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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE DRAFT LAW
ON AMENDMENT AND SUPPLEMENTATION
OF LAW N° 02/L-31
ON FREEDOM OF RELIGION**

OF KOSOVO*

**adopted by the Venice Commission
At its 98th Plenary Session
(Venice, 21-22 March 2014)**

on the basis of comments by:

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** "All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo"*

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I. Introduction

1. By a letter of 7 November 2013, the European Union Special Representative in Kosovo* requested the Venice Commission to provide an opinion on the Draft law amending the law on freedom of religion in force in Kosovo*, thereafter the “draft law” (see CDL-REF (2013)057 and CDL-REF (2014)06).
2. Ms Finola Flanagan, Mr Jorgen Steen Sorensen, Mr Jan Velaers and Mr Ben Vermeulen acted as rapporteurs.
3. On 4-6 February 2014, the Rapporteurs travelled to Pristina and met with representatives of the authorities and of the religious communities, as well as of the civil society and the international organisations active in Kosovo*. The Venice Commission is grateful to all participants in the meetings held in Pristina for their co-operation.
4. The present opinion was adopted by the Commission at its 98th Plenary Session (Venice, 21-22 March 2014).

II. Scope

5. The scope of this opinion is to assess the Draft Law on Amendments and Supplementation of the Law No.02/L-31 on Freedom of Religion in Kosovo*, (hereinafter the “Draft Law”) from the viewpoint of its compatibility with international and constitutional standards on the freedom of religion or belief.
6. The opinion is based on the English translation of the above-mentioned provisions. Since the translation may not accurately reflect the original version, certain comments and omissions might be affected by problems of the translation. The Rapporteurs of the Venice Commission have been informed that there are significant differences between the Serbian and the Albanian texts of the Draft Law and it was not clear on several occasions whether the English translation tallied with either. It is essential that all language issues be resolved.

III. Background

7. There are by general agreement three major religious communities in Kosovo* - the Islamic Community, the Serbian Orthodox Church (SOC) and the Catholic Church. According to the 2011 population census¹, out of 1,739,825 persons, 95.6 percent (1,663,412 persons) of the population identifies as Muslims, 2.2 percent (38,438 persons) as Catholics, and 1.4 percent as Orthodox (25,837 persons). According to non-official information (estimations by the representatives of the concerned groups), the Protestant Evangelical Community comprises approximately 2,000 followers. Its Council is an umbrella body representing 47 churches. Also, the Jewish Community has about 50 members though in existence in Kosovo* for centuries. There are also religious communities of Dervish Tarikats of approximately 60,000 people (according to their own estimations) with longstanding existence of 350 years in Kosovo*. There are other smaller religious communities in Kosovo* the situation of which has not been considered by the Rapporteurs.
8. The basic Law no.02/L-31 on Freedom of Religion in Kosovo* (hereinafter “Law No. 02/L-31), entered into force on 1 April 2007, with the aim of ensuring the right to freedom of thought, conscience and religion. Its Article 5.4 provides that “*All religions and their communes in Kosovo* including Islamic Community in Kosovo*, Serbian Orthodox Church, Catholic Church,*

¹The accuracy of the census results is challenged. According to certain estimations, there are about 100,000 - 120,000 Orthodox and 60,000 Catholics in Kosovo*.

Hebrew Belief community, and Evangelical Church, shall be offered any kind of protection and opportunity in order to have rights and freedom foreseen by this law." The law affirms the right of freedom of expression, conscience, and religion for all residents regardless of their religious convictions.² The provision should be read in conjunction with other provisions in the law which also provide protection for individuals. It provides for the separation of religious groups from public institutions and for equal rights for all religious groups, stipulates that the country does not have an official religion, and prohibits discrimination based on religion and ethnicity.³ No legal mechanism exists for registering religious groups.

9. It should be noted that Article 7 of the Comprehensive Proposal for the Kosovo* Status Settlement dated February 2007 (hereinafter the "Ahtisaari Settlement") required that Kosovo* ensure the autonomy and protection of all religious denominations and their sites. In view of the fragile position of the Serbian Orthodox Church in Kosovo*, additional guarantees were required for the full enjoyment of its rights and those of its members. These guarantees were set out in Annex V of the Ahtisaari Settlement dealing with "Religious and cultural heritage". According to Article 1 (on the name, internal organisation and property of the Serbian Orthodox Church) of Annex V:

"The Serbian Orthodox Church (SOC) in Kosovo shall be afforded the protection and enjoyment of its rights, privileges and immunities as set forth in this Annex. The exercise of such rights, privileges and immunities shall carry with it duties and responsibilities to act in accordance with Kosovo* law, and shall not violate the rights of others."*

10. Following amendments of the Constitution regarding the ending of international supervision of independence of Kosovo* adopted in 2012⁴, the articles of the Constitution which made reference to the Ahtisaari Settlement were removed or reworded. In particular, article 143 stating that 'the provisions of the Comprehensive Proposal for the Kosovo* Status Settlement dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo*' was deleted.

11. However, the 2012 Law no. 04/L-115 on Amending and Supplementing the Laws related to the ending of International Supervision of Independence of Kosovo* has integrated into the legislative framework of Kosovo* elements of the Ahtisaari Settlement. In particular, its Article 13 has introduced important amendments to Law no. 02/L-31, inserting Article 7A regarding the Status of the Serbian Orthodox Church (largely inspired by the Annex V of the Ahtisaari Settlement). It furthermore provides for custom duty and tax privileges for religious communities (Article 12.5) and increased protection for their buildings and premises (Article 8) (see CDL-REF(2014).). The most significant provision is Article 7A:

"Article 7A

Status of the Serbian Orthodox Church

1. *The Serbian Orthodox Church in Kosovo shall be considered as an integral part of the Serbian Orthodox Church (SOC).*

2. *The name and the internal organization of the Serbian Orthodox Church, including its hierarchy and activities shall be respected.*

[...]"

12. In recent years, religious leaders complained that the lack of a mechanism allowing religious groups to register and obtain a legal status created a number of practical difficulties in carrying out daily activities - including owning and registering property and vehicles, opening bank accounts, and paying taxes on employees' salaries.⁵ Religious communities had to operate under an inadequate legal framework requiring them to register as NGO's.

²Article 1 Law no.02/L-31 on Freedom of Religion in Kosovo*

³Article 5 Law no.02/L-31 on Freedom of Religion in Kosovo*

⁴Decision of the Assembly of the Republic of Kosovo*, No. 04-V-436 on September 7, 2012, Official Gazette of the Republic of Kosovo* No. 25 / 7 September 2012, page 1

⁵Kosovo* 2012 International Religious Freedom Report, <http://www.state.gov/documents/organization/208542.pdf>

13. In this respect, on 7 June 2010, the Ombudsperson of Kosovo* recommended⁶ the National Assembly to complete Law No. 02/L-31 in order to regulate the legal status of religious communities of Kosovo*. For the Ombudsperson, regulating the issue of legal status was also meant to help ending discriminatory treatment of the different religious communities in Kosovo*.

