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RESEARCH ARTICLE

Recent Developments on the Question of Religion Courses: An Analysis of a Turkish Constitutional Courts's Decision in 2022

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Abstract

In this study, the decision of the Turkish Constitutional Court in 2022 regarding the compulsory religion classes, Hüseyin El and Nazlı Şirin El, was analyzed. The decision was criticized on the following eight points: (1) Although the correct decision was quite apparent, the Constitutional Court found a violation by only one vote. It created an unsafe situation. (2) The Constitutional Court established the violation too late. It weakened the objective effect of the decision. (3) The Constitutional Court referred to crucial international materials but did not consider their merits. (4) The Constitutional Court based its decision on the violation with reference to the decisions of the European Court of Human Rights but it missed the chance to make a much deeper analysis. (5) The Constitutional Court ignored the original and alternative theses in Turkish literature. (6) The Constitutional Court made controversial inferences regarding the principle of laicism, especially in the context of the doctrine of positive obligations. (7) The Ministry of Justice misrepresented the European Court of Human Rights judgments. (8) The application was not prepared professionally and powerfully enough.

Keywords

Turkish Constitutional Court, European Court of Human Rights, Compulsory Religion Course, Religious Culture and Moral Knowledge, Secularism

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Introduction

Compulsory religious lessons are one of Turkiye's chronic problems in human rights law. There were two judgments[1] delivered by the European Court of Human Rights (hereafter 'the ECtHR') and a considerable number of articles[2] published on the issue in English. In this respect, the problem was clearly identified at the international level, and some suggestions were put forward. Therefore, the government's responsibility was to take steps to solve the problem. However, the expected steps were not taken because it is a 'sensitive' issue for the conservative AK Party government, which has been in power for more than 20 years.[3] Nevertheless, the Turkish Constitutional Court (hereafter 'the TCC' or 'the Court') did what the AK Party government failed to do and contributed to the solution of the problem by delivering a violation decision in an individual application.[4]

This study examined the TCC's related decision published in the Official Gazette on July 28, 2022.[5]

I. The Background of the Case

The first applicant was the father of the second applicant, who was studying in the fourth grade of primary school in 2009. The first applicant requested that the school principal exempt his daughter (the second applicant) from the religious culture and ethics lesson (hereafter, 'the RCE'). However, the request was rejected with references to a document by the General Directorate of Primary Education of the Ministry of National Education and a decision of the High Council of Education and Training. According to the decision, among Turkish citizens, only students who belonged to the religions of Christianity or Judaism could be exempted from the said course if they could prove they belong to one of these religions. He subsequently applied to the civil registry office. He requested the removal of 'Islam' from his daughter's identity card and that the box be left blank or the phrase 'atheist' be written in the box.[6] The

1 *Hasan and Eylem Zengin v Turkey,* App no 1448/04 (ECtHR, 09 October 2007), *Mansur Yalçın v. Turkey,* App no 21163/11 (ECtHR, 16 September 2014)

2 Among many articles, see Olgun Akbulut and Zeynep Oya Usal, 'Parental Religious Rights vs. Compulsory Religious Education in Turkey' (2008) 15 Int. J. Minor. Group Rights 433; Özgür Heval Çınar, 'Compulsory Religious Education in Turkey' (2013) 8 Religion & Human Rights 223; Özgür Heval Çınar, 'An Unsolved Issue: Religious Education in International Human Rights Law and Case of Turkey' in Mine Yıldırım and Özgür Heval Çınar (eds), Freedom of Religion and Belief in Turkey (CSP 2014) 185; Ceren Özgül, 'Freedom of Religion, the ECtHR and Grassroots Mobilization on Religious Education in Turkey' (2019) 12(1) Politics and Religion 103

3 Olgun Akbulut, 'Turkey's Reaction to the Judgments of the European Court of Human Rights' (2015) 5 Int J Multidiscip 75, 80; Mine Yıldırım, 'Are Turkey's Restrictions on Freedom of Religion or Belief Permissible?' (2020) Religion & Human Rights 172, 187

