



Strasbourg, 5 March 2010

Opinion no. 535 / 2009

CDL(2010)011*
Engl. Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE LEGAL STATUS
OF NON-MUSLIM RELIGIOUS COMMUNITIES
IN TURKEY**

**AND THE RIGHT OF THE ORTHODOX PATRIARCHATE
OF ISTANBUL TO USE THE ADJECTIVE “ECUMENICAL”**

On the basis of comments by

Mr Pieter van DIJK (Member, Netherlands)
Mr Christoph GRABENWARTER (Member, Austria)
Mr Fredrik SEJERSTED (Substitute Member, Norway)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

TABLE OF CONTENTS

1.	Introduction	3
2.	European standards for granting legal personality to religious communities.....	3
A.	Introduction.....	3
B.	European Convention of Human Rights	4
C.	The Guidelines for Review of Legislation Pertaining to Religion or Belief	5
D.	Comparative overview of the legal status of religious communities in Europe.....	5
E.	The assessment by European bodies of the situation of religious minorities in Turkey...	7
3.	Legal recognition of non-Muslim religious communities in Turkey – law and practice	10
A.	Legal situation of religious communities in Turkey	10
B.	The Foundation System.....	11
C.	The Association System	12
D.	Other aspects of legal personality	13
4.	Assessment of the question of legal personality for religious communities in Turkey.....	13
A.	The lack of legal personality for the religious communities as such	13
B.	Compatibility with Articles 9 and 11 of the European Convention of Human Rights.....	14
C.	Rights of access to court and enjoyment of possessions.....	18
D.	Compatibility with the OSCE-ODIHR and Venice Commission “Guidelines for review of legislation pertaining to religion or belief”	19
E.	Practice in other European States.....	19
F.	Conclusions and recommendations	19
5.	The right of the Orthodox Patriarchate of Istanbul to use the title “ecumenical”	21
A.	The ecumenical character of the Patriarchate	21
B.	Assessment of the Turkish government’s lack of recognition of the ecumenical nature of the Patriarchate.....	21
C.	Other basic issues for the Patriarchate	25
6.	Conclusions	26

1. Introduction

1. The Venice Commission received a request from the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) on 7th April 2009 asking 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”.

2. Messrs Van Dijk (Netherlands), Grabenwarter (Austria) and Sejersted (Norway) were appointed to act as rapporteurs on this request. Messrs Grabenwarter and Sejersted, together with Mr Markert from the Secretariat, visited Turkey on 9 to 11 November 2009 and held meetings with the authorities and religious leaders. A report on the visit appears in document CDL(2009)183.

3. *The present opinion was adopted by the Venice Commission at its .. plenary session (Venice,*).

4. The request raises two questions, which are different in scope and character, and only partly and indirectly related. The first is a very wide and general issue, the second more limited, although of great importance to the institution concerned.

5. With respect to the first question, the present opinion only deals with the legal status of non-Muslim (minority) religious communities. Many of the considerations set forth in this opinion will be applicable *mutatis mutandis* also to Muslim communities in Turkey. In other respects, however, due to the existence of the *Diyanet* (see paragraph 34 below), their situation may differ to such an extent that they have been left out of consideration here.

6. As for the second question, on the “ecumenical” status of the Orthodox Patriarch, this is first and foremost an internal religious and ecclesiastical matter. However, if the Patriarchate is hindered from using this title, this becomes also a legal issue with possible human rights implications, and this is addressed in the present opinion.

2. European standards for granting legal personality to religious communities

A. Introduction

7. The request invites the Venice Commission to assess whether the rules and practice in Turkey with regard to the legal personality of religious communities are in line with “European standards”. “European standards” can mean both “hard” and “soft” law. In the present case, “hard” law consists of the rules of the European Convention on Human Rights (ECHR), while “soft” law refers to the Guidelines for review of legislation pertaining to religion or belief, jointly prepared by OSCE- ODIHR and the Venice Commission. The concept of “European standards” may also cover comparative overviews, illustrating common models for regulating a specific issue, or even a “best practice” model. Such common models can and may be identified even if there are national exceptions in some countries, as there inevitably almost always are, given the rich legal and constitutional tapestry of Europe.

8. Legal instruments of the United Nations such as the International Covenant on Civil and Political Rights (ICCPR) do not contain European standards but obviously apply within Europe as well. Given the level of protection offered by the European Convention of Human Rights, and the substantial case law of the ECtHR, a separate review of the compatibility of the situation in Turkey with the ICCPR, in particular its Articles 18 and 22, appears not to be required in the present case.

B. European Convention of Human Rights

9. The fundamental right to freedom of thought, conscience and religion is laid down in Article 9 of the European Convention of Human Rights, which is the basic provision for assessing the case at hand. It is, however, not the only one. As has been stressed in the case law of the European Court of Human Rights (ECtHR), freedom of religion is not merely an individual right, but also has a collective dimension. As a consequence the ECtHR has held in a number of cases that Article 9 should be interpreted and applied in conjunction with Article 11 on freedom of association, in such a way that religious communities are offered the possibility to register in a way which makes it possible for them to exercise effectively and collectively their religious beliefs. This was held *inter alia* in the case of *Hasan and Chaush v. Bulgaria*¹ from 2000, and then reiterated and developed in the case of *The Metropolitan Church of Bessarabia v. Moldova*² from 2001, in which the Court held, *inter alia*, that:

"118. Moreover, since religious communities traditionally exist in the form of organised structures, 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 (see Hasan and Chaush, cited above, § 62).

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 ..."

10. This has been followed up in later case law, including a number of cases dealing specifically with property rights of religious communities in Turkey.³

11. The relevant issue under the ECHR is the right to legal personality for religious communities under Article 9 in conjunction with Article 11. With regard to the issue of the Ecumenical Patriarchate there is the right under Article 9 of a religious community to define its own internal spiritual and ecclesiastical concepts and denominations, without interference from the secular authorities. The related right of religious communities to possess property under Article 9 in conjunction with Article 1 of Protocol No.1, and the right of access to court of religious communities under Article 9 in conjunction with Article 6 will be mentioned in this opinion, but not dealt with in detail, as they are not covered by the request of the Parliamentary Assembly.

¹ ECtHR, *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000.

² ECtHR, *The Metropolitan Church of Bessarabia v. Moldova*, judgment of 13 December 2001

³ Including but not exhaustive: *Fener rum erkek lisesi vakfi v. Turkey* (Fener Boys High School Foundation v. Turkey) judgment, No. 34478/97, 09.01.2007, *Apostolidi and Others v. Turkey* (Application no. 45628/99, 27 March 2007), *Fener Rum Patrikligi (Ecumenical Patriarchate) v. Turkey*, (Application no. 14340/05, 8 July 2008) and the cases of *Yedikule Surp Pirgiç Ermeni Hastanesi Vakfi v. Turkey*, Application no. 36165/02, 16 December 2008, *Samatya Surp Kervok Ermeni Kilisesi, Mektebi Ve Mezarligi Vakfi Yötenim Kurulu v. Turkey* (Application no. 1480/03, 16 December 2008) and *Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey* no. 2 (Application nos. 37639/03, 37655/03, 26736/04 and 42670/04, 3 March 2009).

C. The Guidelines for Review of Legislation Pertaining to Religion or Belief

12. These Guidelines⁴ were prepared in 2003 by OSCE/ODIRH experts in consultation with the Venice Commission, and then adopted by the Venice Commission in June 2004 and welcomed by the OSCE Parliamentary Assembly in July 2004.

13. The guidelines deal with the issue of legal personality for religious communities in Section B on “basic values”, in point 8, which states that:

8. Right to association. OSCE commitments have long recognized the importance of the right to acquire and maintain legal personality. Because some religious groups object in principle to State chartering requirements, a State should not impose sanctions or limitations on religious groups that elect not to register. However, in the contemporary legal setting, most religious communities prefer to obtain legal personality in order to carry out the full range of their activities in a convenient and efficient way. Because of the typical importance of legal personality, a series of decisions of the European Court of Human Rights recognized that access to such a status is one of the most important aspects of the right to association, and that the right to association extends to religious associations. Undue restrictions on the right to legal personality are, accordingly, inconsistent with both the right to association and freedom of religion or belief.

This is further elaborated in Section F of the guidelines, which lists in detail the aspects that the national authorities have to take into account when regulating the issue of legal personality for religious communities. The main point here is that “laws governing access to legal personality should be structured in ways that are facilitative of freedom of religion or belief; at a minimum, access to the basic rights associated with legal personality”.

