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RESEARCH ARTICLE

## Transforming the Judiciary into the Rulers' Proxies: The Case of Hagia Sophia

Bariş Bahçeci\* , Serkan Yolcu\*\* 

### Abstract

This article examines from a critical perspective the judgment of the Turkish Council of State (Danıştay) in 2020, which invalidated the executive decision of 1934 regarding the designation of Hagia Sophia in Istanbul as a museum. We argue that Council of State did not really perform adjudication of a legal dispute in this case, but rather functioned as a proxy of the executive power for particular reasons. As a matter of fact, we argue the justifications regarding the case law of the European Court of Human Rights (ECtHR) and the right to property on which the decision was based to be a falsification. Moreover, the developments before and after the decision demonstrate this judgement to be a product of a non-judicial motivation. Lastly, the sequence of political actions regarding the conversion of several other museums into mosques that have been observed in Turkey over the last ten years implies the non-judicial dynamics behind the Council of State's decision regarding Hagia Sophia. Our analysis reveals the political decisions that would possibly be the subject of criticism by domestic opponents and the international community to have been eliminated by referring the issue to the packed courts in order to avoid all undesired consequences.

### Keywords

Rule of Law, Judicial Independence, Court Packing, Judicial Falsification, Council of State

\* **Corresponding Author:** Bariş Bahçeci (Assoc. Prof. Dr.), İzmir University of Economics, Faculty of Law, İzmir, Türkiye. E-mail: baris.bahceci@ieu.edu.tr ORCID: 0000-0001-9991-0378

\*\* Serkan Yolcu (Assoc. Prof. Dr.), Bilkent University, Faculty of Law, Ankara, Türkiye. E-mail: serkan.yolcu@bilkent.edu.tr ORCID: 0000-0002-2951-4406

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## I. Introduction

On July 2, 2020, the Turkish Council of State (*Danıştay*) paved the way for the Hagia Sophia Museum to be converted into a mosque.<sup>1</sup> Immediately after the Court announced that it had revoked Hagia Sophia's status as a museum, the President of the Republic then issued a decree ordering Hagia Sophia to be opened for prayers.<sup>2</sup> Several commentators have already criticized the decision with respect to the historical role of Hagia Sophia, mostly focusing on the political features,<sup>3</sup> cultural implications,<sup>4</sup> and compliance with international law and human rights.<sup>5</sup> We argue, however, that this decision was delivered by a high court of questionable independence and should be considered contrary to the rule of law, not only as an example of abusive judicial review but also as a justification that is legally wrong. In this context, our aim is to investigate the role of the judiciary in light of the legal and political facts related to the decision. The rest of the article proceeds as follows. In Section 2, we briefly explain the background of the case in order to give a better understanding of the issue and a fully coherent analysis. Section 3 concerns the institutional and functional reasons behind why the Council of State is regarded as having been abused by the executive power. The final section will then focus on the falsity of the decision's argumentation and provide the reasons proving the illegality of the decision.

## II. Background of the Decision

In order to fully understand the consequences of the decision, one must begin by examining the technical details of the legal framework in which the decision was delivered. Apart from its appellate powers, the Council of State also has an original jurisdiction as a first instance administrative court to review the legality of executive decisions. The lawsuit regarding Hagia Sophia was filed with the Council of State alongside the request to annul the decision of the Council of Ministers regarding Hagia Sophia having been converted from a mosque into a museum in 1934. The plaintiff was the organization named Sürekli Vakıflar, Tarihi Eserlere ve Çevreye Hizmet Derneği [the Association of Service to Foundations, Historic Monuments, and the Environment].