4 *Hüseyin El ve Nazlı Şirin El,* App no 2014/15345 (AYM, 07 April 2022)

5 Official Gazette of 28 July 2022, Nr. 31906 <https://www.resmigazete.gov.tr/eskiler/2022/07/20220728-18.pdf> accessed 28 July 2022

6 The religion section in the identity card is another human rights violation issue in Turkey. For more information see Selin Esen and Levent Gönenç, 'Religious Information on Identity Cards: A Turkish Debate' (2008) 23(2) JLR 579; Berke Özenç, 'The Religion Box on Identity Cards as a Means to Understand the Turkish Type of Secularism' in in Mine Yıldırım and Özgür Heval Çınar (eds), Freedom of Religion and Belief in Turkey (CSP 2014) 89. For the ECtHR's approach, see *Sinan Işık v Turkey,* App no 21924/05 (ECtHR 02 February 2010)

civil registry office accepted the request and removed the phrase 'Islam' from his daughter's identity card.

The applicant filed an annulment action in the administrative jurisdiction against the rejection of his request for exemption from the RCE class by stating that there was no longer an Islam inscription on his daughter's identity card.

The first-instance court accepted the request for exemption in 2011, referring to a decision of the TCC in 1998[7] and *Hasan and Eylem Zengin* case of the ECtHR. For the first-instance court, this lesson's content included 'religious education,' although the course was called RCE. Consequently, the applicant's case was accepted since the Constitution (article 24) stipulated that religious education depends on the request of the minor's legal representative.

However, the Council of State (hereinafter 'the CoS') overturned the decision. First, according to the CoS, the RCE lesson was not a ''religious education' course; it did not indoctrinate a specific religion, and its content included teaching religions objectively. Secondly, the Presidency of the High Council of Education and Training granted an exemption only to students belonging to Christian or Jewish religions. Finally, the first-instance court extended the administration's decision and delivered a new decision on the nature of an administrative act and transaction.

The applicant then tried to request a revision of the decision from The CoS, and he applied to the TCC since the result did not change.

II. The Applicants' Arguments

The applicants claimed many violations. According to them, the fact that the second applicant was forced to attend a class on a religion to which she was not a member violated both 'freedom of religion and conscience' and 'the right of parents to ensure education and teaching in conformity with their own religious and convictions.' Moreover, they claimed that the following two situations violated their freedom of religion and conscience: (i) they had to reveal their religious and philosophical beliefs and convictions upon the response letter of the administration in response to their exemption requests, (ii) selection of the experts in the related case from 'the area responsible for matters related to the Religion of Islam' violated the freedoms of religion and conscience.[8]

For the applicants, the following two situations violated their right to a fair trial: (i) the examination was not conducted by an impartial and independent panel of experts,

7 Although the decision was not directly related to compulsory religious classes, it emphasized the importance of a laic education in Turkey. E. 1997/62, K. 1998/52 (AYM, 16 September 1998)

8 *Hüseyin El ve Nazlı Şirin El*, §194

and (ii) the first-instance court found that the applicants did not complain that the lesson violated their religious or philosophical beliefs, although they explicitly emphasized the point.[9]

III. Arguments of the Ministry of Justice

The individual application system in Turkey did not require an adversarial procedure. However, the Ministry of Justice was entitled to give opinions on the cases before the TCC. These opinions could be in favor of or against the applicant, or they could be neutral. In this case, the Ministry of Justice explicitly developed some theses against the application.

Six of the Ministry's arguments explained why the relevant ECtHR judgments could not be taken into account in the given case:[10]

Firstly, unlike Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution does not guarantee 'the right of parents to ensure education and teaching in conformity with their own religious and convictions.' Therefore, since the scope of the constitutional complaint was limited to 'one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights (hereafter 'the ECHR' or 'the Convention'), which the Constitution guaranteed under its article 148, the application could be found inadmissible *ratione materiae*.

Secondly, the related lesson was constitutionally compulsory; therefore, the TCC could handle the case differently than the ECtHR, which considered the Convention and not the Constitution.[11]

Thirdly, the provision that 'other religious education and instruction shall be subject to the individual's own desire, and to the request of their legal representatives in the case of minors,' which was written in Article 24(4) of the Constitution, proves that this course was objective.

