

Rethinking Turkish Secularism: Towards “Unofficial” Islamic Constitutionalism?

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This blog post is deliberately provocative—at least its title is. The basic fact is there are both domestic and foreign concerns that Turkey is a theocracy in the making or some “attenuated” version thereof. While most of these concerns are full of extravagant exaggerations, often suggesting Iran as an example Turkey is allegedly headed towards, there is a certain element of truth embedded in these concerns: For better or worse, Turkish secularism has been and currently is being renegotiated, to say the very least. While it is not always easy to distinguish political liberalization and the relaxation of stringent laws targeting religion and its social visibility in the public domain from legal and political efforts that challenge Turkey’s secular order, there are indications today that point to the latter, that is, what may be termed an “unofficial” mode of Islamic constitutionalism that operates as a constitutional reality, despite the capital-C Constitution’s text providing otherwise that Turkey is a secular country.

Turkey is a peculiar case study when it comes to constitutionalism and religion. Comparative constitutional law scholarship orthodoxy treats Turkey as an outlier, possibly along with France—both regarded as assertively secular countries where most social manifestations of religion are prohibited. Having been identified thusly, Turkey is usually not even considered as a case study for scholars of Islamic constitutionalism. Studies on Turkey and Islamic constitutionalism merely indicate how Turkey—as both state-sponsored and other statistics indicate, a Muslim-majority country—does not have an Islamic constitution. Polities whose constitutions make some reference to Islam or Sharia are treated by comparative constitutional law scholars as primary cases to study (Egypt, Iraq and Iran being prime examples), hence the lively debate surrounding some Islamic constitutions’ references to Sharia as being either *a* or *the* source of legislation. I hope to unsettle this orthodoxy by trying to pluralize the notion of Islamic constitutionalism with a distinct mode, that is, “unofficial” Islamic constitutionalism that can come into being under the *absence* of specific constitutional stipulations referencing Islam or Sharia, and even *despite* constitutional stipulations making numerous and repeated references to secularism.

Liberal But Still Secular

While the AKP government chose to describe itself using the term “conservative democrat,” foreign references almost always used—and continue to use—labels such as “Islamist,” often followed or preceded by additional qualifiers such as “moderate” and/or “democrat.” The change in Turkey’s political landscape throughout more than a decade has unsurprisingly witnessed a complementary change in the judicial landscape, and after the 2010 constitutional amendments, which reshuffled the judiciary and reconfigured the composition of the Turkish Constitutional Court, the Turkish judiciary’s stance towards religion and its social manifestations changed significantly. Regulations concerning religious attire were loosened and the ban on wearing headscarves in institutions of higher learning was lifted. In [a landmark case](#) in 2012, perhaps best encapsulating this trend towards relaxation/liberalization, the Constitutional Court upheld a law instituting optional courses in public schools titled “The Life of Our Prophet” and “The Holy Quran,” and more importantly, in dicta, ruled:

“When secularism’s historical development is examined, two interpretations and applications of the concept emerge, contingent upon the approaches to the phenomenon of religion. According to the stricter understanding of these two, religion is a phenomenon that only finds place in the individual’s conscience that is prohibited from going beyond this and from manifesting itself socially and publically. A more flexible and liberal interpretation of secularism derives from the conclusion that

religion is, apart from its personal dimension, a social phenomenon. This understanding of secularism does not imprison religion to one's conscience, but views it as an important element of individual and collective identity, and allows for its social visibility."

The Court's espousal of what it called the "liberal interpretation of secularism," some scholars have argued, was a commendable jurisprudential change that marked a significant shift from the Court's earlier jurisprudence that was arguably motivated by anti-Islamic sentiments, as partly evidenced by a case dating back to 1989, where in dicta [the Court had ruled](#):

"Secularism, which has accelerated modernity and which is the foundation of the Turkish Revolution, ensures that society is saved from irrational and unscientific notions ... [Our] Republic and democracy are the opposite of Sharia rule."

Given the Court's earlier jurisprudence, the change was welcomed by many, and regarded as constituting a part of the broader legal and political trend towards liberalizing restrictions on religion and its social visibility.

"Unofficial" Islamic Constitutionalism: The Political Landscape

While one legal and political strand in recent Turkish history has been to liberalize restrictions on religion and its social visibility, some phenomena simply go beyond that and indicate a political and—to a certain extent—legal willingness to promote Islam in general and to have it penetrate Turkey's legal system, despite the Turkish Constitution's unequivocal and repeated references to secularism, which is why I dub this whole transformation "unofficial."

The most (in)famous and futile attempt came from the Turkish Parliament speaker—also an AKP MP. He commented on the discussions surrounding the recent referendum in April 2017 that amended the Constitution, seriously altering the Turkish democracy's separation of powers arrangements. [Commenting](#) on the need for "a new and religious constitution," and noting further the absence of the word "Allah" in the current Turkish Constitution, the speaker went on and proposed to erase all references to secularism in the text. His party quickly responded, arguing that the speaker was speaking on his behalf only, and that his remarks did not reflect the AKP's views on secularism. President Erdogan, in a similar vein, noting that his own views on secularism were clear, said: "The reality is that the state should have an equal distance from all religious faiths." The debate around "Islamizing" the Constitution provided Turkish constitutional lawyers with yet another opportunity to reflect on the timeless "[parchment barriers](#)" problem, given the eternity clause in Article 2 of the Turkish Constitution, which, in theory (or simply put, "in parchment") declares secularism to be an irrevocable and unamendable pillar of the Turkish constitutional order. Despite this strong stipulation of irrevocability, a high profile politician such as the Parliament speaker did not feel hesitant to propose adding religious references to the text and erasing references to secularism.