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1 10th Chamber of the Council of State (*Danıştay*), Matter No. 2016/16015, Decision No. 2020/2595, July 2, 2020: [https://danistay.gov.tr/assets/pdf/guncelKararlar/10\\_07\\_2020\\_060019.pdf](https://danistay.gov.tr/assets/pdf/guncelKararlar/10_07_2020_060019.pdf) (accessed on March 25, 2021)

2 New York Times, *Erdogan Signs Decree Allowing Hagia Sophia to Be Used as a Mosque Again*, <https://www.nytimes.com/2020/07/10/world/europe/hagia-sophia-erdogan.html> (accessed on March 25, 2021)

3 Berkley Forum, *Hagia Sophia: From Museum to Mosque*, July 17, 2020, <https://berkeleycenter.georgetown.edu/posts/hagia-sophia-from-museum-to-mosque>

4 Serhun Al, "Hagia Sophia in Turkey's culture wars", *Le Monde Diplomatique*, 3 August 2020, <https://mondediplo.com/outsidein/hagia-sophia>; Judith Herrin, Opinion, "Converting Hagia Sophia into a Mosque Is an Act of Cultural Cleansing", *Washington Post* 15 July 2020, <https://www.washingtonpost.com/opinions/2020/07/15/converting-hagia-sophia-into-mosque-is-an-act-cultural-cleansing/>

5 Michael P. Goodyear, "Heaven or Earth: The Hagia Sophia Re-Conversion, Turkish and International Law, and the Special Case of Universal Religious Sites", *UCLA Journal of Islamic & Near Eastern Law*, Forthcoming Fall 2021, <https://ssrn.com/abstract=3680139>

Upon filing the lawsuit, the Office of the Prime Minister was called in as the defendant in respect of the Council of Ministers. However, the Office of the Prime Minister had been abolished as a result of the constitutional amendment and government system change in 2017, and thus the defendant became the President of Turkey.<sup>6</sup> Immediately after the Council of State annulled the decision of 1934, President Erdogan issued a decree reconverting the building into a mosque under the responsibility of the Directorate of Religious Affairs.<sup>7</sup> In other words, the defendant in this case was the same authority who had provoked the decision.

A comprehensive legal analysis requires that the facts of the case be recalled, and to do this requires a brief historical background. The cultural and architectural value of Hagia Sophia is widely known around the world. The more decisive point in this regard, however, is its symbolic value. Hagia Sophia was known as the cathedral with the largest dome in the Eastern Roman period, and due to its iconic position in the Orthodox world, its identity became the target of both Latin (Fourth Crusade in 1204) and Ottoman (1453) invasions. Sultan Mehmet II, who acquired the title of *Fatih* [The Conquerer] when the Ottoman army captured Istanbul, established a waqf [foundation] under his name and ordered that Hagia Sofia be converted into a mosque under the possession of the foundation.

As noted by Byzantologists, converting the largest church of a conquered city into a mosque eventually became a tradition, and thus even churches whose names had not actually been Hagia Sophia suddenly become known as Hagia Sophia mosques.<sup>8</sup> In fact, the name Hagia Sophia contains a symbolism that goes beyond a particular architecture built in Istanbul in the 6<sup>th</sup> century, such that several Hagia Sophia mosques are found that had never been known by this name when functioning as churches. For example, the church known as the Little Hagia Sophia had been built in Istanbul under the name of Hagia Sergios and Bachos and was converted into a mosque after the conquest of Istanbul during the reign of Sultan Beyazıt, long before the reign of Sultan Mehmet II.

The practice of Ottoman sultans establishing symbolic mosques gained special importance in terms of the structure of power during the reign of Sultan Selim. After conquering the sacred lands in the Hijaz, this sultan also adopted the title of caliph, and the Ottoman Empire consolidated its theocratic identity as the leading authority in the Islamic world. Accordingly, the *selamlık*, namely the sultan's ceremonial cortege

6 Prior to 2017 constitutional amendment, Turkey had a dual executive consisting of the Council of Ministers led by the Prime Minister and the President of the Republic. Nevertheless, 2017 amendments removed the parliamentary structure of the government system and established a *sui generis* presidential system of government in which only the President of the Republic is vested with executive power.

