

THE CLASH BETWEEN FREE EXERCISE OF RELIGION AND
SECULARISM
WITHIN THE TURKISH LEGAL SYSTEM

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Abstract

Laicism as a model of separation between state and religion/secularism is often studied for its role in Turkey's ideology of Republican nationalism. Turkish Constitutional Court should approach cases regarding free exercise not only as an issue of laicism but also as an issue of the relationship between laicism and free exercise. Considering the issue as one beyond just the separation of religion and state does not mean that religious sensibilities will always win or lose but it requires evaluating whether there is a violation of religious freedom as one of the fundamental rights and freedoms. This approach would be helpful to enable the coexistence of respect for religious beliefs and the state's neutrality toward religion. Thus, first, the development of Turkish practice of laicism and Constitutional Court's approach towards free exercise issues are discussed. Finally, application of proportionality standard in cases of free exercise, which is guaranteed under the article 24 of the Constitution, is introduced and elaborated.

Keywords: *Laicism, secularism, religious freedom, proportionality standard*

TÜRKİYE'DEKİ HUKUK DÜZENİNDE SEKÜLERİZM VE İBADET
ÖZGÜRLÜĞÜ ÇATIŞMASI

Özet

Türkiye'de laiklik şu ana kadar din-devlet ayrılığı/sekülerizm modeli olmasının ötesinde, cumhuriyetin önemli değerlerinden biri olması yönüyle çalışılmıştır. Anayasa Mahkemesinin özellikle ibadet özgürlüğü taleplerine ilişkin değerlendirmesi, sadece laikliği değil, laiklik ve ibadet özgürlüğü ilişkisini dikkate almayı da gerektirmektedir. Bu ilişkinin göz önünde

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bulundurulması, bu taleplerin her durumda kabul edileceği veya reddedileceği anlamına gelmese de, bir özgürlük değerlendirmesini zorunlu kılacaktır. Bu değerlendirme, farklı din ve inançlara saygı ile devletin tarafsızlığının aynı anda sağlanmasını da beraberinde getirebilir. Bu nedenle çalışmada öncelikle, Türkiye 'de laiklik anlayışının gelişimi, Anayasa Mahkemesi 'nin ibadet özgürlüğü taleplerine ilişkin yaklaşımı değerlendirilmiştir. Sonrasında da, Mahkemenin, özellikle bireysel başvuru yoluyla önüne gelecek ibadet özgürlüğü taleplerini, Anayasanın 24. maddesine güvence altına alınan bir hak ve özgürlük olarak değerlendirirken, ölçülülük standardını nasıl uygulayacağı incelenmekte ve öneriler getirilmektedir.

Anahtar kelimeler: *Laiklik, sekülerizm, din özgürlüğü, ölçülülük standardı*

Introduction

Turkey is the only secular state in the Muslim world. It has played a significant role in the Islamic and Western worlds as a unique example of the potential for peaceful coexistence of Islam and democracy¹ in a state with an overwhelming Muslim majority. Even though it is the only secular country in the region, people are more inclined to recognize the social significance of religion in Turkey. There is an effort to harness the social utility of religion in the context of nationalism and strengthening Turkey's role in the region. This could result in the weakening of religious liberties and secularism being seen something exceptional for a Muslim state or something that changes based on the current political climate. My research and subsequent publication will undertake a comparative analysis that will contribute to a broader understanding of secularism in Turkey that does not leave many religious liberties unprotected while guaranteeing only the practice of religious belief or disbelief.

Turkish secularism is often studied for its role in Turkey's nation-building along with its fundamentality to Turkey's ideology of Republican nationalism.² The principle of secularism often associated with modern liberal democracy proposes removing religion from the public sphere and yet maintaining a

¹ Noah FELDMAN, *After Jihad: America and the Structure for Islamic Democracy*, Farrar, Stratus, Giroux, New York, 2003, s. 101.

² Nilüfer GÖLE, *Manifestations of the Religious-Secular Divide: Self, State, and the Public Sphere*, Comparative Secularisms in a Global Age, Ed. by. Linell E. Cady and Elizabeth Shakman Hurd, New York, Palgrave Macmillan, 2010, s. 41-47.

public debate for all citizens regardless of their different religious beliefs.³ However, the current Turkish practice of secularism does not guarantee that those of different beliefs will necessarily be involved in the public debate; paradoxically, it has kept the voice of the religious minority and sometimes even majority out of the public sphere. In my research, I will elaborate on the free exercise of religion under the Turkish Constitution through the application of proportionality analysis.