14. The Venice Commission has also issued several opinions of relevance, in which it has assessed national rules in the light of the guidelines.⁵

D. Comparative overview of the legal status of religious communities in Europe

15. Religious affairs are legally regulated in different ways in Europe. Most European countries are secular, in the sense that they operate a clear distinction between state and religion. A few countries however have state churches, where the traditional and dominant church is legally seen more or less as part of the state itself. Even these countries can today be regarded as “secular” in the sense that the authorities do not operate according to any religious requirements, and also do not interfere in the internal religious affairs of the churches.⁶

⁴ OSCE/ODIHR Guidelines for legislative reviews of laws affecting religion or belief (CDL-AD (2004)028).

⁵ See for example, CDL-AD(2007)041, Opinion on the Draft Law on Freedom of Religion, Religious Organisations and Mutual Relations with the Sate of Albania.; CDL-AD(2009)036 Joint Opinion on the Law on Making Amendments and Addenda to the Law on the freedom of Conscience and on Religious Organizations and on the Law on Amending the Criminal Code of the Republic of Armenia by the Venice Commission, the Directorate General of Human Rights and Legal Affairs of the Council of Europe, the OSCE/ODIHR Advisory Council on freedom of religion or Belief; CDL-AD(2008)032 Joint Opinion on freedom of Conscience and Religious Organizations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on freedom of religion or belief.

⁶ It should be emphasized that the Turkish concept of “secularism” differs in several ways from that normally used in the rest of Europe. In many ways it is a much stricter concept, limiting religious activities in ways that would not be thinkable in most European countries. One example is the prohibition against political parties engaging in religious activities, as previously assessed by the Venice Commission in its 2009 report on the prohibition of political parties in Turkey (CDL-AD(2009)006). On the other hand, in Turkey the mainstream Sunni religion is organised as part of the administration, under the Presidency of Religious Affairs (the Diyanet). This is a model that in several important aspects resembles the “state church” model of the UK and the Scandinavian countries. In this respect, Turkey can be said to have a “state religion”.

16. The common and clearly most widespread model in Europe is that religious communities have the possibility (though never the duty) to register as legal entities themselves. They are not required to go indirectly through the construction of an association or foundation. The church or community can register as itself – and own property as itself, and have access to court, employ people, et cetera.

17. How this is regulated differs, with four main categories:

- State church (for the one dominant church) – other rules for the rest
- Different kinds of public law status for the most important religious communities
- Special laws on (all) religious communities, with legal personality for the community as such
- Only ordinary laws on associations, foundations etc. available.

18. As for the state church category this is today a small one, and mainly confined to the UK and some of the Scandinavian countries, in particular Denmark and Norway. Even in these countries the state church model is controversial and subject to debate and calls for reform. The model is not as such regarded as being in breach of the ECHR and other standards of religious freedom, although particular elements of the various arrangements may be considered problematic. The Protestant state church model is of particular interest with regard to the Turkish situation, in that it bears a certain resemblance in some ways to the manner in which Turkey has organized its mainstream Sunni Muslim religion, through the Diyanet (see below paragraph 34).

19. The “public law model” for the most important religious communities is found mostly in countries close to the German legal tradition. Under this model, 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. However, in the countries with such arrangement, there will also be a number of (smaller) religious communities that do not fulfill the special requirements, and which are therefore given the possibility of other kinds of registration as legal entities.

20. A widespread model in Europe is that the national legislation provides for some kind of special legal entity status for religious communities, specially tailored to their particular needs and characteristics. Such legislation typically offers religious communities the possibility to register as a special form of private law entity. One example is the French institution of *association culturelle*. In Norway, the Church of Norway is a state church, organised formally as part of the administration, but for all other religious communities there is a special statute on “Religious societies” that provides them with the possibility of registering as legal entities and obtaining much the same rights and privileges (and funding) as the state church. In the Netherlands the Civil Code provides that churches (*kerkgenootschappen*) and their separate parts have legal personality and are regulated by their own by-laws, while the general provisions concerning legal persons do not apply.

21. Finally, there appear to be situations in which 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 the United Kingdom with respect to those religious 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.

22. In conclusion, although there are some differences and exemptions, there is still a common European basis for dealing with the issue – that religious communities as such in some way or another have the possibility of acquiring legal personality, without having to go through indirect institutional arrangements involving more or less representative organisations acting legally on their behalf.

E. The assessment by European bodies of the situation of religious minorities in Turkey

23. As regards the situation for the non-Muslim religious communities in Turkey, there are a number of other recent reports and documents that are of interest to the assessment of the case at hand, and which illustrate the emerging consensus on this topic in the institutions of the Council of Europe and the European Union.

24. Of particular interest in this regard is Resolution 1704 on Freedom of Religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (Eastern Greece), adopted by the Parliamentary Assembly of the Council of Europe on 17 January 2010. This resolution states, *inter alia*, that:

“19. Specifically concerning Turkey, the Assembly urges the Turkish authorities to:

19.1. come up with constructive solutions concerning the training of religious minorities' clergy and the granting of work permits for foreign members of the clergy;

19.2. recognise the legal personality of the Ecumenical Orthodox Patriarchate in Istanbul, the Armenian Patriarchate of Istanbul, the Armenian Catholic Archbishopric of Istanbul, the Bulgarian Orthodox Community within the structures of the Ecumenical Orthodox Patriarchate, the Chief Rabbinate, and the Vicariate Apostolic of Istanbul; the absence of legal personality which affects all the communities concerned having direct effects in terms of ownership rights and property management;

19.3. find an agreed solution with the representatives of the minority with a view to the reopening of the Heybeliada Greek Orthodox theological college (the Halki seminary), inter alia by making official in writing the proposal to reopen the seminary as a department of the Faculty of Theology of Galatasaray University, in order to open genuine negotiations on this proposal;

19.4. give the Ecumenical Orthodox Patriarchate in Istanbul the freedom to choose to use the adjective "ecumenical";

19.5. resolve the question of the registration of places of worship and the question of the mazbut properties confiscated since 1974, which must be returned to their owners or to the entitled persons or, where the return of the assets is impossible, to provide for fair compensation.”

25. In a review on the human rights of minorities in Turkey, the Commissioner for Human Rights of the Council of Europe, Mr Thomas Hammarberg, visited Turkey in the summer of 2009. In his report of 1 October 2009 the Commissioner paid extensive attention to the situation of the non-Muslim religious communities.⁷ The Commissioner concluded by stating that:

“178. The Commissioner recommends that the Turkish authorities establish and pursue periodic, open and substantive consultations with the representatives of all religious minorities concerning all major issues that affect their human rights and daily lives, in accordance with the Council of Europe standards.

⁷ Cf. CommDH(2009)30, Report by Thomas Hammarberg following his visit to Turkey on 28 June – 3 July 2009 on “Human rights of minorities” of 1 October 2009, where freedom of religion and minority rights are addressed on pp 17- 22 (§§ 72-104) and in the conclusions and recommendations on p 35 (§§ 177-182).

179. One such major issue is the recognition of the legal personality of the religious minority institutions and communities established in Turkey, which is necessary for the effective protection of the human rights, especially property rights, of all minority communities, and for their preservation and development that are necessary in the inherently pluralistic society of Turkey on which the latter rightly takes pride.

180. The Commissioner calls upon the authorities to adopt immediately measures that would lead to the recognition of the legal personality of established, religious minority institutions and communities, allow the reopening of the Theological Seminary of Heybeliada (Halki) and ensure the possibility of education of the Armenian Orthodox clergy in Turkey.

181. Turkish authorities are urged to adopt and implement legislative and all other necessary measures in order to ensure the effective enjoyment by members of all religious (Muslim and non-Muslim) minority groups of their freedom of religion and of their property rights, in full and effective compliance with the case law of the European Court of Human Rights.

182. The Commissioner commends the efforts made by Turkey, especially by the new Law on Foundations introduced in 2008, to guarantee the religious, association and property rights of members of minority foundations. However the shortcomings identified in this report need to be urgently addressed by the authorities in full and effective compliance with the Council of Europe human rights standards. In particular, minority members who have lost their property unlawfully should be provided with reparation in accordance with the established principles of international law.”

26. The assessments so far of the institutions of the Council of Europe is in conformity with the assessments made by the EU Commission in its recent progress reports on Turkey, in which it addresses the issue of the non-Muslim minorities at some length. In the 2008 progress report it is stated, *inter alia*, that:⁸

“Non-Muslim communities – as organised structures of religious groups – still face problems due to lack of legal personality. Restrictions on the training of clergy remain. Turkish legislation does not provide for private higher religious education for these communities and there are no such opportunities in the public education system. The Halki (Heybeliada) Greek Orthodox seminary remains closed. There have been reports of foreign clergy who wish to work in Turkey facing difficulties in obtaining work permits. The Ecumenical Patriarch is not free to use the ecclesiastical title Ecumenical on all occasions. In January 2008, Prime Minister Erdogan declared that use of the title “ecumenical” should not be a matter on which the State should rule. [...] A legal framework in line with the ECHR has yet to be established, so that all non-Muslim religious communities and Alevi can function without undue constraints. Turkey needs to make further efforts to create an environment conducive to full respect for freedom of religion in practice and to carry out consistent initiatives aimed at improving dialogue with the various religious communities.”