Fourthly, *Valsamis v Greece*[12] and *Folgerø and others v Norway*[13] showed that the organization and planning of the curriculum were primarily under the authority of the state parties, and the Ministry enjoyed a wide margin of appreciation.

9 *Hüseyin El ve Nazlı Şirin El*, §194

10 *Hüseyin El ve Nazlı Şirin El*, §133

11 Art. 24/4 of the Constitution: 'Instruction in religious culture and ethics shall be one of the compulsory lessons in the curricula of primary and secondary schools.'

12 *Valsamis v Greece,* App no. 21787/93 (ECtHR, 18 December 1996)

13 *Folgerø et al. v Norway,* App no. 15472/02 (ECtHR, 29 June 2007)

Fifthly, the existence of terrorist organizations (such as FETÖ/PDY and ISIS) that abused religion in Turkiye made the relevant lesson much more important in a Turkish context.

Sixthly, as shown by *Osmanoğlu and Kocabaş v Switzerland*[14], the aim of preventing social exclusion must be considered in courses aimed at integrating citizens from different cultures and religions. According to the Ministry:

> 'In the decision above, the ECtHR evaluated that the compulsory swimming lesson aimed at integrating foreigners from different cultures and religions and that the measure in question was aimed at preventing the social exclusion of international students, and it was observed that the Court considered the special situation.'[15]

These six arguments of the Ministry focused on why the ECtHR case-law could not be applied technically in the given case.[16] Additionally, the defense of the Ministry regarding the said course was as follows:

> The new RCE course syllabus is currently being implemented, and this course aims to comply with the principles of pluralism and impartiality envisaged in Protocol no. 1, Article 2 of the ECtHR. Accordingly, different cultures and their religious values have been given in the new RCE course curricula introduced in the 2011-2012 academic year. In this direction, it aims to teach in order to recognize, understand and empathize with differences with a supra-denominational approach and a model that opens to religions. The unifying model of the supra-sectarian religious education approach lasted until the 2000s, and the RCE course curricula evolved into a pluralistic model after 2000.
>
> RCE course curricula include not only religious thoughts and movements in Turkey but also different religious beliefs and cultures such as Judaism, Christianity, Buddhism, Hinduism, Sikhism, Shintoism and Taoism. It also aims to approach its members with tolerance by recognizing the essential characteristics of other religions. In this context, the RCE lesson is compatible with having basic knowledge about the different religions and belief systems and their diversity in line with the Toledo principles. The lesson does not aim to impose any religious or denominational understanding and seeks to inform students objectively about RCE subjects.[17]

IV. Aspects Related to Admissibility

The TCC emphasized two points regarding the admissibility of the application. The first one was *ratione materiae*. However, the TCC readily overcame the problem by stating that the guarantees stipulated in Article 2 of Protocol no.1 were also safeguarded under the Constitution.[18]

14 *Osmanoğlu and Kocabaş v Switzerland,* App no. 29086/12 (ECtHR, 10 January 2017)

15 *Hüseyin El ve Nazlı Şirin El*, §133

16 For the Ministry, the given case is more similar to *Hasan and Eylem Zengin v Turkey* than to *Mansur Yalçın v Turkey*, as there is an exemption request.

17 *Hüseyin El ve Nazlı Şirin El*, §133

18 *Hüseyin El ve Nazlı Şirin El*, §140

The second controversial issue on admissibility was related to the rule to exhaust all other remedies. The first applicant filed a lawsuit in the name of the second applicant (his daughter), as the addressee of the refusal was his daughter on the rejection of his daughter's request to be exempted from the lesson. The majority of the TCC (despite the dissenting opinion of six members) concluded that the refusal of the first applicant's request for the exemption of his daughter from the lesson was directly related to the applicant's right to religious and philosophical beliefs respected in education and training as a parent, even though the first applicant was not technically a party to the proceedings before the lower courts.[19]