To give another example dating back to 2013, then Prime Minister Erdogan supported a legislative bill restricting the sale of alcoholic beverages in certain locations (mainly due to their proximity to schools and places of worship) and after certain hours, partly relying on the express constitutional stipulation in Article 58(2) of the Constitution, granting the government the power to "take necessary measures to protect youth from addiction to alcohol and drugs..." Among other reasons in support of the bill, however, then Prime Minister Erdogan also noted that the legislation in question was [in line with what religion commanded](#). Erdogan's reference to religion in support of the bill, which indeed ended up being enacted into law, raised questions about whether the bill had violated the principle of secularism by virtue of being partly motivated by religious sentiments, arguably violative of Article 24(4) of the Constitution, stating that "No one shall be allowed to exploit or abuse religion or religious feelings ... for even *partially* basing the fundamental, social, economic, political, and legal order of the State on religious tenets."

“Unofficial” Islamic Constitutionalism: The Legal Landscape

Judicial opinions of the Constitutional Court, too, seem to indicate more than mere liberalization in terms of how the judiciary interprets secularism vis-à-vis Islam. I will give two examples to demonstrate this phenomenon.

First, in a fairly recent [individual application case last year](#) (2016), in reaching the conclusion that the Islamic call to prayer (also known as *azan*) did not violate petitioner’s right to improve his physical and spiritual existence protected by Article 17 of the Turkish Constitution, the Court reasoned as follows:

“In this context, it should be noted that the call to prayer is a religious practice of the Islamic faith, dating back to the foundational years of Islam, that aims to call people to daily prayer and to inform those who are unable to go to worship places of the prayer time, and that it has gained cultural significance among society.”

The Court did not seem to exercise any caution in making judicial statements about how central the call to prayer was to Islam, and further, it did not hesitate to deem the call to prayer a religious ritual that, at least within the Turkish context, had gained cultural significance. Bracketing the question of how well suited the judiciary is in recognizing values that have—and by implication, that have not—gained societal acceptance, the Court took a step further from its earlier jurisprudence of liberalizing restrictions on religion: in this case, the Court made pronouncements on behalf of majorities, more specifically on behalf of the religion of the majority in the country, despite its reasoning in a previous paragraph of the very same decision that:

“It is outside the purview of the judicial organs to question what individuals’ interpretations of their own religions or what “common religious practices” are. A contrary approach would be tantamount to courts or public authorities substituting their own values for applicants’ convictions and thereby assessing “the appropriateness” of what they should believe in...”

Second, in [a very recent decision handed down in 2017](#), the majority of the Court rejected a libertarian challenge to invalidate sections of the Civil Code deeming most property interests acquired during marriage part of the marital assets equally shared by the spouses. One of the dissenting justices, taking a libertarian stance, reasoned that the relevant sections of the Civil Code indeed violated the Constitution. While finding the relevant sections of the Civil Code in violation of the right to property recognized by the Constitution in Article 35, the dissenting judge continued with a litany of items, which he believed contained norms and principles violated by the relevant parts of the Civil Code:

“As explained above, to take someone’s property from them without their consent is a violation of one’s right to property, personhood, and one’s right as a subject of God [tr. kul hakkı].”

The dissenting judge, in an unprecedented move, listed “one’s right as a subject of God,” (also known as one’s “rightful due”—a special term in Islamic law discourse) as one of the sources of constitutional adjudication to settle the question of whether a provision of the Civil Code contravened the Constitution. While it is true that the quoted term has an everyday meaning in Turkish that is more or less tantamount to a general notion of justice, it is nevertheless undisputedly a term with deep Islamic connotations that the dissenting judge had no hesitation to make use of, which did generate considerable reaction from the secular media, but not so much from Turkish constitutional law scholars.

I should point out three things at the very end: (1) The aim of this post is not fear mongering, given a significant number of Turks' suspicion that the current government is trying to undermine the secular—for some, the *assertively* secular—constitutional order. (2) Further, as the title suggests, I am thinking about recent political and legal developments in the Turkish constitutional space that may be indicating a trend *towards* what I call “unofficial” Islamic constitutionalism, the word “towards” denoting an ongoing transformation as opposed to a process that is completed. (3) Thirdly, this blog post quite consciously avoids discussions of the normative implications of this trend; it confines its subject to a *merely descriptive* analysis of an ongoing transformation—not because I think the normative implications are of no moment, but because I believe they warrant a separate and lengthier treatment.

All I am arguing is that recent developments in the Turkish political and legal landscape show a willingness to renegotiate Turkish secularism at a level that cannot merely be described as liberalization and remedying a past full of animus against Islam and its social visibility. Thus, what we are witnessing may be a trend towards establishing a secular constitutional order, with a flavor of Islam, whatever that means.

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