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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON RELIGIOUS ORGANISATIONS IN SERBIA

By

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The following report covers a range of remarks regarding the conformity of the draft Law on "Religious Organisations" as it is in February 2005, with the common practice of the European Convention of Human Rights about religious freedom. The present report also takes into account the main European principles of "the Guidelines for Review of Legislation Pertaining to Religion or Belief," prepared by the OSCE/ODIHR advisory panel of experts on the freedom of religion or belief, in consultation with the Venice Commission.

1. The Scope of the Law

1.1. The draft law mainly addresses the **legal status of registered religious organisations**.

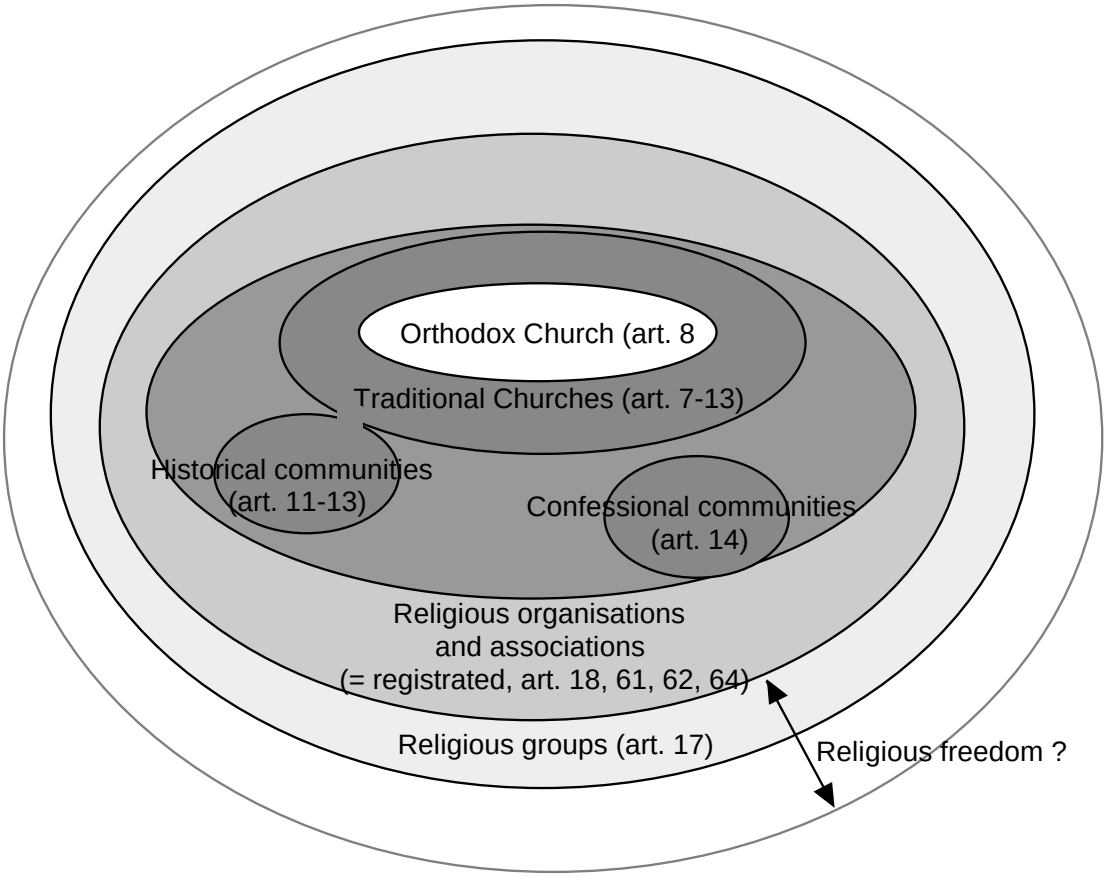
Article 61 refers to a registration system which is not an automatic and unconditioned one. It would require notably the initiative of citizens of Serbia, the signatures of 700 adult members with personal ID numbers, and information about religious instruction. Article 18 provides special rules for registration of an association of smaller religious groups. According to article 62, the competent ministry would seemingly have a discretionary power (he "should issue a decision on the application"). Furthermore, no special recourse seems to be available following a refusal to register a group.

