment of powers in the executive, the use of emergency powers, and the adoption of temporary emergency measures that restrict certain rights, most notably expression, political participation, and assembly. For proponents of the militant democratic thesis, such measures are necessary because “under cover of fundamental rights and the rule of law, the antidemocratic machine could be built up and set in motion legally.”<sup>3</sup> In contrast, those critical of the thesis argue that militant democratic measures do not fit easily within an international law framework and their judicial supervision is weak.<sup>4</sup> Although militant democracy is often embedded in constitutions, and therefore provides a legal framework for democracies to “fight back” against movements that look to subvert democratic institutions, such “democratic” interventions can also be used to silence political opposition or target particular groups. Ultimately, the use of these measures may well erode and devalue the very principles that they seek to protect.

Since its introduction by Karl Lowenstein in 1937, the concepts associated with militant democracy have periodically surfaced within both political science and constitutional theory. Although the term itself is not referenced, within both political science and law, there is a significant body of work that critically engages with the first two militant democratic techniques: the concentration of power in the executive and the use (and abuse) of emergency powers.<sup>5</sup> It is only within the last two decades that we begin to see specific reference to militant democracy by comparative constitutional lawyers, human rights scholars, and political scientists. Within comparative constitutional law, militant democratic arguments have bled in to how models of liberal democracy are understood.<sup>6</sup> Most of the legal scholarship on militant democracy tends to focus on the third component—the use of ad hoc (temporary) legislation. The idea that all political expression and association is entitled to protection has now shifted towards a reading of those measures “necessary in a democratic society,” entailing restriction of basic rights in order to preserve democracy.<sup>7</sup> Here, the extent to which these

3. Karl Loewenstein, *Militant Democracy and Fundamental Rights I*, 31 AM. POL. SCI. REV. 417, 423 (1937).
4. See Paul Harvey, *Militant Democracy and the European Convention on Human Rights*, 29 EUR. L. REV. 407 (2004); Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT'L J. CONST'L LAW 488 (2006).
5. See John Ferejohn & Pasquale Pasquino, *The Law of Exception: A Typology of Emergency Powers*, 2 INT. J. CONST. L. 210 (2004).
6. See András Sajó, *From Militant Democracy to the Preventive State?* 27 CARDOZO L. REV. 2255 (2006). Peter Niesen, *Banning Parties in Germany: Lessons From Europe*, 9 WORKING PAPER TECHNISCHE UNIVERSITÄT DARMSTADT (2007).
7. See *id.*; Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L. LAW J. 1 (1995).

restrictions are allowed, and therefore the cross national variance, is linked to the particulars of each case. The stronger the historical tie to democratic governance, the lesser the need for a limit or restriction on rights.<sup>8</sup>

The largest body of related work by political scientists has focused on the use of executive authority and emergency powers.<sup>9</sup> In those studies that look at the use of ad hoc measures, the focus has been on particular cases where militant democratic measures have been used to place restrictions, or to excise groups from the public sphere that are considered to be “extreme.”<sup>10</sup> Again, these studies do not make specific reference to the militant democratic thesis, but have endeavored to provide causal hypotheses to account for the variation in legal techniques employed, as well as the normative frameworks in each case study.<sup>11</sup> There are also a number of quantitative studies that examine the underpinnings of state repression, including legal techniques used by states engaged in repressive measures.<sup>12</sup> Whilst these studies encompass more than democratic regimes, the work of Christian Davenport in particular touches upon the militant democratic thesis in a number of ways. Davenport examines the role of law in the repression dissent nexus and conceptualizes the relationship between a repressive government’s behavior and dissent as a two way street. Both sets of actors (government and potential dissenters) seek out the most favorable strategies to achieve their goal. Davenport posits five indicators, which are assessed by the state when deciding to repress violence or dissent. Amongst these

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8. Jan-Werner Müller, *Militant Democracy*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1254 (Michel Rosenfeld & Andrés Sajó eds., 2012).
  9. GIOVANNI CAPOCCIA, DEFENDING DEMOCRACY: REACTIONS TO EXTREMISM IN INTERWAR EUROPE (2005); THE CONSEQUENCES OF COUNTERTERRORISM, (Martha Crenshaw ed., 2010).
  10. Raphael Cohen-Almagor, *Boundaries of Freedom of Expression before and after Prime Minister Rabin’s Assassination*, in LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE: ESSAYS IN HONOUR AND MEMORY OF YITZHAK RABIN 79 (Raphael Cohen-Almagor ed., 2000); THE CONSEQUENCES OF COUNTERTERRORISM 2 (Martha Crenshaw ed., 2010); Meindert Fennema, *Legal Repression of Extreme-Right Parties and Racial Discrimination*, in CHALLENGING IMMIGRATION AND ETHNIC RELATIONS POLITICS: COMPARATIVE EUROPEAN PERSPECTIVES 119, 120 (Ruud Koopmans & Paul Statham eds., 2000); John Finn, *Electoral Regimes and the Proscription of Anti-democratic Parties*, in THE DEMOCRATIC EXPERIENCE AND POLITICAL VIOLENCE 51, 53–54 (David C. Rapoport & Leonard Weinberg eds., 2001).
  11. Martin Klant, *Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions*, in EXPLORATIONS IN LEGAL CULTURES 133, 154 (Fred Bruinsma & David Nelken eds., 2004); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 22 (1992); Jaap van Donselaar, *Patterns of Response to the Extreme Right in Western Europe*, in RIGHT-WING EXTREMISM IN THE TWENTY-FIRST CENTURY 272 (Peter H. Merkl & Leonard Weinberg eds., 2003).
  12. Christian Davenport, *State Repression and the Tyrannical Peace*, 44.4 J. PEACE RES. 485, 487 (2007); Raymond Gastil, *Freedom in the World: The Annual Survey of Political Rights and Civil Liberties*, FREEDOM HOUSE (2004); Ron Francisco, *European Protest and Coercion Data: 1980–1995*, Data Set, Dep. Polit. Sci., Univ. Kans., Lawrence (1996); Mark P. Gibney & Matthew Dalton, *The Political Terror Scale*, in HUMAN RIGHTS AND DEVELOPING COUNTRIES 73 (David L. Cingranelli ed., 1996).

are questions related to the feasibility of various policy responses as well as the state's ability to carry out and enforce the reactive policy. While the evaluation of these measures will likely take place, as Davenport argues, against the backdrop of the other indicators, the nature and degree of the threat, and the political economy of the state, the repressive tools of the state (particularly liberal, democratic states) both in kind and degree, are defined by the norms of that society and are reflected (indeed find determinacy) in the law.<sup>13</sup> Finally, there is a significant body of work that examines the inclusion-moderation/exclusion-radicalization hypothesis.<sup>14</sup> These hypotheses provide an important foil to the militant democracy argument and raise a number of questions regarding the process of democratization, the way we engage with Islam and democracy (in many cases seeing these as fixed and beyond interrogation) and importantly, how exactly we assess the moderating effect on processes of inclusion or the radicalizing effect of exclusion.

There are a few conclusions that can be drawn from each of these areas of work. First, that the militant democratic thesis is now deeply embedded in our contemporary understanding of democracy. Second, that important research on various components of the militant democracy thesis has been undertaken within both political science and in law (constitutional, international human rights) yet these threads are often disconnected, remaining in their disciplinary pockets. Finally, despite the various bodies of work that examine and indeed challenge the militant democratic thesis, there remain significant legal and empirical gaps in the literature. This article will endeavor to fill one such gap by focusing on one of the most visible militant democratic technique—the exclusion of political parties—specifically looking at the Turkish case.

Although, the principles that underpin militant democracy are embedded in a number of constitutions globally and have served as a legal technique to excise groups from the public sphere in a number of so called “democratic” states, this article is situating an examination in Turkey where militant democracy has been “co-determinate of the Turkish political paradigm.”<sup>15</sup> Our choice to focus on the Turkish case is underpinned by two main factors. Historically, both militant democratic reasoning coupled with an enforced

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13. Christian Davenport, *Human Rights and the Democratic Proposition* 43 J. CONFLICT RESOLUTION 92 (1999). Davenport's later work breaks this down to two distinct groupings of repression—civil liberties restrictions and personal integrity violations. Christian Davenport, *State Repression and the Tyrannical Peace*, 44.4 J. OF PEACE RESEARCH, 485, 487 (2007).
  14. There is a vast literature on this subject; for an excellent summary, see Jillian Schwedler, *Can Islamists Become Moderates? Rethinking the Inclusion-Moderation Hypothesis*, 63 WORLD POLITICS 347 (2011).
  15. Bertil Emrah Oder, *Roots of “Militant Democracy” in Turkey: Modernity, Authoritarianism and Europeanization*, in THE “MILITANT DEMOCRACY” IN MODERN DEMOCRACIES 263, 263 (Markus Thiel ed., 2009).

secularism which embedded a particular reading of Turkish national identity underpinned the rulings of the Turkish Constitutional Court and was reproduced by the European Court of Human Rights (ECtHR) decision in the case of *Refah Partisi v. Turkey* (2003).<sup>16</sup> This ruling was significant in that it gave the concept of militant democracy “legal legs” at a supranational level and, as Patrick Macklem argued, “[b]y its decision, the principle of militant democracy has become an explicit feature of European law.”<sup>17</sup>

The Court’s reasoning in this decision was largely based on the belief that the *Refah* Party was proffering an “unacceptable form of legal pluralism . . . that appears to have had its origins in a system established in the early years of Islam where Jewish and polytheist communities possessed a modicum of self-government independent of Islamic law.”<sup>18</sup> The Court’s decision in upholding the ban on *Refah* was informed by its belief that an Islamist political party, however moderate or reformist, was per se incompatible with a democratic society, as Islam, according to the Court, is a belief system that is intolerant, rigid, and one that cannot be divorced from the political sphere.<sup>19</sup> This view mirrors the perceptions held by member states of the Council of Europe that increasingly have come to see Islam in the public sphere as in contradistinction to democratic tradition. More broadly, however, this debate about the secular identity of democracy maps onto a larger discussion about the moderating effects of democratic political participation of so called “Islamist” groups. As Mehmet Gurses has observed,

The rise of Islamist movements in the Muslim world has been the subject of heated debate among scholars and policymakers. One group of scholars argues that Islamists use elections as a facade and warn against their political ascendency via electoral democracy. Another group of scholars, however, points to the moderating effects democracy has on views held by Islamists.<sup>20</sup>

How much the Turkish case can inform a broad discussion about Islamism and democracy is unclear. There is much about the Turkish historical and political landscape that sets it apart from its neighbors. Although electoral processes were historically “managed” by the military, something that is shared with other states in the region, the election of the *Adalet ve Kalkınma Partisi* or AK Party<sup>21</sup> (and the fact it has remained in power through the elec-

16. Case of *Refah Partisi (The Welfare Party) and Others v. Turkey*, 2003–II Eur. Ct. H.R.

17. Macklem, *supra* note 4, at 508.

18. *Id.* at 508.

