(Re)interpreting Secularism in a Democratic Society:
A Cursory View of the Case-Law of the Turkish Constitutional Court

by

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Distinguished colleagues,
Ladies and gentlemen,

It is a great pleasure for me to address such distinguished participants. Before I start my speech, I would like to thank my dear friend Professor Arief Hidayat, the Chief Justice of the Constitutional Court of Indonesia for his warm and generous hospitality.

(bu paragraph alttaki paragrafla birleştirilip ikinci cümle en sona alınsa daha iyi olabilir, aşağıdaki şekilde)In my presentation, I argue that the constitutional courts determine the contents and essential features of state ideology enshrined in constitutions. I will substantiate this argument by examining the case-law of the Turkish Constitutional Court on the principle of secularism which is an essential part of the Turkish state ideology and constitutional identity. As the Turkish example reveals, the courts' interpretation and application of state ideology as well as constitutional identity may vary over time.

Before analyzing the changing attitude of the TCC towards the principle of secularism, I would like to say a few words on the role of the constitutional courts in interpreting and upholding the principles that constitute the state ideology and constitutional identity.

1. Conceptual framework

Almost all constitutions include state ideologies or ideological principles and values, whether they are comprehensive or flexible, authoritarian or liberal. Like other constitutional provisions, they are superior and binding principles of the constitution. For instance, the Preamble of the Indonesian Constitution stipulates that the Republic of Indonesia is a state based on "the belief in One and Only God, just and civilized Humanity, the Unity of Indonesia and a Democratic Life". Article 1 of the French Constitution states that "France is an indivisible, secular, democratic and social Republic".

Likewise, the Preamble and many other articles of the Turkish Constitution contain principles that characterize the constitutional identity of Turkey. According to Article 2 of the Constitution, the Republic of Turkey is a secular, democratic and social state governed by the rule of law. Respecting human rights, loyalty to nationalism of Atatürk, and indivisibility of the state (Article 3) are also among the features of the Turkish constitutional identity.

The main task of the constitutional courts is to uphold constitutional identity based on both ideology and other constitutional principles such as supremacy of constitution, separation of powers, rule of law, and democracy. In democracies the Constitutional Courts act as the guardian of democratic order. Therefore they have a duty to interpret the ideological principles in accordance with democracy.

The concept of constitutional identity is dynamic and dialogical in the sense that it has been the product of historical, socio-political developments and of the interactions among different stakeholders in society. In other words, constitutional identity is subject to change over time depending on the legal paradigms of interpreters and understanding of the people at large.

In this regard, secularism is an essential part of the state ideology and therefore constitutional identity of Turkey. Even though the principle of secularism is an eternal clause of the Constitution, "its specific content would vary over time, tethered to the text, but only loosely, so as to accommodate the dialogical interactions between codified foundational aspirations and the evolving mores of the Turkish people".[1]

Since the principles of state ideology as well as other principles of constitutional identity are very abstract, they have to be interpreted and applied by constitutional courts. Indeed, constitutional adjudication is an act of interpretation that constitutes a "process by which a judge comes to understand and express the meaning of an authoritative text [the Constitution] and the values embodied in that text".[2]

2. The Legal Paradigms in (Re)Interpreting the Principle of Secularism

In 1937, the Turkish Constitution was amended to adopt secularism (or *laicite* in French) together with five other principles of Kemalism or Ataturkism, which is the official state ideology. Since then secularism is one of the fundamental principles that has been included in the Turkish constitutions. The concept of secularism is stipulated in the Preamble and a number of articles of the Constitution.

[1]Gary Jeffrey Jacobsohn, *Constitutional Identity*, (Cambridge: Harvard University Press, 2010), p.14.
[2] Owen M. Fiss, "Objectivity and Interpretation", *Stanford Law Review* 34 (1982): 739–63, at 739.

Ever since the establishment of the Turkish Constitutional Court in 1962, the issue of protecting state ideology by the judiciary has always been the subject of heated debate in Turkey. The judgments of the TCC involving the interpretation and application of the principles of state ideology, secularism in particular, have been fiercely debated among legal and academic circles.

