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TURKEY: The fundamental problem and how it might be solved

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Turkey should allow full legal status for all religious and belief communities, Otmar Oehring of the German Catholic charity Missio, argues in a commentary for Forum 18. No community independently exists or has ever existed in Turkish law – whether Muslim, Jewish, Armenian Apostolic, Greek Orthodox, Syriac Orthodox, Catholic, Protestant, Baha'i, Jehovah's Witness, or any other. This leads to bizarre situations, such as communities being unable to prove they are liable for the taxes they already pay. It also raises the question of whether Turkey really is – as officials repeatedly claim – a secular state. Achieving legal status for all would not solve all problems, but the changes in official and social attitudes necessary would help resolve the other problems. To achieve this, both the Constitution and the Civil Code must be changed. Anything less than directly resolving the fundamental problem - independent legal status - will fail to meet Turkey's human rights obligations and aspirations.

It is becoming increasingly clear that Turkey should allow full legal status for religious and belief communities of all kinds – including atheists and agnostics. But it is also becoming clear that the issue cannot be addressed indirectly, as a by-product of addressing other problems. The issue is so fundamental that the whole framework of relations between religion and the state needs to be changed.

For example, in 2008 the European Court of Human Rights (ECtHR) ruled that Turkey had to return to the Ecumenical Patriarchate the Buyukada orphanage it had confiscated. This was very welcome. Yet the judgment did not resolve the fundamental issue behind this and similar human rights violations. This is that Turkey's religious communities are denied legal personality essential for them and their followers to securely exercise freedom of religion or belief, and carry out normal religious activities.

The ECtHR judgment over the Buyukada orphanage cannot address this issue, even though it enabled the Ecumenical Patriarchate to finally recover the orphanage building in November 2010 (Application no. 14340/05 <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=837594&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>). The judgment requires the Turkish state to hand back a building they confiscated in 1964 to its rightful owners. This implies an implicit recognition that the owners exist in law.

However the owner in question – the Ecumenical Patriarchate – does not exist in Turkish law, has never existed in law and – unless the Turkish state changes its Constitution, laws and attitudes – will not exist. The ECtHR has forced the state to recognise that there is an owner who is not the state, and to act on that recognition. But the Orphanage's rightful owner – and the owners of other religious property - are not allowed by the Turkish state to legally exist.

This depressing conclusion was confirmed by Deputy Prime Minister Bülent Arinc. "The institution represented by Greek Orthodox Patriarch Bartholomew does not have a legal personality under current Turkish law," he declared on 17 January at the Ankara offices of the newspaper Zaman. "They don't have a legal personality, but they exist."

And he added: "We are seeking an arrangement that recognises the existence of the patriarchate but doesn't offer a legal personality to it, in line with the [1923] Lausanne Treaty and our laws."

No religious community has secure legal status

Just like the Ecumenical Patriarchate, no religious community – whether Muslim (Sunni, Alevi or of any other orientation), Jewish, Armenian Apostolic, Syriac Orthodox, Catholic, Lutheran, Protestant, Baha'i, Jehovah's Witness or any other - has secure legal status. In sharp contrast, every country in the European Union – which Turkey has been seeking to join for decades – has enabled religious communities to have a legal status within the widely varying legal systems that enables communities to exercise their activities. The European Commission has been urging Turkey to implement international human rights commitments by resolving this issue, as have successive Popes and other religious leaders.

Lack of legal status leads to many bizarre situations. For example some religious communities have owned and used buildings, as well as paying property taxes on them, from before the 1924 foundation of the Turkish Republic. But there is not even the possibility in Turkish law for them to attempt to prove that they are the owners and so are liable for the property taxes they pay. Other religious

communities have pointed out to Forum 18 that because they do not have the legal right to exist and own the buildings they have themselves built, they do not have the legal right to make repairs. They cannot legally even repair a small hole in the roof of a building they have built and have always been the sole users of (see F18News 13 March 2008 http://www.forum18.org/Archive.php?article_id=1100).