19. Kevin Boyle, *Human Rights, Religion and Democracy: The Refah Party Case*, 1 ESSEX HUM. RTS. REV. 1, 2 (2004).

20. Mehmet Gurses, *Islamists, Democracy and Turkey: A Test of the Inclusion-Moderation Hypothesis*, 20 PARTY POL. 646, 646 (2012).

21. There is political symbolism in how members of *Adalet ve Kalkınma Partisi* refer to their party. Rather than using “AKP,” AK Party members refer to the “AK” (which means “white” in Turkish, denoting purity) as a symbolic-political manifestation. We have adopted this referencing both to reflect this and for consistency. Also, the AK Party has

toral process) sets it apart from most other Muslim majority states. The AK Party is both an opposition party historically excised from political power as well as an “Islamist” party, a type of “civil” Islamism that has accessed and maintained power through electoral processes for over a decade. These factors all give weight to the argument that the Turkish case is unique. That said, the AK Party did push forward processes of democratization however incomplete and sought to construct a more pluralist Turkish national identity, which cracks open the question: what ought to be the limits of democratic self preservation?

This leads us to a second factor in selecting the Turkish case. The change in Turkey’s political landscape in 2002, which brought the AK Party to power, provides us with an opportunity to test one particular technique which is central to the militant democratic project—the use of ad hoc measures which restrict or excise political parties from the public domain. The leadership of the AK Party emerged “from the cadres of the first organized political representative of Islamism in Turkish politics,”<sup>22</sup> some of whom had previously been excluded from the Turkish political landscape as a result of militant democratic arguments. So, what can be assessed in the thirteen years since the *Refah* party decision in Turkey? Has the Trojan horse indeed entered the Turkish political landscape or is it possible to argue for “faith in moderation?”<sup>23</sup>

In addressing these questions, this article will be divided into four main sections: the first section will provide a brief historical overview of the concept of militant democracy, reconstructing the attendant debates and developments. As the banning of political parties in Turkey has occurred at a frequency that sets it apart from other Council of Europe member states, section two will examine the political context within which this has occurred and provide a legal audit of cases where the militant democratic thesis has been engaged to justify such exclusions in Turkey. Section three will then turn to dissolution of political parties at the European level, focusing on Turkey and the case law of the ECtHR. The final section will ask whether the AK Party marks the beginning of post [il]liberal secular Turkey. In undertaking these tasks, the multiple disciplinary lenses that prop up militant democracy theory will be drawn from.

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been characterized, elsewhere, as a “moderate Islamist Party.” We have resisted using this term, in text, as supporters of the Party have been drawn from different segments of society, including those that would self identify as secular.

22. Ihsan Dagi, *Turkey’s AKP in Power*, 19 J. DEMOC. 25, 25–26 (2008).

23. JILLIAN SCHWEDLER, FAITH IN MODERATION: ISLAMIST PARTIES IN JORDAN AND YEMEN (2006).



## II. MILITANT DEMOCRACY

Karl Lowenstein first introduced the concept of militant democracy in 1937.<sup>24</sup> As we noted earlier, the arguments that underpin the concept are rooted in the “toe in the door” thesis, that posits that if antidemocratic groups are allowed to exploit the features of democracy such as freedom of speech, press and assembly, as well as political participation, the path remains open for them to seize power and destroy the institutions that provided their platform. Therefore, Loewenstein argued, democracy “must become militant.”<sup>25</sup>

Loewenstein rejected the constraints implied by what Alexander S. Kirshner refers to as the “paradox” of militant democracy: “the possibility that efforts to stem challenges to self-government might themselves lead to the degradation of democratic politics or the fall of a representative regime.”<sup>26</sup> For Loewenstein, and more contemporaneously, András Sajó, a former ECtHR judge,

it is hard to avoid a departure from “constitutionalism as usual” in the fight against international terrorism; and (2) it is better to constitutionally authorize such a departure by setting levels of departure, where the greater the departure, the stronger the judicial or other control by external bodies; however, such control might be exercised *ex post* under the constitution. The example of militant democracy indicates that a clearly constitutionalized regime of exceptions makes the constitutional system sustainable.<sup>27</sup>

Loewenstein’s writings in the 1930s and 1940s were in response to the rise of fascism in Europe. This backdrop would also inform the enactment of militant democratic measures in a number of European countries that adopted militant democratic measures following World War II. For example, under Article 9(2) of the German Basic Law, “[a]ssociations whose aims or activities contravene the criminal laws, or that are *directed against the constitutional order* or the concept of international understanding, shall be prohibited.”<sup>28</sup> Article 18 warns that whoever abuses freedom of expression, assembly, or association, among others, “in order to combat the free democratic basic order shall forfeit these basic rights.”<sup>29</sup> Article 21(1) stipulates that political parties, “must conform to democratic principles,” and in paragraph two, it outlines that “[p]arties that, by reason of their aims or the behaviour of their

24. Loewenstein, *supra* note 3; Karl Loewenstein, *Militant Democracy and Fundamental Rights II*, 31 AM. POL. SCI. REV. 423, 430 (1937).

25. Loewenstein, *supra* note 3, at 423.

26. ALEXANDER S. KIRSHNER, *A THEORY OF MILITANT DEMOCRACY: THE ETHICS OF COMBATING POLITICAL EXTREMISM*, 2 (2014).

27. Sajó, *supra* note 6, at 2291.

28. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], 23 May 1949, BGBl. I, art. 9.2 (Ger.).

29. *Id.* art. 18.

adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.”<sup>30</sup> Similarly, Article 6 of the Constitution of Spain states:

Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and their functioning must be democratic.<sup>31</sup>

Given the historical experience of both Germany and Spain, it is unsurprising that there would be a constitutionally embedded guarantee protecting the “democratic” nature of the state, what perhaps is surprising is how pervasive such guarantees are throughout Europe. Most post war European states have, either through their constitutions or legislative framework, sought to restrict the rights of those “opposed to the constitutional order.”<sup>32</sup>

Looking specifically at the Turkish case, the militant democratic thesis has framed the justification for the various undertakings by previous Turkish governments in which, primarily, Islamic groups were excised from the public political sphere. Before the AK Party assumed power in Turkey in 2002, secularism was enforced as a matter of “right.” Historically, this concept of a secular society meant the absence of religious involvement in government affairs as well as the absence of government involvement in religious affairs. During the early Republican period, Kemalists founded the Presidency of Religious Affairs (*Diyanet*). Given the ethos of this period, establishing a state authority to deal with matters of religion seems counterintuitive. However, Republicans quickly became aware that their initial agenda, to eliminate religion from the public sphere and distinguish between religion and Turkish culture/tradition, would not succeed as religion and culture within Turkish civil society were inextricably linked. Their solution was to establish an official state bureau to deal with religious affairs, which would reproduce, and control, a particular understanding of Islam. Religious practice was, according to Presidency rules, protected in the private sphere, but the public sphere was to be policed; any manifestations of conservative or “Islamic” lifestyles in public was considered to be a “politicization” of Islam and a threat to democracy.<sup>33</sup>

Secularism would evolve as an ideology or belief that is an end in itself, something that requires protection and indeed enforcement. Although such a reading is not unique to Turkey, and can be found littered throughout state

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30. *Id.* art. 21(1).

31. CONST. OF SPAIN.

32. Harvey, *supra* note 4, at 408.

33. See Ufuk Ulutas, *Religion and Secularism in Turkey: The Dilemma of the Directorate of Religious Affairs*, 46 *MID. EASTERN STUD.* 389 (2010).

rhetoric (particularly in Europe) it has been foundational in the Turkish case. This form of illiberal secularism, as José Casanova has quite rightly termed it, polices religion, confining it to the realm of the private and communal sphere, thereby keeping the public square free from religious manifestations.<sup>34</sup> The Turkish state engaged the constitution and the Constitutional Court in regulating democratic self-defense and through its domestic jurisprudence gave legitimacy to preventative state measures that enforced secularism, actions that would later be supported at the international level in the *Refah* case.

The election of the AK Party, an ostensibly moderate “religious” party, was met with significant apprehension amongst Turkish nationalists who feared that this was the toe in the door and that faith, even in moderation, was incompatible with the democratic foundations of the state. There have been a number of studies, which have attempted to provide some empirical and analytical clarity as to whether the entry of the AK Party into the mainframe of Turkey’s political terrain has unleashed an antidemocratic machine, or conversely, led to a process of moderation through the necessities and responsibilities of governance (an idea that underpins the inclusion moderation hypothesis). Two in particular, Berna Turam’s study of Islam and democracy in Turkey<sup>35</sup> and Gurses’ examination of the inclusion moderation hypothesis using quantitative and qualitative data on Turkey,<sup>36</sup> merit some review.

