

30 November 2011

TURKEY: The new Constitution drafting process and freedom of religion or belief

By Mine Yildirim, Åbo Akademi Uni. and

Turkey's new Constitution drafting process offers many possibilities for the protection of freedom of religion or belief. Forum 18 News Service notes that the constitutional legal framework will determine how far religious freedom will be protected. Questions that remain to be answered include: Will the Diyanet, or Presidency of Religious Affairs under the Prime Minister, continue to be identified as a constitutional body? Will manifestations of religion or belief in worship, practice, teaching and observance be explicitly protected? Will "laiklik", often perhaps misleadingly translated as "secularism", be maintained in the new Constitution? Will Article 174 ("Preservation of Reform Laws") of the current 1982 Constitution be deleted or re-interpreted? Recent developments on conscientious objection and ongoing problems resulting from legislation and practice suggest that, unless these issues are addressed, there may not be significant improvement in the constitutional protection of freedom of religion or belief for all.

The process of drafting Turkey's new Constitution has produced expectations that this will lead to progress in protecting freedom of religion or belief. Many questions are open, and the possible answers that the drafting process produces need to be monitored closely. The issues that affect the legal framework for protecting religious freedom are many.

These include: Will the Diyanet, or Presidency of Religious Affairs under the Prime Minister, continue to be identified as a constitutional body? Will manifestations of religion or belief in worship, practice, teaching and observance be explicitly protected? Will "laiklik", often perhaps misleadingly translated as secularism, be maintained in the new Constitution? Will Article 174 ("Preservation of Reform Laws") of the current 1982 Constitution be deleted or re-interpreted?

It is vital that the new Constitution enshrines full guarantees of freedom of religion or belief for all including agnostics and atheists, fully in line with Turkey's international human rights obligations. In this regard, reform of both the Constitution and legislation is essential (see F18News 7 February 2011 http://www.forum18.org/Archive.php?article_id=1537). But on its own - without good laws, regulations and state actions - a Constitution can have only a limited impact in generating practical change in the daily lives of people belonging to minority religious and belief communities (see F18News 27 June 2011 http://www.forum18.org/Archive.php?article_id=1585).

The Process

The Constitutional Reconciliation Commission (AUK), which is chaired by the Grand National Assembly [parliament] Speaker Cemil Cicek, has been assigned the task of constitution drafting. The members of the AUK are from the ruling Justice and Development Party (AKP) and the main opposition party the Republican People's Party (CHP), with other members from the opposition Nationalist Movement Party (MHP) and Peace and Democracy Party (BDP). That AUK decisions will only be made unanimously is very significant, and raises hopes that the new Constitution may enjoy a broad basis of consensus. Topics where no unanimous decision can be reached will be re-evaluated at a time the AUK deems appropriate.

The AUK seems eager to make this process open to submissions from all sectors of society, including political parties, constitutional organisations, professional organisations, trade unions, NGOs, foundations, and religious communities. The AUK's work will be in three phases. The first phase consists of public participation including receiving submissions, data collecting and assessment. This phase is intended to finish by the end of April 2012 (see <http://yenianayasa.tbmm.gov.tr/calismaesaslari.aspx>). Following this the Constitution's principles and a draft text will be produced, followed by a third phase of public debate on this and changes following public discussion. The AUK aims to finish its work by the end of 2012, when it will be considered by the General Assembly of the Turkish parliament, the Grand National Assembly.

Although it is highly unlikely that the new Constitution will solve all of Turkey's problems in respecting freedom of thought, conscience, or belief, the process itself may be very helpful in making progress towards that goal.

Firstly, the process may help create a mentality change in thinking about Turkish identity. Contemporary nationalist attitudes – a

powerful force in state and society - see "threats" from "others" who do not fit the nationalist stereotype of who is Turkish, including non-Sunni Muslim communities (see F18News 29 November 2007 http://www.forum18.org/Archive.php?article_id=1053).

Secondly, the process may open up for public debate the provisions of the current Constitution and laws which prevent people in Turkey from fully enjoying the right to freedom of religion or belief.

Mentality Change?

Possibly the greatest contribution of the new Constitution process may be encouraging public acceptance of a pluralist approach to state policies, and relationships between citizens and the state.

