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Editor: Celal Ülgen, Attorney at Law
Coşkun Ongun, Attorney at Law

Cover: Can Eren

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THE ISSUE OF THE HEYBELİADA
(HALKI) SEMINARY AND
THE LEGAL EXPLICATION
OF THE FENER-GREEK
PATRIARCHATE'S
CLAIM TO ECUMENICAL STATUS

The Heybeliada Seminary and The Patriarchate
Associate Professor Dr. Sibel ÖZEL

Translated by: Şebnem Kaptan Göktaş



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The Heybeliada Seminary and The Patriarchate

The difficulties caused by the demand for the re-opening of the Heybeliada Seminary and the claims to ecumenical status have been on our agenda for years.

The spiritual leader of the Catholics, Pope Benedict XVI's visit to the Patriarchate brought up the agreed upon text pointing out that both institutions should do their best to put an end to the conflicts amongst Christians and rekindled the debate on the status of the Patriarchate once again. Under what status did the Patriarchate negotiate with the Vatican?

Both issues have been discussed and debated for years. However, it has been quite difficult to come across a work that is transparent enough to do away with the confusion on the subject.

We believe that this transparency will be achieved through this book.

With its plain but comprehensive narration, this book offers a chance to comprehend why Heybeliada Seminary was closed down, whether it will be re-opened or not, the Patriarchate's role in its ongoing closure, the legal structure of the Patriarchate shaped by the Treaty of Lausanne and the destructive conduct and attitude towards this structure.

We have no doubt that this work, which deals with both issues from the legal perspective, will be beneficial for our colleagues as well as anyone who may be interested in this matter.

This work is kindly submitted for the attention of our readers, this time in its English version.

Hope to meet you soon, yet with another publication.

CONTENT

I. Introduction.....	9
Chapter One.....	13
The Issue of the Heybeliada Seminary	13
I. In General.....	13
II. The Short History of the Heybeliada Seminary ...	18
a. Between 1844 and 1951	18
b. Between 1950 and 1971	18
c. After 1971.....	18
III. The Evaluation of the Positive Provisions of the Turkish Law	31
A. The Constitution of the Turkish Republic ...	31
B. The Basic Law on National Education and the Law on Higher Education	33
C. The Law on Private Educational Institutions..	35
D. The Treaty of Lausanne	37
Chapter Two.....	43
The Fener Greek Patriarchate.....	43
I. In General	43
II. The Patriarchate Issue at the Lausanne Conference.	44
III. The Patriarchate's Status according to the Treaty of Lausanne	50
IV. Regulations concerning the Greek Patriarchate ...	55
V. The Issues regarding the Law on Foreigners	60
VI. Evaluation of the Issue in the Minority Law Field.	61
Conclusion	65
Bibliography.....	69

THE ISSUE OF THE HEYBELIADA SEMINARY AND THE LEGAL EXPLICATION OF THE FENER GREEK PATRIARCHATE'S CLAIM TO ECUMENICAL STATUS

I. Introduction

The issue of the reopening of Heybeliada Seminary - which is brought up on every possible occasion for years by the Fener Greek Patriarchate, put on the agenda during visits of foreign diplomats and treated as a specific subject matter in the progress reports during Turkey's integration period to the European Union- has combined with the Patriarchate's claims to ecumenical status and become a means of imposition upon Turkey. The issue has been detached from its legal background and thereby, reflected as a domestic problem of Christianity that Turkey should not interfere with; also it is tried to be legitimized under such titles as human rights, minority rights, minorities' freedom of worship and freedom of training religious functionaries. In response, while the State of Turkish Republic generally remains silent, politicians see the matter merely on a political level, make promises under foreign pressure and give out the message that they are planning to reopen the Heybeliada Seminary.

No matter how political the issue is, the existence, powers and the demands of an institution located in Turkey should be determined within the legal framework. This obligation applies to religious institutions as well. In a secular republic, no religious institution (be it Christian, Jewish, or Muslim) can demand rights or privileges by putting religious law before existing legal regulations. Under these circumstances, the institutions that can not refer to religion put forward their demands under the coverage of the concepts such as freedom of religion, minority rights, human rights or international covenants.

However, these concepts are not sufficient enough to realize such demands. Binding and tangible legal rules should also provide the same conclusion. The Treaty of Lausanne has a special significance at this point, since whenever the activity of the Patriarchate and especially, the issue of the Heybeliada Seminary is put on the agenda, it is being claimed that the Treaty of Lausanne supports the opening of the school¹. Likewise, the Patriarchate also demands the foreign Orthodox bishops to be granted Turkish citizenship or visa-free entrance to the country, as well as work permit, in order for their activities to be facilitated. When this demand is not met, it tends to be seen as a violation of Turkey's obligations towards the Patriarchate².

As a result, the questions that must be answered are as follows: On which legal principle does the patriarchate rely on while declaring their desire to open the Heybeliada Seminary under the ecumenical title as an international theology school attached to the Patriarchate and their demand for foreign clergy to be able to travel to Turkey without any restrictions, to work here and to be granted Turkish citizenship and eventually to become patriarchs; are there any national or international legal norms regarding this matter that force Turkey to take an action? Since the issues are handled in a purely political dimension, the legal aspect of the matter is often neglected and an impression is made in a way that the solution depends on a decision of the political government. Whereas, since the Turkish Republic is a state governed by the rule of law, political powers will only be able to act

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- (1) Macar, Elçin, Çözüm Gibi Çözüm Şart, access: 13.7.2004, www.bjanet.org; MACAR, Elçin: Laik Türkiye'de Ruhban Yetiştirme Sorunu(The Problem of Training Clergy in Turkey), access: 01.04.2005, www.bjanet.org; MACAR, Elçin/GÖKAÇTI, Mehmet Ali, Heybeliada Ruhban Okulu'nun Geleceği Üzerine Tartışmalar ve Öneriler, TESEV Yayınları, Dış Politika Programı Dış Politika Analiz Serisi-3, 2005, s. 34 vd. (Discussions and Recommendations on the Future of the Halki Seminary, TESEV Publishing, Foreign Policy Program, Foreign Policy Analysis Series-3).
- (2) Burnett, Maria / Pulzetti, Maria / Young, Sean. "Turkey's Compliance with its Obligations to the Ecumenical Patriarchate and Orthodox Christian Minority" The Allard K. Lowenstein International Human Rights Clinic Yale Law School, the report filed upon the request of American Greek Orthodox Archbishopric, dated 11.12.2004, p.2.

within the boundaries of national and international law. That is why, first of all the legal dimension of the much debated the Heybeliada Seminary issue and the legal status of the patriarchate around the framework of the Treaty of Lausanne should be considered and the said demands are required to be examined from the point of view of both national and international law.

Chapter One

The Heybeliada Seminary Issue

I. In General

The demand for the refunctioning of the Heybeliada Seminary, together with the patriarchate's claim to ecumenical status, has turned into a display of power and the legal aspect of the issue has been left aside. The patriarchate on the one hand speaks of the need to train clergymen for the minority in Turkey, on the other hand wants the seminary to operate as a theological school for all Orthodox Christians in the world. That is why it refuses the offers for reopening of the Heybeliada Seminary as it was but, insists on its functioning as an international theological school of special status under the full control of the Patriarchate. First and foremost, the Heybeliada Seminary has not been closed down upon a political decision. Therefore, its reopening with a political decision made under the impositions is out of question.

For the objective examination of the issue, a research is required to be made through the legal framework without circling around slogans and the right questions should be asked. The first question to be asked at this point is: "Was the Heybeliada Seminary closed down unlawfully?" And the question to be answered regarding its re-opening is: "According to the Turkish law, is it possible for the Heybeliada Seminary to be opened in the manner that the Patriarchate desires and is there an international legal principle that obliges the government of the Turkish Republic to allow the opening of the Heybeliada Seminary in this manner?"

To comprehend the issue of the Heybeliada Seminary and to be able to reach a healthy conclusion firstly, the legality of the closing down process should be investigated and then, given the school's qualities, the possibility of its refunctioning under the international treaties, Turkish Constitution and Turkish domestic law

in the way that the patriarchate desires should be objectively determined.

Heybeliada Seminary was closed after a decision made by the Constitutional Court in 1971³. It should be directly emphasized that this decision was not about the Heybeliada Seminary. The event that led to the decision concerned a lawsuit brought to the Council of State by an engineer, against the Ministry of National Education for the invalidation of the diplomas of eight graduates of İzmir Aegean Private Architecture and Engineering Academy's Department of Engineering. The claim of the violation of the constitution was considered serious and thus, the cancellation of the 1st and the 13th articles of the Law on Private Educational Institutions were demanded. Upon its examination, the Constitutional court has decided on the cancellation of the relevant articles of the law grounded on unconstitutionality.

Article 1 of the Act nr. 625 and dated June 8th, 1965 concerning the Private Educational Institutions (Rule 5. Issue 4, Volume 3, Book, p. 2847 onwards) stated that: "Private Educational Institutions are schools of all degrees, institutions that provide education through correspondence, various courses, private establishments that prepare students for exams, tailoring schools and similar establishments founded by natural persons who are Turkish citizens, corporate bodies or legal persons governed by the provisions of private law and the educational institutions opened by foreigners." Article 13 on the other hand states that: "At the higher degree private schools, the examinations of practical and theoretical courses that are essential for the diploma are carried out by the Ministry of National Education". Thus, the law allowed the opening of private schools of every degree enabling the corporate bodies and Turkish citizens to establish schools of higher education.

(3) Constitutional Court's decision of 1969/31 file nr., 1971/3 decision nr., 12.1.1971 dated (Official Gazette, 26.3.1971-13790). For the decision see, rule 5, issue v. 10, Book 1, November 1st, 1970-February 28th, 1971.

Article 120 of Constitution of 1961 predicated on the establishment of universities by the state only and adopted that private persons cannot establish universities. The case that was taken to court questioned whether schools of higher education that are subject to the Constitutional Court Law on Private Educational Institutions fall within university category in relation to article 120 and thus, whether or not private schools of higher education are unconstitutional.

The Constitutional Court declared that in order to prevent the influence of various groups in society on higher education, article nr. 120 of the Constitution stipulates that the universities can be established by state and law only, the private persons are prohibited from opening universities, therefore, several groups of self-interest are prevented from providing biased higher education and training for their own benefit⁴ and it was concluded that all institutions which provide higher education and qualification equivalent to that of a university should fall under the university category with regard to article 120, even though they are not named as Universities⁵. Thus, according to the Constitutional Court, institutions of higher education and training that undertake the social duties of universities, fundamentally provide university education and training, give diplomas in university level but, are not designated as universities also fall under the university category.⁶

Consequently, the Constitutional Court has decided to annul articles 1 and 13 of the Act nr. 625 and sub-clauses 2, 3 and 4 of article 8 concerning private schools of higher education, as well as the rule regarding the private schools of higher education under article 48⁷.

Following the decision of the Constitutional Court on the unconstitutionality of private schools of higher

(4) Rule, 5. Issue, v. 10, 1. Book, p. 1188.

(5) *Ibid.*, p. 1188.

(6) *Ibid.*, p. 1188.

(7) *Ibid.*, p. 1195.

education, Istanbul Directorate of National Education reported the situation to the Directorship of the Heybeliada Seminary with a text dated August 12th, 1971 and nr. 101787 concerning the Private Institutions of Higher Education which states: “According to the Constitutional Court decision dated January 12th, 1971 with the legal ground dated March 26th 1971, your school has been understood to be within the scope of this decision thus, the Theology department which is in the nature of a private school of higher education like others does not longer have a legal entity starting from July 9th, 1971.”⁸

Upon the closure of the seminary like the alikes due to its school of higher education characteristics, Fener (Phanar) Greek Patriarch Athinagoras sent a letter to the Prime Minister Nihat Erim stating that their school cannot be considered as a school of higher education and requesting some support and care.⁹

Istanbul 3rd Civil Court of Peace assigned a trustee to the school and this trustee has applied for the cancellation of administrative ruling before the Council of State through an attorney at law. The claims put forward before the Court were as follows: The school falls under the scope of article 40 of the Lausanne Treaty; there is no difference between a Turkish high school diploma and the Seminary’s Theology division diploma other than the passage on the seminary diploma that states, “deemed as educated at vocational school level for at least one more year after high school”; the graduates of the Theology division can only become priests by profession; the school has been operating since 1844 and it was not possible to open a private school of higher education according to the existing legislation at the time the By-laws of the School were approved; although all the private educational institutions, which were closed down, were put under the

(8) General Directorate of Security, Security Department Archive, Folder Nr.: 42226-3/3-8/F3, quoted in Özyılmaz, Emre: Heybeliada Ruhban Okulu [Heybeliada Seminary], Ankara 2000, p. 101.