First, I will analyze the development and critical assessment of the Turkish practice of secularism. This part of the study is critical because it will help form an understanding of how Turkey's distinctive external and internal features have shaped the resulting in relationship between religious liberties and democracy. Second, I will discuss current Turkish practice of secularism through the arguments in relevant Turkish Constitutional Court cases. In this section I will also try to give a comparative analysis between Turkey, secular European countries (such as France and Germany) and the United States, will be undertaken to allow a deep examination that goes beyond a simple comparison of the similarities and differences between the three. Finally, the conclusion of the research will aim to introduce the recognition of proportionality and how this standard would work in cases of Turkish free exercise. Notably, it will be helpful to reinterpret the Turkish practice of religious liberties broadly.

I. The Development and Critical Assessment of the Turkish Practice of Secularism

Since the time of the Islamic Ottoman Empire,⁴ which brought the influence of a peaceful coexistence of diverse ethnicities and religions, the Turkish state and Turkish religion have run almost parallel; however it should be noted that the state and the process of centralization have always come before religion.⁵ This unique practice of secularism is called *Turkish Isla-*

³ Serap YAZICI, *İnsan Hakları Açısından Laiklik, Çağdaş Yaşamı Destekleme Derneği Yayınları-7*, 2. Bası, 1996, s. 15-18.

⁴ FELDMAN, s. 102-03.

⁵ Cemal KAFADAR, *Between Two Worlds: The Construction of the Ottoman State*, University of California Press, USA, 1995, s. 151-154.

mic exceptionalism by Serif Mardin.⁶ He argues that this approach, which prioritizes the state over religion coupled with a fervent interaction with the Western world -not seen in many other regional countries- has made Turkey an exception in the region. Mardin argues that the Turkish concept of secularism, based on defending the state over religion, is not simply an unexpected outcome of the first constitution -the 1924 Constitution- of the Turkish Republic under Atatürk's regime; rather, he argues that it is a continuation of Ottoman practice.⁷ However, Suna Kili has made the argument that even though the 1924 Constitution kept the religion of the state as Islam, Atatürk's revolution was indeed a complete break from the old Ottoman regime.⁸ Regardless of which approach is taken, there is one thing that is exclusive to the Turkish case: unlike what has been seen in many European countries, secularism in Turkey has implicated more than just the separation of religion and state and the non identification between religious institutions and the state. For Turkey, secularism is all of the above coupled with *Westernization*.⁹

This development was a battle to effectuate the adoption of a democratic and modern social and political system that is played out in the context of religion. More importantly, it was a battle to enable Westernization within the country as part of a broader search for a new, Republican national identity.¹⁰ While this Westernization program was not specifically a fight against Islam,¹¹ it seemed to pressure the Muslim majority to distance themselves from an Islamic identity. I believe at that point the new Republic's efforts were a continuation of the Ottoman desire for Westernization. Later Ottoman leaders tried to show Western countries that the state was civili-

⁶ Şerif MARDİN, *Turkish Islamic Exceptionalism Yesterday and Today: Continuity, Rupture and Reconstruction in Operational Codes*, Turkish Studies, C.6, No:2, 2005, s. 145-152.

⁷ MARDİN, *Turkish Islamic Exceptionalism Yesterday and Today: Continuity, Rupture and Reconstruction in Operational Codes*, s. 145-152; *Turkish Exceptionalism: Interview with Serif Mardin*, available at <http://english.aawsat.com/2007/12/article55260541/turkish-exceptionalism-interview-with-serif-mardin>, September 9, 2015.

⁸ Suna KİLİ, *The Atatürk Revolution: A Paradigm of Modernization*, İş Bankası Kültür Yayınları, İstanbul, 2011, s. 250-252.

⁹ Tarık Zafer TUNAYA, *Türkiye'nin Siyasi Hayatında Batılılaşma Hareketleri*, İstanbul Bilgi Üniversitesi Yayınları, İstanbul, 2010, s. 122-127.

¹⁰ MARDİN, *Turkish Islamic Exceptionalism Yesterday and Today: Continuity, Rupture and Reconstruction in Operational Codes*, s. 148.