V. Merits of the Case

In this case, the TCC thoroughly explained the history of the developments in religious education in Turkiye by citing the relevant legislation and preparatory works and decisions. Moreover, in terms of international law, it cited the Universal Declaration of Human Rights (art. 26), International Covenant on Civil and Political Rights (art. 18), International Covenant on Economic, Social and Cultural Rights (art. 13), Convention on the Rights of the Child (art. 14), Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools, reports of the European Commission against Racism and Intolerance and the leading cases of the ECtHR.[20]

The TCC, which included these sources and claims of the parties in its decision, proceeded with its considerations on the merits. According to the TCC, the essence of the problem was simple: Article 24 of the Constitution stated that 'instruction in religious culture and ethics shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and teaching shall be subject to the individual's own desire and the request of their legal representatives in the case of minors.' Therefore, the crucial point of the given case was whether the RCE that the applicant took could be qualified as optional religious education and training, exceeding the extents of religious culture and moral education, which is stipulated as compulsory according to the Constitution.

The TCC focused on the curriculum of the first applicant's daughter at the time, which was also the subject of the judgment of *Mansur Yalçın and others* against Turkiye. Therefore, the TCC has excluded the revised curriculum in the 2018-2019 academic year, as it did not apply to the applicants.

The TCC primarily noted historical and legal developments about the lesson in question including cases like *Hasan and Eylem Zengin*, *Mansur Yalçın and others* and various cases concluded by The CoS.

19 *Hüseyin El ve Nazlı Şirin El*, §150. AYM also reffered to the *Kapmaz v Turkey,* App no 13716/12, (ECtHR, 07 January 2020)

20 *Hüseyin El ve Nazlı Şirin El*, §98-130

The references to The CoS's case-law were quite remarkable:

> The Council of State foundit is unlawful that the request for exemption from RCE lessons, referring mainly to the ECtHR's findings in *Mansur Yalçın and others v Turkey* and *Hasan and Eylem Zengin v Turkey*, which concluded that 'the RCE is not taught objectively and rationally within the understanding of pluralism' in our country.

Expressing that it has examined the RCE curriculum (between 2005-2018) in detail and considering the decisions of the ECtHR and the previous decisions of The CoS, the TCC concluded as follows:

> In terms of the aforementioned (2005-2018) curriculum, there is no reason to depart from the conclusion of the ECtHR, stating that the curriculum primarily includes information about the religion of Islam and that the changes made in the course curriculum do not result in an actual revision in terms of the main components of this course, and the conclusion of the Council of State, stating that an RCE lesson is not given objectively within the understanding of pluralism in our country.

The CoS's decision to change its ongoing approach in 2017 and declaring that the course complies with the Constitution, the TCC noted that the reasons for this case-law change were not disclosed. After these evaluations, the TCC concluded as follows:

> (…) Until the 2018-2019 academic year, the RCE course curriculum is not within the scope of religious culture education, which is expected to be compulsory to provide objective and introductory information about religions. It has been evaluated within the scope of its original interpretation that goes beyond the education and training of the religion of Islam and the teaching of religious culture. Therefore, the failure to provide suitable alternatives to the applicant, who did not want his daughter to take the RCE course mentioned above, violated the right to demand respect for parents' religious and philosophical beliefs in education and training.

After concluding the result above, the TCC considered it necessary to clarify two points to avoid misunderstandings.

First, it emphasized that the judgment was not against the RCE lesson itself but its content until 2018 by referring to the former case-law. According to the referred case-law; 'measures and practices that offer options to people in the context of religious education and training and facilitate meeting the widespread and common needs of individuals who make up the society' and the fact that 'the lessons of 'The Holy Quran' and 'The Life of Our Prophet' are optional elective courses in secondary and high schools' were not unconstitutional.[21]

Secondly, religious education and training were among the state's positive obligations within the scope of freedom of religion and conscience.[22]

21 E. 2012/65, K. 2012/128 (AYM, 20 September 2012)

22 E. 2012/65, K. 2012/128 (AYM, 20 September 2012)

VI. Dissenting Opinions

There are six dissenting opinions on admissibility and seven dissenting opinions on merits.

