REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

GENERAL ASSEMBLY

DECISION

Application No: 2014/256

Date of Judgment: 25/6/2014

GENERAL ASSEMBLY

DECISION

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	M. Emin KUZ
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Rapporteur : Yunus HEPER

Applicant : Tuğba ARSLAN

Counsel : Att. Ali ÖZKAYA

Att. Habibe SELİMOĞLU

I. SUBJECT OF APPLICATON

1. The applicant claims that she works as an attorney registered in Ankara Bar Association, the fact that the judge granted a period to her client in order to for her to be represented by another attorney and postponed the hearing by stating that the hearing would not be held because she participated at a hearing with a headscarf constituted contrariety with the freedom of religion and conscience, the right to defense and the right to access to court, the right to work and the prohibition of discrimination.

II. APPLICATION PROCESS

2. The application was directly lodged by the attorney of the applicant to the Constitutional Court on 8/1/2014. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the First Commission of the Second Section on 16/1/2014 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 29/1/2014, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases, which are the subject matter of the application, were notified to the Ministry of Justice on 29/1/2014. The Ministry of Justice presented its opinion to the Constitutional Court on 24/2/2014.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 25/2/2014. The applicant submitted her counter statements against the opinion of the Ministry to the Constitutional Court on 6/3/2014 and 11/3/2014.

III. FACTS AND CASES

A. Facts

7. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

8. The applicant works as a freelance attorney registered in Ankara Bar Association.

9. The Council of State, through the decision of its Eight Chamber dated 5/11/2012 and no. M.2012/5257, stayed the execution of the phrase "*heads uncovered*" stipulated in Article 20 of the Code of Conduct, which was ratified in the IV. General Assembly of the Union of Turkish Bar Associations (TBB) dated 8-9 January 1971 and entered into force upon its publication in the TBB Bulletin dated 26 January 1971.

10. TBB, through its announcement dated 25/2/2003 and no. 2013/11, made a call for all the Bar Associations to carry out their actions in line with the Judgment of the Council of State.

11. After the stay of the execution of the aforementioned phrase "*heads uncovered*", the applicant started participating at the hearings by wearing a headscarf.

12. The applicant filed a divorce case before the 11th Family Court of Ankara on 4/12/2012 on behalf of her client.

13. At the hearing dated 11/12/2013 of the divorce case tried in the 11th Family Court of Ankara with the Merits number of 2012/1629, the court judge stated that the applicant would not be able to serve at the hearing by wearing a headscarf and for this reason, the hearing could not be held and granted a period for the client of the applicant to be represented by a new attorney until the next hearing. Justifications of the decision of the 11th Family Court of Ankara as regards the subject are as follows:

> *"1- That the hearing be postponed to 06/02/2014, 11:40 as the attorneys cannot serve at the hearing by wearing headscarves in accordance with the Bangalore Principles of Judicial Conduct, the Code of Conduct of the Council of Bars and Law Societies of Europe, the decisions of the ECtHR and the Constitutional Court as to the fact that the headscarf is a strong religious symbol and political symbol that is against the secularism,*
>
> *2- That the period be granted to the plaintiff in order for her to be represented by another counsel until the next hearing,*
>
> *…"*

B. Relevant Law

14. The related part of Article 9 of the Attorney's Law no. 1136 dated 19/3/1969 with the side heading "*Attorney license and oath*" is as follows:

> *"The licenses and the attorney's identity cards shall be printed and arranged by the Union of Turkish Bar Associations in a standard way. When the decision of the approval is issued by the Board of the Union of Turkish Bar Associations as specified in the paragraph four of the article 7, the licenses shall be signed by the President of the Union and the President of the related Bar Association. The attorney's identity cards shall be valid as the official identity card to be accepted by all official and private institutions."*

15. Article 49 of the Law No: 1136 with the side heading "*Official outfit of the attorneys*" is as follows:

> *"The attorneys shall be obliged to appear in the courts with the official outfit that the Union of the Turkish Bar Associations will specify."*

16. Paragraphs one, two, seven and eight of Article 13 of the Regulation of the Attorney's Law of the Union of the Turkish Bar Associations with the side heading "*Attorney's License, Oath and Attorney's Identity Card*" are as follows:

> *"The attorney's license and the attorney's identity card shall be printed and arranged by the Union of Turkish Bar Associations in a standard way.*
>
> *The Union of Bar Associations of Turkey shall prepare the license of the candidate, who is admitted to the profession, on the basis of the data in his/her file, put an embossed stamp across his/her photograph and record it in the license book. The license, which is signed by the President of the Union of the Turkish Bar Associations, shall be sent to the related bar association for signature by the president of the bar association and given to the candidate after the signature has been completed. The identity card of the candidate, who is admitted to the profession, shall also be prepared with the license by the Union of the Turkish Bar Associations and sent to the related bar association for delivery to the concerned.*
>
> …
>
> *Identity cards printed by the Union of the Turkish Bar Associations in a standard format and completed with the information received from the bar associations shall be sent to the related bar association for delivery to the concerned.*

The attorney's identity card shall bear the quality of an official document."

17. Article 20 of the the Regulation of the Attorney's Law of the Union of the Turkish Bar Associations with the heading "*Outfit*" is as follows:

"Attorneys shall be obliged to be dressed in the official outfit designated by the Union of the Turkish Bar Associations when they appear in courts, when they are on duty in the disciplinary boards of the Union of Turkish Bar Associations and the bar associations and when they attending the ceremonies for the attorney's oath.

The official outfit designated by the Union of the Turkish Bar Associations may also be worn in the general assemblies of the Union of the Turkish Bar Associations or the bar associations, and the official ceremonies where the members of judicial organizations appear in their official outfit.

Attorneys may not wear official outfit in courts except in lawsuits in which they exclusively serve as attorneys.

Attorneys shall be obliged to act in accordance with Article 20 of the Code of Conduct during their professional and jurisdictional activities."

18. Article 20 of the the Regulation of the Attorney's Law of the Union of the Turkish Bar Associations with the heading "*Outfit*" is as follows:

"Attorneys and attorney interns shall serve in the courts with an attire and outfit worthy of the profession and with their heads uncovered. They shall appear at the hearings wearing the court dress, whose shape is designated by the Union of the Turkish Bar Associations, and a clean dress. Male attorneys shall wear ties to the extent permitted by the climatic and seasonal conditions."

19. The related part of the judgment of the Eight Chamber of the Council of State dated 5/11/2012 and no. M.2012/5257 is as follows:

"…

When the action, which is the subject matter of the case, the request by the plaintiff for cancellation of this action and the content of the case petition are considered together; it is accepted that the request is related to the phrase "heads uncovered" stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations and no examination and evaluation will be made in terms of the other parts of this article.

Form and quality of the identity cards and licenses of the attorneys were designated while including the rules as regards these documents through the regulations made in the Attorney's Law and the Regulation; no designation was made as regards the photos to be used on the aforementioned documents. In these regulations; the official outfit, which needs to be worn by the attorneys in certain places and at certain times, was mentioned and it was understood that this outfit was the court dress designated by the Union of the Turkish Bar Associations and worn by the attorneys in the courts or certain ceremonies. On the other hand, in the Regulation, it was referred to the fact that the attorneys were obliged to act in accordance with Article 20 of the Code of Conduct during their professional and jurisdictional activities.

In the evidence of this reference, it was concluded that the attorney licenses could not be thought independently from the execution of the profession and the aforementioned article would also be valid for the attorney identity cars as it was part of the duty.

For this reason, it is necessary to consider the dispute, which is the subject matter of the case, as regards the phrase "heads uncovered" as stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations in the evidence of these explanations.

As only the service, which is performed, is a public service without evaluating the fact that the profession of attorneyship is a freelance profession, through the article, which is the subject matter of the case, a practice, which had similar qualities with the rules brought about

with the provisions of the legislation in force, with which the public officials comply, was implemented and these rules were also applied for the attorneys, who serve in a freelance profession.

As specified in the aforementioned rules, the attorneyship is a public service in terms of the service provided and a freelance profession as a professional activity. In this sense; as the profession has its unique rules, the profession of attorneyship is not considered within the definition of the public officer made in the Constitution. Subjecting them to the rules, to which the public officers are subjected, considering the fact that only the service, which is performed, is a public service through a contrary approach will not match with the quality and requirements of the profession.

The subjects, which are regulated in the superior legal norms to which a regulatory action is hierarchically related, need to contain the general and objective rules in a clear way. In cases where there is no clear regulation in the superior legal norms, it is not legally possible to make another regulation, which results in the prevention or limitation of the exercise of a right.

It is only possible to limit the fundamental rights and freedoms, which are enshrined through the Constitution and the international conventions to which we are party, by law in the event that the reasons stipulated in these articles exist without affecting the essence thereof and based on these reasons. It is also regulated in the Constitution that these limitations cannot be contrary to the essence and spirit of the Constitution, the requirements of the democratic societal order and of the secular republic and the principle of proportionality.

As can be understood from these explanations; a regulation, which goes beyond the purpose of the Law, was made by including this phrase, whose basis is not included in the Law, in the article, which is the subject matter of the case. Therefore, the rule, which is the subject matter of the case, has turned into a quality, whose basis is contrary to the Law.

As a matter of fact, it is also obvious that, although there is no limitation or prevention about this matter in the superior legal norm, which constitutes the basis thereof, the determination stipulated in the aforementioned article will result in the violation of the right and freedom to work, which is enshrined in the Constitution and the international conventions to which we are party, in connection with the freedom of religion and conscience, which is also enshrined with these regulations.

On the other hand; as the photo to be affixed to the identity card needs to have the qualities that will reflect the characteristics of the concerned and be in a way which will ensure that the holder is easily recognized because the identity cards are the official documents, which are used for recognizing persons, it is certain that no other element that will make it difficult to recognize needs to be present.

As a matter of fact, while determining the quality of the photos to be affixed to the identity cards and the international family record booklets in the Regulation on the Implementation of the Law of Census Services, it is pointed out that the women can issue a photo by wearing a headscarf on the condition that their foreheads, chins and faces are uncovered. Thus, the criterion as regards the photo to be issued by wearing a headscarf has been introduced in this way.

In this form; it is concluded that the phrase "heads uncovered" as stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations and the action performed based on this do not comply with the law as they are in contrary to the superior legal norms.

On the other hand, in the event that the actions, which are the subject matter of the case, are performed, it is clear that the damages which are difficult or impossible to compensate for will arise.