¹¹ TUNAYA, s. 122.

zed through the passive rejection of Islamic institutions and a conscious adoption of Europe's concept of a civilized country, which was distinctly Christianity. As Anscombe states, this approach to westernization - even by the leaders - was adopted with the intention of empowering a defense for the Empire rather than with the intention of removing its Islamic identity and institutions.¹² Regardless, this approach to westernization in the late Ottoman period was not only unattractive to the Muslim majority, but also dissatisfactory for the non-Muslim minorities. For instance, tax immunities for Ottoman non-Muslims not only triggered anger and suspicion from most of the Muslim population, but also led to a struggle between the state and non-Muslim minorities. The privileges provided to non-Muslim minorities from Christian European countries, like Britain and France, served as a way for these countries to put pressure on and interfere in state policies.¹³ It could be argued that the new Republic of Turkey followed this same approach to modernization and tried to show that it was a new, modern country by pushing the majority to distance itself from its religious identity. On the one hand, it could be said that -unlike the intention of Ottoman leaders, which was to appear modern and civilized- the intention of Atatürk reforms was secularization. On the other hand, it could also be argued that the question of Islamic identity was still left open in terms of where and how it fit within society. At some point, distancing the state from religion had led to a dissociation between the public majority and the state, which lost touch with each other, because the outcome of secularization in Turkey went clearly beyond a simple separation of religion and state.¹⁴

The changes that took place as part of this process were not only effected on the institutions, but also on civic life, some examples of which are the adoption of Western clothing,¹⁵ the Latin alphabet,¹⁶ and civil marriage¹⁷.

¹² Frederick F. ANSCOMBE, *State, Faith, and Nation in Ottoman and Post-Ottoman Lands*, Cambridge University Press, New York, 2014, s. 95, 96.

¹³ ANSCOMBE, s. 94, 95, 101.

¹⁴ FELDMAN, s. 110.

¹⁵ *Law on Wearing Hats, No. 671*, 25/11/1925, Official Gazette No: 230, 28/11/1925.

¹⁶ *Law on Adoption and Implementation of Turkish Alphabet, No. 1353*, 01/11/192, Official Gazette No: 1030, 03/11/1928, available at <http://mevzuat.meb.gov.tr/html/112.html>, September 9, 2015.

¹⁷ See *Turkish Civil Code/Türk Medeni Kanunu No. 4721*, 22/11/2001, available at <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4721.pdf>, September 9, 2015.

Swiss Law was transported to replace Ottoman family law, which had been based on Shari'a, in order to guarantee equal family rights such as equal custody for women.¹⁸ The French system of secularism – laicite/laiklik – was incorporated into the principle of the separation of state and religion.¹⁹ Not surprisingly, there were some early developments that signaled Turkey would be a case of a unique practice of secularism and the implications of such practice would not play out in the same way as those in European models of secularism. For instance, the headscarf was not banned by the Atatürk reforms, yet freedom to wear the headscarf was not guaranteed in the same way the freedom *not* to wear it was, and in many public institutions, including universities, it was prohibited. It could be said that unveiled women were seen as the protectors of laicism in some sense. Women who wore headscarves became excluded from education, employment as public officers, and actually from almost all civic life. That is why it could easily be argued that it was beyond separation of religion and state and it was “state control over Islam”.²⁰ However, even though headscarves were not banned by these reforms, the first Constitution of the Republic, the 1924 Constitution, adopted Islam as its official state religion. This formulation was kept until its elimination by the constitutional amendments of 1928. It is pertinent to mention here that the abrogation of the official state religion was not immediately replaced by the principle of laicism.²¹ The principle of laicism was adopted later in 1937 and kept by the 1961 Constitution and the current 1982 Constitution.²² But what happened that led to the development of such a distinctive practice of secularism?²³ What brought Turkey to the

¹⁸ Andrew DAVISON, *Turkey, a “Secular” State? The Challenge of Description*, South Atlantic Quarterly, C.102, No:2/3, 2003, s. 333, 337.

¹⁹ Bülent TANÖR, Necmi YÜZBAŞIOĞLU, *1982 Anayasasına Göre Türk Anayasa Hukuku*, Beta, İstanbul, 2014, s. 90-93, 97-100; Ergun ÖZBUDUN, *Türk Anayasa Hukuku*, Yetkin, Ankara, 2014, s. 79-81; Kemal GÖZLER, *Türk Anayasa Hukuku Dersleri*, Ekin, Bursa, 2015, s. 64, 67, 68, 70.

²⁰ Jocelyne CESARI, *The Awakening of Muslim Democracy: Religion, Modernity, and the State*, Cambridge University Press, New York, 2014, s. 45; Feldman, s. 110.

²¹ Bülent TANÖR, *Osmanlı-Türk Anayasal Gelişmeleri*, 25. Bası, Yapı Kredi Yayınları, İstanbul, 2015, s. 322, 323.

²² ÖZBUDUN, s. 18; TANÖR, YÜZBAŞIOĞLU, s. 93, 94.