According to the members of the minority, the application was problematic both because the father did not have a lawsuit filed on his behalf and the mother of the second applicant was not consulted. In the TCC's view, the father's application could be rejected on the ground that remedies had not been exhausted. On the other hand, whether the mother has permission to apply for this application or not should be examined since article 341 of the Turkish Civil Code provided that 'the right to determine the religious education of the child belongs to the parents.' The second applicant, a minor in the case before the administrative judiciary, came of age while the case before the TCC was being examined. Therefore, the application was not found admissible without asking whether it was authorized for this case.

For the minority, there was also a problem related to the scope of the examination. According to them, problematic and objectionable aspects of the RCE lesson that his daughter was forced to attend were not specified by the first applicant in the petition to the administration or at the administrative adjudication stage. Furthermore, their petitions did not discuss which beliefs or philosophical thoughts were included more and less or which concrete situations led the course to turn into religious education. As the applicants stated that they only wanted to be exempted from the course and did not submit any specific data in this regard, it was not deemed possible to examine the merits of the case.

On the other hand, another notable argument of the minority concerning the merits of the case was the necessity of an examination by an expert:

> (…) The principles set forth both in the case-laws of the Council of State and in the decisions of the ECtHR and the above-mentioned explanations shall be submitted to a committee that will consist of faculty members specialized in fields such as philosophy, sociology, psychology, religious education, and pedagogy in the relevant faculties of our universities such as theology, education, medicine, and law. A decision should be made by observing the principles determined in the report to be prepared consequent to the examination in order to determine the principles that are compatible with international objective standards regarding the content of the RCE lessons in our country.

Finally, it was observed that minority members agreed with the arguments of the Ministry of Justice in general and explained why the RCE lesson was essential for Turkiye. Some of these explanations will be further analyzed below.

VII. Eight Comments

First of all, it should be noted that the decision was crucial considering the authoritarian conditions of Turkiye and the power of the political Islam movement.

However, this significance did not hinder the criticism of the decision. On the contrary, the decision was criticized based on a minimum of eight aspects.

1. Swing Justices

The first remarkable point in the decision was that it was delivered by one vote. Seven of the fifteen members of the Court found that there was no violation in the present case. Undoubtedly, there may be a difference of opinion in some cases. Still, it was thought-provoking that the decision remained on the edge of an issue where the ECtHR has given a violation decision twice. However, it was not surprising considering the Court's inconsistent decisions in recent years. The probable reason for that is the ongoing grouping among its members.

The members are categorized by the President who appointed the member. Six members (Kadri Özkaya, Recai Akyel, Yıldız Seferinoğlu, Selahaddin Menteş, Basri Bağcı, İrfan Fidan) appointed by President Recep Tayyip Erdoğan tend to deviate from international human rights law standards in cases with a 'sensitive' nature for the government. The four members (Zühtü Arslan, Hasan Tahsin Gökcan, Engin Yıldırım, Emin Kuz) appointed by President Abdullah Gül insist on these standards. Two members break the pattern. Judge Yusuf Şevki Hakyemez, appointed by president Erdoğan, usually moves with the second group, while judge Muammer Topal, appointed by president Gül, often moves with the first group.

Those interested in the topic can review recent decisions where such trends are visible. For example, *Mehmet Osman Kavala* and *Cem Sarısülük and others* decisions regarding the Gezi Park protests; *Müyesser Uğur* and *Fikri Sağlar* decisions regarding dissident journalists; the *Umut Congar* decision related to the Kurdish issue; The *Yasin Agin and others* decision regarding anti-government protests and the decisions of *Gülistan Atasoy and others* and *Yağmur Erşan* regarding the State of Emergency Decrees are some of the examples that present the division mentioned above.[23]

Therefore, viewing through the lens of Presidential appointments, the first group, namely the group of members appointed by President Erdoğan, appears to be more powerful with a distribution of seven to five votes in the Court. That being so, there are also three other members elected by the Turkish Grand National Assembly. In most cases, these three members determine the fate of the decision. Since the preferences of these members are determinative, the TCC can deliver surprising decisions.