Turam’s study examines interactions between Turkey’s “mainstream” Islamists and the state. Here, rather than examining the inclusion of these actors in electoral politics or parties in Turkey, she focuses instead on “the contemporary everyday settings that have allowed Islamic actors and the state to interact and reshape each other.”<sup>37</sup> In doing so, she challenges the exclusion/radicalization hypothesis by suggesting that exclusion may in the Turkish context have actually led to moderation, which if correct, would lend weight to militant democratic arguments. Despite some very rich analysis, however, it can be argued that Turam’s work does not adequately capture the rather more complex relationship between state and Islam in Turkey. In focusing on the Gülen movement,<sup>38</sup> a transnational Muslim community movement, Turam appears to map their particular lens on to Turkey’s political and social landscape. Although it is true that until 2012, the AK Party and the Gülen movement were a coalition of sorts, promoting moderate “Islamist politics,” nonetheless, they were quite distinct entities. Whereas Gülen members were

34. José Casanova, *Religion, European Secular Identities, and European Integration*, in *RELIGION IN AN EXPANDING EUROPE* 65 (Timothy A. Byrnes & Peter J. Katzenstein eds., 2006).

35. BERNA TURAM, *BETWEEN ISLAM AND THE STATE: THE POLITICS OF ENGAGEMENT* (2007).

36. Gurses, *supra* note 20.

37. TURAM, *supra* note 35, at 9.

38. The Gülen movement describes itself as a “worldwide civic initiative rooted in the spiritual and humanistic tradition of Islam and inspired by the ideas and activism of Mr. Fethullah Gülen.” See *The Gülen Movement, What is the Gülen Movement*, available at <http://www.gulenmovement.us/gulen-movement/what-is-the-gulen-movement>.

elitists, comprised of a group of “organic” intellectuals representing a portion of Islamic habitus with their own perspectives on Islam, the *Refah* and AK Parties were populists. As well, these parties, especially true for the AK Party, were not driven by ideology and much like in other Muslim societies their actions have “little to do with religion as such; they are more closely tied to the material and nonmaterial interests of those who hold power.”<sup>39</sup>

It is true, as Turam argues, that especially in the 1990s, members of the Gülen movement were excluded from the public domain and that military and legal interventions excluded certain political parties from holding power.<sup>40</sup> However, the identity politics represented by religious affiliations were not completely banned or excluded from the public sphere in Turkey.<sup>41</sup> In emphasizing the ways in which members of the Gülen movement were excluded from the public sphere, Turam fails to recognize the social conditions that explain why, for example, the Gülen movement failed to mobilize the masses against AK Party in the local elections of March and Presidential elections of August 2014. Both of these points are important in order to tackle the “moderating” effect of exclusion.

Gurses’ study provides an interesting foil to Turam’s analysis. Here Gurses asks “the important question of whether Islamist groups [in Turkey] are actually transformed by democratic inclusion.”<sup>42</sup> He attempts to “test” the inclusion moderation theory by examining survey data on Turkey collected by the World Values Survey in 2000 and 2007, alongside in-depth interviews he undertook with members of Turkey’s Islamist parties and communities. In order to extrapolate to what “extent Islamists have moderated their views as a function of participation/inclusion,”<sup>43</sup> Gurses specifically focuses on two factors: the acceptance of political pluralism (ideological moderation) and participation in electoral processes (behavioral moderation). Gurses’ conclusion is that “Islamists develop positive attitudes toward electoral democracy to the extent that they are allowed to share power. Islamists’ support for democracy, however, seems to be fragmented, provisional and driven by pragmatism more than a principled commitment to democratic norms and values.”<sup>44</sup>

There are a number of unresolved questions that arise from Gurses’ work, some of which he acknowledges in his conclusion. Much like other large N quantitative studies, there are limitations as to what can be derived

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39. ASEF BAYAT, *MAKING ISLAM DEMOCRATIC: SOCIAL MOVEMENTS AND THE POST-ISLAMIST TURN* 13 (2007).

40. TURAM, *supra* note 35.

41. Ümit Cizre Sakallıoğlu, *Parameters and Strategies of Islam-State Interaction in Republican Turkey*, 28 INT’L J. MIDDLE EAST STUD. 231 (1996); Binnaz Toprak, *Islam and Democracy in Turkey*, 6 TURKISH STUD. (2005).

42. Gurses, *supra* note 20, at 647.

43. *Id.* at 646–47.

44. *Id.* at 646.

both in terms of relationships between Islamists and the state and shifts in attitudes of Islamic parties toward democracy without partnering the results with other rich qualitative work. As well, as other studies indicate, even if it is possible to argue that Islamist groups in Turkey moderate through the political process, this may not mean that democracy is secured as, “the harbinger of democratization and/or consolidation of democracy” may not rest solely with “participation of the Islamist groups/parties in the electoral system.”<sup>45</sup> Finally, as noted earlier, the Turkish case may not reproduce easily and may have “qualitative differences from the typical Muslim-majority States.”<sup>46</sup> That said, in each study, the fact that political actors or parties were labeled as “Islamists” framed the analyses that followed and was the entry point in to the discussion on Turkey’s path to democratization.

In addition, and importantly, whether including the AK Party in mainstream politics brings about a modification or moderation of behavior may be secondary to whether, by their actions, the AK Party has opened up a political space that will be hard for them to close. It will be argued that the inclusion of the AK Party has cracked open spaces where pluralism and dissent have manifested. This exposes and makes vulnerable the theoretical underpinnings of militant democracy that made possible the exclusion of Islamist (and indeed Kurdish) political party participation in the past. The AK Party’s earlier engagement with the now stalled Kurdish peace process has broadened the political space for Kurdish parties to operate. These parties in the past were, much like Islamist groups, frequently banned by the Turkish Constitutional Court. As well, the pro Kurdish *Halkların Demokratik Partisi*: People’s Democratic Party (HDP)<sup>47</sup> formed in the wake of the AK Party reforms, may yet prove to be AK Party’s main opposition. As this political space broadens, fragmenting and perhaps reframing identity politics in Turkey may provide a vehicle for broader democratization.

### III. THE BANNING OF POLITICAL PARTIES IN TURKEY

The legal restrictions on the activities of political parties in Turkey are found in the Turkish Constitution and in Law No. 2820 on Political Parties.<sup>48</sup> Article

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45. *Id.* at 652.

46. *Id.*

47. The HDP (*Halkların Demokratik Partisi*: People’s Democratic Party) is a pro-Kurdish leftwing party founded in 2013. It replaced the pro-Kurdish BDP, which gained most of its votes from the mainly Kurdish southeastern part of Turkey, whereas HDP seeks to represent itself as an alternative leftist party in the whole of Turkey.

48. Hakyemez and Akgun note that the Turkish provisions on the dissolution of political parties were based originally on the German model. See Yusuf Sevki Hakyemez & Birol Akgun, *Limitations on the Freedom of Political Parties in Turkey and the Jurisprudence of the European Court of Human Rights*, 7 MEDITERRANEAN POL. 55, 59 (2002).

68 of the Turkish Constitution recognizes that political parties are “indispensable elements of democratic political life” but notes in Article 68(4) that the:

[S]tatutes and programs, as well as the activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, 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, nor shall they incite citizens to crime.<sup>49</sup>

In the Turkish context the proviso that activities of political parties shall not be contrary to the indivisibility of the state or the principles of a democratic and secular republic, takes on particular relevance, as detailed below. Article 69 of the Turkish Constitution provides that “activities, internal regulations and operation of political parties shall be in line with democratic principles” and sanctions the permanent dissolution of a political party where it violates the provisions of Article 68(4) “when the Constitutional Court determines that the party in question has become a centre for the execution of such activities.”<sup>50</sup> An amendment to this article of the Constitution in 2001 slightly raised the threshold of what would be deemed as unconstitutional activities meriting dissolution and introduced the consideration that a political party would be deemed to become the center of such actions “only when such actions are carried out *intensively* by the members.”<sup>51</sup> Equally significant was the “new gradual punishment system”<sup>52</sup> introduced by the 2001 amendments to the constitution, which provided that political parties could have their state funding removed as a less restrictive alternative to being closed. Therefore, as Levent Gönenç notes instead of dissolving the political party permanently, the Constitutional Court may rule that the party should be precluded from receiving state aid, either wholly or in part, depending on the intensity of the actions brought before the court.<sup>53</sup> Additionally, Article 149 was amended to stipulate a three-fifths majority of the Constitutional Court was required in political party closure cases, subsequently increased to a two-thirds majority in the amendments introduced by the constitutional reforms of 2010.<sup>54</sup>

In addition to these relevant constitutional provisions, Law No. 2820 on the Regulation of Political Parties (1983) establishes a comprehensive regulatory framework for the establishment, membership, conduct, and

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49. CONST. OF TURKEY 23 Jul. 1995, art. 68.

50. *Id.*

51. *Id.* art. 69.

52. Levent Gönenç, *The 2001 Amendments to the 1982 Constitution of Turkey*, 1 ANKARA L. REV. 89, 104 (2004).

53. *Id.*

54. CONST. OF TURKEY, *supra* note 49.

financing of political parties in Turkey.<sup>55</sup> Specific to this article, the most pertinent sections of the law are sections 78, 80, 81, 90, 95, and 101.<sup>56</sup> What is clear from these provisions is that for political parties in Turkey, quite stringent conditions are attached to how they conduct their activities in the public domain. Where such conduct pierces what is read as Turkey's secular, unitary framework, then both the state and, since 1961, the Constitutional Court, are likely to intervene.