²³ *Should the UK Ban the Muslim Face Veil?*, available at <http://news.bbc.co.uk/2/hi/uk/8481617.stm>, September 9, 2015; Samra MURSALEEN, *The Power Behind the Veil*, available at <http://www.theguardian.com/commentisfree/belief/2010/jan/25/burqa-ban->

point where it would prefer the absence of freedom of religion instead of respecting such a right? Is it still to be viewed as only the legacy of Ottoman Westernization? Could it be any other feature of the Atatürk Revolution period, like fear of the threat of Islamic fundamentalism that contributed to the development of such a unique practice of secularism?

Turkey's distinctive geographical, demographical, and social features always matter in the examination of this issue. Turkey has been a bridge between the Islamic world and Europe since the Ottoman Empire. Turkey was and has been a country with a Muslim majority while enacting Christian Europe's codes.²⁴ On one hand, neither the goal of Westernization nor the adoption of European secularism has changed the reality that Turkey has always had a relationship, however strong or weak, with the Islamic world. Yet Turkey has also had a gradual but progressive relationship with the European world. Turkey did not isolate herself from Europe; instead, Turkey attempted to channel the experience of approaching diverse ethnic and religious elements into cooperation with the European world as a democratic secular country.²⁵ On the other hand, an external perspective may even say that Islam has shaped the fabric of society, although it has not always served as its main guiding force. Turkey adopted the French model of secularism called *laïcism*, particularly the model in the Act of 1905 by stating laicism as one of the non-amendable principles of the state.²⁶ It has been said that Turkey reflects a unique practice of secularism with its overly rigid separation and control over religion.²⁷ Conversely, I believe that it does not reflect a unique example of secularism but rather reflects pure laicism, which is a model of secularism that effectuates a state's rigid control over religion – as is seen in France. Thus, Turkey is simply a normal reflection of laicism because it only effectuates the laicism model's requirement for state control over religion and does not constitute a unique model of secularism in practice.

[veil-sarkozy-ukip](#), September 9, 2015.

²⁴ Niyazi ÖKTEM, *Religion in Turkey*, Brigham Young University Law Review, 2002, 371-404.

²⁵ Suna KİLİ, *Türk Devrim Tarihi*, İş Bankası Kültür Yayınları, İstanbul, 2009, s. 237-239.

²⁶ TANÖR, YÜZBAŞIOĞLU, *1982 Anayasasına Göre Türk Anayasa Hukuku*, s. 91.

²⁷ Ahmet KURU, *Secularism and State Policies Toward Religion: The United States, France, and Turkey*, Cambridge University Press, USA, 2009, s. 166, 167; MARDİN, *Turkish Islamic Exceptionalism Yesterday and Today: Continuity, Rupture and Reconstruction in Operational Codes*, 148.

Laicism's lack of a guarantee of protecting freedom of religion and its strong pressure on minority religions is also seen in France, but arguably in Turkey this pressure could also be seen on the majority religion which also did not have a defined place in society until recent changes.

It could be said that laicism in Turkey has not led to a uniquely sharper separation between the state and Islam, and Islamic ideology has always been present in Turkish society -not only in national politics,²⁸ and but also in the constitutional system. Yet, even this entanglement between Islam and the state does not reflect an exceptional practice of laicism. Because control over religion leads to either dominance of the majority religion or the dominance of the state elite who designed the legal system. Thus, I believe that a laic state's attempts to tighten control over religion could actually lead to increased entanglement between the state and religion –more so than other secular models such as the US separationist or German cooperationist systems.²⁹ Turkish state elites and the Constitutional Court have responded to this entanglement by justifying restrictive policies, not only for the majority but also for minority religions, based on the principle of laicism that imprisons religion to the private sphere – attempting to render it completely invisible within society as a whole. In conclusion, Turkey could be considered exceptional in the Muslim region for maintaining those features along with a democratic system that separates religion and state with a Muslim majority citizenry, but Turkey is not exceptional for its unique practice of secularism and even unique practice of laicism.

II. The Turkish Constitutional Court's Approach on Religious Claims

Turkey's current 1982 Constitution that adopts laicism as one of the characteristics of the state³⁰ under Article 24, also guarantees freedom of religion

²⁸ ÖKTEM, *Religion in Turkey*, s. 395-400.

²⁹ Jacques BERLINERBAU, *How to be Secular: A Call to Arms for Religious Freedom*, First Mariner Books, USA, 2012 s. 47, 48.

