"Democratic Opening," the Legal Status of Non-Muslim Religious Communities and the Venice Commission

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ABSTRACT

This article deals with a recent opinion adopted by the Venice Commission at its meeting onMarch 12-13 concerning the legal status of non-Muslim religious communities in Turkey and the right of the Orthodox Patriarchate of Istanbul to use the title "ecumenical." On the first issue the Commission points out the difficulties that arise from the lack of legal personality for such communities, especially in matters related to access to courts and property ownership. The Commission urges Turkish authorities to attend to this problem by choosing from the many models of legal personality for religious groups practiced in European countries. On the second point, the Commission observes that the title ecumenical is a spiritual and ecclesiastical matter, and not a legal one. It concludes that unless Turkish authorities actively interfere with the use of such title by the Patriarchate, the simple refusal of the use of this title by Turkish authorities does not amount to a breach of the European Convention on Human Rights.

Insight Turkey Vol. 12 / No. 2 / 2010
pp. 213-222

When the Justice and Development Party (*Adalet ve Kalkınma Partisi,* AKP) government a few months ago announced its intention of introducing a "democratic opening", it was generally perceived that it would involve mainly the resolution of Turkey's Kurdish problem through peaceful and democratic means. In the following months, it became increasingly clear that while the Kurdish question remains at the center of the opening, as it should, the iniative will have other components, such as improving the status of the Alevis and the non-Muslim religious communities.

The Venice Commission of the Council of Europe (the European Commission for Democracy through Law) adopted an opinion at its March 12-13, 2010 meeting precisely on the last point. The Commission prepared its report at the request of the Monitoring Committee of the Parliamentary Assembly of the Council of

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Europe (PACE), which asked it "to assess the compatibility with European standards of the lack of legal personality for the religious communities in Turkey and examine, in this context, in particular the question of the right of the Greek Orthodox Patriarchate of Istanbul to use the adjective 'Ecumenical'." The Commission's opinion is entitled the "Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to Use the Adjective 'Ecumenical'.[1]" The word "non-Muslim" in the draft was deleted in the plenary, since many of the observations and suggestions in the opinion are also relevant for Muslim religious communities, especially for the Alevi communities. The opinion was adopted by consensus at the plenary.

The Question of Legal Personality

As is clear from the title, the opinion is divided into two main parts. One part analyzes the problems caused by the lack of legal personality for religious communities, and the second part discusses the Greek Orthodox Patriarchate's claim to use the title "ecumenical." A third and last section deals with the question of the Halki (Heybeliada) seminary, which, while not mentioned in the Monitoring Committee's request, was found by the Commission to be a relevant issue since it is an important element of the freedom of religion.

Regarding the lack of legal personality, the report quotes several decisions by the European Court of Human Rights (ECtHR) in which the Court correctly stressed that freedom of religion is not merely an individual right but also has a collective dimension. Consequently, Article 9 of the Euorepean Convention on Human Rights (ECHR) on freedom of religion should be interpreted in conjuction with Article 11 on freedom of association. Thus, the ECtHR stated in the cases of Hasan and Chaush v. Bulgaria (October 26, 2000) and the Metropolitan Church of Bessarabia v. Moldova (December 13, 2001) that

> … Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary state intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords... In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6.

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Although the ECtHR did not specifically refer to the question of legal personality as such in its ruling quoted above, the reference to "the possibility of ensuring judicial protection of the community, its members and its assets" can be seen as an endorsement of the need for such personality, since this seems to be the most effective way of ensuring judicial protection. However, as the Venice Commission report correctly states, there is no single European model in this regard. In England and some Scandinavian countries, there is an established state church that is "legally seen more or less as part of the state itself." The Turkish system is in some ways comparable to this system, as the Presidency of Religious Affairs (*Diyanet İşleri Başkanlığı*) that serves the interests of the dominant Sunni majority is part of the public administration and its public status is recognized in the Constitution (Art. 136). However, the *Diyanet* does not have a legal personality of its own and is attached to the office of the prime minister, and the strictly secular Turkish Constitution does not, of course, recognize a state religion. Apart from the state-church model which, however, offers other minority religious communities effective legal protection, there are several other models in Europe. In Germany and other "countries close to the German legal tradition… religious communities are offered the possibility to apply for special public law status given that they fulfill certain criteria, and they can then exercise certain public functions" (para. 19).