Due to the reasons explained; on 05.11.2012, it is decided by the majority of votes in terms of the justification that the execution of the action of the Union of the Turkish Bar

Associations dated 3.11.2011 with the no. 5620 on the dismissal of the application of the plaintiff for the renewal of the attorney identity card thereof upon the decision of the defendant administration about the renewal of the attorney identity cards in accordance with Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations be stayed; it is unanimously decided that the execution of the basis of this action, which is the phrase "heads uncovered" as stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations, be stayed on the condition that the objection remedy is open before the Plenary Session of the Administrative Law Chamber within 7 (seven) days following the date of the notification of this judgment."

IV. EXAMINATION AND JUSTIFICATION

20. The individual application of the applicant dated 8/1/2014 and numbered 2014/256 was examined during the session held by the court on 15/4/2014 and the following are ordered and adjudged:

A. Claims of the applicant

21. The applicant stated that the 8th Chamber of the Council of State had decided on the stay of the execution of the phrase "*heads uncovered*" in the sentence "*Attorneys and attorney interns shall serve in the courts with an attire and outfit worthy of the profession and with their heads uncovered*" as stipulated in Article 20 of the Code of Conduct of the Union of the Turkish Bar Associations (TBB) through the decision dated 5/11/2012 with the merits no. 2012/5257, that, following this judgment, the judgment had been sent to all the bar associations for the performance of the action in line with the judgment of the Council of State through the announcement of the presidency of TBB dated 25/2/2013 with no. 2013/11. The applicant claimed that there was no rule that prevented the entry into the hearings by wearing the headscarf after the judgment of the Council of State, therefore the interim decision of the 11th Family Court of Ankara as to the fact that she could not serve at the hearing by wearing the headscarf had constituted contrariety with the freedom of religion and conscience stipulated in Article 24 of the Constitution, the right to a fair trial stipulated in Article 36 thereof, the right to work stipulated in Article 49 thereof and the prohibition of discrimination stipulated in Article 10 thereof.

B. Evaluation

1. In Terms of Admissibility

a. In Terms of the Right to a Fair Trial

22. The applicant alleged that the right of her client to access to the court had been violated through the interim decision of the 11th Family Court of Ankara as to the fact that she could not serve at the hearing by wearing the headscarf, besides, as the client had been prevented to be represented by a counsel through the decision, which is the subject matter of the case, she had not been able to exercise the right to defend her client as an attorney before the court; for this reason, the right to defense had been limited.

23. In the opinion of the Ministry against the claims of the applicant, it was stated that as there was no crime alleged to the applicant in the fact, which is the subject matter of the application, the applicant was not the defendant or plaintiff of the aforementioned case; for this reason, there was no need to express an opinion about the claims of the applicants as to the fact that her rights to defense and access to the court had been limited.

24. The applicant repeated her statements in the application petition against the opinion of the Ministry on the merits of the application.

25. Paragraph (1) of article 45 of the Law on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 with the side heading of *"Right of individual application"* is as follows:

> *"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."*

26. Paragraph (1) of article 46 of the Law numbered 6216 with the side heading *"Those who have the right of individual application"* is as follows:

> *"The individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation"*

27. In article 46 of the Law numbered 6216 with the heading "*Those who have the right of individual application*", the persons, who can lodge an individual application, are listed and according to paragraph (1) of the aforementioned article; three main prerequisites need to be presented together in order for a person to lodge an individual application before the Constitutional Court. These prerequisites are that "*one of the current rights of the applicant is violated*" due to the act or action or negligence of the public force that is stipulated in the application and alleged to have resulted in the violation, that the person is "*personally*" and "*directly*" affected due to this violation and that the applicant alleges that s/he is "*aggrieved*" as a result of this (App. No: 2013/1977, 9/1/2014, § 42).

28. In addition to these three main prerequisites, according to paragraph (1) of article 45 of the Law numbered 6216 with the heading "*Right of individual application*", an application may only be lodged before the Constitution Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights (ECHR) and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated. According to the outcome of this, an individual, whose fundamental rights and freedoms enshrined in the Constitution, a right within the scope of the ECHR and, in addition, the protocols, to which Turkey is a party, are not directly affected, cannot acquire the status of "*victim*" (App. No: 2013/1977, 9/1/2014, § 43).

29. In the incident, which is the subject matter of the application, one of the parties serves as an attorney in a case that is tried in the 11th Family Court of Ankara. In other words, the applicant is not one of the parties, but the attorney of a party. However, the right to a fair trial stipulated in Article 36 of the Constitution guarantees the rights, which arise out of the procedure, of the parties in the civil justice and of the individuals, to whom the crime is alleged, in the criminal justice. In the concrete case, the individual, in whose right to access to the court and the right to defense are intervened, is not the applicant, whose hearing was postponed and who was told that she would not be admitted to the next hearing because she was wearing a headscarf.

30. A current and personal right of the applicant, whose hearing was postponed and about whom it was decided that she would not be admitted to the next hearing because she was wearing a headscarf, was not directly affected in terms of the right to a fair trial Being indirectly affected by this action does not grant the status of victim to the applicant in terms of this complaint. In this case, it cannot be stated that the action in question constitutes an intervention in the rights of the applicant. The applicant, who is not the victim of the action, does not have the right to lodge an individual application against this action (for a decision in the same vein see App. No: 2012/615, 21/11/2013, §§ 33-34).

31. Due to the reasons explained, as it is understood that the applicant does not have the title of victim in terms of the right to defense and the right to access to the court, it should be decided that this part of the application is inadmissible due to *"the rejection of authority in terms of the person"* without examining the other conditions of admissibility.

b. In Terms of the Freedom of Religion and Conscience, the Prohibition of Discrimination and the Right to Work

32. The applicant claimed that although there was no rule that prevented the entry into the hearings by wearing the headscarf, the interim decision of the 11th Family Court of Ankara as to the fact that she could not serve at the hearing by wearing the headscarf had constituted contrariety with the freedom of religion and conscience stipulated in Article 24 of the Constitution, the right to work stipulated in Article 49 thereof and the prohibition of discrimination stipulated in Article 10 thereof.

33. The European Convention on Human Rights (Convention) and the additional protocols thereto do not guarantee the employment in the public service and the performance of a certain profession for the states that are party to the Convention. However, in the event that the complaints as regards some issues that can be considered within the scope of the right to work are also related to the other rights protected in the Convention, the European Court of Human Rights (ECtHR) can make an examination by relating them with the related rights (for some decisions about the approach of the ECtHR, see *Sidabras and Dziautas v. Lithuania*, App. No: 55480/00 and 59330/00, 27/7/2004, §§ 46-67; *Dahlab v. Switzerland (dec.)*, App. No: 42393/98, 15/2/2001).

34. While the freedom of work and contract that the applicant states in her petition and is stipulated in Article 48 of the Constitution is a fundamental right and freedom enshrined in the Constitution, it does not fall under the scope of the ECHR and the additional protocols thereto, to which Turkey is a party. However, the complaint of the applicant about the freedom of work and contract is associated with the freedom of religion and conscience and the prohibition of discrimination, which are present in the common field of protection of the Constitution and the ECHR.

35. Due to the reasons explained, the claims of the applicant as to the fact that Articles 48 and 49 of the Constitution were violated should be evaluated within the framework of the claims as to the fact that Article 24 of the Constitution was violated.

36. At the hearing of the 11th Family Court of Ankara dated 11/12/2013, it was decided that the hearing not be held and be postponed because the applicant was wearing a headscarf and that a period be granted to the client of the applicant in order to hire a new attorney. The applicant claimed that there was no legal remedy to be resorted to against these interim decisions of the Court of First Instance. The Ministry of Justice has not presented any opinion about the exhaustion of the domestic remedies.

37. In paragraph four of Article 148 of the Constitution and paragraph (2) of Article 45 of the Law numbered 6216, it is stated that all administrative and judicial application remedies, which are prescribed in the law for the act, action or negligence that forms the basis of the violation claim, need to be exhausted before lodging an individual application. As required by the secondary quality of the individual application remedy, the obligation to primarily eliminate the violations of the fundamental rights before the courts of instance requires the condition of exhausting the legal remedies (App. No: 2012/1027, 12/2/2013, §§ 19, 20; App. No: 2012/13, 2/7/2013, § 26)

38. In accordance with the principle of exhaustion of the ordinary legal remedies, the applicant needs to primarily convey the complaint, which she files before the Constitutional

Court, to the administrative and judicial authorities of venue within due period in accordance with the due procedure, to submit the information and evidence that she has about this subject within due period and to pay required attention to following her case and application in this process. As a rule, admission and examination of an application by the Constitutional Court before the exhaustion of the remedies is not possible.

39. The reason for the existence of the rule of exhaustion of the legal remedies is to grant the opportunity of preventing or correcting the alleged violations of the Constitution to the authorities, which perform the acts and actions of the public force, and particularly to the courts. Given the aim of the rule of exhaustion of the legal remedies to protect the human rights, it is necessary to apply it free from the formality and with a certain flexibility. On the other hand, the rule of exhaustion of the domestic remedies is a rule, which is neither certain, nor can be applied automatically; it is essential that the conditions of the concrete case be taken into account in supervision of the compliance with this rule. In other words, it is necessary to take realistic account not only of the existence of formal remedies in the legal systems but also of the context in which they operate as well as the personal circumstances of the applicant (see *Kozacıoğlu v. Turkey* [BD], App. No: 2334/03, 19/2/2009, § 40).

40. In the concrete case, the Court of First Instance delivered two interim decisions. The first of these is that the trial was not conducted and the hearing was postponed because the applicant was wearing a headscarf and the second one is that it granted a period to the client of the applicant in order to hire a new attorney. An applicant, who lodges an application to the Constitutional Court, needs to exhaust the domestic remedies, which are existing both in theory and in practice and which will ensure that the complaint is satisfied in the event that s/he directly applies and which provide a chance of success to a reasonable extent. Even if it is possible to file a complaint to the High Council of Judges and Prosecutors (HCJP) about the Judge of First Instance because of his failure to apply the judgment of the Eight Chamber of the Council of State dated 5/11/2012, as it is not possible for the HCJP to supervise and lift the interim decision of the court of first instance, this remedy cannot be considered as a remedy that will satisfy the complaint of the applicant.

41. Even if it is possible for the applicant to apply to the same court for the review and lifting of the interim decision delivered by the 11th Family Court, as the Court of First Instance expressed its opinion about this subject previously and as it does not seem possible that it will change this decision, this remedy may not be accepted as an effective legal remedy (for the decision in the same vein see App. No: 2013/7521, 4/12/2013, § 30, 31, 34, 38, 39).

42. Under the current conditions, in our legal system, there is no administrative or judicial remedy that is effective, but sufficiently clear in practical terms at the same time which will review this interim decision of the Court of First instance and determine the contrariety with the law and, if necessary, lift the interim decision delivered by the Court. For these reasons, the application is not admissible in terms of the exhaustion of the legal remedies.