³⁰ Article 2 of the 1982 Constitution, See Constitution of Republic of Turkey, available at https://global.tbmm.gov.tr/docs/constitution_en.pdf, September 9, 2015.

and conscience.³¹ According to this Constitution, worship, religious services, and religious ceremonies which do not violate the prohibition of the abuse of fundamental rights and freedoms, shall be conducted freely and not only shall no one be “compelled to worship and reveal religious beliefs and convictions, but also neither shall they be prosecuted nor accused because of religious belief”(Article 24/2-3).³² Furthermore, it is assured that any discrimination before the law, irrespective of religion or sect, is prohibited. It even guarantees gender equality by stating that men and women have equal rights and it is for the state to put such equality into practice (Article 10/1-2).³³ But is this the case in reality? As has been illustrated, Turkey adopted the German model of an unchallengeable constitutional order, but not the German cooperationist model of secularism, which accommodates the practices of the majority religion while guaranteeing not to coerce or pressure religious minorities; instead, Turkey incorporated the French laicism model of secularism on top of the German constitutional model of an unchallengeable constitutional order. Do secular European states, particularly member states of the EU that reflect constitutional pluralism,³⁴ implement secularism in the same way as each other? To what extent can Turkey struggle to keep the same constitutional language and apply the French model of laicism in a country that has an overwhelming Muslim majority, while even France itself has come to be considered an exception in the region³⁵ with its weaker tolerance towards the principle of freedom of religion? These are a few of the questions that will be answered in the this section, while different concepts that might share similar constitutional requirements and challenges as regards the protection of religious liberties

³¹ Article 24 of the 1982 Constitution, See Constitution of Republic of Turkey, available at https://global.tbmm.gov.tr/docs/constitution_en.pdf, September 9, 2015.

³² Article 24 of the 1982 Constitution, See Constitution of Republic of Turkey, available at https://global.tbmm.gov.tr/docs/constitution_en.pdf, September 10, 2015. See also İbrahim KABOĞLU, *Din Özgürlüğü: Sınırı ve Güvencesi*, Ankara Üniversitesi SBF Dergisi, Sayı 46/1, 1991, s. 268.

³³ See https://global.tbmm.gov.tr/docs/constitution_en.pdf, September 9, 2015.

³⁴ Paul CRAIG, Grainne de BURCA, *EU Law: Text, Cases, and Materials*, *EU Law: Text, Cases, and Materials*, Oxford, New York, 2008, s. 375-377.

³⁵ T. Jeremy GUNN, *Religion and Law in France: Secularism, Separation, and State Intervention*, *Drake L. Rev.*, Yıl 57, 2008-2009, s. 958; Tariq MODOOD, *Muslims, Religious Equality and Secularism, Secularism, Religion and Multicultural Citizenship*, Geoffrey Brahm Levey, Tariq Modood, Cambridge University Press, New York, 2009, s. 164-65.

will also be explored.

The approach of the Turkish Constitutional Court to religious liberties can be evaluated through three important cases.³⁶ In 1989, the Act on Higher Education, which allowed headscarves that cover the hair and neck, was challenged before the Constitutional Court.³⁷ Then in 1990, Article 17, which emphasized freedom of dress in complying with the laws, was added to the Act on Higher Education. These applications were rejected by the Constitutional Court.³⁸ In these two related cases, the Constitutional Court stated that in a secular state, fundamental, social, economic, political, and legal order couldn't be drawn on religious tenets.³⁹ The Constitutional Court chose to consider the issue of wearing headscarves as a threat to religion and secular state relations rather than an expression of freedom of religious belief and conscience, which is guaranteed under article 24 of the Constitution. The Court also emphasized that a laic state cannot endorse a religion and these kind of religious outfits could be seen as endorsement of Islam. This evaluation could be seen as a weak practice of the endorsement standard because it still does not see it as an issue of a fundamental right and freedom.⁴⁰

In 2012, the Constitutional Court, with its new and more conservative members, dealt with the unconstitutionality of the Education Reform Law, which introduced selective courses regarding Kuran-ı Kerim (Quran) and the life of the Prophet Mohammad within school hours in middle and high schools.⁴¹ According to the Court, providing these new courses was not against the principle of laicism because it did not prevent the Minister of Education from providing lessons for members of other religions. During this case, the Constitutional Court also stated that there are two interpretations of laicism. One is a restrictive understanding of laicism and is based

³⁶ E. 1989/1, K. 1989/12, 7.3.1989, Official Gazette No. 20216, 05.07.1989; E. 1990/36, K. 1991/8, 9.4.1991, Official Gazette No. 20946, 31.07.1991; E. 2012/65, K. 2012/128, 20.09.2012, Official Gazette No. 28622, 18.04.2013.

³⁷ E. 1989/1, K. 1989/12, 7.3.1989, Official Gazette No. 20216, 05.07.1989.

