TWO GENERATIONS OF DEBATE ON FREEDOM OF RELIGION IN TURKEY

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I. Introduction

Issues related to freedom of religion are among the hot topics for public debate in today’s Turkey. They also make up a significant part of the greater debate on constitutional principles such as secularism, rule of law and respect for human rights. In this paper, I will be discussing the debate on freedom of religion in Turkey, with a focus on constitutional law scholarship and its repercussions in the jurisprudence of high courts. Within that body, I will argue that we can identify two distinct generations of debate on freedom of religion—two generations, both of which are alive with an oscillating degree of vibrancy.

To introduce my point about those two generations briefly, I would say that the first generation of debate has evolved around the question on the proper place of Islam in the secular nation-state; while the second one has encompassed the plural concerns of protecting the rights and freedoms, pertaining to religion or belief, of a diverse multitude, under the rule of law. For each of those generations, I will provide an overview of the debate in context, the scholars related, and their competing approaches. Then I will try to trace the impact of those approaches in the jurisprudence related to freedom of religion. Finally, I will try to present my reasons for expecting the second generation to prevail over the first one—to prevail, not in terms of eroding or terminating the former, but in terms of successfully including and transforming it, by establishing a new normative framework of reference.

II. The Constitutional Norm in Context

Introduction of the notion of freedom of religion in the modern sense into Turkish political language can be traced back to 19th century Ottoman modernisation, a process where the established millet system based on

differentiated categories of religious toleration was transformed partially and gradually into a modern framework of nationality based on equal rights regardless of religious affiliations. Carrying on the equalisation brought forward by the 19th century edicts and regulations, the 1876 Ottoman Constitution, *Kanunu Esasi*, included equal rights clauses pertaining to free exercise of ‘renowned religions’ within Ottoman territory. Constitutions of the Republic included protection clauses for, inter alia, freedom of conscience and religion. The formulations vary to a degree but there exists a common understanding: Religion is politically sensitive; therefore freedom of religion can only be protected provided a certain list of superior public goods is safeguarded.

Since 1961, the formation of the Turkish constitutional rights regime has been based on an adaption of the German system of constitutional rights (*Die Grundrechte*) with some modifications and constraints. In 1982, many of the constitutional rights clauses were updated in formulation under the light of the European Convention on Human Rights. But for some reason the formulations of freedom of religion clauses in Article 24 remained mostly unchanged.

Moreover, the Turkish constitutional rights regime has been revised several times since 1982, mostly in line with the European standard. Particularly, in 2001, the basic norms on the limits of constitutional rights were updated. Most articles in the Fundamental Rights section were amended accordingly. Article 24, however, remained untouched. Numerous proposals submitted to the public/political debate for amending the Constitution within the last two decades reflect the same pattern: The political imagination on freedom of religion does not show any significant variation from the established understanding—apart from a few recent examples.

A well-established formulation in constitutional texts might seem to indicate a well-established consensus, which is not quite the case here. It is, however, an indicator of the stabilized paths of political agony and public debate related to freedom of religion. In terms of the argument I present in this article, the formulations in the Constitution represent reconciliations achieved within the first generation of the debate, and the newly emerging set-off from the established formulation is closely linked to the dynamics of what I hereby choose to term as the second generation of debate on freedom of religion.

Three basic socio-political processes of change must be briefly mentioned, for they are closely related to the debate studied here: Secularisation, democratisation and Muslimisation. Ottoman secularisation involved building legal and political institutions of a central political
authority, alongside which the authority of the religious class was gradually restricted in terms of scope and autonomy. Secularisation that paved the way for a modern polis state to dominate within its territory was interestingly accompanied by increased elements of Islamic discourse, and the modernisation program by the central state included a novel reference to normative principles of Islam. By the time the Empire officially ended, 1922, the Muslim religious class was mostly transformed into a specific category of public servants whose mandate were by and large confined to hard-core religion—with the gradual secularisation of education and judiciary.6

Republican secularisation carried on the same policy, with a much more ambitious approach to police life within its territory. Republican reforms interfered into a larger sphere of life with a manifest will to modernise and that came along with more secularisation efforts. Once the independence battle was fought and done, the power elite steering the political programme of the Republic promptly abandoned Islamist tones in their political discourse, which would increasingly refer to nationalism and recognize modern civilisation as the highest goal of the polity. Religious public service remained, operating within a much more restricted scope and the rest of the religious class were treated with an iron fist.7 A 1925 statute provided the government with the power to suppress political opposition in harsh ways.8 By 1937, when the Constitution was amended to state that the Republic was ‘laic’, the secularist political reform along with a cultural revolution had been completed with no opposition whatsoever being heard for many years. The silence was only broken after the 1944 democratisation. Since then, secularism and Islam have been a constant issue of debate, and nationalism has repeatedly provided the framework of reference to reconcile the opposing views into a minimally coherent public policy.9

The fate of secularisation in Turkey is hence related to the fact that the country has been democratised.10 Operating within a democratising context required secularisation to be affirmed by popular consent and for civil rights to be protected. The other set of dynamics, Muslimisation, is primarily demographic. Within the last century, the ratio of non-Muslim population in Turkey has decreased from roughly 35 per cent to less than 1 per cent.11 Under such circumstances, the smaller in number the more fragile became the religious minority groups, and today, pluralism in the field of religion is not only about protecting the rights of non-Muslim minority groups but also about protecting the religious diversity within the broad category of Muslims.12
III. A Short Conceptual History

