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TURKEY: Constitutional Court judgment on Armenian Patriarchal election – a precedent?

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Turkey's Constitutional Court ruled in May 2019 that state interference in the election to replace the ailing Armenian Patriarch was not prescribed by law and not necessary in a democratic society. The precedent is relevant for similar cases over interference in the internal affairs of other religious communities, particularly those the state considers Lausanne Treaty minorities. But any impact remains to be seen.

Turkey's Constitutional Court (Anayasa Mahkemesi – AYM) issued an important judgment in May 2019 addressing state interference in the election of a religious leader, namely the long-standing obstruction of the election of a Patriarch for the Armenian community in Turkey. The Court found such interference not prescribed by law and not necessary in a democratic society.

The Armenian Apostolic Church community is the largest Christian community in Turkey.

State interference in the internal affairs of religious or belief communities is a long-standing concern that impacts a number of religious or belief communities in critical ways.

In theory, the Constitutional Court judgment could be applied to other religious communities in Turkey which endure such state interference (http://www.forum18.org/archive.php?article_id=1477). The judgment sets a precedent and should guide other courts when considering analogous cases, though whether this happens in practice remains to be seen.

While the judgment includes important findings related to the state's unjustified interference in the internal affairs of the Armenian community, it also raises questions about whether the Constitutional Court is an effective domestic remedy or an actor that conveniently blocks applications to the European Court of Human Rights (ECtHR) in Strasbourg, thus closing the door to international supervision.

The state had prevented the Armenian community from electing its religious leader between 2009, when the then Patriarch Mesrob Mutafyan could no longer perform his duties due to illness, and 2019, when the community finally elected Bishop Sahak Mashalyan as the new Patriarch.

The December 2019 election of the new Patriarch became possible only after the state authorities allowed elections to go ahead following the death in March 2019 of Mutafyan, the 84th Patriarch of Turkey's Armenians.

The state's obstruction of the election of a Patriarch by the Armenian community had affected community affairs in very negative ways (http://www.forum18.org/archive.php?article_id=2352).

Constitutional court judgment

The Turkish Constitutional Court's judgment of 22 May 2019 on the individual application made by two local Armenians Levon Berç Kuzukoğlu and Ohannes Garbis Balmumciyan in 2014 (Application No. 2014/17354) has significant implications for the interferences in the internal affairs of religious or belief communities in Turkey.

The applicants had complained that the state's refusal of the request they made for the election of a Patriarch for Turkey's Armenians violated their right to freedom of religion.

The Istanbul 3rd Administrative Court rejected Kuzukoğlu and Balmumciyan's original application on 27 March 2012. It argued that, under the 1863 Regulation for the Armenian Millet (ethno-religious community) and subsequent Interior Ministry directives (talimatname), the Patriarchal seat can be considered vacant only following the death or resignation of the Patriarch.

The Administrative Court ruled that since the Patriarch (Mesrob Mutafyan) was neither dead nor had given his resignation as of 4

October 1998, elections could not be held. The Court therefore found that the state's refusal of the request for a new election was not incompatible with the law.

The applicants appealed against this decision, but the Court of Cassation (10th Chamber) rejected their appeal on 23 November 2015.

Constitutional Court finds state interference not prescribed by law

The Constitutional Court's May 2019 judgment presents an accurate description of the state interference in the Armenian community's right to elect its own leader (http://www.forum18.org/archive.php?article_id=2352), both before the applicants lodged their case and subsequently.

When considering the applicable law, the Constitutional Court refers to the 1863 Regulation for the Armenian Millet (ethno-religious community) and international legal provisions, including the European Convention on Human Rights and the 1923 Lausanne Peace Treaty's provisions on the protection of non-Muslims in Turkey.

A key question here concerns the relevance of the 1863 Regulation that regulates the election of Turkey's Armenian Patriarch (Articles 1-7), the various organs of the Patriarchate and their elections, and the functioning of the charity and social bodies within the Patriarchate, and also includes provisions on the Jerusalem Patriarchate (which was in 1863 under the Ottoman Empire). Article 2 sets out how elections take place when the Patriarch's seat becomes vacant for various reasons, such as "the death of the Patriarch, resignation and other".

While the 1863 Regulation is a remnant from the Ottoman era, throughout the Republican era the state authorities have left the procedure of the four elections for the Armenian Patriarch that have taken place (in 1950, 1961, 1990, 1998 and 2019) partly unchanged, but with some arbitrary changes. These have left the Armenian community with only limited influence over its own election and with no way to foresee what procedures the state would impose.

For the most part, the election Directives were based on the Cabinet Decree of 18 September 1961 (No. 511654), which had been issued only for that year's Patriarchal election and which included no provisions for future elections. Despite this, the Interior Ministry has continued to use this Decree.

