



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 9 June 2004

Restricted
CDL (2004) 062
Engl. only

Opinion no. 271/2004

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**INFORMAL COMMENTS
ON OSCE/ODIHR GUIDELINES
FOR LEGISLATIVE REVIEW OF LAWS
AFFECTING RELIGION OR BELIEF**

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These comments relate to the draft OSCE/ODIHR Guidelines for legislative review of laws affecting religion or belief. They were submitted to the OSCE/ODIHR Panel of Experts on Religion or Belief prior to the adoption of the final text of the Guidelines (see CDL(2004)061).

(1). These draft Guidelines provide a generally comprehensive description of the law in the OSCE region on the right to freedom of religion or belief. It carefully and in detail sets out the issues that typically arise in legislation (Parts III and IV).

(2). Appendix II summarises leading ECHR cases. The draft Guidelines will provide a useful checklist for the reviewer for all major issues. What is clear from this draft is that there is a very wide range of state practices in controlling - or not controlling (Part III A. para 10) – this freedom and much of these practices have not yet been the subject-matter of judicial or other supervisory decision or the jurisprudence is developing. Therefore in many circumstances under the headings chosen in the draft Guidelines, reasoning is from first principle or general human rights principle e.g. (paragraph I. 3 Part III) in relation to religious raising funds through the state tax system. This freedom of religion or belief is evolving continuously. For example, on the issues of religious attire, currently topical, widely diverging political approaches are taken based, amongst other considerations, on different approaches to cultural integration.

(3). The draft Guidelines identify the various issues that a reviewer should examine. They therefore raise questions in many cases rather than providing a clear basis for answering them. This results from the evolving nature of the subject.

(4). I think that it would be worthwhile at an early stage of the draft Guidelines in a “general” part to elaborate on the considerable overlap between the freedoms of religion or belief, expression and of association and assembly and issues concerning discrimination. So the European Convention on Human Rights must be understood and interpreted as a whole – *Refah Partisi – v- Turkey* (2003). This overlap arises specifically in relation to manifestation of belief. In deciding the relative priorities between competing rights, the European Court of Human Rights has accorded, on occasion, a higher priority to religious belief over other freedoms such as the freedom of expression e.g. *Otto-Preminger Institut –v- Austria*. In other cases, though factual circumstances involve a range of rights and freedoms, including of religion or belief, the ECHR may find that no separate issue arises under Article 9 either taken alone or in conjunction with another article. So in *Hoffmann –v- Austria*, though religion was a prominent issue, the Court held that no separate issue arose under Article 9 since the factual circumstances relied on as the basis of the complaint were the same as those which were at the root of the complaint under Article 8 (right to respect for private and family life) taken in conjunction with Article 14, of which a violation had been found.

(5). Whilst there is little controversy about the right to hold religious or other beliefs – what is described in the draft Guidelines as “Internal Freedom” - unresolved and difficult questions arise about manifesting religion, which though expressly guaranteed, may nonetheless be subject to limitation.

(6). At Part III A, the draft Guidelines refer to the “broad consensus...on the contours of the right to freedom of religion or belief”. It might be appropriate at this early stage to advert to the fact that the case law does not provide a comprehensive definition of “thought, conscience and religion”. The Court generally avoids making a decision on whether the “belief” in question is one that is within the meaning of Article 9.

(7). In addition, the very lack of consensus on the significance of religion within society leads to a certain margin of appreciation being accorded to states in relation to the measures necessary to protect religious belief. Thus state agencies can be allowed considerable scope to decide on what measures may be necessary to protect Article 9 beliefs in their society. See *Wingrove –v- UK 1996 - V1837* which states that “[what] is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever-growing array of faiths and denominations”. This margin of appreciation can be used to “foster [the] climate of mutual tolerance and respect” referred to in Part III A paragraph 7 of the draft Guidelines in the context of developing a human rights jurisprudence designed to meet domestic conditions.