14. At the end of 2011, Kosovo*'s Assembly sent similar recommendations to the Office of the Prime Minister. In the Assembly's view, amending and supplementing the law in force was needed, inter alia, to: regulate the legal status of religious communities in Kosovo*; regulate the issue of legal property-ownership of religious communities; equally treat all religious issues in Kosovo*, without discrimination; and address issues concerning the financing of religious communities in Kosovo*.

15. During 2012-2013, the Legal Office of the Prime Minister prepared the Draft Law. As stated in its Article 1A, the aim of the Draft Law is to "*regulate the legal status of religious associations, their registration and closure as well as few financial aspects related to the activity of religious communities in the Republic of Kosovo* on the basis of international and constitutional principles on freedom of religion, conscience and faith as well as the neutrality of the Republic of Kosovo* on issues of religious belief*".

16. According to the information obtained by the Venice Commission, while there appears to be consensus on the need for a legal framework enabling religious communities to register as legal entities, consultation by the Government in relation to the text of the draft law was rather limited. The Commission recalls that, according to article 5.5 of Law No. 02/L-31, "*Recognizing their identity and their specific contribution to society, the public authorities shall maintain an open, transparent and regular dialogue with religious associations, religious communities in matters of common interest*".

IV. Standards

17. The most relevant international instruments are the International Covenant on Civil and Political Rights (hereinafter ICCPR), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR).

18. Article 18 (1) of the ICCPR provides that everyone has the right to freedom of thought, conscience and religion; including freedom to have or to adopt a religion or belief of his/her choice, and freedom, either individually or in community with others and in public or private, to manifest his/her religion or belief in worship, observance, practice and teaching. Article 18 (3) provides scope for restriction on the freedom to manifest one's religion or beliefs, which may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights of others.

19. Article 9 (1) of the ECHR provides that everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief, in worship, teaching, practice and observance. The restriction clause in Article 9 (2) provides that the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and necessary in a democratic society in the interests of public safety, public order, health or morals, or for the protection of the rights and freedoms of others. This list of possible restrictions is exhaustive. Article 14 ECHR contains a prohibition of discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other

⁶Report no. 145/2010 concerning "*The lack of normative acts concerning the position and legal status of the religious communities in Kosovo*".

status, with respect to rights guaranteed by the Convention.

20. In this Opinion the case law of the European Court of Human Rights (hereinafter “the Court”) will be used for analysis, as well as the 2004 *Guidelines for Review of Legislation Pertaining to Religion or Belief*, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the Venice Commission (hereinafter the “Guidelines”)⁷.

21. According to the Guidelines, “*Legislation should be reviewed to assure that any differentiations among religions are justified by genuinely objective factors and that the risk of prejudicial treatment is minimized or totally eliminated. Legislation that acknowledges historical differences in the role that different religions have played in a particular country’s history are permissible so long as they are not used as a justification for discrimination*” (Guidelines, II.B., § 3).

22. The Guidelines also emphasize States’ obligation of neutrality and impartiality in dealing with freedom of religion issues, which among other aspects, includes an obligation to refrain from taking sides in religious disputes (Guidelines, II.B, § 4).

V. Constitutional and legal framework

23. Article 22 of the Constitution of the Republic of Kosovo* enshrines the principle of direct applicability of international agreements and instruments protecting human rights and fundamental freedoms and provides a list of eight international instruments covered by this principle, including the ECHR and the ICCPR. In the case of conflict, these International instruments “have priority over provisions of laws and other acts of institutions”.

24. The Constitution of the Republic of Kosovo* also protects and guarantees the freedom of religion.

25. According to Article 8 of the Constitution, the Republic of Kosovo* is a secular state and is neutral in matters of religious beliefs.

26. Article 9 of the Constitution states that the Republic of Kosovo* “ensures the preservation and protection of its cultural and religious heritage”.

27. Article 24 of the Constitution guarantees the equality of all and prohibits discrimination *inter alia* on the ground of religion, article 38 guarantees freedom of belief, conscience and religion and article 39 enshrines the protection of religious denominations. Article 55 of the Constitution contains a clause on the limitation of fundamental rights and freedoms.

“Article 24 [Equality Before the Law] 1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination. 2. No one shall be discriminated against on grounds of race, colour, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. 3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.”

⁷ *Guidelines for legislative reviews of laws affecting religion or belief*, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the European Commission for Democracy through Law (Venice Commission), adopted by the Venice Commission at its 59th Plenary Session in June 2004, CDL-AD (2004)028

“Article 38 [Freedom of Belief, Conscience and Religion] 1. Freedom of belief, conscience and religion is guaranteed. 2. Freedom of belief, conscience and religion includes the right to accept and manifest religion, the right to express personal beliefs and the right to accept or refuse membership in a religious community or group. 3. No one shall be required to practice or be prevented from practicing religion nor shall anyone be required to make his/her opinions and beliefs public. 4. Freedom of manifesting religion, beliefs and conscience may be limited by law if it is necessary to protect public safety and order or the health or rights of other persons.”

“Article 39 [Religious Denominations] 1. The Republic of Kosovo ensures and protects religious autonomy and religious monuments within its territory. 2. Religious denominations are free to independently regulate their internal organization, religious activities and religious ceremonies. 3. Religious denominations have the right to establish religious schools and charity institutions in accordance with this Constitution and the law.”*

“Article 55 [Limitations on Fundamental Rights and Freedoms]

- 1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.*
- 2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfilment of the purpose of the limitation in an open and democratic society.*
- 3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.*
- 4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.*
- 5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.”*

VI. Analysis of the draft amendments

28. It is recommended that the amending provisions in Article 2 of the Draft Law - new Articles 1A and 1B - be placed after Article 1 of Law No. O2/L-31 or after Article 6 dealing with freedom of religious association. The principle of freedom of religion in Article 1 of Law No. 02/L-31, which largely replicates article 9 (1) ECHR, should come first. Article 1.3 largely replicates Article 9 (2) ECHR.

29. Furthermore, since the law on freedom of religion has a much wider scope and will not be dealing exclusively with the issue of registration, Article 1A should be redrafted.

30. It is necessary that new Article 1A (2) (or other provisions of the future law) make completely clear that religious groups or communities, as well as individuals, are fully guaranteed freedom of religion, including the freedom to manifest religion "alone or in community with others", even if they do not register.

