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COMMENTS

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"

by

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TABLE OF CONTENT

I. Introduction 3

II. European standards for granting legal personality to religious communities 3
1. Introduction 3
2. Requirements for legal recognition of religious communities under European and international law 4
3. European soft law standards for legal recognition of religious communities 6
4. Other relevant reports and documents regarding religious minorities in Turkey 7
5. Comparative overview of the legal status of religious communities in Europe 9

III. Legal recognition of non-Muslim religious communities in Turkey – law and practice 11

IV. Assessment of the question of legal personality for religious communities in Turkey 15
1. The lack of legal personality for the religious communities as such 15
2. Challenges of access to court and property ownership 17
3. Interpretation and application within the existing model 18

V. Assessment of the Ecumenical Status of the Greek Orthodox Patriarch of Constantinople 19
1. The ecumenical character of the Patriarchate 19
2. Assessment of the Turkish government's lack of recognition of the ecumenical nature of the Patriarchate 20
3. Other basic challenges for the Patriarchate 22

VI. Conclusions 23

I. Introduction

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"".

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

As for the general question, on "legal personality", I suggest we interpret it restrictively, which is in line with the background and context of the request. First, I suggest we confine ourselves primarily to non-Muslim (minority) religious communities, even though of course we have to be aware that our assessment may also be of relevance to the (majority and minority) Muslim communities in Turkey.

Second, I suggest we confine ourselves primarily to the general issue of "legal personality", without going into all the concrete and complex details of the various issues arising under the heading of "legal personality", such as right to property, right to enter into contracts, access to court, right to train and employ clergy and etcetera. It is however not possible to separate the general question of legal personality from the substantive rights and obligations normally contained in such a concept, so to some extent we have to address them.

As for the second question, on the "ecumenical" status of the Patriarch, this is first and foremost an internal religious and ecclesiastical matter. However, to the extent that the Patriarchate is hindered from using this title, then this it is also a legal issue, and this is what the Venice Commission should address.

II. European standards for granting legal personality to religious communities

1. Introduction

The mandate requests us to assess whether the rules and practice in Turkey with regard to the legal personality of religious communities are in line with "European standards". As is often the case for the Venice Commission, "European standards" can mean both "hard" and "soft" law – in this case both the rules of the European Convention on Human Rights (ECHR) and various European or international soft law texts – including resolutions from the Council of Europe and the PACE, the Venice Commission itself, and the institutions of the European Union. Such texts are not legally binding, but may still be of interest when interpreting and applying legal texts, and as normative standards of a more political nature. There are also a number of other recent documents and reports on the issues at hand that are of substantial interest, even if they are not sources of law.

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 main 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.

On the issue of offering legal personality (of one sort of another) to religious communities, there are both hard law and soft law standards of relevance to the case at hand, as well as a fairly widespread European common tradition. The main features are described in the following, though briefly, as a full account would go beyond the scope of the present report.

2. Requirements for legal recognition of religious communities under European and international law

I propose that our report should start by giving a general concise overview of the relevant provisions of the ECHR and the case law of the ECtHR, which will then give a basis for the assessment of the Turkish law and practice in section 4. The relevant questions are: (i) the right to legal personality for religious communities under article 9 cf. article 11, (ii) the right of religious communities to possess property under article 9 cf. article 1 of Protocol 1, and (iii) the right of religious communities of access to court under article 9 cf. article 6. And with regard to the issue of the Ecumenical Patriarchate there is (iv) 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.

Following discussions amongst the rapporteurs, it has been agreed that my colleagues Mr van Dijk and Mr Grabenwarter will provide an overview of the relevant ECHR rules and case law, so I will confine myself to a few observations.

Under the case law of the ECtHR it is clear that the right of freedom of religion is not merely an individual right, but that it also has a collective dimension. Thus the Court 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 from 2000, and then reiterated and developed in the case of *The Metropolitan Church of Bessarabia v. Moldova* 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 .

This has been followed up in later case law, including a number of cases dealing specifically with property rights of religious communities in Turkey.[1]

The core question as regards the present case, is whether the ECtHR case law can be interpreted so as to require that a religious community be given the possibility under national law to register and obtain legal personality *as such* – or whether it is sufficient under the ECHR

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[1] Including but not exhaustive: Fener rum erkek lisesi vafki 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).

if the community can register for example associations for the *support* of the community, but not (neither legally nor factually) identical to the religious community and organization.