I argue that there are two possible yet conflicting paradigms that may be adopted in interpreting the basic constitutional principles including secularism. The first legal paradigm may be called "ideology-based" which favors the state and society over the individual. This paradigm reflects a positivist, one-dimensional, monolithic, and authoritarian outlook.

The other is the "rights-based" paradigm which gives priority to individuals and their rights *vis-a`-vis* every kind of social and political association. The rights- based paradigm is pluralist in the sense that it envisages a political (and legal) sphere that is open to competing conceptions of good. This public sphere embraces those unrepresented, marginalized, and excluded 'others.'[3] The rights-based paradigm does not seek to silence the voices that are different from, and sometimes contrary to, the official discourse.[4] These two paradigms may also be called as "ideology-based" and "rights-based" approaches to constitutional issues.

For the sake of my argument, I want to note that during the first fifty years of its work the TCC adopted an ideology-based approach to secularism, while for the last five years the Court has adopted a rights-based approach.

3. The Age of "Monolithic" Laicite (1962-2012)

The ideology-based paradigm of the TCC is revealed in cases involving the dissolution of political parties and the ban on Islamic headscarf (*başörtüsü*). The TCC dissolved some political parties on the ground that either their statutes and programs or their discourses and activities were contrary to the principle of secularism. In 1971, the National Order Party (*Milli Nizam Partisi*) was dissolved because the Party defended, among others, the adoption of compulsory

[3] For the concept of the 'other' and his/her rights, see Zühtü Arslan, "Taking Rights Less Seriously: Postmodernism and Human Rights*", Res Publica*, 5 (1999): 195– 215.
[4]Zühtü Arslan, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court", *Critique: Critical Middle Eastern Studies,* 11/1 (Spring 2002): 9-25.

religious instruction at schools which was found in breach of secularism.[5] Likewise, the Court closed down the Prosperous Party (*Huzur Partisi*) for violating the principle of secularism on the ground that the party program proposed to include religious courses in the curriculums of the universities.[6] Welfare Party (*Refah Partisi*) and Virtue Party (*Fazilet Partisi*) were dissolved for becoming the "center" (focal point) of activities against secularism. Relatively recently, the Justice and Development Party (AK Parti) escaped from being dissolved by one vote only. Nonetheless, the Court ruled that AK Parti must be prevented from receiving financial state aid on the basis that it became the "center" (focal point) of activities against secularism.

We may now turn to the very interesting narrative of the headscarf in Turkey. In 1988, an Act of Parliament (Law 3511) was passed to lift what was known as the "headscarf ban" in the universities. The Law stipulated, "[within the buildings of the universities] it shall be permitted to cover for religious reasons their heads and necks with a headscarf or turban".

The Constitutional Court invalidated this Law in 1989.[7] The basic question, according to the Constitutional Court, was whether a law could be enacted on the basis of religious rules. The Court responded to this question in the negative, and found the Law to contravene the Preamble, and Articles 2, 24, and 174 of the Constitution.

The Constitutional Court first declared that the principles of secularism and nationalism of Kemalism guaranteed in the Preamble and Article 2 of the Constitution made it impossible to view this Law as constitutional. In this instance, the Court explicitly ruled out the possibility that there may be some "democratic rights" which are in conflict with the principle of secularism.

The Court reluctantly also conceded that secularism might in fact be incompatible with the protection of rights and freedoms. In the Court's view, the Constitution is extremely vigilant to protect the principle of secularism against freedoms; 'it does not sacrifice this principle for the sake of liberties'. It is obvious that the Court conceived secularism as an "ultra-constitutional norm" that determines the boundary of the rights. However, a certain definition of secularism was not given by the Court, though it said that the principle of secularism could not be seen as

[5] E.1971/1 (Parti kapatılması), K. 1971/1, 20/5/1971.
[6] E.1983/2 (Parti Kapatma), K. 1983/2, 25/10/1983.
[7] E. 1989/1, K.1989/12, 7/3/1989.

a mere separation of religion and the state, and it must be interpreted according to the social and political conditions in Turkey.

More interestingly, the Constitutional Court asserted that the law had nothing to do with freedom of religion and conscience as protected by Article 24 of the Constitution. This is perhaps the only point in which the European Court of Human Rights differs from the Constitutional Court. The later conceives the wearing of the Islamic headscarf as a matter of freedom of religion but finds the restriction on this freedom necessary in a democratic society.[8] Nonetheless, the Strasbourg Court's endorsement of the ban on the headscarf for university students has by no means ended the controversy in Turkey.

