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

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I. Introduction

On 2 July 2020, the Turkish Council of State (Danıştay) paved the way for the Hagia Sophia museum to be converted into a mosque. Then, the President of the Republic issued a decree, ordering Hagia Sophia to be opened for prayers immediately after the Court announced that it had revoked Hagia Sophia’s status as a museum. Several commentators have already criticised the decision with respect to the historical role of Hagia Sophia. They mostly focused on the political features, cultural implications, and the compliance with international law and human


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We argue, however, that this decision, delivered by a high court whose independence is questionable, should be considered as contrary to the rule of law, not only because it is an example of abusive judicial review but also the fact that its justification is also legally wrong. In this context, our aim is to investigate the role of judiciary in the light of the legal and political facts related to the decision. The rest of the article proceeds as follows. In section 2 we briefly explain the background of the case in order to give a better understanding of the issue and fully coherent analysis. Section 3 concerns the institutional and functional reasons behind why the Council of State is regarded as being abused by the executive power. Final section focuses on the falsity of the decision’s argumentation and provides the reasons which proves that the decision illegal.

II. Background of the Decision

In order to fully understand the consequences of the decision, it is necessary to begin by examining the technical details of the legal framework in which the decision was delivered. Apart from its appellate powers, the Council of State has also an original jurisdiction (as a first instance administrative court) to review legality of the decisions of the executive. The lawsuit about Hagia Sophia at the Council of State was filed with a request of annulment of the decision of the Council of Ministers regarding the conversion of the Hagia Sophia mosque into a museum in 1934. The plaintiff was an organisation named Association of Service to Foundations, Historic Monuments and Environment.

When the lawsuit was filed, the Office of Prime Minister was called as the defendant in respect of the Council of Ministers. However, with the constitutional amendment and government system change in 2017, the Office of Prime Minister was abolished and the defendant became the President of Turkey. Immediately after the Council of State annulled the decision of 1934, President Erdogan issued a decree reconverting the building into a mosque under the responsibility of the Directorate of Religious Affairs. In other words, the defendant in this case was the same authority who provoked the decision.

A comprehensive legal analysis requires recalling the facts of the case. For that, we need a brief historical background. The cultural and architectural value of Hagia Sophia is widely known around the world. The more decisive point in it, however, is its symbolic value. Hagia Sophia was known as the cathedral with the largest dome in the Eastern Roman period, and due to its

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

iconic position in the Orthodox world, its identity has been the target of both Latin (Fourth Crusade in 1204) and Ottoman (1453) invasions. Sultan Mehmet II, who acquired the title of ‘Conqueror’ (Fatih) when the Ottoman army captured Istanbul, established a foundation (vakıf) under his name and ordered that Hagia Sofia be converted into a mosque belonging to the foundation.

As noted by Byzantologists, it eventually became a tradition to convert the biggest church of a conquered city into a mosque, thus even churches whose names are not actually Hagia Sophia suddenly become known as Hagia Sophia mosques. In fact, the name Hagia Sophia contains a symbolism that goes beyond a particular architecture built in Istanbul in the 6th century, such that, there are several Hagia Sophia mosques which had never called with this name when functioning as churches. For example, in Istanbul, the church called the “small Hagia Sophia” was built under the name of Hagia Sergios and Bachos, and after the conquest of Istanbul, it was converted into a mosque during the reign of Sultan Beyazıt, long before the reign of Sultan Mehmet II.

The practice of the Ottoman sultans establishing symbolic mosques gained special importance in terms of the structure of the power within the reign of Sultan Selim. After conquering the sacred lands in the Hijaz, he also adopted the title of caliph and the Ottoman state consolidated its theocratic identity for being the leading authority in the Islamic world’. Accordingly, throughout the years, the selamlık, the sultan’s ceremonial cortege towards a mosque for Friday prayer, became a ritual. Nevertheless, unlike other prayers, Friday prayers had a political rather than religious character. Hagia Sophia was used as one of the venues of this political ritual for many centuries.

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

Under AKP rule, with the constitutional amendments in 2010 and 2017, the judicial power, which took a rather hostile attitude to these parties in the past, has undergone a massive change,
and now the ruling party’s policy preferences are rarely invalidated. The transformation of the judiciary in favour of the AKP rule is also reflected in the change in decisions regarding Hagia Sophia; new lawsuits filed on the same started to conclude in the opposite direction to earlier ones.

III. Abuse of the Court

Hagia Sophia decision does not only constitute an example of turning a particular museum into a mosque, but also gives a role to judiciary in the political program of the government. In this regard, it resonates with the concept of ‘abusive judicial review’ observed in many other countries across the World. The process of converting more than one museum called Hagia Sophia into mosques in Turkey has been going on since 2011. However, the role that a high court assumed for this particular Hagia Sophia in Istanbul is different from others.