Beyond mere logical correspondence, the development of a modern notion of freedom of religion in Turkey was linked to modernisation, as a conceptual history of the term would reveal. At the heart of the modern concept of freedom of religion lies a conception of religion as an autonomous subjective adoption *vis-a-vis* an objective and socially-determined category of belonging. It operates according to a key concept: *Conscience*, which can roughly be termed as being the name for an assumed human capacity to distinguish ethical categories and which guides ethical action. As evident in the 1948 Universal Declaration of Human Rights (UDHR) Preamble, conscience, along with reason, is one of the basic assumptions in the construction of the human, which is the subject, entitled to the universal rights therein. Instruments of the same human rights protection paradigm, be they covenants, conventions, declarations or some type of soft-law instruments, maintain a common understanding of freedom of religion: Freedom of conscience is the core of freedom of religion, hence it is afforded more strict protection compared to rights of free manifestation.

The Turkish equivalent of the term *conscience* (*vicdan*) is a new-comer in the vocabulary of late 19th century Ottoman political thought. Apart from a few late 19th century volumes translated from French to Turkish, the earliest publications in Turkish on freedom of conscience are two articles by Abdullah Cevdet, dated 1922 and 1924. Abdullah Cevdet’s conception of freedom of conscience bears parallels to that of Spinoza. Freedom of conscience primarily means freedom of individual conscience from established belief systems and the polity should undertake the duty to safeguard such freedom. We do not know much about the immediate response of pro-Islam thinking, mainly due to the 1925 *Takrirî Sükûn Kanunu* (Establishment of Silence Act) that put the whole public debate into an atmosphere like that of a classroom: A disciplined silence only broken by the voice of the authority or of the permitted. Thus, the prompt outpouring of the public discourse of the pro-Islam opposition following the liberalisation accompanying the 1944 democratisation can be viewed as early examples of the delayed response to the secularist notion of freedom of conscience. That is the point I will suggest marking as the beginning of the first generation of the debate on freedom of religion in Turkey.
IV. The Two Generations Identified

The first generation of the debate on freedom of religion, I will argue, started with the 1944 democratisation, when the disciplined silence was gradually broken to leave room for democratic discourse of a political opposition. It was, inter alia, a time when the then completed secularist reform could be publicly debated. Freedom of religion served as the hallmark of the critics of such reform, meaning primarily the freedom of Muslims to exercise rights vis-à-vis restrictions imposed by the state within the secularist reform. The public debate took place in a political context which brought with it setbacks of secularist attacks or restorations of Muslim religion in several areas such as public education or religious public service. It was evidently a time of restoration: Critics of secularist reform labelled the process as restoration of Muslims’ freedom to manifest their religion, while their opponents saw it as political opportunism usurping religious feelings and bringing about a restoration of the religious character of the polity. The proper place of Islam within the polity, namely the newly built Turkish nation and its Republic, was the key question debated. The debate has continued until the present, with repeated periods of heat.

The second generation of debate emerged alongside the first, within the democratisation in the 1990s. It developed around the question of how to secure equal rights and freedoms for everyone in a democracy under the rule of law. Here, the old question of Islam-in-the-secular-republic was relocated within the above mentioned broader question. The debate was led by liberal democrat public intellectuals yet the contributors were not limited but diverse: Islamists, secularists, nationalists, leftists contributed to the debate, as well as voices from beyond the national borders—be they individual, governmental, intergovernmental or non-governmental.

Here I would like to take a closer look at both generations, with a particular focus on the scholars of constitutional law and the jurisprudence of the higher courts.

V. The First Generation and the Dual Deadlock: Freedom to Religion vs. Freedom from Religion

Contributions to the first generation of the debate on both sides were authored mostly by statesmen or public intellectuals, many of whom were also scholars of some discipline taught in university education. Scholars of constitutional law were particularly engaged and in leading positions. Thus we can see competing conceptions of the constitutional norm protecting
freedom of religion. But these are theoretical accounts rather than fully developed theories on freedom of religion and are mostly located as a derivative within competing theories on the interpretation of the constitutional principle of secularism. Nevertheless, in retrospective, two competing conceptions can be identified, both of which were based on highlighting one side of freedom of religion at the expense of the other: The negative and positive aspects of freedom, or freedom from religion vs. freedom to religion. Two distinguished professors of constitutional law, Ali Fuat Başgil and Bülent Nuri Esen, can be studied as paradigmatic examples, since they both were significant contributors to the public and scholarly debates on secularism and freedom of religion, at a time when the flourishing modern Turkish academy on constitutional law consisted of a handful of scholars.

A. Ali Fuat Başgil and the Argument for Freedom to Religion

Başgil was no doubt the most prominent figure among the critics of the secularist reform. He enjoyed a very successful academic career and regularly published contributions to the public debate on secularism and freedom of religion. Thus, for opponents, he was not easy to ignore and for comrades he was the one who provided the solution of the hot question as to the science of constitutional law. Enjoying the status of a scientific authority, he was unusual in his time when he wholeheartedly embraced religion and affirmed it with glorious descriptions.

He believed that religion was useful and necessary both for the individual and society, and impossible to fully repress by the state of a polity. In parallel with Locke, he argued that repression was useless and mostly counter-productive. He maintained a liberal position in the question of secularisation: Public authority and its policy should respect the natural rights of people, i.e. freedom of religion.