(9) Macar, Elçin. Cumhuriyet Döneminde İstanbul Rum Patrikhanesi (Istanbul Greek Patriarchate during the Period of Republic), İstanbul 2004, s. 293.

control of the existing universities and academies no such transfer was made regarding the Heybeliada Seminary and this is a clear evidence that the lawmaker did not consider the seminary to be a school of higher education¹⁰.

Upon these claims, the respondent authorities of the time asserted that the degree granted to the Theology division graduates is determined to be superior than the one granted to graduates of the faculties of the University of Athens and the University of Thessaloniki; apart from the diploma samples, which are attached to the statement of claim, a document in Greek which is secretly presented to the diploma-bearer grants the title of theology instructor and; the people who are authorized to teach theology at high school level have to be graduates of an institution of higher education¹¹.

The suit filed against the Council of State was rejected on the grounds that the Patriarchate does not possess a legal entity and capacity to sue and establish schools.¹²

The high school division of the seminary stayed open but, due to the shortfall in the number of students, Fener Greek Patriarchate requested it to be closed down, However, this request was rejected due to the principle of reciprocity.¹³

In conclusion, the closing down of the Heybeliada Seminary took place when the Constitutional Court ruled that the private schools of higher education are unconstitutional. Therefore, the main issue here is whether or not the Heybeliada Seminary is a school that falls under the scope of this decision. The claim that the closing down of the Heybeliada Seminary is unlawful makes sense only if we reach a conclusion that the seminary is not a school

(10) Ibid., s. 293-294.

(11) Özyılmaz, s. 107-108. For the Turkish version of the secret document taken from General Directorate of Security, Security Department Archive, Folder Nr.: 42226-1/3-8/G8, see, Özyılmaz, s. 108; for the Greek text see, Ibid., s. 212 (Appendix XI).

(12) Macar, s. 295; Somuncuoğlu, Sadi. Patrikhane ve 551 Yıllık Hesap İstanbul'da Yeni Roma İmparatorluğu (The Patriarchate and the Issue of 551 Years: The New Roman Empire in İstanbul), Ankara 2004, s. 84.

(13) Macar, s. 296; Somuncuoğlu, s. 84.

that falls under the scope of the Constitutional Court's decision. In this case, we should examine what kind of a school the Heybeliada Seminary is, what sort of an educational activity it offers and around the framework of which legal principles it operates.

II. The Short History of the Heybeliada Seminary

a. Between 1844 and 1951

The growing nationalism in the 19th century led to the foundation of new states in the Balkans. These new states, which have an Orthodox Christian population, have established their own national churches and tried to depart from Fener Greek Patriarchate's sphere of influence. In response, the patriarchate planned to open a school of theology under its own auspices in order to maintain religious unity among Orthodox communities in various nation states. First step was taken in 1821 by Patriarch Germanos IV, who got Agia Triada [Holy Trinity] Monastery on Umut Tepesi [Hill of Hope] in Heybeliada dating back to Byzantine times renovated. The school was opened on October 1st, 1844.¹⁴

The monastery was restructured as a theological school under Sultan Abdulmecid's rule dated 1259 and lessons were started on October 8th, 1844¹⁵.

Alongside the fees collected from the students, income made from candles, mill rent, garden and bamboo, grapes, rakı and wine sales,¹⁶ the school also had an income from the land donated to the school on Ksandra region of Greek Halkidia peninsula.¹⁷ During the following years, some of the income of Monastery of Agia Anastasia in Halkidia was also donated to Fener Greek

(14) Macar, s. 288. the opening date is said to be September 13th, 1844 by Yaşar. See. Yaşar, Necdet. Heybeliada Ruhban Mektebi in Dünden Bugüne İstanbul Ansiklopedisi, İstanbul 1994, c. 4, s. 57.

(15) Özyılmaz, s.33.

(16) Gülen, Nejat. Heybeliada, İstanbul 1982, s. 106.

(17) General Directorate of Security, Security Department Archive, Folder Nr.: 42226-1/3, 2/G-8, cited in, Özyılmaz, s. 34-35.

Patriarchate for the maintenance of the Heybeliada Seminary¹⁸.

Heybeliada Seminary started off its first academic year of 1844-45 with two classes and by 1847-1848 school years, two more classrooms were added on. Until 1852 the Heybeliada Seminary accepted only high-school graduates but, later on those who have not completed high-school were also accepted and the fifth year of the high school division was deemed as the first year of the theology school. Between the years of 1852 and 1873, the Seminary carried out its activities as a high-school for five years and as a theological school for three years¹⁹.

Between 1873 and 1885, the Heybeliada Seminary became a school of eight years but, in 1885 8th grade was abolished and the students of eight and seven grades are graduated at the same time.²⁰

The school building was collapsed altogether during the large İstanbul earthquake in 1894, lessons were cancelled and the students had to go back to their countries. After the reconstruction permit was granted, the school was rebuilt in seventeen months through donations, was opened with a ceremony by Patriarch Antimos VII and the lessons had started upon the will of Sultan Abdulhamid II.²¹

Heybeliada Seminary building was confiscated by the admiralty on May 8th, 1918 due to the inadequacy of the Naval Academy building. In 1918, Naval Academy's classes of candidates were moved here, while the students of the Heybeliada Seminary were sent over to Hagia Yorgi Monastery²².

On October 30th, 1918, after the Armistice of Mudros was signed, the navy students were transferred from the Heybeliada Seminary to the building on the coastline and on December 5th, 1918, 750 German sol-

(18) General Directorate of Security, Security Department Archive, Folder Nr.: 42226-1/3, 2/G-10, cited in, Özyılmaz, s. 35.

(19) Özyılmaz, s. 36.

(20) *Ibid.*, s. 36.

(21) *Ibid.*, s. 36-37.

(22) Gülen, s. 107-108.

diers were placed in the building. The students of the Heybeliada Seminary were able to leave Hagia Yorgi Monastery in order to return to their school only by December 29th, 1918. Meanwhile, the Belarussians who escaped from the recently established Communist regime had sheltered in the Heybeliada Seminary in 1919²³.

Heybeliada Seminary which was composed of a high-school and a division of theology until the year 1919 has obtained an academy status that year and the duration of the academy program was determined to be five years at first and then, reduced to four years²⁴.

In 1921 a committee from occupying forces wanted to place the Russian immigrants at the school in Selimiye barracks but, the Patriarchate opposed to this and ensured Belarussians stay at the school until they left İstanbul²⁵. Due to the scarcity of students, the third and the fourth years of the Academy were united in 1922-23 and all of the seminary students were graduated in June 1923²⁶.

After the elites of İstanbul Greeks migrated to Greece during 1922 and 1923, the Greek government lowered the accreditation status of the Heybeliada Seminary and the graduates of the Seminary started to be ranked as teachers rather than doctors²⁷.

As it can be seen, the Heybeliada Seminary started its activity by providing theological education after high-school, started to operate as both high school and theological school in 1852, its high school division was abolished altogether in 1919 leaving behind the theology division now serving as an academy. From 1923 onwards the seminary went back to providing three years of high-school and four years of theology education, but it should be emphasized here that the school was always consid-

(23) *Ibid.*, s. 109.

(24) Özyılmaz, s. 39.

(25) Gülen, s. 110.

(26) Özyılmaz, s. 40.

(27) *Ibid.*, s. 41.

ered as a secondary school.²⁸ Therefore, the theology education given after high-school has always considered to be at secondary school level rather than university level. In this regard, some of the diagrams that show the different educational periods of the Seminary describe the period before 1951 as four years of secondary school and three years of theology school²⁹, others as four years of high school and three years of theology school³⁰. Year 1951 is the turning-point here since before this year the school was considered to give secondary education even if it was a post high school. Therefore, the information about the education that the Seminary provided and especially, terms such as secondary school and high school should be discussed in this context and all of the Heybeliada Seminary together with its theology division should be considered under secondary school category. The status of the Seminary after 1951 was accepted to be a post high school of higher education.

The framework of the legal status of the religious minorities in Turkey was determined with the Lausanne

(28) The Fener Greek Patriarch Athenagoras clearly described the situation in a statement he gave to Hronos newspaper dated July 13th, 1953 and declared that the seminary, which was qualified as a secondary school during the era of the old government (before Menderes administration) and has become a faculty of theology which can provide its students with university education in the era of the current government (Menderes Government). Coşar, Ömer Sami. Patrikhane Dosyası (The Patriarchate File), HÜRRIYET, August 18th, 1976.

(29) The educational periods are described as cited below in Macar, s. 292 (also see, Macar/Gökçağı, s. 5-6):

- 1) 1844-1919 four years of secondary school and three years of theology.
- 2) 1919-1923 five years of theology without the secondary school.
- 3) 1923-1951 back to the initial period.
- 4) 1951-1971 four years of high-school and three years of theology.

(30) The educational periods are described as cited below at www.megarevma.net/ruhbanokulu.htm (3.10.2005):

- 1) 1844-1915 seven classes, four of which are high-school and three are theology.
- 2) 1918-1923 five years of higher education.
- 3) 1923-1951 the former seven year system.
- 4) 1951-1971 four years after high school.

Treaty³¹ that is signed on July 24th, 1923³². Since no special arrangement was made on the legal status and authority of the Patriarchate during the period of the Republic, articles 14, 15 and 16 of 1882 dated Greek Patriarchate Regulation³³ regarding İstanbul Patriarchate's and Metropolitan Communities' Interrelation (which actually ceased to have effect with the signing of the Treaty of Lausanne) were accepted to be in effect by the Patriarchate thus, the Heybeliada Seminary was kept open for education³⁴. Hence, the Seminary had continued its activity, not on grounds of a special legal arrangement but, simply with the tolerance of the Turkish Government and its secondary school status has been especially asserted.

A license was granted to the Heybeliada Seminary on July 16th, 1928 in the name of Nikolai alias Polikarpos and the license had been renewed in the name of the same person in 1940, 1943 and 1951³⁵. Thus, the activity of the Heybeliada Seminary after the Treaty of Lausanne was carried out not around the framework of a general recognition or vested rights but, in accordance with the system the private schools are subject to and in consequence of renewed licenses.

Heybeliada Seminary came within the scope of annexed foundations in accordance with the Act of Foundations nr. 2762 and dated June 3rd, 1935³⁶ and the metropolitan of Tarabya, Yovakom and the metropolitan of Bursa, Polikarpos made declarations about the Foundation to the Kadıköy Directorate of Pious Foundations on March 12th, 1936 according to the provi-

(31) For the full text of Lausanne negotiations, see, rule 3, issue volume 5, p. 7. Necmi İstiklal Matbaası, İstanbul 1931. For this text also see, www.ttk.gov.tr (3.10.2005). For the full text of Lausanne Treaty also see, Soysal İsmail, Türkiye'nin Siyasal Antlaşmaları, 1. Cilt (1920-1945) Ankara 1983, s. 85 vd.

(32) While the issue of minorities was discussed during Lausanne negotiations, a demand was made to move Fener Greek Patriarchate out of Turkey, but this had not been possible. See, Chapter 2, II.

(33) See Chapter 2, IV.

(34) Özyılmaz, s. 76.

(35) Ibid., s. 77. The license in question is the Official License Granted to Private Schools and it has been granted in consequence of the By-laws Regarding Private Schools article nr. 12. See Özyılmaz, s. 177, Ek VI.

(36) Official Gazette, 13.6.1935-3027.

sional article of the Act. According to this declaration, the Seminary is a boarding school free of charge; has no assets or income of its own and all its expenses are paid by the Patriarchate³⁷.