The current Constitution glorifies the state, as against enshrining respect for the individual person, and privileges Turkish nationalism. This does not set out a framework which encourages the development of the pluralistic democracy Turkey aspires to become.

Public discussions on a new Constitution, including negotiations between political parties, and the contributions of NGOs and minorities are contributing to the development of an open society – a Turkey that is "more free", as some put it. This encourages a change of mentality which recognises the many parts of Turkish society. But defence of the current Constitution's general outlook is also very widely heard in Turkey.

"Laiklik", or "Turkish secularism"

"Laiklik", or "Turkish secularism", has a great impact on the protection of freedom of religion or belief. Its meaning is very different from either the French concept of "laïcité", or what many outside Turkey understand by the term "secularism". Laiklik is strongly protected in the 1982 Constitution as a principle and is described as "separation of state and religion". But in practice it means protection of the state from the influence of religion through close state supervision of religious activity, and less autonomy of religious communities than in many other countries (see F18News 7 February 2011 http://www.forum18.org/Archive.php?article_id=1537).

The greatest problem of laiklik is that there is not one meaning of it; there are several, with for example different meanings used by different political parties.

The drafting process offers the AKP an opportunity to enshrine in the new Constitution its own version of laiklik, as the ruling party will be the major actor in formulating the Constitution. Prime Minister Recep Tayyip Erdogan, in speeches he gave during his Arab Spring tour, said that laiklik to him means that the state keeps an equal distance to all religion. At the same time he acknowledged his religious identity by stating that he himself is a Muslim. Yet when one compares these statements with AKP policies on freedom of religion or belief in recent years, there is a lack of clarity as to what the AKP really thinks (see F18News 27 June 2011 http://www.forum18.org/Archive.php?article_id=1585).

In defining what the new Constitution means by laiklik, the AKP will have to find a balance between the demands of "conservatives", "nationalists" and "secularists" - all of whom have differing understandings. The AKP will also have to take account of the normative demands of international law, for example judgments of the European Court of Human Rights (ECtHR) in Strasbourg demanding a neutral role for the state. The drafting process will reveal what this will mean for issues at the intersection of freedom of religion and belief and nationalism.

These issues include but are not limited to: the Diyanet (see F18News 4 May 2011 http://www.forum18.org/Archive.php?article_id=1567); compulsory school religion classes (see F18News 23 August 2011 http://www.forum18.org/Archive.php?article_id=1603); obligatory recording of religious identity in national identity cards (see F18News 8 October 2010 http://www.forum18.org/Archive.php?article_id=1496); accommodation of manifestations of religion, particularly the headscarf in the public school and workplace (see the commentary by T. Jeremy Gunn on the European Court of Human Rights' judgment in the Sahin case <http://www.strasbourgconsortium.org/document.php?DocumentID=3846>); and the lack of an adequate legal entity status for religious or belief communities (see F18News 7 February 2011 http://www.forum18.org/Archive.php?article_id=1537).

The main opposition party, the CHP - through which the Republic's founder, Mustafa Kemal Atatürk, led Turkey as a one-party state for many years - is the main political defender of laiklik. For a significant group of Kemalists, laiklik has meant restricting the influence of religion – especially Islam – on the state by the state restricting the exercise of freedom of religion or belief. This understanding of laiklik promotes policies that exclude manifestations of religion in the public sphere. And many in the CHP are determined to keep it this way. The CHP's Constitution draft proposes a short Preamble that states the qualities of the Republic as "laik, democratic, social and respectful of human rights". It also proposes taking out "Turkishness" and using the term "citizen" in its stead (see F18News 27 June 2011 http://www.forum18.org/Archive.php?article_id=1585).

Whatever concept of laiklik makes its way into the new Constitution, it will find its meaning in related laws and their interpretation.

And the important point is that the state's role and actions must come into line with its obligations under international human rights standards.

Preservation of Reform Laws

Article 174 ("Preservation of Reform Laws") of the current Turkish Constitution states: "No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim (..) to safeguard the secular [laik] character of the Republic.."