It would be fair to argue that Başgil, when he praised religion, meant primarily and sometimes only Islam, as established and exercised in his contemporary Turkey. At one point as late as 1960, he suggested the protection afforded by the Constitution should be restricted to renowned denominations in the country, along with a prohibition on introducing new religions whatsoever. His work was a rare example of the study of freedom of religion as an independent constitutional principle, out of which originated numerous subjective rights such as the right to worship, right to assembly, right to teach, publish and so on. Also a rare example of the detailed study of the limits to free exercise can be found in his work. He suggests a dual distinction between manifestations of religious beliefs
based on the scope of effect by the act concerned: Those which are individual acts should be subject to no limitation at all; while those which are social acts, that is to say, which have direct effect beyond the individuals themselves, could be subject to limitation provided no extra limitations are imposed on the act just because it is religious. For example, publications on religion could be subject to legal intervention to the extent to which any publication is, and no more.24

Başgil’s dual distinction is based on arguably vague criteria, yet his contribution must be noted in relation to two points:

1. It is parallel to the commonly established *forum internum*—*forum externum* standard of freedom of religion as a human right, but the protected hard core of freedom covers a larger sphere, including not only acts of believing but also worshipping etc.; and
2. The Turkish Constitutional Court in its first formulae of secular state employed a similar distinction without openly referring to Başgil.

The Court stated that in a secular state, those aspects of religion pertaining to the spiritual life of the individual is protected subject to no limits whatsoever; while those going beyond that and pertaining to the lives of others or of the society should be subject to limitation by law for the purposes of maintaining public order or protecting public good.25 Başgil influenced right-wing political thinking much more directly, and his understanding of secularism guided that of the makers of the 1982 Constitution via right-wing political thinking, although the judicial interpretation of the Constitution never openly referred to him.

It would also be fair to say that Başgil focused on freedom to religion rather than freedom from religion. In fact he spent no time mentioning freedom from religion. It is interesting that a liberal like Professor Başgil, who was also among the founders of the first human rights NGO in Turkey, deliberately ignored the negative aspect of the freedom he studied most. Interesting, but not unique, on the contrary, it was a common attitude he shared with his adversaries: Examples of the freedom from religion approach, similarly, provide one-sided accounts of freedom of religion, focusing on the negative aspect, under the title freedom of conscience.
B. Bülent Nuri Esen and the Argument for Freedom from Religion

Abdullah Cevdet’s secularist account of freedom of conscience as the freedom of individual conscience from established religion received a delayed response, which employed a discursive strategy that equated the terms freedom of religion and freedom of conscience. In the works of Basgil and the like, both terms are used as synonyms with no reference to freedom from established beliefs. The freedom from religion approach maintains the Cevdetian stance. Bülent Nuri Esen, a renowned jurist and a long-time professor of constitutional law in the Law School of Ankara University is a typical example. A leading contributor to the freedom of religion debate on the freedom from religion side, Esen praises the individual conscience as a non-violable and sacred domain and religious affiliations, beliefs, etc. are totally matters of individual autonomy, while the political community—polity—is definitely different from religious communities. Maintaining such difference and safeguarding freedom of individual conscience is the duty of the polity, a duty which lies at the heart of the constitutional principle of secularism.

Esen’s account of legal protection afforded to the freedom of individual conscience, in my view, is a good summary of the negative aspect of freedom of religion and the role of a modern democratic state related thereto. But when dealing with the free exercise rights protected by the Constitution (1924 Teşkilatı Esasiye Kanunu, Article 75) a minimalist approach interestingly takes the scene. Esen’s description in his 1946 textbook on constitutional law is worth quoting, where he said:

in accordance with freedom of conscience and religion (clauses of the Constitution) a person can hang a Maşallah sign on the wall of his home . . . or his shop, or people can gather in places of worship, or a person can invite people in his home for a mevlüt ceremony, provided that those acts do not breach the limits imposed in the Article 75 (of the Constitution).

The dramatically narrow scope of manifestation quoted can be argued to be a result of the related article itself, but it would not be true, bearing in mind that Basgil’s detailed description of the scope of free exercise rights is based on the same article.

As the debate developed and the critics of secularist reform employed the term freedom of conscience synonymously with freedom of religion, Esen and his fellow scholars would grow less willing to praise freedom of conscience as an ultimate rule. They would instead refer to merely secularism itself, as an all-encompassing constitutional principle. In a
1968 paper entitled Freedom of Conscience and Secularism presented at a conference celebrating the 20th anniversary of the UDHR, Esen argued that there was an ongoing plot under the banner of freedom of conscience in Turkey, and suggested numerous detailed policy measures to combat this plot authored by the reactionaries supported by foreign states like Saudi Arabia and the USSR. 30

These two competing discursive strategies of the two main rival parties in the first generation of debate produced important results: Against the equation strategy adopted by the freedom to religion approach, the freedom from religion approach functionally abandoned the term freedom of conscience and retreated wholly to the term secularism. The freedom from religion approach moved towards a point where secularism was assumed to be the paramount principle of constitutional law, while freedom of religion was just a derivative thereof. This understanding, which I would suggest labelling as the doctrine of derivation (DoD), would become influential on the jurisprudence of the Turkish high courts.

C. Jurisprudential Repercussions of the First Generation

The 1961 Constitution introduced a more developed system of constitutional rights modelled on that of the 1949 Basic Law of Germany. Constitutional rights were described in detail in terms of scope, limits, limitation procedures, hard-core and protection during public emergency. The Constitution also introduced a constitutional court, which interpreted rights clauses within its mandate of constitutional review. The 1982 Constitution maintained the same system, while restricting the protected scope and enlarging the limitations for the rights.