23 *Mehmet Osman Kavala (2),* App no. 2020/13893 (AYM, 29 December 2020), *Cem Sarısülük and Others,* App no. 2015/16451 (AYM, 15 December 2021), *Müyesser Uğur,* App no. 2020/18546 (AYM, 07 April 2022) *Durmuş Fikri Sağlar (2),* App no. 2017/29735 (AYM, 17 March 2021), *Umut Çongar,* App no. 2017/36905 (21 October 2021), *Yasin Agin and Others* App no. 2017/32534, (AYM, 21 January 2021) *Gülistan Atasoy and Others,* App no. 2017/15845, (AYM, 21 January 2021)

Transitions sometimes occur between groups. For example, the change in the approach of judge Basri Bağcı, appointed by President Erdoğan, seemed to have played a role in the delicate balance in the given case. Bearing that judge Basri Bağcı voted against the admissibility issue, it is quite possible that the opposite could be decided in a future case.

2. Delayed Justice

The second issue related to the decision was the time it took to reach a conclusion. The father-daughter complained about the lesson first and started their struggle in 2009.[24] The TCC delivered its decision thirteen years later, in 2022. Although the process before the administrative judiciary was not short, the main problem was at the TCC stage because eight out of these thirteen years passed before the TCC.

It was impossible to argue that the delay was due to a workload problem because (according to the statistics published by the TCC itself), the TCC ruled on almost 20 thousand applications made in 2014. According to the statistics published in 2018, the number of pending cases from 2014 is 148. This number decreased to 61 in 2019, 44 in 2020, and 38 in 2021 and remained the same until April, when the individual application was concluded.[25]

Based on this data, we understand that the finalization of the application was deliberately delayed and it was possible to conclude it earlier. However, how could the file be pending? We do not know this officially. However, we can point to the source of the problem. The problem arose from Article 13 of the Constitutional Court Law.[26] The provision in question granted the President of the Court the authority 'to set the agenda of the General Assembly and the sections whenever required'. Still, it leaves the criteria for exercising this authority unclear.

The arbitrariness, which cannot be controlled transparently, has led to at least three additional problems:

> First, the second applicant Nazlı Şirin El, a nine-year-old fourth-year primary school student in 2009 when the dispute arose, is currently a twenty-two-year-old university student.[27] The delay of the TCC forced her to take an unconstitutional lesson in her education until university.

Second, the ECtHR decided on this issue in 2007 and subsequently in 2014. TCC also based its decision on this case-law. However, the TCC did not act quick enough to implement these decisions. This was a great contradiction.

24 *Hüseyin El ve Nazlı Şirin El*, §11

25 For the statistics, see <https://www.anayasa.gov.tr/tr/yayinlar/istatistikler/bireysel-basvuru/> accessed 28 July 2022

26 For the full text, see <https://www.anayasa.gov.tr/en/legislation/law-on-constitutional-court/> accessed 28 July 2022

27 *Hüseyin El ve Nazlı Şirin El*, §10

Third, the delay of the Court has had a negative impact on millions of citizens because the TCC technically had to focus on the curriculum applied to the applicants. However, a curriculum change occurred in 2018 before the TCC decided.[28] Therefore, the decision of the TCC was meaningful only for the previous curriculum and had no direct impact on the current RCE lessons.

3. The Problem of Over-Length

Reading the decision of the Constitutional Court was not an easy task since the decision was 84 pages long. One of the reasons for this was that the resolution included the opinions of the dissenting members. I will not criticize this point. Nevertheless, other factors extended the length of the decision, which deserved to be criticized. For example, the resolution included many international documents and a long history of the Constitution. Incorporating the history of the Constitution may be understandable if it was used as part of a historicist interpretation. However, in the essence of the decision, such was not required.

Including many international documents could also be considered reasonable if references were made to these documents. There were no such references based in the decision. However, the issue was available to be handled from various aspects, particularly from the view of the Convention on the Rights of the Child.

Therefore, the reason for including these sources, which ultimately made the decision more difficult to read, remains unclear.