In 1947, the Patriarchate applied to the Ministry of National Education with the request to make changes in the class organization and the curriculum of the Heybeliada Seminary and also to appoint foreign teachers and students. The demands and responses to this application³⁸ are interesting that they reflect the actual structure of the Heybeliada Seminary as well as the government's perspective of the Seminary.

The first request was raising of the level of the first four classes of the Heybeliada Seminary from secondary school to high school. The response to this request is that it is possible to raise the first year of those four classes to the level of the third year of secondary school and to raise the subsequent three classes to high school level, on the conditions that the common regulations and the program of existing Greek high-schools be applied as they are and the school governed by a secular headmaster, just as it is in other Greek high schools.

The second request was the extension of the education duration of the Division of Specialty (Theology) from three years to four years and removal of geography and sociology courses from this Division's curriculum. The respective response to this is that there is no objection to the addition of a year to Seminary's specialty division but, this division will not have a degree and the school's name will be Heybeliada Greek School for Priests. It also stated that the removal of the Turkish language and culture lessons from the School's curriculum is not acceptable.

The third request was for the permission to appoint teachers from abroad. The response stated that only the teachers from Greece will be accepted.

(37) Özyılmaz, s. 77.

(38) General Directorate of Security, Security Department Archive, Folder Nr.: 42226-1/2 cited in, Özyılmaz, s. 82.

The fourth request was for the graduates of Schools of Priests to be admitted to Greek minority schools as religious instructors. In the response it was stated that there is no objection for graduates of seminaries to be assigned to teaching posts at Greek minority schools, only on the condition that they are not assigned solely to these posts.

The fifth request was for the graduates of the Seminary who go to Europe to continue their training with the same conveniences that are available for the graduates of state schools. The response to this stated that it is natural to provide convenience to Seminary graduates who are Turkish citizens according to the general rules and regulations.

The sixth request was for the consulates in Turkey to grant visa to the students who apply to the Seminary from abroad without any interpellation. This request was rejected since the Country's legal procedures do not allow it.

As prescribed, the Heybeliada Seminary is constituted of a four year division designated as a secondary school and three years of theology division following this. It is understood that the theology division accepts high school graduates as well as non-graduates³⁹. Therefore, the four years of education designated as secondary school before theology education is demanded to become high school education. In response, the first year of the seminary's four years of secondary school education came to be designated as the last year of secondary school, in order to make an adaptation according to the standard three year high school education in Turkey.

The request to increase the three years of theological education to four years was also accepted but, it was specifically emphasized that this theology division will not offer a degree and its name will be "Heybeliada Greek School of Priests". What was meant by this was that the

(39) In the response to the second demand it was stated that; the Turkish language courses should be instructed in all the classes of the Seminary under different schedules for the graduates of both Turkish and other high schools and for foreign students and while graduates of Turkish high schools will be exempted from history and geography courses the same courses shall be compulsory for the foreign students as arranged under a different schedule. Özyılmaz, s. 83

Heybeliada Seminary will not be recognized as a university or a school of higher education even though it gives four years of education after high school. The theological education after high school will not be accepted as university education no matter how many years it lasts, it would not be ranked with any degree, but just be called the School of Priests and this aims to keep the school at a secondary school status.

As to the appointment of the foreign teachers to the Seminary, only teachers from Greece were accepted due to the principle of reciprocity that is solely valid between Greece and Turkey according to Article 45 of the Lausanne Treaty. According to this principle, Greece can send teachers to Turkey while teachers from Turkey are sent over to Greece in exchange.

As it is understood, the Heybeliada Seminary accepts foreign students. However, demand for visas to be granted to these students unexceptionally and without any interpellation was found unlawful since the conditions regarding foreigners' entrance to the country, their residence and travels concern the country's security and every sovereign state determines the visa applicant status in the framework of its own legal principles. Therefore, the request for treating the foreign students applying to the Seminary different than the other foreigners especially, granting visas to same without any interpellation is an imposition of the Patriarchate and contradicts with the law. This issue has been clearly put forward in 1947.

Patriarchate's requests in question were evaluated once more by a commission composed of the representatives of Ministries of Internal Affairs, Foreign Affairs and National Education on October 26th, 1949⁴⁰ and it is decided that: There is no treaty or act that renders it obligatory to accept foreign students to the Seminary;

The Patriarchate's visa application for 45 students although the Seminary has only 11 teachers and 16 stu-

(40) General Directorate of Security, Security Department Archive, Folder Nr.: 42226-1/2 cited in, Özyılmaz, s. 85.

dents aims to change its status from minority school to a center for all the Orthodox Christians in the world; whereas the Heybeliada Seminary is an establishment opened not for education of foreign students but, for the training of clergy who will carry out its professional activities for the benefit of the minority in Turkey;

A mission such as keeping the Christian Orthodox population away from Moscow's influence is entirely political and therefore, does not accord with the spiritual quality attributed to the Patriarchate, considering that Lord Curzon's statement in Lausanne -outlining that they agree on the Patriarchate's development into a religious establishment- is accepted as an acknowledgement;

The Patriarchate's attempts to change the Seminary Senate into an establishment of higher education is not a genuine necessity especially, for a school with sixteen local students and moreover, in the case of a genuine necessity, the shortage can be overcome by establishing an Orthodox chair under the Faculty of Theology since the Act nr. 4936, the universities and the faculties which are not part of universities can only be established by state and law;

It should be taken into consideration that if exceptions and privileges other than these rudiments are accepted in favor of Greek Orthodox community, they will constitute a precedent for other minorities in Turkey.

As can be seen, the fact that the establishment of an international school of theology attached to the Patriarchate is legally impossible was already revealed in 1949 with all its legal grounds. At this point, the commission considered and settled the demands from the angle of both domestic and international law. The Heybeliada Seminary is clearly a minority school and that is why it should only supply the need for religious functionaries of the Greek Orthodox community in Turkey. The permission granted for foreign students to be accepted to the Seminary simply aims the benefit of the Muslim Turkish minority in Greece around the framework of the principle of reciprocity. The reference made to the Treaty of

Lausanne regarding the functions of the Patriarchate emphasizes that its ecumenical title is not recognized and also that the Fener Greek Patriarchate's power struggle with the Moscow Patriarchate is not religious but, political.

The Patriarchate could not format the Heybeliada Seminary as it wished in 1949. However, it received a promise from the Turkish Democrat Party before the elections of 1950 that the Heybeliada Seminary will be turned into a school of higher education in exchange of the Greek votes⁴¹.

b. Between 1950 and 1971

When the Democrat Party came to power, the four year division of the Seminary was removed from the scope of minority high schools, the three year division was increased to four years and it was ranked as a Specialty School for Theology under the name of "Heybeliada Greek School for Priests" according to the Ministry of National Education's Decision nr. 912/7 and 2601, dated December 8th, 1950⁴². Whereupon, the Board of Education of the Ministry of National Education had approved the "By-laws on the Greek School for Priests" according to the Ruling nr. 151, dated September 25th, 1951⁴³.

According to the said By-laws, the purpose of the Heybeliada Seminary is to train candidates for priesthood (article 1). The legal founder of the establishment is the person who is elected by the Patriarchate's Saint Synod assembly amongst the metropolitans in İstanbul and registered by the Ministry of National Education (article 2). Since the Patriarchate has no legal entity, it is not possible for it to undertake school's foundership that is why a metropolitan, being a natural person, is designated as founder.

(41) Özyılmaz, s. 86.

(42) *Ibid.* s. 77-78.

(43) For the text of regulations see Özyılmaz, s. 179 vd., Ek VII.

The school consists of a high school of three years and a Theological Specialty Department of four years. Those who are graduated from the department of theology are deemed to obtain an education at the level of vocational schools with a duration of at least one year (article 3). The administrative, educational and disciplinary affairs of the high school division are managed separately from the administrative body of the theology department, according to the common by-laws of the Greek secondary and high-schools (article 5). Thus, the administrative, educational and training affairs of the theology department are managed in accordance with article 7 per se and other provisions of the By-Laws on the Heybeliada Seminary. The school accepts high school graduates, who are over 17 but, under 22 years of age. No such age condition is required for the foreign students. However, among these the ones over 22 years old are trained in separate classes (article 54). Foreign students can be admitted upon the permission of the Ministry (article 56). The students of the theology division are obliged to become clerics by being consecrated, either during the period they are enrolled in the Seminary or within three years after graduation (article 86). Foreign students have to complete the Turkish courses opened during the period of education⁴⁴.

The Seminary has been active with three years of high-school division and four years of theology division in accordance with this By-laws and the theology division was recognized as a school at a level that gives at least one year of vocational training. Since it was legally not possible to call it a school of higher education, its specialty division of four years after high school was termed as vocational school. In this way, the change of status that was previously found improper was ensured with the decision of the political government by enacting a by-laws. Therefore, the new status of the school became a

(44) Appendix to the By-law on the Greek School of Priests, article 3 (a). See, Özyılmaz, s. 196.

school of higher education that provides specialty training, no matter how it was named in the By-laws⁴⁵. Moreover, unlike the previous practice, the foreign students who would study in the Heybeliada Seminary were all granted visas without exception upon the instruction of the Prime Minister Adnan Menderes. In this way, the number of the foreign students surpassed the number of the Turkish students⁴⁶.

Consequently, during the governing period of the Democrat Party, the Heybeliada Seminary became a specialty school of four years following high school that educates mostly foreign students⁴⁷. The graduates of the Seminary, which is a part of the Patriarchate that trains clergymen at university level, were sent over to Greece and other European countries either for internship or for personal development and all of their expenses were covered by the Patriarchate⁴⁸.

With this new status, the Heybeliada Seminary was clearly in the position of a school of higher education⁴⁹. Even though private schools of higher education were against the law during that period, with a political decision, a school that provides theological training for four years was accepted as a school that provides one year of

(45) A series of articles that appeared in the newspaper, Makedonia published in Thessaloniki reported that the Heybeliada Seminary is made up of three classes of high school and four classes of theology department and that it will become the great university of all Christianity soon. Coşar, Ömer Sami. Patrikhane Dosyası, (The Patriarchate File), HÜRRİYET, August 18th, 1976. Patriarch Athenagoras said in a statement he made to Hronos newspaper dated July 13th, 1953 that although the Seminary qualified as a secondary school during the era of the former government, it has been turned into a faculty of theology that can provide the students with university education, under the current government administration despite of the existing legislation. Moreover, he declared that the Turkish education which used to be quite hard during the time of the former government and caused difficulty for students has become easier now especially, for foreign students as being not more than a single course. *Ibid*.

(46) Özyılmaz, s. 87.

(47) After 1950, 187 students in total, out of which 38 were Turkish citizens of Greek descent, 162 Greek, 8 English, 1 French, 8 Ethiopian, 2 Syrian, 2 American and 3 Lebanese citizens were graduated from the Seminary (see, Özyılmaz, s. 88, dn. 69).

(48) Toroslu, M. "Rum Azınlık Okulları" Türk Kültürü, S. 40, February 1966, s. 401.

(49) The Patriarch personally stated this. See, footnote 45.

higher education⁵⁰. Hence, the Heybeliada Seminary is a school of higher education within the scope of the Constitutional Court decision that led to the closure of private schools of higher education⁵¹ and there is no reason for it to be subjected to a different treatment.

c. Period after 1971

After the closure of the Heybeliada Seminary, the Senate of Ankara University formulated a solution with the Decision nr. 5118 and dated December 21st, 1971 in order for the Seminary to restart its activities. According to this, the Seminary would be able to activate as a department that provides education on the Orthodox religion within one of faculties of theology or could function within the university's theology department under the name of Culture of World Religions. However, this legal solution was rejected by both of the Seminary's administration and the Patriarchate⁵².

As you can see, in 1971 right after its closure earnest efforts were made for the school to keep functioning within a state university, just like all other closed private schools of higher education but, these offers for a solution were insistently refused by the Patriarchate, causing the situation to be portrayed as of a minority devoid of its right to train religious functionaries.