43. The complaints of the applicant as to the fact that the freedom of religion and conscience and the prohibition of discrimination were violated because she was excluded from the hearing as she was wearing a headscarf are not clearly devoid of the basis. Besides, as there is no other reason for inadmissibility, it must be decided that the part of the application as regards these complaints is admissible.

2. In Terms of Merits

a. In Terms of Freedom of Religion and Conscience

44. The applicant stated that everyone possessed fundamental rights and freedoms which were personal, inviolable, inalienable and indispensable according to the Constitution and that the fundamental rights and freedoms could only be limited within the framework stipulated in the Constitution. The applicant advocated that she wore the headscarf in line with her religious belief, that she was not admitted to the hearings because she was wearing the headscarf, that it constituted intervention in the freedom of religion and conscience stipulated in Article 24 of the Constitution. The applicant alleged that the fundamental rights and freedoms stipulated in the Constitution could only be limited by law without interfering with the essence thereof, but that the prevention of her attendance at the hearings although there was no legal provision as regards the fact that she could not attend at the hearings by wearing the headscarf constituted the violation of Article 24 of the Constitution.

45. The Ministry of Justice

i. stated that the complaints of the applicant under this heading should be evaluated under Article 9 of the Convention and Article 24 of the Constitution. In the opinion of the Ministry, the importance of the freedom of religion and conscience for the society was reminded of and it was stated that the wearing of religious clothing, caps, veils or symbols were accepted as religious behaviors of individuals in the ECHR case law, that for this reason wearing of the veil or a religious symbol by individuals on their own volition and with the will of abiding by the religious commandments should be considered within the scope of the freedom of religion and conscience.

ii. Besides, the Ministry, in its opinion, reminded that the ECtHR delivered decisions of violations by stating that the states did not secure the freedom of religion and conscience in a sufficient manner in contrary to the positive liabilities in Article 9 in the interventions made by the states in the right of the individuals in the event that it cannot be proven that the wearing of religious symbols such as cross, headscarf, veil harms the professional image and interests of others.

iii. The Ministry considered that the states had broad discretionary power over the regulations as regards the freedom of religion and conscience in the established case law of the ECtHR, that the ECtHR made evaluations within the doctrine of discretionary power based on some restrictive regulations and judicial decisions in the domestic law as for the applications previously lodged to the ECtHR on the similar subject, but that in recent years, as a result of the expansion of the democratization and freedom areas of the governments, limitations as regards the attire and outfit including the headscarf were lifted. In the opinion of the Ministry, it was notified that the phrase "*Dress, trousers, skirt shall be clean, decent, ironed and plain, shoes and/or boots shall be plain and have normal heels, be polished, the head shall always be uncovered, hair shall be combed well or tied up, nails shall be normally clipped*" stipulated in Article 5 of the Regulation on Attire and Outfit of the Personnel Employed in Public Institutions and Organizations was abolished through the resolution of the Council of Ministers no. 2013/5443 dated 4/10/2013 as for the freedom of attire and outfit. Following the aforementioned resolution of the Council of Ministers, it was made possible for the women to work in the public institutions and organizations by covering their heads.

46. The applicant agreed with the opinion of the Ministry and requested that a decision be delivered in order to confirm that her rights stipulated in Article 24 of the Constitution had been violated.

47. Paragraphs one, two, three and five of Article 24 of the Constitution with the heading "*Freedom of religion and conscience*" are as follows:

"Everyone has the freedom of conscience, religious faith and conviction.

Prayers, religious rituals and ceremonies are freely performed on the condition that they are not in violation of the provisions of article 14.

No one can be forced to attend prayers, religious rituals and ceremonies and to reveal their religious faith and convictions; no one can be condemned and blamed for their religious faith and convictions.

…

No one can abuse and misuse religion or religious feelings or religiously sacred things in any manner whatsoever in order to base the social, economic, political or legal order of the State on religious principles even partially or to gain political or personal advantage or influence."

48. Paragraphs (1), (2) and (3) of Article 18 of the International Covenant on Civil and Political Rights of the United Nations (UN) are as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

49. Article 9 of the Convention with the heading *"Freedom of thought, conscience and religion"* is as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

50. In paragraph one of Article 24 of the Constitution, it is stated that everyone has the freedom of conscience, religious faith and conviction, in paragraph two thereof, it is emphasized, as a natural consequence of this freedom, that prayers, religious rituals and ceremonies are freely performed on the condition that they are not in violation of the provisions of Article 14 that bans the misuse of the freedoms. In paragraph three, the principle as to the fact that no one can be forced to attend prayers, religious rituals and ceremonies and to reveal their religious faith and convictions; that no one can be condemned and blamed for their religious faith and convictions is included.

51. The freedom of religion and conscience is one of the indispensable elements of the democratic state that is stipulated in Article 2 of the Constitution. Similarly, the ECtHR also accepts the freedom of religion and conscience as one of the most important principles of the democracy, which is the basic element of the European public order. In its judgment of *Kokkinakis v. Greece*, the ECHR put forth the importance of the freedom in Article 9 of the Convention for the pluralistic democratic society in this way:

"As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention.

It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it." (Kokkinakis v. Greece, App. No. 14307/88, 25/5/1993, § 31)

52. That both the religion is one of the main sources that the individuals, who are devoted to a religion, refer to so as to understand and give meaning to the life and it has an important function for the shaping of the social life is present in the origin of the fact that the freedom of religion and conscience is one of the foundations of the democratic society. Because of this function, it has been accepted at international level that the individuals have freedoms of religions and faith within certain measures independently from the positions of the religions against the freedoms. Just as other freedoms, the freedom of religion was also enshrined with certain legal and constitutional guarantees as a result of a long and difficult process. As a matter of fact, the freedom of religion is a right that is protected in most of the international declarations and conventions as regards the human rights at universal and regional level.

53. The fact that the right protected by Article 24 of the Constitution is indispensable is because the freedom of religion and conscience is of vital importance for establishment and sustainment of the foundation of an effective and meaningful democracy based on the rule of law. On the other hand, the freedom of religion and conscience can only be protected in a democracy based on the understanding of recognition, pluralism and impartiality.

54. In the context of the freedom of religion, "*recognition*" requires that the state accepts the existence of all religious and faith groups as regards the state-individual relations. The policy of the state for the pluralistic recognition on one hand forces the state to treat everyone equally in the society and on the other hand, does not allow the state to embrace any religion or ideology in an official way. The pluralism is only possible when everyone takes part in the social and political life through his/her own identity and as himself/herself. The pluralism cannot be mentioned in a place where the differences and those, who are different, are not recognized and protected against the threats. In the pluralistic society, the state shall be obliged to ensure that the individuals live as required by their own world views and faiths. The state does not have the authority to accept one of the views or life styles present in the society as "*wrong*". In this context, unless the reasons for limitation stipulated in the Constitution are present, making the differences exist together is a requirement of the pluralism although the majority or the minority does not like it. The third understanding that protects the freedom of religion and conscience is the impartiality arising out of the secularism which is the guarantee of the protection of the freedom of religion and conscience of the individuals in an equal way.

55. The freedom of religion and conscience, whose meaning and scope are defined with Article 24 of the Constitution and Article 9 of the Convention, guarantee that everyone "*has the freedom of manifesting his/her religion or belief*", "*has the freedom of changing his/her religion and belief*", that individuals have the belief and conviction that they desire and that they do not have any belief and conviction (See CC, M.1997/62, D.1998/52, DD 16/9/1998). In other words, as the individuals cannot be forced to manifest their religious or conscientious convictions and pray in any fashion, to practice religion and to participate in rituals, they cannot be condemned and blamed due to their prayers and religious practices and the religious faiths and convictions that they have manifested either.

56. As a matter of fact, the ECtHR, by stating "*While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion.*

Bearing witness in words and deeds is bound up with the existence of religious convictions." (*Kokkinakis v. Greece*, App. No: 14307/88, 25/5/1993, § 31), declared that Article 9 of the Convention protected two areas as regards the freedom of religion and conscience. The first of these is the internal area where everyone has the absolute freedom of thought, religion and conscience, the second one is the external area, which occurs as a result of manifestation of this right and is limited.

57. In parallel with Article 9 of the Convention, Article 24 of the Constitution recognizes and protects the internal area of the freedom of religion and conscience by guaranteeing that the individual has or does not have any belief, that s/he can freely change his/her belief, that s/he cannot be forced to manifest his/her belief, that s/he cannot be condemned and put under pressured due to these and similarly recognizes and protects the external area of the freedom of religion and conscience through the right of manifesting one's religion or belief by teaching, practice and by praying and performing a ritual either alone or in community with others.

58. The internal area of the freedom of religion and conscience that defines the right of an individual to choose his/her religion and the fact that s/he cannot be forced to manifest or change his/her religion, that s/he cannot be condemned, put under pressure due to these and that the state cannot impose a certain religion or belief on the individuals is outside all types of influence of the lawmaker in a democratic, secular state of law. This matter has been explained in the justification of Article 24 through the phrase ".. *the freedom of religious faith and conviction shall not be subjected to any limitation due to its quality. This matter has been clearly stipulated in Article 15*". In fact, in Article 15 of the Constitution, it is clearly stated that no one can be forced to manifest his/her religion, conscience, thoughts and convictions and blamed due to these even in times of war, mobilization, martial law or states of emergency.

59. Article 24 of the Constitution does not protect any behavior arising out of- or inspired by a religion or belief and does not guarantee the right to behave in a way required by a belief in the public space in any case. The freedom of manifesting one's religion and belief may only be limited due to the reasons specified in paragraph five of Article 24 of the Constitution and under the conditions in Article 13 of the Constitution.

60. The ECtHR explained that the only reason for placing limitations on the freedom of manifesting one's religion and belief in accordance with Article 9 of the Convention was to reconcile the interests of the various groups and ensure that everyone's beliefs are respected in democratic societies, in which several religions coexist within one and the same population (*Kokkinakis v. Greece*, App. No. 14307/88, 25/5/1993, § 33).

61. Following these general explanations, first of all, it should be determined whether the applicant has a right protected by Article 24 of the Constitution or not and, if yes, whether there is an intervention in this right of hers or not. In the event that the existence of an intervention in a right of the applicant protected by Article 24 of the Constitution is determined, it should be evaluated whether this invention meets the conditions of being prescribed by law within Article 13 of the Constitution, being directed towards a legitimate aim and being necessary in a democratic society or not.

A. Concerning the Existence of the Intervention

62. It is clear that it is difficult to define the concepts of "*conscience*", "*religious faith*"" and "*conviction*" stipulated under paragraph one of Article 24 of the Constitution. Due to this difficulty, rather than making an extensive definition, it should be evaluated whether a

behavior is within the field of protection of Article 24 of the Constitution or not depending on the conditions of the concrete case.