Apart from the above mentioned anonymous reference to the formulae of Başgil by the Turkish Constitutional Court, I can fairly argue that the freedom from religion approach and its DoD has dominated the jurisprudence of the higher courts on freedom of religion. DoD was employed in both directions, i.e. in decisions strengthening the protection of the rights as well as those weakening them.

For example, the 1995 decision of the Constitutional Court that upheld the provision requiring citizens to declare their religious affiliation to the population register was based on a DoD type reasoning. 31 The Court did not discuss Articles 15 and 24 of the Constitution that explicitly guaranteed the right not to be forced to manifest religion under any circumstances, but simply argued that maintaining such practices was not in contradiction with the principle of secularism. Shortly afterwards, in a 1996 decision, the Court annulled the provisions of the Penal Procedure
Law, which required the judge during trial to ask witnesses their religious affiliations among other personal data such as name and occupation.\textsuperscript{32} Here again the Court did not rely on the explicit prohibitions in Articles 15 and 24, but argued that it would contradict the principle of secularism since it would result in religion being a determinant in public affairs. The decision also did not address the question put forward in several minority opinions, as to whether it was a departure from the established case-law in population register cases.\textsuperscript{33}

Because DoD is structurally open to go in both directions without actually taking into account the specific normative content of the rights clauses themselves but merely the secular state clause, it cannot be appropriate to protect constitutional subjective rights. This point is clearly put by Judge Sezer of the Constitutional Court in his minority opinions in two 1995 cases, decided at opposite directions in quite similar cases employing the same DoD approach. The wordings of the opinions were almost the same, since Sezer was making the same point in both cases: A secular state review is irrelevant, where review under specific clauses for protection of subjective rights under the rule of law is needed.\textsuperscript{34}

Employing a DoD type of understanding, a court can go as far did the Council of State in its well-known Akbulut case:\textsuperscript{35} Reviewing the administrative regulation requiring university students to have their heads uncovered while at school, the Council did not spend time to address the question of the statutory basis of the administrative regulation under review—a question which was central to the notion of rule of law and to the Council’s established jurisprudence. Instead, the Council offered a reasoning which argued that it would be in conformity with the law to ban those female students, who by covering their heads, manifested that they were opponents to Atatürk’s reforms and principles—since education in accordance with those principles was among the leading duties of Turkish universities defined in the Constitution.\textsuperscript{36}

VI. The Second Generation and the Pluralisation of Parties and Concerns

The first generation of debate was national, both in terms of participation and framework of reference. It developed around one key question on the place of Islam in the secular Republic, led to a dual deadlock between pro-Islam and secularist parties, and its representation in constitutional law can be described as two competing single-sided approaches to freedom of religion: Freedom to religion \textit{vs.} freedom from religion. In that generation of debate, religions other than Islam are almost completely missing.
Finally, the term ‘debate’ could be misleading, as I would carefully note that none of the parties to the first generation debate wasted their time engaging in a direct debate with the opposite view. They did not even mention each other; and did not refer to each other once even for the purpose of criticism. Both parties referred to Western resources and resources of national law, and they focused their efforts on stating what the truth was or how it should be understood or implemented. But that does not prevent us describing it as a debate, because it was of course a debate, carried on not in terms of direct engagement but of mutual ignorance to the fullest degree possible. The parties did not talk directly to each other and it would be fair to argue that they had no appeal to each other. Mostly due to that, the public policy outcome of the first generation depended on the arbitration provided by nationalism.37

The dual deadlock and the arbitration of nationalism could not frame the new formulations of the question of freedom of religion in the 1990s. Rather, it was a time of pluralisation of axes and the dual deadlock seemed more or less irrelevant for many of those focal points. There were efforts to formulate re-emerging social demands into political causes within a framework of democracy under the rule of law. Pro-Kurd and pro-Islam political movements challenged mainstream representative politics with agendas of radical political reform backed by ever growing popular support. Such a challenge was also directed at the privileged status of the principles of nationalism and secularism and helped to improve those of democracy, human rights and rule of law, all of which were Article 2 basic tenets of the Republic.38

It is also worth noting that the Alevi community reorganized themselves in combinations of traditional and experimental forms with increasing public visibility.39 Many minority beliefs, be they four thousand or just four years old in the territory of the Republic, also gained relatively more public visibility. Deepening integration with the rest of the world in terms of culture, commerce or politics resulted in pluralisation of views and concerns. European integration and its political criteria again contributed to the pluralisation of these focal points. Within such plurality, human rights and democracy under the rule of law might not be the original aspirations of the most vibrant political groups, but a good deal of effort has been put in to present it as a Jeffersonian best choice—best possible—and a good amount of work has been done. The human rights paradigm provides a new lexicon to discuss what to do with religions and believers. Freedom of religion in this context is the freedom of everyone from oppression and discrimination on the grounds of religion.40
A. Senior Scholars Revisit an Old Question: New Terms?

It is no coincidence then that the legal scholarship informed by the second generation debate on freedom of religion mainly takes place within human rights research—with a focus on the Strasbourg standard. Works dedicated to the study of freedom of religion within the discipline of constitutional law are rare. Apart from a recently published doctoral work, only four scholars of Turkish constitutional law have published works focusing on freedom of religion: Bülent Tanör, İbrahim Kaboğlu, Mustafa Erdoğan, and Ergün Özbudun. Their works are not monographic volumes but journal articles or book chapters. All of them are senior researchers of constitutional law renowned in their field, renowned not for their work on freedom of religion but for their scholarship on constitutional law in general. They were in late middle age and in tenure posts when the second generation of debate emerged. Their contributions could fairly be described as personal transitions from the first generation to the second.

