

"Religious freedom via Strasbourg, not Ankara or Brussels?"

by Dr. Otmar Oehring ("Forum 18," January 18, 2007)

Two issues remain at the forefront of attention for Turkey's non-Muslim religious minorities:

- whether the controversial Foundations Law will be adopted (and if so in what form);
- and whether the authorities will take any steps towards religious freedom and towards recognising the legal status of religious communities in the wake of a momentous 9 January ruling by the European Court of Human Rights (ECHR) in Strasbourg.

In case No. 34478/97, the ECHR ruled in favour of a Greek Orthodox community foundation running a High School in Istanbul's Fener area (Fener Rum Erkek Lisesi Vakfi) that acquired a building in Istanbul's Beyoglu area in 1952 by donation. The building was confiscated by the state as a result of a court case launched by the Turkish authorities in 1992 based on a ruling of the Court of Cassation of 1974 referring to the so-called 1936 declaration on the registration of community foundations. The ECHR held that the Foundation's rights to its property had been violated and ordered the property legally returned to the Foundation or, if the authorities failed to do so, to award compensation of 890,000 Euros. It also awarded costs of 20,000 Euros to the Foundation.

The ECHR decision is positive – even if it is quite narrow in its scope. It shows that the Court does not accept the Turkish state's argumentation over the seizure of non-Muslim minorities' property. Significantly, even the Turkish judge at the Court had no objections to the ruling.

The Foundation has been seeking to protect its rights through the Turkish courts since 1992. In the wake of the rejection of this attempt in 1996, the Foundation lodged the case at the ECHR as far back as 1998 – an unusually long time to reach a ruling even by the Strasbourg court's standards. The Turkish government showed close interest in the case, with eight representatives involved at the court. Most probably the number of submissions from the Turkish government prolonged the case.

Although the Turkish press speculated excitedly about changes to the legal rights of foundations in the aftermath of the ECHR ruling, I doubt that changes will be far-reaching: the ruling itself will probably have an impact only on the community foundations that are allowed to some of Turkey's religious minorities. Even so, under the Lausanne Treaty there is no reason why other non-Muslim minorities should not have such community foundations. The impact on religious freedom more broadly is likely to be minimal.

Yet far more significantly, the ruling will provide a boost to religious minorities who will be encouraged to see the ECHR as a route to seeking the vindication of their rights. The Ecumenical Patriarchate has already lodged a number of cases in Strasbourg over property and the Armenian Patriarchate is likely to follow.

In one of its cases already at Strasbourg, the Ecumenical Patriarchate is challenging the confiscation of its orphanage in Büyükada, Princes Islands, arguing, in accordance with the title in the land deed – Owner: Greek Orthodox Patriarchate - that the orphanage is the property of the Patriarchate, a right Turkey says does not exist. The authorities do not recognise the legal existence of the Patriarchate – whether under the name the Greek Patriarchate (Rum patrikhanesi), as the Turkish authorities prefer, or under the name the Ecumenical Patriarchate, to which the Turkish authorities virulently object - and therefore claim that it cannot own property.

Experts say that it does not matter either whether the Court rules that the Patriarchate exists (therefore it can own property), or whether the Court rules that the orphanage belongs to the Patriarchate (therefore the Patriarchate must exist in law). Either way the Court will recognise the Patriarchate's right to a legal existence.

Moreover, presuming that the ECHR will rule in favour of the Patriarchate, this would provide a precedent that should force the Turkish authorities to treat other religious-owned properties and their owners in the same way.

The Vincentians, a Catholic Congregation, are also considering lodging a case over a confiscated orphanage in Istanbul, originally run by nuns, which it argues was church property. The Vincentians explain that the orphanage was originally registered as the property of one of its priests, as foreigners could not then generally buy property. After his death, the Turkish authorities sought the seizure of all property registered in his name and in 1991 the nuns were "shamefully" expelled as the Directorate General for Foundations (which should never have been involved as this property was not owned by a community foundation) had sublet the property to a private company.