63. While evaluating the scope of the right to manifest religion or faith, the references made to the states of manifestation in Article 24 of the Constitution and the international conventions should also be taken into account. As a matter of fact, in accordance with Article 24 of the Constitution and Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the Convention, the manifestation was generally accepted as *"practices, prayers, teaching and rituals" of "a religion or faith"*. As can be understood from these terms, the texts of the Convention that define the manifestation mostly focus on the religious manifestations such as *"prayer"* and *"ritual"*. However, as the term of "*exercise of the faith*" is much more inclusive than other types of manifestation, it requires handling thereof in a more detailed way. For example, as a result of this requirement, the Human Rights Committee of the United Nations, in the General Comment No. 22 of on Article 18 of the ICCPR, gave a list of various types of behaviors that evaluated the content of the terms "*teaching, practice, prayer and ritual*" in a broader manner. According to the Committee:

> *"The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, the participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."*

64. However, it cannot be said that the international conventions put forth which types of faith may be manifested in a complete manner. The first difficulty that occurs in determination of the scope of the manifestation of a "*faith*" occurs in determination of whether the said "*faith*" is really existing or not and of what its status is. The second difficulty is the problem of proving that the manifestation occurs in accordance with the principles of the said religion or faith.

65. The bodies of the Convention abstained from evaluating the extrovert behaviors within Article 9 of the Convention in the applications, in which a faith does not come into prominence, but which mostly contains the expression of personal desires or thoughts. Tendency of the court and the Commission was to assume that the behavior was the expression of an opinion rather than a faith in cases where a certain behavior required by a religion or faith was not existing (inter alia to other decisions see *Pretty v. United Kingdom*, App. No. 2346/02, 29/4/2002, § 82).

66. As preventing an individual from acting in accordance with his/her religion or faith will result in weakening of the faith itself and the violation of the freedom of religion and faith of the individual, while evaluating the manifestation of the faith of the individual, it becomes important to determine whether the manifested behaviors are the "*practice*" of the faith or not. Should the "*practice*" be perceived only as the behaviors that are similar to the prayer or should all the behaviors, orders and teachings that are important for the religion or faith be evaluated within this concept? For the solution of this problem, the ECtHR, in some of its decisions, embraced an approach as to the fact that there needs to be a relation between the behavior that defines the manifestation and the religion or the faith (*Arrowsmith v. United Kingdom)*, App. No. 7050/75, 12/10/1978, §§ 43-44; *X v. Austria*, App. No. 8652/79,

15/10/1981). The ECtHR has mostly used this "*criterion of requirement*" for determining whether the behaviors, which are encouraged or allowed by a religion or faith, but which are not compulsory for the manifestation of the said religion or faith are covered by Article 9 (for a similar decision, see *Khan v. United Kingdom*, App. No. 11579/85, 7/7/1986). As a rule, in this test of requirement, the applicant needs to demonstrate that a behavior or activity of his/hers limited by the public force is a practice arising out of his/her faith. Therefore, the matter to be questioned is the relevance of the limitation against the applicant with his/her religious faiths; that is, in other words, the relation of the behavior that the applicant is forced to- or abstains from engaging in with his/her faiths.

67. In order to overcome the difficulties encountered in completely revealing whether a behavior constitutes an aspect of any religion or faith that may be manifested, whether there is a structural or theoretical connection between the religion and faith and the revealed behavior, the time and place of occurrence of the behavior and whether the individual puts forth the faith as the reason for his/her behavior are the important points to be taken into account while making this determination.

68. Nevertheless, except for the state of meeting an urgent social need, it may be decided by the members of the said religion or faith how a religion or faith may be manifested in the best way or whether a behavior is a requirement of a religion or faith that the applicant has put forth. In other words, the understanding of the applicant as regards the exercise of his/her religion or faith and his/her explanations arising out of this understanding need to be taken into account as long as they are not clearly baseless or illogical.

69. However, in order to be sure about the reality of the statements of the applicant, it may be necessary to confirm the explanations that s/he has made about his/her religion or faith. In this context, in addition to the statement of the applicant in relation to his/her religion and faith, the opinions of the authorities as regards the religion or faith which is the subject matter of the application can also be taken into account.

70. Nonetheless, as may some religions and faiths not envisage any hierarchical structure, it needs to be kept in mind that the teachings of most of the religions or faiths which have a certain hierarchical structure may be interpreted in various forms in most of these religions or faiths. The differences in the same faith are frequently observed among the members of a certain faith and furthermore, the judicial bodies are not sufficiently equipped to resolve this type of differences in terms of the provisions of the freedom of religion and conscience by themselves. Besides, the guarantee as regards the manifestation may not be accepted to be limited to the faiths shared by all the members of a religious faith. Especially in this sensitive area, investigating which members of a certain religion or faith understand the orders of their common faith more correctly cannot be considered within the judicial activity and the trial authority.

71. While evaluating whether a behavior is a requirement of a religion or faith that the applicant has put forth or not, it is necessary to avoid acting in a way such as making a decision on what a member of a religion or faith can do without his/her faith being violated; in other words, on what an individual needs to believe in and how s/he needs to behave.

72. Similarly, questioning the comments of the applicants as regards their own religions and what "*the common religious practices*" are, is outside the relevance of the judicial bodies. A contrary approach will mean that the courts or the bodies which exercise the public force will determine what the applicants believe in about the practices of the religion or faith is "*legitimate*" by replacing the conscientious evaluation thereof with their own value judgments. As specified in one decision of the American Supreme Court, the courts or the bodies which exercise the public force must not presume to decide on the

plausibility of a religious claim (see American Supreme Court, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 6/11/1989). However, if necessary to repeat, such an approach will not mean that Article 24 of the Constitution will protect every behavior arising out of- or inspired by a religion or belief and guarantee the right to behave in a way required by a belief in the public space in every case (see § 50).

73. The applicant advocated that her dressing style was one of the rules of the Islam religion, of which she was a member, to be certainly fulfilled, that for this reason her removal from the court by the judge while she was present at the hearing as the attorney was a clear intervention in her right to freely manifest her religion. Moreover, the applicant based her explanations as to the fact that wearing a headscarf or her behavior of rejecting the taking off thereof at the hearing was a practice to be fulfilled in terms of the Islam religion on the related Verses included in the Holy Quran, Hadiths and the opinions of the Presidency of Religious Affairs on this matter, put forth that wearing the headscarf and her rejection of taking it off during the hearing of a court was necessary in terms of the Islam Religion.

74. In terms of these aspects, it is necessary to accept that wearing of the headscarf by women with the belief that it is an order of the Islam religion is a subject that may be considered within the ordinary meaning of Article 24 of the Constitution.

75. As it was accepted by the ECtHR that wearing the headscarf must be considered within the freedom of religion (see *Leyla Şahin v. Turkey*, App. No. 44774/98, 29/6/2004, § 71), it was also accepted by the Human Rights Committee established in order to observe the implementation of the International Covenant on Civil and Political Rights of UN in the countries, which are party thereto. In the decision that the Human Rights Committee delivered about Uzbekistan, it was stated that the use of the unique religious headscarves constituted an aspect of the religious life to be protected:

> *"The applicant victim claims that her rights of freedom of thought, conscience and religion were violated and she was excluded from University because she wore a headscarf for religious reasons and refused to remove it. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, the Committee considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion." (see Raihon Hudeyberganova v. Uzbekistan, App. No. 931/00, 5/11/2004, § 6.2).*

76. In this respect, it must be accepted that the public force acts and actions that place limitations on the place and style of wearing the headscarf as required by the religious faith constitutes an intervention in one's right to freely manifest his/her religion.

77. These interventions will constitute a violation of Articles 13 and 24 of the Constitution unless they are the constitutional prohibitions stipulated in paragraphs two and four of Article 24 of the Constitution and they fulfill the condition of being prescribed by laws and they fulfill other conditions stipulated under Article 13 of the Constitution.

78. Article 13 of the Constitution states "*Fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant articles of the Constitution and by law without prejudice to their essence. These restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic societal order and of the secular Republic and the principle of proportionality.*" This article of the Constitution puts forth what criteria may be used by the lawmaker to limit all the rights and freedoms. In other words, the criteria of guarantee stipulated in Article 13 of the Constitution are valid for all the limitations placed by law on the rights and freedoms and form the limit of limitation.

79. For this reason, it is necessary to determine whether the intervention in a fundamental right and freedom is in line with the conditions of bearing no prejudice to the essence prescribed under Article 13 of the Constitution, of being indicated in the relevant article of the Constitution, of being prescribed by laws, of not being contrary to the letter and spirit of the Constitution, the requirements of the democratic societal order and of the secular Republic and to the principle of proportionality or not. During this review, the Constitutional Court will primarily examine whether the intervention fulfills the condition of lawfulness or not. Because it will be concluded that an intervention, which is not based on the law, violates a Constitutional right or freedom without examining whether it is in line with the other guarantees such as bearing no prejudice to the essence, being one of the requirements of the democratic societal order and the proportionality or not. For this reason, it is initially necessary to evaluate the lawfulness. In the event that the condition of lawfulness is fulfilled, it should be reviewed whether the intervention is made towards the aim envisaged in the Constitution and then, whether it is in line with the other conditions or not.

B. Being Prescribed by the Laws

80. The applicant asserted that there was no legal basis as to the fact that there was a ban on the wearing of the headscarf by the attorneys at the hearings, that previously there was a rule in the Professional Principles of the Union of the Bar Associations as regards the fact that the attorneys must take part at the hearings with their heads uncovered, that the execution of this rule was stayed through the judgment of the 8th Chamber of the Council of State dated 5/11/2012, that the judgment of the Council of State was announced to all the bar associations through the decision of the Presidency of the Union of the Bar Associations dated 25/2/2013 and that it was requested to take action in line with this decision, that therefore; there was no provision of any law or legislation as to the fact that she could not participate at the hearings by wearing headscarf on the date of the incident.

81. Democracies are regimes in which the fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The limitations which bear prejudice against the essence of the fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic societal order. As a result, the fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of the democratic societal order and only with law. Similarly, due to this reason, the criterion for limiting the rights and freedoms by law has an important place in the constitutional law (see CC, M.2006/142, D.2008/148, D.D. 24/9/2008).

82. When there is an intervention in a right or freedom, the matter to be primarily determined is whether there is a legal basis of the intervention or, in other words, whether there is a provision of the law that grants authorization for the intervention or not. In order to accept that an intervention made within Article 24 of the Constitution meets the condition of lawfulness, it is compulsory that the intervention has a "*legal*" basis (for a decision that attracts attention to the condition of lawfulness in another context, see App. No: 2013/2178, 19/12/2013, § 36).