In others, religious communities are offered "the possibility to register as a special form of private law entity. One example is the French institution of *association cultuelle*" (para. 20). Finally, in some countries "there is no special legislation for the legal status of religious communities, and they have to resort to the ordinary rules on registering various forms of associations. An example is England with respect to those communities which do not have the status of a state church. English law provides, however, to such communities the possibility to register as charities. While registration as charity does not provide legal personality, it brings other benefits and seems to satisfy the practical needs of religious communities within the British Common Law system" (para. 21).

With regard to the situation in Turkey where religious communities as such do not have legal personality and they have to represent their interests only through foundations and associations established by their members, the lack of legal personality has been mentioned in a number of Council of Europe documents. Thus,

That if non-Muslim religious communities are granted legal personality, Muslim religious communities should also benefit from this possibility

the PACE, in its resolution 1704 adopted on January 17, 2010, urged the Turkish authorities to "recognise the legal personality of the Ecumenical Orthodox Patriarchate in Istanbul," as well as the other Christian church organizations and the Chief Rabbinate, and stated that "the absence of legal personality… affects all the communities concerned having direct effects in terms of ownership rights and property management" (para. 24). Similar comments were made by the Commissioner for Human Rights of the Council of Europe in his report of October 1, 2009, as well as by the EU Commission's 2008 and 2009 progress reports (paras. 25-27). Based on the 2009 progress report, the European Parliament on February 10, 2010 passed a resolution stating, *inter alia*, that while it "welcomes the implementation of the Law on Foundations; regrets, however, that the religious communities continue to face property problems not addressed by that law, concerning properties seized and sold to third parties or properties of foundations merged before the new legislation was adopted; urges the Turkish Government to address this issue without delay" (para. 28).

The Venice Commission notes that "the basic problem in Turkish law as regards religious communities is that they cannot register and obtain legal personality as such… Instead they have to operate indirectly through foundations or associations." As regards the prevailing opinion of the Turkish authorities and "most of the legal community," to the effect that Turkey's secular legal system does not allow such recognition of legal personality, the Commission responds that this is based "on a particular interpretations" of the constitutional provisions on secularism: "There are many secular states in Europe that provide religious communities with a legal framework for registering… Rather, the interpretation of the Turkish Constitution on this point can only be understood in light of the particular understanding of 'secularism' in Turkey, which is unlike that of any other European country and which it would probably require both constitutional change and a profound change of mentality to alter" (paras. 32, 33).

The Venice Commission makes a positive note about the improvements brought about by the 2008 Law on Foundations and the 2004 Law on Associations, while pointing out some remaining problems, such as "access to court, employment rights and the right to train and educate clergy. As regards access to court, it appears that the non-Muslim communities as such do not have this, and that their only alternatives are to go through the foundations (for property disputes),

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Treaty of Lausanne, in no way, limits the right of the Patriarchate to use the title 'ecumenical'.

or to appear in the name of the church leaders or members, as private citizens. As for the right to provide religious education – and in particular to train clergy – it would appear that it is also negatively affected by the fact that the churches do not have legal personality as such" (para. 46).

The Venice Commission then proceeds to examine whether the current situation in Turkey amounts to a breach of the Convention (ECHR), and answers the question in the affirmative: "The Venice Commission … concludes that on the basis of the case law of the ECtHR, there seems no doubt that the present Turkish system of not providing non-Muslim religious communities as such with the possibility to obtain legal personality amounts to an interference with the rights of these communities under Article 9 in conjunction with Article 11 [of the] ECHR" (para. 58). The Commission based its argument on various rulings of the ECtHR which stated that "to establish a legal entity in order to act collectively in a field of mutual interest" is one of the most important aspects of freedom of association, without which that right "would be deprived of any meaning" (para. 55).

In the light of this opinion, the case law of the ECtHR on which it is based, and the insistent urgings of the Council of Europe and the EU authorities in

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this regard as mentioned above, it appears that the the Turkish government is well advised to introduce some reforms to improve the legal status of religious communities. However, even if we dismiss the counter arguments based on the principle of secularism, as we should, there remain some technical difficulties. The current Turkish legal system recognizes only two types of private legal personality, namely associations and foundations, both of which are presently available to religious communities. However, one may concur with the opinion of the Venice Commission that neither solution fully meets the needs of religious communities especially as regards access to courts and the protection of property rights. To grant them public legal personality as some European countries do, on the other hand, would be much more problematic given the strictly secularist character of the Turkish constitutional system. Besides, such a solution would most likely not be favored by the religious communities themselves, since it would be tantamount to making them a part of public administration which, in turn, would entail the exercise of tutelary state control over them.