27. In the 2009 report, it was stated, *inter alia*, that:⁹

“Non-Muslim communities – as organised structures of religious groups – still face problems due to lack of legal personality. Restrictions on the training of clergy remain.

⁸ Cf. SEC(2008) 2699 final, at p. 19. See also p. 24 on the problems of property ownership for religious communities.

⁹ Cf. SEC(2009) 1334 final, at p. 20-22.

Turkish legislation does not provide for private higher religious education for these communities and there are no such opportunities in the public education system. The Halki (Heybeliada) Greek Orthodox seminary remains closed, although its re-opening was widely debated over the reporting period. The Armenian Patriarchate's proposal to open a university department for the Armenian language and clergy has been pending for a number of years. The Syriacs can provide only informal training, outside any officially established schools. Despite the progress made on obtaining work permits for foreign clergy who wish to work in Turkey, overall procedures remain cumbersome.

The Ecumenical Patriarch is not free to use the ecclesiastical title 'Ecumenical' on all occasions. In June 2007 the Court of Cassation ruled that persons who participate and are elected in religious elections held in the Patriarchate should be Turkish citizens and be employed in Turkey at the time of the elections. However, Turkish and foreign nationals should be treated equally as regards their ability to exercise their right to freedom of religion by participating in the life of organised religious communities in accordance with the ECHR and the case law of the ECtHR. (...)

Regarding places of worship, non-Muslim religious communities report frequent discrimination and administrative uncertainty: applications to authorities for allocation of places of worship are refused and existing Protestant churches and Jehovah's witnesses' prayer halls face court cases. (...)

Overall, implementation of the law on foundations has been smooth (see the section on property rights). The Government has undertaken a dialogue with the Alevi and non-Muslim religious communities. However, their specific problems have yet to be addressed. Attacks against minority religions still occur. A legal framework in line with the ECHR has yet to be established, so that all non-Muslim religious communities and Alevi community can function without undue constraints, including as regards training of clergy. Further efforts are needed to create an environment conducive to full respect of freedom of religion in practice."

28. Based on the 2009 progress report, the European Parliament on 10th February 2010 passed a resolution stating, *inter alia*, that it:

"19. Emphasises freedom of religion as a universal fundamental value and calls on Turkey to safeguard it for all; welcomes the dialogue entered into by the Turkish Government with representatives of religious communities, including the Alevis, and encourages the authorities to intensify the interreligious dialogue, so as to establish regular and constructive communication; reiterates, however, once again, that positive steps and gestures must be followed by substantial reforms of the legal framework, which must enable these religious communities to function without undue constraints, in line with the ECHR and the case law of the European Court of Human Rights; underlines in particular the need for all religious communities to be granted legal personality;

20. 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;

21. Reiterates its concern about the obstacles faced by the Ecumenical Patriarchate concerning its legal status, the training of its clergy and elections of the Ecumenical Patriarch; repeats its call for the immediate reopening of the Greek Orthodox Halki seminary and for measures to permit the public use of the ecclesiastical title of the

Ecumenical Patriarch and more generally to create the conditions for the unhindered training of the clergy of Christian communities in Turkey;”

29. These documents illustrate a clear consensus in key European institutions as regards the conditions under which the non-Muslim religious communities operate in Turkey, and are as such of relevance to the Venice Commission when assessing whether the present Turkish rules and practice on the question of legal personality for religious communities are in line with European standards.

3. Legal recognition of non-Muslim religious communities in Turkey – law and practice

A. Legal situation of religious communities in Turkey

30. On 9 to 11 November 2009 a Venice Commission delegation visited Istanbul and Ankara, and met with the Orthodox Patriarch of Istanbul, as well as with representatives of the Armenian Patriarchate, the Jewish Community, the Catholic Church, the Association of Protestant Churches, Jehovah’s Witnesses, the Tesev Foundation, the European Commission delegation to Turkey, the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Justice, and in the Parliament with the chairman of the Committee on Human Rights and the chairman of the Turkish PACE delegation. The report from the visit appears in document CDL(2009)183.

31. The leaders of religious communities whom the delegation met with, expressed the view that their position had improved in recent years, and that they could sense today a new willingness on the part of the government to address their concerns, as compared to previous governments. At the same time, most of them stressed that further reform was necessary, not only by amending the law but also by changing the mentality with which the law is applied, at all levels of the administration.

32. The basic problem in Turkish law as regards religious communities is that they cannot register and obtain legal personality as such. There is no clear arrangement in the legal system for this, and no religious community has so far obtained legal personality. Instead they have to operate indirectly through foundations or associations.

33. From the observations of the delegation it appears that the idea of giving religious communities as such legal personality is regarded by the authorities, the courts and most of the legal community as contrary to the principle of secularism, as laid down, *inter alia*, in Articles 2, 13, 14 and 24 of the Constitution. This however rests on a particular interpretation of these provisions. To the outside legal observer, there is nothing in the constitutional provisions that would explicitly prohibit a legislative reform providing legal personality to religious communities as such. There are many secular states in Europe that provide religious communities with a legal framework for registering. As mentioned above, France with its tradition of *laïcité* provides religious communities with the possibility to register as *associations culturelles*. 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.

34. Although the lack of legal personality in principle applies equally to all religious communities in Turkey, there is in practice a clear distinction between Muslims and non-Muslims. For Muslim activities, these are administered through the Presidency of Religious Affairs (the Diyanet), which is formally part of the administration and reports directly to the Prime Minister. The Diyanet has responsibility for regulating the operation of the country’s

75,000 registered mosques and employing local and provincial imams, who are civil servants.¹⁰ For the Muslim communities, issues related to legal personality and representation are therefore handled by the Diyanet.¹¹

35. For non-Muslim religious communities, the Diyanet cannot be considered the legal representative. They, therefore, do not legally exist as themselves. Instead, the model provided for under Turkish law is for their members to register *foundations* or *associations*, which may (to some extent) *support* the religious communities. Both these legal structures – foundations and associations – have clear limitations for religious communities, but both have recently been reformed, making them somewhat more usable.

B. The Foundation System

36. Until recently, the only form of legal entity open to religious communities was for its members to establish *foundations*, for owning the property of the community (mosques, churches, schools, other building, land and etcetera), or for supporting activities related to the religious community. The foundation system is old, and dates back to the Ottoman era tradition of *vakfis*, which is still the Turkish name for it. Almost all the foundations of the Greek Orthodox, Armenian and Jewish communities, as well as those of several others, date back to before the 1923 establishment of the Turkish Republic, or at least back to an important 1936 registration of foundations. Under present law, foundations are regulated in the Turkish Civil Code, First Book, Third Section, Articles 101 to 117, and in a special Law on Foundations. This applies to all foundations in Turkey, of which there are a great variety, with foundations having a direct or indirect relationship to religious activity being only a minority. All foundations are under the supervision of the Directorate-General for Foundations.

37. For religious communities, the foundation system seems primarily to provide them with an indirect arrangement for *property* ownership and the financing of related activities (schools, hospitals, and etcetera). However, there are many obstacles with having to register property rights indirectly, in the name of an external foundation and under the supervision of a directorate, as compared to owning it directly. Furthermore, there were until recently a number of problems with the foundation system for religious communities, both as regards confiscation, expropriation, maintenance and other issues. Under a 2008 reform, many of these have been solved, but some remain, in particular as regards the possible return of property previously confiscated from foundations.¹²

38. Another problem follows from Article 101 (4) of the Civil Code, which prohibits the formation of a foundation “*contrary to the characteristics of the Republic defined by the Constitution, Constitutional rules, laws, ethics, national integrity and national interest, or with the aim of supporting a distinctive race or community*”. This may be interpreted so as to prohibit the establishment of foundations with a religious purpose or serving the interests of a distinctive religious community. In fact, many existing foundations have the clear purpose of supporting

¹⁰ In principle, the Diyanet treats equally all who request its services. In practice, it has been claimed by some groups, *inter alia* the large Alevi minority, that the Diyanet reflects mainstream Sunni Islamic beliefs to the exclusion of other beliefs. This is a matter that falls outside of the scope of the present opinion, and which is therefore not for the Commission to assess.

