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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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**

**Adopted by the Venice Commission
at its 79th Plenary Session, (Venice, 12-13 June 2009)**

On the basis of comments by

Ms Finola FLANAGAN (Member, Ireland)

Mr Jim MURDOCH (Expert, DGHL)

The OSCE/ODIHR Advisory Council on freedom of religion or belief

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I. Introduction

1. *By a letter of 2 March 2009, Mr Hovik Abrahamyan, Speaker of the National Assembly of Armenia, asked the Council of Europe to provide an expert assessment of the draft amendments to the law on freedom of Conscience and on Religious Organisations (CDL(2009)064). By a letter of 22 March 2009, Mr Armen Ashotyan, Member of the National Assembly of Armenia, referred to such request and asked the Venice Commission to provide an assessment jointly with the OSCE/ODIHR Advisory Council of freedom of religion or belief.*
2. *Ms Finola Flanagan acted as rapporteur on behalf of the Venice Commission; she had a meeting with Mr Ashotyan in Yerevan on 20 March 2009, and participated in a conference of the civil society on this, and other matters relating to fundamental freedoms on 20-21 March.*
3. *Mr Jim Murdoch, Professor at the University of Glasgow, analysed the draft amendments on behalf of the DGHL (Annex I).*
4. *The OSCE/ODIHR Advisory Council of freedom of religion or belief submitted its comments on 10 April 2009 (Annex II).*
5. *While the request for assessment concerns the draft amendments to the law on freedom of conscience and on religious organizations, the law currently in force (CDL (2009)065, hereinafter "the current law", has necessarily been examined to the extent necessary to understand the said amendments and their practical impact on the legal situation of religious organisations in Armenia. In addition, the comments by the ODIHR Advisory Council also contain pertinent remarks concerning other provisions.*
6. *This opinion, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).*

II. The legal context

7. Two provisions in the Armenian Constitution of 2005 protect freedom of religion and religious activities: Article 8.1, providing that:

The church shall be separate from the state in the Republic of Armenia.

The Republic of Armenia recognizes the exclusive historical mission of the Armenian Apostolic Holy Church as a national church, in the spiritual life, development of the national culture and preservation of the national identity of the people of Armenia.

Freedom of activities for all religious organizations in accordance with the law shall be guaranteed in the Republic of Armenia.

The relations of the Republic of Armenia and the Armenian Apostolic Holy Church may be regulated by the law;

and Article 26 which provides:

Everyone shall have the right to freedom of thought, conscience and religion. This right includes freedom to change the religion or belief and freedom to, either alone or in community with others manifest the religion or belief, through preaching, church ceremonies and other religious rites.

The exercise of this right may be restricted only by law in the interests of the public security, health, morality or the protection of rights and freedoms of others.

8. The law which is currently in force, the "Law of the Republic of Armenia on the Freedom of Conscience and on Religious Organizations" (CDL (2009)065) was adopted on 17 June 1991 and has been in force since then, with some amendments being made in 1997 (among others, the number of adult members required to qualify for registration was raised from 50 to 200).

9. The "Law of the Republic of Armenia Regarding the Relationship Between The Republic of Armenia and the Holy Apostolic Armenian Church (hereinafter: HAAC)"¹ regulates the "special relationship" between the State and the HAAC. This law provides in particular for: the right for the HAAC to construct monasteries, churches and other buildings of worship and to rehabilitate monasteries and churches that have the status of historical monuments (Article 6); state funding of cultural institutions, collections, museums, libraries and archives which are the property of the HAAC and constitute a part of the national cultural inheritance (Article 7); the right for the HAAC to establish or sponsor pre-school institutions, elementary, secondary and high schools, specialty colleges and institutions of higher learning, to participate in the preparation of the scholastic curriculum and textbooks for "Armenian Church History" courses within state educational institutions, to organize voluntary scholastic courses within state educational institutions, utilizing their buildings and resources (article 8); recognition of marriages and dissolutions of marriages by the HAAC (article 9); exemption of the income of the HAAC from taxation (Article 11).

10. The "Law of the Republic of Armenia on public organisations", adopted on 4 December 2001², regulates the founding and registration of non-profit legal entities. It provides in particular that "a public association, if its objectives correspond to the objectives set forth in Article 1 of this law, may be registered as a public organization acquiring the status of a legal entity from the moment of its state registration. The state registration, promoting the implementation of the chartered goals of a public association by setting it up as a legal entity, does not impede the person's right to form associations in what regards creating such associations, being a member of or acting through the associations without state registration".

III. Analysis of the draft amendments to the law on Freedom of Conscience and on Religious Organisations

Article 2 (amending Article 1 of current law)

11. The draft amendments extend the explicit guarantee of freedom of conscience and religion to *everybody*, while the current law only mentions freedom of conscience and religion of *citizens*. The draft amendments in this respect implement both the relevant provisions of the Constitution (see para. 7 above), which was amended in 2005 after the adoption of the law currently in force, and international commitments, notably Article 9 ECHR and Article 18 ICCPR that guarantee freedom of religion or belief and freedom of conscience for everyone regardless of citizenship.

12. Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

¹

Available at <http://www.accc.org.uk/%20%20The%20Church/Church%20Notices/Law%20of%20the%20Republic%20re%20Church/law%20of%20the%20republic%20re%20church.htm>

² Available at www.parliament.am

2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

13. Article 18 of the ICCPR reads:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Freedom to manifest one's religion or beliefs 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 and freedoms of others.

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

14. However, many of the provisions of the current law (other than those contained in article 2) that restrict the freedom to manifest one's conscience, religion or belief to citizens are not affected, but instead should be affected, by the draft amendment. The extension of the explicit guarantee of freedom of conscience and religion to everyone including non citizens should cover all the relevant articles in the current law (Articles 2 and 4, for example).