7 Presidential Decision numbered 2729, dated 10 July 2020, Official Gazette of the Republic of Turkey, <https://beta.shariasource.com/documents/3777> (accessed on March 29, 2021)

8 <https://islamansiklopedisi.org.tr/ayasofya>

toward the mosque for Friday prayer, became a ritual over the years. Nevertheless, Friday prayers unlike other prayers had a political rather than religious character, and Hagia Sophia was used as one of the venues for this political ritual for many centuries.<sup>9</sup>

After modern Turkey was established following the War of Independence, this tradition came to an end with the removal of the sultanate in 1922 and the abolition of the caliphate in 1924.<sup>10</sup> With the development of secularism, Islamic law and the concept of conquest was removed from the political agenda.<sup>11</sup> Criticisms toward Hagia Sophia's transformation into a museum have been put forward since the 1950s by leading pro-Islamic thinkers.<sup>12</sup> However, with the rise of political Islam, the issue began to take form on the agenda more effectively. After the dissolution in 1997 of the leading political party of the Islamist movement, the Welfare Party, one of its successors, Justice and Development Party, (Adalet ve Kalkınma Partisi/AKP), came to power in 2002.

Under AKP rule and with the constitutional amendments in 2010 and 2017, the judicial power that had taken a rather hostile attitude toward these parties in the past underwent a massive change and currently rarely invalidates the ruling party's policy preferences.<sup>13</sup> The transformation of the judiciary in favor of AKP rule has also been reflected in the change in decisions regarding Hagia Sophia, with new lawsuits filed on similar issues now concluding in the opposite direction from its earlier decisions.

### III. Abuse of the Court

The decision regarding Hagia Sophia not only constitutes an example of turning a particular museum into a mosque but also gives the judiciary a role in the government's political agenda, and in this regard thus resonates with the concept of abusive judicial review as observed in many other countries throughout the world.<sup>14</sup> The process of converting multiple museums with the name of Hagia Sophia into mosques has been going on in Turkey since 2011. However, the role that the high court assumed for this particular Hagia Sophia in Istanbul was different from the others.

During this conversion, the first step actually involved another symbolic building, the Hagia Sophia in the town of İznik, currently a municipality in Bursa Province.

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9 Ibid.

10 Hilafetin İlgâ ve Hanedan-ı Osmaninin Türkiye Cumhuriyeti Memaliki Haricine Çıkarılmasına Dair Kanun, Law no 431, Enacted on 03.03.1924, Resmi Gazete 06.03.1924/63.

11 As a matter of fact, in the light of the Cyprus operation in 1974, there was no experience for the Turkish army to acquire any land outside the land of Turkish country.

12 See, for example, Necip Fazıl Kısakürek, "Ayasofya" *Büyük Doğu* (1959) 1.

13 Demirhan Burak Çelik, "16 Nisan Anayasa Değişikliği ve Yeni Hâkimler ve Savcılar Kurulu Üzerine Bir Değerlendirme", *Ankara Üniversitesi SBF Dergisi* 73 (2018) 1057-1094.

14 David Landau and Rosalind Dixon, "Abusive Judicial Review: Courts Against Democracy", *UC Davis Law Review* 53 (2020): 1313-1387.

This building had hosted the Ecumenical Councils that are considered extremely important in terms of the history of Christianity.<sup>15</sup> When İznik (ancient *Nicaea*) was conquered by Orhan Gazi, the second sultan of the Ottoman Empire, this building was the first structure to be converted into a mosque of Hagia Sophia. It too was transformed into a museum in the 1930s, and continued its function as such until 2011. Interestingly, the same plaintiff that was involved in the Istanbul Hagia Sophia case, the Association of Service to Foundations, Historic Monuments, and the Environment, had also become involved in demanding permission to hold religious ceremonies in İznik's Hagia Sophia. The demand was rejected by the court; however, the Directorate of Foundations as the central administrative authority charged for all foundations decided that same year to convert the museum into a mosque with the name *Aya Sophia Orhan* [Hagia Sophia Orhan].<sup>16</sup>