This kind of registration system creates a strong diversity and a serious distance between registered groups and non registered ones. This distance is further aggravated by the possibility of being deleted from the register (article 65: see infra).

1.2. Two consequences of such a specific scope have to be analysed:

1.2.(a) A large **margin of State appreciation** about Churches and State relationships.

A scope restricted to religious registrations and legal status of these organisations might benefit from the European principle of a specially large margin of appreciation left to contracting states in church and state issues. Following the position of the European Court of Human Rights, contracting states have such a greater margin of appreciation, "particularly with regard to establishment of the delicate relations between the Churches and the State" (*Cha'are Shalom Ve Tsedek V. France*, Appl. no. 27417/95, Judgment, 27 June 2000, sp. no. 84). No Church-State regimes existing in contracting states would be deemed *in itself* incompatible with the European Convention. Furthermore, even a State Church system cannot in itself be considered to violate article 9 of the European Convention (*Darby v. Sweden*, Appl no. 11581/85, Judgment, 23 October 1990). The large diversity of Churches-State regimes in European countries legitimises a large range of regulatory options and limits in proportion to the critical capacity of any international observation. Nevertheless, a growing number of interpretations of the ECHR provided by the European Court of Human Rights will progressively influence each of the European Church-State regimes. The following remarks have to be interpreted within this framework.



Appraisal A:

From that point of view, the symbolic and national aims of the draft law may not be considered, *in themselves*, as addressing specific issues with regard to the European Convention. A similar appreciation may be specifically held about (for instance) draft article 2 (social importance and cultural identity), article 5 (public status of registered religious organisations) and articles 7-15 (traditional churches and historical communities).

1.2.(b) **No subordination of the guarantees of freedom of religion** to a specific regime of registered organisations.

The large margin of appreciation of Contracting States about church and state regime is not given carte blanche. No legal regimes of churches-state relationships are exempted from the provisions of the European Convention, especially article 14 linked to article 9. A church and state regime cannot restrict the field of the European common guarantees of the freedom of religion. It may only provide some non necessary complements to it in a non-discriminatory way. This is of particular importance regarding individual religious freedom and religious freedom of non registered religious organisations (i.e. any "religious group" along the definition provided by article 17). Religious freedom has to be equally guaranteed to any religious community. Only reasonable distinctions with regard to a democratic society would have to be admitted.

The application of article 9 of the European Convention may not be subordinated to any registration system. The guarantees provided by article 9 of the European Convention must

benefit "everyone", even the atheist (comp. draft article 6), and any religious group without conditions of affiliation or registration (comp. article 2 first paragraph).

Therefore, it is necessary to provide a provision that clearly shows that there is no confusion (nor subordination) between religious registration and general religious freedom.

Appraisal B

Article 1 of the draft does not match the requirement set under our 1.2.(b). The formula "This Law sets forth and describes the content of the right to freedom of religion" seems to restrict the general right to religious freedom to organisations registered in accordance with the law. This provision would seem to introduce a too restrictive regime of religious freedom. More specifically, it is not sufficient to provide that individuals may not be discriminated against due to affiliation or non affiliation to religious *organisations*. This principle of non discrimination has to be extended to the religious freedom of *groups* as well, as a consequence of the collective dimensions recognized to religious practice and association. The formula of article 61 ("New religious organisations may b*e established* by citizens of Serbia", as well as the *conditions* of this regime of registration, have to be compared with the definition of "religious groups" provided by article 18. This comparison confirms that the purpose of the draft law itself seems hardly compatible with the "description of the content" of a general religious freedom system.