¹¹ This is in principle comparable to those European countries that have a state church system. In Norway, for example, the Church of Norway (of which some 85 % of the population are members) does not itself have legal personality, but is regarded formally as part of the administration, under the Ministry of Culture and Church. The Church is financed over the state budget, and the priests are publically employed. A difference with Turkey is that the state provides equal financial support (per member) to other religious communities (registered as legal entities), while in Turkey it does not.

¹² For a thorough analysis, cf. a 2009 report by the TESEV (the Turkish Economic and Social Studies Foundation), an independent think-tank, on “*The Story of an Alien(ation): Real Estate Ownership Problems of Non-Muslim Foundations and Communities in Turkey*”.

distinctive religious communities (both Muslim and non-Muslim), and this provision has not been invoked in order to try to shut down old (pre-1936) foundations. However, it might, depending upon interpretation and application, be an obstacle to the setting up of *new* foundations for supporting the activities of a given religious community, especially if the purpose of the foundation goes beyond support for a specific religious building or institution.

39. Foundations are used in practice both by Muslim and non-Muslim communities. Mosques in Turkey are mostly the property of the so-called Diyanet Vakfi, which is a foundation under the Civil Code, established in 1975 with the purpose of fostering knowledge of Islam, building mosques, and charitable work. However, there seems to be a great number of foundations devoted to other Islam-oriented activities.

40. For the non-Muslim religious communities, those which have existed in the country for a long time on the whole seem to have a number of related foundations, almost all dating back to 1936 or earlier.¹³ Such foundations own the buildings and properties of for example the Greek Orthodox Church, the Armenian Church, and the Jewish Rabbinate. The various Catholic communities, too, for the most part have old foundations. For religious communities more recently established in Turkey (Protestant churches, Jehovah's Witnesses, and others) there seem to be fewer foundations, and more problems establishing new ones.

C. The Association System

41. There is no special form of legal association open to religious communities under Turkish law. However, it is in principle possible for the members of a religious community to establish associations under *ordinary* association law, and for these to support the activities of the community. This is a recent development, which dates back to a 2004 reform of the Association Law. Before that, it seems that it was not possible to establish ordinary associations with the purpose of supporting religious activities. Now in principle there is such a possibility, though it appears unclear exactly how far such a purpose may be stated. There is no explicit prohibition in the Association Law comparable to that which applies to foundations in Article 101 (4) of the Civil Code. However, the establishment of associations must be in accordance with the law, and while this is a normal requirement, in the Turkish setting it may create problems in relationship to the principle of secularism in the Constitution. This was demonstrated in 2005, when Jehovah's Witnesses tried to set up an association with "religious, informational and charitable" purposes. This was rejected by the authorities as being against Article 24 of the Constitution.¹⁴ The case was taken to the court, which in 2007 declared that the stated purpose was not in breach of Article 24, and allowed for the association to be formed.

42. The instrument of ordinary association appears to have been used to some extent after 2004 by a few other religious communities, primarily some of the Protestant churches.

¹³ In connection with the implementation of the new Foundation Law, a deadline was set in August 2009 for registering existing foundations and properties. By the end of the deadline, the non-Muslim religious communities had registered a total of 107 foundations, owning 1393 immovable properties. The Greek Orthodox community had 56 foundations (744 properties), the Armenian community 36 (321), the Jewish community 10 (31) and the Assyrian 2 (241).

¹⁴ Article 24 of the Turkish Constitution regulates freedom of religion. The first three paragraphs are on the nature of this freedom, while the last two set down certain restrictions, namely that: "(4) Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives. (5) No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets."

43. For the long-established non-Muslim religions in Turkey, registering associations for the support of religious activities do not at the present time seem to be an option, for several reasons. First, they cannot register as such, since the form of an ordinary association may not be tailored to the organisational and institutional set-up of churches such as the Orthodox Patriarchate and the Armenian Patriarchate, or the Chief Rabbinate. Neither can they set up associations in their own name, since they themselves do not have legal personality. So, at best it can only be associations established by individual believers, in support of the activities of their religious community. Second, the functions that such associations can perform seem on the whole to be covered by existing (old) foundations. Thirdly, it seems still unclear exactly how far the Turkish Constitution would allow associations for the main or sole purpose of religious activities. It might also be that some of the churches and communities may consider it inappropriate to try to register as ordinary “associations”, on par with and under the same regulations and conditions as for example fitness clubs and automobile associations.

44. However, the option of establishing an association is quite recent, and it may be that in time more religious communities may avail themselves of it for specific purposes.

D. Other aspects of legal personality

45. The model provided for under Turkish law for the non-Muslim communities to set up foundations or associations at best seems only to cover *some* of the elements normally connected to “legal personality”, primarily those of ownership rights.

46. The concept of legal personality however covers a number of other elements, many of which seem to be problematic for the non-Muslim religious communities in Turkey. The Venice Commission cannot do a full examination of these, which would fall outside of the scope of the present opinion. But there seem to be several potential problems, *inter alia* in regard to 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), or to appear in the name of the church leaders or members, as private citizens.¹⁵ As for the right to provide religious education – and in particular to train clergy – it would appear that this is also negatively affected by the fact that the churches do not have legal personality as such.

4. Assessment of the question of legal personality for religious communities in Turkey

A. The lack of legal personality for the religious communities as such

47. The main question under the mandate is whether it is compatible with European standards that the religious communities in Turkey do not have the possibility as such to register and obtain legal personality. The basic situation seems clear and undisputed. No religious community in Turkey may as such obtain legal personality. The Muslim communities are represented and administered through the Diyanet. For the non-Muslim communities the only way open is to act through foundations or ordinary associations established by their members, which may take care of some but not all aspects of legal personality.

48. As regards the questions of legal personality for the mainstream *Muslim* communities, this falls outside of the scope of the present report. It should however be mentioned that it can be argued that the Diyanet model takes care of the basic issue of legal representation. A system

¹⁵ For example, in a case from 2007 arising over a dispute between the Patriarchate and a priest of the Bulgarian Church, the Patriarchate could not itself be a party to the case, and the parties were instead a number of private persons, including the Patriarch himself, under his personal name of Dimitri Bartolomeos Arhondon. See case no. 2005/10694, judgment of 2007 by the Court of Cassation, 4th Penal Chamber.

under which the mainstream religious community is organised formally as a legal part of the public administration, with no separate legal personality, is found in other countries, in particular with respect to the Protestant state churches in the UK and some of the Scandinavian countries. For the Muslim communities, the crucial question is whether the Diyanet organisation is representative for those groups not belonging to the mainstream Sunni belief, and thus whether it is sufficient to guarantee their religious freedom. But this is a question which falls outside of the scope of this opinion.

49. As for the non-Muslim religious communities, there is no equivalent to the Diyanet, and these communities therefore do not legally exist as themselves under Turkish law. Here the basic question for the Venice Commission to assess is whether this in itself must be considered in breach of European standards, or alternatively whether the lack of legal personality may still be compatible with such standards given that it does not substantively, and after a concrete assessment unduly restrain the exercise of their freedom of religious belief.

B. Compatibility with Articles 9 and 11 of the European Convention of Human Rights

Existence of an interference with the freedom of religion and the freedom of association

50. As explained above (paragraph 8), the right to freedom of religion under Article 9 is closely linked to freedom of association under Article 11. The right to manifest one's religion in community with others presupposes the right to meet, to publicly give expression to common religious opinions and values, to associate freely and to have some form of organised community, without arbitrary interference by public authorities.¹⁶ This means that the legal status of religious communities may raise issues both under Article 9 and under Article 11. As the ECtHR held: "religious communities traditionally and universally exist in the form of organised structures" while Article 11 "safeguards associative life against unjustified State interference".¹⁷

51. A systematic approach to Articles 9 and 11 of the Convention thus leads to the conclusion that the freedom to manifest a religion or belief is not an exclusively individual right. The case law of the ECtHR makes it clear that this freedom has also a collective dimension, recognised in Article 9 by the words "in community with others".¹⁸ Consequently, religious communities and churches are also to be regarded as subjects of this right. They may claim to be the victims of alleged violations, irrespective of whether they have legal personality under domestic law. While the freedom of thought and conscience, and the freedom to choose a religion, are strictly personal, the right to freedom of religion has also a collective dimension, and indeed the functioning of churches and other religious entities depends on respect for this right.