83. In accordance with the wording of the Convention and the case law of the ECtHR, the legitimacy of an intervention to be made within Article 9 of the Convention is made conditional on the fact that the said intervention be made in accordance with the "*law*" (*prescribed by law*) and when it is determined that the intervention does not have the element of lawfulness, it is concluded that the intervention is in contrary to the relevant article without examining the other guarantee criteria stipulated in paragraph (2) of Article 9 of the

Convention (For judgment of the ECtHR in the same vein, see Hasan and Chaush v. Bulgaria [BD], App. No: 30985/96, 26/10/2000, §§ 84-86).

84. The criterion of "*limiting by law*" or "*the principle of lawfulness*" are included in Article 9 of the Convention that regulates the freedom of religion and faith as a criterion of limitation and guarantee. However, the concept of "*prescribed by law*" stipulated in the Convention is not the exactly same with "*the principle of lawfulness*" stipulated in the Constitution (see §§ 94-95). The ECtHR gives a broader meaning to the concept of "*being prescribed by law"* than the meaning given to the principle of lawfulness in Turkish law.

85. According to Article 87 of the Constitution, "*enacting, amending and abolishing laws*" is the duty and authority of the Grand National Assembly of Turkey. The law, as a legislative act, is the product of the will of the Grand National Assembly of Turkey, The law is the acts, which are excluded from the decision of the parliament and performed by the Grand National Assembly of Turkey, whose authority is granted by the Constitution, by complying with the procedures of lawmaking prescribed in the Constitution. The rule stipulated in Article 7 of the Constitution "*The legislative power belongs to the Grand National Assembly of Turkey on behalf of the Turkish Nation. This power cannot be delegated*" covers the meanings of the law in material and form without making any differentiation. The meaning of Article 7 of the Constitution is that the power of lawmaking cannot be delegated to another authority and that, as a natural consequence thereof, a regulation which is to be made with a law according to the Constitution cannot be made by another authority.

86. However, in accordance with Article 8 of the Constitution "*The executive power and duty are exercised and performed by the President and the Council of Ministers in accordance with the Constitution and laws*". In this respect, as the legislative power and duty is to be exercised "*in accordance with the laws",* it is possible for the legislative body to be contented with establishing the main rules as regards the subjects that may be regulated with the law and to leave the secondary and the implementation rules to the administrative regulatory actions in addition to these.

87. In other words, a subject, which does not have to be certainly regulated by the law according to the Constitution, may be left to the regulatory actions of the administration on the condition that it has a legal basis. However, Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by the law does not allow the executive body and the administration to limit a right and freedom through a first-hand regulatory action in the absence of a provision of the law.

88. Moreover, except for the social and economic rights in accordance with paragraph one of Article 91 of the Constitution, no regulation may be made as regards the fundamental rights and freedoms through the decree in the force of law. Therefore, it is not possible to make a regulation as regards the limitation of the fundamental rights and freedoms, which cannot even be regulated through a decree in the force of law, through the first-hand administrative regulatory actions according to the Constitution.

89. In the field of the fundamental rights and freedoms, the legislative body is obliged to make foreseeable regulations that do not allow for the arbitrariness. Granting a very broad discretionary power that may pave the way for the arbitrary practices to the administration may be in contrary to the Constitution. The formal existence of the laws as regards the limitation of the fundamental rights and freedoms may not be considered to be sufficient; at the same time, the quality of the laws should also be examined. The measures to be taken by the executive body based on the order of the law in a field as regards the fundamental rights and freedoms must have an objective quality and must not grant a broad discretionary power

that will pave the way for the arbitrary practices to the administration (see CC, M.1984/14, D.1985/7, DD. 13/6/1985). In the contrary case, a contrariety will also occur with Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by law.

90. The concrete case must be evaluated in line with the aforementioned principles. It was concluded through the judgment of the Eighth Chamber of the Council of State dated 5/11/2012 that the phrase "*heads uncovered*" stipulated in Article 20 of the Professional Rules of the Union of the Bar Associations was a regulation that did not have any basis in the law and exceeded the aim of the law; that the Professional Rule did not comply with the law due to the aforementioned phrase stipulated in the rule, which is the subject matter of the case, although there was no limitation in the superior legal norm and it was decided that the execution of the said rule be stayed. On the other hand, according to the judgment of the Council of State, the provision stipulated in Article 49 of the Law no. 1136 "*The attorneys shall be obliged to appear in the courts with the official outfit that the Union of the Turkish Bar Associations will specify*" does grant the Union of the Bar Association with the authority of making a limitation about the headscarf.

91. Therefore, in the current situation, it is understood that there is no accessible, foreseeable and final provision of the law which prevents the arbitrary behaviors of the bodies that limit the freedom of religion and faith of the applicant and exercise the public force as sought by Article 13 of the Constitution and which helps the individuals be informed about the law.

92. In the incident, which is the subject matter of the application, the request of the applicant to take part at the hearing by wearing a headscarf was dismissed with the justification that "*the attorneys cannot serve at the hearing by wearing headscarves in accordance with the decisions of the ECtHR and the Constitutional Court as to the fact that the headscarf is a strong religious symbol and political symbol that is against the secularism*".

93. The meaning that the ECtHR gives to the regulation of "*being prescribed by law*" which is the equivalent of "*prescribed by law*" in the original texts of the Convention has a meaning that exceeds the concept of "*code"* in Turkish law and can only be defined with the term "*law"*. When there is an intervention in a right or freedom, the ECtHR primarily reviews whether the intervention has a "*legal basis*" or not. In other words, the ECtHR does not apprehend the code from the term "*law*" in terms of the form, examines the quality of the regulation to be accessible, foreseeable and final rather than the source of the legal regulation that places the limitation (See Hasan and Chaush v. Bulgaria [BD], App. No: 30985/96, 26/8/2000, § 85). Due to this approach, the word "*code*" or "*law*" in the phrase of being prescribed by law according to the ECtHR covers not only the written law, but also the precedent law.

94. As a matter of fact, the ECtHR examined the condition of being prescribed by law in the evidence of its own autonomous principles of interpretation and decided that the rights may be limited in the absence of the formal provisions of the law in its judgment *Leyla Şahin v. Turkey*, which is the most important decision that it has delivered as regards the headscarf and on which the 11th Family Court of Ankara based for its interim decision (see *Leyla Şahin v. Turkey*, App. No. 44774/98, 29/6/2004, § 51).

95. The judgments of the Constitutional Court, which the ECtHR used as a basis for its decision *Leyla Şahin v. Turkey* and on which the 11th Family Court of Ankara based as regards the concrete case, which is the subject matter of the application, were delivered in 1989 and 1991. In 1988, an article was added into the Law no. 2547 and the provision was

added: "*It is obligatory to wear modern outfit and to have a modern appearance in the higher education institutions, classrooms, laboratories, clinics, polyclinics and corridors thereof. It is free to cover the neck and the hair with a covering or veil due to the religious faith*". This provision was annulled by the Constitutional Court with the justification that "*in a secular state, the legal regulations cannot be made according to the religious rules*" (see CC, M.1989/1, D.1989/2, DD. 7/3/1989). After the annulment judgment, in 1990, the provision was added into the Law no. 2574: "*it is free to wear any attire and outfit in the higher education institutions on the condition that they are not in contrary to the laws in force*". The request for the annulment of the regulation was dismissed, but in the justification of the judgment of the Constitutional Court, it was determined that the "*freedom*" "*does not cover the covering of the neck and hair with the veil due to the religious faith and the religious clothes*" (See CC, M.1990/36, D. 1991/8, DD. 9/4/1991).

96. Although, the law created by the judge is accepted as a source of the law in some fields of Turkish law, it can never acquire a status of rule with the quality of "*law*" in a field that is organized based on a completely formal principle of lawfulness such as limitation of the human rights and freedoms. On the other hand, the fact that the intervention made in a fundamental right and freedom acquires continuity and becomes accessible and foreseeable does not transform the action of the public force, which is the basis of the intervention, into a "*law*". The acceptance of a contrary thought will mean the acceptance of the fact that the violations of right arising out of an act or action of the public force that is accessible and foreseeable have the "*legal*" bases.

97. Finally, in the ECtHR judgment *Leyla Şahin v. Turkey* there is not a decision of violation, but a decision of compliance with the Convention. As a rule, the fact that the ECtHR did not decide on the violation means that the contracting state will not result in the violation in the event that it fails to make any attempt. Nevertheless, making regulations that will strengthen the fundamental rights and freedoms even more in the same subject or abolition of the existing limitations does not mean that it will certainly constitute a contrariety with the Convention except for the case where it prejudices the rights of the other people living under the sovereignty of the state.

98. According to Article 13 of the Constitution, a law is certainly needed for the limitation of the fundamental rights. There is no legal limitation as to the fact that the attorneys will take part at the hearings "*their heads uncovered*". Neither the ECtHR's judgment *Leyla Şahin* nor the judgments of the Constitutional Court dated 1989 and 1991, on which the ECtHR based and which became the basis of the practice as regards the attire and outfit of the students in Turkey, may not be accepted as the rules that meet the "*condition of lawfulness*" stipulated in the relevant provision of Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by law.

99. In the concrete case, at the hearing that the applicant took part in the capacity of the attorney, it is understood that the intervention in the freedom of religion and conscience, which was made through the fact that the Court of First Instance did not hold and postponed the hearing because she wore a headscarf and that it granted a period to the client of the applicant in order to hire a new attorney, does not meet the condition of lawfulness.

100. As it was determined that the intervention did not meet the condition of lawfulness, it was not considered necessary to separately evaluate whether the criteria such as being covered by one of the legitimate aims, which are to be existing in the presence of an intervention in the freedom of religion and conscience and which is prescribed in Article 13 of the Constitution (see §§ 78-80) and stipulated in the relevant article of the Constitution, and not being in contrary to the requirements of the democratic societal order were complied with.

101. For the aforementioned reasons, it should be decided that the applicant's freedom of religion and conscience guaranteed by Article 24 of the Constitution was violated.

b. In Terms of Prohibition of Discrimination

102. The applicant reminded that everyone is equal before law without being subject to any discrimination based on language, race, colour, gender, political opinion, philosophical belief, religion, sect or similar grounds; that it was regulated that the State bodies and the administrative authorities were obliged to act in accordance with the principle of equality before law as regards all their actions. The applicant asserted that she was prevented from exercising the rights granted to the other attorneys as she could not take part at the hearing by wearing the headscarf and that her failure to participate at the hearing by wearing the headscarf although the attorneys who do not wear the headscarf could participate had the quality of discrimination.