Under the case law of the ECtHR it seems clear that a refusal by national authorities to grant the status of legal personality to a community of believers amounts to an infringement of Article 9 (1) cf. Article 11 (1), as this restricts their freedom to pursue their religious beliefs in the forms they have chosen. Such infringements can therefore only be accepted if they are prescribed by law, justified by legitimate aims, and proportional under Articles 9 (2) and 11 (2). The fact that religious communities may be offered alternative ways of formally organizing in an indirect manner, through foundations or associations established in their support, does not take away the infringement, although it may have some bearing on the assessment of proportionality (provided there is legitimate justification).

If religious communities as such are denied access to legal personality, this may have a number of substantive consequences for the way in which they are able to operate. Two areas in which the consequences may be particularly problematic are (i) access to court, and (iii) property ownership. These are also fields in which cases have arisen before national courts and the ECtHR. The basic problem in such cases is usually the lack of legal personality as such, which is an infringement of Articles 9 and 11. But the cases are normally assessed also in conjunction with other relevant articles of the ECHR, which is Article 6 as regards access to court and Article 1 of Protocol 1 as regards property ownership.

Thus there is a requirement under the ECHR Articles 9 and 6 that religious communities must have the possibility of seeking access to court as themselves.[2] It is not enough that they can be represented in the courts by their leaders acting as private persons or by associations or foundations acting on their behalf.

As regards property rights under Article 1 of Protocol 1 this provision does not guarantee the right to acquire property. However, any restriction of the right to acquire and maintain property, as a restriction on the right to freedom of association, requires a legal basis that meets requirements of accessibility, preciseness and predictability. It can also be an infringement of Article 1 of Protocol 1 if the lack of legal personality restricts a religious community from holding on to and maintaining property that it has at some time originally owned. This has been the issue in many of the cases before the ECtHR dealing with property rights of religious communities in Turkey, in which the Court has found there to be violations of the ECHR.

As regards the freedom of religious communities to define their own internal spiritual and ecclesiastical concepts and denominations without interference from the secular authorities this follows directly from Article 9, and must be regarded as a core element of the freedom of religion.

Thus, the conclusion so far is that there are clear legal requirements under the ECHR that are of direct relevance to the issues raised by the PACE in our mandate, both in general and as regards the more specific issues.

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[2] Cf. inter alia the case of the Canea Catholic Church v. Greece of 1997, in which the Court held that the Church had been denied access to court in breach of Article 6, and in this regard stated, inter alia, that “It is not for the Court to rule on the question whether personality in public law or personality in private law would be more appropriate for the applicant church or to encourage it or the Greek Government to take steps to have one or the other conferred. The Court does no more than note that the applicant church, which owns its land and buildings, has been prevented from taking legal proceedings to protect them, …” (para 47).

3. European soft law standards for legal recognition of religious communities

There are also several international and European soft law documents and standards that are of relevance. For the Venice Commission, the most important are the "Guidelines for Review of Legislation Pertaining to Religion or Belief" that 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.

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 problems 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".

The Venice Commission has also issued several other reports of relevance, in which it has assessed national rules in the light of the guidelines. [3]

Another document of particular importance is Resolution 1704 (2010) on "Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (Eastern Greece)", which was passed by the Parliamentary Assembly of the Council of Europe (PACE) on 27 January 2010. The resolution was based on a thorough report made by the rapporteur, Mr Hunault, and passed by the Committee on Legal Affairs and Human Rights.[4] Resolution 1704 (2010) 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;

[3] *Here I would suggest that the secretariat lists the most relevant reports in a footnote.*

[4] Cf. Doc 11860 regarding "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 committee in March 2009.

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; […]

As the quote illustrate, the PACE resolution (and the underlying report) covers basically the same issues as those referred to the Venice Commission.

4. Other relevant reports and documents regarding religious minorities in Turkey

As regards the situation for the non-Muslim religious communities in Turkey, there are also 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.

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.[5] 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.

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

[5] 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).

> 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.

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:[6]

> 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 Alevis 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.

In the 2009 report, it was stated inter alia that: [7]

> 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, 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

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

[7] Cf. SEC(2009) 1334 final, at p. 20-22.

> 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.

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;

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.

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

Following discussions in the working group it has been agreed that the secretariat will draw up a comparative overview on the legal status of religious communities in Europe, and the following are only some preliminary remarks.