Turkish religious communities of all faiths are, for good reason, often very reluctant to discuss these bizarre situations in public. They fear that – as the example of the Mor Gabriel Monastery (see below) shows – if they attract the hostility of officials they will face complex and expensive legal battles. This may result in them losing the de facto freedom they have to operate in their own country.

What is the current legal situation?

Open-minded Turks say that recognition of Christian and other non-Muslim communities as legal entities will only happen when the issue is resolved for Muslims. However it appears that this cannot happen until Turkey reassesses its understanding of secularism.

A March 2010 opinion prepared by the Council of Europe's Venice Commission on the legal status of religious communities addresses precisely this issue (see F18News 11 August 2010 http://www.forum18.org/Archive.php?article_id=1477). As it rightly points out, the problem is rooted in Turkey's Constitution, as well as in Article 101 (4) of the Civil Code, which bans religious communities from gaining legal entity status as foundations (see below).

Religion in Turkey is tightly bound under a complex and contradictory web of Ottoman-era and republican-era laws, decrees and regulations, as well as current Constitutional restrictions and underlying prejudice against free and autonomous religious communities.

Two laws seem to provide some kind of legal status – the Foundations Law and the Associations Law.

To complicate things even more, there are two kinds of foundations: the so-called community foundations, and foundations established under the Civil Code. So the properties of the Armenian Apostolic, Greek Orthodox and Jewish communities are organised as so-called community foundations (cemaat vakif). These Foundations are in law not allowed to conduct religious activity – all they can do is administer property used for religious purposes. Their management is not the same as the leadership of the religious communities that use their property. And their hold over property is far from secure – numerous properties that were in the hands of foundations linked to religious/ethnic communities have been confiscated under various pretexts in recent decades.

The second category of foundations are those established according to the Civil Code (under Article 101 and following articles). This is little used by religious communities, for example only one Protestant foundation - the Istanbul Protestan Vakfı – having been established under it.

Some communities have registered associations, for example the Association for the Support of Jehovah's Witnesses. There are also 22 Protestant churches who have organised themselves as associations – but this has not stopped the difficulties of many kinds that they face (see "A threat" or under threat? Legal and social problems of Protestants in Turkey, 2010, p. 32ff http://www.protestankiliseler.org/Protestants_in_Turkey-_A_Threat_of_Under_Threat_2010_.pdf). Establishment as associations has been possible because the latest Law on Associations (No 5253 of 2 November 2004) does not directly forbid associations with a religious purpose. But this is still a highly insecure form of status.

The articles of the Civil Code referring to associations do not mention a prohibition on associations with a religious purpose – unlike article 101 (4) dealing with foundations. However, the Constitution bans establishing associations with a religious purpose. This means that any such association could be either prevented from being established or abolished at any time – as happened to the Seventh-day Adventist Church in 2005 (see F18News 13 March 2008 http://www.forum18.org/Archive.php?article_id=1100).

Other communities use other means to try to use the limited legal possibilities available to them, even by establishing private companies. Yet crucially, like all the other possibilities, this is not the same as a religious or belief community having full legal personality as themselves.

The situation is very complicated, but it is important to note that all the available options provide only indirect ownership of property by religious communities. Another aspect is that all the available foundations options involve supervision and control (not just regulation) by the Directorate-General for Foundations. This – as experience has shown - brings the risk of possible confiscation of property by the state. If communities were able to – with full legal status as themselves - directly own and run their own property, this would bring the situation into line with Turkey's human rights obligations. For at present, any form of "indirect" status that communities or those who agree to work for them acquire is highly precarious (see F18News 13 March 2008 http://www.forum18.org/Archive.php?article_id=1100).

Legal personality in international law is secure recognition that a group - such as a religious community – is legally able to run a bank account, sign contracts, employ people, own or rent property, publish literature, etc. In other words, it is the legal foundation

for any religious community to run its own affairs responsibly and autonomously – without needing to work through another institution, association, foundation, or company.

Is Turkey really a secular state?

Turkey repeatedly insists that it is a secular state. Yet the Turkish state refuses to allow religious communities of any faith – and indeed atheist and agnostic groups - the possibility to gain full and unchallengeable legal status. This is totally incompatible with the European Convention on Human Rights and Fundamental Freedoms. If Turkey were to be brought before the European Court of Human Rights for this, it would certainly be found to be violating its human rights obligations.