³⁸ E. 1990/36, K. 1991/8, 9.4.1991, Official Gazette No. 20946, 31.07.1991.

³⁹ Bertil Emrah ODER, "Turkey", The 'Militant Democracy' Principle in Modern Democracies, Ed. by. Markus Thiel, Asgate, UK, USA, 2009, s. 288, 289.

⁴⁰ See also *Case of Leyla Şahin v. Turkey*, Application No. 44774/98, Strasbourg, 10 November 2005.

⁴¹ E. 2012/65, K. 2012/128, 20.09.2012, Official Gazette No. 28622, 18.04.2013.

on a rigid separation between the public sphere and religion and does not allow the religious majority and minorities to be visible in public. The other is a less restrictive understanding of laicism and requires the state to create and uphold an atmosphere of tolerance for both the majority and minorities to exercise their religion. According to the Court, since this understanding of laicism allows religion to be visible in the public sphere, the state can provide elective religious courses. Moreover, the Court argued that those elective courses are a part of religious education under state supervision, which is guaranteed under article 24 of the Constitution, and the Minister can still provide the same kind of courses for different religions.

Covering and wearing headscarf has always given rise to a public debate and a few court decisions as mentioned before. However, the most unrestricted decision of the Constitutional Court was reached in 2014. A Muslim lawyer insisting on wearing a headscarf during a court hearing brought a case before the Constitutional Court after the judge postponed the hearing and granted a period for her client to be represented by a new attorney until the next hearing. The judge held that the headscarf is a strong religious symbol and political symbol that goes against the principles of laicism. The Constitutional Court, in its judgment, referred to the previous case mentioned above containing its less restrictive understanding of laicism. According to the Court, a democratic and laic state should establish a social and political atmosphere where different religions can coexist in peace. It also stated that in order to use laicism as a reasonable basis to reject the applicant's claim, it was necessary to show that the applicant's wearing of the headscarf was politically aggressive with the aim of imposing her own faith on other people or disrupting the social order and peace in some manner. In conclusion, the Court held that in order to limit a fundamental right and freedom, there must be a law/legal limitation. Since there is no legal limitation regarding attorneys attending hearings with "their heads uncovered", preventing the attorney from entering hearings because of her covering was an unconstitutional infringement on her religious freedom and put her in a disadvantageous situation as compared to attorneys who did not wear the headscarf.

One might argue that this demonstrates a positive change and a leaning

towards a more liberal understanding of laicism.⁴² Yet it could also be said that the Court still fails to look at the issue as one of respect for religious liberties. It is still obsessed with a formal observation of neutrality that does not involve deeper determination of the state's duty to protect individual religious liberties. More importantly, it struggles between the essential features of laicism and protecting religious liberties. It is trying to make up different meanings of laicism. In its recent judgment, it refers to the restrictive meaning as a first meaning/interpretation and less restrictive/more liberal approach as a second meaning/interpretation of laicism. While referring to the first/the restrictive meaning, the Court talks specifically of laicism. However, when it talks of the less restrictive and more liberal understanding of laicism, it does not refer to laicism anymore; it cites the US separationist and/or German cooperationist models, which have a more liberal separation doctrine and accommodate both majority and minority to engage in free exercise. Thus, as the Court is trying to come up with a new interpretation of laicism, it references features of completely different models. I believe that this clearly demonstrates a need to develop a new understanding of the practice of secularism in Turkey without simply attempting so-called new interpretations. Since laicism is one of the non-amendable principles of the current constitution, the Court should define and apply a standard that grants constitutional protection of freedom of religion not only for the majority but also for minorities. Applying a coherent standard, especially in deciding contentious issues like those related to religious sensibilities, would enable the coexistence of a plethora of religious beliefs and the state's neutrality toward religion.

III. The Application of the Proportionality Standard in Turkish Religious Cases

Proportionality standard is clearly provided for in article 13 of the Turkish Constitution.⁴³ However, the Constitutional Court has not held that this re-

⁴² “*Anayasal Yönden Sorun Gormedik*”, <http://www.milliyet.com.tr/-anayasal-yonden-sorun-gormedik-/gundem/gundemdetay/22.09.2012/1600268/default.htm>, September 9, 2015.

⁴³ Article 13 of the Turkish Constitution states that restrictions on fundamental rights and freedoms shall not be contrary to the letter and spirit of the Constitution and the

quires the application of proportionality between the benefit to the state's interest and the negative effect on the individual's religious liberties. The proportionality standard requires i) a rational connection between the means and the purpose, ii) less restrictive means to achieve the purpose (necessity), and iii) proportional relation between the purpose and the means (balancing).⁴⁴ Although proportionality is not the only standard/test to be employed for examining administrative and constitutional discretion, it results in greatly protecting the individual's freedom. It does not automatically annul the state's action⁴⁵ but pushes the state to introduce an alternative.