But even more crucially, potential new cases from religious minorities are likely to tackle head-on the religious freedom itself of Turkey's religious minorities, not just their ownership of properties either through their foundations or directly as for example in the case of property of Catholic religious orders.

Progress elsewhere has been slow. During Pope Benedict's visit to Turkey at the end of last year, according to information given by media outside Turkey, Vatican representatives and government officials discussed the possibility of establishing a mixed working group to resolve the Catholic Church's problems in Turkey, especially over property and work permits for clergy and nuns. Catholics in the country heard

nothing about any progress on the working group during the visit, and on 7 January the Vatican's Secretary of State Cardinal Tarcisio Bertone renewed the Church's urging to the government to initiate the working group. The Turkish government has still not reacted at all to the Vatican proposal – at least in public – even though prime minister Recep Tayyip Erdogan himself proposed setting up a number of joint working groups when he met members of the Turkish Bishops' Conference back in 2004.

The long-running saga of the Foundations Law – which might have resolved property problems for the foundations allowed to some non-Muslim ethnic/religious communities - reached a new twist on 2 December, when President Ahmet Necdet Sezer, a committed secularist, vetoed the Law which had been approved by the Turkish Parliament on 9 November.

The Foundations Law (No.5555) – which was intended to replace the Foundations Law No.3027 of 1935 - was due to regulate the rights of all foundations, whether Muslim or non-Muslim, though much of the attention focused on the way it would have affected non-Muslim foundations. Muslim foundations would have found their lives little changed – the Law would merely have codified existing law.

Contrary to expectations, the Parliament's version of the Law did not offer what the non-Muslim minorities had expected over defunct foundations, or over the property confiscated from foundations by the state in the wake of a 1974 High Court ruling and then sold on to third parties.

Before Parliament approved the Law, non-Muslim circles were abuzz with discussion over whether they should hope for this law's adoption or not. Many argued that any law adopted would be in a very negative version that could not then be amended for another ten or twenty years.

When Parliament adopted the law, reaction among Christian and Jewish communities was mixed. Some were happy that at least a few of the points put forward by minorities had been considered, such as the demand for return of or compensation for properties confiscated by the state as a result of the 1974 High Court ruling and still in state hands.

On the negative side, reciprocity – a principle that has been deployed especially to restrict the rights of the Ecumenical Patriarchate, with its treatment tied to the Greek government's treatment of its Turkish Muslim minority – was enshrined in law for the first time. Although Greece does unfairly restrict the rights of its Muslim minority, such restrictions are not as extensive as those imposed by the Turkish government on its Greek Orthodox minority. Yet it is quite clear that the formal inclusion of the reciprocity principle in Turkey's Foundations Law was done deliberately as an excuse to restrict Greek Orthodox rights.

President Sezer's veto of the Foundations Law was harshly criticised even in the Turkish liberal media. Most of the President's justification was based on points he disliked which affected non-Muslim minorities. He argued that some of these provisions went too far in their favour and went too far against the Turkish interpretation of its obligation to its ethnic/religious minorities under the 1923 Lausanne Treaty. On one point the President insisted that it is impossible to recognise a foundation and its ownership of properties for which there is no certificate as a foundation.

One leading journalist from the Istanbul-based Radikal newspaper argued that this was strange as when such properties were accumulated no community foundations existed – such properties were simply social and educational institutions. Permits to own them were issued in a different way, as in the Ottoman Empire even in the late 19th century ownership regulations comparable to those valid today did just not exist.

Although the President vetoed the Foundations Law it has not returned to parliament. Deputy Prime Minister Mehmet Ali Sahin declared in the wake of the ECHR ruling on the Greek Orthodox college Foundation that some parts of the Law would have to be redrafted. Any changes ought to cover foundations' properties seized by the state and then sold on to third parties, an issue not even mentioned – let alone resolved - in Parliament's version of the Law. Yet it will be difficult to overcome many deputies' view that compensating religious minorities for such seized property will be too expensive and that the issue should therefore be dropped.