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.[8]

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, and etcetera.

How this is regulated differs, with four main categories:

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

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 has however managed to survive into modern times, and it 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 clear resemblance in several ways to the manner in which Turkey has organized its mainstream Sunni Muslim religion, through the Diyanet.

The "public law" model for the most important religious communities is as far as I can see mainly a Germanic institution, which may perhaps not easily be transferred to countries with different legal systems. 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.

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 associations cultuelle. In Norway, the Church of Norway is a state church, organized formally as part of the administration, but for all other religious communities there is a special statute on "Religious

[8] 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 March 2009 Opinion on the Constitutional and Legal provisions Relevant to 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".

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.

Finally, there appears to be some European countries in which there is no special legislation for the legal status of religious communities, and in which they have to resort to the ordinary rules on registering various forms of associations. One example is the Netherlands, where there are no special regulations for religious communities. Another example is England, where all religious communities with the exception of the Church of England have to register as "charities". However, it seems that this is in general practiced in such a way as to allow the religious communities to register as themselves – e.a. they do not have to set up indirect associations acting on their behalf or in their support.

In general it seems that the prevailing context in Europe is one of tolerance as regards the possibility of religious communities to obtain legal personality and exercise the rights inherent in this concept. In most countries this is formally easy, and even in those where it is not, the rules still seem on the whole to be interpreted and applied in a tolerant manner, respecting the needs and characteristics of religious communities.

In conclusion, although there are some differences and exemptions, there is still a clear and widespread common European model – that religious communities as such in some way or another have the possibility of acquiring legal personality as such, without having to go through indirect institutional arrangements involving more or less representative organizations acting legally on their behalf. This is a model that I think the Venice Commission should recommend not only as the most common but also as the *best* model for regulating religious communities.

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

On 9 to 11 November 2009 a mission of the Venice Commission consisting of Mr Grabenwarter, Mr Thomas Markert and myself visited Istanbul and Ankara, and met with the Greek Orthodox Patriarch of Istanbul, as well as with representatives of the Armenian Patriarchate, the Jewish Community, the Catholic Church, the Protestant Churches, the Jehovah's Witnesses, the Tesev Foundation, the EU 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 mission provided us with insight into the complex legal and factual situation in Turkey as regards religious affairs in general and the challenges of the non-Muslim religious communities in particular. We have also studied a number of reports and other documents on these issues.

Most of the religious communities that we met with expressed the view that their position had been 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, many of them stressed that further reform was necessary, and that it was also necessary not only to change the law but also the mentality with which the law is applied, at all levels of the administration.

The basic element in Turkish law as regards religious communities is that they can not 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 status. Instead they have to operate indirectly through foundations or associations.

From our observations, 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 an interpretation. 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.

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.

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.[9] For the Muslim communities, issues related to legal personality and representation are therefore handled by the Diyanet.[10]

For non-Muslim religious communities, the Diyanet can not 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 instruments have clear limitations for religious communities, but both have recently been reformed, making them somewhat more usable.

The Foundation System

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.

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 challenges with having to register property

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[9] 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 mandate of the present report, and which is therefore not for the Venice Commission to assess.

[10] 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.

rights indirectly, in the name of an external foundation and under the management 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.[11] Another problem is 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 is interpreted so as to prohibit the establishment of foundations with a religious purpose or serving the interests of a distinctive religious community.

Despite the wording of article 101 (4) of the Civil Code, it appears that many existing foundations have the clear purpose of supporting distinctive religious communities (both Muslim and non-Muslim), and that 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.

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. Also, there seems to be a great number of foundations devoted to other Islam-oriented activities.

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.[12] 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 also for the most part have old foundations. For religious communities more recently established in Turkey (Protestant churches, Jehovah's Witnesses, and others) there seems to be fewer foundations, and more problems establishing new ones.

Association Law

Unlike in most European countries, 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, 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

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[11] 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*".

[12] 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).

normal requirement, it may in the Turkish setting 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 against article 24 of the Constitution.[13] The case was taken to the courts, which in 2007 declared that the stated purpose was not in breach of article 24, and allowed for the association to be formed.

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.

For the old and long-established non-Muslim religions in Turkey, registering associations for the support of religious activities does not at the time seem to be an option, for several reasons. First, they can not register as such, since the form of an ordinary association may not be tailored to the organizational 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 the 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.