The jurisprudence of the Turkish Constitutional Court makes it clear that secularism in Turkey does not mean separation of religion and state. It means that there should be close supervision of religious activity, and less autonomy of religious communities than in many other countries. The majority Sunni Islamic community has no independent legal status, but is under the control of the Diyanet, or Presidency of Religious Affairs, which reports directly to the Prime Minister (see the F18News religious freedom survey http://www.forum18.org/Archive.php?article_id=1379).

Turkey is quite open about its bizarre definition of "secularism" in its international relations. For example the Turkish Foreign Ministry on 20 December 2002 sent a Memorandum to the Holy See stating that: "Granting legal status to a 'community' or 'religious group', for example to the members of the Catholic Church, is irreconcilable with the constitutional principle of the secular state. According to the Constitution, this principle cannot be amended nor can it be considered unconstitutional" (see Oehring, O. (2004), Human Rights - Turkey on the Road to Europe – Religious Freedom? , Aachen, Missio, p. 77, <http://www.missio.de/media/pdf/menschenrechtsstudie/20-tuerkei-en.pdf>).

What kind of "secularism" is this, that denies people the right of independent legal existence and instead wants to control them? It is certain that this is not the secularism which in many countries fully conforms with international human rights standards, and which religious believers, agnostics and atheists strongly support. Indeed, is this "secularism" secularism? If not, what is it?

The root of many problems

This lack of clear legal status for all religious and belief communities – both Muslim and non-Muslim – is at the root of many of the problems they face. However, resolving this will require a number of steps.

Simply lifting the Civil Code restrictions, for example on religious communities themselves forming foundations, would not be enough – this would not allow religious communities to administer themselves fully as they choose and conduct the full range of administrative and religious activities. For example, all religious communities would still not be permitted by this change to choose the leaders they wish (see F8News 11 August 2010 http://www.forum18.org/Archive.php?article_id=1477).

What is needed is an autonomous legal status that would allow a religious community to gain such status freely, administer its own affairs, invite foreigners if it wishes to, apply to gain land for places of worship and run religious education establishments.

One other route – albeit a slow one – would be for religious communities to take the Turkish government to the ECtHR in Strasbourg over the denial of legal status (see F18News 19 January 2007 http://www.forum18.org/Archive.php?article_id=901). They would clearly win, but the judgment would take years to achieve and many religious communities are reluctant to go through this. When religious communities discuss this option, they all seem to want another community to take this step.

Achieving legal status would challenge oppressive attitudes

Achieving legal status for all would be a major step forward. It would not by itself solve all problems. But the changes in official and social attitudes necessary to achieve legal status, including recognition of the diversity of Turkish society, would help resolve the other problems. An example of the need to challenge and change the attitudes which lie behind legal problems is the Mor Gabriel Syriac Orthodox Monastery. Turkey's current attitudes seem to lead it to want to use "legal" means to remove the existence of a monastery which pre-dates the Turkish Republic by many centuries. This is shown by the many state attempts to deprive the Monastery, founded in 397 AD, of land it has owned for centuries (see F18News 9 November 2010 http://www.forum18.org/Archive.php?article_id=1508).

The latest development in this complex and costly legal battle for the Monastery took place on 7 December 2010 (published only on 27 January 2011). Turkey's Court of Cassation (T.C. Yargıtay), or highest Court of Appeal, rejected an earlier ruling of the Cadastre [land registry] Court in Midyat (Ruling 2009/11-2009/28, dated 24 June 2009), basing its decision on the findings of the recent – and rather questionable - land registration process. The Cassation Court by this decision (File reference 2010/13416, Ruling 2010/15347) ruled in favour of State Treasury claims twelve parcels of land, totalling 99 Hectares (244 Acres), are "forest" lands and cannot be owned by the Monastery or a private owner. The land in dispute therefore becomes the property of the State Treasury.