Applying proportionality might not change the result of every religious case decided by the Turkish Constitutional Court, but it would definitely provide a deeper examination of the principle of freedom of religion as an individual liberty.⁴⁶ For instance, as mentioned before, the judgment in the case of introducing selective courses regarding Kuran-ı Kerim (Quran) and the life of the Prophet Mohammad could be seen as a positive and more liberal understanding of laicism. Yet it could also be said that the Court still fails to consider the issue as one beyond just the separation of religion and state and one of respect for religious liberties. In this case, introducing elective religious courses is not interpreted as infringing on the freedom of religion of Muslim majority students and is not a free exercise claim. However, it infringes the religious freedom of students from minority religions. Thus,

requirements of the democratic order of the society and the secular republic and the principle of proportionality, https://global.tbmm.gov.tr/docs/constitution_en.pdf, September 9, 2015.

⁴⁴ Vicki JACKSON, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement*, Fed. L. Rev., Yıl 35, 2007, s. 167; see also David M. BEATTY, *The Ultimate Rule of Law*, 160-164 (excerpts) in Vicki J. JACKSON, Mark TUSHNET, *Comparative Constitutional Law*, 3. bs., Foundation Press, USA, 2014, s. 733, 734; Donald L. BESCHLE, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"*, Hastings Constitutional Law Quarterly, Sayı 39:2, 2011-2012, s. 387, 388; See judgment of Justice A. Barak in Beit Sourik Village Council v. Government of Israel, June 30 (2004), HCJ 2056/04, Supreme Court of Israel, in Jackson, Tushnet, *Comparative Constitutional Law*, s. 701-715; George A. BERMANN, *The Principle of Proportionality*, Am. J. Comp. L. Sup., Yıl 26, 1977-1978, s. 415-432; Francis G. JACOBS, *Recent Developments in the Principle of Proportionality in European Community Law*, The Principle of Proportionality in the Laws of Europe Ed. by. Evelyn Ellis, Hart Publishing, USA, 1999.

⁴⁵ BESCHLE, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"*, s. 384.

⁴⁶ Korkut KANADOĞLU, *Laiklik ve Din Özgürlüğü*, TBB Dergisi, Yıl 109, 2013, s. 380.

the clash of interests here, are the interests of the students of other religions in safeguarding their religious sensibilities and the state's interest in providing religious education to majority religion students seeking that education. Although it seems the result -allowing the introduction of elective courses on Islam- is a constitutional protection of religious sensibilities, I believe that if the Court applied the proportionality standard the result would be different and more protective of religious freedoms overall. Under the proportionality standard, introducing those religious courses would be found unproportional and would be seen as a violation of the religious freedoms of minority religion students. Under the circumstances of this case, the law introducing those religious courses would fail the second and third prong of the proportionality standard. The second prong, necessity, requires that the means used infringe on the individual as little as possible.⁴⁷ Thus the court should have determined whether there were less restrictive ways to restrict the religious freedom of the students from minority religions in achieving the goal of providing religious education under state supervision. The least restrictive means would be to introduce lessons for members of minority religions at the same time. In Turkey, there are non-Muslim minorities and even different religious communities within Islam such as the Sunnis, Alevi, and Sufis that demand different religious education. According to the Court, the law in question does not prevent the Minister of Education providing religious classes for students of other religions. But if there are not sufficient teaching materials and teachers to provide the same kind of lessons for other religions as well then, in reality, it could be impossible to provide religious classes for the students of different religions. And it could easily be argued that the materials and teachers necessary for providing Islamic classes within a Muslim majority country would be much more readily available than those required for providing classes on different religions. Moreover, in evaluating necessity, the Court would also have to consider whether there is sufficient number of elective courses because there might be Muslim students who do not want to take the Islamic courses. Thus, since the current curriculum provides few elective courses -two of which are religious- the Court would have to require the state to provide a wider range of elective courses, including religious ones, in order to guarantee

⁴⁷ *Supreme Court of Israel, Horev v. Minister of Transportation*, HCJ 5016/96, July 11, 1996, published in April 15, 1997.

