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TURKEY: Constitutional Court justifies more freedom of religion or belief restrictions

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Surprisingly little attention has been paid in Turkey to an 18 April decision of the Constitutional Court (Anayasa Mahkemesi – AYM), Forum 18 News Service notes. The AYM's decision goes much wider than its starting point of education in schools: it establishes new jurisprudence on "Turkish secularism" (laiklik). This new approach allows more unjustifiable state interference in freedom of religion or belief, by attributing to the state a positive obligation to both provide Islamic religious services and to reinforce restrictions on individuals and groups exercising freedom of religion or belief. This has wide and possibly unforeseeable implications, not least as the AYM's perception of Turkish society is strikingly at odds with the reality of today's diverse society. For the AYM to unequivocally protect freedom of religion or belief for all, it would have to establish a new understanding of secularism that is in practice in line with Turkey's international human rights obligations.

Turkey has been gripped by widespread protests following the 31 May police repression of environmentalists protesting at Istanbul's Gezi Park development plan. The protests rapidly grew to encompass many policies of the current Justice and Development Party (AKP) government, particularly the authoritarianism of Prime Minister Recep Tayyip Erdogan. Many in Turkey argue that the government must work to find common ground wide enough to accommodate the rights and freedoms of everyone in Turkey's seemingly increasingly polarised society.

Yet surprisingly little attention has been paid to an 18 April decision of the Constitutional Court (Anayasa Mahkemesi – AYM) concerning the constitutionality of the controversial 2012 Education Reform Law. The decision goes much wider than simply the field of education in schools: it establishes new jurisprudence on "Turkish secularism" (laiklik). This has important implications for the protection of the right to freedom of religion or belief in Turkey.

The Education Reform Law has led to many concerns over its implementation, in particular in relation to optional Islamic religion lessons (see F18News 20 August 2013 http://www.forum18.org/Archive.php?article_id=1867).

The Constitutional Court's new jurisprudence allows more unjustifiable state interference and involvement in freedom of religion or belief matters. It accepts the existing restrictions on non-state organisations or individuals providing religious teaching outside the public education system. From this basis the AYM attributes to the state a positive obligation to provide Islamic religious services – for example in school education. This approach has wide and possibly unforeseeable implications.

This AYM decision fails to meet the expectations of religious or belief communities from the promised new Constitution. These hopes focused on real equality and a neutral role for the state, with the effective protection of the right to freedom of religion or belief (see F18News 30 November 2011 http://www.forum18.org/Archive.php?article_id=1641).

Is AYM reflecting the AKP approach?

The April AYM decision sets out, apparently for the first time in an official document, a new interpretation of laiklik. This comprises, firstly, an acceptance by the AYM of the existing state involvement and restrictions on the right to manifest religion or belief in, for example, training religious leaders (see Forum 18's Turkey religious freedom survey http://www.forum18.org/Archive.php?article_id=1379). Secondly, and simultaneously, the AYM attributes a positive obligation on the part of the state to provide religious services which inevitably leads to the promotion of the state's interpretation of Islam.

It is not possible to state with certainty that the AYM decision represents the AKP policy as it affects freedom of religion or belief. In the past, the AYM would have been critical of AKP approaches. But in recent years the composition of the court has changed. Nine of the 17 member court being appointed by President Abdullah Gül and two have been appointed by the Turkish Grand National Assembly. The April AYM decision matches the observable AKP approach to freedom of religion or belief.

The AKP has emphasised the protection of freedom of religion or belief in its political statements. But it has yet to establish a legal framework that is in line with Article 9 ("Freedom of thought, conscience and religion") of the European Convention on Human

Rights and Fundamental Freedoms (ECHR) (see F18News 30 November 2011 http://www.forum18.org/Archive.php?article_id=1641).

The AKP's discontent over constraints under "Turkish secularism" on Islamic practice has long been clear, for example over women wearing headscarves in the workplace (see eg. F18News 4 March 2013 http://www.forum18.org/archive.php?article_id=1810). But – if the Constitutional Court decision truly represents the mentality behind the AKP's policies concerning freedom of religion or belief - the AYM decision sets it out much more clearly.