4. Delegative Timidity

The remarkable aspect of the decision was how both the majority and minority members avoided taking responsibility and referred the decision to other addresses.

However, in the given case, it was quite possible to make specific conclusions as to why the contents of the lesson had an indoctrination to guide the administration. Thus, it could be pointed out that the inoculation in question could be applicable not only for the RCE lesson but also for the history lesson in terms of hate speech and hostility, biology lesson in the context of the theory of creation, and even for a music lesson in terms of ignoring the Alevi culture.[29] Unfortunately, however, the TCC seemed to have avoided such considerations.

The hesitation was a clear manifestation of a willingness to say the least to the possible extent about a subject considered 'sensitive.' In my opinion, it was the result

28 *Hüseyin El ve Nazlı Şirin El*, §83

29 Tolga Şirin, 'Nüfus Cüzdanındaki Din Hanesi ve Eğitimdeki Din Dersi Zorlamalarına İlişkin Güncel Gelişmeler' (2016), Güncel Hukuk, 149

of the same point of view that the Court has chosen not to say anything about the current curriculum by limiting its review to the period before 2018.

Let us go even further. The inclusion of references to the importance of the lesson in an 'apologetic' form, right after the Court's finding of a violation, could also be interpreted as a pre-emptive measure for the government's possible reactions.

I think these points indirectly indicate the pressure put on the Constitutional Court.

5. Ignoring Alternative Theses

The TCC's avoidance of considerations on merits and its approach, which could be paraphrased as 'there is no need to depart from the case-law of the ECtHR and the Council of State,' has also prevented the Court from developing original initiatives.

For example, it was a perfect opportunity to address the contradiction of why non-Muslims could be exempted from the lesson, while it was claimed that this course was completely objective. If this lesson were entirely objective, then Christian or Jewish students would not be exempted.

On the other hand, according to an opinion in the literature, the fact that the course in question was compulsory means it was mandatory to include it in the curriculum.[30] This requirement did not exclude the possibility of exemption from the course if appropriate conditions exist. For example, sports lessons are compulsory in the curriculum. Every student was responsible for this lesson unless there was a special request. However, this obligation did not prevent a student with a broken leg from being exempted from this course. There was no reason the same logic could not be applied to the RCE course.

Likewise, the case in question provided an opportunity to evaluate the arguments that if the exemption of individuals from this course was accepted, there would be a possibility of violation, so the request should be documented, not the exemption, in such courses. Because, even under the conditions in which Turkiye takes steps to solve this problem, new issues related to the violation decisions made by the ECtHR regarding other countries (for example, which course to take during the exemption, questions to be subjected in university exams, how the exemption will be expressed in the report card, etc.) are still waiting for Turkiye.[31]

By addressing these and similar comments, the Court missed the chance to develop its case-law.

30 For instance, see Çınar (n2)

31 *Gorzelik and others v Poland,* App no. 44158/98 (ECtHR, 17 February 2004)

6. Inverted Laicism

Another controversial point in the decision was how the Court interpreted the principle of laicism. The Court made its controversial considerations in a previous decision.[32]

The first problem concerned the Court's determination of the extent to which religion could overflow. In the present case, the Court had once again gone beyond the tendency of the principle of laicism as a 'conscientious' issue in its previous 2010 case-law and re-normalized the spill over of religion into the 'social' and 'public' sphere.[33] Moreover, on this point, members of the minority mostly seemed to agree. For example, minority members, referring to a study by President Zühtü Arslan on this subject, described religion as 'an indispensable part of human and social life and culture,' considered that it 'has an important function in both the self-definition of individuals and in the shaping of *social and political life*.'[34] They also decided that 'almost all civilized societies accept the necessity of religious education.'[35] Both the relevance and appropriateness of these manifesto-like considerations to the given event were highly controversial.

Secondly, the Court's description of religious education and training as a 'positive obligation of the state' was also controversial from a similar point of view.[36] The reverse meaning of this description, which had no direct equivalence in human rights law, was that the freedom of religion and conscience would be violated if the state did not provide religious education. The interpretation of making religious education services an absolute obligation for the state by referring to it as a positive obligation was also problematic because it was a matter of 'margin of appreciation.' On the other hand, expressing it as a requirement of the principle of laicism multiplied the problem and even turned laicism upside down.