Bülent Tanör in his 1994 volume on human rights in Turkey dedicated a chapter to freedom of belief and religion. In his conception, freedom of religion goes beyond religiosity, it is indeed a question of freedom of conscience, conviction and belief in matters related to religion and it covers the right not to believe, not to be discriminated against on grounds of religion and not to be forced to adopt or manifest belief. Such conception allows us to cover the negative aspect of freedom of religion tightly while not preventing us covering the positive aspect. Tanör was of the opinion that freedom from religion was the main issue in a country where Muslimisation was so wide and deep, with the public authority pursuing policies to impose a certain understanding of Islam within its territory. As of 1994, he provided a balance sheet for freedom of religion, where he stated there were no major human rights issues for the majority religion other than that of the female students’ religious dress and that again this was dealt with under de facto toleration. Minority religions did not suffer any structural discrimination accorded in the law of the land but socio-cultural prejudices distorted the proper implementation of equal freedom norms.

The main issue for Tanör was about the imposition of more and more Islam by governmental and civil agencies. History of the republican policy toward Islam, in his view, could be summarized in stages of restriction, liberalisation, support, and finally enforcement—to force (persons) to believe and practice. While not agreeing with the Constitutional Court in its conclusion that the ban on religiously motivated dress in university education originates directly from the Constitution itself, he was of the
opinion that such prohibition did not amount to discrimination on grounds of religion, also having noted that the ban was implemented rarely. Later, in 2000, when the *de facto* toleration he mentioned had long been replaced by an active campaign against *türban* (religious headdress) mobilized by the military intervention of 1997, he wrote that

> [t]he common point in decisions of domestic and foreign courts (was) that secular education (would) not allow manifestations of religious symbols. Those decisions (were) important instruments (of law) on the limits of the right to observe one’s belief code, (where) also mentioned (was) the pressure over conscience that (would) originate from the manifestations of religious symbols.  

I would fully agree with Tanör in his argument for the necessity to take the right not to practice Islam seriously in a context of Muslimisation. State imposition would definitely add to the urgency of the need to do so. The problematic aspect is that his balance sheet was based on groups and not individuals as subjects, and on religiosity and not freedom. The fact that religiosity in some sense increases in certain spheres of life due to government support and/or imposition would not mean followers of that religion would then have ‘even more than freedom’. That is not ‘more than freedom’, it simply is something else. Such an understanding would lead us to an unfair offset as the one seen in his balance sheet: If a group enjoys ‘more than freedom’ practicing their religion, then restrictions on certain rights of some of the members of that group would be a fair deduction. That is definitely erroneous, also in terms of accounting, simply because the subjects of the gains and deductions are not identical. It would seem fair only from a perspective where certain human beings were seen as mere elements of sets and not individuals.

İbrahim Kaboğlu presents a similar approach with more room for freedom to religion. Like Tanör, he goes beyond the DoD, and his conception of “freedom of conscience, belief and religion” is based on human rights. The right to decide on matters of religion is a non-alienable right of human conscience. No ‘scientific truth’ or no ‘true religion’ can be grounds to deny human beings such freedom, which includes rights to believe/not to believe, rights to practice/not to practice and not to be discriminated upon one’s decisions thereon. Religion, he stresses, should not be viewed as mere feelings rooted in *forum internum* but a whole set of individual and collective acts and respective social institutions.

In his 2002 work on the Law of Freedoms, under the section entitled “Violations of Freedom of Religion,” Kaboğlu writes that “[t]he most severe violations of freedom directed against the secular legal system...
occurs within public service,” and mentions compulsory religion classes in primary and secondary level schools, allocation of public resources to acts of religious practice, and the giant bureaucratic body maintaining public service in matters of Islam—the Directorate of Religious Affairs. Under the section entitled “Headscarf Issue in University (Foulard Islamique)” he provides a brief analysis of the issue with reference to rights and freedoms involved. He does not affirm or reject the ban but tries to point out the pros and cons for both stances and concludes by stating that the ban was affirmed by the jurisprudence of national courts and international human rights courts.

Kaboğlu’s work is among those rare examples, which enter into technical legal talk on the subjective rights related to freedom of religion. Though very briefly, he even mentions the technical difficulties that arose from the 2001 Amendment to Article 13, in determining the limits of freedom to practice religion. It is worth mentioning because he is the only scholar of constitutional law who published several lines on that particular issue. As for the question of religion in politics, his conclusion is in parallel with Ergun Özbudun: “Religion should be confined to the individual and social domain and not carried into the political domain. That is because individual and social domains are those of freedom; the political domain is that of authority. Carrying religion into government destroys freedom of religion and causes the political system to change.”

Mustafa Erdoğan is a quite different example. His understanding of freedom of religion is summarized in the title he gave to one of his journal articles: Freedom of religion as a civil liberty. His critique of what I above tried to term ‘Doctrine of Derivation’ is worth quoting in full:

In the current system [in Turkey] freedom of religion is conceived not within the larger context of universal human rights but within the context of necessary limits thereto imposed by the secularism policy. Within such context, freedom of religion is viewed not as a non-violable, inalienable human right by itself, but as a positive legal right recognized and effective to the extent allowed by the secularist understanding of the state. Hence, we cannot possibly understand the situation in Turkey in terms of the near-universal standard about the place of freedom of religion in a democracy based on human rights.

