

**REPUBLIC OF TURKEY
COURT OF CASSATION
4th Penal Chamber**

REJECTION ON MERITS (RATIFICATION)
CASE DROPPED-ACQUITTAL

**VERDICT OF THE COURT OF CASSATION
ON BEHALF OF THE TURKISH NATION**

Case No : 2005/10694
Decision No : 2007/5603
Notification No : 4/2005-80106

THE REVIEWED DECISION'S

COURT : Fatih 3rd Criminal Court of First Instance
DATE : 20.12.2004
NUMBER : 03/380 – 04/1142
ACCUSED PERSON(S) : Vasil Yuanidi, Dimitri Bartolomeos Arhondon, Apostol Yanilides, Yanaki Atanasyadis, Kostandinos Harisyadi, Yorgi Diragun, Mihal Roka, Hrisostomos Emilyos Kostandinidis, Dimitri Savaidis, Haralambos Sofraniadis, Hrisostomo Kalaycı, Dimitri Komatas, Iakovas Fenerli
OFFENCE(S) : Debarring others from worship and the rituals of a religion
DATE OF OFFENCE : 31.10.2002
VERDICT(S) : Conviction
APPEALED BY : The Prosecutor of the area, the legal representative of the complainants
NOTIFICATION REQUESTING: RATIFICATION OF THE VERDICT

Following the appeal lodged against the decision of the local court, the case has been reviewed in light of the content of the application, the type of penalty, its duration and the date of offence.

As it was concluded that there were no grounds requiring the rejection of the appeal request, the court decided to proceed with the review of the case on the basis of its merits.

Following the appeal review made on the basis of the content of the minutes, documents and justifications reflecting the proceeding of the hearing where a conscientious opinion had been formed;

1) It has been decided to REJECT THE APPEAL REQUEST ON THE MERITS OF THE CASE AND TO RATIFY THE VERDICT, in line with the notification, as the

appeal arguments of the legal representative of complainants Konstantin Kostoff and Bujidar Çipof have not been found to be substantiated with regard to the decision to DROP THE CASE due to the death of accused Mihal Roka;

2) As regards the appeal against the decision to acquit accused persons, Vasil Yuanidi, Dimitri Bartolomeos Arhondon, Apostol Yanilides, Yanaki Atanasyadis, Kostandinos Harisyadi, Yorgi Diragun, Mihal Roka, Hrisostomos Emilyos Kostandinidis, Dimitri Savaidis, Haralambos Sofraniadis, Hrisostomo Kalaycı, Dimitri Komatas, Iakovas Fenerli;

A public lawsuit had been filed against the accused persons on charges of infringing freedom of religion by "deciding to withdraw the title of spirituality" of complainant Konstantin Kostoff, a priest at the Bulgarian Church, based on the conviction that the Fener Greek Patriarchate has spiritual superiority over the Bulgarian Orthodox Church,

From the content of the file, it has been understood that;

- The accused persons, i.e. the Fener Greek Patriarch and the members of the Saint Sinod Assembly who are members of the Greek minority, have decided to banish the clerical powers of complainant Konstantin Kostoff (a priest who works and leads rituals at Saint Stephan (Iron) Church on the Golden Horn in Istanbul based on a service contract with the Bulgarian Church Foundation), on grounds of disobedience to the Patriarch of Fener and for failing to cite the name of the Patriarch when he supposedly should, despite the fact that they don't have any religious or legal authority over the Bulgarian Church which conducts the religious rituals and sermons of the Turkish citizens of Bulgarian origin, which is another Orthodox minority. It has also been understood that the accused persons reported this decision to the Bulgarian Church Foundation as well as to various Orthodox churches throughout the world and the Executive Board of the Bulgarian Church Foundation, which could not resist the pressure, dismissed as a result the complainant from the church by terminating his service contract.

As for the Patriarchate's legal status in Turkey; the situation of the minorities in Turkey has been regulated in the Lausanne Treaty of 24 July 1923. During the negotiations of the Lausanne Treaty, when the existence and rights of minorities were being debated, no specific provision had been included in the treaty text on the Fener Patriarchate. Furthermore, even in the final text of the Treaty and the annexes of the convention, the name of the Fener Greek Patriarchate had not been mentioned and they had been stated only as the church of a minority. Therefore, in terms of their status, they are a minority church. As the Treaty text does not include any specific provision of the legal status of the Patriarchate, their status should be determined solely according to the Turkish domestic law by taking as a basis the minutes of the Lausanne negotiations.

A scrutiny of the negotiation minutes of the Lausanne Conference reveals that; the Turkish Delegation insisted on having the Patriarchate transferred abroad, however, emphasized that they would consider as a "verbal act" the official statements made by the Delegation representing the Allied Forces in the presence of the delegations participating in the conference as well as the guarantees given by the Patriarchate that they would never be involved in any political or administration-related business and would suffice with issues falling

under the scope of religion only (verbal agreement recorded in the negotiation minutes on 10 January 1923). Thus, the Turkish Delegation let the Patriarchate stay in Istanbul on condition of conducting only the religious affairs (rituals, marriage ceremonies divorce, baptising ...) of all Orthodox Christians of Greek-origin among the citizens of the Republic of Turkey and stripped them off all political and managerial rights and powers.