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55. Omer Faruk Genckaya, *Impact of Party Regulation on Small Parties and Independent Candidates in Turkey*, Working Paper Series on the Legal Regulation of Political Parties, No. 41 (2014).

56. Section 78 provides that political parties:

shall not aim, strive or incite third parties to change the republican form of the Turkish State; the . . . provisions concerning the absolute integrity of the Turkish State's territory, the absolute unity of its nation, its official language, its flag or its national anthem; . . . the principle that sovereignty resides unconditionally and unreservedly in the Turkish nation; . . . the provision that sovereign power cannot be transferred to an individual, a group or a social class . . . ; jeopardise the existence of the Turkish State and Republic, abolish fundamental rights and freedoms, introduce discrimination on grounds of language, race, colour, religion or membership of a religious sect, or establish, by any means, a system of government based on any such notion or concept.

[. . .]

shall not aim to defend or establish the domination of one social class over the other social classes or the domination of a community or the setting up of any form of dictatorship; they shall not carry on activities in pursuit of such aims.

Section 80, frequently invoked in cases concerning Kurdish political parties, provides that political parties, "shall not aim to change the principle of the unitary State on which the Turkish Republic is founded, nor carry on activities in pursuit of such an aim." Under Section 81, political parties "shall not (a) assert that there exist within the territory of the Turkish Republic any national minorities based on differences relating to national or religious culture, membership of a religious sect, race or language; or (b) aim to destroy national unity by proposing, on the pretext of protecting, promoting or disseminating a non-Turkish language or culture, to create minorities on the territory of the Turkish Republic or to engage in similar activities." This Section has been applied to ban Kurdish parties, and reflects the historically restrictive approach to the question of minorities in Turkey.

Section 90(1) of Law 2820 provides that "[t]he constitution, programme and activities of political parties may not contravene the Constitution or this Law" whereas section 95 (1) restricts the political activity of those who fall foul of a Constitutional Court dissolution of a political party by providing that "[p]residents, founders, members of administration councils, all executive or administrative officers and members of Parliament of a political party which has been closed cannot become founders or members of any other political party." Lastly, Section 101 outlines the circumstances in which the Constitutional Court will sanction a closure and provides that

the Constitutional Court shall dissolve a political party whose (a) constitution or programme . . . is contrary to the provisions of Chapter 4 of this Law; (b) membership, central committee or executive committee . . . take a decision, issue a circular or make a statement . . . contrary to the provisions of Chapter 4 of this Law, . . . or whose Chairman, Vice-Chairman or General Secretary makes any written or oral statement contrary to those provisions . . . (c) representative appointed . . . by the administrative committee . . . makes oral statements on radio or television that are contrary to the provisions . . . of this Law.

## A. THE BANNING OF POLITICAL PARTIES: GUARDING OR SUBVERTING DEMOCRACY?

Since the foundation of the Republic in 1923, a total of forty-seven political parties have been banned in Turkey, the largest number of any country in comparative European terms.<sup>57</sup> The majority of the bans were instituted in the aftermath of the 1980 military coup, when eighteen political parties were banned.<sup>58</sup> In the remaining cases, fourteen political parties were proscribed based on their support, real or perceived, for separatism, eight for procedural irregularities, five for engaging in antisecular activities, one for being the successor of a banned party, and one, the Progressive Republican Party which was the first party to be banned in Turkey, for “treasonous activities.”<sup>59</sup> In 2008, the ruling AK Party came very close to being banned by the Constitutional Court<sup>60</sup> on the basis that it had engaged in activities contrary to the principles of secularism. Since it was established in 1961, forty-five cases have come before the Turkish Constitutional Court and in twenty-seven of these the Court has approved the closure of the political party.<sup>61</sup> Subsequently, many of these closure decisions have been challenged before the ECtHR. The most recent case was in 2009, where the domestic Court upheld the ban on the *Demokratik Toplum Partisi* (Democratic Society Party) on the basis that they advocated separatism.<sup>62</sup>

When reviewing the jurisprudence of the Turkish Constitutional Court, the decisions to ban political parties in Turkey tend to be either procedurally or politically justified.<sup>63</sup> The procedural requirements for political parties in Turkey remain the most stringent amongst Council of Europe countries. Under these regulations, a party must reach a 10 percent threshold in order to take a place in Parliament, a threshold that is the highest in Europe<sup>64</sup> but

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57. Ödül Celep, *The Political Causes of Party Closures in Turkey*, 67 PARLIAMENTARY AFF. 378, 386 (2014).

58. *Id.*

59. *Id.*

60. *Id.* The judges were fairly evenly split, with six judges in favor of the ban and five opposed. In order for the ban to have been upheld, seven judges would have had to vote in favor.

61. *Id.*

62. This case is currently pending before the European Court of Human Rights: *Demokratik Toplum Partisi and six others v. Turkey*, Application No. 3840/10. See [http://hudoc.echr.coe.int/eng#{"itemid":\["001-160074"\]}](http://hudoc.echr.coe.int/eng#{) (in French).

63. Celep, *supra* note 57, at 379.

64. Ergun Özbudun, *The Turkish “Democratization Package,”* MIDDLE EAST INSTITUTE (15 Oct. 2013), available at <http://www.mei.edu/content/turkish-%E2%80%9Cdemocratization-package%E2%80%9D>. Özbudun noted that as the highest electoral threshold rate in Europe, “it practically eliminates minor parties from parliamentary representation and gives an undue advantage to major parties.”



which has been maintained on the basis that it provides stability, whereas coalition governments have threatened stability in Turkey in the past.<sup>65</sup>

Amongst the political reasons for the closure of parties, two central themes emerge: closures on the basis of antiseccular activities and dissolution on the basis that a party has advocated separatism, which corresponds broadly to the conservative religious right and the socialist, frequently Kurdish, left. For scholars of Turkish constitutional history that these are the two reasons most often invoked is unsurprising. Mustafa Kemal Atatürk's radical program of secularization was implemented from the foundation of the Republic and included the abolition of the Sultanate and Caliphate, the closure of all *madreses* and *kuttabs* (religious schools) and abolition of religious orders, the replacement of Islamic law with European style legal codes, the substitution of Latin letters for Arabic script and, most importantly, the complete secularization of the Constitution.<sup>66</sup>

As a result of these measures, tensions emerged between secular and non secular parts of Turkish civil society. Nonetheless, Atatürk sought to emulate what he viewed as more progressive "Western" states, and expression of religious sentiment in the public sphere fell victim to his laic reformist zeal, incorporated into Turkish law under Article 163 of the 1926 Penal Code, which prohibited propaganda against the principles of secularism and outlawed religious functionaries from criticizing the laws and public authorities during the course of their work.<sup>67</sup> In 1939, the Law of Associations further cemented secularism by prohibiting the formation of religious societies and making it illegal for political parties to engage in religious activities or in the making of religious propaganda.<sup>68</sup> A new Civil Code, which was adapted from the Civil Code of Switzerland, was passed before the National Assembly on 17 February 1926 and repealed the religious *Şeriat* Courts declaring its rules null and void.<sup>69</sup> The Civil Code also governed issues such as commerce, maritime law, criminal law, civil and criminal procedure, and created a new judiciary to administer the new laws but, importantly, excluded all provisions of the previous religious and customary legal systems.

Atatürk's efforts set the scene for what can be viewed as an illiberal and overly restrictive form of secularism, confining religious sentiment rigidly to the private sphere as embodied under Article 2 of the Turkish Constitution. Article 2 guarantees the secular nature of the state by providing that

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65. Sevgi Akarçesme, *High Threshold Prevents Full Representation in Turkey*, TODAY'S ZAMAN (4 Aug. 2013), available at <http://www.todayszaman.com/news-322669-high-threshold-prevents-full-representation-in-turkey.html>.

66. NİYAZI BERKES, THE DEVELOPMENT OF SECULARISM IN TURKEY 466 (2d ed. 1998).

67. *Id.*

68. *Id.*

69. Tolga Köker, *The Establishment of Kemalist Secularism in Turkey*, 2 MIDDLE EAST L. & GOVERNANCE 17 (2010).

the Republic of Turkey is a “democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.”<sup>70</sup> The Preamble to the Constitution, which Article 2 incorporates, asserts the secular democratic nature of the state by affirming that:

[N]o protection shall be accorded to an activity contrary to Turkish national interests, *the principle of the indivisibility of the existence of Turkey with its state and territory*, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk and that, *as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics.*<sup>71</sup>

The constitutional guarantee of secularism, quite unusual in the context of a majority Muslim state,<sup>72</sup> and the particularly militant form of laicism, espoused in the Turkish context, has meant that the manifestations of religion have been, at least until the election of the AK Party in 2002, excised from the public sphere.<sup>73</sup>

Those political parties that were banned for political reasons mainly those who are deemed to advocate separatism fell foul of a second pillar of Atatürk’s Republic. Expressing an identity that was something other than Turkish clashed with the restrictive attitude to the recognition of minorities and the paranoia regarding separatism. As Hugh Pope has rightly identified, “[i]n Turkey, almost nothing in the lexicon of international politics provokes a more prickly reaction than the simple word ‘minority.’”<sup>74</sup> The notion of ethnic and religious community divisions “conjures up two threatening images for the majority of Turks: one of Christian powers plotting to divide, rule, and carve up the country, as happened after the fall of the Ottoman Empire, the other of non-Muslim fifth columnists conspiring to stab the Turkish majority in the back.”<sup>75</sup> The Preamble to the Constitution<sup>76</sup> which refers to Atatürk, the founder of the Republic as an “immortal leader” and an “unrivalled hero” recognizes “Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk [with] all Turkish citizens

70. CONST. OF TURKEY, *supra* note 49, art. 2.

71. *Id.* pmb., (emphasis added).