A similar effort was made through the decision of the Council of Higher Education dated September 14th, 1999, according to which a Culture of World Religions department was going to be established within İstanbul University's Faculty of Theology⁵³. Prof. Dr. Zekeriya Beyaz, who was assigned with the execution of the estab-

(50) The Seminary's obtaining the status of a school of higher education had been sufficient for the Patriarchate, since the Seminary diploma was usually put to use outside Turkey. That is why the graduates were granted with a confidential Greek diploma together with the official one and were thereby titled as Instructor of Christian Orthodox Theology. See, Özyılmaz, s. 108.

(51) After the closure of the Heybeliada Seminary, 11 students were transferred to Thessaloniki and continued their education there. Özyılmaz, s. 102

(52) Özyılmaz, s. 139-139.

(53) For the decision sample see Özyılmaz, s. 213, Ek XII.

lishment procedure, sent a letter to the spiritual leaders of the community on December 14th, 1999 in order to ask for their suggestions and support but, received no reply⁵⁴.

As can be seen, the formulas developed for the Heybeliada Seminary to function legally within a state university body have persistently been rejected by the Patriarchate, which had expressly declared that they oppose to the affiliation of the Heybeliada Seminary to the Council of Higher Education (YÖK)⁵⁵. The significant point here is that the Heybeliada Seminary is aimed to become an international theology school that functions under the Patriarchate. Therefore, the actual issue is not whether the Heybeliada Seminary will reopen or not but, whether its opening with the status foreseen by the Patriarchate is possible or not under the Turkish law.

III. The Evaluation of the Positive Provisions of the Turkish Law

A. The Constitution of the Turkish Republic

While Article 24 of the Constitution of the Turkish Republic⁵⁶ titled “Freedom of Religion and Conscience” defines the meaning and the context of secularism, which is one of the fundamental characteristics of the State of the Turkish Republic; the third sub-clause asserts that, “religious and ethical education and instruction shall be conducted under the State supervision and control”. According to this, religious education cannot be taught without state supervision and control in the secular Turkish Republic. Hence, the Patriarchate’s insistence on forming a school solely under its control is, first of all, against Article 24 of the Constitution.

Article 10 titled “Equality before the Law” firstly emphasizes that everyone is equal before the law regard-

(54) Macar, s. 297-298. For the full text of Prof. Dr. Beyaz’s letter, see Özyılmaz, s. 214, Ek XIII.

(55) Macar, Elçin. “Laik Türkiye’de Ruhban Yetiştirme Sorunu”, www.bianet.org, 1.4.2005.

(56) Official Gazette, 9.11.1982-17863 repeated.

less of their language, race, color, sex, political opinion, philosophical belief, religion and sect or any such considerations and then, underlines in the third sub-clause the rule that; “No privilege shall be granted to any individual, family, group or class”. Therefore, all citizens of the Turkish Republic have equal rights on theological education and training and no one can be granted any privileges. The Patriarchate demands privileges for the Orthodox community in Turkey by means of the Heybeliada Seminary and moreover, wants this privilege to be conceded to Orthodox people, who will come from abroad.

Since the Heybeliada Seminary has the status of a school of higher education, the issue has to be scrutinized within the scope of Article 130 of the Constitution. After stating expressly that the universities will be established by the State and by law, Article 130 goes on to stipulate that institutions of higher education subject to the supervision and control of the state can also be established by foundations in accordance with the procedures and principles set forth in the law, provided that they do not pursue lucrative aims. In this case, if the Heybeliada Seminary is not wished to be a part of a state university, it can still be active within the body of an institution of higher education established by a foundation. However, the Patriarchate cannot establish such an institution since it has no legal entity. Since the Patriarchate insists on the Heybeliada Seminary to be put entirely under its control, it does not accede to the idea of a school of higher education to be established through a foundation.

Another reason for the Patriarchate objection to the formula of the Heybeliada Seminary’s opening under a university body is that the universities established by foundations are bound to YÖK just like the state universities and thus, are subject to state control. According to the last sub-clause of Article 130 of the Constitution, except for the financial and administrative matters the universities established by foundations are subject to the provisions set forth in the Constitution for state institu-

tions of higher education as regards to the academic activities, recruitment of teaching staff and security,. Therefore, the Heybeliada Seminary within a university body (be it a state or a foundation university) would be subject to state control and this control involves academic activities, staff and security, which prevents the Patriarchate from providing a theological education entirely dependant to itself.

Heybeliada Seminary's organization under a university, at the same time means that it will be subject to the Law nr. 2547 on Higher Education⁵⁷. The Patriarchate does not want to give education and training under this Law. Article 4 defining the aim of higher education is especially important from this aspect⁵⁸.

The Constitution determines the institutions of higher education that are subject to special provisions other than the general provisions as the ones connected to the Turkish Armed Forces and the Security Department (article 132). Religious establishments and communities are not included in this category. Nor the institutions of higher education subject to special provisions are allowed for minorities. Just as the unifying structure of the universities does not allow this sort of distinctions; granting of privileges for any class is out of question according to the principle of equality stated under article 10 of the Constitution.

B. The Basic Law on National Education and the Law on Higher Education

In accordance with the Act nr. 430 on Unification of Education⁵⁹, all schools are put under the control of the Ministry of National Education (article 1). The Basic Law

(57) Official Gazette, 6.11.1981-17506.

(58) Article 4 asserts that the aim of higher education is to educate students as the citizens devoted to Atatürk nationalism directed by the reforms and principles of Atatürk, who bear the national, moral, humane and cultural values of the Turkish nation, who feel the honor and dignity of being a Turk, who are aware of their duties and responsibilities towards the State of the Turkish Republic and who take action for these.

(59) Official Gazette, 6.3.1340-63.

on National Education nr. 1739⁶⁰ frames the state's duty and responsibility in the field of education and instruction by a fundamental law, according to which the administration, supervision and the inspection of the education service is put under the responsibility of the Ministry of National Education (article 56) and all educational activity, except that of military schools is to be conducted in accordance with the provisions of this Law (article 57).

The Law foresees that primary schools, high schools and schools of equivalent level to the latter can only be opened with the permission of the Ministry of National Education (article 58). The definition of school degrees is also determined by the Ministry of National Education. The program and by-laws of high schools and high school equivalent institutions under the supervision of other ministries are drawn up together by the relevant ministry and the Ministry of National Education and thereafter, approved by the Ministry of National Education. The supervision of these schools is also assigned to the Ministry of National Education (article 58).

Law nr 2547 on Higher Education⁶¹ aims to define the goals and principles pertaining to higher education and to establish the functioning, duties and obligations of all institutions of higher education (article 1). The Law covers all subjects related to the institutions of higher education and their sub-divisions but, not the issues concerning the institutions of higher education bound to the Turkish Armed Forces and the Department of Security (article 2). It defines all levels of post-secondary education of at least four terms as higher education (article 3-a), according to which, the two-year associate degree programs after high school are in the category of higher education and are directed by YÖK (article 6). Therefore, the two years associate degree program of the Ministry of National Education⁶², which was discussed for many years

(60) Official Gazette, 24.6.1973-14574.

(61) See footnote 57.

(62) Radikal, 25.6.2004. Also see Macar / Gökaçtı, p. 39.

within the projects aiming the Heybeliada Seminary's functioning separately from YÖK, is not excluded from the Law nr. 2547 on Higher Education. Because the associate degree program of two years (four half terms) is also an institution of higher education that falls within the scope of the Law nr. 2547 and can not be counted among the exceptions stated under article 2. Hence, all post-high school programs of at least two years, fall under the category of higher education and are regulated by YÖK. It is not legally possible for a private institute of higher education to be under the supervision of the Ministry of National Education but, not under the control of YÖK. In this regard, the solution suggestion imposed by the Patriarchate is unlawful.

C. The Law on Private Educational Institutions

The Law nr. 625 on Private Educational Institutions⁶³ regulates the issues regarding the administration, inspection and supervision of private institutions of pre-school, primary and secondary education, also of the institutions of the same level of education that is run through correspondence. This Law provides the regulations for schools opened by natural persons of Turkish citizenship, corporate bodies or legal persons governed by private law provisions. The schools opened by foreigners are also counted within the meaning of this law⁶⁴.

The Law on Private Educational Institutions regulates all levels of private schools, except for higher education. However, one has to be a natural or legal person of Turkish citizenship, for a private school to be opened within the meaning of this Law. Since the Patriarchate does not have a legal entity, mediation of a community

(63) Official Gazette, 18.6.1965-12026.

(64) According to article 5 of the Law, which was amended in 1985, international institutions of education (except higher education) to which only foreigners can be enrolled, can be opened by foreign natural or legal persons, directly or through partnership with Turkish citizens, around the framework of the Law nr. 6224 on Encouragement of Foreign Capital, upon the permission of the Council of Ministers. Turkish citizens and legal persons can open institutions of education of international quality in their own name, for the same purpose.

foundation or a natural person is necessary. Yet again, sub-clause 3 of article 3 of the same Law clearly states that, “No private educational institutions identical or similar to either military schools, private educational institutions that provide religious education or schools connected to the Security Department, can be opened” and prohibit the private educational institutions giving religious education. Therefore, the prohibition of schools that provide theological education as a private school is valid not only for the Orthodox community but, for all the other minority groups and especially, for Muslims who constitute the majority.

The Law nr 625 also includes regulations for the schools, which concern article 40 and 41 of the Treaty of Lausanne. According to article 25, distinctive characteristics of this type of schools are determined by a by-laws. The by-laws is drawn up with the consideration of relevant countries’ corresponding legislations and practices on the subject. The legislation on official schools are applied on the subjects that are not stated in the by-laws (article 25/II). What is in question here is the principle of reciprocity and in accordance with the article 45 of the Lausanne Treaty, distinctive characteristics of the schools are determined in the by-laws on the basis of the rights granted to the Turkish muslim minority in Greece.

The law states that only the children of Turkish citizens can study in minority schools (article 25/III). Therefore, only the children of the Orthodox community with Turkish citizenship can receive education at the Heybeliada Seminary, which claims to be a minority school. However, the Patriarchate wishes to turn the Seminary into a school of theology for all the Orthodox Christians in the world and this wish contradicts with both the Treaty of Lausanne and the provisions of the Law nr. 625.

Article 28 of the Law nr. 625 states that, “the number of foreign students that can be admitted to a private school is determined by the Ministry of National Education, on condition that it does not exceed 20% of

the number of Turkish students enrolled in that school". Actually, this provision is not related to the Heybeliada Seminary, which is a minority school since foreign students can by no means be admitted to the minority schools (article 25/III). However, even if we assume that the Heybeliada Seminary is removed from minority school status and gained private school status⁶⁵ it should be accepted that there is still a drastic limitation on the number of foreign students. The patriarchate demands to provide education for foreign students mostly, by claiming that not many clergy candidates come out of the local community.

D. The Treaty of Lausanne

The Lausanne Peace Treaty⁶⁶, which is the treaty establishing Turkey, includes provisions (articles 37-45) on non-Muslim minorities under the title of Protection of Minorities. With this Treaty, the Turkish Republic recognized the presence of only the non-muslim minorities in Turkey and therefore, accepted the validity of these provisions under the title of Protection of Minorities only for non-muslim minorities⁶⁷. Regulation of the Lausanne Treaty's relevant section under the title of "Protection of Minorities"; the fact that according to article 44 the provisions in this section, as much as they are relevant to non-muslim minorities in Turkey, set international obligations; the debates held during the negotiations all show that the articles in this section refer only to non-muslim minorities. Therefore, it would not be right to claim that some of the liberties included in this section cover not only non-muslim citizens but, all Turkish citizens who speak a language other than Turkish, in other words, to

(65) However, according to article 3/III of the Law nr. 625, it should also be remembered that it is forbidden to open private schools providing religious education.

(66) See footnote 31.

(67) During Lausanne Negotiations, the Allied Powers attempted to assert that there are also Muslim minorities by race, lineage and language but, the Turkish Delegation insistently stated that minorities exist only on religious basis in Turkey and ensured the signing of the Agreement accordingly. See Lozan Barış Konferansı, Tutanaklar Belgeler (çev. Reha Meray), Takım 1, Cilt 1, Kitap 2, s. 175.

assume that the provisions passed for the minorities are also valid for the citizens who do not hold that status⁶⁸. All Turkish citizens, holding minority status or not, have equal rights and obligations resulting from their citizenship.