1. Criminal liability and the exercise of freedom of religion

31. Article 3 of the Draft Law adds a new paragraph to article 4 of Law No.02/L-31, which reads as follows:

“4.3. Committing a crime or the failure to implement the law in compliance with the Criminal Code shall not release a person from the responsibility on grounds of religion

or belief exercised, unless otherwise required under international provisions on limitations.”

32. The text of this new provision is not easy to understand. However, it seems to imply that any provision of the Criminal Code prevails over the exercise of freedom of religion or belief unless the criminal responsibility on grounds of religion of belief is not in compliance with the limitation clauses of the freedom of religion

33. In principle, the Venice Commission has no objection to this provision which, by its own wording, ensures compliance with international obligations. Also, it might be relevant to explicitly state as a legal principle that religious belief does not take precedence over the law (unless required by international obligations). However, since the provision regulates an important matter of principle, it would be useful if examples of its practical implications could be given, at least in the *travaux préparatoires*.

34. Also, it should be considered whether the provision ought to refer not only to international obligations, but also to the Constitution. If provisions of the Criminal Code contain limitations to the freedom of religion, they only prevail over the freedom of religion if they are in compliance with the limitation clauses of the ECHR, the ICCPR and the Constitution⁸. The Venice Commission recalls that Article 9.2 ECHR provides that “[f]reedom to manifest one’s religion or belief 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”. This also extends to the provisions of the Criminal Code.

2. Registration of religious communities

a. Proposed amendments

35. The main objective of the draft law is to provide a legal framework for the registration of religious communities in Kosovo*. The draft contains a two-tier registration system.

36. Five religious communities are deemed by the Draft Law to “constitute the historical, cultural and social heritage of the country”. These will automatically be registered (new article 4A.4.1): the Islamic Community of Kosovo*, the Serbian Orthodox Church, the Catholic Church, the Jewish Community and the Evangelical Protestant Church. The new Article 4 A.4.2 provides that the future Office for the Registration of Religious Communities *shall* issue registration certificates to these five religious communities, which shall also provide them with the status of legal person. Moreover, according to the new Article 4A.4.4, these communities shall have the additional right of establishing “*various institutions within themselves of humanitarian, religious, educational or other character*”, which may also obtain the status of legal entity, as well as the right of establishing “*various associations and units enjoying the right to legal personality in compliance with their norms and legal norms of the Republic of Kosovo**.”

37. According to article 7.B.1 of the Draft, “new religious communities, other than those specified in Article 4.A”, can be registered if they meet the following conditions (laid down in the new Article 7B of the Draft Law) :

- 1.1. the community has at least fifty (50) members, adult citizens of the Republic of Kosovo*;
- 1.2. the community has their statute/regulation and a clear hierarchy of organization;
- 1.3. their purpose or practices shall not to be in contradiction with the inter-religious tolerance and the Constitution of the Republic of Kosovo*;

⁸ See Articles 19 and 22 of the Constitution.

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- 1.4. to present the assets/properties possessed and their management in case of liquidation;
- 1.5. to present the request for registration by an authorized representative.

38. The registration may be refused if a community's activity violates inter-religious tolerance and the Constitution of the Republic of Kosovo* (new Art. 7B. 2) and this issue is addressed at paragraph 76 below. Furthermore, registration may be refused if a community's name "is identical or similar with the names of another community recognized under Article 4A" (new Art. 7B. 3). To avoid a too restrictive approach, this formulation would benefit from being more specific, for example by stating that registration may be refused only *if there is a very high risk that the name of an applicant community will be confused with the name of another community recognized under Article 4A.*

39. The Draft Law provides for the registration procedure (new Article 7C): the Office for the Registration of Religious Communities, acting within the Ministry of Justice, shall be responsible to review requests for registration. It shall take its decision within 30 days after the reception of a request for registration. A negative decision can be appealed before the competent court within 30 days. Once registered, the newly registered religious communities seem to have the same rights as the five historical religious communities: they also have the status of a legal person and they also enjoy the above mentioned additional rights (new Article 4A.4.4.) However, as discussed below, the attributes of legal personality are not elaborated in the Draft Law. (See also comments under "Closure of registered religious communities").

40. Finally there are the religious communities which do not meet the conditions for registration laid down in the law and/or which do not apply for registration. These religious communities will not have legal personality. This implies that they "*may not possess or exercise its rights related to the legal status of the entity, such as the right of property ownership or renting property, maintaining bank accounts, recruitment of employees, provision of legal protection to community members and its assets*" (new Article 4A.4.3.); neither do they enjoy the additional rights mentioned under new Article 4A.4.4.

b. Freedom of religion and the registration and legal personality of religious communities

41. On a number of occasions, the European Court of Human Rights has had to consider rules on the recognition of religions and the effects of non-recognition. Because of the importance of legal personality, the Court in a series of judgments recognized that access to such a status is one of the most important aspects of the right to association⁹, and that the right to association extends to religious associations. Undue restrictions on the right to legal personality are, accordingly, inconsistent with both the right to association and freedom of religion or belief.

42. In its Judgment in the case *Religionsgemeinschaft der Zeugen Jehovas v. Austria*¹⁰, the Court stated: "*Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords.*" The Court furthermore stated¹¹ that "*the ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning*".

⁹*Sidiropoulos v. Greece*, 1998; *United Communist Party of Turkey v. Turkey* (1998); *Gorzelik v. Poland*, §55 (2001)

¹⁰*Religionsgemeinschaft der Zeugen Jehovas v. Austria*, judgment of 31 July 2008, § 61; see also *Hasan and Caush*, Application no. 30985/96, Judgment of 26 October 2000, §§ 77-83

¹¹*Religionsgemeinschaft der Zeugen Jehovas v. Austria*, judgement of 31 July 2008, § 61.

43. The Court has consistently held the view that a refusal by the domestic authorities to grant legal-entity status to an association of individuals amounts to an interference with the applicants' exercise of their right to freedom of association.¹² Where the organisation of the religious community was at issue, a refusal to recognise it has also been found to constitute interference with the applicants' right to freedom of religion under Article 9 of the Convention.¹³ However, arrangements which favour particular religious communities do not, in principle, contravene the requirements of the Convention "*providing there is an objective and reasonable justification for the difference in treatment and that similar [arrangements] may be entered into by other churches wishing to do so*".¹⁴

44. The Venice Commission and the OSCE/ODIHR have stated in several opinions that reasonable access to legal entity status with suitable flexibility to accommodate the differing organisational forms of different communities is a core element of freedom to manifest one's religion.¹⁵ Therefore, in order to allow a religious group to obtain legal personality, the State must be careful to maintain a position of neutrality and be able to demonstrate it has proper grounds for refusing recognition.¹⁶

c. The assessment of the new amendments by the Venice Commission

45. When the law in force was enacted it was considered a major flaw that it did not include provisions providing a right for all religious communities to acquire legal personality and attain access to legal entity status in order to carry out the full range of their legitimate religious activities.¹⁷ The Draft Law seeks to remedy this omission and is therefore, in principle, to be welcomed.