The next step was the Hagia Sophia in Trabzon (ancient *Trebizond*). The city had been conquered by Sultan Mehmed II, with its largest central church, *Panagia Hrisokefalos*, being converted into a mosque with the name *Ortahisar Fatih*. However, this Hagia Sophia church was neither turned into a mosque by Mehmet II nor given to a foundation. The building, which is thought to have been converted into a mosque about a century after the conquest of Trabzon, began being used as a museum in the early 1960s.<sup>17</sup> In 1996, the regional directorate of foundations in Trabzon filed a lawsuit demanding its Hagia Sophia be transferred to the central authority of foundations. The case was rejected by the first instance court and the Court of Cassation in 1998. After 14 years, a new lawsuit with the same demand was refiled in Trabzon and summarily dismissed.<sup>18</sup> However, the appellate division of the Court of Cassation decided this time that no final verdict would occur regarding possessory actions and that, since the building was under the ownership of the Foundations Administration, the demand for transfer would be accepted.<sup>19</sup> Thus, after the high court's decision in 2013, the museum was reverted into a mosque.

The process of converting the Chora Museum in Istanbul into a mosque followed a very similar path. The lawsuit regarding the cancellation of the Council of Ministers' Act from 1945 regarding the Chora Mosque being allocated to the Ministry of National Education for use as a museum was rejected by the relevant chamber of the Council of State in 2014. In 2017, the appeal filed against this refusal decision of the

15 Pınar Aykaç, "Contesting the Byzantine Past: Four Hagia Sophias as Ideological Battlegrounds of Architectural Conservation in Turkey", *Heritage & Society* 11:2 (2018), 151-178.

16 Consequently, the head of the NGO filed a lawsuit for the monument's allocation for religious ceremonies, which was denied by court (İsmail Kandemir as the head of the Association of Service to Foundations, Historic Monuments and Environment, April 9, 2011, BDFa). Aykaç, p 160.

17 Semavi Eyice, <https://islamansiklopedisi.org.tr/ayasofya-camii--trabzon>

18 Yargıtay 1. Hukuk Dairesi (Court of Cassation, First Chamber), Matter No 1998/6603, Decision No 1998/9265, <http://www.muzemedokunma.org/AyasofyaMuzesiHakkinda.html#>

19 Yargıtay 1. Hukuk Dairesi E. 2012/5916 K. 2012/8101 T. 27.6.2012 <https://lib.kazanci.com.tr/kho3/ibb/files/1hd-2012-5916.htm>

Chamber was also rejected by the higher appeal authority of the Council of State, the Board of Administrative Litigation Chambers. However, upon making an objection against this decision, the same Board decided to reverse its decision in 2019. After this reversal decision, the 6<sup>th</sup> Chamber of the Council of State then cancelled the allocation process, which was the subject of the case, through a decision in opposition to its previous decision, thus enabling the Chora Museum to revert to a mosque.<sup>20</sup> As can be seen, the Council of State began taking an opposite stance on this issue after 2017.

Three facts exist that reveal the bias in the Council of State's 2020 decision. Firstly, the results from previous case law on the same matter was reversed after a court packing strategy had been applied to higher judicial bodies following the 2010 constitutional amendment.<sup>21</sup> In fact, the same body of the Council of State (10<sup>th</sup> Chamber), composed of different judges, had rejected another lawsuit in 2008 that had been filed demanding the annulment of the decision of the Council of Ministers regarding Hagia Sophia having been turned into a museum.<sup>22</sup> All five members of the 10<sup>th</sup> Chamber who unanimously ruled to invalidate the decision in 2020 had been appointed following the 2010 constitutional amendment under AK Party rule.<sup>23</sup>