Existing "Turkish secularism"

"Turkish secularism" (laiklik) is strongly protected in the current 1982 Constitution. The way "secularism" has been interpreted in Turkey has been crucial for the exercise, and indeed interference in, the right to freedom of religion or belief in Turkey. In practice it means close state supervision of any exercise of freedom of religion or belief, including a ban on religious communities from acquiring independent legal personality (see F18News 7 February 2011 http://www.forum18.org/Archive.php?article_id=1537).

In a 1971 decision, the AYM viewed laiklik as compatible with Diyanet personnel and imams being civil servants, i.e. to be paid from the taxes of all citizens irrespective of their religious or non-religious beliefs. Yet laiklik has also made it possible for Turkey to protect the right to change religion or belief, despite the fact that many would consider this action against Islamic religious law.

The Diyanet, or Presidency of Religious Affairs, is a state body reporting to the Prime Minister's Office. Espousing only Sunni Hanafi Islam, it has a monopoly over significant parts of Islamic activity including administering all mosques and appointing all imams. Massive state financial and institutional support of the Diyanet along with its activities – including biases against certain Muslim and non-Muslim beliefs – contribute to the difficulties people in Turkey face in exercising freedom of religion or belief (see F18News 4 May 2011 http://www.forum18.org/archive.php?article_id=1567).

Discussions around the drafting of the new Constitution have made it clear that there are multiple interpretations of Turkish secularism. Some of these interpretations would help Turkey implement its international human rights obligations to respect freedom of religion or belief (see F18News 30 November 2011 http://www.forum18.org/Archive.php?article_id=1641).

The new "Turkish secularism"?

The AYM's new theory of laiklik is in some ways an improvement on the old idea of laiklik. It states that "individual preferences and the ensuing lifestyles remain outside the interference of the state, instead, they are under the protection the state". It goes on to state that one of the purposes of the secular state - which does not have a religion - is to establish a political order where, while protecting social diversity, individuals of different beliefs can live together in peace. Secularism, the AYM states, ensures the state's neutrality in the face of religions and beliefs.

Accordingly, the AYM concludes that the state must take the necessary measures to ensure an environment where freedom of religion or belief can be realised. This implies, the AYM notes, that the state will refrain from interfering in the freedom of religion or belief of individuals unless it is necessary. It also implies, in the AYM's view, that the state should remove obstacles to freedom of religion or belief.

Yet the AYM's application of these ideas is disappointing.

The Constitutional Court's April 2013 decision justifies the existing preferential treatment of Islam by saying that "from the beginning in Turkey the principle of secularism, both at the constitutional level and in practice" has not excluded the institutional relationship between the state and the Islamic religion. While the Constitution does not explicitly refer to a particular religion, "it foresees certain mechanisms to meet the needs, such as belief, worship and education, of those belonging to the majority religion".

Here the Constitutional Court goes on to give examples of these mechanisms and religious services, such as the Diyanet and educational institutions training imams. The AYM concludes that the Constitution perceives religious services as social needs which the state is under an obligation to meet.

Yet the AYM does not consider how this preferential treatment for Islam can be reconciled with a state that is neutral toward all religions, as the AYM outlines in its theory of the new secularism.

Not discriminatory?

Referring to the 2012 Education Reform Law specifically, the Constitutional Court considers whether the preferential treatment of Sunni Islam creates inequalities.

Among other things, the Education Reform Law introduced optional lessons within school hours in Koranic studies, Basic Religious Knowledge (Islam) and the life of the Prophet Mohammad in middle and high schools. The new religion lessons began in September

2012, and many in Turkey have complained that their implementation has failed to respect the rights of parents and children to freedom of religion or belief (see F18News 20 August 2013 http://www.forum18.org/Archive.php?article_id=1867).

The AYM claims that, for two reasons, preferential treatment of Islam in schools is not discriminatory. Firstly, it states that no rule prevents the Education Ministry from providing religion lessons for members of other religions. Secondly, the AYM claims that the arrangements for minority religions named in the 1923 Lausanne Treaty are satisfactory. For these two reasons, the AYM concludes that the arrangements for the new lessons are not discriminatory.

The Constitutional Court's perception of Turkish society is striking. It appears to think that people in Turkey can be subdivided into only two groups: those belonging to the majority Islamic community, which it sees as a monolith; and non-Muslim ethnic/religious communities named in the Lausanne Treaty. According to the AYM, the state is responsible for Islamic activity, and the Lausanne Treaty arrangements cover everyone else. This approach misses both the diversity of Turkish society, and the binding international human rights standards on freedom of religion or belief which Turkey has undertaken to implement.