46. Provided it meets legitimate conditions, a religious group must have access to legal personality status if it wishes to avail of it. The Venice Commission has opined¹⁸ that the lack of a possibility for religious communities to acquire legal personality in itself constitutes an infringement of Art. 9 along with Art.11 ECHR.

47. A requirement to be registered as a religious community for the purposes of obtaining legal personality can in principle be justified. In its Judgment of 14 June 2005 in the case *Cârmuirea Spiritual a Musulmanilor din Republica Moldova v. Moldavia*¹⁹, the Court held unanimously that "*the requirement to obtain registration (...) served the legitimate aim of allowing the Government to ensure that the religious organisations aspiring to their official recognition by the State were acting in accordance with the law, did not present any danger for a democratic society and did not carry out any activity directed against the interests of public safety, public order, health, morals or the rights and freedoms of others.(...) Without such a document the State could not determine the authenticity of the organisation seeking recognition as a religion*

¹² *Gorzeliik and Others v. Poland* [GC], no. 44158/98, para. 52 et, passim, 17 February 2004, and *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, para. 31 et passim).

¹³ *Metropolitan Church of Bessarabia and Others v. Moldova*, no 45701/99, § 105, 13 December 2001

¹⁴ ECHR, Appl. No. 53072/99, *Alujer Fernandez And Caballero Garcia v. Spain*, decision of 14 June 2001

¹⁵ CDL-AD(2008)032, *Joint Opinion on Freedom of Conscience and Religious Organizations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on Freedom of Religion or Belief*, (Venice, 17-18 October 2008), §33

¹⁶ CDL-AD(2009)036 *Joint Opinion on the Law on Making Amendments and Addenda to the Law on the Freedom of Conscience and on Religious Organizations and on the Law on Amending the Criminal Code of the Republic of Armenia* by the Venice Commission, the Directorate General of Human Rights and Legal Affairs of the Council of Europe, the OSCE/ODIHR Advisory Council on Freedom of Religion or Belief, §29, and CDL-AD(2012)004, *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, §38

¹⁷ See, for example, the Analysis of the Law on Freedom of Religion in Kosovo* adopted by the Assembly of Kosovo* by the Institute on Religion and Public Policy (Expert Panel on Religious Legislation and Implementation), <http://www.osce.org/odihr/21529>.

¹⁸ CDL-AD(2010)005, *Opinion on the legal status of Religious Communities in Turkey and the right of the Orthodox Patriarchate of Istanbul to use the adjective "Ecumenical"* – Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), §58

¹⁹ *Cârmuirea Spirituala a Musulmanilor din Republica Moldova v. Moldavia* (dec.), no. 12282/02, 14 June 2005

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and whether the denomination in question presented any danger for a democratic society. The Court does not consider that such a requirement is too onerous and thus disproportionate under Article 9 of the Convention”.

48. However, according to international standards, individuals and groups should be free to practise their religion without registration if they so choose (see *Guidelines*, II.F, §1). It is important that this be expressly stated in the draft law.

49. Compliance of the specific elements of the registration system with the international and constitutional standards on the freedom of religion and the prohibition of discrimination, will be examined under the following headings:

- i. the differential treatment of the five listed religious communities and other religious communities;
- ii. the substantive and procedural conditions for the registration of religious communities; and
- iii. the status of religious groups without legal personality.

i. Differential treatment of the five listed religious communities and other religious communities

50. Granting automatic registration to five named religious communities whilst at the same time requiring a formal application and assessment of compliance with conditions of all others who wish to register and thereby acquire legal personality, as provided by the draft law, raises a number of questions.

51. According to the Guidelines, legislation should “*assure that any differentiations among religions are justified by genuine objective factors and that the risk of prejudicial treatment is minimized or better, totally eliminated. Legislation that acknowledges historical differences in the role that different religions have played in a particular country’s history are permissible so long as they are not used as a justification for ongoing discrimination.*”²⁰

52. The Venice Commission has expressed the opinion²¹ that, while international law does not oblige States to provide an identical status to all religious communities,²² it nonetheless regards all advantages granted exclusively to one religious community as unjustified unless they are based on a legitimate justification and remain proportionate²³. It therefore considers that differential treatment relating to the procedure applied in granting legal personality is not necessarily in contradiction with the principle of non-discrimination, provided however, that there is objective and reasonable justification for it to be legitimate and that this difference in treatment does not have a disproportionate impact on the exercise of freedom of religion by religious communities and their members.

53. The Commission nevertheless recalls that no religious community should be compelled to register and accept legal personality against its will.

54. State permission may not be made a condition for the exercise of the freedom of religion or belief. The freedom of religion or belief, whether manifested alone or in community with others, in public or in private, cannot be made subject to prior registration or other similar procedures, since it belongs to human beings and communities as rights holders and does

²⁰CDL-AD(2004)028, *Guidelines for legislative reviews of laws affecting religion or belief*, p. 6.

²¹CDL-AD(2011)028 *Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, the administrative offences code and the law on the relations between the Republic of Armenia and the Holy Armenian Apostolic Church of the Republic of Armenia by the Venice Commission and the OSCE/ODIHR*, § 96.

²²See *The Canea Catholic Church v. Greece*, ECtHR Judgment of 16 December 1997 (Application no.25528/94), § 47.

²³See *Cha’are Shalom ve Tsedek v. France*, ECtHR Judgment of 27 June 2000 (Application no. 27417/95), § 87.

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not depend on official authorization.

55. By listing the five communities and thereby entitling them to unconditional access to the status of legal person, the Draft Law confers on them a special position compared to all other religious communities; these other communities are obliged to apply for registration if they wish it and to demonstrate that they meet all conditions set in the Draft Law. The question is whether the differential treatment provided for in Article 4.A.1 of the Draft Law is justified in the light of Article 9 ECHR taken together with Article 14 ECHR.

56. As stated by the ECtHR, “[t]he Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment”²⁴. The national authorities must exercise their discretion reasonably, carefully and in good faith, in a manner that is proportionate to a legitimate aim and for reasons, adduced by the authorities, which are relevant and sufficient to justify those differences.²⁵

57. The Venice Commission understands that, in the light the historical and political context prevailing in Kosovo*, this margin of appreciation might be needed in trying to reach a compromise on issues relating to the sensitive area of religious freedom. Such a margin of appreciation is all the more warranted because there are no common European standards on all aspects of the legal recognition of religious communities. The Commission furthermore notes that, in this particular case, the differential treatment does not seem to be related to the possibility of obtaining legal personality, but only to its procedural dimension (see comments in Section ii below).