(8). I refer to part III F “Limitation Clauses “. As this is a qualified right, the state is entitled to justify what is a *prima facie* interference with such a right. Articles 8 – 11 ECHR allow for a state authority to interfere with these rights in broadly similar terms. It is these limitations or qualifications of the right that pose the real difficulty in assessing any law. There is considerable ECHR jurisprudence on justification of such limitations based on a standard analysis. Many of the specific issues described in the draft Guidelines involve guidance to the effect that non-discrimination norms apply and that tolerance and mutual respect for religious beliefs should be promoted. These considerations arise where some qualification exists. I believe that it would be of benefit to reviewers if a more elaborate general description of the standard approach to assessing limitations were contained in the draft Guidelines under the headings of “prescribed by law”, “legislative aims” and “necessary in a domestic society” including the principle of proportionality and “pressing social need”.

(9). A fuller description of these fundamental concepts would assist, for instance, in addressing such topical issues as restrictions on attire and grooming and on religious symbols which may be considered by individuals affected as an unwarranted limitation on their freedom of religion or belief or expression. These issues are addressed in Part III B paragraph 6 of the draft Guidelines in the context of education. The draft Guidelines state that though “international instruments do not speak clearly to these issues...caution should be offered and general guidelines of promotion of tolerance should be weighed”.

(10). It seems to me that this highly topical matter, which, of course, increasingly goes far beyond the exercise of the right or limitation in state schools, is to be resolved by using the standard analysis of justification of limitation of a qualified right. I would suggest therefore that it would go beyond “promotion of tolerance”. It might be preferable to emphasise the jurisprudence and rules that do exist for resolving such issues together with the capacity of a state to exercise its margin of appreciation in an area so much grounded in national policy and local circumstance. Widely differing responses are taken to ethnic diversity and minority cultures. The approaches revolve around the dichotomy between “assimilation” on the one hand (e.g. France), and “cultural pluralism” on the other (e.g. United Kingdom).¹ The French approach would seek to ensure equality by barring religion from the public arena whereas the UK approach promotes cultural diversity relying on strong laws against discrimination.² See for example *Mandla (Sewa Singh) –v- Dowell Lee* [1983] 2 A.C. 584 in which a school’s “no turban” rule unlawfully discriminate against a pupil on racial/ethnic origins grounds which could not be justified. Both countries are parties to the main international treaties and which prohibit discrimination on the basis of religion. Limitations on attire etc can impinge on the freedom of

¹ Oxford Journal of Legal Studies; Vol. 17, No. 1, page 52.

² Integrating Minorities, The Economist, Feb. 7 2004, page 24.

religion, expression, association and of discrimination. They may raise issues of integration, security, public order health and safety. The interest in public order might be considered paramount in certain circumstances based on a need to preserve racial and religious harmony within a multiracial state. Also issues around terrorism fuelled by radical religious fundamentalism might be considerations.

(11). It is generally considered that the right to freedom of religion or belief may impose positive obligations on a state. Though there is no authoritative definition of what is a positive obligation it has been defined as “requiring member states to...take action”. *Otto-Preminger-Institut* showed the potential for situations where states were obliged to take measures to safeguard the Article 9 rights of specific persons from hostile attacks by other private individuals or groups. It was considered that the state had a responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of the beliefs and doctrines in question. The positive nature of the right might be stressed. See also *Thlimmenos –v- Greece* (6 April 2000) in which the court developed an interpretation of Article 14 ECHR that can place a positive obligation upon states to treat persons differently. In this case a breach of Article 14 was found to exist in combination with Article 9.

(12). The case of *Refah Partisi –v- Turkey* (13 Feb. 2003) is such an important case, dealing as it does with the principle of maintaining a secular state and covering such a variety of fundamental issues, that I consider it would merit some fuller treatment in the text. Whilst the judgement does not examine Article 9 (or articles 10, 14, 17 or 18) and finds there to have been no violation of Article 11, the factual circumstance are closely connected with religious freedom. The case is also of significance by virtue of the strong dissenting opinion of three of seven members of the court.

I hope these comments are of some use. I would be happy to provide further comment if required.