Lastly, the decision to covert Hagia Sofia into a mosque was actually a promise the President and the political movement from which he emerged had made decades earlier, the same President who appeared as the defendant in this case. More importantly, the actions and rhetoric prior to and immediately after the conclusion of this case provided strong hints as to what the outcome would be in advance. Indeed, Berat Albayrak, son-in-law of President Erdoğan and his then Minister of the Treasury, recited the words of a famous Islamic poet, "One Day Hagia Sophia will be opened," on social media, just 14 days before the decision was announced.<sup>24</sup>

Accordingly, the decision was celebrated by the ruling party and its media outlets. The opening took place on Friday, July 24, with a special event to mark the decision. The president and the political elites performed the Friday prayer in the newly

20 All this process is summarized in the Hagia Sophia decision of the Council of State.

21 Başak Çalı & Betül Durmuş, "Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey", *German Law Journal*, 19 (7) (2018): 1671-1706.

22 Matter no: 2005/127, Decision no: 2008/1858, 31 March 2008. The Court refers to this decision in its subsequent decision on Hagia Sophia.

23 The head of Chamber, Judge Akçil, was appointed on 24.02.2011 by the Board of Judges and Prosecutors (RG 11.03.2011/27871). Among the members, Judge Ürker appointed by President Erdoğan on 15.12.2014 (RG 16.12.2014/29207) while Judge Civri and Judge Aygün on 16.07.2018 by the Board of Judges and Prosecutors (RG 17.07.2018/30481). Judge Akbulut was also appointed on 28.11.2018 by President Erdoğan (RG 29.11.2018/30610).

24 "Bakan Albayrak'tan Ayasofya Paylaşımı", *Hürriyet*, 10.07.2020 <https://www.hurriyet.com.tr/ekonomi/son-dakika-bakan-albayrak-kazanimlarimizi-koruyarak-bu-surecten-guclenerek-cikacagiz-41561700> (accessed on March 25, 2021). See also "Hagia Sophia converted into mosque as Erdoğan signs decree", *Hürriyet Daily News*, <https://www.hurriyetdailynews.com/hagia-sophia-converted-into-mosque-as-erdogan-signs-decree-156455> (accessed on March 25, 2021). In addition, it was claimed that 13 days before the decision, a carpet order was ordered by the circles close to the ruling party to cover the opening of the fourteen thousand square meters of Hagia Sophia, <https://www.cumhuriyet.com.tr/haber/yandas-anapalidan-tuhaf-iddia-ayasofyanin-parasini-ummetin-halife-dedigi-biri-odedi-1750925>

reverted Hagia Sophia within the atmosphere of a political demonstration and with the participation of thousands. The President of the Directorate of Religious Affairs held a ceremony with a sword in hand, symbolizing the conquest.

However, this case had already been filed against the presidency as an adversary. Therefore, that the government would be so pleased with the acceptance of this lawsuit against itself appears strange. As a matter of fact, no appeal was ever filed against this decision. Thus, the decision to turn Hagia Sophia into a mosque, which is understood to have been the government's plan, was organically accepted by the court. Of course, the dependency issue is a controversial subject. However, although this administrative decision appears to have been the fulfilment of a judgment made by the judiciary with the appearance of a more neutral institutional body, this decision actually appears to have been made by the person who actually enforced it, rather than the one who finally approved it. Therefore, the government left the way open for the decision to be made by the Council of State, thus giving this conversion the appearance of a judicial decision, at least in technical terms.

Consequently, this decision reflects a trend in the judiciary, similar to the recent approach to abortion by the Polish Constitutional Court. As a matter of fact, the Polish Constitutional Court's decision regarding the right to abortion on October 22, 2021 set a pattern regarding the function of the court and the content of the trial.<sup>25</sup> Another fact that cannot be overlooked is the similarity of the Turkish and Polish cases in terms of this change in the role of judicial bodies, their structures, and their decisions. Court-packing in favor of the ruling party and its role as a proxy power to keep the government's hands clean,<sup>26</sup> or at least as an institution in which the ruling party can hide from the reactions of international public opinion.<sup>27</sup> This explains why the European Parliament condemned the Polish<sup>28</sup> as well as the Turkish rulings.<sup>29</sup>