103. The Ministry of Justice stated that the complaints of the applicant under this heading should be evaluated under Article 14 of the Convention and Article 10 of the Constitution. In the opinion of the Ministry, it was stated that treating the individuals in the same situation differently without any objective and reasonable ground would create the discrimination and the judgments of the ECtHR on the discrimination were pointed out. Moreover, in the opinion of the Ministry, it was stated that a general measure or policy, which had deleterious effects on a group of people although it did not target a certain group, may be accepted as the discrimination and it was stated that the discrimination may also arise from not only a legal measure, but also an actual situation. In the opinion of the Ministry, it was stated that the current practice in Turkey was the participation of the female attorneys at the hearings irrespective of them wearing the headscarf or not, that the ECtHR emphasized that the case of the discrimination which arose as the applicant experiences a different treatment than the individuals in the same situation with the applicant when these individuals experience a positive treatment was the main characteristic of the ordinary discrimination (*Eweida and Others v. United Kingdom*, App. No: 48420/10, 36515/10 and 59842/10, 15/1/2013).

104. It was concluded that the applicant's freedom of religion and conscience guaranteed by Article 24 of the Constitution was violated. On the other hand, the claim of the applicant as regards the violation of the prohibition of discrimination forms an important aspect of the concrete application. For this reason, it is also necessary to examine the case in terms of the principle of equality and the prohibition of discrimination.

105. Paragraphs one, two, four and five of Article 10 of the Constitution with the heading "*Equality before law*" are as follows:

> *"Everyone is equal before law without being subject to any discrimination based on language, race, colour, gender, political opinion, philosophical belief, religion, sect or similar grounds.*
>
> *Men and women have equal rights. The State is responsible for ensuring that this equality is exercised. Measures to be taken for this purpose cannot be interpreted as contrary to the principle of equality.*
>
> …
>
> *No individual, family, group or class can be granted privilege.*
>
> *The State organs and administrative authorities must act in compliance with the principle of equality before law in all their proceedings."*

106. Article 14 of the Convention with the heading *"Prohibition of discrimination"* is as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

107. The principle of equality and the prohibition of discrimination are the concepts which can sometimes be used together and can sometimes be used in order to express the same thing. Today, the principle of equality is an inseparable part of the international conventions on the human rights. In other words, the principle of equality and the prohibition of discrimination are accepted as the basic legal norm that is at the top of the international law. In this respect, the principle of equality should be accepted as both a right in itself and a basic principle that is prevalent for the exercise of the other human rights and freedoms.

108. Even if Article 10 of the Constitution is regulated in the form of the "*prohibition of discrimination*", it is necessary to put the prohibition of discrimination in an effective way as the principle of equality has a normative value to base on in every case in the constitutional context(See CC, M.1996/15, D.1996/34, DD. 23/9/1996). In other words, the principle of equality also contains the prohibition of discrimination as a concrete standard norm.

109. The potential scope of the principle of equality and the prohibition of discrimination was not limited through the phrase "*everyone*" stipulated in paragraph one of Article 10 of the Constitution which reads "*Everyone is equal before law without being subject to any discrimination based on language, race, colour, gender, political opinion, philosophical belief, religion, sect or similar grounds*". Besides, in the same paragraph, by adding the principle that no discrimination may be made based on the "*similar grounds*", it was stated that the bases of the discrimination were not only limited to those listed in the article and the subjects, over which no discrimination may be made, were extended (See CC, M.1986/11, D.1986/26, DD. 4/11/1986).

110. Article 10 of the Constitution has not placed any limitation about the individual that will make use of the principle of equality and the scope of the principle. In accordance with the provision stipulated in Article 11 of the Constitution which reads "*The provisions of the Constitution are fundamental legal rules which are binding on the legislative, executive and judiciary organs, administrative authorities and other institutions and individuals*", it is obvious that the principle of equality regulated in the chapter of "*general principles*" of the Constitution is also valid for the listed bodies, institutions and individuals. In addition, in accordance with the provision stipulated in last paragraph of Article 10 of the Constitution which reads "*The State organs and administrative authorities must act in compliance with the principle of equality before law in all their proceedings*", the legislative, executive and judicial bodies and the administrative authorities are responsible for acting in accordance with the principle of equality and the prohibition of discrimination.

111. In Article 138 of the Constitution, it is prescribed that the judges will deliver a decision in accordance with the Constitution and law. Therefore, the Constitutional provisions are also included among the law that the judge will implement. When Articles 11 and 138 of the Constitution are evaluated together, it occurs that the judges are responsible for implementing the principle of equality stipulated in Article 10 of the Constitution.

112. As no definition of the prohibition of discrimination is made in the Constitution, it is not possible to make a definition which has the standards that can be valid for every concrete case either. However, the Constitutional Court defined the principle of equality as follows:

"The principle of equality stipulated in Article 10 of the Constitution is valid for those who have the same legal situation. The legal equality rather than the actual one was prescribed with this principle. The aim of the principle of equality is to ensure that the individuals in the same situation be subjected to the same action before the laws, to prevent the discrimination and the granting of the privileges. Through this principle, the same rules were applied for some individuals and communities in the same situation and the violation of the principle was prohibited before law. Equality before law does not mean that everyone will be subjected to the same rules in every aspect. Characteristics in the situations of some individuals or communities may require different rules and practices for them. If the same legal situations are subjected to the same rules and different legal situations are subjected to the different rules, the principle of equality prescribed in the Constitution is not harmed." (See CC, M.2009/47, D.2011/51, DD. 17/3/2011).

113. The ECtHR briefly defines the discrimination in its case law as "*treating differently, without an objective and reasonable justification, persons in relevantly similar situations*" (see, *Zarb Adami v. Malta*, App. No. 17209/02, 20/6/2006, § 71).

114. The principle of the prohibition of discrimination contains the rejection of the provision of the opportunities or the deprivation from the opportunities based on religion, political opinion, sexual and gender identity, which are the elements of the personality of an individual and which are the personal preferences, or based on the personal characteristics such as gender, race, disability and age, which cannot be preferred in any way.

115. It is obvious that the different treatment directed towards the applicant is related to the exercise of the right of the freedom of religion (§ 75). The Judge of the Court of Instance asks that all the attorneys take part at the hearing as heads uncovered. According to ECtHR "*A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group*" (see, *DH v. Czech Republic*, App. No. 57325/00, 13/11/2007, § 184). In other words, if the same treatment is applied for the individuals in different situations, but this treatment affects a certain individual or the members of a group in a disproportionate and negative way, then the discrimination can be mentioned.

116. In the incident, which is the subject matter of the application, while it was asked all the female attorneys to uncover their heads at the hearing, this situation negatively affects the applicant as it reveals a religious behavior that is a personal preference of the applicant or, in other words, she wears the headscarf that is the manifestation behavior of the applicant's desire to fulfill the orders of the religion that needs to be considered as her "*personal quality*".

117. The matter to be evaluated at this phase is whether a different treatment was really applied for the applicant or not and whether this different treatment occurred on a basis prohibited in Article 10 of the Constitution or not.

118. Although the applicant, who states that she has a desire to apply her religious faith in a strict manner, is not allowed to take part at the hearing as she wears the headscarf, the female attorneys, who do not wear the headscarf, take part at the hearings. No claim was made as to the fact that the applicant and the other female attorneys, who were allowed to take part at the hearings, were in different situations.

119. At this phase, it is necessary for the bodies, which exercise the public force, to base the privileged treatment on the valid and objective justification, to show the coercive social reasons why the applicant is not allowed to take part at the hearings just because she wears the headscarf while all the female attorneys, who do not wear the headscarf, are allowed to take part at the hearings under the condition of the concrete case.

120. The ECtHR decided that the prohibition of discrimination stipulated in Article 14 of the Convention did not prohibit the differences in treatment which were mainly based on an objective evaluation of the different factual situations and which established a fair balance between the protection of the interests of the society and the respect for the rights and freedoms enshrined in the Convention. The ECtHR put forth the criteria as regards the implementation of Article 14 as follows:

> *"It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration; the principles which normally prevail in democratic societies should be taken into account. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."* (see *Belgian Linguistice Case v. Belgium*, App. No. 1474/62, 23/7/1968, § 10)

121. The criterion that the ECtHR put forth contains two elements: the determination of a legitimate aim for the different treatment, which is a liability for the state, and the evaluation of whether there is a "*reasonable relation of proportionality*" between the different treatment and the pursued aim.

122. While the different treatment behaviors that are referred to the Constitutional Court are evaluated, in the event that the state fails to enforce the claimed discrimination in any way, then this claim of the applicant will come through apart from the exceptional cases. If the explanations are made as regards the aim of the different treatment behavior, it is necessary that the justifications that are put forth have a reasonable basis and that the justifications be based on the evidence.

123. In the opinion document of the Ministry of Justice, no explanation was made as regards the aim of the different treatment behavior that the judge of the 11th Family Court of Ankara engaged in by stating that the applicant could not take part at the hearing by wearing the headscarf and that for this reason the hearing would not be held. Moreover, the Ministry seems to accept that the behavior exhibited against the applicant constituted a different treatment (§ 105).

124. At this phase, it should be evaluated whether the justification of the 11th Family Court of Ankara has a legitimate and reasonable basis or not and whether a fair balance has been established between the protection of the interests of the society and the rights and freedoms enshrined in the Constitution or not.

125. The 11th Family Court of Ankara based its decision as to the fact that the applicant could not take part at the hearing by wearing the headscarf and that for this reason the hearing could not be held on the justification that "*the headscarf is a strong religious symbol and political symbol that is against the secularism*" (§ 13).

126. In the event that the manifestation behavior of any religious faith constitutes the basis for the different treatment, it is possible to accept it as legitimate only if the manifestation behavior of the religion is directed towards "*the protection of the rights and freedoms of others*" and "*the maintenance of the public order*" (for the criteria used in the context of Article 9 of the Convention, see *Leyla Şahin v. Turkey*, App. No. 44774/98,

29/6/2004, § 108). As it was not explained, in the decision of the 11th Family Court of Ankara, how the rights and freedoms of others would be damaged and how the public order would be damaged when the attorney took part at the hearing, it was not stated for what reason the wearing of the symbols that imply the religious identities of the attorneys was a behavior that must be prevented as a response to a coercive societal need either.

127. Consideration of a religious symbol as a compulsory religious duty by the members of the religion that use it is an understandable situation. The issue that needs to be questioned is the effect that the perception of a religious symbol as compulsory creates over the others. Each symbol, whether it stems from a religion or a secular world view, may create a psychological pressure on those who are against it. These effects are inevitable in the pluralistic societies where the people with different faiths and thoughts live. In the societies, where the majority is the member of a certain religion, it is easier for those who are in the minority to feel themselves under such a pressure. In this case, the duty of the State is not to prohibit the symbols of the faiths based on the assumptions or, in other words, to limit the rights and freedoms (for a similar approach, see *Şerif v. Greece*, App. No. 38178/97, 14/12/1999, § 53); but to take the measures which will not prevent the exercise of the freedom of religion and conscience by the majority, which will prevent the oppression of the minority against the majority and which will ensure that the individuals live in mutual recognition and tolerance (see § 132).