In this conversion process, the first step concerned another symbolic building, Hagia Sophia in the town of Iznik, currently a municipality of the Bursa province. This building hosted Ecumenical Councils that may be considered extremely important in terms of the history of Christianity. When Iznik (ancient Nicæa) was conquered by Orhan Gazi, the second sultan of the Ottoman Empire, this was the first structure converted into a mosque of Hagia Sophia. It was transformed into a museum in the 1930s, and continued this function until 2011. Interestingly, in 2011, the same plaintiff, ‘Association of Service to Foundations, Historic Monuments and Environment’ which was involved in the Istanbul Hagia Sophia case, was also involved in demanding permission for religious ceremonies in Iznik Hagia Sophia. The demand was rejected by the court, however, in the same year, the Directorate of Foundations (central administrative authority charged for the all foundations) decided to convert the museum into a mosque with the name of Aya Sophia Orhan.

The next step was the Hagia Sophia in Trabzon (ancient Trebizond). The city was conquered by Sultan Mehmed II and the largest central church Panagia Hrisokefalos was converted into a mosque named Ortahisar Fatih. However, the Hagia Sophia church was neither turned into a mosque by Mehmet II, nor given to a foundation. The building, which is thought to have been converted into a mosque about a hundred years after the conquest of Trabzon, has been used as a museum since the early 1960s. In 1996, the regional directorate of foundations in Trabzon filed a lawsuit demanding that the Hagia Sophia transferred to the central authority of foundations. The case rejected by the first instance court and the Court of Cassation in 1998.

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16 Consequently, the head of the NGO filed a lawsuit for the monument’s allocation for religious ceremonies, which was denied by court (İsmail Kandemir as the head of the Association of Service to Foundations, Historic Monuments and Environment, April 9, 2011, BDFA). Aykaç, p 160.
17 Semavi Eyice, https://islamansiklopedisi.org.tr/ayasofya-camii--trabzon

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After 14 years, a new lawsuit with the same demand was filed in Trabzon again and dismissed. However, this time the appeal section of the Court of Cassation decided that there would be no final verdict in possessory actions and since the building is under the ownership of the Foundations Administration, accepted the transfer demand. Thus, after a high court decision in 2013, the museum reconverted into a mosque.

The process of converting the Chora Museum in Istanbul into a mosque followed a very similar path. The lawsuit regarding the cancellation of the Council of Ministers’ act from 1945 regarding the allocation of the Chora Mosque to the Ministry of National Education to be used as a museum was rejected by the relevant chamber of the Council of State in 2014. In 2017, the appeal filed against this refusal decision of the Chamber was also rejected by higher appeal authority of the Council of State, the Board of Administrative Litigation Chambers. However, upon the objection made against this decision, the same Board decided to reverse it in 2019. After this reversal decision, the 6th Chamber of the Council of State cancelled the allocation process, which was the subject of the case, with a decision opposite to its previous decision and enabled the Chora museum to become a mosque. As can be seen, after 2017, the Council of State has taken the opposite stance on this issue.

There are three facts showing the bias in the decision of the Council of State in 2020. First, the results of previous case law on same matter were reversed after court packing strategy was applied in higher judicial bodies after the 2010 constitutional amendment. As a matter of fact, in 2008 the same body of the Council of State (10th Chamber) composed of different judges, rejected another lawsuit filed demanding the annulment of the decision of the Council of Ministers on turning Hagia Sophia into a museum. All five members of the 10th Chamber, which unanimously ruled the invalidation decision in 2020, was appointed after the 2010 constitutional amendment during the AKP rule.

Finally, the decision to covert Hagia Sofia into a mosque was actually a promise made decades earlier by the President, who seems to be the defendant of this case, and the political movement he emerged from. More importantly, the actions and rhetoric before and immediately after the conclusion of this case provided strong hints to the outcome in advance. Indeed, Berat Albayrak, son-in-law of President Erdoğan and his then minister of treasury, recited the words

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of a famous Islamic poet, "One Day Hagia Sophia will be opened", on social media, just fourteen days before the decision was announced.24

Accordingly, the decision was celebrated by the ruling party and its media outlets. The opening took place on Friday, July 24, with a special event to mark the decision. The president and the political elites performed the Friday prayer in the newly re-converted Hagia Sophia, in the atmosphere of a political demonstration with the participation of thousands. The president of Directorate of Religious Affairs, held a ceremony with a sword symbolizing the conquest.