As a result, the Patriarchate, the status of which had been determined during long talks in Lausanne, lost all its privileges it had acquired during the Ottoman Empire, and has acquired a new status upon the foundation of the new Turkish Republic. In this framework, the Patriarchate is an institution which bears only religious powers as the church of the Greek minority in Turkey, and got to be considered as a religious institution under the scope of articles 35. – 45. (Protection of Minorities) of the Treaty (Sibel Özel, "Lozan Antlaşması ve Azınlık Hukuku Çerçevesinde Fener-Rum Patrikhanesinin Hukuki Konumu" [The legal status of the Fanari-Greek Patriarchate in the framework of the Lausanne Treaty and Minority Law], *Avrupa Araştırmaları Dergisi*, Volume 14, No 1, 2006, p. 49; http://avrupa.marmara.edu/tr/web/eci/mjes_pdf,).

As it is understood from the explanations given above, the Patriarchate, which has been allowed to remain on the Turkish territories, "is a religious institution which has no legal personality and which has religious powers only over the members of a certain minority" in the Turkish Republic -which is a democratic, secular and social state governed by the rule of law according to article 2 of the Constitution. And for this very reason, it is completely subject to the Turkish law. Since it will openly contradict with the principle of equality enshrined in article 10 of the Constitution, it is unacceptable for a sovereign state to implement a law as regards the minorities living on its territories which is different from that applicable to its own citizens and grant them a special status by way of recognizing them with certain privileges which are denied for even the majority. Therefore, there is no legal basis for the claim that the patriarchate is Ecumenical. As it can also be understood from the letter of Istanbul Governorate dated 6 December 1928 and numbered 1092, the persons who will participate and get elected in the religious and spiritual elections that will be held in the patriarchate, should be Turkish citizens and be employed in Turkey during the time of elections. This is a clear indication that the Patriarchate does not have the title "ecumenical". It is unquestionable that the Patriarch and the employees of the patriarchate are subject to the Turkish law as regards their activities and their titles; and that they will be subject to the provisions of the Turkish Penal codes where their actions constitute an offence under the framework of Turkish laws.

When the incident is assessed in light of this legal situation, and starting with the principle that no one should interfere in the content of the rituals carried out in line with the beliefs of the community of the independent Bulgarian church and [no one should interfere in] the powers of the spiritual leaders that conduct the rituals, the decision taken by the accused is not justified and rightful to be protected through laws.

Acts against religious freedom, which has been guaranteed under article 24 of the Constitution, have been sanctioned under article 175 of the Turkish Penal Code no 765. This article suggests that "A person who debars or violates the functions or rites and ceremonies of any religion shall be sentenced". On the

other hand, Turkish Penal Code no 5237, which became effective on 1/6/2005 after the commission of the offence, regulates the same offence (violation of freedom of religion) in its article 115/2, and considers as an offence "the debarring of collective performance of religious rites and ceremonies by way of using force or threat or through any other ways that are against the law".

Neglecting the fact that the Patriarchate, where the accused were fulfilling their functions, was authorized to execute the religious affairs of merely the Turkish citizens with Greek origin and belonging to the Christian Orthodox faith, and leaving aside the framework drawn by the laws, thus "ruling for the removal of the spiritual title" of complainant Konstantin Kostoff who functions as a priest at the Bulgarian Orthodox Church, on the basis of a claim encompassing the perspective that there is a spiritual superiority, is not sufficient to accept that the freedom of religion of the aforementioned person has been violated. In the same manner, although more than one year has passed over the decision, complainant Konstantin Kostoff's continuation with the conduct of services and later the termination of his labor contract by the executive board of the Bulgarian Orthodox Church Foundation is a proof of this.

It has been concluded that the offence of 'violation of the freedom of religion' -which has been regulated through article 175/1 of TCP no 765 and article 115/2 of the later TCP no 5237- attributed to the offenders has not been committed since the elements "debarring and violation of the functions or rites and ceremonies of the religion" and "debarring of collective performance of religious rites and ceremonies by way of using force or threat or through any other ways that are against the law" have not been established in the actions of the accused within the framework foreseen by the Law.

On the basis of the justifications expressed, since it has been understood that the actions of the accused are not in a fashion to violate the freedom of religion, it has unanimously been concluded on 13/06/2007 to RATIFY THE VERDICT AND REJECT THE APPEAL REQUEST ON THE MERITS OF THE CASE in accordance with the notification since the appeal allegations concerning the actions and attributed offences expressed by the local Prosecutor and the legal representative of complainants Konstantin Kostoff and Bujidar Çipof have not been considered satisfactory.

Niyazi ERDOĞAN
Deputy Chairman

A. Nasuhi KURDOĞLU
Member

Nuri YILMAZ
Member

Celal ARAS
Member

E. Saba ERTUĞRUL
Member