Erdoğan argues that the 1982 Constitution is a nominal constitution in the Sartorian sense of the term, due to its political philosophy being irreconcilable with ideals such as freedom, human rights, democracy and the rule of law. Its philosophy reflects the official ideology, which comprises of solidarist nationalism, corporatism, a state cult and a certain
notion of civilisation and secularism—understood as the imposition of a secular lifestyle by the state. Such philosophy results in a restrictive understanding of freedom of religion that requires religion to be kept out of social life, as illustrated in the jurisprudence of the Constitutional Court. Religion understood as mere religious feelings within *forum internum*, together with a notion of the State intervening in any aspect of lives it deemed necessary, actually leaves no room for freedom of religion. Erdoğan, on the contrary, suggests that the fact that secularism is a limit imposed on the state by the Constitution and not on individuals should be kept in mind, and freedom of religion must be taken seriously, based on a realistic conception of religion as human experience. He is of the opinion that the American experience of freedom of religion could be seen as a good example of protecting free exercise of religion under the rule of law and a secular government.51

Erdoğan’s account of freedom of religion equips us with a critical understanding of the constitution in general and the constitutional norms on freedom of religion in particular. Yet he does not help us with the question of how to take the existing constitutional rights pertaining to freedom of religion seriously. In his work, neither subjective rights nor technical legal issues related thereto are elaborated. Moreover, he does not address the issues related to freedom from religion and its critical value under conditions of Muslimisation.

Ergun Özbudun, while discussing the principle of secularism in his treatise on Turkish constitutional law, adapts a similar stance to that of Kaboğlu: Religious experience takes place in many ways in human life, therefore a mere *forum internum* protection would lack some of the most needed aspects of a real guarantee. He stresses the need to interpret constitutional norms of secularism and rule of law simultaneously and without fortifying one at the expense of losing the other.52

Özbudun recently published a chapter entitled Secularism and Religious Liberty in an edited volume aimed at contributing to the debate around the on-going constitution-making process.53 His chapter employs the same terminology as Bağış’s classic work (“Din hürriyeti”, roughly translated as “religious liberty”) and his conception of freedom of religion refers to that of Başgil. That is noteworthy, because Başgil’s legacy is simply ignored by the mainstream study of constitutional law in Turkey, whereas Özbudun enjoys the status of a prominent scholar.54 However, unlike what Başgil did in his time, Özbudun does not offer a subjective right analysis or engage in technical legal talk. Rather, he focuses on an analysis of competing visions of secularism in Turkey, employing the conceptual tool set offered recently by Ahmet Kuru: Assertive secularism vs. passive
Özbudun discusses the ways in which assertive secularist practices contradict the principles of democracy and the rule of law. Passive secularism, on the contrary, would be ideal to optimise the contingently competing basic principles of the Republic such as the rule of law and secularism, as well as to reconcile rival political visions in contemporary politics. He rightly points out that the Turkish Constitutional Court often reiterated but did not employ its 1971 standard on freedom of religion in relevant cases. That, in his view, is among the consequences of the Court having adapted the assertive secularist approach.

B. Jurisprudential Repercussions of the Second Generation

The second generation debate is firstly about taking freedom of religion as a constitutionally protected value in itself, contrary to the DoD. Secondly, it is about taking subjective rights seriously. Both points are quite underdeveloped in the jurisprudence. Subjective rights protected under Article 24 were openly referred to only in one set of cases in the late 1980s, where the Court of Cassation decided on the criminality of merely being a member of the Jehovah’s Witnesses community and concluded that it was within the protected scope of Article 24. The Court in its reasoning stated that, by virtue of being a belief system, the belief adopted by Jehovah’s Witnesses should be afforded Article 24 protection—regardless of whether they are known to be a religion, a sect or an order. The Court also stated without explaining their reasoning that acts of worship, teaching, publication and assembly were within the scope of Article 24 protection, which is interesting given the fact that there is no mention of publication and assembly in the wording of Article 24.

A recent decision by the Constitutional Court bears interesting parallels with Özbudun’s above mentioned critiques. In the case on the constitutionality of a statute which provided optional classes on Islam, the Court manifestly adapts a new approach as regards the interpretation of the principle of secularism:

The more flexible and pro-freedom interpretation of secularism starts from the fact that religion is a social phenomenon . . . Such a conception of secularism does not imprison religion in the individual forum internum, (but) recognizes (religion) as an important element of individual and collective identity and enables its social visibility. In a secular polity, individual choices on religion and lifestyles formed thereby are beyond intervention and under protection by the state. Secularism, in that sense, is the guarantee of freedom of religion.
The Court also mentions the need to interpret the principle of secularism within the integrity of the Constitution, as opposed to the previous understanding where secularism was accepted as the paramount norm of the Constitution. Nevertheless, the Court still does not address the subjective rights relevant to the case. Moreover, after having stressed the need for an integral approach that takes all the relevant norms into account, the Court gives a long list of relevant provisions, where Article 24 on freedom of religion is absent. A manifest change in jurisprudence is a rarity in Turkish Constitutional Court case-law; therefore the decision is clearly a turning point. However, of the two keywords the Court chose to describe the change, “flexible” and “pro-freedom”, the former seems to have functioned more efficiently, while the latter resonated more pleasantly: The decision upheld a new move toward accommodationism without addressing any concern to balance the relevant rights to freedom from religion and rights to non-discrimination. Therefore, it would be more than optimistic to accept that the Court left behind its habitual failure to take freedom of religion seriously.60

VII. Conclusion: Why the Second Generation Will Prevail?

The first generation has been alive for more than sixty years and still at times it seems much more vibrant than the second. The recent change in jurisprudence of the Turkish Constitutional Court on secularism and freedom of religion fits better in the first generation debate than the second. A similar point could be made about Özbudun’s adaption of the assertive/passive secularism dichotomy. Then, why would the second generation of debate prevail over the first? I have two good reasons to expect that eventually to be the case. The first reason is political and the second is institutional.