Another difficulty derives from the fact that the lack of legal personality is a problem not only for non-Muslim communities, but also for many Muslim communities as well, especially for the heterodox Alevi community who rightly claims that its interests are not properly served by the Sunni-dominated *Diyanet*. To make things even more complicated, Alevis are divided into various sub-groups (presently operating as foundations or associations) with significantly divergent views on the nature of Alevism. Similarly, many Sunni religious groups that operate either as officially unrecognized orders (*tarikat*) or communities (*cemaat*), or as associations and foundations, may not be happy with the official, individualized version of Islam propagated by the *Diyanet*. Therefore, even if granting religious communities (Muslim and non-Muslim alike) legal personality is accepted in principle, the practical problem of where to draw the line will still persist. Perhaps the most realistic and feasible approach would be to develop a system along the lines of the French model of "*association cultuelle*." This can be done either by adopting a special law, or by adding a new chapter to the Law of Associations, with due regard to their special characteristics. Obviously, rules governing ordinary associations cannot be applied *in toto* to religious community associations, because of the special nature of the latter. In developing such a system, the Venice Commission recognizes that the Turkish authorities can choose from various models:

"The Venice Commission… encourages the Turkish authorities to continue the reform process and introduce legislation making it possible for all non-Muslim religious communities as such to acquire legal personality. There are many models in Europe how to do this and the Turkish authorities are free to choose the model they consider most suitable for the situation in their country as long as it is in full compliance with the requirements of the European Convention on Human Rights" (para. 109). As for Muslim religious communities, the report notes that for the mainstream Sunni Muslim community, "the Diyanet model takes care of the basic issue of legal representation," but raises the question whether this "organisation is representative of those groups not belonging to the mainstream Sunni belief, and thus whether it is sufficient to guarantee their religious freedom." The Commission feels, however, that "this is a question which falls outside the scope of this opinion" (para. 48). It is clear, on the other hand, that if non-Muslim religious communities are granted legal personality, Muslim religious communities should also benefit from this possibility.

Halki Seminary functioned freely during the Republican period until 1971 when the Constitutional Court found university-level private schools unconstitutional

With regard to possible restrictions on the granting of legal personality to a religious community, the Venice Comission quotes the rulings of the ECtHR which stated that "the list of exceptions to freedom of religion and assembly, as contained in Articles 9 and 11 of the Convention is exhaustive, they must be construed strictly and only convincing and compelling reasons can justify restrictions. The States have only a limited margin of appreciation in these matters" (para. 62). The Venice Commission concurs, stating that "the state may interfere if the religion concerned is an extremely fundamentalist one, if it has certain goals which threaten State security or public safety, in particular if it does not respect the principles of a democratic State, or infringe upon the rights and freedoms of its adherents. However, State authorities may not determine themselves whether the religion concerned is a sincere and appropriate one, and interpret its beliefs and goals; the right to freedom of religion excludes assessment by the State of the legitimacy of religious beliefs" (paras. 63, 64).

Finally, the Venice Commission notes that the current situation in Turkey constitutes an interference not only in the freedom of religion and freedom of association, but also in the right to a fair trial protected by Article 6 of the Convention: "As a consequence of their lack of legal personality, religious communities in Turkey cannot access the court system as such, but only indirectly through founda-

tions acting on their behalf or by the members of the community acting as private citizens. This clearly falls short of the requirements of the ECHR as expressed in a number of cases" (para. 68).

The Right of the Orthodox Patriarchate of Istanbul to Use the Adjective "Ecumenical"

With regard to this question, the opinion correctly states that "the ecumenical nature of the patriarchate is … first and foremost a spiritual and ecclesiastical matter – not a legal one." However, it points to a 2007 judgement of the Court of Cassation which stated that "the Patriarchate is an institution which bears only religious powers as the church of the Greek minority in Turkey," and that there is no legal basis for the claim that the patriarchate is "Ecumenical." The opinion then goes on to say that "this denial of the title 'ecumenical' by the authorities constitutes an interference with the autonomy of the religious freedom of the Orthodox community. Freedom of religion includes certain autonomy on the side of the religious community to decide on its own organisation, such as questions of internal structure, designating religious leaders, the election and education of the clergy, and not the least the official denomination of a religious group… Whenever a State decides to interfere with these 'internal' aspects of organisation of a religious group it interferes with its 'autonomy' and therefore with the rights under Article 9 of the Convention" (paras. 84, 86, 87).