There is no indication on whether or not this Article will be preserved in the new Constitution. The Reform Laws are directly or indirectly linked to the active protection of laiklik (as constructed by the founders of the Republic). They include: Act No. 430 of 3 March 1924 ("Unification of the Educational System"), which keeps all religious education under state control (see F18News 5 January 2011 http://www.forum18.org/Archive.php?article_id=1526); Act No. 2596 of 3 December 1934 ("Prohibition of the Wearing of Certain [Muslim religious] Garments"); and Act No. 677 of 30 November 1934 (1925) ("Closure of Dervish Convents and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles") (LADLS). This Act, among other things, closed Alevi places of worship (see F18News 2 March 2011 http://www.forum18.org/Archive.php?article_id=1549) and prevents their leaders from using their religious titles (see F18News Turkey religious freedom survey http://www.forum18.org/Archive.php?article_id=1379).

Whether the Reform Laws will be preserved in the new Constitution, and if so to what extent, will be a contentious issue. It is possible that the laws will be debated individually, rather than as a package. The CHP, the natural defender of the Reform Laws, has said that they have no "red lines" in negotiations. But only time will tell what this means. Some of the Reform Laws are not applied in practice; it has been many years since a fine has been imposed under Act No. 671 of 25 November 1934 (1925) ("Wearing of Hats") for failing to wear a hat. The prohibition on the use of Alevi titles also seems to be no longer enforced. But other Reform Laws, such as Act 677 (LADLS) and Act 430 ("Unification of the Educational System"), will be fiercely debated.

Under LADLS Dervish Lodges, used mostly by Sufi orders, are still closed. Most have been turned into museums where believers cannot meet for worship, and can visit only by purchasing tickets. Some argue that one of the greatest obstacles to recognising cemevi (places of worship of Alevis, who may be around one third of the population) is LADLS, while other do not see it as an obstacle. This issue will need to be addressed in the Constitution drafting process.

If LADLS is abolished, many complex issues will immediately arise. For example: Will the Dervish lodges and shrines be given to whichever religious communities have a link with them? The properties of the lodges and shrines were transferred to the Directorate-General of Foundations. This transfer is likely to be a source of problems if there are attempts to recover the property. Under the government's recent Restitution Decree, it is impossible to recover similar property which belonged to Christian community foundations which no longer exist (see F18News 6 October 2011 http://www.forum18.org/Archive.php?article_id=1621).

But it is highly unlikely that LADLS will be abolished. Instead, recognition of cemevi as places of worship may be allowed through an addition to LADLS, stating that the cemevi will not be regarded as a "tekke" (place of worship) within the meaning of LADLS - or indeed through another formula.

But even this will not remove all obstacles to dealing with this one issue. In legal cases, the state has relied on an opinion of the Diyanet that cemevis are not places of worship, as Muslims worship in mosques – even though the Diyanet has no legal authority in this matter (see F18News 2 March 2011 http://www.forum18.org/Archive.php?article_id=1549).

Senol Kilic, of the Association of Liberal Thinking, argued in the Star newspaper on 14 November that even though the LADLS provision is problematic for Sunni Sufi movements, it is in practice not applied to them. But for the Alevis, Bektashi and Nusayri it still poses a problem as they cannot use the dervish lodges for worship and similar purposes. LADLS seems to function - for many - as a security "on paper" against the influence of Islamic religious communities. It should be remembered that no religious community in Turkey has legal personality (see F18News 7 February 2011 http://www.forum18.org/Archive.php?article_id=1537).

Constitutional protection of freedom of religion or belief

Article 24 ("Freedom of Religion and Conscience") of the existing Constitution protects the freedom to have a religion or belief and freedom to worship, and regulates the teaching of religion. But it does not explicitly recognise either the right to change one's religion or belief, or to manifest one's religion or belief "in worship, teaching, practice and observance" as international human rights standards put it. So a good step forward would be the incorporation of Article 9 ("Freedom of thought, conscience and religion") of the European Convention on Human Rights and Fundamental Freedoms (ECHR) which Turkey ratified in 1954, into the new Constitution (see F18News 7 February 2011 http://www.forum18.org/Archive.php?article_id=1537).

Explicit protection of manifestations of religion may reinforce the acceptance of normal religious activity that may go unprotected under a narrow interpretation of the right to "have a religion or belief" and "worship". Use of religious symbols by individuals in

various walks of life may in this way be given stronger protection. For example, Minister of Family and Social Policies Ayse Sahin on 4 November stated that the headscarf problem should be solved through the Constitution.