72. Turkey is in fact one of only eleven states with a predominately Muslim population that prescribe secularism in their Constitutions. The other ten countries are Burkina Faso, Chad, Guinea, Mali, Niger, Senegal, Azerbaijan, Kyrgyzstan, Tajikistan, and Turkmenistan.

73. Edell Hughes, *The Secularism Debate and Turkey’s Quest for European Union Membership*, 3 J. RELIGION & HUM. RTS. 15, 17 (2008).

74. Hugh Pope, *Turkey’s Minority Report*, 6 GEORGETOWN J. INT’L AFF. 95 (2005).

75. *Id.*

76. CONST. OF TURKEY, *supra* note 49.

. . . united in national honour and pride, in national joy and grief, in their rights and duties regarding national existence, in blessings and in burdens."<sup>77</sup>

In contemporary Turkey, Atatürk's legacy hangs heavy, imprinted in both the institutions of the state but, equally, in the struggle for Turkish identity. The "children of the republic" have been tasked with securing that legacy and, at a very basic level, attempts to do so are manifested in the seemingly omnipresent Atatürk imagery. As Esra Özyürek has noted,

[v]isitors to Turkey are immediately greeted with images and reminders of Mustafa Kemal Atatürk. When travellers land at the Atatürk Airport in Istanbul, two gigantic pictures of the leader welcome them. The shuttle from the airport drops them in Taksim Square, across from the Atatürk library and the monument to the struggle for independence led by Atatürk. When they tour the city, visitors pass by the Atatürk Bridge, only then to encounter the numerous statues, portraits, and sayings of the leader than encumber every available public space.<sup>78</sup>

Kemalism and the values of Atatürk's republic are not just reflected in the ubiquitous Atatürk iconography. The education system, for example, as well as the school curriculum has been seen as a key means of propagating a single notion of culture, language, ethnic identity, and religion. Compulsory courses in primary and secondary schools "transmit the official Kemalist version of Turkish history and various topics such as Turkey's relations with her neighbours, all in a highly nationalist and militarist language."<sup>79</sup> Those who seek to challenge this dominant narrative, including political parties, run the risk of attracting the ire of state institutions.

## B. Dissolution of Political Parties and the European Framework

Although international human rights mechanisms have not yet fully embraced pre-emptive measures when dealing with the dissolution of political parties, a number of decisions by the ECtHR have been underpinned by militant democratic arguments. The 1998 case of *United Communist Party v. Turkey* (1998) was the first case where the dissolution of a political party, based on militant democratic arguments, was brought before the ECtHR.<sup>80</sup> Since then,

77. *Id.*

78. ESRA ÖZYÜREK, *NOSTALGIA FOR THE MODERN: STATE SECULARISM AND EVERYDAY POLITICS IN TURKEY* 93 (2006).

79. Kenan Çayır, *Preparing Turkey for the European Union: Nationalism, National Identity, and "Otherness" in Turkey's New Textbooks*, 30 J. INTERCULTURAL STUD. 39, 40 (2009). Interestingly, Kemalist markers in the primary school textbooks increased after AK Party's rise to power at 2002, which is perhaps best understood as a technique to insure that a state controlled narrative remains and as an indicator that the party intends to carry out its own agenda gradually.

80. *United Communist Party of Turkey v. Turkey*, App. No. 19392/92, (1998).

the Court has dealt with twelve cases that directly concern the dissolution of political parties. In nine of these twelve cases the Court ruled that the dissolution was a violation of the Convention. However, in two cases, *Refah Partisi v. Turkey* (2003)<sup>81</sup> and *Batasuna v. Spain* (2009), the Court found that the dissolution was within the margin afforded to the state and not beyond that which was “necessary in a democratic society.”<sup>82</sup>

Specific to Turkey, the policing of the public square at the domestic level was paired at the international level, as many of the political parties that were banned lodged a complaint under Article 11 of the ECtHR, which provides for the right to freedom of peaceful assembly and to freedom of association.<sup>83</sup> Article 11 allows a state to limit the right provided that such restrictions are prescribed by law and “are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”<sup>84</sup>

While the ECtHR found a violation of Article 11 in a majority of cases where parties were dissolved in Turkey, in *Refah* the Court upheld the Turkish Constitutional Court’s decision to ban the party.<sup>85</sup> The *Refah* judgment has already generated much academic discussion and critique and the concepts of militant democracy and legal pluralism weigh heavily in the Court’s reasoning in this case.<sup>86</sup> The case illuminates the “intimate relationship”<sup>87</sup> between militant democracy and legal pluralism which, for this article’s purpose, will be defined as religious, cultural or national communities that seek to implement a form of autonomy not authorized by the constitution of the state within which it resides. This article will, therefore, briefly revisit some of the most relevant terrain raised by this case.

The *Refah* Party was founded in July 1983 by the former Prime Minister of Turkey, Necmettin Erbakan.<sup>88</sup> In the local elections of March 1989 the party obtained about 10 percent of the vote and its candidates were elected mayors of a number of towns and five large cities.<sup>89</sup> Between 1989 and 1995

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81. Case of *Refah Partisi (the Welfare Party) and Others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, (2001) Judgment 2003 [hereinafter *Refah*]. The case was first heard by a Chamber of the European Court of Human Rights, the Third Section on 31 July 2001. Other cases involve the banning of the political activities of political parties, the refusal to register political parties, and the decision to cut the financial support for political parties.

82. *Herri Batasuna and Batasuna v. Spain*, App. Nos. 25804–04, 25817/07, (2009), ¶ 69.

83. European Convention on Human Rights, *opened for signature* 4 Nov. 1950, art. 11, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953).

84. *Id.*

85. *Refah*, *supra* note 81, ¶ 139.

86. *United Communist Party of Turkey*, *supra* note 80.

87. Macklem, *supra* note 4, at 488.

88. *Refah*, *supra* note 81, ¶ 10.

89. *Id.* ¶ 11.

the party grew immensely in power, partly, as Susanna Dokupil suggests, “because of the Islamic resurgence in the country, partly because of divisions among the center-right parties, and partly in response to anti-Western sentiment.”<sup>90</sup> Against this backdrop, in the general elections of 1995, *Refah* won twenty-four mayoral seats and a total of 158 seats in the Assembly. Perhaps worryingly for the secularist establishment, *Refah* was becoming a political force. Having gained approximately 22 percent of the vote, it held the largest number of seats in the Turkish Parliament.<sup>91</sup>

In June 1996, *Refah* formed a coalition with the *Doğru Yol Partisi* (True Path Party). The True Path Party was avowedly secular, pro Western and anti *Refah*.<sup>92</sup> From the outset, therefore, the coalition was an odd coupling. What is interesting to note, however, is that in an interview given shortly after the coalition was formed, the True Path Party leader, Tansu Çiller, stated that although she was still in favor of the principle of secularism and remained cautious about *Refah*, “she believed that taking the *Refah* party into the mainstream of Turkish politics was the only way to maintain social peace and preserve democracy.”<sup>93</sup>

In May 1997 the Principal State Counsel at the Court of Cassation applied to the Constitutional Court of Turkey to have *Refah* dissolved on the basis that it was a “centre of activities contrary to the principles of secularism.”<sup>94</sup> In support of this assertion, it was alleged that the *Refah* chairman and other prominent members had advocated the wearing of the Islamic headscarf in state schools and buildings, thus violating the principle of secularism; that Erbakan had encouraged Muslims to join *Refah* by stating that only his party could establish the supremacy of the Koran and that Erbakan had assured Islamist movements of his support.<sup>95</sup> It was also alleged that members of *Refah* had called for the secular political system to be replaced by a theocratic system and that members had expressed support for introduction of Shari’a law in Turkey.<sup>96</sup>

In their submission, the defendants rejected the claim that *Refah* represented a threat to the secular nature of the Turkish Republic and alleged that extracts from Erbakan’s speeches had been taken out of context and distorted.<sup>97</sup> The applicants also argued that statements which had advanced

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90. Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53,105 (2002–3).

91. *Refah*, *supra* note 81, ¶ 11.

92. Haldun Güllalp, *Political Islam in Turkey: The Rise and Fall of the Refah Party*, 89 MUSLIM WORLD 22, 36 (1999).

93. Interview with Ahmet Coşkun and Zahit Akman, Kanal 7, 27 Oct. 1996, *cited in* Güllalp, *id.* at 36.

94. *Refah*, *supra* note 81, ¶ 12.

95. *Id.*

96. *Id.*

97. *Id.* ¶ 12, ¶ 17.

political Islam<sup>98</sup> had been made by members who were not authorized to represent *Refah* and that when the party was made aware of their actions the three members of Parliament concerned were expelled from the party.<sup>99</sup> Despite these arguments, in January 1998, the Turkish Constitutional Court dissolved the party on the basis that it had become a center of activities contrary to the principle of secularism, basing its decision on Sections 101(b) and 103(1) of Law No. 2820 on the Regulation of Political Parties.<sup>100</sup>

In their submission to the ECtHR, the applicants alleged that the dissolution of *Refah* and the order preventing its leaders, including Necmettin Erbakan, Şevket Kazan, and Ahmet Tekdal from holding similar office in any other political party had infringed their right to freedom of association, established in Article 11 of the ECHR.<sup>101</sup> In its earlier jurisprudence, also involving a Turkish political party, the Court had stressed the importance of the rights arising from Article 11:

[A]n association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions. As the Court has said in the past, while it is in principle open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions.<sup>102</sup>

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98. It was alleged that members of *Refah* had made speeches calling for the replacement of the secular system with a theocratic one and had stated that “blood would flow” if any attempt was made to close the “*İmam-Hatip*” theological colleges. *Id.* ¶ 12.