In order to avoid this ambiguity, it may be suggested:

(a) to adopt a negative formula: "This Law does not restrict the general right to religious freedom as guaranteed by the Constitution and the International Conventions".

(b) to provide that religious freedom is guaranteed to every individual and every religious organisation, even non-registered.

As far as the European guarantees are concerned, it might be held to be quite impossible for a State to enact a precise "general provision" of religious freedom in any other way than duplicating the very formula of article 9 of the Convention.

The only hypothesis of an autonomous provision would aim at additional guarantees. This would notably be the case of the "right to preserve, develop and publicly display religious heritage and tradition" (Draft article 1 §1).

Only these additional guarantees (distinct from the basic core of the European guarantees) may be subordinated to certain specific systems of registration: for example, financial support (articles 31, 34, 44, and 60), tax exemptions (articles 46, 53, and 58), local taxes (articles 47 and 59) For example, the freedom to perform liturgies (article 19) may not be reserved only for registered religions. It is a general element of religious freedom. A similar evaluation should be held, with some balancing, for the right to organise cultural activities (article 39), to construct religious edifices (article 45), to own movable or real property (article 55) or to receive gifts and donations (article 58).

2. Church Autonomy

2.1. Draft Article 3 guarantees the full autonomy "to all religious organisations". As precised above (appraisal B), this guarantee has to benefit non registered religious organisations as well.

The European Court permanently reiterates the general principle "that the autonomous existence of religious communities is indispensable for pluralism in a democratic society" (*Supreme Holy Council of the Muslim Community v. Bulgaria*, Appl. no. 39023/97, Judgment, 16 December 2004).

2.2. Many provisions of the draft refer to the necessity for the clergy and religious organisations to act "according to the canons" (articles 5, 24, 25, 56, and 58). It is unclear whether these formulas give special jurisdiction to the Courts of the State or not. Draft art 4 does not provide a clear answer to that issue. How to combine the idea that "The judicial-disciplinary power of religious organisations belongs to themselves only" with the legal "obligation" for the religious organisations "to observe their constitutions …"? In conformity with the very principle of autonomy, it may be pointed out that the violations of the Canons are not considered by the draft Law as an hypothesis of deleting from the Register (arg. article 65). This last issue is about legal methodology and does not concern the compatibility with the European Convention.

2.3 Concerning the enforcement of decisions passed by the competent bodies of religious organisations, draft article 4 provides that "the public authorities are obliged to extend relevant administrative and executive assistance". It is not clear whether this provision is compatible with the individual religious freedom of clergy and clerics. In some hypothesis, confirmed by the case law of the European Commission of Human Rights, these individuals must remain free to choose apostasy or exit instead of submission to a State enforcement of the canons of a Church.

Other issues concern the extent of a State judicial review of these ecclesiastical decisions in order to evaluate their conformity with the European Convention itself. In particular when some Church decisions have to be enforced by the State, the European Court of Human Rights has sometimes considered that the principle of Church autonomy has to be balanced with other human rights (see *Pellegrini v. Italy*, Appl. no. 30882/96, Judgment, 20 July 2001).

2.4. Many provisions of the draft intend to guarantee a large range of special facilities to the religious organisations. But these provisions could have a counter-productive effect: that is to replace a regime of general and unlimited freedom by a regime of limited and specific authorisations. A similar observation could be made about the enumerative lists proposed by many provisions of the draft (articles 19, 39, 45, 50, 52, 55, 59, and 60): what about the events or institutions not enumerated in these lists?

2.5. The obligation to file notice of any association or religious organisations (article 18) does not seem compatible with the general principle of church autonomy. It is only conceivable within the framework of a *complementary* regime of registration.

2.6. The acquisition of a legal personality is a basic requirement of autonomy, but it seems linked by the draft Law with the registration (article 5). It should be possible for a "religious group" to be a juridical person before such a "discretionary" registration (*Canea Catholic Church v. Greece*, Appl. no. 143/1996/762/963, Judgment, 16 December 1997). A concrete test would be the capacity of erection of religious edifices (article 47) by simple "religious groups" or non affiliated individuals (comp. the possibility for liturgy to be held in rented premises: article 19).