128. As a matter of fact, in another context, the ECtHR stated "*the role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other*" (see, *Supreme Holy Council of the Muslim Community v. Bulgaria*, App. No. 39023/97, 16/12/2004, § 96). In other words, the primary duty of the state is to ensure peaceful coexistence of the people, whose faiths, thoughts and lifestyles that are in conflict with each other, and to secure a pluralistic environment in the society, where all types of faiths can express themselves.

129. In this context, it should be remembered that the ideals and values of the democratic society need to be based on dialogue and a spirit of compromise that will entail the mutual concessions on the part of the individuals. Then, the duty of the democratic state is to take the necessary measures against the possible behaviors that will constitute a crime such as the exercise of pressure, coercion and resorting to violence. Attempting to prohibit the elements that may create tension in the society rather than this requirement of the pluralism and political impartiality has the potential of creating an oppressive, totalitarian and homogenization-oriented regime (for similar evaluations, see *Leyla Şahin v. Turkey*, App. No. 44774/98, 29/6/2004, *dissenting opinion of Tulkens*, § 1). The pluralism is not a concept that means the coexistence of the individuals, whose identities are repressed and freedoms are limited. The pluralism requires that the individuals take part in the common places with their identities.

130. In order for the argument as to the fact that some religious behaviors may be limited in order to "*protect those who are in the minority*" (see Leyla Şahin v. Turkey, App. No. 44774/98, 29/6/2004, § 99) to be valid, it may be necessary to analyze the factual situation that is based on the evaluation of the conditions of the concrete case, not based on the possibilities. Even if the women, who wear the headscarf, are shown to be in the majority, it is necessary to show in which way the attorneys, who wear the headscarf, create pressure on those, who do not look like themselves, based on the concrete facts. The principle of just trial also entails this. However, in Turkey, any claim on how the headscarf has created pressure on the others and the data based on the concrete facts could not be put forward.

131. Finally, a thought as to the fact that the prohibition of headscarf is necessary to ensure "*impartiality*" and "*pluralism*" in the society brings about the thought as to the fact that the state is authorized to determine what is "*normal*" and "*correct*" in the field of religion and faith. Deciding on whether the headscarf, just as any religious behavior, is an expression of a political opinion, not a religious faith or not is outside the field of interest of the Constitutional Court. On the other hand, the mistake of attributing political meanings to the symbols that people wear is associated with putting forth "*a coercive societal need*".

132. The 11th Family Court of Ankara included the justification as to the fact that "*the headscarf is a strong religious symbol against the secularism*" in its decision. In order to resolve the relation between the headscarf and the secularism, it is necessary to remind some principles put forward in a recent decision of the Constitutional Court, in which the relation between the secularism and the freedom of religion and conscience was evaluated.

133. The secularism is one of the fundamental principles that has been included in our constitutions since 1937. The concept of secularism is stipulated in the Preamble and Articles 2, 13, 14, 68, 81, 103, 136 and 174 of the Constitution. In the aforementioned articles, the secularism is regulated as a political principle that determines the position of the state against the religious faiths. In other words, the secularism is a quality of the state, not the individual or society (See CC, M.2012/65, D.2012/128, DD. 20/9/2012).

134. When the historical development of the secularism is examined, it is seen that the concept has two different interpretations and practices depending on the differences in the approach towards the phenomenon of religion. Of these, the religion according to the strict secularism understanding is a phenomenon, which is only present in the conscience of the individual and which must certainly not be reflected in the social and public space by going beyond this. More flexible or libertarian interpretation of the secularism is inspired by the determination that the religion is a social phenomenon in addition to its individual dimension. This secularism understanding does not confine the religion into the inner world of the individual, perceives it as an important element of the individual and collective identity, allows for its social visibility. In a secular political system, the individual preferences in the religious subjects and the lifestyle that they shape are outside the intervention, but under the protection of the state. In this respect, the principle of secularism is the guarantee of the freedom of religion and conscience (See CC, M.2012/65, D.2012/128, DD. 20/9/2012).

135. The religions and faiths affect the lifestyles, identities of the members thereof and their relations with other individuals. It is a historical and sociological reality that the societies vary in terms of the religion and faith, that there are different religions, faiths or disbeliefs in the society. For this reason, one of the main aims of the democratic and secular state is to establish political orders, where the individuals will live together in peace with the faiths they have by protecting the social diversity (See CC, M.2012/65, D.2012/128, DD. 20/9/2012).

136. The secularism is a constitutional principle which ensures the impartiality of the state against the religions and faiths, determines the legal position of the state against the religions and faiths, duties and authorities and limits thereof. The secular state is the state which does not have an official religion, which treats the religions and faiths equally, establishes a legal order where the individual may freely learn and live their religious faiths in peace, guarantees the freedom of religion and conscience. The separation of the state and the religion is a requirement of the freedom of religion and conscience and is also necessary for the protection of the religion against the political interventions and the maintenance of the independence (See CC, M.2012/65, D.2012/128, DD. 20/9/2012).

137. Those who have different religious faiths or those who do not have any faith are under the protection of the secular state. As a matter of fact, according to the definition made in the justification of Article 2 of the Constitution, "*The secularism, which never means disbelief, means that every individual can have the faith, sect of his/her choice, make his/her prayer and not being subjected to a different treatment when compared to other citizens due to his/her religious beliefs.*" The state is obliged to take the necessary measures in order to prepare the environment, where the freedom of religion and conscience can materialize (See CC, M.2012/65, D.2012/128, DD. 20/9/2012).

138. In this sense, the secularism encumbers the state with the negative and positive liabilities. The negative liability entails that the state does not adopt a religion or faith in an official manner and that it does not intervene in the freedom of religion and conscience of the individuals unless there is force majeure. The positive liability brings about the duty of the state to remove the barriers in front of the freedom of religion and conscience, to provide an appropriate environment where the individuals can live as they believe and the opportunities required therefor. The source of the positive liability that the secularism encumbers on the state is Articles 5 and 24 of the Constitution. According to Article 5 of the Constitution, one of the fundamental aims and duties of the State is "*to work in order to remove political, economic and social barriers restricting the fundamental rights and freedoms of the individual in a way which does not accord with the principles of social state of law and justice and to prepare the conditions required for the development of the material and spiritual existence of individuals.*"

139. It is indisputable that the secularism is an indispensable principle and is necessary for the protection of the democratic system in Turkey as specified in the judgment of the Constitutional Court dated 7 March 1989 (See CC, M.1989/1, D.1989/12, DD. 7/3/1989) Nevertheless, the freedom of religion and conscience is also one of the foundations of the democratic societies and the pluralistic secularism understanding becomes the guarantee for the freedom of religion and conscience by allowing for the social visibility and by keeping the individual preferences in the religious subjects outside the intervention, but under the protection of the state (§ 137).

140. One of the main aims of the democratic and secular state is to establish political orders, where the individuals will live together in peace with the faiths they have by protecting the social diversity (§ 135). In the societies, where the pluralistic secularism understanding is accepted, there is an opportunity of ensuring peaceful coexistence of the people, whose faiths, thoughts and lifestyles that are in conflict with each other, and of securing a pluralistic environment in the society, where all types of faiths can express themselves. Seeing the pluralism and social diversity as an element that threatens the social unity without considering these opportunities leads to a monolithic society understanding that does not accord with the democracy.

141. The applicant stated that she also adopted the principle of secularism and that she did not intend to make this principle a question of debate. On the other hand, the secularism needs to have a reasonable basis even if its justification is legitimate and in this respect, sufficient evidence should be presented as to the fact that the behaviors, attitudes or actions of the applicant were in violation of this principle and the evidence should be provided for the justification of the secularism. Provision of the evidence is a test that the ECtHR always applies in its judgments (see (*Kokkinakis v. Greece*, App. No. 14307/88, 25/5/1993, § 49).

142. In order to be able to state that the justification of the secularism has a reasonable basis, it is necessary to show that the headscarf, which the applicant claimed to be

wearing as a religious requirement, is aggressive or intervenes in the faiths of the others, is oppressive, provocative, has an aim of imposing its own faith by force or disrupts the social functioning, causes some disorders and irregularities. However, such a claim was neither stated by the Ministry nor shown in the decision of the 11th Family Court of Ankara.

143. If the only meaning of any manifestation behavior of a religion is interpreting it as a religious challenge against the secular state, then it means ignoring the capacity of the members of this religion to define their own actions. It is possible to accept that the limitation as regards any right enshrined in the Constitution is legitimate not based on the concerns and assumptions, but only by putting forth the facts, which will be indisputable, and the reasons, which are legally unquestionable. The case law of the ECtHR in this aspect is as to the fact that the simple claims are not sufficient in the event that an intervention is made in a fundamental right and freedom and that these claims need to be supported with the concrete examples (*Smith and Grady v. United Kingdom*, App. No. 33985/96 and 33986/96, 27/9/1999, § 89). For this reason, in accordance with the principle of just trial, the responsibility of proving through the concrete evidence that the manifestation behavior of a religion or faith is in contrary to the pluralistic meaning of the secularism does not belong to the applicant, but to the state, which imposes a limitation through this justification. The law predicates on the "*existing*" and no decision can be delivered according to the suspicion and the possibilities in the future.

144. Finally, the consideration of the assumption that the headscarf is a "*religious and political symbol"* that is *" against the secularism*" in the context of the freedom of expression may make it easier for us to evaluate the effects that those who wear the headscarf create on those who do not wear it. The ECtHR has never accepted the interventions made in the freedom of expression with the justification that they are not adopted by everyone and that they may disturb the others. In fact, no limitation has been introduced to the freedom of expression and dissemination of thought with regard to content within the scope of Article 26 of the Constitution, only in areas such as racism, hate speech, war propaganda, encouraging violence and incitation, calls to riot or justifying terrorist acts, which are the borderlands of these freedoms, it was accepted that the State authorities disposed of a broader discretion margin in their interventions (for a judgment of the ECtHR in the same vein see *Gözel and Özer v. Türkiye*, § 43453/04, 31098/05, 6/7/2010 § 56). Then, while the sayings, which may be considered to be encouraging the hatred based on the religion or faith, can be protected within the scope of the freedom of expression of thought (*Gündüz v. Turkey*, App. No: 35071/97, 4/12/2003 § 40); similarly, it is necessary to be based on very important justifications that prevent the others from exercising their rights and freedoms in order for the manifestation of the religion by wearing the headscarf to be prohibited.