99. *Id.* ¶ 18.

100. *Id.* ¶ 23. Section 101(b) of Law No. 2820 stated:

The Constitutional Court shall dissolve a political party[. . .] (b) where its general meeting, central office or executive committee[. . .] takes a decision, issues a circular or makes a statement[. . .] contrary to the provisions of Chapter 4 of this Law [This chapter (from section 78 to section 97), which concerns restrictions on the activities of political parties, provides, *inter alia*, that such activities may not be conducted to the detriment of the democratic constitutional order (including the sovereignty of the people and free elections), the nature of the nation State (including national independence, national unity and the principle of equality), and the secular nature of the State (including observance of the reforms carried out by Atatürk, the prohibition on exploiting religious feelings and the prohibition on religious demonstrations organised by political parties), or where the chairman, vice-chairman or general secretary makes any written or oral statement contrary to those provisions.]

Section 103(1) of the Law stated “Where it is found that a political party has become a centre of activities contrary to the provisions of sections 77 to 78[. . .] of the present Law, the party shall be dissolved by the Constitutional Court.”

101. *Refah*, *supra* note 81, ¶ 49.

102. *United Communist Party of Turkey*, *supra* note 80, ¶ 27.

The Court had also stated that the restrictions on Article 11, provided for in paragraph two of the provision, should be strictly construed where political parties are concerned; “only convincing and compelling reasons can justify restrictions on such parties’ freedom of association.”<sup>103</sup> It is unsurprising therefore that in four cases concerning dissolution of political parties prior to the *Refah* case, the European Court found violations of Article 11.<sup>104</sup> In assessing the role of the Court in cases concerning the dissolution of political parties, Olgun Akbulut suggests that the Court tends to protect those parties that have been sanctioned for their criticism of state policy on sensitive domestic issues but is unlikely to protect parties who espouse anti secular viewpoints (like *Refah*) or those with links to “terrorist” organizations.<sup>105</sup>

In its examination of the *Refah* case, the Court first assessed whether there was an interference with the rights of *Refah Partisi* under Article 11 of the Convention and concluded that there was, in fact, an interference with the applicants’ right to freedom of association.<sup>106</sup> The Court then looked at whether this interference could be justified by looking in turn at whether it was “prescribed by law,” whether it served a “legitimate aim” and whether the interference was “necessary in a democratic society.”<sup>107</sup> In its assessment of the first element whether the interference was prescribed by law the Court noted that Article 69 of the Turkish Constitution gave the Constitutional Court sole discretion in the issue of dissolution of political parties and the measures imposed by the Constitutional Court were based on sections 101 and 107 of Law 2820, as well as Articles 68, 69 and 84 of the Constitution of Turkey.<sup>108</sup> The provisions in question were accessible to the applicants and given the status of *Refah* as a large political party with legal advisors familiar with constitutional law and the rules applicable to political parties, the applicants were reasonably able to foresee that they ran the risk of dissolution of the party if they or the party’s members engaged in anti secular activities.<sup>109</sup>

As to whether the interference served a legitimate aim, the Turkish government asserted that it pursued several, namely the protection of public safety, national security, the rights and freedoms of others and the preven-

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103. *Id.* ¶ 46.

104. See *Yazar and Others v. Turkey*, App. Nos. 22723/93, 22724/93, 22725/93, Judgment 9 Apr. 2002; *Socialist Party and Others v. Turkey*, App. No. 20/1997/804/1007, Judgment 25 May 1998; *Freedom and Democracy Party (Özdep) v. Turkey*, App. No. 133/1996/752/951, Judgment 8 Dec. 1999; *United Communist Party of Turkey and Others v. Turkey*, App. No. 133/1996/752/951, Judgment of 30 Jan. 1998.

105. Olgun Akbulut, *Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties*, 34 *FORDHAM INT’L L. J.* 46, 69 (2010).

106. *Refah*, *supra* note 81, ¶ 50.

107. *Id.* ¶ 51.

108. *Id.* ¶ 56, ¶ 59.

109. *Id.* ¶ 62, ¶ 63.

tion of crime.<sup>110</sup> The applicants argued, however, that the real reason for *Refah's* dissolution was that its economic policy, which included reducing the national debt to zero, would threaten the interests of major businesses and the military.<sup>111</sup> With a “notably brief analysis”<sup>112</sup> the European Court concluded that the applicants had not presented sufficient evidence to suggest that *Refah* had been dissolved for reasons other than those cited by the Constitutional Court and having taken into account “the importance of the principle of secularism for the democratic system in Turkey” agreed with the position advanced by the government and concluded that *Refah's* dissolution pursued several of the legitimate aims listed in Article 11.<sup>113</sup>

Finally, with regard to whether the interference was “necessary in a democratic society,” the applicants argued that the speeches advancing political Islam had been made several years prior to the institution of dissolution proceedings and therefore *Refah* could not be said to constitute a threat to secularism and democracy in Turkey at the time of the proceedings.<sup>114</sup> In its thirteen year existence it had taken on many responsibilities of local and central government and accordingly in coming to its decision, the Court should assess all of the factors that had led to the decision to dissolve the party and all of the party’s activities since it had come into existence.<sup>115</sup> The applicants also pointed to the fact that during the year in which it was in power (from June 1996 to July 1997), it made no attempt to introduce legislation that would facilitate a regime based on Islamic law.<sup>116</sup> Furthermore, *Refah* had expelled the members who had made the inflammatory statements and Erbakan’s comments, when read in context, contained no apologia for violence, nor did *Refah's* constitution or program make any reference to either Shari’a or Islam.<sup>117</sup> The applicants argued that to sanction the dissolution of *Refah*, the imposition of restrictions on the political activities of its members, and the financial losses the party would suffer as a result would constitute an interference which was disproportionate to the legitimate aims pursued.<sup>118</sup>

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110. *Id.* ¶ 65.

111. *Id.* ¶ 66. Note that was an argument that was related to *Refah's* anti-capitalist stance, which was manifest in its “A Manifesto for Just Order.” For more on this, see Alparslan Nas, *Turkey's Passive Revolution and its Discontents*, TURKEY AGENDA, ¶ 6 (18 June 2014), available at <http://www.turkeyagenda.com/turkeys-passive-revolution-and-its-discontents-799.html>.

112. David Schilling, *European Islamophobia and Turkey: Refah Partisi* (The Welfare Party) v. Turkey, 26 *LOV. L.A. INT’L & COMP. L. REV.* 501, 510 (2004).

113. *Refah*, *supra* note 81, ¶ 67. The aims included protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

114. *Id.* ¶ 68.

115. *Id.* ¶ 69.

116. *Id.* ¶ 70.

117. *Id.* ¶ 71, ¶ 73.

118. *Id.* ¶ 77.



The Turkish government put forth a militant democratic argument suggesting that had *Refah* been the sole party in power in the government, it “would have been quite capable of implementing its policy and thus putting an end to democracy.”<sup>119</sup> A number of other arguments were also advanced, including the assertion that certain aspects of the party’s activities and speeches suggested that if the party held power, it would introduce “a plurality of legal systems” and “had adopted an ambiguous stance with regard to the use of force to gain power and retain it.”<sup>120</sup> In this regard, the government alleged that some members of *Refah* advocated the use of violence in order to resist certain government policies or to gain power, constituting incitement to a popular uprising.<sup>121</sup>

The European Court’s approach to this case departed from its reasoning from earlier judgments in a number of significant respects. First, the Court failed to use *Refah*’s constitution to determine if there was a specific exception to Article 11(1). The Constitution of *Refah* made no reference to either Shari’a or Islamic law forming the basis of the Turkish system. Even if the proposals of *Refah* were inconsistent with the principle of secularism set out in the Turkish Constitution, as David Schilling has noted, instead of ensuring the freedom to associate and publicly debate ideas, as provided for in Article 11, the European Court became “the judge of secularism.”<sup>122</sup> Second, it did not assess the political behavior of *Refah* when it was the controlling party in government.<sup>123</sup> Third, it placed too great an emphasis on the more extreme members within *Refah*. It is important to understand the Court’s reading of these points against the political landscape in Turkey at the time. The media in Turkey was a particularly useful vehicle in promoting *Refah* as anti democratic. One effective technique was to graft the imagery of religious fundamentalism (so, for example, public figures who were calling for Shari’a) to the *Refah* party. This, in turn, helped to facilitate and justify actions to dissolve the party using militant democratic arguments.

In its consideration of the case, the Court revisited its ruling in the *United Communist Party of Turkey v. Turkey* by emphasizing that democracy is an important feature of the European public order and that freedom of thought, conscience and religion, protected by Article 9 of the Convention, is one of the foundations of a “democratic society” within the meaning of the Convention.<sup>124</sup> Nonetheless, the Court then turned to the principle of

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119. *Id.* ¶ 78.

120. *Id.* ¶ 81.

121. *Id.* ¶ 63.

122. Schilling, *supra* note 112, at 511–12.

123. Kevin Boyle has noted the particular seriousness of sanctioning the closure of a party serving in government: “By any standard, the dislodging of a government from office is a radical intervention in democratic political life by a national court. It took the notion of ‘militant democracy’, the measures permissible to defend democracy from being subverted through electoral politics, to a new level.” Boyle, *supra* note 19, at 2.