The AYM appears to ignore that the Islamic community is very diverse - even within the Sunni, Sufi, Alawite and Alevi communities - and thus their needs for religious education may differ. There is also great diversity among other parts of Turkish society, far greater than the Lausanne Treaty encompasses.

The Constitutional Court also ignores the fact that the Turkish state has so far interpreted non-Muslim minorities restrictively to mean those affiliated with the Jewish community, Greek Orthodox and Armenian community, and unlawfully interferes in their leadership choices (see F18News 11 August 2010 http://www.forum18.org/archive.php?article_id=1477). Other religious communities such as the Syriac Orthodox, Jehovah's Witnesses and Protestant community - as well as atheists and agnostics - are not able to benefit from the limited rights enshrined in the Lausanne Treaty (see Forum 18's Turkey religious freedom survey http://www.forum18.org/Archive.php?article_id=1379).

The Constitutional Court similarly overlooks the fact that even what may be called the Lausanne minorities are denied the right to establish private educational institutions to teach their own beliefs, for example to train clergy. The most well known example of this is the forcible closure in 1971 of the Orthodox theological seminary on the island of Heybeliada (Halki).

This means that the state continues to have a monopoly on deciding what, if any, form of education to do with religions and beliefs can be provided, and to have a total monopoly of how this is provided.

Positive change?

Any changes in the jurisprudence of the high courts on the interpretation of "Turkish secularism" need to be closely watched. The Constitutional Court has by its April decision opened the way for even more state involvement in teaching religion, in particular the state's interpretation of the Islamic faith to everyone in Turkey. In doing this, the Constitutional Court also ignored the real situation of freedom of religion or belief in Turkey.

This decision will not encourage the state to open the way to protect the right to manifest religion or belief in teaching, for example, by way of establishing religious schools or seminaries.

The Chief Judge of the Constitutional Court, Hasim Kilic, went as far as to claim on 24 April that the decision made "a positive change, and thus, an understanding of secularism which is more liberal and which advocates more freedom".

As Kerem Altiparmak of Ankara University observed in an opinion published on Bianet on 24 April: "As much as the old Constitutional Court went too far to exclude religion from social life, the new Constitutional Court, by considering the provision of religious education a positive obligation, has gone too far to place religion at the centre of law - the consequences of this approach cannot be foreseen."

Lost opportunity

Not only was the April Constitutional Court decision a lost opportunity to reach a principled decision on the Education Reform Law, upholding human rights for all in the area of education. It also provides a legal underpinning for future decisions that might uphold restrictions on freedom of religion or belief.

Indeed, given the Constitutional Court's role as the leading Turkish court in providing determinations on constitutional and human rights issues, its ruling may make it more difficult to win cases in Turkey upholding the right to freedom of religion or belief for all. This may result in increased applications to the European Court of Human Rights (ECtHR) in Strasbourg.

Since it has become possible to bring individual complaints to the AYM, those who wish to lodge cases with the ECtHR have, since 24 September 2012, had to take their cases first to the Constitutional Court as the last court of appeal within Turkey. This significantly increases the length of time and financial cost of cases that will eventually go to the Strasbourg court. It also increases

the importance of the ECtHR as a defender of human rights in Turkey (see F18News 18 January 2007 http://www.forum18.org/archive.php?article_id=901). The Constitutional Court, however, has the opportunity to rule in a way that will uphold the protection of human rights as protected under the ECHR in Turkey so that applicants will not have to take their cases to the ECtHR.

The Constitutional Court decision also demonstrates that - whatever references to freedom of religion or belief, secularism or neutrality there may be in the new Constitution – it is the interpretation and application of these terms which will determine whether human rights are respected in practice or not. The April decision does not give hope to those who would like the right to freedom of religion or belief for all to be unequivocally enshrined in the new Constitution.

For the Constitutional Court to affirm unequivocally the principle of freedom of religion or belief for all – which it claimed to support in the initial part of the April decision – it would have to reconsider the application of these principles in the rest of the decision. To achieve this, the AYM would need to establish a new understanding of secularism that is indeed not only "more liberal and which advocates more freedom" in theory, but is also in practice in line with Turkey's international human rights obligations. (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.

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