58. Therefore the Venice Commission finds that here there is an objective and justifiable basis for historical reasons for treating the Serbian Orthodox Church differently in the matter of registration on the basis of its fragile position in Kosovo* and of the need for the special protection provided to it by Article 7A introduced by Article 13 of the 2012 Law No. 04/L-115 on Amending and Supplementing the Laws Related to the Ending of International Supervision of Independence of Kosovo, which amended Law 02/L-3, by inserting a new Article 7A. However there is a continuing concern that the rights and protections under the Ahtisaari Settlement not be eroded.

59. The Venice Commission further understands that, by virtue of their margin of appreciation and their knowledge of the other four religious communities named in article 4A.4.1, the authorities of Kosovo* considered that these communities, like the Serbian Orthodox Church, could be granted access to legal personality without going through the procedure²⁶. This implies that, for other religious groups, it would be difficult for the authorities to make such an assessment in the absence of the registration procedure.

60. However, having regard to information received by the Venice Commission, the basis set out in the draft law for the difference in treatment - i.e. that the five communities “constitute the historical, cultural and social heritage of the country” - is questionable, as it suggests that religious communities which are not expressly named are not part of that “historical, cultural and social heritage”. This is all the more so given that the requirement to apply for registration does not only relate exclusively to religious communities in Kosovo* established after the Draft Law comes into force.

61. To avoid a discriminatory approach, it is essential that the authorities of Kosovo* ensure that all other established religious groups which form part of the historical, cultural and social heritage of Kosovo* are included in the list.

²⁴ *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, 31 July 2008, § 96

²⁵ *Dudgeon v United Kingdom*, Application no. 7525/76, Judgment of 22 October 1981

²⁶ It is noted that, already in the Law on freedom of religion (Law No. 02/L-31) currently in force in Kosovo*, the five religious communities are explicitly listed.

62. In deciding whether there are other religious communities that can be compared with the five listed communities, the authorities have a certain margin of appreciation according to the European standards. Nonetheless, as it appears from the case law of the European Court of Human Rights, state authorities must apply the criteria in a neutral way and on an equal basis in assessing whether or not to include a given religious community in the list of those communities in Article 4.A.1 of the Draft Law. The decision to grant or not to grant this special treatment is a delicate question and the authorities must be careful to treat all religious communities fairly in deciding whether they meet the criteria set in the Draft Law, i.e. whether they also constitute the “historical, cultural and social heritage of the country”. Including one religious community with particular relevant characteristics whilst at the same time excluding another which also has those characteristics is unlikely to be justified²⁷.

63. To illustrate this, and by way of example, the Commission stresses that, during their visit to Pristina, its rapporteurs were informed of the existence for centuries in Kosovo* of the religious community of the Dervish orders (the Tarikats), which at the present moment would have many tens of thousands of adherents²⁸ and is in the process of elaborating its own statute. It considers it important that the authorities of Kosovo* carefully and coherently examine - in consultation with representatives of the Dervish orders - whether the situation of this religious community merits the inclusion in the list because they form part of the “historical, cultural and social heritage of the country” as are deemed the five religious communities mentioned in the drafted article 4.A.4.1.

64. There would appear to be a dispute within the Islamic Community about whether the Dervish community is a separate community. The Islamic Community representatives stated that it represents all the Islamic believers in Kosovo*, including the Tarikats, even though the Tarikats express the wish to be registered separately. In this connection the Venice Commission refers to the Judgment of the Court in the case of the *Metropolitan Church of Bessarabia and others v. Moldova*, in which it stated: “*in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership (see Serif, cited above, § 52).*”²⁹

ii. Conditions for the registration of religious communities

65. As previously indicated, according to the Court’s case law, arrangements which favour particular religious communities do not necessarily contravene the requirements of the Convention “*providing there is an objective and reasonable justification for the difference in treatment and that similar [arrangements] may be entered into by other churches wishing to do so*”.³⁰

66. In view of the comments in the previous chapter, the conditions (substantive and procedural) for the registration of religious communities other than the five expressly mentioned in the law are of particular importance in assessing whether the scheme proposed by the Draft Law is in line with the principle of non-discrimination.

67. Under European standards, excessively burdensome constraints or conditions for obtaining

²⁷ *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, 31 July 2008, §§92-99

²⁸ A union of the dervish orders (SIDRA), subsequently transformed into the Community of the Dervish orders (ZIDRA) was created in 1974 in the former Socialist Federative Republic of Yugoslavia. The Community has not survived the break-up of the Socialist Federation.

²⁹ *Metropolitan Church of Bessarabia and others v. Moldova*, 13 December 2001, §117. See also *Serif v. Greece*, 14 December 1999 and *Hassan and Caush v. Bulgaria*, 26 October 2000.

³⁰ ECHR, Appl. No. 53072/99, *Alujer Fernandez And Caballero Garcia v. Spain*, decision of 14 June 2001

legal personality should be avoided. In the specific social, political and historical circumstances prevailing in Kosovo*, as long as these conditions pursue a legitimate aim, are reasonable and do not pose excessively burdensome obstacles to the registration of religious communities, the proposed scheme may be seen as falling within the authorities' margin of discretion (see comments below).

Substantive conditions

68. Article 7.B.1.1., requiring the religious community a minimum of fifty members, adult citizens of the Republic of Kosovo*, does not give rise to criticism, although no specific explanation was given to the Rapporteurs for setting the minimum number at fifty (other than an attempt to find a compromise between various views within the religious communities). The Guidelines state that high minimum membership requirements should not be allowed with respect to obtaining legal personality (see Guidelines, II.F.1).

69. Article 7.B.1.2 requires the religious community to have 'their statute/regulation and a clear hierarchy of organization'. This condition seems to exclude from registration the religious communities without "a clear hierarchy of organization." However, not all religions have a "clear hierarchy of organization"; there are also communities which are more loosely organized or have a democratic-horizontal structure.

70. It is not clear to the Venice Commission for what purpose only religious communities organized on a clear, hierarchical basis, can be registered, and no comprehensive explanation was given to the rapporteurs during the visit to Kosovo*. Therefore, to the extent that this requirement refers to the "religious organization" of the community, it implies interference in its internal structure and a differential treatment on this basis and is not in compliance with article 9 ECHR, article 18 of ICCPR and the articles 38 and 39 of the Constitution of the Republic of Kosovo*, nor with the principle of non-discrimination read in conjunction with these articles: there is no ground in the restriction clauses that may justify such interference, nor is the interference proportional, nor is the differential treatment justified. Moreover, it seems to contradict both the new article 4A.4.5³¹ and the existing article 7.2³² of the Law No 02/L-31. In any event, there should not be an essential requirement for a "clear hierarchy of organization" beyond what is required for the acquisition of legal personality generally, outside the context of religious communities.