choice for students. Otherwise the situation could be seen as espousing indirect compulsory religious education. Thus, with the application of simply this second prong of proportionality, the Court would be able to address the requirement that the state pursue less restrictive ways where available. The law allowing for the courses would likely fail under the third prong, balancing, as well. The third, balancing prong would require weighing the benefits of achieving the goal against the harm caused to minority religion students by its achievement. Thus, the third portion of proportionality focuses on the relationship between potential benefit and harm. In its judgment, the Constitutional Court failed to weigh the state's interest to provide religious education for the majority religion against the interests of students from different religions. The Court did not consider whether the state could demonstrate that providing such classes would not excessively burden students of other religions. The Court could have argued that under the third balancing test, the religious freedom of students of different religions was infringed beyond what was necessary to safeguard the religious freedoms of students of the majority religion, especially in considering the technical difficulties of providing lessons on other religions. Furthermore, religious education has always occasioned criticisms and been contentious. While such tensions were not at issue in this decision, applying proportionality could also potentially be used to lower tensions.

Proportionality was also not applied in the case about wearing a headscarf to court. According to the Court, since there is no law banning the wearing of a headscarf in Turkey, rejecting the lawyer with headscarf in the courtroom is *prima facie* unconstitutional and it is not necessary to evaluate proportionality. I believe that the applicant would and should have won the case even if the proportionality standard were considered but this should not have a bearing on whether or not the Court should use the proportionality standard. The application of the proportionality standard would contribute to take free exercise claims being treated more seriously. Of course, it would not guarantee or require all religious practices to be protected, but it would require the Court to address: i) whether there was rational connection between preventing the applicant wearing a headscarf and the aim of protecting a laic state, which removes religion from the public sphere and the important aspects of public decision making, and ii) whether there exists a less restrictive means of achieving this aim. I argue

that in this case the state would pass the first and the second prong, necessity and balancing. There is a rational connection between refusing to let her wear the headscarf and the goal of removing religion from public sphere. It could also be seen as necessary since it seems to be the only way to make this headscarf invisible in the courtroom/public place and not allow it as a visible symbol of religious commitment and practice. However, I believe that in this case and in previous cases on covering and wearing a headscarf in institutions of higher, the state would fail the third/balancing prong if the proportionality standard were applied. Under the balancing test, the Court would have to evaluate the benefits and harms of the state action. As mentioned above, under the balancing prong, the Court would have had to determine whether the state's interest in removing the headscarf from the university or the courtroom was sufficient to justify infringing on the free exercise of religion. The motive for removing religion from the public sphere is to avoid pressure on non-believers and minority religions thereby protecting their freedom to believe and not to believe, therefore I think the Court would have held that there was insufficient justification to infringe on the lawyer's right to exercise freedom of religion and wear a headscarf to court. The relationship between the benefit to the state or non-believers and minorities of refusing a headscarf in the university or courtroom and the harm to the college student's and lawyer's right to manifest a belief is not proportionate. Under the facts, the harm to the religious sensibilities of the person who wanted to wear a headscarf is more severe than the harm -the state's benefit- to non-believers and believers of different religions of any pressure exercised by the visibility of a religious symbol in a public space.

Conclusion

Applying a free exercise standard does not mean that religion will always win. The 2010 amendment package introduced individual application to the Turkish legal system.⁴⁸ In this way, the Court finally started to deal with individual claims regarding fundamental rights and freedoms. The Court must consider that free exercise issues require a balance between the subs-

⁴⁸ Saadet YÜKSEL, *A Comparative Approach on New Constitutionalism*, Annales de la Faculte de Droit d'Istanbul, Yıl 44, Sayı 63, 2012, s. 352.

tantiality of the benefit to the state and the individual interest in each case. Neither the Muslim majority's nor religious minorities' free exercise of religion is protected by a limited approach of the Constitutional Court that does not take proportionality into account. Since the Constitutional Court has never applied a free exercise standard, it is easily argued that majority's ideology and contemporary political debates can determine rulings of the Court in such cases. As mentioned in the second section, changes in the formation and approach of the members of the Court easily change rulings in Turkey.⁴⁹ The Court should move away from approaching every case regarding freedom of religion only as an issue of separation of state and religion and should adopt the proportionality standard, which enhances protections for the individual.⁵⁰

⁴⁹ See E. 1989/1, K. 1989/12, 7.3.1989, Official Gazette No. 20216, 05.07.1989; E. 1990/36, K. 1991/8, 9.4.1991, Official Gazette No. 20946, 31.07.1991; E. 2012/65, K. 2012/128, 20.09.2012, Official Gazette No. 28622, 18.04.2013.

⁵⁰ JACKSON, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement*, s. 167; Vicki JACKSON, *Being Proportional About Proportionality*, (The Ultimate Rule of Law, By David Beatty), Const. Comment. Book Reviews, Yıl 21, 2004, s. 851.

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