2.7. The obligation for the appointed clergy to "extend spiritual instruction" to "every individual" and "free of charge" (article 24) seems hardly compatible with the general principle of church autonomy. Moreover, the invocation of "the spirit of the canon law" (article 25) in

favour "for those who are unable to pay the foreseen compensation" seems to be a prescription extracted from a specific religious doctrine.

3. Freedom of Speech

The freedom of speech provided by article 6 of the draft Law has to be submitted to the critics pointed out in 1.2.(b) and Appraisal B.

(a). The regime of registration cannot restrict the field of the European common guarantees of the freedom of speech. Every religious organisation has to benefit from this freedom and not only the registered ones.

(b) As far as the European guarantees are concerned, it might be held to be quite impossible for a State to enact a precise "general provision" of freedom of speech in any other way than duplicating the very formula of article 10 of the Convention. For instance, it remains unsure that the propagation of "falsehoods" or "intolerance" could be generally prohibited by a Contracting State (analog. *Jersild v. Denmark*, Appl. no. 15890/89, Judgment, 23 September 1994).

4. Discretionary Powers

(a) First level :

The discretionary powers of the competent ministry in order to make a decision about the application for registration (article 62) have already been commented. upon (see point 1.1. above).

(b) Second level:

After the registration, other forms of discretionary powers are explicit and could lead to some form of discrimination at a "second level" of public support.

A first form of discretionary power is provided by the requirement of "separate agreements" (article 31) without any criteria.

Secondly, two provisions of the draft Law refer to "the request of members" (article 20) or to "a referendum" on local taxes (article 48, even if it is about introducing a *voluntary* system or a specified-purpose local tax). These provisions could provoke some bias in favour of the dominant local church and discrimination against local minorities.

Thirdly, some financial supports could be decided by "local public authorities" without any legal criteria (article 46), or with very flexible criteria (article 60: pro rata to the number of members "and depend as well on the importance and the types of programmes…").

5. Deletion from the Register

Article 65 of the draft Law enumerates three cases of harmful activities which may lead to the deletion from the Register. Moreover, this article provides that this decision of deletion would be only taken on the basis of an effective and final decision of a competent Court.

The procedure does not seem, in itself, to be incompatible with the European Convention. The European Court has recognised that the States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population (*Manoussakis v. Greece*, Appl. no. 18748/91, Judgment, 26 September 1996, no. 40). Nevertheless, it is difficult to imagine that only one decision could lead the relevant ministry to the conclusion that a group "systematically destroys family". A similar observation could be proposed about the notion of "other forms of intolerance". A judicial review of the decision of the competent ministry should be provided. Another solution would be the exclusive competence of a judicial Court in order to punish a religious organisation by deleting it from the Register.

6. Various

Draft article 26 affirms the inviolability of the secret of the “confessional”. This concept seems to be too closely linked to particular christian religions. A more general concept would be better to avoid any risk of discrimination.

Main recommendations

We recommend the following priorities

1. to restrict the scope of the law to the legal procedure of registration and the administrative-legal regime of "religious organisations".

2. to delete article 1, article 2 (first paragraph) and article 6 and to provide that the present law does not restrict the general guarantees of freedom of conscience and religion provided by the European Convention, especially to the benefit of every individual, affiliated or not, national or not, and to the benefit of every non-registered group.

3. to propose in a new article 4 a more coherent conception of the legal status of canon laws and ecclesiastical decisions

4. to restrict the discretionary power provided by the draft law, especially by improving some procedures of judicial review (article 4, 62, 65).

5. to maximise some concrete guarantees for the protection of pluralism (article 2) and to limit to an honorary precedence (article 8) the particular status and the "State-building-role" of the Orthodox Church.