However, the association alternative is still new, and it may be that in time some more of the religious communities may avail themselves of it for specific purposes.

Other aspects of legal personality

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

The concept of legal personality however covers a number of other elements, many of which for the non-Muslim religious communities in Turkey seem to be problematic. The Venice Commission can not do a full examination of these, which would fall outside of the scope of the present study. But there seems 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.[14] 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. Furthermore, there are

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[13] Article 24 of the Turkish Constitution regulates freedom of religion. The first three paragraphs are on then 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."

[14] 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.

other limits, in particular article 14 (4) of the Constitution, stating that “Education and instruction in religion and ethics shall be conducted under state supervision and control”, and the practical application of this.

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

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

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.

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 at can be argued that the Diyanet model takes care of the basic issue of legal representation. It must be in line with European standards to have a system under which the mainstream religious community is organised formally as a legal part of the public administration, with no separate legal personality, as indeed is the case for the Protestant state churches in the UK and some of the Scandinavian countries. For the Muslim communities, the crucial question is whether the Diyanet organization 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 our mandate in this case.

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 it appears that 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.

As far as I can see, this is a question that can be assessed directly as a “hard law” issue under the ECHR. There does not appear to be any significant differences between the hard law standards and the soft law, which builds on the interpretations of the ECHR made by the ECtHR.

As outlined above, the ECtHR has stressed the collective dimension of freedom of religion on a number of occasions, and it has dealt with the issue of legal personality for religious communities in various contexts, directly and indirectly. Based on the relevant case law, it is clear that denying religious communities the possibility to obtain legal personality amounts to an infringement of the ECHR.

The Venice Commission should therefore state that it follows from Article 9 in conjunction with Article 11 that a religious community should have the right (but never the duty) to obtain legal personality as such – in a way that is representative of the religious community itself. It is not sufficient that the members have the right to register foundations or associations (wholly or partly) in support of the community. If the community itself is denied the possibility to acquire legal personality, then this constitutes an infringement of Articles 9 (1) and 11 (1).

Whether such an infringement can be accepted, must be assessed under Articles 9 (2) and 11 (2), depending on whether the national restrictions are prescribed by law, legitimately justified and necessary in a democratic society (proportional).

On this basis, I propose that the Venice Commission should state that it must be considered an infringement of Articles 9 and 11 that the non-Muslim religious communities in Turkey do not have the possibility to register and obtain legal personality as themselves. This infringement follows from national law. However, it is for the outside legal observer very difficult to see that the infringement can be justified with reference to the purposes stated in Articles 9 (2) and 11 (2). Protecting the national concept and principle of “secularism” can not be regarded in itself as a legitimate reason under the ECHR. And it is in our view not possible to see how granting legal personality to the small and peaceful non-Muslim religious communities in Turkey could in any way endanger public order.[15]

Given that there does not appear to be adequate justification for the infringement at hand, it is not necessary for the Venice Commission at this point to assess whether the lack of recognition of legal personality for religious communities as such under Turkish law is a proportional limitation that is “necessary in a democratic society”. It might still be mentioned that under the proportionality assessment it would be relevant to consider to what extent the religious communities have other more indirect ways of obtaining the rights and obligations connected to legal personality (in this case through foundations or associations). However it would appear that in this case the existing alternatives can at best only partially make up for the concrete disadvantages stemming from the lack of legal personality to the free exercise of the religious freedom of the communities at hand.

On this basis the Venice Commission should hold that the general status as regards the lack of legal personality for non-Muslim religious communities as such in Turkey is problematic in light of Articles 9 and 11 of the ECHR.

This conclusion is strengthened by the fact that the present Turkish system is also clearly in reach of the “Guidelines for review of legislation pertaining to religion or belief”, as prepared by the ODIRH and the Venice Commission and adopted by the Venice Commission in 2004 and approved by the OSCE Parliamentary Assembly in 2004. In Section B.8 and F.1 and 2, it is clearly stated 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”. 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.

Furthermore it should be mentioned as a more factual observation that Turkish law is in contrast to the main model in Europe – which is that religious communities as such in one way or the other is allowed to register and obtain legal personality, without having to go (indirectly) by way of other institutional arrangements set up by their members and partially more or less covering their activities and needs.[16] 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.