7. Misquotation of the ECtHR Case-law

Another issue that caught our attention in the case was related to the Ministry of Justice. The Ministry was legally authorized to express opinions on such applications. However, this power to express an opinion did not make it a party to the case. Despite this, the Ministry seemed to have taken a very proactive approach to the case. Undoubtedly, this could also be a political choice. Nevertheless, the problem was that it reflected this political choice incompletely or incorrectly in some ECtHR decisions.

32 *Hüseyin El ve Nazlı Şirin El*, §154

33 *Hüseyin El ve Nazlı Şirin El*, §157

34 There is no emphasis in the original text.

35 *Hüseyin El ve Nazlı Şirin El*, §57 in the dissenting opinion of Kadir Özkaya, Recai Akyel, Yıldız Seferinoğlu, Selahaddin Menteş and İrfan Fidan.

36 *Hüseyin El ve Nazlı Şirin El*, §185

The Ministry seemed to have referred to three different ECtHR decisions. The first two reinforced the argument that each state could prepare its curriculum as it wishes. However, the paragraphs quoted from these decisions seemed out of context.

For example, the *Folgerø et al. v. Norway* decision contained a result contrary to the Ministry's argument. In this case, it was concluded that the compulsory religion course in Norway constituted a violation.[37]

The focus of the *Valsamis v Greece* decision, which the Ministry referred to in the same context, was not on the compulsory religion course. Instead, in this case, it forced the children of a pacifist parent who was a Jehovah's Witness to attend national holiday celebrations (related to the war between Greece and Fascist Italy in 1940) was prominent.[38]

Another argument by the Ministry using the jurisprudence of the Strasbourg organs was that this course was a part of cultural integration. For this reason, it seemed to have applied to *Osmanoğlu and Kocabaş v Switzerland*.[39] The context of this decision, however, was quite different. The subject of the case in question was the coercion of a Muslim student to attend swimming lessons in a mixed pool for boys and girls. In the case of integration, there were other factors, such as the fact that the applicants were immigrants, the absence of a particular religious/philosophical compulsion in the lesson, and the permission to attend the class with a veiled swimsuit. Including factors unrelated to the RCE lesson was not reasonable.[40]

8. Quality Problem in a Strategic Litigation

Finally, it was necessary to criticize the applicants alongside the criticisms of the public authorities. This application did not seem to be well structured. In such applications, which concern millions of students, it was essential to structure strategic litigation and to provide a third party (amicus curiae) contribution when necessary. However, it was doubtful that the application had these qualities.

In particular, some administrative steps (for example, changing the registration of the religion on the identity card) were taken later, the indoctrination elements in the content of the course were not systematically revealed from the very beginning, and effective opinions and support were not received from the associations and experts working on this subject. This situation caused most of the Court to present an image of protecting the applicants 'despite their application.'

37 *Folgerø and others v Norway* (n13)

38 *Valsamis v Greece* (n12)

39 *Osmanoğlu and Kocabaş v Switzerland* (n14)

40 The Ministry's defence of the Turkey-specific importance of the course by referring to organizations such as FETÖ/PDY and ISIS, and its function against the abuse of religion in the political arena, should be a separate article for Turkey governed by the pro-Islamist AKP.

Conclusion

After all that has been written, I can summarize my criticisms as follows: This decision could have been taken in 2014, and it would be ideal to deliver this decision with easy-to-read wording, without the controversial considerations and descriptions regarding the principle of laicism, in a more creative manner and in unanimity beyond repeating what the Strasbourg organs had already said.

Nevertheless, seeking perfection did not require ignoring conditions. For this reason, let me repeat what I said at the beginning in order not to be unfair to the Court: In a context where religious conservatism was at its peak in Turkiye, this decision was like a puddle in the desert. Therefore, it was crucial to see it positively and embrace it despite all criticisms.

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