The Interior Ministry's submission to the Constitutional Court states that the measures taken by the authorities derive from "the state's positive obligation to organise the religious field".

The Constitutional Court's judgment describes the issue as one that essentially relates to religious freedom that is protected under Article 24 of Turkey's Constitution. Equally, the Constitutional Court recognises as relevant the Lausanne Peace Treaty, specifically Article 38 that refers to the freedom to practice religion, and the applicable jurisprudence of the ECtHR in Strasbourg.

The Constitutional Court notes that the election of a religious leader constitutes a form of manifestation of religion and, as such, is protected under the Constitution.

In addition, the Constitutional Court finds that measures that led to the appointment of a Patriarchal Vicar-General (in 2010) (http://www.forum18.org/archive.php?article_id=1477) occurred not as a result of a process that took place within the competing civilian and spiritual initiatives in the Armenian community, but as a result of "state pressure that was unconstitutional".

As a result, the Constitutional Court finds that there has been interference in the Armenian community's right to freedom of religion or belief, a freedom that is guaranteed under Article 24 of the Constitution.

A crucial finding in the judgment concerns the legality of the restriction. The Constitutional Court notes that it may be considered that public authorities have the authority to organise the election of the Armenian Patriarch under the 1863 Regulation and practice in subsequent elections.

However, the Constitutional Court rules that under Article 13 of the Constitution, fundamental rights may only be restricted by law. It notes that, in the present case, a legal provision that can prevent arbitrary actions by public authorities, that will enable persons to know the law, that is accessible, foreseeable and absolute is absent. As a result, the restriction cannot be considered as being prescribed by law.

While the Constitutional Court found that the restrictions pursued a legitimate aim, that of protecting the right to freedom of religion of the members of the Armenian community, other criteria for permissible limitations were not fulfilled.

Moreover, the Constitutional Court noted that events that occurred after the application was submitted in 2014 demonstrate the

state's continuing desire to determine the conditions under which elections for an Armenian Patriarch might take place.

In conclusion, the Constitutional Court found that the state has not been able to demonstrate a pressing social need that overrides the "spirit of Armenian traditions" and the "Armenian community's will". Therefore the interference in the applicants' right to freedom of religion or belief by way of refusing the request to hold Patriarchal elections cannot be considered compatible with the requirements of a democratic society, and Article 24 of the Constitution had thus been violated.

The judgment provides an authoritative interpretation of applicable law and therefore should guide future practice. Patriarch Mashalyan welcomed the Constitutional Court judgment, adding on 16 March 2020 that "it should be taken into account in the preparation of directives for elections in the future".

Sebu Aslangil, the lawyer in the case, commented to Forum 18 in February 2020 that the Constitutional Court judgment is a precedent in its reference to legality, secularism and the right to freedom of religion or belief. However, he argued that it is important that these judgments continue and that similar judgments concerning analogous applications become the norm for all court decisions.

Constitutional Court - effective domestic remedy in religious freedom cases?

The Constitutional Court's judgment is thorough and well argued, and the finding that the restriction on the way the Armenian community chooses its religious leader was not prescribed by law is particularly significant. On the other hand, a significant shortcoming of the Constitutional Court's judgment was its timing.

The application was lodged in 2014, but the Constitutional Court did not rule until May 2019, two months after the 8 March death of Patriarch Mesrob Mutafyan. Therefore the judgment came when the state's arguments that an election could not go ahead no longer existed.

The timing might be interpreted as a sign of the Constitutional Court's hesitation to contradict state practice in situations where domestic practice clearly contradicts human rights standards.

Patriarch Mashalyan commented that the Constitutional Court is independent and therefore the timing of the judgment did not raise any questions. Aslangil, however, maintained that "had it been issued before the death of Mesrob Mutafyan, it would have been a very strong judgment".

Where it is evident that legitimising state practice that is not compatible with human rights law in the area of freedom of religion or belief would jeopardise the Constitutional Court's position as an effective domestic remedy, the Court's practice has been to postpone judgment.

That over 20 individual applications on conscientious objection to military service are still pending with the Constitutional Court is compatible with this finding. The Constitutional Court had referred an individual application on conscientious objection to the Plenary Chamber of the Constitutional Court in 2016. The Court has not yet ruled on any of these cases.

Patriarchal election interference despite Constitutional Court judgment

After the May 2019 Constitutional Court judgment, the state authorities continued to interfere in the way the Armenian community elected its new leader following Patriarch Mutafyan's death two months earlier. The interference came despite the binding nature of Constitutional Court judgments for legislative, executive and judicial organs, administrative authorities, and real and legal persons under Article 153 of the Constitution.