The closure of the Heybeliada Seminary has been claimed to be against article 40 of the Lausanne Treaty⁶⁹. The exact passage in article 40 reads:

“Non-muslim minorities, who are Turkish nationals, shall legally and virtually benefit from the same treatment and security provided to the Turkish nationals. In particular, they shall have an equal right to establish, manage and control at their own expense, any charitable, religious and social institution, any school and other establishment for instruction and education, with the right to use their own language and to exercise their own religion freely therein”.

Hence, article 40 grants negative rights in areas regarded relevant to minorities, so gives the opportunity to be treated the same with other citizens. The article by no means guarantees the non-muslim minorities that they shall be able to open charities, religious or social foundations or schools as they like. What is important here is that the non-Muslim minorities are granted equal rights with other citizens in areas mentioned. The key words of this article are “same treatment” and “equal rights”.

When we look at it from this perspective, if the Heybeliada Seminary was closed down while other Turkish citizens have private schools of higher education that provides theology education, this would be against the Treaty of Lausanne. However, since the Heybeliada Seminary was closed together with all the other private schools of higher education, contradiction of equality is out of question. The conditions for religious education are determined by law in

(68) For the contrary opinion see Oran, Baskın. Türkiye’de Azınlıklar-Kavramlar, Lozan, İç Mevzuat, Uygulama (Minorities in Turkey: Concepts-Theory, Lausanne, Legislation, Jurisprudence, Implementation), TESEV Yayınları, İstanbul 2004, s. 56 vd..

(69) Macar, Elçin. “Çözüm Gibi Çözüm Şart”, www.bjanet.org, 13.7.2004; Macar, Elçin. “Laik Türkiye’de Ruhban Yetiştirme Sorunu”; Macar/Gökçe, s. 34 vd.

Turkey and this applies to all citizens. In this case, a right or privilege not granted to other Turkish citizens cannot be demanded on the basis of Lausanne Treaty. An exclusive right of theological education to be granted to minorities and not to Turkish citizens can only be possible by means of a positive right, in other words with a privilege. And that privilege cannot be derived from article 40 of the Treaty of Lausanne. Because that article by using the terms “same treatment” and “equal rights” clearly shows that minorities are granted only with negative but, not with positive rights in this realm.

Regarding the positive rights granted to minorities, it would be beneficial to refer to article 41 of the Treaty of Lausanne. According to this article, as regards to the public education in the towns and districts, where a considerable population of non-muslim citizens are resident, the Turkish Government will grant adequate facilities ensuring that in the primary schools the instruction shall be given to the children of such Turkish citizens in their own language. The positive right granted to minorities here is the opportunity to be educated in their own languages in primary school. When we look at it from this perspective, the Heybeliada Seminary is not counted within the scope of article 41 and therefore, demand for privilege is not founded on a legal basis.

In accordance with article 45 of the Lausanne Treaty and provisions in this section, the rights granted to non-muslim minorities in Turkey are also granted by Greece to the muslim minority there. So Lausanne Treaty, being a multilateral international agreement, laid down the condition of reciprocity only for Greece and Turkey. The principle of reciprocity was adopted as a guarantee for the rights granted to certain groups of citizens holding minority status in both countries⁷⁰. The principle of reciprocity

(70) About the reciprocity principle not being taken into consideration for citizens and hence, the inapplicability of article 45 see, Macar, s. 303; Çetin, Fethiye. *Yerli Yabancılar (Native Foreigners) in Ulusal, Ulusalüstü ve Uluslararası Hukukta Azınlık Hakları (Minority Rights in National, Supranational and International Law)*, (hazırlayan: İbrahim Kaboğlu), İstanbul Bar Association 2002, s. 78-79.

means that granting rights to a foreigner in our own country depends on the condition that the same rights are granted to our citizens residing in that country the foreigners hold the citizenship of. From this perspective according to today's legal system, it is unacceptable to say that article 45 of Lausanne Treaty bounds the opportunities and equal treatment provided by citizenship rights to the principle of reciprocity and to treat some citizens different than others. All citizens have equal rights within the framework of the Constitution at present. Thus, we cannot interpret article 45 of the Lausanne Treaty pertaining to the condition of the minorities, as a demand for reciprocity in the sense of negative rights. The article can only be practiced in the sense of positive rights of today. It is not wrong to seek reciprocity in the issue concerning the privileges conceded differently to citizens as positive discrimination and its legal ground is found in article 45 of the Lausanne Treaty.

If the Heybeliada Seminary opens as a private school that gives theological education, accepts foreign students and determines its curriculum freely being bound by the Patriarchate, this situation is surely not an issue to be qualified within the scope of negative rights. Let alone other minority groups, even the muslim majority does not own this sort of a privilege. In this case, when reciprocity is sought within the scope of positive rights, would this reciprocity mean "Requirement for a mosque to be built in Athens" or "Turkish instructors to be assigned to Celal Bayar high-school"? Since reciprocity shall be complete and equivalent in regard to granting of rights, the reciprocity of the Heybeliada Seminary is a private school in Greece which teaches Islamic theology, accepts students from foreign countries and determines its curriculum independently from the Greek State. The excuse that there is no clergy in Islam cannot be effective in the practice of reciprocity either, since both Islam and Judaism have the need for trained religious functionary.

Consequently, the Treaty of Lausanne principally ensured the negative rights, when it comes to minority

rights and article 40 by no means granted privileges about schools. In this regard, the Heybeliada Seminary is not within the scope of article 40 of Lausanne Treaty with the status it demands to hold or even with the status it held just before it was closed down and the school's closure does not constitute any violation of the article. In fact, the Heybeliada Seminary is a school that is status wise not included in any legal framework. Above all, the legal ground for a school that would be opened holding the status as demanded by the Patriarchate appears neither in Lausanne Treaty nor in any other international agreement that Turkey is a party to. The demand in question is a special and separate legal request that should be evaluated out of the Turkish legal system.

Chapter Two

Fener-Greek Patriarchate

I. In General

Fener Greek Patriarchate's claim to ecumenical status together with the demand for the Heybeliada Seminary to run as an international theology school have been on the agenda for a long time and also demands are made for foreign clergy in order to be able to enter Turkey without a visa, to be granted with working permit and opportunity to acquire Turkish citizenship easily. The demand for rights deemed to be grounded on the Treaty of Lausanne on one hand and the claim to ecumenical status for a separate treatment out of the context of Turkish law, which was expressly rejected in Lausanne, on the other make it necessary to define the legal status of the Patriarchate clearly and explicitly. The false information put forward causes the issue to be misperceived as a matter of Christianity and to be detached from the sovereignty of the Turkish State and the Turkish Law. With such apathy and contempt, attempts are made to attribute the Patriarchate an extra-territorial status that it was never granted before in history, a status of exclusion from the legal system of the country it is located in.

The privileges conceded to the Patriarchate by the Ottoman State dominated by the Millet System were provided around the framework of the Ottoman laws and the Patriarchate had never been the subject to any other legal system than the Ottoman. If a church which is regarded as a minority church within the Secular Turkish Republic governed by a sole legal system and has lost all the privileges it was conceded from the Ottomans attempts to be excluded from the sovereignty of the Turkish law with reasons that are entirely political, law should be the basis of such responses and it should be explained why the demands contradict with the national and international law. The argument that the "Patriarchate is a Turkish

institution"⁷¹ and that it remains here only because of the Turkish State's complaisance, put forward in order to reassure the Turkish public opinion against the claims imposed, should mean more than a slogan. For this, correct informing and legal reasoning should be made and the issue should be handled from an objective point of view. Remaining silent and extending the issue over time will cause delay in justification for Turkey. The issue is not political but, legal and action should be taken only within the legal boundaries of the national and international law. Therefore, in order to be able to scrutinize the demands of the Patriarchate, firstly, its legal status around the framework of the Treaty of Lausanne and secondly, the legal validity of the demands made against the Turkish legal system should be closely examined.

II. The Issue of the Patriarchate at the Lausanne Conference

During the Lausanne Conference negotiations, the Turkish delegation demanded the Patriarchate to be expelled from Turkey. For this purpose, the head of the delegation, Mr. Rıza Nur presented a written statement on December 16th, 1922⁷². According to this, the Turkish Grand National Assembly (TBMM) government granted the non-Muslim minorities residing in Turkey the same rights as the ones granted to the minorities in the states that were expanded or newly founded after the World War, the privileges conceded to the non-muslim minori-

(71) The suggestion that the Patriarchate is a Turkish institution is usually made to underrate the matter and to say that it is not an issue to be exaggerated and immediately after, the cliché that "it is bound to the Governorship of Eyüp" is repeated. It is not clear whether or not the Patriarchate, which is located within the boundaries of Fatih, took the governorship of Eyüp seriously. However, it is perfectly clear that the official website of the Patriarchate (www.patriarchate.org or www.ec-patr.org), which is considered to be a Turkish institution, does not even have a Turkish language icon. The site is constructed in English, Greek and Spanish and the official language of the country that the Patriarchate is located in is excluded. Despite the fact that all the other patriarchates prepare their websites in the official language of the country they are located in, Fener Greek Patriarchate insistently refuses to have webpages in Turkish and moreover, Istanbul is referred to as Constantinople on its website.

(72) Lausanne, p. 327-328.

ties during the Ottoman period had been abolished, the new republican regime ipso facto substitutes these privileges, the spiritual head governing the internal structure of various communities were a legal representative or mediator besides the state during the Ottoman times but, from now on the government will be in direct contact with the educational and charitable institutions, the people who leading these institutions in the capacity of religious functionaries should deal solely with religious matters, the new regime will provide the opportunity for believers of different religions to develop their religious interests freely as is the case in countries like England, France, USA and thus, by urging the religious functionaries to stay solely in the realm of religion, a new leap in religion would emerge, the Patriarchate which had been a political organ until that time should be expelled from Turkey since it did not seem possible for the Patriarchate to adapt to the circumstances that will arise with the abolition of its political privileges when its former attitude was considered, consequently, the abolition of the religious functionaries' privileges pertaining to worldly matters and the expulsion of the Patriarchate from Turkey were inevitable necessities for Turkey and way of liberation for the community in question.

Because of the hostile attitude of the Patriarchate during the Turkish War of Independence⁷³, also the Turkish public opinion had supported the Patriarchate's expulsion from Turkey and believed that the Turkish delegation at Lausanne would not compromise on this issue⁷⁴. The statement that Mustafa Kemal Atatürk made to Paul Ario, the reporter of *Le Journal*⁷⁵, reflected this perspective. Atatürk's words were as follows:

(73) For detailed information on the political activity of the Patriarchate see Atalay, Bülent. *Fener-Rum Ortodoks Patrikhanesinin Siyasi Faaliyetleri (1908-1923)* (The Political Activity of Fener Greek Orthodox Patriarchate (1908-1923)), İstanbul 2001, s. 107 vd.; Şahin, Süreyya. *Fener Patrikhanesi ve Türkiye*, (Fener Patriarchate and Turkey), İstanbul 1999, s. 164 vd.

(74) Atalay, s. 198.

(75) For the full text see, Atatürk'ün Bütün Eserleri (Complete Works of Atatürk), c. 14 (1922-1923), s. 197-199.

“... However, we cannot allow the Greek Patriarchate, which owns a den of mischief and treachery, spreads seeds of discord and conflict to the country and causes balefulness and woe to our Christian citizens’ peace and prosperity, to remain on our land. What inducements and reasons can be put forward in order to oblige us to preserve this dangerous organization?”

What obligation does Turkey have to shelter the Greek Patriarchate on its land? The actual place that this den of mischief belongs to Greece, doesn’t it?

Our Central Government has given strict instructions to our delegation committee on all these points, in accordance with the provisions of the National Pact...”⁷⁶.

Accordingly, Turkey demanded the expulsion of the Patriarchate from the country during the Lausanne negotiations and insisted on it⁷⁷.