124. *Refah*, *supra* note 81, ¶ 86, ¶ 90.

secularism, which it argued was “one of the fundamental principles of the state which are in harmony with the rule of law and respect for human rights and democracy.”<sup>125</sup> The dissolution of the *Refah Partisi*, was, then, within the power of preventive intervention on the part of the state because “a State may reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime.”<sup>126</sup> Dissolving *Refah*, the Court argued was a preventative measure necessary to meet the pressing social need of averting the danger to democracy and was a proportionate response to the legitimate aim of upholding democracy and the principles of secularism.<sup>127</sup> The ECtHR followed the “logic of collapsing unity, democracy and progress” employed by the Turkish Constitutional Court, which had indicated that *Refah* was a “political representation of the general Islamist threat.”<sup>128</sup>

The root of the Islamist threat was in its being backward-looking, threatening to steer Turkey away from the road of progress. According to the Court, the major threat *Refah* represented was to the laicism principle of the constitution. At the hands of the Court, laicism became not merely the tenet of separation of religious and governmental spheres, or even of state control over religion, but also a crucial embodiment of the idea of progress. In turn, laicism functioned as a means of enhancing national unity.<sup>129</sup>

The approach of the ECtHR in *Refah* was the precursor to how the Court has related questions of religion and, in particular, Islam, in the public sphere. That the Court may continue to adopt an inflexible approach to this issue was left in little doubt by its view of Islamic formulations of law as that which,

clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts[. . .] In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.<sup>130</sup>

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125. *Id.* ¶ 93.

126. *Id.* ¶ 81.

127. *Id.* ¶ 132, ¶ 135.

128. Dicle Koğacıoğlu, *Progress, Unity, and Democracy: Dissolving Political Parties in Turkey*, 38.3 LAW & SOC. REV. 433, 454 (2004).

129. *Id.* at 454–55.

130. *Refah*, *supra* note 81, ¶ 123.

Leaving aside the Court's limited understanding and questionable reading of Shari'a,<sup>131</sup> the Court's reasoning was problematic in two other significant ways. First, contrary to the arguments of the state, *Refah's* Constitution made no reference to imposing Shari'a law in Turkey. Second, the Court's decision did not reflect the Venice Commission's guidelines on the prohibition of political parties, in particular the essential notion that dissolution of political parties should be a last resort only in circumstances where that party advocates violent methods.<sup>132</sup>

131. Kevin Boyle notes that the

stridency of the European Court's assessment of Islamic law and shariah is regrettable. In effect the Court seems to say that shariah, *tout court*, is incompatible with universal rights, or at least European ideas of democracy and rights [. . .] the judgment represents an unsympathetic dismissal of what is a central element of a 1400-year-old civilization, comprising today the cultures of in excess of a billion people, and the religion of at least 100 million Muslims in the Council of Europe countries. The Court makes no effort, in its thinking or language, to separate the vast majority of Muslim people and their religious practices from extremists.

Boyle, *supra* note 19, at 12.

132. The Venice Commission guidelines state:

Prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution

See European Commission for Democracy through Law (Venice Commission) *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures* CDL-INF (2000) 1, Strasbourg, 10 Jan. 2000.

In 2008, against the backdrop of the 2008 case taken against the AK Party, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) on 15 September 2008 requested that the European Commission for Democracy through Law (Venice Commission) of the Council of Europe undertake a review as to, "whether the rules in the Turkish Constitution and legislation on prohibition and dissolution of political parties are in conformity with European democratic standards, the rule of law and human rights, as set forth in the European Convention on Human Rights (ECHR)." In 2009, the Commission published its findings and concluded that, as compared with common European practice, the procedure in relation to the dissolution of political parties in Turkey differed in three important respects. First, the Commission noted that there is a long list of substantive criteria applicable to the constitutionality of political parties, as laid down in Article 68(4) of the Turkish Constitution and the Law on Political Parties, which "go beyond the criteria recognised as legitimate by the ECtHR and the Venice Commission." Second, the Commission highlighted that the procedure for initiating decisions on party prohibition or dissolution "makes this initiative more arbitrary and less subject to democratic control, than in other European countries." Third, the Commission referred to "the tradition for regularly applying the rules on party closure to an extent that has no parallel in any other European country, and which demonstrates that this is not in effect regarded as an extraordinary measure, but as a *structural and operative part of the constitution*." In relation to the applicable law in Turkey, the Commission concluded that that the provisions in Article 68 and 69 of the Constitution and the relevant provisions of the Law on Political Parties "as a whole is incompatible with Article 11 of the ECHR." See European Commission for Democracy through Law (Venice Commission) *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey* CDL-AD (2009) 6, Strasbourg, 13 Mar. 2009, ¶¶ 1, 2, 105, 106.

#### IV. POST [IL]LIBERAL SECULAR TURKEY?

In the fifteen years since the *Refah* judgment, Turkey's sociopolitical landscape has been transformed. While the degree to which these changes constitute true reform is debated, there is no doubt that Turkey's social, economic and to a more limited extent, legal framework has undergone significant change. Yet the fundamental tensions<sup>133</sup> that were expressed in *Refah* between what is necessary to protect democracy (militant democracy) and what is necessary *in* a democracy (legal pluralism), persist. Militant democratic, illiberal secular tendencies remain structurally embedded in Turkey's institutions, despite Turkey entering what has been termed a "post secular" era.

It is here where one returns to the question of what is necessary in a democratic society and the paradox of self-determination; "the capacity of a collectivity to freely determine its political status and pursue its economic, social and cultural development"<sup>134</sup> that, at the same time, ensures "political arrangements that respect the ongoing capacity of individuals and groups to freely participate in the formation of laws affecting their future."<sup>135</sup> As Patrick Macklem argues, a static read of the self determination norm suggests that the only thing required is that people are able to freely choose their government, whereas a more dynamic read requires the policing of the form and substance of that government.<sup>136</sup>

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133. These tensions were made clear in 2008 when an attempt to ban the governing AK Party was brought before the Turkish Constitutional Court. In its decision, the Court found that the actions of the party impugning Article 68.4 of the Constitution "had been carried out intensely and in a determined manner by the leader and members of the defendant party and it had become a centre for such [anti-secular activities] activities" (AK Party Dissolution Case: Case No. E.2008/1 (SPK), K.2008/2, Judgment of the Constitutional Court of the Republic of Turkey, ¶4 Available (in Turkish) in *Resmi Gazete* (Official Gazette) 27034, 24 Oct. 2008. The Court was of the opinion that "the religious sensitivities of the society were being exploited for the blatant pursuit of political gain, and it had become harder for the fundamental economic, social, and cultural problems of the society to rise to the forefront of the political agenda." [¶4]. However, the Court fell one vote short of the required number necessary to dissolve the party (6 judges voted in favor and five against the ban). The Court, instead, sanctioned the party by withdrawing half of the party's public financial support for the period of one year. As a result of this case, the President of the Constitutional Court (who had disagreed with the majority that the party's actions were contrary to the principles of secularism) argued the need for Constitutional reform so that the rules for party closure cases before the Court would be tightened. That the AK Party did not suffer the same fate as *Refah* can be explained, in part at least, by the narrative that surrounded each party at the time of the rulings. *Refah's* politics were portrayed as "revolutionary" and opposed to the European integration process; both of which were significant factors in the perception of European institutions of the Party's "anti democratic" nature. In contrast, AK Party emerged as a "coalition" of anti-Kemalists and reformists which not only paved the way for AK Party to consolidate its power politically but also portray itself as pro Europe (at least in the early part of its rule).

134. Macklem, *supra* note 4, at 490.

135. *Id.* at 500.

136. *Id.* at 499–500.

Prior to the election of the AK Party, the excising of political groups from the public sphere based on militant democratic discourse, underpinned by a more dynamic read of self determination, allowed for the banning of political parties based on the need to ensure that the democratic machinery was protected. Yet by 2015, Turkey's political landscape was irrevocably altered. The "collectivity" has indeed spoken in Turkey, with the AK Party gaining yet another electoral success in the August 2014 Presidential elections and ultimately a majority in the general elections of 2015. This has, in turn, reshaped how Turkey's political community is constituted with the question as to who should be appointed the gatekeeper of Turkish national identity, unresolved. What is certain is that a significant part of Turkish civil society has captured the public square and is unlikely to relinquish this space. The hegemonic control of Turkish identity as secular is contested; just what is to emerge in its place is unclear. What is clear, however, regime change has brought the margins of Turkish civil society to the core of power and with it, previously excluded post secular norms and values. It is at this intersection that this "paradox" of the self determination is so clearly revealed.

Arriving back to the original question; has the Trojan horse indeed been released? Whilst the success of the AK Party is often attributed to the charismatic authority<sup>137</sup> of Erdoğan,<sup>138</sup> critics suggest that there has been a roll back in democratic reforms since 2010. They point to the swift and brutal response to the Gezi Park protests of summer 2013,<sup>139</sup> the reaction to the public demonstrations on the one-year anniversary of Gezi and the protests in response to the Soma mining disaster, as well as the banning of Twitter and YouTube in 2014, and most recently, limitation and restrictions on freedom of expression,<sup>140</sup> as markers of Erdoğan's authoritarian departure.<sup>141</sup> Additionally, significant amendments to the laws on the judiciary were made in February 2014 when the Grand National Assembly passed Law No. 6524 that amends Law No. 6087 on the High Council of Judges

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137. In Max Weber, *The Three Types of Legitimate Rule*, 4 BERKELEY PUB. SOCIETY & INSTITUTIONS 1 (1958) Weber introduces the idea of and equates charismatic leadership with a dynamic and inspirational and non-rational political figure, a visionary leader.

138. Esra Bulut, *Communicating Charismatic Leadership and Community Across Nationalist and Islamist Movements in Turkey*, Paper presented at Nation and Charisma Conference, London School of Economics, 13–15 Apr. 2010.