71. Instead of requiring a "clear hierarchy of organization", the Draft Law should only require that the religious community be able to present a representative body for the purpose of its contacts with the public authorities and its capacity to operate as a legal entity. Moreover, in order to guarantee legal certainty to the natural and legal persons dealing with other religious communities, it should be made clear which organs of the legal entity can make decisions that are binding on itself and its members.

72. The Draft Law should also clarify the effects of the status of 'legal entity' (in article 1B or elsewhere) and the provisions attached to this status. According to information provided by the authorities of Kosovo* (the Legal Office of the Prime Minister), a 'legal person' means "*any organization, including any business organization that has, as a matter of law, a legal identity that is separate and distinct from its members, owners or shareholders, such as, but is not limited to, joint stock company and limited liability company*". Definitions of the terms "entities" and "legal person" are to be found in the Law No. 03/L-161 on Personal Income Tax (article 2§1.14 and article 1.13.2 respectively). Further clarifications may be found in the Law no. 02/L-123 on business organizations. Furthermore, Law No. 04/L-030 on Liability of Legal Persons for Criminal Offences regulates the liability of legal persons for criminal offences - penal sanctions

³¹"The State shall respect Religious Communities in Kosovo* and shall recognize as their representative only persons authorized by Religious Communities in Kosovo* and shall guarantee the protection of Religious Communities from any person or group claiming their name, premises of worship, properties, logos and stamp."

³²"Religious communities shall independently regulate and administer their internal organization".

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that may be imposed on legal persons and special provisions that regulate the applicable procedure against the legal person.

73. It is not clear whether these provisions will be applicable to registered religious communities. The Commission invites the authorities of Kosovo* to clarify this and provide all information needed in this respect to the religious communities seeking legal personality. In particular, clear information should be provided in the Draft Law - formulated in a positive way and not *a contrario* - with regard to the rights and benefits that a religious community may enjoy and the duties incumbent upon it following its recognition as a legal entity.

74. Finally, the meaning of the requirement to have "their statute/regulation" is not clear. The Venice Commission recalls its stance in previous opinions issued jointly with the OSCE/ODIHR: "*The law should not require the inclusion of excessively detailed information in the statute of the religious organisation. Refusal of registration on the basis of a failure to provide all information should not be used as a form of arbitrary refusal of registration. This is particularly important where registration is mandatory.*"³³ "*It must be left to the religious organization to decide in which way internal rules are adopted.*"³⁴

75. New Article 7.B.1.2 requires the purpose or practices of the religious community "*not to be in contradiction with the inter-religious tolerance and the Constitution of the Republic of Kosovo* (...)*". This condition is very vague and may open the door to arbitrary denial of registration. The legislature should indicate more precisely, at least in the *travaux préparatoires*, what kind of purposes and activities are deemed to be "in contradiction with the inter-religious tolerance and the Constitution". The Venice Commission recalls its stance in a previous opinion: "*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 or to public safety*"³⁵. "*The state may interfere if the religion concerned is an extremely fundamentalist one, if it has certain goals which threaten State security or public safety, in particular if it does not respect the principles of a democratic state, or infringe upon the rights and freedoms of its adherents.*"³⁶ In this connection, new Article 7.B.2 should not be interpreted as prohibiting legitimate proselytism.³⁷ It is only when the activities of the religious community have the potential to seriously harm societal interests, mentioned in the restriction clause of Article 9(2) ECHR, that registration should be refused.

76. The two final conditions in Article 7.B.1.4. and 7.B.1.5 do not give rise to criticism.

Procedural conditions

77. New Article 7C establishes the Office for Registration of Religious Communities as a "Government body acting within the Ministry [of Justice]" which employs Ministry staff (art. 7.C.1). The Office will act as the responsible authority for reviewing requests for registration. In order to prevent the interference of the Government in its activities and to enhance trust in the impartiality and neutrality of the Office, it would be advisable to organize it as an agency which operates, and be seen to operate, in a manner independent of Government and strictly according to the law.

78. The obligation for the Office to take its decision within 30 days after the reception of a

³³CDL-AD(2011)028, *Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, the administrative offences code and the law on the relations between the Republic of Armenia and the Holy Armenian Apostolic Church, by the Venice Commission and the OSCE/ODIHR*, § 66

³⁴CDL-AD(2012)022 *Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR*, §76

³⁵*Metropolitan Church of Bessarabia and Others*, cited above, §113

³⁶CDL-AD(2010)005 *Opinion on the legal status of Religious Communities in Turkey and the right of the Orthodox Patriarchate of Istanbul to use the adjective "Ecumenical"*, §§ 63-64

³⁷*Kokkinakis v. Greece*, 14307/88, §§ 48-50, 25 May 1993.

request for registration and the possibility to appeal against a negative decision before the competent court within 30 days, in compliance with the Guideline according to which “Parties asserting religious claims should have rights to effective remedies”, is welcome. The Venice Commission also stated in this connection: “*Particularly significant in this area is that religious organisations be assured of prompt decisions on applications and a right to appeal, either in the legislation under consideration or under applicable administrative review provisions spelled out in separate legislative enactments. It follows from this, that either an independent tribunal must decide on the registration or that there is a subsequent control of the decision by an independent court.*”³⁸

79. Under article 7.C.5, the appeal may be introduced before “the competent court”. The Venice Commission was informed that, in accordance with Article 11 of the Law on Courts, by “competent court” is meant the “basic court”.

iii. Status of religious groups without legal personality

80. Finally there are religious communities which do not meet the conditions for registration as laid down in the law and communities who choose not to seek registration. In order to ensure compliance with the freedom of religion standards and with the prohibition of non-discrimination, one has to assess also, in terms of proportionality, the effects that non-registration has on the rights and freedoms of the non-registered religious community.

81. According to the new Article 4A.4.3 non-registered religious communities will not have legal personality, which implies that they “*may not possess or exercise its rights related to the legal status of the entity, such as the right of property ownership or renting property, maintaining bank accounts, recruitment of employees, provision of legal protection to community members and its assets*” (new Article 4A.4.3.).