52. This interpretation is also in conformity with Article 34 ECHR, which expressly provides for the possibility of non-governmental organisations and groups of individuals claiming to be the victim of a violation of one of the rights set forth in the ECHR, to lodge an application with the European Court of Human Rights (ECtHR). Issues concerning the legal status of a religious community affect both the members of that community and the community as a collective body.¹⁹ The right to freedom of religion of the individual members of a religious community and that of the community do not substitute for each other in the sense that one is derived from the other; they have their own rationale. As the European Commission of Human Rights (Commission) held: "the right to manifest one's religion 'in community with others' has always been regarded as an essential part of the freedom of religion". The Commission held "that the

¹⁶ ECtHR, *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

¹⁷ ECtHR, *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 62.

¹⁸ ECtHR, *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

¹⁹ ECtHR, *Cha'are Shalom Ve Tsedek v. France*, judgment of 27 June 2000, § 72.

two alternatives 'either alone or in community with others' in Article 9(1) cannot be considered as mutually exclusive, or as leaving a choice to the authorities, but only as recognising that religion may be practised in either form".²⁰

53. As a consequence, the ECtHR has treated the freedoms set forth in Articles 9 and 10 as elements of Article 11 and considered their violation as constituting an additional argument for the finding of a violation of Article 11.²¹ Thus, the ECtHR held in the case of *Hassan and Chaush*: "Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards the associated life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from 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 Article 9 affords".²² Viewed from the other side, the organisational aspects of religious communities as associations form an integral part of Article 9. As the ECtHR held: "Were the organisational life of the [religious] community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable".²³

54. Based on this understanding as confirmed by the ECtHR, the problem of legal personality of religious communities can be formulated in two ways leading basically to the same requirements under the Convention: First, it may be asked whether there is a positive obligation on the part of Turkey to create a legal framework which provides for proceedings and requirements to register and obtain legal personality. The second – more traditional – question would be whether refusal to grant legal personality amounts to an interference by Turkey and, in the affirmative, whether the interference is justified under the conditions of Article 9 para. 2 of the Convention. These two ways of approaching the problem of legal personalities concern basically two sides of the same coin, the requirements of the Convention being substantially the same.²⁴

55. With respect to Article 11 the Court has consistently held the view that a refusal by the domestic authorities to grant status as a legal entity to an association of individuals amounts to an interference with the applicants' exercise of their right to freedom of association.²⁵ The ability "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 – according to the ECtHR – that right "would be deprived of any meaning".²⁶ In particular, the ECtHR found that the refusal by the authorities to recognise or register the organisational structure that a group of persons has chosen, may deprive them of the possibility to individually and collectively pursue their goals and thus to exercise their right to freedom of association.²⁷ The mere fact that they have

²⁰ Commission, *X. v. United Kingdom*, D&R 22 (1981), p. 27 at p. 34.

²¹ ECtHR, *Young, James and Webster v. United Kingdom*, judgment of 13 August 1981, § 57. For the link between Article 11 and Article 10, see ECtHR, *Refah Partise (Prosperity Party) and Others v Turkey*, judgment of 31 July 2001.

²² ECtHR, *Hassan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 62.

²³ *Ibidem* and ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 103.

²⁴ See among others ECtHR, *López Ostra v. Spain*, judgment of 9 December 1994, § 51.

²⁵ See *Gorzelik and others v. Poland*, judgment of 17 February 2004, § 52 *et passim*, and *Sidiropoulos v. Greece*, judgment of 10 July 1998, § 31 *et passim*.

²⁶ ECtHR, *Moscow Branch of the Salvation Army v. Russia*, judgment of 5 October 2006, § 71.

²⁷ ECtHR, *Özbek and Others v. Turkey*, judgment of 6 October 2009, § 35.

been offered some kind of an alternative does not mean that there is no interference, if that alternative does not offer them the same legal status.²⁸

56. The same principle applies to communities with religious purposes. This was confirmed by the ECtHR in its judgment in the case of the *Metropolitan Church of Bessarabia and Others* where the Court came to the following conclusion: "In the present case the Court observes that, not being recognised, the applicant Church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practise their religion and, not having legal personality, it is not entitled to judicial protection of its assets. The Court therefore considers that the government's refusal to recognise the applicant Church, upheld by the Supreme Court of Justice's decision of 9 December 1997, constituted interference with the right of the applicant Church and the other applicants to freedom of religion, as guaranteed by Article 9 paragraph 1 of the Convention."

57. The fact that leaders and members of a religious community can use alternative forms of organising their religious life different from establishing an association with legal personality does not change the legal situation. The mere fact that the religious community concerned may have certain alternatives available to compensate for the interference resulting from State measures, while it may be relevant in the assessment of proportionality, cannot lead to the conclusion that there was no State interference with the internal organisation of the community concerned.²⁹

58. The Venice Commission therefore 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 ECHR.

Justification of the interference

59. It remains to be examined whether refusal to grant legal personality to religious communities as such is "necessary in a democratic society". According to its settled case-law, the ECtHR leaves to States party to the Convention a certain margin of appreciation in deciding whether and to what extent interference is necessary, but that goes hand in hand with European supervision of both the relevant legislation and the decisions applying it.

60. The ECtHR has held that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimensions, one of the most vital elements that go to make up the identity of believers and their conception of life (...). The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".³⁰ In addition, the ECtHR has emphasised that the autonomy of religious communities is indispensable for that pluralism and for that reason forms a core element of the protection provided by Article 9.³¹ A good deal of weight must therefore be given to the need to maintain religious pluralism when determining, as paragraph 2

²⁸ *Ibidem*, § 38. Also ECtHR, *G.M. v. Italy*, judgment of 5 July 2007, § 23.

²⁹ ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 113.

³⁰ ECtHR, *Kokkinakis v. Greece*, Judgment of 25 May 1993, § 31.

³¹ ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, § 118; *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

of Article 9 requires, whether the interference corresponds to a "pressing social need" and, as implied therein, whether it is "proportionate to the legitimate aim pursued."³²

61. Moreover, the ECtHR has held that "the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have the right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions. Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association."³³

62. Accordingly, only in very exceptional situations, restrictions on granting legal personality to a religious community may be justified under Articles 9 paragraph 2 and 11 paragraph 2. The ECtHR has stated as follows: "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."³⁴

63. It can be derived from the case law that restrictions on granting legal personality may pursue the legitimate aims of protection of public order and public safety.³⁵ States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety.³⁶ 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 secular State, or infringe upon the rights and freedoms of its adherents.

64. However, State authorities may not determine themselves whether the religion concerned is a sincere and appropriate one, and interpret its beliefs and goals;³⁷ the right to freedom of religion excludes assessment by the State of the legitimacy of religious beliefs.³⁸ The ECtHR has held that "but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."³⁹ While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory powers and in its relations with the various religions, denominations and groups within them.⁴⁰ What is at stake here is the preservation of pluralism

³² See, *mutatis mutandis*, among many other authorities, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports* 1996-V, p. 1956, § 53.

³³ ECtHR, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, § 40.

³⁴ ECtHR, *Svyato-Mykhaylivska Parafiya v Ukraine*, judgment of 14 June 2007, § 114.

³⁵ See, *mutatis mutandis*, ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, judgment of 31 July 2008, § 76.

³⁶ *Metropolitan Church of Bessarabia and Others*, cited above, § 113.

³⁷ ECtHR, *Mannoussakis and Others v. Greece*, judgment of 26 September 1996, § 47.

³⁸ ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, § 117.

³⁹ ECtHR, *Hassan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 78.

⁴⁰ ECtHR, *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

and the proper functioning of democracy.⁴¹ From the same requirement of neutrality – as well as from Article 14 – follows that State authorities have to treat all religious communities equally.⁴²

65. In the light of the above principles the Venice Commission is of the opinion that a national legal situation that generally denies religious communities the possibility to register themselves as legal entities under the law is not in compliance with the requirements of Article 9 paragraph 2 in conjunction with Article 11 paragraph 2 of the Convention, given that the religious communities concerned are small and peaceful and pose no threat to public order. As stated above the refusal to grant legal personality could be justified only in exceptional circumstances. The Venice Commission does not see any reason to assume that there are such exceptional circumstances.

C. Rights of access to court and enjoyment of possessions

66. The lack of a possibility for religious communities to acquire legal personality in itself constitutes an infringement of Article 9 in conjunction with Article 11. But this may also lead to other problems. These may then be seen primarily as a question of Article 9, but at the same time the tradition under the ECHR is to also consider such issues in light of other relevant articles.

67. The Venice Commission has not done a full study of the problems that the religious communities in Turkey face due to their general lack of legal personality. It should however mention the two that appear most pertinent – which are access to court under Article 6 and property ownership under Article 1 of Protocol No. 1.

68. As a consequence of their lack of legal personality, religious communities in Turkey can not access the court system as such, but only indirectly through foundations 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. As the ECtHR has held: "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".⁴³ Thus there appears to be an infringement also of Article 6 (1), and the Venice Commission can not see how this can be justified under Article 6 (2).