Implementation of the Law – had it been adopted - would also have run into problems as some provisions contradict other legal provisions, especially those found in the Civil Code.

But such contradictions already abound. Even though Article 110 of the Civil Code bans the formation of foundations with religious purposes, at least three such foundations - two Protestant and one Syrian Catholic - have been founded during the last few years. Whether this means that the related congregations as such have got legal personality as foundations or whether these foundations are foundations of congregations which as such still are not recognised legally still has to be discussed as more and more cases will go to the ECHR not just on the principle but on establishing foundations.

Alevis – a Muslim group the government does not recognise as a distinct religious minority - could also demand religious foundations – so far their places of worship are recognised only as cultural associations.

Property ownership for minority communities has been and remains beset with problems. Places of worship of minority communities which are allowed to maintain

legally-recognised community foundations – such as the Greek Orthodox, the Armenians, the Syrian Orthodox and the Jews – are owned by these foundations.

But for Catholics and Protestants, who have not historically been allowed such foundations, title deeds indicate that the congregations or church communities themselves own the buildings. Yet the state often refuses to recognise this. For example, it argued in ECHR case No. 26308/95 that the Assumptionist Fathers, a Catholic Order, are unknown in Turkey, so cannot own property. Places of worship which belong to communities which do not have foundations are in a worse legal situation than those owned by foundations.

In several extreme cases in the recent past, the state has argued that some Christian churches owned by foundations are in fact the property of individual saints (they are after all named after them). The state has gone on to argue from this that the saints concerned cannot be located – nor their heirs – so these places of worship cannot be returned to the community foundations that claim ownership and should therefore be seized by the state. Nowadays, the state is more willing to accept that minority communities' foundations own such places of worship.

But the problems for communities without foundations do not end with insecure legal ownership of their places of worship. Such communities cannot run bank accounts. A priest, bishop, individual or group of individuals has to set up a personal bank account on behalf of the community. The same even holds for communities with foundations, such as the Orthodox or Jews: their community foundations themselves are recognised but not the churches or Jewish congregations behind them. Such a restriction could be challenged at the ECHR – it is part of the whole issue of the lack of recognition of religious minority communities.

Publication of books and magazines is also more complicated – they have to be published in the name of an individual, who therefore has to take personal responsibility for their content. This has created problems in the past, though less so today.

Religious communities' charitable bodies also have no legal status. Caritas Turkey, for example, functions under the control of the Turkish Catholic Bishops' Conference (which also legally does not exist) and even works with government agencies, but has no legal status.

Religious leaders' status is not recognised in law. The one exception is with the leaders of Protestant associations that have recently been allowed to register, though even then they are recognised as leaders of an association, not of the religious community per se.

As to the vetoed Foundations Law, the government can send it to parliament again for further discussion - as President Sezer indicated in his veto - although if it is again approved the president cannot veto it a second time. His only option if he still disagrees with provisions in it is to refer it to the Constitutional Court. The government's other alternative is to abandon it – or wait until the next presidential elections expected in May, which many predict Erdogan will win.

Although Sezer did not spell it out bluntly, his comments on the vetoed Foundations Law make clear that he does not want any of the properties confiscated from foundations over the years to be given back. He sticks to the understanding of the Kemalists, the followers of Mustafa Kemal Ataturk, of how Turkey should be governed. Erdogan, on the other hand, is no more in favour of religious minorities' foundations, but takes a different view of the state's role.

Yet sadly, neither of the two big parties, the governing Justice and Development Party (AKP) or the opposition Republican People's Party (CHP), is willing to accept the principle that all people have rights, regardless of what was determined at Sevres back in 1920 and Lausanne back in 1923. Neither party gives any sign that it has read or understood Article 9 of the European Convention on Human Rights, which spells out individuals' rights to religious freedom, still less that it is ready to implement it.

Now that negotiations with the European Union over Turkey's potential accession have gone quiet – and the Turkish government feels less constrained to make concessions over religious freedom – the European Court of Human Rights in Strasbourg appears to have taken over as the best route for Turkey's religious minorities to assert their rights.