In 2008, the parliament amended Articles 10 and 42 of the Constitution in order to remove the headscarf ban at universities. Referring to its previous case-law and to the decisions of the Strasbourg Court, the TCC annulled these constitutional provisions on the ground that they contravened the eternal (unamendable) principle of secularism.[9] Less than two months later in the case against the Justice and Development Party (JDP), the TCC regarded this attempt to end headscarf ban through constitutional amendment as an evidence that JDP become the focal point of activities against the principle of secularism.[10]

The fundamental flaw in these judgments of the Constitutional Court lies in its reading of the law and constitutional provisions. The Court obviously founded this interpretation of these legal/constitutional provisions on the assumption that wearing headscarf was nothing but an indication of so-called "political Islam".

As a matter of fact, for those wearing headscarf, it is obviously a religious obligation, and it therefore constitutes a subject of freedom of religion and conscience. A rights-based approach would entail handling the case in this way. The Constitutional Court, however, misconceptualized the problem, and (mis)construed the above-mentioned provisions to restrict (or deny) the fundamental freedom of religion and conscious, simply because it adopted an "ideology-based" approach towards the principle of secularism.

[8] *Leyla Şahin v. Turkey* (GC), App. No: 44774/98, 10 November 2005.
[9] E. 2008/16, K. 2008/116, 5/6/2008.
[10] E. 2008/1 (Siyasi Parti Kapatma), K. 2008/2, 30/7/2008.

4. Introducing "Pluralistic" Secularism (2012- ….)

The adoption of constitutional complaint (individual application) by 2010 constitutional amendment has triggered a radical paradigm shift in the jurisprudence of the TCC. The constitutional rights, including freedom of religion and conscience, were invoked by individuals through constitutional complaint. In examining individual complaints, The TCC has started to employ a rights-based paradigm when interpreting and applying the constitutional rules and principles.

Indeed, this paradigm shift may be traced in the field of both constitutionality review and individual constitutional complaint. Two judgments of the TCC will illustrate the reinterpretation of the principle of secularism in a rather liberal way.

a) Elective Religious Courses and Secularism (2012)

In a judgment of 20 September 2012, three days before the constitutional amendment on individual application came into force, TCC reinterpreted and applied the principle of secularism. The Court found constitutional the legal provisions which introduced elected courses of "Kur'an al-Kerim" and "Siyer" (The Life of the Prophet) into the curriculum of secondary schools.

The TCC declared that the Constitution considers "secularism as "a political principle that determines the position of the state against the religious faiths". In this regard it is "a quality of the state, not the individual or society".[11]

By shifting to a flexible and liberal understanding of secularism, the Court stated that religion, as a historical and sociological phenomenon, has played a significant role in shaping the identities of individuals. A secular state, therefore, must not prevent individuals from having and expressing their religions and faiths.

Further, the Court has emphasized the importance of freedom of religion and conscience in a secular and democratic society. Under the TCC's new approach, the concept of secularism

[11]See E. 2012/65, K.2012/128, 20/9/2012.

should not be interpreted as a principle that entails the suppression of religious belief. On the contrary, secularism guarantees the practice and implementation of religious faith provided that they do not harm others. In short, freedom of religion and conscience is an essential requirement of secularism.

Given the diversity of religions and beliefs, the democratic and secular state must aim to establish a political order where the individuals live together in peace with their different religions, beliefs or disbeliefs. In other words, according to the Court, the primary task of the secular state is to secure a pluralistic environment where all types of faiths can freely express themselves.

The Court has also pointed out that this pluralistic understanding of secularism imposes negative and positive obligations on the state. The negative obligations entail that the state must not adopt an official religion or faith and that it must not intervene in the freedom of religion of individuals in the absence of compelling reasons.