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[15] There might be examples of *other* religious communities, for example of a fundamentalist or violent nature, for which it may be clearly legitimate for the national authorities to deny legal personality with reference to public order and safety (given that this is a proportionate measure). But none of the non-Muslim religious communities appear to fall anywhere near such a category.

[16] Even if there are some national exemptions I think that the Venice Commission still may and should point out the *main* European model. We may also point out the fact that this is a European legal model that all religious communities benefit from, including Muslim communities registered as legal entities in other European countries.

On this basis, I propose that the Venice Commission should recommend that Turkey should introduce legislation that would make it possible for religious communities to acquire and maintain legal personality.

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 formal associations that would allow the religious communities the right to register as such, in a way corresponding to their nature and characteristics.

2. Challenges of access to court and property ownership

Lack of legal personality for the religious communities is a general problem, which in itself in principle may be regarded as an infringement of Article 9 of the ECHR, in conjunction with Article 11. Furthermore, this may lead to several more concrete and specified problems and challenges. These may then still be seen primarily as a question of Article 9. At the same time, the tradition under the ECHR is to also consider such issues in light of other relevant articles.

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 seem most important – which is access to court under Article 6 and property ownership under Article 1 of Protocol 1.

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. Thus there appears to be a general infringement of Article 6 (1), and it is not easy to see how this can be justified under Article 6 (2).

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 1. Others, however, fall within the scope of the provision. The most problematic issue appears to be that religious communities have been loosing 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 be 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 is no longer met), the properties have been transferred to the state. This may be seen as confiscation or expropriation without compensation, which is a matter under Article 1 of Protocol 1, and has been seen as an infringement by the ECtHR.

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.

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

3. Interpretation and application within the existing model

The principal and clear recommendation of the Venice Commission should be that Turkey comes up with a new system, which will allow the religious communities the possibility to register as such as legal entities and thus acquire legal personality. This would then also take care of the more concrete challenges, such as access to court and property ownership. This is the only model fully compatible with European standards and with the requirements of ECHR Article 9 and other articles.

Until such a general reform may be adopted the Venice Commission should also strongly urge the Turkish authorities to interpret and apply the present legal system (the laws on foundations and associations) in such a way as to minimize 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 also with regard to article 24 of the constitution, article 101 of the civil code, and other potentially relevant rules.

As regards the law on *associations*, there seems at present to be a problem with registering associations wholly or partially for religious purposes. At least there appears to be a lack of clarity as to the exact legal situation. In the example of Jehovah's Witnesses they were first denied registration of an association that would function in their support, and it was only after they had obtained a court ruling that the association could be set up. Other communities may have similar problems, and may not have the resources necessary to overcome them.

The Venice Commission should therefore recommend Turkish authorities to interpret and apply the present law on associations in such a way as to allow for religious communities as such to register as associations, or in the alternative at least to allow for the registration of associations the sole purpose of which is to support religious activities and the internal organization of which closely mirrors the particular institutional and ecclesiastical arrangements of the community.

As regards the law on *foundations*, there seems 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 it is all the more important under the ECHR that this is a easily accessible system – making it easy to set up new foundations, or for old foundations to register new property and to exercise effective ownership over the existing properties.

In this regard it appears 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 should state clearly that we 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 specific religious activities. The more so if this is the only way that religious communities in Turkey may actually hold property. So my proposal would be that the Venice Commission 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.

Furthermore I suggest we make a brief reference to other problems related to the foundation system, in particular the fact that the recent reforms do not settle adequately the question of return of property seized by the authorities after 1974, as also pointed out by Mr Hunault in his report to the PACE (para 95) and later also expressed by the EU. And we should firmly recommend that these cases are dealt with and resolved in a manner compatible with the requirements of the ECHR.

V. Assessment of the Ecumenical Status of the Greek Orthodox Patriarch of Constantinople

1. The ecumenical character of the Patriarchate

The second part of the mandate from the PACE 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.[17]

The problem in this regard is that Turkish authorities do not recognize the Patriarch as "ecumenical", and regards him only as leader of the Greek Orthodox Church in Turkey, and even as such the Patriarchate does not have any legal personality, nor the possibility to own property itself, employ clergy, access to court, etcetera.

Before assessing this, two basic facts should be emphasized. The first is that the Patriarchate considers *itself* "ecumenical", a title that has been used by the Greek 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.

