

6 October 2011

TURKEY: What does Turkey's Restitution Decree mean?

By Mine Yildirim, Åbo Akademi Uni. and , and Otmar Oehring, @oehring_otmar (https://x.com/oehring_otmar)

Following the announcement by Turkey's Prime Minister Recep Tayyip Erdogan of a Decree allowing non-Muslim community foundations to apply to regain or receive compensation for property the state confiscated from them, Regulations to implement this were published on 1 October. But what does the Decree actually mean? The Decree is best seen as a further step in the process of trying to solve the property problems of non-Muslim community foundations. Yet Forum 18 News Service notes that its scope is narrow, excluding some important categories of confiscated property. The Decree relates only to non-Muslim community foundations and does not address property loss of for example, Muslim and Catholic religious communities. Among other deficiencies, the state body that was mainly responsible for confiscations – the Directorate-General of Foundations – has been given control of restitution as well as being given oversight of any compensation to be paid. The absence of an independent valuation and review process to judge compensation increases the possibility that fair compensation may not be paid.

To the surprise – indeed delight – of the 162 community foundations who were the hosts of an iftar (Ramadan break of fast dinner) held in Istanbul on 28 August for senior members of Turkey's government, Prime Minister Recep Tayyip Erdogan announced that a Legislative Decree had been adopted the previous day allowing community foundations to apply to regain religious property confiscated from them by the state since 1936. Some religious minorities and commentators immediately saw the Decree as a revolution, others as at least a significant improvement.

More than a month on, and after the publication on 1 October of Regulations to implement it, what does the Decree actually mean? If implemented in full, it would provide for the restitution of much property confiscated from those Turkish religious/ethnic communities that are allowed community foundations, or compensation instead. But the scope of the Decree is narrow and it falls short of being an adequate and deep-rooted solution to correcting the basic injustices at the heart of the property issue – or correcting the wider injustices affecting freedom of religion or belief.

Religious communities' property insecure

Turkey's religious communities cannot acquire, own or rent property themselves because they are not allowed independent legal status. Some foundations are allowed to hold and manage some religious property, including places of worship. However, these foundations cannot be run by the communities themselves. Non-Muslim ethnic/religious communities protected under the 1923 Lausanne Treaty (such as Armenians, Greeks, Syriac Orthodox, Jews and others) have community foundations (see F18News 2 March 2011 http://www.forum18.org/Archive.php?article_id=1549).

Religious communities as diverse as the Muslims, Catholics, the Greek Orthodox, Protestants, and the Syriac Orthodox Church have for many years seen no significant progress in resolving long-standing property problems (see F18News 27 October 2009 http://www.forum18.org/Archive.php?article_id=1368). The Mor Gabriel Syriac Orthodox Monastery faces serious problems trying to retain its land against ongoing attempts by the judiciary to deprive the community of it (see F18News 7 February 2011 http://www.forum18.org/Archive.php?article_id=1537).

Creating an adequate legal framework for the acquisition of legal personality for communities of all faiths is one of the fundamental issues that needs to be addressed to resolve the property problems of religious communities – and meet Turkey's human rights obligations and aspirations (see F18News 7 February 2011 http://www.forum18.org/Archive.php?article_id=1537).

Latest step

The 27 August Decree – which amended the current Law on Foundations (No.5737) by adding a temporary Article 11 - entered into force on the day it was adopted. In principle, it aims to provide for the restitution of property that was wrongfully taken from non-Muslim community foundations.

The Decree is best seen as a further step in the process of trying to solve the problems of non-Muslim community foundations. This started with the passing of the Third Harmonisation Law of August 2002 which amended the 1935 Law No. 2762 on Foundations and Statutory Instrument No. 227 on the Organisation and Duties of the Vakıflar Genel Müdürlüğü (VGM - Directorate-General of

Foundations). The process continued with the Fourth Harmonisation Law of January 2003 amending further Law No. 2762 on Foundations, and finally the long-promised revised Foundations Law (No. 5737) passed by a reluctant parliament in 2008 (see F18News 13 March 2008 http://www.forum18.org/Archive.php?article_id=1100).

The Decree

According to the Decree, to qualify for restitution non-movable property must:

- be registered in the 1936 Declaration on the registration of community foundations of the VGM and the name of the owner recorded in the Land Registry must be blank;

- or the non-moveable property must be registered in the 1936 Declaration and registered in the name of the State Treasury, the Directorate-General for Foundations, a municipality or city special administration for reasons other than nationalisation, sale, or exchange.