The chairman of the American Representative Delegation insisted that the Patriarch should stay in İstanbul and emphasized the importance of this issue for the USA, despite its geographical remoteness⁷⁸. Greek Representative Delegation stated that they can not become a party to an agreement that stipulates the expulsion of the Patriarchate from İstanbul since the institution is not Greek but, Turkish. Therefore, having Greece’s signature under such an agreement will be of no value⁷⁹.

The French Representative Delegation intended to find a conciliatory formula and suggested that; the Patriarchate should remain in İstanbul, having no administrative or political relations with the other Orthodox churches such as Greek, Romanian and Yugoslavian, and the independent İstanbul church; the patriarch should be elected amongst the candidates approved by the Turkish Government and moreover, the Turkish Government

(76) The same text has also appeared in *Hakimiyet-i Milliye* newspaper on January 20th, 1923. Şahin, s. 262-264.

(77) Lozan, s. 337.

(78) Lozan, s. 324, 338, 341.

(79) Lozan, s. 338.

should have the authority to supervise the Patriarch lest he goes beyond spiritual matters in his practice⁸⁰.

The Italian representative Montagna made a request on behalf of the sub-commission, to the English representative, Lord Curzon, to settle this matter that caused the suspension of the negotiations.⁸¹ Lord Curzon stated that the Turkish Delegate's claims on the Patriarchate may constitute sufficient reason to amend, restrict or abolish the political privileges of the Patriarchate but, these claims would not suffice to abolish the Patriarch's powers pertaining to spiritual issues and church matters⁸². Lord Curzon suggested that the institution of the Patriarchate should be deprived of its political quality and administrative powers but, remained in İstanbul merely as a religious institution⁸³.

Romanian Representative, Diamandy, had firstly stated that should the Patriarchate which had been located in İstanbul for hundreds of years were presented with a fait accompli, the independence of the Romanian Church and the Romanians' religious feelings would be hurt⁸⁴. The representative of Serbian-Croatian-Slovenian Kingdom, Rakitsch, agreed with Lord Curzon's proposal and stated that the generations had applied to the Patriarchate for assistance, support and consolation in their days of suffering and for guidance about Christian moral law in their everyday lives for hundreds of years. Moreover, the Patriarchate's expulsion would leave behind a great moral vacancy that a part of the civilization would seem to have disappeared with this⁸⁵.

The Greek Representative, Venizelos, stated that the Patriarchate had existed for five hundred years during the era of the Ottoman Empire and this is the first time the Turkish Government complained about its manner of

(80) Lozan, s. 338.

(81) Lozan, s. 324.

(82) Lozan, s. 324.

(83) Lozan, s. 324-325.

(84) Lozan, s. 325-326.

(85) Lozan, s. 326.

conduct but, the events that had taken place starting from the Armistice of Mudros could not construe the Patriarch's disloyalty towards the Turkish Government; the profound turmoil that such a catastrophe as war had created in people's consciences should also be taken into consideration; and they wish the Patriarchate remain in its place, in a way to exercise its authority solely in spiritual and church matters⁸⁶. Venizelos also said that the marriage is a sacred ceremony performed by the Orthodox church thus, only the church officials had the authority to realize and terminate the marriages; it was possible to deprive the leading officials of the Orthodox Church and the bishops of all of their other rights but, in this way the Turkish Government would be counted to be taking away the rights and the privileges they themselves once granted and thereafter, complained about; it would be within the authority of the Turkish Government only not to recognize the Patriarch as the leader of the Greek nation anymore and to abolish whatever political authority the Patriarch was granted in accordance with the laws passed for instance, to abolish the provisions of the Law of Provinces that anticipate the Patriarch's membership in certain committees due to his administrative function or the provisions of the Law on Elections that grant the Patriarch the right to supervise the drawing up of the election chart and finally; they hope that there would be no resistance to the issue of Patriarchate's removal from İstanbul. Venizelos also added that they were ready to take action to expedite the present Patriarch's resignation from his post⁸⁷.

İsmet Pasha stated that he considered the official calls and promises made by the members of Allied Delegation at the conference as an acknowledgement that the Patriarchate would stay out of the political and administrative matters and only engage in issues regarding the religious realm⁸⁸. Lord Curzon uttered that he was

(86) Lozan, s 327-328.

(87) Lozan, s. 328-329.

(88) Lozan, s. 331.

glad to see his suggestion was met with such an understanding manner by the chairman of the Turkish Delegation and that he believed this news would create a big sensation throughout the world⁸⁹.

It was agreed that the Patriarchate constituted an important matter for Turkey to be resolved. Ismet Pasha had also emphasized in the statements he made before the signing of the Treaty that it was not possible for the Patriarchate to remain as it was; Anatolian and Rumelian metropolitans did not exist anymore; and Mr. Patriarch had no function in İstanbul henceforth.⁹⁰

Likewise, the idea that the Patriarchate should be removed from Turkey prevailed in the Turkish Grand National Assembly's closed sessions⁹¹. However, as Ismet Pasha said in a telegram he delivered to Ankara on January 10th, 1923, "they had to withdraw from this since they were left alone on this issue confronting harsh opposition from all the representatives".⁹² Consequently, the Turkish Government struggled to expel the Patriarchate from Turkey during the Lausanne negotiations but, could not succeed in doing so⁹³.

(89) Lozan, s. 331-332.

(90) Alkan, Hakan, Geçmişten Günümüze Türkiye Patrikhaneleri: Fener Rum Patrikhanesi ve Türk Ortodoks Patrikhanesi(The Patriarchates of Turkey from Past to Present: Fener Greek Patriarchate and Turkish Orthodox Patriarchate), İstanbul 2003, s. 55-56. Ismet Pasha answered the journalists' queries on the subject with the following words: "There is no need to worry; we will make no allowances about the issue of the Patriarchate's expulsion from İstanbul", Halkimiyet-i Milliye, 24 Kanunievvel 1338/24 December 1922. Cited in Atalay, s. 207.

(91) Alkan, s. 56; Atalay, s. 218.

(92) Atalay, s. 219.

(93) Atatürk brought up the situation during an interview he made with the journalists from İstanbul in İzmit Summer Palace on January 16/17, 1923 and said that, "However, we could not manage to expel the İstanbul Greeks and the Patriarchate. We have agreed only on the condition that the Patriarchate shall not engage in political matters. They desired to turn the Patriarchate issue into an issue of Christianity and therefore, we did not act too insistent. Atatürk'ün Bütün Eserleri, c. 14, s. 268. During a public statement in Bursa, Şark Cinema on January 22nd, 1923 he said that, "the Patriarchate may remain in İstanbul on the condition that it does not engage in political matters otherwise, it shall immediately be expelled", *ibid.*, s. 366.

III. Patriarchate's Status According to the Treaty of Lausanne

The issue of the Patriarchate which brought the Lausanne negotiations to the point of breaking off was not even mentioned nominally in the eventual text or in the appendixes of the Convention. The Greek Delegation intended to make the Turkish Delegation draw up a document in where the name of the Patriarchate is mentioned and its ecumenical status is recorded⁹⁴. However, this could not be realized. Therefore, the institution of the Fener-Greek Patriarchate did not appear in any of the articles of the Lausanne Treaty and consequently, the contracting states had not become internationally liable for this institution.

On February 11th, 1925, Greece took the issue of the Patriarchate to the League of Nations in order to emphasize that the Patriarchate constitutes an international issue and to prevent this institution from becoming entirely bound to the Turkish Government. However, the Turkish Government demanded Greece to withdraw its application and the matter to be settled between the two governments through direct negotiations, insisting that the Patriarchate is a Turkish institution that is bound by Turkish domestic law; no foreign power can interfere with its constitution and administration and there exists no international agreement or convention on this subject. Hereupon, Greece withdrew its application⁹⁵. Hence, the issue of the Patriarchate was prevented from becoming a matter discussed on an international platform.

According to Psomiades, Ismet Pasha's declarations that the Patriarchate will not be removed from Turkey were clearly in the nature of an international engagement although there are no provisions concerning the Patriarchate in the Lausanne Treaty and its appendixes⁹⁶. However, this interpretation of the commentator, who

(94) Atalay, s. 218.

(95) Psomiades, Harry. "The Ecumenical Patriarchate under the Turkish Republic", 1961, 2 *Balkan Studies*, p. 47-70. Reprint www.orthodoxchristianity.net (17.3.2006), p. 10.

(96) Psomaides, p. 3.

accepts the stay of Patriarchate in İstanbul as an international engagement and interprets the attempt for transfer of the Patriarchate from İstanbul as a violation of an engagement of international nature, lacks any legal ground. Because İsmet Pasha did not give any guarantee or made any declaration for non-removal of the Patriarchate from İstanbul. İsmet Pasha had only stated that he considered the official calls and promises made by the Allied and Greek Delegations during the conference as an acknowledgement that the Patriarchate would stay out of political and administrative matters and would only engage in the issues on religious realm and he declared that he withdrew the request for the removal of the Patriarchate on the basis of this acknowledgement⁹⁷. Therefore, the actual issue that should be considered as a verbal engagement is that the Patriarchate is devoid of its political and administrative powers and restricted with religious matters but, not that the Patriarchate will remain in İstanbul. Whatever powers and privileges the Patriarchate had in the past, these authorities and privileges are abolished with the Lausanne Treaty and it is allowed to stay in İstanbul as a religious institution only.

Psomiades claims that while the Treaty of Lausanne assured the Patriarchate a seat in İstanbul, it did not prevent the Turkish Government from interfering with the liberty of the Patriarch and the free exercise of his ecumenical function. Psomiades also emphasizes that “actually, the future of the Patriarchate depends on the Greek-Turkish relations starting from the Greek independence”⁹⁸. Therefore, Turkey’s control over the Patriarchate has been built not with an international arrangement but, with national ones. In this regard, the legal status of the Patriarchate according to the Treaty of Lausanne can be expressed within the following framework⁹⁹:

(97) Lozan, s. 331.

(98) Psomaidēs, p. 3.

(99) İksel, Settar. İstanbul Rum Patrikhanesi, Belgelerle Türk Tarihi Dergisi, 1971-1973, c. XI, S. 61, s. 43.

The Patriarchate's stay in İstanbul is provided by Turkey's unilateral disposition but, not by a treaty provision.

The Patriarchate is a Turkish institution. The Patriarch and the officials of the Patriarchate are assigned with the consent of the Turkish Government and are subject to supervision.

The political and administrative privileges that the Patriarch and the Patriarchate enjoyed between 1453 and 1923 are abolished. The Patriarchate can only deal with religious matters. Since the Patriarch is not the representative of the Greek community in İstanbul, he can not act as an intermediary for the community's relations with the Turkish official posts.

The Patriarchate benefits from the protection asserted in article 40 and 42 of the Treaty of Lausanne, just like a church or a synagogue. On the other hand, the Patriarch and the officials of the Patriarchate are subject to Turkish laws pertaining to their posts and if their activity constitutes a crime according to the Turkish laws, they will be sanctioned according to the Turkish Criminal Code.

The legal regime that the Patriarchate will be subject to was not determined with a convention provision in the Treaty of Lausanne. From this point of view, the Patriarchate qualifies as a church and should be assessed within the scope of religious institutions in the framework of articles 34-45 titled "Protection of Minorities" of the Treaty. Meanwhile, the debate and conciliation on the authorities of the Patriarchate that took place during the negotiations concerning the expulsion of the Patriarchate from İstanbul draw the boundaries of the Patriarchate's legal status. The parties have agreed that the political and administrative authorities of the Patriarchate have been abolished and would not be recognized anymore but, a Patriarchate equipped solely with religious authorities can stay in İstanbul. The negotiation records demonstrate this clearly.

The Patriarchate will not be able to enjoy the privileges it had in the past. In other words, it is out of ques-

tion for the Patriarchate, which acted as a bridge between the community and the state with the title of ethnarch (milletbaşı), in an empire governed by theocratic monarchy where millet system was exercised, to mediate between the Greek community and the state or to lead a community enjoying a privileged position among citizens, who are granted equal rights without distinction of religion by the secular Republican system. Therefore, the Patriarchate's privileges and administrative authorities granted by the system of Ottoman State have been removed with the collapse of the Ottoman State and the foundation of a new state, leaving no need for a special legal arrangement. Since the Lausanne Treaty is designated as the founder treaty of the State of Turkish Republic, the abolishment of the privileges of the Patriarchate is dated with this Treaty.