The second fact is that the Greek Orthodox Patriarch in Istanbul is recognized as "ecumenical" by Orthodox churches *in other countries*. 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 recognized broadly as ecumenical spiritual leader by other autonomous and autocephalous Orthodox churches.[18] The Patriarch is first in honor 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 communion, 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 Church unity.

On this basis, the Venice Commission should hold 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.

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[17] The Patriarchate refers to itself as the Ecumenical Patriarchate of Constantinople, while the Turkish Government usually refers to it as the Greek Orthodox Patriarchate of the Phanar (the district in Istanbul where it resides). In the following it will be referred to simply as "the Patriarchate", while bearing in mind that there is also an Armenian Patriarch in Istanbul.

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

2. Assessment of the Turkish government's lack of recognition of the ecumenical nature of the Patriarchate

As a starting point, the Venice Commission should state that whether or not the Patriarchate is "ecumenical" is not for it to assess. This is for the Patriarchate and for the Orthodox Church itself to determine. The Venice Commission should also state that for its part it recognizes the ecumenical nature of the institution, and also the freedom of this and any other religious community to define its own ecclesiastical concepts and denominations.

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,[19] and also 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 church of the Greek minority in Turkey", and that "there is no legal basis for the claim that the Patriarchate is Ecumenical".[20]

The formal basis for the denial of the Turkish authorities and Court of Cassation of the ecumenical nature of the Patriarchate seems to be partly that this is an issue for Turkish domestic law to decide, and partly the Treaty of Lausanne signed in 1923 between the Republic of Turkey and the Allied Powers. 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,[21] 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.[22]

When assessing this question under European standards, the Venice Commission should start by stating clearly that the right of freedom of religion as protected by Article 9 of the ECHR also covers the right of religious communities to determine for themselves the spiritual and ecclesiastical status and titles of their leaders, without government interference. This is an indisputable and self-evident element of freedom of religion, which was confirmed by the ECtHR in 2009 in a case in which it held that the Bulgarian authorities had breached Article 9 by trying to interfere in an internal dispute over leadership in the Bulgarian Orthodox Church.[23]

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[19] 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 emphasize that their presence does not imply recognition of his title.

[20] 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.

[21] 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.

[22] 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.

[23] Cf. ECtHR, Holy Synod of the Bulgarian Orthodox Church and Others v. Bulgaria, judgment of 22 January 2009, § 104.

Thus, to the extent that the Turkish government should actively interfere with the right of the Patriarchate to call itself "ecumenical", then this should in the view of the Venice Commission be considered a clear infringement of ECHR Article 9 (1), which can only be accepted under Article 9 (2) if it is prescribed by law, justified by reference to legitimate requirements and proportional. The Venice Commission should also point out that it can not see how any of the requirements listed in Article 9 (2) would possibly be applicable in such a case, as neither public safety, public order nor any of the other concerns can be affected, and certainly not proportionally, by the Patriarchate using its ancient title of "ecumenical".

Whether and to what extent such infringements actually occur is not for the Venice Commission to assess. It should be emphasized 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 titling himself 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 signs of change, and recently Prime Minister Erdogan has been quoted as saying that the title of ecumenical is an internal affair for the Orthodox Church.

The Venice Commission should however be clear that to the extent that if the national authorities should try – directly or indirectly, legally or actually – to obstruct or hinder the Patriarchate from using the title "ecumenical", then this will constitute an infringement under Article 9 for which it will be difficult to see how legitimate and proportional justification can be found.

As for the 2007 judgment of the Court of Cassation, the Venice Commission should state, first, that in its opinion no secular court has any competence or jurisdiction to rule on whether a religious leader is "ecumenical" or not. Thus the judgment in the case at hand has no interest or bearing on this point, as it is simply outside the realm of the law. The Patriarchate is neither more nor less ecumenical as a result of the judgment. However, the judgment is still troubling, in the sense that the fact that a national court interferes in this way with the internal ecclesiastical status of a religious leader may in itself arguably be seen as an infringement of Article 9.

As for the argument that it follows from the 1923 Lausanne Treaty that the Patriarchate is not ecumenical, the Venice Commission should remark that this can not be supported for several reasons.

First, the fundamental rights protected by the ECHR today clearly take precedence over the Lausanne Treaty. If freedom of religion protects the right of the Patriarchate to call itself "ecumenical" (or any other title for that matter) then this right can not be set aside with reference to a treaty from 1923. Turkish courts and authorities are anyway bound to respect the ECHR.