Cemeteries and fountains must be registered in the 1936 Declaration, and currently registered in the name of legally recognised public institutions.

Applications for restitution must be made within 12 months, i.e. by 27 August 2012. In order to approve the registration of property in the name of community foundations by the deed office, the Assembly of the Directorate-General for Foundations – the government body that oversees them - has to approve the application.

In addition, the value of property that was purchased by a community foundation, or left to them through a will, but whose ownership is registered in the name of a third party because the community foundations were not allowed to acquire the property, will be paid by the Treasury or the Directorate-General for Foundations. The value of the property will be determined by the Finance Ministry.

Finally, the Decree stated that the Directorate-General for Foundations would prepare Regulations concerning how the Decree will be applied. These Regulations were adopted on 1 October.

Why a Decree?

It is interesting that the government chose to partially address the confiscated property issue not by amending the Law on Foundations through a parliamentary act, but through a Decree.

The government was given temporary power to make legislative Decrees as of 2 May 2011 for six months. Some groups criticised the bypassing of Parliament in this matter of "national importance", which they argued should have been discussed in the Grand National Assembly first.

It might be that the government wanted to avoid tension in the Grand National Assembly similar to the tensions seen when successive Laws on Foundations were drafted (see F18News 13 March 2008 http://www.forum18.org/Archive.php?article_id=1100). The ruling Justice and Development Party (AKP) could still have passed the Amendment, but the discussions and resulting tension might have harmed the AKP's popularity.

Why only limited scope?

The Decree does not create an overall solution to all the property problems of community foundations – or indeed the other problems faced by foundations (see F18News 13 March 2008 http://www.forum18.org/Archive.php?article_id=1100). Because of the Decree's narrow focus, only covering some but not all property problems, it cannot reasonably be described as a revolutionary step.

That the Decree targets specifically property that was declared in the 1936 Declaration is in itself controversial. To understand why, the use to which the Declaration has been put should be understood. In 1936, a basically harmless regulatory statute on the Implementation of the 1935 Foundations Law provided for drawing up an inventory of the foundations' property. This became the 1936 Declaration.

However, in 1974 (amid the tensions of the Cyprus crisis of that year) the Court of Appeal ruled that the state could confiscate any property acquired by community foundations since 1936 through purchase, gift or inheritance. State agencies able to do so included the Directorate-General for Foundations, which has now been made responsible for applying the Decree by way of drafting Regulations and being directly involved in decisions concerning applications.

In its 1974 ruling, the Court argued that, as such property had not been declared by the non-Muslim minorities in the inventory of 1936, it had been acquired illegally. This was justified by the false claim that the non-Muslim minorities were non-Turks and so the

law on foreigners' rights to acquire property was applied and they had no right to purchase land in Turkey.

Under this ruling, more than 40 buildings were seized from Armenian community foundations alone and handed back to their previous owners or – if the previous owners could not be found – transferred to the state Treasury.

Also, a property may be listed in the 1936 Declaration but have been transferred to legal entities that are under the supervision of a public body or other foundations. An example of this is property transferred to the Valide Sultan Foundation. It is likely that applications concerning these transferred buildings will not be accepted. Laki Vingas, the member of the VGM Assembly representing community foundations, calls this a deficiency of the Decree incompatible with "the spirit of the Decree".

Why aren't all cemeteries included?

For cemeteries, again, the Decree's scope is limited to those that were registered in the 1936 Declaration. However, since in some cases cemeteries were not seen as property, these were not listed in the Declaration. Since the Decree requires that these be listed in the Declaration, the risk is that these cemeteries will not be returned to community foundations.

This problem could have been overcome had the Decree included "cemeteries used by community foundations", as has been suggested by a lawyer representing Armenian community foundations, Setrak Davuthan. Laki Vingas encourages applications for the restitution of cemeteries even if they do not appear to meet the criteria, hoping that these applications will demonstrate the gaps in the Decree so that further regulations can be made for complete restitution.

What else does the Decree not cover?

One of the exceptions in the Decree concerns property that was "nationalised". Nationalisation has not solely been directed at the property of community foundations, and usually owners are compensated for the nationalisation. But the Istanbul-based Armenian newspaper Agos complained, on 16 September, that the property of non-Muslims in Turkey has often been nationalised in an unjust manner. The newspaper argued that it amounted to "wrongful seizure".

Also not included is property confiscated by the state from community foundations and handed back to previous owners from whom the foundations had legally acquired it.

Nor does the Decree cover properties taken from religious institutions or communities that do not have community foundations. For example, property that once belonged to the Roman Catholic or Anglican churches is not covered. These communities have neither community foundations, nor – like all other religious communities – independent legal status.