69. The lack of legal personality also appears to create various kinds of problems for the property ownership rights of the religious communities, which is only partially addressed through the foundation system. Some of these problems may fall outside of the rights guaranteed by Article 1 of Protocol No. 1.⁴⁴ Others, however, clearly fall within the scope of the

⁴¹ ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 119.

⁴² ECtHR, *Supreme Holy Council of the Muslim Community v. Bulgaria*, judgment of 16 December 2004, §§ 76-85.

⁴³ ECtHR, *Svyato-Mykhaylivska Parafiya v Ukraine*, judgment of 14 June 2007, § 117.

⁴⁴ Article 1 of Protocol No. 1 does not guarantee the right to *acquire* property, cf. ECtHR, *Jantner v. Slovakia*, judgment of 4 March 2003, § 34. The ECtHR has so far refrained from interpreting the right to freedom of association as creating an automatic right of access to private property, cf. ECtHR, *Appleby and Others v. United Kingdom*, judgment of 6 May 2003, § 47. However, from Article 11 in conjunction with Article 1 of Protocol No. 1 a positive obligation could arise for the State to ensure the effective enjoyment of freedom of association by regulating the association's property rights, cf. *Broniowski v. Poland [GC]*, judgment of 28 September 2005, § 143. In so doing, the State has a broad margin of appreciation to take into consideration the interest of protecting the *ordre public* and the interests of the members of the association concerned, cf. *Fener Rum Erkek*

provision. The most problematic issue appears to be that religious communities have been losing properties that have historically belonged to them. One of the reasons for this is that under the foundation system the property is held by the foundation and not by the religious community itself, although in practice and from ancient times in reality it is clearly the property of the community (the church, rabbinate, etcetera). The problem is that in situations where the foundation falls away (the members die and the requirements for upholding the foundation are no longer met), the properties have been transferred to the state. This may be seen as confiscation, which is a matter under Article 1 of Protocol No. 1, and has been seen as an infringement by the ECtHR.

70. The reform of the foundation system resolves some of these issues but not all. The basic problem is that the religious communities have to go through the foundation system – instead of being able to register, own, maintain and operate property themselves. As long as this is not remedied, further concrete infringements of the right to hold property under Article 1 of Protocol 1 may be expected.

71. On this basis the Venice Commission recommends that the Turkish authorities provide a national legal framework that would allow the non-Muslim religious communities as such adequate access to court and the right themselves to hold property, without having to do this through the foundation model.

D. Compatibility with the OSCE-ODIHR and Venice Commission “Guidelines for review of legislation pertaining to religion or belief”

72. These Guidelines have been prepared by the ODIHR and the Venice Commission and were adopted by the Venice Commission in 2004. They were welcomed by the OSCE Parliamentary Assembly in 2004. They state clearly in Section B.8 and F.1 and 2, that restrictions on the right to legal personality for the religious communities are “inconsistent with both the right to association and freedom of religion or belief”. For the reasons given above the Turkish system does not meet the requirements of the guidelines on this point, even if there is an alternative model of foundations and ordinary associations in support of the communities. The Guidelines are not legally binding in the strict sense. However, they do reflect common European standards, and the Venice Commission recommends that all States take the necessary steps to comply with them.

E. Practice in other European States

73. Finally it should be mentioned as a more factual observation that Turkish law is also in contrast to the main model in Europe – which is that religious communities as such in one way or the other are allowed to register and obtain legal personality, without having to go (indirectly) by way of other institutional arrangements set up by their members and covering partially their activities and needs. This is the main model, which may be construed in different ways – the most common one being a special law on religious legal communities, granting them legal personality and regulating their rights and obligations under the law.

F. Conclusions and recommendations

74. In view of the strict requirements established in the case-law of the European Court of Human Rights, the Venice Commission sees no reason which would justify not granting to religious communities as such the possibility to obtain legal personality. It therefore recommends that Turkey should introduce legislation that would make it possible for religious communities as such to acquire and maintain legal personality.

Lisesi Vakfi v. Turkey, judgment of 9 January 2007, § 52; *Özbek and Others v. Turkey*, judgment of 6 October 2009, § 36.

75. This can be done in various ways, as the different European approaches illustrate. This is for the national legislator to decide, within the framework of the national context and legal traditions. One way would be a separate statute on legal personality for religious communities, following the model of such statutes in many European countries. Another model might be a special section or chapter in the law on associations, creating a category of associations that would allow the religious communities the right to register as such, in a way corresponding to their nature and characteristics. It interferes with the autonomy of a religious community if the community itself cannot register as an association. As a consequence the internal ecclesiastical rules of the community cannot be the ones governing the association – which has of course to be organised along the lines of association law. Any model would have to ensure that non-Muslim religious communities as such have adequate access to court and also the right to hold property themselves, without having to use the foundation model. Only then would the Turkish system be fully compatible with European standards and in particular with the requirements of Articles 9 and 11 ECHR.

76. In the meantime, until such a general reform may be adopted, the Venice Commission urges the Turkish authorities to interpret and apply the present legal system (the laws on foundations and associations) in such a way as to minimise the restrictions on the exercise of religious freedom of the non-Muslim religious communities. This calls for a liberal and flexible interpretation and application both of the two statutes and with regard to Article 24 of the Constitution, Article 101 of the Civil Code, and other potentially relevant rules.

77. As regards the law on *associations*, there seems at present to be a problem with registering associations wholly or partly for religious purposes. There seems to be a lack of clarity in Turkish legislation, and administrative discretion tends to be exercised in a way not favourable to religious communities. This is shown by the example of Jehovah's Witnesses, who had to go to court to obtain the right to register an association to support their religion. The Venice Commission therefore recommends that the Turkish authorities interpret and apply the present law on associations in such a way as to allow for religious communities as such to register as associations.

78. As regards the law on *foundations*, there seem at present to be various problems with regard to the property ownership of the religious communities. The basic problem is that they cannot hold property themselves, but have to go through a foundation. This should be remedied. But as long as this is not done, then this makes it all the more important under the ECHR and other European standards that this is a fairly easily accessible system – making it easy to set up new foundations, or for old foundations to register new property and to exercise effective ownership control over the existing properties.

79. In this regard it is particularly troubling that Article 101 (4) of the Civil Code as interpreted by the authorities and the Turkish courts seem to prohibit the setting up of new foundations with the aim of supporting a specific religious community or specific activities of such a community. The Venice Commission cannot see any legitimate reason why it should not be possible to set up a foundation for the purposes of a specific religious community or for specific religious activities. The Commission therefore recommends that Article 101 (4) of the Civil Code should not be interpreted and applied so as to prohibit the establishment or maintenance of foundations with the purpose of supporting religious communities or activities. In addition, all outstanding cases concerning the question of return of property seized by the authorities after 1974 should be dealt with and resolved in a manner compatible with the requirements of the ECHR.

5. The right of the Orthodox Patriarchate of Istanbul to use the title “ecumenical”

A. *The ecumenical character of the Patriarchate*

80. The second part of the request from the Parliamentary Assembly calls on the Venice Commission to assess “the question of the right of the Greek Orthodox Patriarchate of Istanbul (the “Patriarchate”) to use the adjective “Ecumenical” under European standards. This part of the request is motivated by the fact that the Turkish authorities do not recognise officially the Patriarch as “ecumenical”, and regard him only as leader of the Greek Orthodox Church in Turkey.

81. Before entering into a legal evaluation, two basic facts should be emphasised. The first is that the Patriarchate considers *itself* “ecumenical”, a title that has been used by the Patriarch in Constantinople since the 6th century, and which was continued after the city came under Ottoman rule in 1453. The Patriarchate has never formally or factually renounced this ancient title, and indeed considers it essential to the identity and functions of the institution.

82. The second fact is that the Orthodox Patriarch in Istanbul is recognized as “ecumenical” by Orthodox churches *in other countries* (as well as by other religious communities). First, he has direct administrative competence over Orthodox churches in a number of other countries, including the Orthodox communities in Western Europe and in North and South America. Second, he is recognised as ecumenical spiritual leader by other autonomous and autocephalous Orthodox churches.⁴⁵ The Patriarch is first in honour among the Orthodox bishops, presides in person or through a delegate over any council of Orthodox primates or bishops in which he takes part, and serves as primary spokesman for the Orthodox community, especially in contacts with other Christian denominations. He has no direct jurisdiction over the other patriarchs or the other autocephalous Orthodox churches, but he enjoys the right of convening extraordinary synods consisting of them or their delegates to deal with ad hoc situations and has also convened well-attended Pan-Orthodox Synods in the last forty years. In this way one of his primary functions is that of preserving Church unity.