Absence of a provision regarding the Patriarchate in the Treaty of Lausanne and the bounding of the institution entirely to the Turkish law indicate the fact that Turkey does not and can not recognize the ecumenical status. Therefore, the Turkish law will decide on the appointment of the Patriarch and the related assignment procedure.

After the Treaty of Lausanne was signed, Venizelos kept his recorded promises and advised the Patriarch of the time, Meletios IV, to resign, upon which the Patriarch firstly went to Mt Athos under the pretext of health problems and then, handed in his resignation in consequence of increasing pressure and was later honored by being assigned to the title of Patriarch of Alexandria¹⁰⁰. Before Patriarch Meletios IV left for Mt Athos, the Holy Synod and the General Council made the following decisions: The Patriarchate has renounced all its political and administrative characteristics and it will remain only within the boundaries of the Panorthodox religious foundation, marriage and other such occasions will remain within the scope of religion, institutions of education and

(100) Benlisoy / Macar, s. 50.

law will be run by the delegates that will be elected in accordance with the instructions about minorities, the patriarch elections will be held in accordance with the holy canons, the Patriarchate's relations with the government will resemble the relations it has with England, France and the USA as stated by the Turkish delegate Mr. Rıza Nur during the Lausanne Conference, the Turkish Government will not interfere with the Patriarchate's religious government and hierarchical meetings although the privileges of the clergy as a theocratic monarchy have been abolished¹⁰¹.

Meanwhile, the Governorship of İstanbul sent the Patriarchate a memorandum nr. 1092, dated December 6th, 1923 on the election of the patriarch. The memorandum read as,

“To the Holy Synod of İstanbul Greek Orthodox Patriarchate,

The candidates of the religious and spiritual elections that will take place within Turkey should be Turkish citizens and already be assigned to a post within Turkey at the time of the election. These conditions also apply for the person who will be elected”¹⁰².

This Governorship Memorandum being the only legal regulation issued during the period of the Republic takes the Regulation on the Greek Patriarchate of 1862 as its legal ground, according to which Holy Synod presents a list of the patriarch candidates to the Governorship of İstanbul. These candidates have to be Turkish citizens and assigned to a post in one of the metropolitans within the boundaries of Turkey. The Governorship has the right to eliminate candidates it does not wish to see elected. The candidates on the list sent back from the Governorship are voted in the Holy Assembly and elected as a patriarch¹⁰³.

(101) Macar, s. 121.

(102) Macar, s. 124-125; Benlisoy/Macar, s. 50.

(103) Benlisoy/Macar, s. 60; Gökçen, Salim. Fener-Rum Patrikhanesinde Metropoliten Revizyonu Mevcut Statüye Rağmen Neden Yapıldı?, 2023, Mart 2004, s. 73.

As can be seen, it is essential that the patriarch is a Turkish citizen and his post is in a metropolitan located in Turkey. These conditions are clear indications that the Patriarchate's claim to ecumenical status is not accepted by Turkey¹⁰⁴. The metropolitans that are outside the boundaries of Turkey will not be able to become a candidate for the patriarch election and take part in the election.

IV. Regulation on the Greek Patriarchate

No legal dispositions were made about the election of a patriarch other than the governorship memorandum dated 1923. What should be questioned then is whether or not the Greek Regulation of 1862¹⁰⁵ is still in force.

The Regulation on the Greek Patriarchate of 1862 was enacted as a legal regulation that is in accordance with the Ottoman millet system¹⁰⁶. The millet system aims an understanding that encourages the persistence and development of a separate society's identity within the sovereign nation¹⁰⁷ and sets regulations providing the subordination to different legal systems under the same state's sovereignty¹⁰⁸. These nations, which were subject to their own special laws in many cases although they were Ottoman citizens, used to run their relations with the state through Patriarchates¹⁰⁹. After the conquest of

(104) Alexandris called the memorandum of the governorship, Turkey's first attack to the ecumenical title of the Patriarchate. According to the author, the patriarch of the ecumenical Patriarchate is also ecumenical, in other words supranational. Therefore, this post cannot be restricted to a single nationality. Cited in Macar, s. 124

(105) Rule C II, p. 902-937. For the text of these regulations made up of different acts, in Latin alphabet see, Benlisoy/Macar, s. 71 vd.; Çelik, Mehmet. Fener Patrikhanesinin Ökumenlik İddiasının Tarihi Seyri (325-1453) (The Historical Course of Fener Patriarchate's Claim to Ecumenical Title [325-1453]), İzmir 2000, s. 211 vd..

(106) For detailed information about the millet system see Bozkurt, Gülnihal. Alman-İngiliz Belgelerinin ve Siyasal Gelişmelerinin Işığı Altında Gayrimüslim Osmanlı Vatandaşlarının Hukuk Durumu (1839-1914) (The Legal Status of the non-Muslim Ottoman Citizens under the Light of the German and English Documents and Political Developments [1839-1914]), Ankara 1996, s. 9 vd.; Eryılmaz, Bilal. Osmanlı Devlet Sisteminde Millet Sistemi (Millet System in the Ottoman State), İstanbul 1992, s. 72; Kenanoğlu, Macit. Osmanlı Millet Sistemi (Ottoman Millet System), İstanbul 2004, s. 30 vd..

(107) Eryılmaz, s. 73.

(108) Bozkurt, s. 10.

(109) Eryılmaz, s. 73.

Istanbul by Sultan Mehmet, the Conqueror, the millet system became established in the Ottoman State by granting sovereignty to the Greek Church in their religious and legal matters and by allowing the patriarch chosen by the Greek nation to lead the community. Thereafter, privileges granted to the Armenian and Jewish communities allowing them to become accepted as separate nations. While non-muslims were tolerated within the millet system in the realm of religion and private law, they were also aimed to be separated from muslims¹¹⁰.

The winds of change that started blowing in the Ottoman State with the Edict of Tanzimat (Reorganization) in 1839 ensured the restructuring of the millet system aiming for the muslims and the non-muslims to be treated equally in many legal realms. This received reaction from the ethnarchs who did not want to abandon their privileges¹¹¹.

The Edict of Reform (Islahat Fermanı) dated 1856 declared that the privileges granted to non-muslim communities are preserved in extenso and every community was asked to form a commission in order to regulate their own administration. For this purpose, Ali Pasha sent the community leaders an exequatur and the regulations drawn up by each commission were put into effect with the approval of the Sublime Porte¹¹². Between the years of 1862 and 1865, new regulations were accepted for all nations and these had been designated as the constitutions of those communities. A significant portion of the authorities granted to patriarchs and chief rabbis were transferred to the newly-formed councils and the community presidents lost the authority of self-decision in spiritual and material issues after the participation of secular members in the councils¹¹³.

(110) Bozkurt, s. 10.

(111) Eryılmaz, s. 67. The fact that non-Muslims became equal with the Muslims in the political realm also caused the reaction of Muslim Turks. See, Eryılmaz, s. 63.

(112) Eryılmaz, s. 82; Bozkurt, s. 170.

(113) Eryılmaz, s. 82; Bozkurt, s. 170.

The Regulation on the Greek Patriarchate came into force on April 25th, 1862. The Regulation includes provisions on the election and the authority of patriarchs, councils, metropolitans, courts, schools and financial management. According to the Regulation, the Patriarch is elected for life, his official dome is confirmed by the imperial decree and he is thus recognized as the spiritual and corporeal leader. As the leader of the Greek nation, the Patriarch is obliged to regulate the relations between his community and the Sublime Porte and to supervise the application of the Regulation¹¹⁴.

As can be seen, the Greek Regulation of 1862 which is based on the millet system is a legal arrangement of constitutional nature that determines the principle rules not just in religion but, also in political administration of the Greek community in a multi legal empire. With this Regulation, alongside the spiritual council a mixed council having secular members was formed and only the Greeks residing in and around İstanbul had a voice at the elections for this mixed council¹¹⁵.

There is no need for a clear disposition for revocation of this Regulation which is an extension of the millet system and which adjusts the non-muslim citizens' relations with the state they are a national of through their ethnarch. Because, the Regulation in question is ceased to have effect without any requirement for a legal disposition upon the foundation of the Turkish Republic as a political order in where a sole legal system dominates, no one is granted with privileges, citizens enjoying equal rights and do not have ethnarchs entitled to mediate between the state and themselves. In accordance with the fundamental principles of law, when the new legal system introduces a regulation different from the old one, the former rules cease to have effect. In this respect, 1862 dated Regulation which construed the legal legislation of the millet system and a multi-legal political structure have

(114) Eryılmaz, s. 82.

(115) This is the constituent code of practice for the permanent mixed assembly (article 4).

ceased to have effect with the change of the political and legal system.

However, since no detailed arrangements were made on the Patriarchate during the period of the Republic, the question of applicable law arises. Unless a new legal arrangement is made, we can assume that the provisions of the Greek Regulation of 1862, which do not constitute violation of the existing Turkish Constitution and laws, are still valid. Besides, if the provisions of the Governorship Memorandum are examined, it will be seen that they overlap with the provisions of the Regulation.

According to the Greek Regulation, "... it is essential for the patriarch to originally descend from the Sublime State"¹¹⁶. The right of election belongs solely to the nationals of the Sublime State¹¹⁷. The rule suggests that the Patriarch should be an Ottoman citizen and the election right belongs solely to the Ottoman citizens. Accordingly, as of today both the Patriarch and the ones who have the right to elect him should be Turkish citizens.

The condition of being a Turkish citizen applies not only to the Patriarch but, also to monks who will become bishops. "It is indispensable for the person who will be elected and appointed as a bishop to be among the nationals of the Sublime State and conversant with the Turkish and Slavic languages"¹¹⁸. The bishops should speak Turkish alongside with being Turkish citizens. Although the Greek Regulation put forward the rule clearly and the Patriarchate declares that they are still bound to the Regulation of 1862, it is disregarded that the Patriarchate itself breaches some of the provisions and the issue is tried to be suppressed on the pretext that it is an internal issue of Christianity with the intention to build a foundation for the pressure and impositions coming from abroad.

(116) The second section declares the qualities required for the person suited to be elected as the patriarch (article 3).

(117) The third section is the committee declaration of the general council that will be formed for the patriarch election (article 3).

(118) Regulation concerning the requisite qualities for priests deserving the title of patriarchate and the procedure of election (article 1).

Two Greeks, one American, one English, one New Zealander and one Finnish citizens were assigned to the membership of the Holy Synod of the Patriarchate that is constituted of twelve members¹¹⁹. Hence, six of the Holy Synod members who will vote for the election of the Patriarch are foreigners, violating both the Regulation of 1862 and the Memorandum of 1923. This situation is a result of the Patriarchate's claims to ecumenical status¹²⁰ and the demands it has been making for many years. When the Fener-Greek Patriarchate is considered as a center for all the Orthodoxy, according to the agenda, the impositions on the condition for the Patriarch and the metropolitans to be Turkish citizens should be abolished and there should be no restrictions for the foreign clergymen in the entries to and exits from Turkey. The point that needs attention here is whether these demands are obligatory engagements that have to be assumed by Turkey or not. The State of Turkish Republic should only act as ordered by the law.

It is indisputable that no international engagements were assumed about the Patriarchate, during the negotiations in Lausanne it is agreed that the Patriarchate which remained in İstanbul shall only be engaged in religious matters and has been deprived of its political powers and its claim to ecumenical status has been rejected, moreover, it has been designated as a minority church and also as a Turkish institution. Hence, there are no legal grounds for a church that holds a minority status in a sovereign state to act as the leader of all the Orthodox Christians of the world and to demand extraterritorial status, forming its legal order accordingly. There are no binding obligations for Turkey to accept this imposition.

(119) Gökçen, s. 72 vd..