However, the Commission observes in the following paragraphs that it had no evidence that the Turkish government actively interfered with the right of the Patriarchate to call itself "ecumenical." It is stated that "the Commission has seen no evidence or heard no claim to the effect that the Turkish authorities are directly trying to stop the Patriarch from using the title ecumenical. There does not seem to be any prosecution of him or his followers or any others for using the title. Furthermore, there seems to be no direct attempt at trying to stop him exercising his ecumenical functions" (para. 90). In the absence of such active interference by the Turkish authorities, their simple refusal of using that title does not, of course, amount to a breach of the Convention. The 2007 decision of the Court of Cassation cannot be considered an instance of such active interference, since its statements quoted above have no direct relevance to the judgement, and therefore can be dismissed as mere "*obiter dictum*" with no binding legal force. As the opinion correctly states, "no secular court has any competence or jurisdiction to rule on whether a religious leader is ecumenical or not. The Patriarchate is neither more or less ecumenical as a result of the judgement" (para. 92). The Commission then discusses whether there are any provisions in the Lausanne Treaty impeding the

use of the title ecumenical and concludes that "1923 Treaty of Lausanne… in no way limits the right of the Patriarchate to use the title 'ecumenical'" (paras. 94-98). The Commission's overall conclusion regarding this issue is as follows:

> The Turkish authorities are under a clear obligation under Article 9 of the ECHR not to obstruct or in any way hinder the Patriarchate from using this title. However, it cannot be inferred from the ECHR that the Turkish authorities are obliged themselves to actively use this title when referring to the Patriarchate, nor to formally recognise it. If the authorities do not want to use this title, they are formally free under the ECHR to do so, as long as they do not obstruct the use of it by others. However, taking into account the fact that the word 'Ecumenical' forms part of the title of the Patriarchate and has done so since the 6th century, and that this title is widely recognised and used globally, the Venice Commission fails to see any reason, factual or legal, for the authorities not to address the Ecumenical Patriarchate by its historical and generally recognised title (paras. 99, 100).

The Halki (Heybeliada) Seminary

Although the status of the Halki Seminary was not among the questions directed to the Venice Commission by the Monitoring Committee of the PACE, the Commission decided to include some comments on the question, because of its relevance to freedom of religion in general. In this regard, the Commission stressed that "the possibility of educating clergy is a core element of freedom of religion, and that any obstruction to this by national authorities may amount to a violation of Article 9 of the ECHR, and also potentially of the right to education as protected by Article 2 of Protocol No. 1" (para. 104).

As I have written elsewhere[2] it is very difficult not to agree with the Venice Commission's opinion in this regard. For a religious community, the right to educate and train its clergy is an indispensable element of freedom of religion. Without it, that religious community will be condemned to a slow death. Turkey is obliged both under the Treaty of Laussanne that explicitly recognized freedom of religion and certain other rights for the three major non-Muslim religious minorities, and also under Article 24 of its own constitution, which guaranteed freedom of religion for everybody, to solve this problem. The origins of the Halki Seminary go back to the Ottoman times, and it also functioned freely during the Republican period until 1971 when the Constitutional Court found university-level private schools unconstitutional. Until then, no points were raised concerning the incompatibility of its status with Turkish laws. It is, therefore, impossible to understand the reluctance of successive Turkish governments to remedy this situation. Excuses given are either of a highly technical nature that can easily be overcome,

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or based on the considerations of reciprocity between Turkey and Greece. The latter should in no way be an excuse for not granting a section of Turkish citizens their constitutional rights. Furthermore, such a reform should not be limited to the three main non-Muslim communities recognized by the Treaty of Lausanne, but should also cover the Syriac and Alevi communities that are not protected by it, and have suffered from the lack of such judicial protection.

In conclusion, one may say that improving the legal status of non-Muslim religious communities in Turkey will bolster the domestic and international credibility of the AKP government's democratic opening. It will also significantly improve Turkey's image internationally. The first, and long overdue, step would be the reopening of the Halki seminary without delay.

Endnotes

1. http://www.venice.coe.int/docs/2010/CDL-AD(2010)005-e.asp
2. Ergun Özbudun, "Rumlara Heybeliada Çarmıhı," *Star-Açık Görüş*, January 3, 2010.