It is important to note that the Decree does not address the property of seized community foundations (mazbut vakif). Seized foundations are community foundations whose administration was seized by the VGM for various reasons, for example because they were not able to hold board elections for a certain time, or they could no longer fulfil their charitable purpose. The administration of this seized property, and thus the property, may not be given back to community foundations. A March 2009 report by the Istanbul-based TESEV Foundation, Bir Yabancilastirma Hikayesi, found that the number of properties seized from Greek Orthodox community foundations alone was over 900 (see http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/AH/TESEV-vakiflar-rapor.pdf).

Also, as the south-eastern city of Hatay (Iskenderun) was not part of Turkey in 1936, community foundations' property in this city is not covered by the Decree.

Will compensation be fair?

Compensation for properties that were purchased or acquired by donation, but which foundations were denied ownership of as they were said not to have the legal capacity to acquire new property and were sold to third parties will be decided on by the Finance Ministry. However, no independent body is involved in deciding on compensation, according to the Regulations.

It is thought that if compensation were judged fairly and paid in full, the state would have to pay compensation worth many millions of Euros for a large number of properties.

Another weakness of the Decree is that the state body with a direct interest in reducing the amount of compensation paid – the Finance Ministry – is the only body permitted to decide on the amount of compensation paid.

The Regulations provide more insight into the valuation process, and allow a flawed appeal procedure. The estimation of the value of property will be carried out by a valuation commission of the Finance Ministry upon the request of the Regional Directorate of Foundations. Community foundations may object to the value if they believe it is not fair. However these objections are assessed by the Regional Directorate of Foundations which oversees the entire valuation process. To ensure a just process it would have been better for valuations to have been assessed by an independent institution, and for appeals to be decided by an independent body not involved in the initial valuation.

Why limited time?

The Decree states that community foundations must apply for restitution within 12 months. Given that the Regulations were issued only on 1 October, this left less than eleven months for the applications to be prepared and submitted.

However, the 1 October Regulations improve the Decree in relation to the time requirement. It does this by lifting the time limit for property that was purchased by a community foundation, or left to them through a will, but whose ownership is registered in the name of a third party because the community foundations were not allowed to acquire the property. Community foundations can apply for the restitution of this kind of property at any time.

Yet, as the Decree concerns correcting a violation of the right to property it is difficult to see why a time limit should reasonably be imposed on any aspect. Many of the documents that will be needed to apply for restitution are very old, and might be found only after the deadline has expired. In such a situation, it is possible that this may lead to a case at the European Court of Human Rights (ECtHR) at Strasbourg (see F18News 18 January 2007 http://www.forum18.org/Archive.php?article_id=901).

But it is not necessary to let matters go as far as the ECtHR. The 2002 changes to the then Foundations Law had allowed for community foundations to have property they were using approved in their name. The time allowed for this was extended in 2003 for 18 months because the initial specified period was inadequate.

Will the VGM approve applications?

The requirement of approval for each restitution application "after the positive decision of the Assembly [of the VGM]" gives the Directorate-General the power to decide how – or if – the Decree will be implemented in each individual case. The Assembly is the highest decision making organ of the VGM, with fifteen members, one of whom is chosen by the community foundations.

The VGM has been given this power in previous cases as well, a practice criticised by the TESEV Foundation. "The authority given to the Directorate-General for Foundations, an institution that has been the primary body responsible for the rights violations experienced by non-Muslim foundations, perpetuates the dominance of this institution," its March 2009 report *Bir Yabancilastirma Hikayesi* observed. As noted above, the VGM was in many cases the government agency which carried out the confiscations. This raises questions as to how far it is fair to give this decision-making power to the VGM.

Will Directorate-General help restoration?

The Regulations – and indeed the priority the VGM gives to restitution – will be crucial for the Decree's efficient and just implementation. Implementation will involve finding and consulting very old documents and transactions, which may lack accurate documentation or be in other ways irregular. Indeed, the state itself – not the foundations – may have the documents the foundations need to prove ownership.

So – as the Decree affects injustices committed by the state – it is vital that the VGM, the State Treasury, and other public authorities actively facilitate restitution. For example, the foundations should not be expected to bear all the burden of proof, and there is no requirement of proof for the state. VGM Assembly member Laki Vingas estimates potentially 350 applications. He believes difficulties in preparing most application files will not be great because the community foundations have done most of the paperwork already in 2010 when they applied for restitution of other property.