A broader scope for manifestation may also open the way for the recognition of the right to conscientious objection to military service. Currently, Turkey claims that conscientious objection is not protected under the right to freedom of religion or belief (see F18News 17 March 2010 http://www.forum18.org/Archive.php?article_id=1053). But on 22 November the ECtHR in Strasbourg found in the case of Jehovah's Witness conscientious objector Yunus Ercep v. Turkey (Application 43965/04) that denying the right to conscientious objection to military service breaks Article 9 (see <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=895413&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>). Prime Minister Erdogan, however, said on 22 November that "what is called 'conscientious objection' has never been in our agenda".

It has been reported in the Turkish media that the draft of a new law defines conscientious objection as a crime, the punishment for which will be to do public service for around twice as long as military service. After this, the "criminal" will be considered to have fulfilled their duty. On 27 November Muslim conscientious objector Muhammed Serdar Delice was arrested, as War Resisters International reported the following day.

Permissible Restrictions

The 1982 Constitution contains several clauses that may be used to restrict manifestations of religion or belief. Article 24 (5) states that "no one shall be allowed to exploit or abuse religion or religious feelings or things held sacred by religion", a vague clause that leaves unclear what is banned. Article 11 ("Supremacy and Binding Force of the Constitution") states that "laws shall not be in conflict with the Constitution" - but the lack of clarity of Article 24 makes it difficult to apply Article 11.

Article 14 ("Prohibition of Abuse of Fundamental Rights and Freedom") includes a clause stating that: "None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights". Yet again, this is an unclear formulation which may be broadly interpreted to unnecessarily restrict rights.

The limitations clause of Article 9 of the ECHR could be adopted instead. This states that: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

It is important that the new Constitution does not permit restrictions which exceed those found in Article 9 of the ECHR.

Teaching of Religion

Article 24 ("Freedom of religion and conscience") of the 1982 Constitution states that: "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". This has led to numerous problems in exercising freedom of religion or belief, including a judgment against Turkey by the ECtHR (see F18News 5 January 2011 http://www.forum18.org/Archive.php?article_id=1526).

Currently, formal teaching of religion is carried out in universities (Islamic theology) and in Diyanet Koran courses. There is teaching of religion in places of worship or under the umbrella of associations or foundations, but these do not provide any formal qualifications. The explicit recognition of the right to manifest one's religion or belief in teaching may allow schools that teach religion outside the state establishment to be set up. This does not imply that the state will not have any regulatory role in this process, but it does mean that the state must guarantee this right for all and create the necessary legal and administrative framework.

The Diyanet

Turkish legal experts, religious minorities, and NGOs have all pointed to the obstacles that the Diyanet – a constitutional public institution - places in the way of Turkey fulfilling its international human rights commitments. Yet the government argues that abolishing the Diyanet is unrealistic (see F18News 4 May 2011 http://www.forum18.org/Archive.php?article_id=1567).

Some in Turkey argue that the state should neither interfere in nor support any religious group or activity, while others argue that the state should support religious services as a tradition and make financial contributions to non-Sunni religious groups as well. This relates to how the Constitution will see relations between the state and religious or belief groups. Perhaps the best one can hope for at present is both that the Diyanet may have a more pluralistic structure, and tax exemption for those who do not want to support or benefit from Diyanet services.

What can be expected from the new Constitution?

With all the possibilities a new Constitution drafting process offers for the protection of freedom of religion or belief in Turkey, one is tempted to hope for a revolutionary transformation. Yet recent developments on conscientious objection, ongoing problems resulting from legislation and practice, and the lack of political will to provide a lasting solution suggest that caution would be more realistic. Perhaps - if outstanding issues are not substantially addressed - this new Constitution will not be a great step towards a "more free Turkey". But it will hopefully be better than the existing Constitution. (END)

For more background, see Forum 18's Turkey religious freedom survey at http://www.forum18.org/Archive.php?article_id=1379.

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

A compilation of Organisation for Security and Co-operation in Europe (OSCE) freedom of religion or belief commitments can be found at http://www.forum18.org/Archive.php?article_id=1351.

A printer-friendly map of Turkey is available at <http://education.nationalgeographic.com/education/mapping/outline-map/?map=Turkey>.

If you need to contact F18News, please email us at:
f18news @ editor.forum18.org

Forum 18
Postboks 6603
Rodeløkka
N-0502 Oslo
NORWAY