#### IV. Falsity of the Justification

That a court which has lost its institutional identity due to a political intervention also declines in the legal quality of its jurisprudence is no surprise. However, the

25 For the translation in English: <https://eclj.org/eugenics/eu/avortement-eugenique--le-jugement-du-tribunal-constitutionnel-polonais-extraits->

26 Aleksandra Kustra-Rogatka, *Populist but not Popular: The abortion judgment of the Polish Constitutional Tribunal*, *VerfBlog*, 2020/11/03, <https://verfassungsblog.de/populist-but-not-popular/>, DOI: 10.17176/20201103-235627-0.

27 Ewa Łętowska, *A Tragic Constitutional Court Judgment on Abortion*, *VerfBlog*, 2020/11/12, <https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion/>, DOI: 10.17176/20201112-200210-0.

28 Polish de facto ban on abortion puts women's lives at risk, says Parliament, <https://www.europarl.europa.eu/news/en/press-room/20201120IPR92132/polish-de-facto-ban-on-abortion-puts-women-s-lives-at-risk-says-parliament>

29 Biden statement on calling "Turkish President Erdogan to reverse his recent decision to convert the Hagia Sophia to a mosque", <https://joebiden.com/2020/10/06/tensions-between-greece-and-turkey-statement-by-vice-president-joe-biden/>, EU ministers chide Turkey over Hagia Sophia, <https://www.dw.com/en/turkey-haghia-sofia-european-union/a-54165074>; Hagia Sophia: UNESCO deeply regrets the decision of the Turkish authorities, <https://en.unesco.org/news/unesco-statement-hagia-sophia-istanbul>



argumentation in the Hagia Sofia decision carries a much more decisive factor. The legislation to which the Court referred by using a fundamental rights discourse involve secular legal rules such as the constitution, civil code, and case law of the European Court of Human Rights (ECtHR). In this context, a case note published in the *Harvard Law Review (HLR)* claimed this decision to be *legally correct* and filled the gaps in the decision using knowledge of Islamic law to turn the concepts of rule of law and judicial independence into an accessory.<sup>30</sup> As a matter of fact, the argumentation in the *HLR* case note shows that the Court had actually arrived at its conclusion by applying Islamic law, but the basis for the decision could not go beyond providing a mere apparent justification as secular law did not arrive at this result in its discourse.

A discrepancy exists between the justification and characteristics of the case, so much so that the argumentation made in the decision of the Council of State actually contains a fundamental contradiction in addition to many smaller inconsistencies. According to the Court's justification, should the purpose of the foundation or its properties change, regardless of the founding will of the donor while forming the foundation, qualifying the foundation as a private legal entity will become impossible, and this situation will not comply with the principles of legal security, freedom of association, and the right to property as found in the 1982 Constitution.<sup>31</sup> The Court also argued the ECtHR to also guarantee the protection of foundations' immovable and rights, including those established in the Ottoman period; thus as a result of their protected status, they fall within the scope of property rights.<sup>32</sup> As a matter of fact, two prominent issues stand out here based on this justification. The first is the will of the founder and the second is the *waqf's* [foundation] property right as a private legal entity protected by the ECtHR case law.

Regarding the first issue, the following question can be put: Is the Fatih Sultan Mehmed Foundation a private legal entity? According to the Court's argumentation, the *establishment of a foundation is a private legal process that creates a private legal entity*. However, this abstract justification overlooks the characteristics of the concrete conditions under which the Sultan Mehmed II had conducted this foundation process. By using modern legal institutions and concepts, the Court ignores the fact that the right of disposition on this building had not been obtained by means of purchase or inheritance, as well as its public nature.