The positive obligation of the state is (a) to remove the obstacles to the protection of freedom of religion and conscience, and (b) to take necessary measures through which individuals have the opportunity to learn and practice their religions. Therefore, the Court reached the conclusion that the introduction of elective courses of "*Kur'an*" and "*Siyer*" in the curriculum of the schools was not in contradiction with the principle of secularism.[12]

b) Wearing of Headscarf in a Court room and Secularism (2014)

The TCC dealt with the headscarf issue once again in a case of individual application where the applicant claimed that her freedom of religion and right to equality were violated.[13] The case concerned a lawyer's expulsion from a courtroom for wearing headscarf. The trial judge decided that the lawyer's presence in the hearing with her headscarf was contrary to the

[12]*Ibid*.
[13]See *Tuğba Arslan*, Application No: 2014/256, 25/6/2014.
http://www.constitutionalcourt.gov.tr/inlinepages/leadingjudgements/IndividualApplication/judgment/2014-256.pdf

principle of secularism under the case-law of the Turkish Constitutional Court and the European Court of Human Rights.[14]

After examining its judgments of 1989 and 1991, as well as Leyla Şahin judgment of the Strasbourg Court, the TCC reached the conclusion that intervention in the applicant's freedom of religion did not meet the constitutional requirement of "lawfulness". This was so because there was no law preventing any lawyer from wearing headscarf at courtrooms.[15]

The TCC also held that no reasonable and objective basis was presented for preventing the applicant from taking part at the courtroom by wearing headscarf for her religious convictions. Therefore, since the applicant was put in a disadvantageous situation compared to those female lawyers who do not wear headscarf, the prohibition of discrimination guaranteed by Article 10 of the Constitution was violated.[16]

5. Europe's headscarf problem and "living together"

There is no doubt that we live in a pluralistic society with different and often conflicting ideologies, beliefs and conception of goods. The main purpose of constitutions must be to provide a legal/political framework to protect and maintain the differences of individuals. At its heart, pluralism requires the coexistence of individuals with their identities.[17]

The headscarf issue poses a formidable challenge for the European democracy. The European Court of Human Rights has left contracting states an extremely wide margin of appreciation in regulating the wear of headscarf at the public institutions as well as at public space. For the Court, since there is no European consensus on this issue, the state authorities are in a better position than an international court to regulate the dress code of individuals.

The Court found no violation of Article 9 of the European Convention in cases of *Dahlab* and *Leyla Şahin*, which concerned the ban on wearing headscarf by a primary school teacher and

[14]The trial judge held that "*the attorneys cannot wear head scarf during hearings 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 secularism*". *Tuğba Arslan*, par. 92.
[15]*Tuğba Arslan*, pars. 93-100.
[16]*Tuğba Arslan*, pars. 153-154.
[17]*Tuğba Arslan*, par. 129.

university students, respectively.[18] More recently the Strasbourg Court held that the blanket ban on full-face veiling was justifiable on the basis that it aimed to guarantee the conditions of "living together" as an element of the protection of rights and freedoms of others.[19]

Likewise, the Court of Justice of the European Union rejected discrimination claims of a Muslim worker who was fired because of her headscarf. The European Court of Justice stated that the employers may impose a general ban on employees as to wearing religious symbols. So far as it does not single out a special religion or belief it cannot be regarded as direct discrimination. For the Court it wouldn't constitute indirect discrimination either if it aims at adopting the policy of neutrality.[20]

Conclusion

While the European Courts continue to avoid headscarf issue by handling it as an exceptional matter instead of a core human rights problem, TCC has shifted its direction to apply constitutional principles to favor the individual and human rights rather than state ideology. By adopting a rights-based approach since 2012, the TCC has started to interpret secularism as a principle that is in harmony with fundamental human rights and democratic society.

As exemplified by the experience of the TCC, it is very difficult, if not impossible, to sustain the position of militant secularism in a pluralistic society. The best and perhaps only way of accommodating religious differences and securing the condition of "living together" is to abandon ideology-based paradigm and adopt instead a rights-based approach to constitutional principles, such as secularism.

[18]See *Dahlab v. Switzerland*, App. No: 42393/98, 15/2/2001; *Leyla Şahin v. Turkey* (GC), App. No: 44774/98, 10 November 2005.
[19]*S.A.S v. France*, App. No: 43835/11, 1/7/2014; *Belcacemi and Oussar v. Belgium*, App. No: 37798/13, 11 July 2017.
[20]*Samira Achbita v. Belgium*, Case C-167/15, 14 March 2017.