Sources in Turkey who are very familiar with the situation described the decision to Forum 18, on 3 February, as "highly political

and ideological". Many in Turkey are also alarmed by the ruling, as it suggests that the other pending court cases could end with similar rulings – causing the Monastery to lose the land it needs to survive.

For Mor Gabriel, this means that they face further time-consuming and expensive legal battles to defend their own land from the Turkish state. The possible end of this monastery is important not just for the Syriac Orthodox community, as it could also easily lead to the end of a many-centuries old Christian presence in the area. This would send a signal to Turkish Christians that there is no more hope for a life as Turkish citizens equal to all. It would also send a signal to other minority religious communities – and indeed to all who want full equality for everyone in Turkey (see F18News 9 November 2010 http://www.forum18.org/Archive.php?article_id=1508).

Freedom for one must be freedom for all

In recent years some scholars, journalists and even some members of the ruling Justice and Development Party (AKP) have discussed lifting some of the government controls on religious communities, and even of separating Islam from the state. Even the former head of the Diyanet, Professor Ali Bardakoglu (who was fired in November 2010) on 23 October 2010 told the Istanbul-based Radikal newspaper that for the Diyanet: "The solution is to allow the religious institution to be autonomous. Turkey is ready for that".

The AKP government seems to want to resolve this issue - at least for the Sunni Muslim community which is its power base. It is not clear that the AKP has realised that allowing the Sunni Muslims to gain legal status would also entail granting the same rights to all groups that might want to operate independently. This includes both other Muslims communities – such as Alevis or other Sunni Muslims – and also non-Muslim communities.

The AKP does not have a well-founded principled commitment to the idea that religious freedom is for all, not just for one group such as Sunni Islam. Full legal recognition for all communities might come as a by-product of the Party's desire to see Sunni Islam granted autonomy from the state. However, against this, the AKP's power base also stands to benefit from maintaining the existing structures – for example to spread their own version of Islam.

Resistance to change

Yet even if the AKP pushes for full legal status for any religious community which wants it, it will still need to overcome the fervent resistance of the "deep state", the nationalist circles in the army, police, National Intelligence Organisation (MIT) secret police and state administration which regard themselves as the custodians of the "secularist" legacy of the Republic's founder, Mustafa Kemal Atatürk. This has revealed itself in, among other ways, Ergenekon and the Operation Cage plan to destabilise the AKP by both targeting non-Muslims and encouraging protests about their targeting (see F18News 22 April 2010 http://www.forum18.org/Archive.php?article_id=1434).

Indeed, it has been suggested to Forum 18 that the "deep state" functions as a rather convenient excuse – because it exists as a real threat to change - for the AKP to avoid introducing change. Whilst a few liberal members of the AKP may want change, they are not representative of the attitudes of the AKP's power base.

Officials have a record of resisting any change. The European Union in 2006 arranged for experts of the Council of Europe's Venice Commission and an officials from the French Foreign Ministry to visit Turkey to explain the French understanding of the state's laïcité. Turkish officials initially accepted the visit, but then cancelled it with no explanation (see F18News 26 July 2006 http://www.forum18.org/Archive.php?article_id=817). The AKP government (in power since 2002) has definite limits to its willingness to listen to ideas from outside Turkey, as Turkish sources have themselves observed to Forum 18.

Under the AKP, some state officials continue to claim that no problem exists as minority communities already have rights under the 1923 Lausanne Treaty. However, the rights it confers are strictly limited and apply only to some religious/ethnic communities which existed then (see the F18News religious freedom survey http://www.forum18.org/Archive.php?article_id=1379). Such officials sometimes add that the possibility for communities to gain status as foundations or associations takes care of other communities' problems. The arguments of such officials have no basis in fact.

Steps needed

The first necessary step would be to change the Constitution to secure rights to legal status for all religious communities and to remove all ambiguity. This would include deleting Article 174 ("Preservation of Reform Laws"). This states that: "No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilisation and to safeguard the secular character of the Republic.." Atatürk's reform laws – which included subjugating religious communities to the state - cannot under this Article be challenged.