The Armenian community started the process of electing the 85th Patriarch by forming an Election Steering Committee (Mütesebbis Heyet). The Interior Ministry, however, sent the directive for the election which stipulated that the future Patriarch had to be "from among the class of bishops of the Armenian Patriarchate of Istanbul", that is, those serving directly in Istanbul. This effectively reduced the pool of candidates to just two.

Views in the Armenian community differed on whether this interference was in accordance with the law and/or justified. Patriarch Mashalyan considered the directive as "based on the 1863 Regulation" and not prepared "despite the Constitutional Court judgment". On the other hand, the lawyer Aslangil commented that the state administration, including the Interior Ministry and the Court of Cassation, demonstrated that they were in no way affected by the judgment.

The Interior Ministry not only changed the criteria for candidates, but also influenced the election of the Locum Tenens (temporary leader, Deghabah) so that the election was between only two candidates. "This is 100 per cent in contradiction to the Constitutional Court judgment," Aslangil insists. The Election Steering Committee, however, did not object to the state-imposed changes in the criteria for the elections.

Aslangil appealed to the Administrative Court in October 2019, objecting to the Interior Ministry's interference in the Patriarchal elections then in preparation. However, the Administrative Court has yet to give a ruling, and there is no limit as to how long it can take to do so. According to Aslangil, were the Administrative Court to reject the application, the applicants could challenge this decision directly to the Constitutional Court. However, this could then also cause the 2019 election to "lose its legitimacy".

Administrative Court and Court of Cassation decisions on non-Muslim minority issues have, since the 1960s, been overwhelmingly against the interests of these communities, Aslangil complains.

The latest of these judgments concerned Archbishop Karekin Bekdjian, the Istanbul-born spiritual leader of Germany's Armenian community. He had challenged the state's move to annul his election in March 2017 as Locum Tenens of the Patriarchate (http://www.forum18.org/archive.php?article_id=2352). Ankara Administrative Court ruled in December 2019 that since the new Patriarch has now been elected, there is no reason for this case to be reviewed. Aslangil objected to this ruling, which is still awaiting court consideration.

Aslangil, the lawyer, commented that administrative courts do not have the necessary expertise to deal with these cases and therefore hesitate to give bold decisions. Asked what needs to be done, he responded: "The Constitutional Court has to reject our case so that we can go to the ECtHR."

Only once a case has been considered by the Constitutional Court can applicants lodge a case to the ECtHR in Strasbourg (http://www.forum18.org/archive.php?article_id=1855).

Commenting on the interference, Garo Paylan, an Armenian MP from the HDP (Halkların Demokratik Partisi – People's Democratic Party) at the time the directive was sent to the Election Steering Committee, told Bianet news agency on 24 September 2019 that under these circumstances the coming elections "cannot be called an election".

Paylan pointed out that in previous elections for a new Armenian Patriarch, candidacy has been open to Armenian clerics from around the world, not just to those serving directly in the Patriarchate in Istanbul. "There are many clerics from Sivas, Malatya, Adana and Istanbul, and all of these candidates were able to participate in all elections, they had the right to be elected," he added.

Is untimely justice really justice?

The Constitutional Court's May 2019 finding is significant in ruling that the state interference in the election of an Armenian Patriarch is not prescribed by law and not necessary in a democratic society. It also sets a precedent and is thus relevant for similar cases over state interference in the internal affairs of other religious communities in Turkey, more specifically those considered as minorities by the state under the Lausanne Peace Treaty (such as the Greek Orthodox or the Jews). Whether this happens in practice remains to be seen.

If the Constitutional Court consistently delivers this line of judgments, it could become an effective agent of change in Turkey. However, it cannot be overlooked that the timing of the judgment in May 2019 played into the hands of the Constitutional Court and the authorities.

The judgment raised the profile of the Constitutional Court as a high court delivering a judgment in line with ECtHR jurisprudence. Yet, due to its timing, the judgment had no impact on rectifying the injustice that the Armenian community experienced. It also closed the door for an application to be made to the ECtHR in Strasbourg, thus blocking international supervision of the implementation of the judgment.

Also as a result of the timing of the judgment, the authorities did not have to deal with an authoritative judgment on the state's unjustified interference in the election. (END)

For more background, see Forum 18's Turkey religious freedom survey (http://www.forum18.org/archive.php?article_id=1916), and the Norwegian Helsinki Committee: Turkey Freedom of Belief Initiative (NHC:IÖG) (<http://www.inancozgurlugugirisimi.org>)

More analyses and commentaries on freedom of thought, conscience and belief in Turkey (<http://www.forum18.org/Archive.php?query=&religion=all&country=68>)

Forum 18's compilation of Organisation for Security and Co-operation in Europe (OSCE) freedom of religion or belief commitments (http://www.forum18.org/Archive.php?article_id=1351)

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