The debate on freedom of religion is now populated by a diverse list of participants, and their respective contributions are guided by their diverse interests in the issue. The long-fought battle on more-Islam or more-secularism in the Republic can still recruit quite a good amount of social forces but it definitely is unable to accommodate the diversity of the debate. In the future there seems to be no reason to expect this diversity to decrease. Particularly, any national solution arbitrated by nationalist thinking, like the one in the first generation, would be lacking the necessary variety to address multiple challenges. The banner of equal rights and freedoms in a democracy under the rule of law has, on the contrary, such multifaceted instrumentality and there is no reason to conclude that it has done badly up to now.

The second reason is institutional and is about the place of subjective rights in the concept of freedom of religion. Conception of freedoms made of subjective rights and their objective consequences is more relevant in the present day understanding, where litigation based on subjective claims make up a significant part of it. Constitutional rights in Turkey were not studied in detail as subjective rights, mostly because there was no immediate need to do so: Until 2010, the Turkish Constitutional Court did not have the mandate to review individual complaints about alleged infringements of constitutional rights; its mandate covered constitutional review of statute law. Such a duty could be somehow fulfilled even by wholly ignoring the subjective rights aspect of the case in hand. In freedom of religion cases for example, the Court usually followed the question [is this allowed in a secular state?] and did not even once follow a question such as [whose and which subjective rights are protected by the Constitution and are they infringed in the present case?]. The individual complaint procedure would simply render that strategy impossible. It would be unreasonable to expect that the Court will keep up with the secular state review in a case where the applicant argues infringement of their certain subjective rights. The Courts and the scholars of constitutional law alike will have to discuss the scope and limits of freedom of religion in growing detail. Litigation and jurisprudence will influence the public debate, as always. The second generation is better fitted to such a task, as was the first generation to the previous task that consisted of norm review.

Notes

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1 For the texts of Ottoman and Turkish constitutional instruments, see Suna Kili and Abdurrahman Ş. Gözübüyük, Türk Anayasa Metinleri, (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2000–2nd ed.). For an illustrative comment on the transformation of religious toleration in Turkey, from the Empire to the Republic, see Walzer’s account of Ottoman millet system as an example of imperial regime of toleration, and the Republican secularism as one of a nation-state type regime of toleration: Michael Walzer, On Toleration (New Haven: Yale University Press, 1997). For a brief history of freedom of religion in Turkey, see for example, Abdullahi A. An-Na’im, Islam and the Secular State (Cambridge: Harvard University Press, 2008), pp. 182–223.

2 For a monographic volume on freedom of religion under the Turkish Constitution,

3 For an unofficial yet authoritative translation of the Constitution of the Republic of Turkey, we can refer to the Constitutional Court in <http://www.anayasa.gov.tr/index.php?l=template&id=210&lang=1&c=1>. Article 24, entitled “Freedom of Religion and Conscience”, reads as follows:

“Everyone has the right to freedom of conscience, religious belief and conviction.

Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14.

No one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.

Education and instruction in religion and ethics shall be conducted under State supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subjected to the individual’s own desire, and in the case of minors, to the request of their legal representatives.

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.”

4 Of all the proposals after 1982, only the 2007 Özbudun Draft shows a significant variation from the established understanding and examples a shift toward the ECHR systematic of regulating freedom of religion. For this and other examples, see Fazıl H. Erdem and Yunus Heper, Türkiye Cumhuriyeti Anayasaları ve Anayasa Önerileri (Ankara: SETA, 2011). Noteworthy is that the Anayasa Uzlaşma Komisyonu (Interparty Reconciliation Committee for Constitution-making) of the TBMM developed a set of formulations resembling the Özbudun Draft.

5 For a more detailed discussion, see for example Vural, supra note 2, pp. 29–40.


7 See for example İsmail Kara, Cumhuriyet Türkiyesinde Bir Mesele Olarak İslam (İstanbul: Dergah, 2008).

8 Takriri Sükun Kanunu (No. 578, “Establishment of Silence Act”) of 4 March 1925 remained in force for two years and the measures based thereupon paved the way for the ruling party to establish its single party rule without opposition, which would last until 1944 democratisation. See for example Mete Tuncay, Türkiye Cumhuriyetinde Tek-Parti Yönetiminin Kurulması (Ankara: Yurt, 1981); also see


10 For the purposes of this paper, democracy is understood in terms of equality, civil rights and representative government. For a history of Turkish democratisation, *see* for example Zürcher, *supra* note 8, pp. 206–336.

11 For there is no clear statistical data on religious denominations in Turkey, numbers depending on estimates and they vary. *See* for example the estimates in the *Turkey* section of the 2012 *US Report on International Religious Freedom* at <http://www.state.gov/j/drl/rls/irf/>. Within the diversity of Muslim population, *Alevi* (15–25 per cent) and *Shi’i* (2–5 per cent) must be noted. Also note that the question as to whether *Alevilik* is a separate belief system is subject to hot debate. For the approach of the European Court of Human Rights, *see* Hasan and Eyelene Zengin v. *Turkey*, 9 October 2007, European Court of Human Rights, No.1448/04, paras. 8–9.