(120) About Fener Greek Patriarchate not being able to hold the title of "ecumenical" according to the Christian law, see Çelik, s.1 vd. Fener Greek Patriarchate's domain of influence encompasses the Greek Orthodox community of 2500 people in Turkey, a few hundred thousands in the USA and two thousand people in Finland. See Ortaylı, İlber, *Ortodoks Kilisesi, Mülkiyeliler Birliği Dergisi*, Haziran 1987, S. 87, s. 23. American Archbishopric is bound to Australian Archbishopric and the Patriarchate of the New Zealand Metropolitan. Macar/Gökçağı, s. 19.

V. Issues Concerning the Law on Foreigners

In consequence of the Patriarchate's claim to ecumenical status, demands have been made for foreigners to be allowed to become Patriarchs or for foreign clergy to be granted citizenship, unrestricted access to the country and work permit.¹²¹ In accordance with the Treaty of Lausanne, it is not possible for the Patriarchate to be ecumenical and the Patriarch to be a foreigner. The Patriarchate is a religious minority institution that is completely bound to the Turkish law.

As to the issue of granting Turkish citizenship to foreign clergymen, granting citizenship right in a sovereign state is within that sovereign state's own power. There exists no international or supranational convention that obliges Turkey to grant citizenship to the people that the Patriarchate chooses. The criteria of citizenship are determined by the Turkish Citizenship Act.

The status that foreigners will be subject to is again determined with the relevant legislation concerning the foreigners. The conditions for foreigners' entry to Turkey are subject to the Passport Law¹²². According to this, the provisions on visa obligation (article 5, 6, 9) and on persons whose entrance to Turkey are forbidden (article 8) are also applicable to the foreign religious functionaries. Foreigners' residence or travels in Turkey have to be in accordance with the Law on Residence and Travel of the Foreigners in Turkey¹²³. The conditions upon which an application for residence permit is rejected (article 7), the duration of the permit (article 9), its renewal (article 10) and the conditions of expulsion (article 19, 21, 22) have to be applied to all foreign religious functionaries without exception. Likewise, the provisions of the Law on the Work Permit for Foreigners¹²⁴ should also be applied to the foreign religious functionaries. According to article 54

(121) Burnett/Pulzetti/Young, s. 2.

(122) Official Gazette, 24.7.1950-7564.

(123) Official Gazette, 24.7.1950-7564.

(124) Official Gazette, 6.3.2003-25040.

of the Implementing Provisions of the Law on the Work Permit for Foreigners¹²⁵, the residence permits of the religious functionaries who will be assigned to religious institutions are granted by the Ministry of Internal Affairs. Such applications are made through the Ministry of Foreign Affairs. This provision applies to all foreign religious functionaries. If a different procedure was put into practice for the functionaries as the Patriarchate desires, it would cause disparity amongst non-Orthodox foreign religious functionaries.

VI. Evaluation of the Issue in the Minority Law Field

The argument defending the demands of the Patriarchate relates concepts such as minority rights and freedom of worship, claiming that international law precedes the Turkish law and binding for the Turkish Republic¹²⁶. It should be signified that the concepts of minority rights relied on do not meet the demands of the Patriarchate. Because, the general principles of minority rights in international law focus on equality and the prohibition of discrimination. These principles “provide the guarantee of uniform treatment to all individuals and allow the people who are members of minorities to benefit from the same rights granted to other citizens under equal conditions”¹²⁷. Hence, the Patriarchate’s demands should be observed from this perspective. The claim to ecumenical status, right to free entrance and exit for the foreign clergy, special status for the Heybeliada Seminary do not accord with the fundamental principles of the minority laws and are asserted as a demand for privilege rather than equality and an extra territorial status outside the Turkish legal system. It is inconceivable for a sovereign state to make use of

(125) Official Gazette, 29.8.2003-25214.

(126) Burnett/Pulzetti/Young, p. 6 onwards.

(127) Kaboğlu, İbrahim. *Kültürel Haklar ve Siyasi Haklar Karşılığında Azınlıklar* (Cultural Rights and Political Rights vs. the Minorities) the abridged version of the text presented to the 4th World Constitution Congress titled *Constitutionalism: Old Understandings, New Worlds*. Santiago January 12-16, 2004, translated from French by Oya Boyar.

a different legal practice for a minority living on its land and to grant this minority an extra territorial status and thereby, assist its integration with foreigners.

The more Turkey remains silent on the issue of the Patriarchate and the Heybeliada Seminary, the more it is claimed by taking refuge behind concepts such as human rights or minority rights that Turkey violates international obligations. Provisions that include the key words such as freedom of religion, minorities, right of education are put forward regardless of their context in order to be used as legal grounds for Turkey's alleged violation of its international commitments. The report drawn up for this purpose by Burnett, Pulzetti and Young is interesting for demonstrating how the international rules are misrepresented. The authors claim that Turkey violates its obligations regarding the Patriarchate's claim to ecumenical status and the issue of the Heybeliada Seminary, founding their argument on the basis of articles 2, 7 and 18¹²⁸ of the Universal Declaration of Human Rights¹²⁹. The articles in question assert that everybody is equal without distinctions of race, religion or language and ensures the freedom of thought, conscience and religion. None of these articles stipulate that the ecumenical status of the Patriarchate shall be recognized or that the Heybeliada Seminary shall be opened as an international theological school. Moreover, article 7 states that, "all are entitled to equal protection against any discrimination and against any incitement to such discrimination". Therefore, the other Turkish citizens should be entitled to equal protection against the Patriarchate's discriminating and even inciting acts for privileges.

The authors also refer to article 13 of United Nations International Covenant on Economic, Social and Cultural Rights¹³⁰ and article 18 of the United Nations

(128) For the actual text, see tihv.org.tr.

(129) Burnett/Pulzetti/Young, p. 6

(130) For the actual text, see, tihv.org.tr.

(130) For the actual text, see, tihv.org.tr.

International Covenant on Political and Civil Rights¹³¹ as the legal basis for their claim that Turkey violates its obligations to the Patriarchate¹³². Neither of the provisions specifies a legal arrangement on the subject we examine.

Article 13 of the International Covenant on Economic, Social and Cultural Rights stipulates the right of education and asserts that the states which are parties to the Covenant recognize the right of everyone to education, the primary education should be compulsory, the technical and vocational education should be made generally available and accessible to all, the higher education should be made equally accessible to all on the basis of capacity, an adequate fellowship system should be established and the material conditions of teaching staff should be continuously improved, the parents are entitled to choose for their children schools other than those established by the public authorities, which conform to minimum educational standards laid down or approved by the State, and to ensure the religious and moral education of their children in conformity with their own convictions, no part of the article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions.

While article 18 of the International Covenant on Political and Civil Rights stipulates under the title of freedom of thought, conscience and religion that everyone is entitled to these rights and are free to manifest his religion or belief in worship, observance, practice and teaching; no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice; however, this freedom may be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others; the liberty of parents to ensure the religious and moral education of their children shall be respected.

(131) For the actual text, see, tihv.org.tr.

(132) Burnett/Pulzetti/Young, p. 6.

As it is seen, none of the articles in question assert international obligations that can become legal basis of the demands for the recognition of the ecumenical status, foreign clergy to freely enter and work in the country, foreign citizens to be allowed to lead a minority institution, the Heybeliada Seminary to run as a private school of higher education that provides theological education to foreign students. There is also no international legal principle that enables the demands to be met.

Conclusion

The legal status of the Fener-Greek Patriarchate was determined by the debates and the agreements registered at the Lausanne negotiations and it has been reinforced with qualities prescribed in the Constitution of the Turkish Republic. The Patriarchate that enjoyed some political and administrative powers with the title of ethnarch in a multi-legal theocratic empire is now a religious institution with no legal entity, endowed only with religious powers in the secular democratic Republic of a sole legal system. This institution was not cited under a provision of the Treaty of Lausanne. Therefore, it is not within the international law's field of intervention.

Since the Patriarchate is an institution that is entirely subject to the Turkish law and it is in this respect within the scope of minorities mentioned in the Treaty of Lausanne; the legal arrangements to be made about the Patriarchate as well as the demands of the Patriarchate will take effect within the framework of the legal norms that are binding for the Turkish Republic. The Patriarchate's claim to ecumenical status will not be a legally valid status unless it is recognized by the State of Turkish Republic. In this respect, the argument that, despite Turkey's rejection the whole world recognizes the Patriarchate as ecumenical, appears in the media as a psychological maneuver and thereby, the legal consequences of the concept are attempted to be deprived of their validity and significance. If the status in question could produce legal results regardless of whether Turkey accepts or not, Turkey's recognition would not have to be required! The secular state of the Turkish Republic would be excluded from this issue of Christianity and the title would be used whatever the consequences might be. However, since the ecumenical title has legal consequences and requires another legal system other than the rule of the Turkish laws, the issue can neither be reduced to simple terms nor underestimated. In this respect, a reli-

gious institution whose ecumenical title has never been recognized and legal status has been determined accordingly cannot receive the ecumenical title by the decision of the actors of world politics and Turkey cannot be demanded to recognize this title and to make legal acts pertaining to it. Turkey is justified in rejecting this demand and shall display that it is, no matter where the pressures come from.

Moreover, the State of Turkish Republic does not have obligations such as allowing foreigners to become patriarchs or granting citizenship to foreign clergy. Neither the laws of the European Union nor the international law includes an obligatory provision about the matter.

The closure of the Heybeliada Seminary is lawful and its re-opening is possible only on condition that it is lawful. The issue is not anymore the need of minorities to train religious functionaries but, it has been turned into a power struggle in consequence of Fener Greek Patriarchate's claim to ecumenical status. The Heybeliada Seminary becoming an international theological school means that it will acquire an extra-territorial status, independent of the Turkish laws. Such a privilege is out of question for not only a section of minorities but, even for the majority. The issue of the Seminary's re-opening carries such weight that a proposal made in a way that Turkey may not legally recognize the Seminary's diploma¹³³. This clearly shows that the school is intended not for the minority but, for the foreigners in Turkey and to prove the authority of the Patriarchate over the Orthodox population in the world.

Heybeliada Seminary had a very special status right from the beginning and its legal framework has been restricted to being a secondary school. The status change that was carried out in 1951 has no legal basis. The school had become an unprecedented center of privileges only

(133) See Elçin, Macar. Laik Türkiye'de Ruhban Yetiştirme Sorunu, Macar/Gökaçtı, s. 43.

with a decision made by the political government at the time. Since article 40 of the Treaty of Lausanne is founded on the principle of equality, it is not possible to say that the Heybeliada Seminary is a minority school within the framework of article 40. In this regard, this unlawful privilege conceded to the Orthodox minority and even to the entire Orthodox population of the world has been abolished with the decision of the Constitutional Court in 1971.

While going abroad for all kinds of education is being encouraged in our globalizing world, to interpret people who go abroad for an Orthodox theology education as people trained in dangerous ideologies¹³⁴ and therefore, to compel training of clergy in Heybeliada is an argument inconsistent within itself and contradictory. If receiving theological education in a foreign country constitutes a threat then, the religious functionaries educated in Heybeliada Seminary will also constitute a threat to the countries which they hold the citizenship of.

The State of Turkish Republic shall handle the matter on a legal ground and shall make evaluations around the framework of legal principles whatever exterior pressures are exerted. Since the Heybeliada Seminary issue has been on the agenda under titles of human rights and minority rights and supported by incorrect information for such a long time, the State of Turkish Republic needs to announce the reality, both to national and international public opinion and to clarify why the status claimed for the Heybeliada Seminary is not in accord with the Turkish or the international law. To see this matter as a political issue and to resort to a politics of delusion, by announcing that the Seminary is planned to be opened, only make things more difficult for Turkey. As a state governed by the rule of law, Turkey shall approach matters through a solely legal framework and shall not act upon illegal notions like “tolerance,” “handsome gesture” or “mark of good will” or take refuge behind the excuse

(134) Macar/Gökaçtı, s. 25.

that this is what the European Union wants. The European Union is built on a very strong legal foundation and the EU laws include no provisions that will support the status claimed for the Heybeliada Seminary and the Patriarchate. Let us not forget that laws apply to everyone, in the name of equality and justice, and legal principles cannot be formed privately.

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