Any change to this is again likely to face fierce opposition from the "secularist"-dominated Constitutional Court. Its judges would probably try to reject any constitutional change that fails to uphold Atatürk-style government control over religion. It is also certain

that there would be an extreme reaction to this change beyond the judges, so an alternative might be to introduce an interpretation of Article 174 which manages to bring their impact into line with Turkey's human rights commitments.

As well as removing the constitutional obstructions to religious freedom, a new Constitution, I think, should also include a positive affirmation of religious freedom for all, ideally based on the wording of Article 9 ("Freedom of thought, conscience and religion") of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Such an affirmation should also include a requirement that the right to freedom of religion or belief should be facilitated in a separate law.

The second requirement is to change Civil Code Article 101 (4), to remove the ban on religious communities' themselves making use of the provisions regarding foundations.

Yet on their own, these two changes would not resolve all the legal problems – and the everyday problems that stem from this legal uncertainty. Turkey has to go further and set out – perhaps in a specific Religion Law – the rights and autonomy that religious communities should enjoy. Such rights must be based on Articles 9 and 11 ("Freedom of assembly and association") of the ECHR. They must include the rights to organise themselves as they choose, select their own leaders, offer training for their own followers including clergy, own and use property – and to be a legal entity able to defend its rights in law.

Whatever laws are proposed should conform with the suggestions in the Organisation for Security and Co-operation in Europe (OSCE) / Venice Commission Guidelines for Review of Legislation Pertaining to Religion or Belief (see <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282004%29028-e>). An example is that the phrasing of the law should be neutral in encompassing all forms of religious organisation, whether Islam (which left to itself generally does not have a formal hierarchy), as well as hierarchical, congregational or other forms of organisation.

Also needing resolution will be which government agency or court will handle granting legal status to religious communities. Procedures will have to be in place so that officials of the majority Sunni Muslim background are unable arbitrarily to deny legal status to disfavoured religious communities – such as small Muslim communities or non-Muslim communities.

The understanding of religion in wider Turkish society is not the same as elsewhere, and many officials regard religion as something that the state must control. This has already been seen in the way some Protestant churches have faced difficulty obtaining association status. One way to avoid such arbitrary treatment would be to introduce registration by simple legal notification of existence.

Such changes to allow religious communities to acquire full legal status will also of necessity leave the Diyanet in an awkward position. At present it controls all official mosques and imams, for which purpose taxes paid by everyone in Turkey, Sunni Muslim or non-Sunni Muslim, are used. It could continue to exist – but only if it becomes a genuinely voluntary association, or assumes radically different tasks for the state. It is crucial that Muslim communities be free to organise themselves independently of the Diyanet and gain autonomous legal status, if they so desire.

The need for full, unambiguous, secure legal status

It is welcome that the issue of the need for full legal status for religious and belief communities of all kinds – including atheists and agnostics - is at last on the agenda. But a mistake many make is not to recognise that the whole framework of relations between religion and the state needs to be changed. Turkish "secularism" – or perhaps more accurately "non-secularism" - in the state's bizarre definition needs to be abandoned. Religious communities need to be granted autonomy in law – and this means a fundamental change in attitude on the part of the state, away from the wish to control to a full recognition of Turkish society's diversity.

Anything less than directly resolving the fundamental problem - independent legal status - will fail to meet Turkey's human rights obligations and aspirations. These include the European Convention on Human Rights and Fundamental Freedoms, among other standards, and Turkey's aspirations to be a member of the European Union. Religious and belief communities need full, unambiguous, secure legal status in their own right. This is the best and indeed only way to begin to fundamentally address violations of freedom of religion or belief in today's Turkey. (END)

For more background, see Forum 18's Turkey religious freedom survey at http://www.forum18.org/Archive.php?article_id=1379.

More analyses and commentaries on freedom of thought, conscience and belief in Turkey can be found at <http://www.forum18.org/Archive.php?query=&religion=all&country=68>.

A compilation of Organisation for Security and Co-operation in Europe (OSCE) freedom of religion or belief commitments can be found at http://www.forum18.org/Archive.php?article_id=1351.

A printer-friendly map of Turkey is available at <http://www.nationalgeographic.com/xpeditions/atlas/index.html?Parent=mideast&Rootmap=turkey>.

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