82. In a previous joint Opinion, the Venice Commission and the OSCE/ODIHR have stated: “*While a group that has not sought legal entity status cannot expect to have all the benefits of that status, a ban on all operation and activity without registration is extremely disproportionate and is clearly an unnecessarily broad limitation of freedom of religion or belief. As stated in the OSCE/ODIHR-Venice Commission Guidelines for Review of Legislation pertaining to Religion or Belief, “Registration of religious organizations should not be mandatory per se, although it is appropriate to require registration for the purposes of obtaining legal personality and similar benefits.*”³⁹

83. New Article 4A 4.3. does not give rise to criticism since the essence of the freedom of religion of the religious community and its members⁴⁰ does not seem to be affected by their not being registered. The rights of non-registered religious communities to manifest their religion or belief and engage in religious activities remain guaranteed.

84. As to other rights and freedoms, the status of the non-registered religious communities is not entirely clear. On the one hand the new article 4A.4.4 implies that the right of establishing “*various institutions within themselves of humanitarian, religious, educational or other character*” and of “*various associations and units enjoying the right to legal personality in compliance with their norms and legal norms of the Republic of Kosovo**” is only guaranteed to registered religious communities. On the other hand, new Article 5.4. states that “*All religions and all*

³⁸CDL-AD(2012)004, *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, §82

³⁹CDL-AD(2008)032, *Joint Opinion on Freedom of Conscience and Religious Organizations in the Republic of Kyrgyzstan by the Venice Commission and OSCE/ODIHR Advisory Council on Freedom of Religion or Belief*, § 26.

⁴⁰The new article 1A, § 2, of the Law NO.02/L-31 on freedom of religion in Kosovo*, reads as follows: “2. *The present law shall not deny any person from enjoying religious fundamental rights and freedoms.*” Also, Article 1.2 of the Law NO.02/L-31 on freedom of religion in Kosovo* already contains a (non-exhaustive) list of freedoms covered by the right of freedom of religion or belief.

religious communities in Kosovo shall be provided with any type of protection and opportunity to enjoy the rights and freedoms provided by the present law”.*

85. The amendment in Article 5⁴¹ deletes the five named religious communities in Article 5.4 of the law in force, a provision which has been much criticised. Law No 02/L-31 (currently in force) provides that “[a]ll religious communities in Kosovo* including Islamic Community of Kosovo*, Serbian Orthodox Church, Catholic Church, Hebrew Belief Community, and Evangelist Church, shall be offered any kind of protection and opportunity in order to have rights and freedom foreseen by this law.” This proposed deletion is an improvement, likely to help to reduce the risk or tendency to discriminate against religions which had not been named in the law. Moreover the existing Article 9.1 provides in general that religious communities are free to establish educational institutions for their needs pursuant to the Law in force. However, the relationship between the new article 5.4, the new articles 4A.4.3 and 4A.4.4 and the existing Article 9.1, needs to be elucidated and their formulations harmonized. A more adequate formulation of new article 5.4 could state that “All religions and all religious communities in Kosovo* shall be provided with any type of protection and opportunity to enjoy the rights and freedoms guaranteed in the Constitution and international conventions including ECHR”.

86. Under the new article 4A.5, “the State shall respect Religious Communities in Kosovo* and shall recognize as their representative only persons authorized by Religious Communities in Kosovo* and shall guarantee the protection of Religious Communities from any person or group claiming their name, premises of worship, properties, logos and stamp.” Since this provision refers to all religious communities - and not only to the registered ones -, clarification on how such protection will be provided to non-registered religious communities would be advisable.

3. Religious activities organised by the Office for the Registration of Religious Communities

87. A new article 7C.7 of Law No.02/L-31, added by Article 6 of the Draft Law, allows the Office for the Registration of Religious Communities to “organise various religious-related activities” and to “consult with representatives of religious communities for the organization of these events.” The Office being a Government body acting within the Ministry of Justice, it is not clear to the Venice Commission how this provision complies with the principle of neutrality of the State, which is enshrined in Article 8 of the Constitution and in the Articles 5.1. and 2 of Law No 02/L-31, providing that there shall be no official religion and that religious communities shall be separated from public authorities. By organising religious-related activities, the Office would become involved in some registered religious communities’ internal affairs. Furthermore, it is not clear what sorts of “activities” are envisaged.

88. According to the authorities of Kosovo*, the aim of this provision is to enable the authorities to promote a spirit of tolerance and interfaith collaboration. If this is the sole aim of the provision, the Venice Commission advises the authorities of Kosovo* to phrase the amendment more restrictively. However, it also underlines that, as stated by the Court, “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.⁴² Therefore it would not be in contradiction with the international standards if other positive measures were taken to secure the effectiveness of the freedom of religion, on the condition however that the principle of non-discrimination is strictly respected, this being a prerequisite to the observance of the State’s neutrality.

89. In this context the Venice Commission reminds the authorities of Kosovo* that burials and burial rites in public graveyards should be permitted to be organised in a neutral way and that persons belonging to a religious or philosophical minority should not be dependent on the religious majority regarding any aspect of their burial. It is recommended that a system in which

⁴¹According to the new Article 5.4.: “All religions and all religious communities in Kosovo* shall be provided with any type of protection and opportunity to enjoy the rights and freedoms provided by the present law”.

⁴²*Airey v. Ireland*, Application no. 6289/73, Judgment of 11 September 1979, § 29

burial places are assigned on a neutral and non-discriminatory basis by public authorities be established, e.g. the municipalities, without interference of other religious groups and that burial rites be permitted to be performed in accordance with the wishes of the families/relatives of the deceased.

4. The obligation on religious communities to inform the Office of their participation in organizations or conferences abroad

90. A new article 7C.8 of Law No.02/L-31, added by Article 6 of the Draft Law, requires religious communities “to inform the Office to participate in various organizations or conferences outside the country where participated as representatives of Kosovo*.” The meaning of this provision is not clear. Since, as stated by Article 8 of the Constitution, “the Republic of Kosovo* is a secular state and is neutral in matters of religious beliefs”, religious communities in principle cannot act as “representatives” of the State.

91. According to the drafters of the amendment, the only purpose is to impose an obligation on religious communities to inform the Office of their membership of foreign organisations, as representatives of a religious community of Kosovo*. Even if this is the purpose of the legislator, the provision, which is perceived by the representatives of all religious communities met by the rapporteurs as an interference in the autonomy of their communities, still contains a limitation of the freedom of religion, the freedom of association and the freedom of expression, which needs to be justified in the light of Article 9, 10 and 11, § 2, of the ECHR. The Venice Commission cannot see the grounds on which such an obligation could be deemed to be “necessary in a democratic society in the interests of public safety, public order, health or morals, or for the protection of the rights and freedoms of others.” It is recommended that this provision be deleted.

5. Closure of registered religious communities

92. It is not clear why new Article 7D requires a registered religious community to give "written justification for closure". The meaning of "inherited" (in relation to assets and property) should also be specified.

93. More generally, it is unclear whether the closure conditions will apply to all registered religious communities, including the five listed religious communities, or only to those having acquired legal personality through the procedure established by the Draft Law.