In many recent cases, especially in connection with regulations on the foundations, administrative regulations from the authorities may de facto counteract a law or a legislative decree. One can only hope that in this case this will not happen.

Urgent need for a Turkish solution to ECtHR cases

Were community foundations to take cases that are not covered in the Decree to the ECtHR, they would almost certainly win compensation or restitution of their property. The lack of adequate Turkish legislative solutions to the problems of community foundations and their property has led to an ever growing number of ECtHR cases lodged by the affected foundations against the state (see eg. F18News 18 January 2007 http://www.forum18.org/Archive.php?article_id=901).

As the foundations are winning such cases at the ECtHR, this shows officials in Ankara that a fundamental solution for the still unresolved cases – whether for the return of property or compensation when this is impossible – is urgently needed. Otherwise, Turkey will continue to regularly lose such cases in Strasbourg. If the Decree is implemented successfully, there will be fewer such cases against Turkey. But the kinds of cases outlined above, which are not covered by the Decree, are likely to be brought before the ECtHR – and it is likely that the foundations will win these cases.

Why was Muslim foundations' property excluded?

Property taken from Muslim foundations was mainly confiscated in the early years of the Turkish Republic. In those years the government took drastic action against foundations that were established before the entry into force of the 1924 Civil Code. Foundations and their property belonging to Muslim brotherhoods were transferred to the Ministry dealing with foundations, and later to the VGM. One example is the Hacı Bektash Dergah (Hacı Bektas Dervish Lodge) – which is very important for the Alevi community – and was turned into a museum. To enter it now, Alevis and others must buy a ticket – with the proceeds of ticket sales going to the state.

The Decree's restitution of some property only to non-Muslim community foundations has been criticised by both the excluded Muslim religious communities and some others, such as Christian leaders. On 19 September the Honorary Chair of the Federation of Alevi Foundations, Professor İzzettin Doğan, spoke of the closure of the Dervish Lodges in 1924 and the loss of property, in particular places of worship, at a meeting that launched a report on the problems of various belief groups in Turkey ('Belief Groups in Turkey - A New Framework for Problems and Solutions' - September 2011). He called for the restitution of property belonging to the Alevi community. At the same meeting Assyrian Catholic Bishop Yusuf Sag also criticised the limited scope of the Decree, saying that it should have been extended to cover all property losses before 1936.

The Chair of the Mazlumder (Association of Human Rights and Solidarity for Oppressed People), Ahmet Faruk Ünsal, commented on the Decree by drawing attention to the general purpose of foundations, which entails the endowment of donated property to "public benefit". "To play with the purpose of use or ownership of property that is dedicated to all humanity is neither legal nor humane," he told Forum 18 on 27 September. "Whoever it is that confiscates property, and uses it for a purpose other than that for which it has been endowed originally, violates the right of the person who endows the property in the first place."

While he did not comment specifically on the property of pre-Republic foundations owning and operating Islamic worship places, he underlined the fact that the rule of protecting property belonging to foundations to fulfil their original purpose is valid for all, regardless of religion. He stressed that it is the responsibility of the public authority to guarantee the property and deed of foundation property.

If the government wishes to take a holistic approach to correcting past injustices suffered by religious or belief communities, the injustice of property confiscated from Muslim foundations must also be addressed. This would be in line with the international standards – to which Turkey has solemnly committed itself – which expressly state that human rights are for all with no exceptions.

The future?

What does the Decree mean for the non-Muslim Lausanne minorities? The government decision clearly improves decisively the climate between the state and non-Muslim minorities which have community foundations. While it is another important step for the correction of the unjustified state interference in the right to ownership of these foundations, it does not create a complete solution to their property problems. On a positive note, the Decree certainly raises hopes for further steps to be taken in this direction.

What does the Decree mean for the future of religious freedom for all in Turkey? Whether the positive but limited step represented by the Decree will have any implications for non-Muslim communities which were active before 1923, but which do not have foundations – such as the Roman Catholic and Protestant churches – remains to be seen. There has been no indication that the government is considering restoring all property taken from foundations that supported various activities of religious communities since the Turkish Republic was established. For example, the demands of various Muslim organisations remain unanswered, as noted above.

Yet the effective protection of freedom of religion or belief in Turkey demands that the rights of all followers of a religion or belief – including rights in relation to property – be respected in practice. (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://education.nationalgeographic.com/education/mapping/outline-map/?map=Turkey>.

If you need to contact F18News, please email us at:
f18news @ editor.forum18.org

Forum 18
Postboks 6603

Rodeløkka
N-0502 Oslo
NORWAY