Second, the Patriarchate itself was not party to the Lausanne Treaty. This was a treaty between Turkey and the Allied Powers, none of which had any jurisdiction over the internal ecclesiastical denominations of the Orthodox Church. So even if the parties had agreed to this, the Patriarchate would not be bound by it.

Third, the Venice Commission should state that having scrutinized the Lausanne Treaty and the relevant minutes there is no evidence whatsoever to the effect that the Parties meant to abolish the “ecumenical” status of the Patriarchate.[24] There is nothing on this in the provisions of the treaty itself, which do not mention the Patriarchate. This indeed seems to be acknowledged by the Turkish authorities, which instead refers 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 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. These were administrative competences that the Ottoman Empire had bestowed on the Patriarchate, and which were abolished. However, it is clear from the statements made by Lord Curzon that he did nor 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.[25] 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.

On this basis the Venice Commission should hold that the 1923 Treaty of Lausanne in no way limits the right of the Patriarchate to title itself ecumenical. And 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.

Having said this, the Venice Commission should also emphasize that it can not 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 recognize 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 recognize and respect the ecumenical nature of the Patriarchate.

On this basis the Venice Commission should recommend that the Turkish Government recognizes the ecumenical nature of the Orthodox Patriarchate of Istanbul, thereby promoting the idea of religious freedom and sending a sign of tolerance and respect.

3. Other basic challenges for the Patriarchate

Although important for symbolic reasons, and as a matter of principle, the lack of recognition by 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 stand at a

[24] 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.

[25] The Greek representative, Mr Veniselos, for example emphasized the importance (also for Turkey itself) that Istanbul should “continue to be the residence of the head of the Orthodox Church”.

mere 2500 people. This raises fundamental challenges to an institution that has a continuous history in the city since it was founded in 330 by Constantine, with the present Patriarch the 270th in line. 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 Greek 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.

It falls outside of the mandate of the report for the Venice Commission to enter into a full 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 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.

Having said this, the Venice Commission can not 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.

In this regard, the Venice Commission should also stress 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 may easily be regarded as an infringement of Article 9 of the ECHR.

As for the lack of legal personality of the Patriarchate, the Venice Commission refers to its position in the previous section, where the primary view is that the Turkish legislation should be amended so as to give all religious communities as such the possibility of obtaining legal personality. In the alternative, given that this is not done, the Venice Commission strongly recommends that the legislation is interpreted and applied in such a way as to ensure that the rights of the religious communities to freedom of religion, freedom of association, property ownership, access to court and other basic rights are respected in full.

VI. Conclusions

I propose that the Venice Commission should start by stating that it is aware of the complex and sensitive situation with regard to religion in Turkey, and the particular understanding of the concept of secularism in the Turkish political and constitutional tradition.

Furthermore, the Venice Commission should recognize and welcome the fact that substantial improvements have been made in recent years in order to reform the legislation so as to improve the situation for the non-Muslim religious communities in Turkey, in particular as regards property rights under the foundation system.

The Venice Commission should also acknowledge that this is an ongoing process, which necessarily takes time, and which requires not only legislative reforms but also a change in mentality in the administration and the courts.

Having said that, the Venice Commission should emphasize that the fundamental right of freedom of religion as protected by Article 9 of the ECHR includes, inter alia, the possibility for religious communities as such to obtain legal personality, the possibility of access to court, the protection of property rights, the determination of religious and ecclesiastical titles and denominations, the possibility of possession of places of worship and the right to educate and employ clergy. These are all issues that to some extent still appears to be problematic as regards some or all of the non-Muslim religious minorities in Turkey.

Furthermore, the Venice Commission should in my view recommend that the Turkish authorities should:

- introduce legislation and practice which would make it possible for all non-Muslim religious communities as such to acquire legal personality;

- if this is not done, then at the least interpret and apply existing legislation, including the laws on foundations and associations, in such a way as to minimize the restrictions on freedom of religion following from the fact that the religious communities do not themselves have legal personality;

- grant the non-Muslim religious communities as such access to court;

- address and resolve the property issues of the non-Muslim religious communities;

- allow for the free use without interference of the Greek Orthodox Patriarchate of the title "Ecumenical";

- allow for the Patriarch to exercise his Ecumenical functions, in such a way as to ensure the continued existence of the Patriarchate in Istanbul.