83. It is not up to the Venice Commission to assess whether or not the Patriarchate is “ecumenical”. This is for the Patriarchate and for the Orthodox Church itself to determine. But the Venice Commission notes that the Patriarchate is an “ecumenical” institution in the way this concept is understood in the Orthodox Church. This is an internal ecclesiastical denomination of the Patriarchate, regardless of how any government or court or commission regards the matter.

B. *Assessment of the Turkish government’s lack of recognition of the ecumenical nature of the Patriarchate*

84. The ecumenical nature of the Patriarchate is thus first and foremost a spiritual and ecclesiastical matter – not a legal one. However, it has to a certain extent also been made into a legal question by the insistence of the Turkish authorities that the Patriarchate is not ecumenical,⁴⁶ and in particular by a judgment from 2007 in which the Turkish Court of Cassation stated that “the Patriarchate is an institution which bears only religious powers as the

⁴⁵ Whether or not this is contested by some Orthodox churches, as some claim, is not relevant to the general point, and not for the Commission to assess.

⁴⁶ The lack of recognition by the Turkish authorities of the ecumenical status of the Patriarchate manifests itself in various ways. One is that the Turkish authorities never refer to the Patriarch or the Patriarchate as “ecumenical”, and stand ready to argue with those who do so. When the Patriarch travels, as he often does, and there are receptions, the Turkish embassies are for example under a standing instruction to emphasise that their presence does not imply recognition of his title.

church of the Greek minority in Turkey”, and that “there is no legal basis for the claim that the Patriarchate is Ecumenical”.⁴⁷

85. 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. This principle, also known under terms like “church autonomy” or the “right to self-determination” of churches and religious communities, is guaranteed by various Constitutions of member States (Art. 140 German Basic Law in connection with Art. 137 Weimar Constitution; Art. 15 of the Austrian 1867 Basic Law on the rights of citizens) and accepted by the case law of the ECtHR.

86. The right of self determination of a religious community includes the general right to decide on its organisational structure. This decision may imply the institution of branches or parishes on regional or local level as well as the integration of a national church or religious community into an international church or community or even in a worldwide organisational structure such as the (Roman) Catholic Church. The legal basis of such organisational differentiation will be on the one hand the internal law of the community, such as ecclesiastical statutes, canon law etc. On the other hand there may exist statutes of single states or even international treaties concluded under public international law confirming certain structures, denominations etc.

87. Whenever a State decides to interfere with these “internal” aspects of organisation of a religious group, it interferes also with its “autonomy” and therefore with the rights under Article 9 of the Convention. The ECtHR has noted in a number of cases, that the personality of the religious leaders is of importance to the members of the religious community and that participation in the organisational life of the community is a manifestation of one’s religion, protected by Article 9 of the Convention. In the case of *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* it confirmed once more that under Article 9 of the Convention, interpreted in the light of Article 11, the right of believers to freedom of religion encompasses the expectation that the community will be allowed to function “free from arbitrary State intervention in its organisation.” 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 of the Convention affords.” And: “Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable”.⁴⁸

88. Decisions on the status of residence of clergy, the establishment of requirements for the education of clergy as well as conditions for opening a “school” for educating clergy may amount to an interference. The same is true for the prohibition of certain organisational decisions, e.g. the foundation of new divisions etc, or the prohibition of the use of a certain name or parts of a name for a religious group or church. Very often questions of names are linked – legally or sometimes only as a matter of fact – to the acceptance of certain religious groups, to their significance as a group, their tradition and relation to the founders of the religion and its prophets. Sometimes questions of names may be the reason of disputes between

⁴⁷ The background to the case was a dispute between the Patriarchate and a priest of the Bulgarian Orthodox Church. Since the Patriarchate is not itself a legal institution, the party to the case was listed as a number of private persons, including the Patriarch himself, under his personal name of Dimitri Bartolomeos Arhondon. See case no. 2005/10694, judgment of 2007 by the Court of Cassation, 4th Penal Chamber (available in English translation). The outcome of the case was that the Patriarch was acquitted from the charges. In its Resolution of 21 May 2008 on Turkey’s 2007 progress report (2007/2269(INI)), the European Parliament shared the concerns expressed by the Council on 24 July 2007 over the ruling of the Turkish Court of Cassation on the Ecumenical Patriarchate (see §11), and reiterated it in its resolution of 10 February 2010 on Turkey’s progress report 2009 (P7_TA-PROV(2010)0025, provisional edition), §21.

⁴⁸ Judgment of 22 January 2009, § 103.

competing groups in which state authorities may be involved, thus risking a violation of the rights under Articles 9 and 11 of the Convention if they do not respect the principle of neutrality *vis-à-vis* those religious groups. In such cases, the ECtHR examines whether state regulations or action in that respect constitute an unlawful and unjustified interference with the internal organisation of the community concerned and the applicant's rights under Article 9 of the Convention. However, it is not the Court's task to determine the canonical legitimacy of church leaders.⁴⁹

89. In any case, a line must be drawn between behaviour on the side of the state which amounts to an interference, on the one hand, and acts or omissions that do not reach this level, on the other hand: while an explicit prohibition to use a certain name which forms part of the identity of a religion usually is an interference with and possibly a violation of the rights under Article 9, the use of a different name in the correspondence or at official events etc. may – depending on the particular circumstances – be a mere political question, not a legal issue under the Convention. The same is true when state authorities consequently do not use a word which reflects the specific status of a leader of a church or religious group. However, such a policy of “re-naming”, first being a matter of political correctness, may reach the level of an interference when it is combined with other measures discriminating the religious group on grounds that are not in line with the ECHR and in particular with Article 14. In this context one has to bear in mind that the ECtHR has explicitly held that “national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be”.⁵⁰

90. Thus, to the extent that the Turkish government should actively interfere with the right of the Patriarchate to call itself “ecumenical”, this would be a clear interference with the religious freedom of the Orthodox community, which can be accepted under Article 9 paragraph 2 ECHR only if it is prescribed by law, justified by reference to legitimate requirements and proportional. Whether and to what extent such infringements actually occur is not for the Venice Commission to assess. It should be emphasised 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; whether it is the administration of churches answering to him, or providing religious leadership in other ways. Lately, there have even been some signs of change, and recently Prime Minister Erdogan has been quoted as saying that the title “ecumenical” is an internal affair for the Orthodox Church.

91. The Venice Commission nevertheless underlines that to the extent that the national authorities *should* try – directly or indirectly – to obstruct or hinder the Patriarchate from using the title “ecumenical”, then this will be an interference with the rights under Article 9 for which it will be difficult to see how a justification can be found that is directed at a legitimate aim and fulfils the requirements of the principle of proportionality.

92. As for the 2007 judgment of the Court of Cassation, the Commission is of the opinion that no secular court has any competence or jurisdiction to rule on whether a religious leader is “ecumenical” or not. The Patriarchate is neither more nor less ecumenical as a result of the judgment. However, the judgment is troubling in the sense that the fact that a national court seems to consider itself entitled to interfere in this way with the internal ecclesiastical status of a religious leader may easily lead to a violation of Article 9.

⁴⁹ *Ibidem*, § 104.

⁵⁰ ECtHR, *Svyato-Mykhaylivska Parafiya v Ukraine*, judgment of 14 June 2007, § 117.

93. As regards possible justification of the interference, the Venice Commission notes that only in exceptional cases it may be justified to deny to a religion the right to choose and use a certain name. It fails to see how any of the requirements listed in Article 9 paragraph 2 would possibly be applicable in such a case, as neither public safety or public order nor any of the other concerns can be affected at all, and certainly not proportionally, by the Patriarchate using its ancient title of “ecumenical”.

94. The basis for the denial of the Turkish authorities and Court of Cassation of the ecumenical nature of the Patriarchate seems at least in part to be the Treaty of Lausanne, which was concluded in 1923 between the Republic of Turkey on the one hand and the British Empire, France, Italy, Japan, Greece, Romania and the Serb-Croat-Slovene State. The argument appears to be that the Patriarchate was only allowed to remain in Istanbul on the condition that it would shed its ecumenical status. This is stated in the 2007 judgment, and also in a 2009 letter sent by the Turkish delegation to the PACE to the chairman of the Monitoring Committee of the PACE,⁵¹ as well as in the comments made by Turkish authorities to the 2009 report by the Commissioner for Human Rights of the Council of Europe on minority rights in Turkey.⁵² This argument cannot be supported for several reasons:

95. First, even assuming that there was a conflict between the ECHR and the provisions of the Lausanne Treaty the latter does not prevail over the first: In the absence of a reservation according to Article 57 ECHR and in view of Article 30 paras. 3 and 4 on the Vienna Convention on the Law of the Treaties and the fact that all parties of the Lausanne Treaty with the exception Japan⁵³ there is no doubt that Turkey is bound by the ECHR without any restriction. On the contrary, with a view to Article 31, one can even proceed from the assumption that the ratification of Human Rights Treaties at universal level by all parties to the Lausanne Treaty (CCPR) and at European Level by all but one parties (ECHR) constitute a “subsequent treaty” and “subsequent practice” within the meaning of Article 31 of the Vienna Convention.