The second issue concerns whether a foundation run by the public authority has property rights. The Court's second argument is partly bound to the first, but goes further: *Should the Fatih Sultan Mehmed Foundation have a private legal identity, then it has the constitutional right to property, and the will of the founder should*

30 The Hagia Sophia Case, 134 *Harvard Law Review*, p 1285, <https://harvardlawreview.org/2021/01/the-hagia-sophia-case/>

31 Decision of the Council of State, p 13.

32 *Ibid*, p 14.



*also be protected from interventions.* In this respect, the Court reveals certain facts, including Hagia Sophia being the property of the Fatih Sultan Mehmed Foundation, which is a private legal entity. However, the decision did not evaluate the status of this foundation. In fact, the General Directorate of Foundations (GDF) is a public body run by state officials. Moreover, GDF as a public authority was a shareholder until 2019 of the bank (Vakıfbank) that represents these historical foundations.<sup>33</sup> Furthermore, by the decision of GDF, a university was established on behalf of five foundations, one being the Fatih Sultan Mehmet Foundation.<sup>34</sup>

The Islamic legal analysis states the property of the foundation to not be “*akin to Mehmed’s private property; these are the city’s civic institutions, fitting well within the category of property made public after conquest.*” However, should the kind of property be a mosque, future rulers (such as Mustafa Kemal Atatürk) are not entitled to control over them. However, the Court fails to clearly address this fact, instead simply stating that properties belonging to foundations cannot be transferred. However, there is no transfer, as it is already registered as a mosque on the deed. The act of the Council of Ministers in 1934 concerned allocation.

Moreover, the Court also cites European human rights law, pointing out the case<sup>35</sup> in which the ECtHR ruled that Turkey to have violated the Convention due to the seizure of property that had been donated to an Armenian Church, School, and Cemetery foundation. Still, the Court’s reference to human rights law seems irrelevant and misleading, given that no possible parallels are present between the conditions of a minority foundation and those of the Sultan Fatih Mehmed Foundation, which is already state-run and whose property therefore was not seized.

The case should be noted to not include any claim regarding the right to property. This was actually expected, given that the Council of Ministers’ decision in 1934 had only changed the building’s *function*, not *ownership*. As explained in the decision of the Council of State, in 1936, Hagia Sophia had already been registered in the land registry under the name of the Fatih Sultan Mehmed Foundation, which was managed by the General Directorate of Foundations, a state institution. Moreover, the administration of the building as a museum was carried out by the Ministry of Culture and Tourism. Therefore, no precedent exists in the context of property rights between the legal dispute regarding the function of Hagia Sophia only (its use as a mosque or a museum) and the seizure of assets from a minority foundation.

In this context, neither the ECtHR jurisprudence nor the fundamental rights regulated in the Turkish Constitution constitute a real justification. On the contrary,

33 <https://www.vakifbank.com.tr/ortaklik-yapisi.aspx?pageID=299>

34 <http://int.fsm.edu.tr/Uluslararasi-Ofis-About-Us--About-the-University>

35 Case of *Samatya Surp Kevork Ermeni Kilisesi, Mektebi ve Mezarlığı Vakfı Yönetim Kurulu v. Turkey*, App. No. 1480/03 (16 December 2008), <http://hudoc.echr.co.int/eng?i=001-90264>

the Council of State, whose composition had been changed by the executive, is seen to have acted not as an independent court but as a proxy for a decision that the executive, having an agenda based on Islamic law, did not want to make directly.

## V. Conclusion

The rule of law can only be achieved through independent courts and a fair trial process. Rule of law also requires that courts do not act as a proxy for the implementation of a political program. However, the Council of State's decision, despite its legal appearance, was arrived at completely independent of the facts of the subject matter and law. As appears from the Hagia Sophia case which emphasized the political significance of historical buildings, the law's undermining was an unfortunate example of a sacrifice of the courts to the spirit of conquest. This phenomenon, which is not unique to Turkey cannot be defined as judicial review, but instead evokes the transformation of the judiciary into a proxy of the government.

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