14 Şemseddin Sami, in his 1903 *Kamusu Türkü* (“Turkish Dictionary”), provides a good description of the status of the word in his time (1996). For further comments on conscience in Ottoman Turkish lexicon, *see* Vural, *supra* note 2, p. 205.

15 *See* Abdullah Cevdet, ‘Hürriyet-i Vicdan Meselesi,’ 147 *İctihad* (1922), pp. 3063–3064; and ‘Siyasi İstiklalden Sonra Vicdani İstiklal,’ 164 *İctihad* (1924), pp. 3336–3338.

16 *See* comments and references to Tunçay and to Zürcher, *supra* note 8.

17 For a detailed list of publications in that genre *see* Vural, *supra* note 2, p. 43.

18 1944 marked the beginning of a new era: Turkey participated in the ‘free world’ or the Western Bloc and reformed its political system to meet the democracy criteria of the Bloc. For a brief historiography of post-1944 democratisation, *see* Zürcher, *supra* note 8, pp. 206–220.

the past two centuries of institutional change and political agony related to the question of Islam-in-Turkey; see for example Talip Küçükcan, ‘State, Islam, and Religious Liberty in Modern Turkey: Reconfiguration of Religion in the Public Sphere’, Brigham Young University Law Review (2003), pp. 475–506.

20 See Vural, supra note 2, pp. 40–49.


22 Especially see his 1954 work: Ali Fuat Başgil, Din ve Laiklik (İstanbul: Yağmur, 1996–6th ed.).


24 See Başgil, supra note 22, pp. 90–130.

25 See Turkish Constitutional Court Decision, E. 1970/53 K. 1971/76, 21 October 1971. It is interesting though that in the Court’s formulae, what is unconditionally protected or subjected to limitation by law is ‘religion’—and not freedom of religion, or subjective rights related thereto.

26 Abdullah Cevdet, supra note 15.


33 Turkish Constitutional Court Decisions, supra note 31.


36 Compare with the UN Human Rights Committee, General Comment No. 22 on Freedom of Religion (1993), para.10, where the States Parties to the Covenant are under the duty to not to discriminate against those who do not adhere to and/or
oppose to the official ideology—where applicable. The Akbulut decision was the first link in the chain of case-law upholding administrative regulations banning female students with headscarves from the universities. The ban would be upheld in the following decades by numerous court decisions, including three decisions by the Turkish Constitutional Court (E. 1989/1 K. 1989/12, 07 March 1989; E. 1990/36 K. 1991/8, 09 April 1991; E. 2008/16 K. 2008/116, 06 June 2008) and the Şahin decision by the ECtHR (Şahin v. Turkey, 10 November 2005, European Court of Human Rights Grand Chamber, No. 44774/98). For an excellent comment on the costs of the pro-ban case-law to the institutionalisation of rule of law in Turkey, see Kerem Altparmak and Onur Karahanoğulları, ‘Pyrrhus Zaferi: Leyla Şahin/Türkiye, AİHM/Hukuk, Düzenleyici İşlem/Kanun’, 1–3 Hukuk ve Adalet (2004), pp. 249–275; and ‘After Şahin: The debate on headscarves is not over’, 2 European Constitutional Law Review (2006), pp. 268–292.

Article 2 of the Constitution reads as follows: “Republic of Turkey is a democratic, secular and social State governed by the rule of law; . . . respecting human rights. . . ”

See for example, Elise Massicard, Alevi Hareketinin Siyasallaşması (İstanbul: İletişim, 2007). See also Necdet Subaşı, Alevi Çalıştayları Nihai Raporu (Ankara: Devlet Bakanlığı, 2012), where the author discusses the current Alevi issue in Turkey, in his final report as the Coordinator to the well-known Alevi Workshops (2009–2011).

Among those works, we can mention Zühtü Arslan, Avrupa İnsan Hakları Sözleşmesi’nde Din Özgürlüğü (Ankara: LDT, 2005); Berke Özenç, Avrupa İnsan Hakları Sözleşmesi ve İnanç Özgürlüğü (İstanbul: Kitap, 2006) and Hande Seher Demir, Avrupa İnsan Hakları Mahkemesi Kararları Işığında Türkiye’de Din ve Vıçdan Özgürlüğü (Ankara: Adalet, 2011).

Bülent Tanör, Türkiye’nin İnsan Hakları Sorunu (İstanbul: BDS, 1994) pp. 45–58.

İbid., pp. 57–58.


İbid., pp. 369–376.

İbid., p. 372.

Mustafa Erdoğan, ‘Bir Sivil Özgürlük Olarak Din Özgürlüğü’, in Demokratik Hukuk Devletinde Din ve Vıçdan Özgürlüğü (İstanbul: Ensar, 2002).


54 The fact that Özbudun led the team of scholars to draft the ruling AK Party’s proposal in 2007 and the product of such work, the *Özbudun Draft*, received critics from mainstream scholarship of constitutional law, where opposition to rather than cooperation with the AK Party is *normal*. Reference to Bağış, a prominent scholar later ignored by the mainstream mainly due to his political alignment, seems particularly interesting on that background context.


57 Turkish Court of Cassation Decision, 9th Chamber, E. 1985/2623 K. 1985/3431.