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

Consequently, this decision reflects a trend in the judiciary, similar to the recent approach to abortion by the Polish Constitutional Court. As a matter of fact, the Polish Constitutional Court's decision regarding right to abortion on 22 October 2021 has set a pattern regarding the function of the court and the content of the trial.25 Another fact that cannot be overlooked is the similarity of the Turkish and Polish cases in terms of this change in the role of judicial bodies, their structures and decisions. Court-packing in favour of the ruling party, and its role as a proxy power to keep the government’s hands clean,26 or as an institution which the ruling party can


hide from the reactions of the international public opinion. This explains why the European Parliament condemned the Polish ruling, as well as the Turkish one.

IV. Falsity of the Justification

It is no surprise that a court that has lost its institutional identity due to the intervention of the political power has also a decline in the legal quality of its jurisprudence. However, the argumentation in the Hagia Sofia decision carries a much more decisive factor. The legislation referred by the Court using a fundamental rights discourse are secular legal rules, such as the constitution, civil code and the case law of the European Court of Human Rights (ECtHR). In this context, a case note published in the Harvard Law Review claimed that this decision legally correct and fills the gaps in the decision using knowledge of Islamic law and turned the concepts of rule of law and judicial independence into an accessory. As a matter of fact, the argumentation in the HRL case note shows that the Court actually reached conclusion by applying Islamic law, but the basis for the decision could not go beyond providing a mere apparent justification, since the secular law in its discourse did not lead to this result.

There is a discrepancy between the justification and the characteristics of the case. So much so that the argumentation made in the decision of the Council of State actually contains a fundamental contradiction, and many smaller inconsistencies. According to the Court’s justification, should the purpose of the foundation or its properties are changed, regardless of the founding will of the donor while forming the foundation, it will not be possible to qualify the foundation as a private legal entity, and this situation will not comply with the principles of legal security, freedom of association and the right to property in the 1982 Constitution. The Court also argues that the ECtHR also guarantees the protection of the immovables and rights of foundations, including those established in the Ottoman period, as a result of their protected status, within the scope of property rights. As a matter of fact, from this justification, two prominent issues stand out. The first is the will of the founder and the second is the foundation's (waqf) property right as a private law person, protected by the ECtHR case law.

Regarding the first issue the question can be put as follows: is Fatih Sultan Mehmed Foundation a private law person? According to the Court’s argumentation, establishing a foundation is a private law process and creates a private law legal entity. However, this abstract justification overlooks the characteristics of the concrete conditions under which the Sultan Mehmed II conducted this foundation process. When using modern legal institutions and concepts, the Court ignores the fact that the right of disposition on this building was not obtained by means of purchase or inheritance, and also ignores the public nature of the building.

Second issue concerns whether a foundation run by the public authority have property rights. The second argument of the Court is partly bound to the first, but goes further: “Should the Fatih Sultan Mehmed Vakfı have a private law identity, then it has a constitutional right to property and the will of the founder should also be protected from the interventions.” In this respect, the Court reveals some facts, including that Hagia Sophia is a property of Fatih Sultan Mehmet Han Foundation, which is a private law legal entity. However, the decision does not evaluate the status of this foundation. In fact, the General Directorate of Foundations (GDF) is a public body run by state officials. Moreover, GDF, a public authority, was the shareholder of a bank (Vakıfbank) until 2019, representing these historical foundations. Furthermore, with a decision of GDF, a university was established on behalf of five foundations including Fatih Sultan Mehmet Foundation.  

Islamic law analysis states that the property of foundation was not “like Mehmed’s private property, these are the city’s civic institutions, fitting well within the category of property made public after conquest.” However, should the kind of property be a mosque, future rulers (such as Mustafa Kemal Ataturk) are not entitled to control over them. Yet, the Court does not clearly address this fact, but simply states that properties belonging to foundations cannot be transferred. However, there is no transfer, and it is already registered as a mosque in the deed. The act of the Council of Ministers in 1934 concerns allocation.

Moreover, the Court also cites European human rights law. The Court points out the case, in which the ECtHR ruled that Turkey violated the Convention due to the seizure a property which had been donated to an Armenian Church, School and Cemetery foundation. Yet, the Court’s reference human rights law seems irrelevant and misleading, given that there were no possible parallels between the conditions of a minority foundation, and those of the Fatih Foundation, which is already run by the state, and whose property therefore was not seized.

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

In this context, neither the ECtHR jurisprudence nor the fundamental rights regulated in the Turkish Constitution constitute a real justification. On the contrary, it is seen that the Council of State, whose composition was changed by the executive, did not act as an independent court, but as a proxy for a decision that the executive with an agenda based on Islamic law did not want to make directly.

V. Conclusion

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