139. The protests in May and June 2013 at the proposed building of a shopping mall in Gezi Park, one of central Istanbul's few remaining green spaces, were met with a brutal crackdown by the police and led to a number of deaths, including that of a fifteen year old boy, as well as serious injuries. An explosion at a coal mine in Soma, Western Turkey, in May 2014 led to the deaths of more than 300 people and prompted demonstrations in cities throughout Turkey in protest at safety standards in Turkey's mines. See Constanze Letsch, *Turkey Mine Disaster: Police Use Riot Tactics at Protests About Mine Safety*, GUARDIAN (16 May 2014); *A Year After the Protests, Gezi Park Nurtures the Seeds of a New Turkey*, GUARDIAN (29 May 2014).

140. This has included labeling any criticism directed at the government's handling of the Kurdish conflict, as terrorist propaganda.

141. Matthew Weaver, *Turkey Rounds up Academics Who Signed Petition Denouncing Attacks on Kurds*, GUARDIAN (15 Jan. 2016).

and Public Prosecutors, Law No. 2802 on Judges and Public Prosecutors, Law No. 2992 on the Organization and Duties of the Ministry of Justice, and Law No. 4954 on the Turkish Justice Academy.<sup>142</sup> The amendments, despite the partial annulment of the law by the Constitutional Court in 2014, allow for more control of the government over the judiciary and call both the separation of powers and rule of law principles into question. For some commentators, this signals that,

Rather than committing itself to overhauling the justice system to make it effective, independent and impartial, the government has chosen to increase political control over the judiciary. After a rotation of suspected Gülen supporters from the High Council of Judges and Prosecutors, the ruling party swiftly proceeded to change the law to tie the body more closely to the executive. In a move that violates the principle of the separation of powers, designed to safeguard judicial independence, the justice minister was granted much greater power to intervene in the council and to initiate disciplinary investigations.<sup>143</sup>

Yet despite Erdoğan's more recent authoritarian leanings, changes to the socio legal landscape in Turkey more than thirteen years since the AK Party came to power suggest that the merits of the *Refah* decision, and the efficacy of its militant democratic roots, are far from clear. Enforced secularism coupled with the excise of political parties had, in the past, defined Turkey's political landscape. Enforcement of Kemalist ideology was not confined to national courts but was endorsed (uncritically) by the ECtHR in the *Refah* decision, where it placed its "faith" in militant democratic principles. Although such practices were justified based on arguments of security and national unity, they underpinned the marginalization of significant portions of Turkish civil society. Turkish identity was state crafted extinguishing diversity and excising faith to the private sphere. As well, prior to AK Party rule, successive Turkish administrations operated under the shadow of the military. Whereas the means by which the military has been removed from the political scene may be debated in Turkey, and particularly in the conduct of the "Ergenekon" trials,<sup>144</sup> it is undoubtedly true that the AK Party has succeeded in containing the threat of military interference in civilian government.<sup>145</sup>

142. *Turkey: President Should Veto Judiciary Law: Would Expand Government Control, Undermine Rule of Law*, HUMAN RIGHTS WATCH (21 Feb. 2014), available at <https://www.hrw.org/news/2014/02/21/turkey-president-should-veto-judiciary-law>.

143. Emma Sinclair-Webb, *In Turkey's Political Contest, Rule of the Law is The Real Loser*, OPEN DEMOC. (6 Apr. 2014), available at <https://www.opendemocracy.net/emma-sinclairwebb/in-turkeys-political-contest-rule-of-law-is-real-loser>.

144. "Ergenekon," a mythical Central Asian valley in Turkish folklore was the name given to the group, which includes former military officers, suspected of being involved in Turkey's "deep state" and plotting a coup against then Prime Minister Erdoğan in 2008.

145. İsmet Akça & Evren Balta-Paker, *Beyond Military Tutelage? Turkish Military Politics and the AK Party Government*, in *DEBATING SECURITY IN TURKEY* 77 (Ebru Canan-Sokullu ed., 2012).

Finally, the AK Party's approach in addressing the Kurdish question with political rather than military means was a significant departure from previous Turkish regimes. It did so despite having been accused of "betraying the republic and Turkish nation" by the Republican People's Party (*Cumhuriyet Halk Partisi*, CHP) and the Nationalist Movement Party (*Milliyetçi Hareket Partisi*, MHP)<sup>146</sup> for its alliance with Öcalan and the PKK. The peace process was also important as it was seen as a vehicle for broader democratization in Turkey. Although the process itself has been stalled since July 2015, against this backdrop the Kurdish political movement consolidated its power in the two general elections held in 2015, surpassing the crucial 10 percent threshold in both. Kurds who were once on the periphery of political decision-making are now at its core and may well be the key in encouraging the AK Party toward further democratic reforms (to decentralize, recognize Kurdish and other ethnic identities, etc.). Had the AK Party suffered the same fate as *Refah* and its other predecessors on the basis that it may seek to "do away with democracy, after prospering under the democratic regime"<sup>147</sup> it is very unlikely that these changes to the institutional structure and political landscape of the Turkish state would have occurred.

Within the public domain, the question as to whether Erdoğan's "authoritarian departure," support or disrupt militant democratic arguments remains unresolved. What is clear, however, is that part of this contestation is the struggle for the hegemonic control of Turkish national identity. This battleground is not unique to Turkey but an examination of the Turkish case suggests that perhaps it is the question itself that needs to be recalibrated. At its heart the contestation over the use of militant democratic techniques is whether or not this struggle is a struggle that happens within a self-determination paradigm or outside of it. People in Turkey have freely elected their government (static self-determination) yet some within the country and indeed outside wish to ensure that its "form" is compatible with liberal principles (dynamic). The question that must be asked then is if these two parts of the self-determination norm collide, should the tensions be resolved through militant democratic techniques or in a democratic maturing of a state?

The changes that Turkey has experienced since the election of the AK Party both those that have prised open and those that have attempted to

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146. The CHP is Turkey's oldest political party and currently the main opposition party. It describes itself as "a modern social-democratic party, which is faithful to the founding principles and values of the Republic of Turkey." The MHP is described as an "ultranationalist" party which, during the 1970s and 1980s had a militarist youth wing known as the "Grey Wolves." Its most recent party program emphasizes democratic values and its commitment to human rights. Both the CHP and MHP have been critical of the peace process with the Kurds. See, e.g., *Turkey's Nationalist Opposition Leader Accuses Ruling AKP of Treason*, HÜRRIYET DAILY NEWS (21 Mar. 2015).

147. *Refah*, *supra* note 81, ¶ 99.

constrain the public space are perhaps better read as a society struggling to expand the notion of the social contract to include others not previously included. The form that this vehicle has taken was, at its core, the area of contestation in *Refah* and remains, at least in the public domain, the issue that makes AK Party governance vulnerable to the rhetoric of militant democracy.

## V. CONCLUSION

While the Turkish case may well present a unique case of a “civil” Islamism, the security narratives that accompanied militant democratic action, and illiberal secular narratives, that challenged the pluralist agenda, all of which characterized and still does to a certain extent, the Turkish socio legal landscape is not unique. Both militant democracy and legal pluralism lack legal frameworks yet, as our examination of the Turkish case suggests, the manifestations of each are already in practice.

With regard to militant state action, the post 9/11 discourse has reinvigorated debate, globally, on the merits of militant democracy with advocates embracing Loewenstein’s thesis, and critics suggesting that these policies create the very conditions they aim to avoid. The question of legal pluralism poses an interesting juxtaposition between those who wish to create a framework that allows multiculturalism to find its public space (in this case in law) and those who believe it provides that toe in the door, which necessitates and justifies militant state action to protect democratic ideals. Thus, it has been argued that the creation of autonomous legal spaces that challenge secular frameworks may engender other platforms through which inherently anti democratic practices thrive, leading back to the necessity for militant state action.<sup>148</sup>

What is alarming is that the discourse that accompanies each thesis often departs from a starting point that we feel is inherently flawed. In the public domain, the use of draconian measures is read as both necessary and effective. The concept of multiculturalism, including its manifestations, is now read and publicly proffered by political elites as having created the space for radicalized agendas to ferment. The public square in which these issues are debated has become increasingly censored. This examination, and the larger project which informs this work, endeavors to interrogate the normative frameworks that house both concepts. The Turkish context provides an interesting case study as to how the legal, social, and political space evolves when a previously marginalized political group comes to the center.

While the results from this research are far from conclusive, what has emerged clearly is that notably absent from public discourse and mainstream

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148. Loewenstein, *supra* note 3, at 579.



academic study is the longer term implications of public policies that embed militant democracy. Jan-Werner Müller reminds us that past experience suggests that “the treatment of public collective memory by political elites, and the formulation as well as the actual application of the legal means for dealing with the enemies of democracy, do have profound long-term effects on the framing of political cultures.”<sup>149</sup> Where “enemies” of democracy are imagined to be those who introduce religious arguments in to public reason, the exclusion of significant parts of civil society is likely to follow. Yet, as Andrew March asks, is it not, “precisely at these moments of founding and refounding within a polity, when obligations of justice are extended to previously excluded groups, that religious, philosophical, and extrarational modes of persuasion are most urgently needed?”<sup>150</sup>

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149. Jan-Werner Müller, *A “Thick” Constitutional Patriotism for the EU? On Morality, Memory, and Militancy*, in *LAW, DEMOCRACY AND SOLIDARITY IN A POST-NATIONAL UNION: THE UNSETTLED POLITICAL ORDER OF EUROPE* 193, 210 (Erik Oddvar Eriksen, Christian Joerges & Florian Rödl eds., 2008).
150. Andrew March, *Rethinking Religious Reasons in Public Justification*, 107 *AM. POL. SCI. REV.* 523, 535 (2013).