6. Financial aspects related to the activity of religious communities

94. Finally new Article 12 A of the Law contains some provisions on the funding of religious communities. It reads as follows:

“Art. 12A.1. The Government may announce annual bids inviting religious communities to obtain for funds for the preservation of cultural monuments in possession of religious communities. 2. Religious communities on their own or through their charitable organizations may apply for state funds for the purpose of implementing specific charity programs. 3. Religious communities shall be entitled to receive donations from legal and natural persons. 4. The Government shall not finance any of the religious communities.”

95. In a previous opinion, the Venice Commission stated: “The European Court of Human Rights, in its judgment in the case *Religionsgemeinschaft Zeugen Jehovas v. Austria*, considered that if a State confers substantial privileges to religious societies by a specific status it must then establish a legal framework which would give to all religious groups a fair opportunity to apply for this status and the criteria established must be applied in a non-

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*discriminatory manner.*⁴³ This implies also that the law has to determine the procedure and criteria to be applied in granting state funding to religious communities for the preservation of their monuments.

96. Finally, the consequences of acquiring legal personality with regard to financial matters should also be clear to the religious communities. The authorities of Kosovo* informed the rapporteurs on the definition of “legal person” of “legal entity” in the Law No. 03/L-161 on Personal Income Tax and in the Law No.03/L –204 on Taxes on Immovable Property Law.

97. Article 8 of the law on taxes on immovable property contains an exemption from immovable property tax for religious institutions whose property is kept and used only for religious purposes. Moreover article 13 of the Law No. 04/L-115 on amending and supplementing the Laws related to the ending of International supervision of Independence of Kosovo* article 13 adds a new paragraph 12.5 to the basic Law No 02/L-31 on freedom of Religion in Kosovo*, with the following text: “12.5. *In addition to the aforementioned exemptions, religious communities enjoy customs duty and tax privileges for economic activities, specific to their financial self-sustainability, as will be defined in the sub-legal law to be issued by the Minister of Finance. Such privileges shall cover import and purchase of relevant products, materials, tools and livestock; and export of products resulting from the above mentioned activities.*”

98. In order to guarantee legal certainty, the Venice Commission advises the authorities of Kosovo* to consider the possibility of referring in the basic law on freedom of religion to the applicable provisions on taxes, or at least to provide adequate information to the religious communities concerned. Provisions requiring transparency with regard to the religious communities’ financial sources and their use may also be useful.

VII. Conclusion

99. The Venice Commission welcomes the initiative of the authorities of Kosovo* to enable registration of religious communities as legal entities, with the aim of eliminating practical difficulties facing these communities in carrying out their activities⁴⁴. Nonetheless, a number of improvements to the Draft Law are suggested.

100. It is recommended that the amending provisions in Article 2 of the Draft Law - new Articles 1A and 1B - be placed after Article 1 of Law No. 02/L-31 or after Article 6 dealing with freedom of religious association. Since the law on freedom of religion has a much wider scope and will not be dealing exclusively with the issue of registration, Article 1A should be redrafted.

101. It is necessary that new Article 1A (2) (or other provisions of the future law) make completely clear that religious groups or communities, as well as individuals, are fully guaranteed freedom of religion, including the freedom to manifest religion “alone or in community with others”, even if they do not register.

102. Regarding Article 3 of the Draft Law, it might explicitly state as a legal principle that religious belief does not take precedence over the criminal law (unless required by international obligations). However, since the provision regulates an important matter of principle, it would be useful if examples of its practical implications could be given, at least in the *travaux préparatoires*. It should be considered whether the provision ought to refer not only to international obligations, but also to the Constitution.

⁴³CDL-AD(2012)004 *Opinion on act ccvi of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, §99

⁴⁴See, for example, the Analysis of the Law on Freedom of Religion in Kosovo* adopted by the Assembly of Kosovo* by the Institute on Religion and Public Policy (Expert Panel on Religious Legislation and Implementation), <http://www.osce.org/odihr/21529>.

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103. To avoid a too restrictive approach, the formulation in new Art. 7B. 2 would benefit from being more specific, for example by stating that registration may be refused *only if there is a very high risk that the name of an applicant community will be confused* with the name of another community recognized under Article 4A.

104. Differential treatment relating to the procedure applied in granting legal personality is not necessarily in contradiction with the principle of non-discrimination, provided however, that there is objective and reasonable justification for it to be legitimate and that this difference in treatment does not have a disproportionate impact on the exercise of freedom of religion by religious communities and their members.

105. The basis set out in the draft law for the difference in treatment granted to the five communities that “constitute the historical, cultural and social heritage of the country” - is questionable. To avoid a discriminatory approach, it is essential that the authorities of Kosovo ensure that all other established religious groups which form part of the historical, cultural and social heritage of Kosovo* are included in the list. Including one religious community with particular relevant characteristics whilst at the same time also excluding another which also has those characteristics is unlikely to be justified.

106. Article 7.B.1.1., requiring the religious community a minimum of fifty members, adult citizens of the Republic of Kosovo*, does not give rise to criticism.

107. To require religious communities to be organized on a clear, hierarchical basis as a precondition for being registered is not in compliance with article 9 ECHR, article 18 of ICCPR and the articles 38 and 39 of the Constitution of the Republic of Kosovo*, nor with the principle of non-discrimination read in conjunction with these articles. The Draft Law should only require that the religious community be able to present a representative body for the purpose of whether its contacts with the public authorities and its capacity to operate as a legal entity.

108. The Draft Law should clarify the effects of the status of 'legal entity' and specify which legislative provisions pertaining to this status will be applicable to registered religious communities. Clear information should be provided in the Draft Law - formulated in a positive way and not *a contrario* - with regard to the rights and benefits that a religious community may enjoy and the duties incumbent upon it following its recognition as a legal entity.

109. The requirement for a registered religious community to have “their statute/regulation”, which may amount to a requirement to provide excessively detailed information, should be clarified.

110. The requirement for the purpose or practices of the religious community “*not to be in contradiction with the inter-religious tolerance and the Constitution of the Republic of Kosovo**” is very vague and may open the door to arbitrary denial of registration. The legislature should indicate more precisely what kind of purposes and activities are deemed to be “in contradiction with the inter-religious tolerance and the Constitution”.

111. It is recommended that the requirement for religious communities to inform the authorities of their participation in organizations or conferences abroad as representatives of Kosovo* be deleted.

112. Including a reference, in the basic law on freedom of religion, to the provisions on taxes applicable to religious communities, may be considered. Provisions requiring transparency with regard to the financial sources of religious communities and their use may also be useful.

113. The Venice Commission remains at the disposal of the EU Special Representative in Kosovo* for further assistance.