145. At this phase, the matter to be examined is whether a reasonable relation of proportionality is really put forth between the tool that the state uses and the aim that it attempts to achieve or not. More serious the different treatment is accepted, more important justifications the state needs to present in order to justify this different treatment. In other words, when there is a potentially serious discrimination, in general, the discretionary area granted to the state will be narrower.

146. After it is stated that no discrimination will be made on the grounds of "*language, race, colour, gender, political opinion, philosophical belief, religion and sect*" in paragraph one of Article 10 of the Constitution, it is also stated in the continuation of the paragraph that no discrimination will be made on the "*similar grounds*". Thus, the Constitution-maker attached special importance to some types of different treatments and listed them by name; moreover, in the same paragraph, the potential scope of the principle of equality and the prohibition of discrimination was not limited by including the principle that

no discrimination will be made on the "*similar grounds*". It should be stated that the Constitution considered the different types of treatment it listed by name as more important and the interventions made in these types may only be justified in the event that "*very important justifications*" are presented.

147. The consideration of a measure taken as proportionate can only be the case in the event that it is not possible to reduce the social conflicts and tensions by protecting the pluralism, which is the requirement of the democracy. Therefore, the state primarily needs to attempt to take the necessary measures in order to reduce the tension by protecting the rights and freedoms of the others and the pluralism, to impose a limitation unless these measures are sufficient and to the extent that the concrete conditions require. No sound decision may be delivered about this subject without questioning to what extent the state fulfills this duty.

148. In the concrete case, it is obvious that the different treatment directed towards the applicant is related to the exercise of the right of the freedom of religion. As no concrete facts were presented except for the abstract evaluation of the 11th Family Court of Ankara as to the fact that the headscarf of the applicant prevented the others from exercising their rights and freedoms, it was not shown which measures were taken in order to protect the pluralism before the limitation of a fundamental right and freedom either. In this case, it cannot be said that the failure to admit the applicant to take part at the hearings by wearing the headscarf is proportionate.

149. In the recommendation that the Parliamentary Assembly of the Council of Europe published in 1999, it was stated that the states had a duty to facilitate the religious practices among the religions including supporting the tolerance, dress (*Recommendation no. 1396*, 27/6/1999, § 8). According to the recommendation, the only opinion that is outside this protection area is the extremist behaviors that prevent the others from exercising their rights and freedoms. Then, in order to be able to assert that the limitations as regards the manifestation behavior of a religion or faith is reasonable, it is necessary to show based on the concrete facts that this behavior has prevented the others from exercising their rights and freedoms. In cases where it cannot be shown that the limitations as regards the religion or faith are reasonable, a discrimination may be made due to the different practices towards those who state that they wear the headscarf in order to fulfill the requirements of that religion and faith and the others.

150. In the international texts in relation to the prohibition of discrimination, it is expected that the states not only do not make any discrimination, but also take necessary measures in order to prevent the discrimination in the entire social life. As a matter of fact, Article 4 of Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of the General Assembly of the United Nations, which is directly related to the subject, stated "*all States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life*".

151. Similarly, in Article 2 of of the International Covenant on Civil and Political Rights as regards the discrimination, the UN also encumbered the states with the duty of preventing the discrimination based on the religion or faith. Article 2 of the aforementioned Covenant is as follows:

> *"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

152. The applicant works as an attorney and, more specifically, the international agreements were ratified in order to prevent that the attorneys are not subjected to any discrimination while performing their professional activities. Article 23 of the UN Basic Principles on the Role of Lawyers (Havana Rules), which was ratified on 7/9/1990, stated "*Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly*". Article 10 of the same declaration imposes the governments the duty of not subjecting the lawyers, like other citizens, to the discrimination due to their belief:

"Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status..."

153. In the concrete case, while no reasonable and objective basis was shown for the prevention of the applicant from taking part at the hearing by wearing the headscarf that she used as required by her religious faiths, no claim as to the fact that the headscarf prevented the others from exercising their rights and freedoms and was the source of the social conflicts and tensions and no data based on the concrete facts could be put forward either. Consequently, an attorney, who wears the headscarf, was put in a disadvantageous situation when compated to those who do not wear the headscarf by preventing her from entering into the hearings.

154. For the aforementioned justifications, it should be decided that Article 10 of the Constitution handled with Article 24 of the Constitution was violated.

c. In Terms of Article 50 of the Law No. 6216

155. The applicant requested that the spiritual compensation of 50,000.00 TL be adjudged.

156. In the opinion of the Ministry of Justice, no opinion was expressed as regards the request of the compensation of the applicant.

157. Paragraph (2) of Article 50 of the Law numbered 6216 with the side heading of *"Decisions"* is as follows:

"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed, In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

158. As it was determined in the current application that Article 24 of the Constitution was violated because the condition of lawfulness for the intervention could not be fulfilled and Article 10 of the Constitution was violated because the female attorneys wearing the headscarf were put in a disadvantageous situation when compared to those who do not wear the headscarf, it should be decided that the file be sent to the relevant Court in order to remove the violation and the consequences thereof.

159. As it was understood that a decision delivered in order to send the file to the relevant Court so as to fulfill what was required by the decision was sufficient compensation for the claim of violation by the applicant although the request of spiritual compensation was made by the applicant, it should be decided that the request of the spiritual compensation by the applicant by dismissed .

160. It should be decided that the trial expenses of 1,706.10 TL in total composed of the fee of 206.10 and the counsel's fee of 1,500.00 TL, which were made by the applicant and determined in accordance with the documents in the file, be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained: it was decided on 25/6/2014

A.

UNANIMOUSLY that the claims of the applicant as to the fact that her right to defense and right to access to the court were violated are INADMISSIBLEdue to "*lack of venue in terms of person*",

her claim as to the fact that Article 24 of the Constitution was violated is ADMISSIBLE,

her claim as to the fact that Article 10 of the Constitution was violated is ADMISSIBLE,

B. BY MAJORITY OF VOTES and the dissenting vote of Zehra Ayla PERKTAŞ that the freedom of religion and conscience guaranteed by Article 24 of the Constitution was VIOLATED,

BY MAJORITY OF VOTES and the dissenting votes of Osman Alifeyyaz PAKSÜT and Zehra Ayla PERKTAŞ that the prohibition of discrimination guaranteed by Article 10 of the Constitution was VIOLATED,

C. that the file be sent to the relevant Court in order for the violation and the consequences thereof be removed,

D. that the request of the spiritual compensation by the applicant be DISMISSED,

E. that the trial expenses of 1,706.10 TL in total composed of the fee of 206.10 and the counsel's fee of 1,500.00 TL, which were made by the applicant be PAID TO THE APPLICANT,

F. That the payments be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment.

President	Deputy President	Deputy President
Haşim KILIÇ	Serruh KALELİ	Alparslan ALTAN

Member Serdar ÖZGÜLDÜR	Member Osman Alifeyyaz PAKSÜT	Member Zehra Ayla PERKTAŞ
Member Recep KÖMÜRCÜ	Member Burhan ÜSTÜN	Member Engin YILDIRIM
Member Nuri NECİPOĞLU	Member Hicabi DURSUN	Member Celal Mümtaz AKINCI
Member Erdal TERCAN	Member Muammer TOPAL	Member Zühtü ARSLAN
Member M. Emin KUZ	Member Hasan Tahsin GÖKCAN	

JUSTIFICATION OF DISSENTING VOTE

1. The system, which is accepted as the European Court of Human Rights (ECtHR) for the examination of the individual applications and adopted in the case law of the Constitutional Court that has gained stability in line with the criteria of the ECtHR since 23.9.2012, is to deliver a judgment as regards the violation and not to carry out an examination as regards the violation and the removal of the violation and not to carry out a separate examination as regards the violation of the prohibition of discrimination (the principle of equality).

2. The Prohibition of Discrimination stipulated in Article 14 of the European Convention on Human Rights (ECHR) and the principle of Equality Before Law in Article 10, which is the equivalent thereof in our Constitution, may not be the subject of a separate examination of a fundamental right on the part of the applicant. Otherwise, in each decision of violation, it is also necessary to deliver a judgment as to the fact that the applicant is subjected to a different treatment when compared to the other individuals that exercise the same fundamental right or freedom in the society at the same time and that accordingly the prohibition of discrimination is violated and, as a matter of fact, such a practice does not accord with the abstract and principal quality of the articles in the ECHR and the Constitution as regards the prohibition of discrimination.

3. In the case, as for the prevention made against the applicant, the professional rules and the case law of the ECtHR and the Constitutional Court were shown as the justifications. Yet, it is known that some attorneys wearing the headscarf could enter into the hearings during the same period upon the judgment of the Council of State. Therefore, the violation of the fundamental right that the applicant was subjected to resulted from the exercise of the discretionary power about the interpretation of the legislation and the different judicial decision by the court.

4. The claims of the applicant were evaluated by the Constitutional Court in terms of the legal basis, the obligation and proportionality in a democratic society and it was decided that the fundamental right in Article 24 of the Constitution had been violated. I totally agree with this part of the judgment. On the other hand, this determination of violation is valid for the special case as regards the application and does not mean that it is necessary to grant an absolute freedom for the religious clothes or symbols just as all the other clothes under every circumstance and condition and in every environment. The evaluations as to the fact that some limitations may be prescribed by law and on the condition that it is necessary and proportionate in a democratic society about the place and form of the rituals and symbols as regards the religion in order to ensure that the public order and the faiths of the others are protected as explained in detail in the judgment of the Constitutional Court numbered M:2008/16, D:2008/116 and in the judgments of the ECtHR referred to in the justification of the judgment prove to be valid.

5. For this reason, I do not agree with the evaluations made in the justification of the judgment in terms of the "*prohibition of discrimination*" which is not directly related to the removal of the violation as regards the freedom of religion and conscience of the applicant.

Member
Osman Alifeyyaz PAKSÜT

JUSTIFICATION OF DISSENTING VOTE

1. The applicant applied with the claim that she works as an attorney registered in Ankara Bar Association, the fact that the judge granted a period to her client in order to for her to be represented by another attorney and postponed the hearing by stating that the hearing would not be held because she participated at a hearing with a headscarf constituted contrariety with the freedom of religion and conscience, the right to defense and the right to access to court, the right to work and the prohibition of discrimination.

2. When it is observed that the applicant performs a duty with a public nature, I do not agree with the counter majority opinion by thinking that there is no violation of a right according to the freedom of religion and conscience stipulated in Article 24 and the principle of equality before law stipulated in Article 10 of the Constitution in terms of the public order as specified in the judgments of the Constitutional Court dated 7.3.1989, numbered M.1989-1 D.1989-12, dated 9.4.1991, numbered M.1990-36 D.1991-8, dated 5.6.2008, numbered M.2008-16 D.2008-116.

Member
Zehra Ayla PERKTAŞ