96. Second, there is nothing on the “ecumenical” nature of the Patriarchate in the provisions of the treaty itself, which do not mention the Patriarchate at all. Instead, in Article 38 the treaty contains a comprehensive guarantee of freedom of religion for all inhabitants of Turkey with express reference to “non-Muslim” minorities. Article 39 prohibits any discrimination of Turkish nationals on the grounds i.e. of religion including the question of language.

97. Third, recourse to the preparatory work of the Lausanne Treaty or the circumstances of its conclusion as supplementary means of interpretation (Article 32 of the Vienna Convention on the Law of Treaties) do not lead to a different conclusion. On the contrary: Having scrutinised the relevant minutes, the Venice Commission notes that there is no evidence whatsoever to the effect that the Parties meant to abolish the “ecumenical” status of the Patriarchate.⁵⁴ However, the Turkish authorities refer to the minutes of the meeting on 19 January 1923 in which the representatives of the Parties discussed the contested question of whether the Patriarchate

⁵¹ Cf. letter from the Turkish PACE delegation of 23 June 2009, in reply to the draft resolution by the Committee on Legal Affairs and Human Rights on freedom of religion and for non-Muslim minorities in Turkey and for the Muslim minority in Eastern Greece.

⁵² Cf. the comments from the Republic of Turkey, appendix to the 1 October 2009 report by Mr Hammarberg to the Council of Europe, cf. CommDH(2009)30, p. 43, where the Turkish authorities argue that the minutes to the Lausanne Treaty “largely explains why the title 'ecumenical' is incompatible with the Agreement and why the Patriarch himself must be a Turkish citizen”. The authorities then go on to state that the title “ecumenical” cannot be used by the Patriarchate “as a pretext to hinder or intervene with the religious freedoms of others”. This is of course correct, but it is not what the present dispute is about.

⁵³ The membership of the “Serb-Croat-Sloven Kingdom” may be assumed on the basis of the rules on state succession.

⁵⁴ The minutes to the meetings preparing the Lausanne Treaty are printed (in English), and the relevant parts were kindly provided to us by the Turkish authorities.

should be allowed to stay in Istanbul. It is clear from the minutes that this was a major issue, which was highly sensitive, but which was solved by a compromise proposed by the chairman of the meeting, Lord Curzon. The solution was that the Patriarchate would be allowed to stay as “a purely religious institution”, without the “political and administrative character” that it had previously had. There were administrative competences that the Ottoman Empire had bestowed on the Patriarchate, which were abolished. However, it is clear from the statements made by Lord Curzon that he did not propose to alter the religious and ecclesiastical nature of the Patriarchate. Several other representatives also explicitly referred to the spiritual significance of the Patriarch for Orthodox believers in other countries, which is at the heart of his “ecumenical” status.⁵⁵ The Turkish representative, who accepted the compromise proposed by Lord Curzon, did not contradict this. Thus the minutes, contrary to the argument of the Turkish authorities, rather confirm that the Patriarchate was allowed to stay in Istanbul as an institution offering spiritual guidance to the Orthodox believers all over the world.

98. The 1923 Treaty of Lausanne therefore in no way limits the right of the Patriarchate to use the title “ecumenical”.

99. 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 the title, they are formally free under the ECHR not to do so, as long as they do not obstruct the use of it by others. At the same time, it would clearly be best in line with European standards and the idea of freedom of religion and mutual respect and tolerance for the Turkish authorities to recognise and respect the ecumenical nature of the Patriarchate.

100. On this basis the Venice Commission recommends that the Turkish Government should recognise the ecumenical nature of the Orthodox Patriarchate of Istanbul, thereby promoting the idea of religious freedom and sending a sign of tolerance and respect to the rest of the world.

C. Other basic issues for the Patriarchate

101. Although important for symbolic reasons, and as a matter of principle, the lack of recognition by the Turkish authorities of the ecumenical nature of the Patriarchate is in itself of limited substantive significance. The Patriarchate is faced with other challenges of a more factual and specific character, which to some extent can be seen as indirectly linked to the issue of ecumenicalism. A basic challenge to the Ecumenical Patriarchate is the gap between the home basis of the institution and its transnational role. On the one hand, the Patriarch is a spiritual leader to hundreds of millions of Orthodox believers abroad. At the same time, the number of Greek Orthodox in Turkey has been gradually dwindling, and today by some estimates stands at a mere 2500 people. The challenges are increased by the requirement under Turkish law that the Patriarch and the metropolitans must be Turkish citizens – combined with the fact that the government in 1971 shut down the Heybeliada Orthodox theological college (the Halki seminar), thereby depriving the Patriarchate of the only seminar in Turkey for educating clergy. The combined effect of this is that it may be difficult for the Patriarchate to survive as an institution in the long run.

102. It falls outside of the scope of this opinion for the Venice Commission to enter into an assessment of whether the nationality requirement and the continued closure of the Halki seminar is in line with Article 9 of the ECHR and other European standards for freedom of belief. Furthermore, this is not contingent upon the use of the title “ecumenical” – even though it

⁵⁵ The Greek representative, Mr Venizelos, for example emphasised the importance (also for Turkey itself) that Istanbul should “continue to be the residence of the head of the Orthodox Church”.

can be argued that the two issues are indirectly linked, insofar as the ecumenical nature of the Patriarchate may be invoked as an argument against strict nationality requirements for the clergy, and as an argument for reopening the seminary in order to provide for religious education.

103. Having said this, the Venice Commission cannot deliver a report on the ecumenical status of the Patriarchate without supporting and reiterating the position taken by the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights of the Council of Europe, the EU Commission, and a number of other international observers, that the Turkish government should find a way to reopen the Halki seminar and to amend the nationality requirements in such a way as to allow for the continued existence of the Patriarchate in Istanbul.

104. In this regard, the Commission stresses that the possibility of educating and employing clergy is a core element of freedom of religion, and that any obstruction to this by national authorities amounts to a violation of Article 9 of the ECHR.

6. Conclusions

105. The Venice Commission is very much aware that relations between the state and religious communities are a sensitive issue in many countries. These depend on the history and tradition of the country concerned and there is no uniform European model, although all European states have to fully respect the principle of freedom of religion as laid down in the ECHR.

106. In Turkey the situation appears particularly complex. There is a specific understanding of secularism, which is strongly enshrined in the political and constitutional tradition of the modern Turkish State, and there is a lively debate within society about the scope and meaning of secularism. This is a debate which goes beyond the legal sphere, and which it is not for the Commission to enter into.

107. The Commission recognises and welcomes the fact that in recent years there have been many important reforms of the Turkish legislation which have improved the situation for the non-Muslim religious communities, in particular as regards property rights under the foundation system and the possibility to establish associations to support the religious community. These reforms are an important contribution towards ensuring full respect for the religious freedom of non-Muslims in Turkey. Such reform processes by their very nature take time and require not only legislative amendments but also a change in mentality in the administration and the courts.

108. Having said that, the Commission would stress that the fundamental right of freedom of religion as protected by Article 9, read in conjunction with Article 11, of the ECHR includes, inter alia, the possibility for religious communities as such to obtain legal personality. This is important not least to ensure access to court, and the protection of property rights. The Venice Commission can see no justification, which would be in conformity with the strict requirements of Articles 9 paragraph 2 and 11 paragraph 2 ECHR, for not granting such rights to the non-Muslim religious communities.

109. The Venice Commission therefore 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. Pending such legislation, the existing rules, including the laws on foundations and associations, have to be interpreted in such a way as to minimise the restrictions on freedom of religion following from the fact that the religious communities do not themselves have legal personality.

110. As regards the right of the Orthodox Patriarchate to use the title “ecumenical”, the Commission holds that any interference with this right would constitute a violation of the autonomy of the Orthodox Church under Article 9 ECHR. The Commission notes that there is no indication that the Turkish authorities prevent the Patriarchate from using this title and that the Turkish authorities are under no positive obligation to themselves use this title. The Commission nevertheless fails to see any reason, factual or legal, for the authorities not to address the Ecumenical Patriarchate by its historical and generally recognised title.