15. The draft amendment appears to extend (the translation is unclear) freedom of religion or belief to changing one's religion, while the current law only explicitly guarantees the right to adopt or not to adopt a religion; the draft amendment thus would comply with both Article 26 of the Constitution and with international standards, in particular Article 9 ECHR.

16. However, there are certain shortcomings which should be remedied in Article 2.

17. It is important that everyone have the right to manifest his or her religion or belief, and to do so *publicly*. Freedom of religion or belief would be an almost empty word if it were confined to the merely private sphere. Freedom to manifest one's religion also entails the right to do so *through teaching*, and also through *observance* and *practice*, failing which very important manifestations of religion or belief such as ceremonies outside of a church or of another building of worship might be prohibited. Further, the draft amendment fails to make it clear whether the right to express one's religion entails the right *to act* according to one's religion or belief in daily life.

18. Article 2 of the draft law under consideration should be redrafted accordingly. In order to achieve full and correct effect of the guarantees in the treaties (ICCPR & ECHR), the wording of those treaties might be adopted.

19. The draft amendment takes up the reference to the role of the HAAC in the previously repealed preamble of the current law. In doing so the draft amendment specifies the role of the HAAC. This change in general attributes greater legally binding force to the provision. It is not clear what consequences result from such a change. The acknowledgement of the special historical role of a specific religion in a country is not *per se* impermissible, but must

not be allowed to lead to, or serve as the basis for discriminations against other religious communities that may not have the same kind of specific role.

20. In a country where there is a marked link between ethnicity and a particular church such as exists in Armenia (98% are ethnic Armenian; 90% of citizens nominally belong to the HAAC), there must be a distinct opportunity for discrimination against other religions. To guard against this possibility there is a particular need to protect pluralism in religion which is an important element of democracy.

21. The “special relationship” between the State and the HAAC is regulated by the “Law of the Republic of Armenia Regarding the Relationship Between The Republic of Armenia and the Holy Apostolic Armenian Church” (see para. 9 above). The privileges expressly accorded to HAAC in this legislation make it particularly necessary to ensure that there are guarantees elsewhere that the state will accord all necessary rights to other religions. HAAC is acknowledged as part of the Armenian identity, but it must not be allowed to suppress other religions in maintaining this identity.

Article 3 (amending Article 1.1)

22. This draft amendment restores references to international treaties, previously contained in the now deleted preamble of the existing law. These international commitments are thus more clearly reaffirmed. However, this provision refers to “laws regulating the sphere and other normative acts”, which is extremely vague and does not meet the general purpose of this provision to refer to at least all the main legal instruments regulating this field.

Article 4 (amending Article 2 of current law)

23. This provision affirms the equality of *citizens* before the law. It is inconsistent with Article 14.1 of the Armenian constitution, which provides that “Everyone shall be equal before the law.”

24. The term “hindering others’ rights” is unduly vague; very often, religious or belief rights will come into conflict with other rights and freedoms of other persons, but in those cases the colliding rights would have to be balanced and be brought into a harmony as far as possible. It would clearly be inappropriate if any other right, however minor, would suffice to override a religious freedom right.

25. It is not clear what religious ‘animosity’ would mean, but this term is problematic, to the extent that it fails to draw a precise line between legitimate and illegitimate expression of feelings. Freedom of expression as guaranteed by Article 10 ECHR is an essential foundation of a democratic society. It is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend shock or disturb³. This is of particular relevance in the context of religious expression. It would only be legitimate for the law to prohibit “incitement of religious hatred,” and this should be understood to cover only extreme cases such as physical risks to persons and property and not theological disagreements or disputes. Practically all Council of Europe member States provide for an offence of “incitement to hatred” and religious hatred is treated within this offence as a subset of incitement to hatred generally.⁴ Indeed, Article 226 of the Armenian criminal code prohibits incitement of national racial or religious hatred.⁵

³ ECtHR, *Giniewski v. France* judgment of 31 January 2006, para. 43

⁴ Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred – adopted by the Venice Commission at its 76th Plenary Session, Venice, 17-18 October 2008

⁵ Article 226 of the Criminal Code: 1) Actions aimed at the incitement of national, racial or religious hatred, at racial superiority or humiliation of national dignity, are punished with a fine in the amount of 200 to 500 minimal salaries, or with correctional labour for up to 2 years, or with imprisonment for a term of 2-4 years. 2) The actions

26. The Law should also specifically provide that public officials or public authorities may not take action that may directly or indirectly restrict individual or collective manifestation of worship other than in circumstances provided for by law and where such action is necessary in a democratic society. Such a restriction on the powers of public officials would help prevent inappropriate interference with collective manifestation of religious belief (for example, when considering whether to intervene in private law relationships relating to the hire, etc of premises for worship).

Article 5 (amending Article 3 of current law)

27. The legitimate aims for restricting the right to freedom of religion appear to correspond to those listed in Article 9 ECHR and in Article 18 ICCPR, despite what appear to be inaccuracies in the translation. Reference should be added to the need for proportionality of such restrictions in a democratic society.

Article 7 (amending Article 5 of current law)

28. This article amends Article 5 of the current Law and needs to be read alongside Chapter 5 of the current Law (on the procedure for registration), and Article 7, which specifies a list of “rights” to be enjoyed following successful registration.

29. In connection with the matter of registration of a religious group, it must be recalled and underlined at the outset that “the expectation that believers will be allowed to associate freely, without arbitrary State intervention [for] 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.”⁶ This follows from a reading of Article 9 of the European Convention on Human Rights in conjunction with Article 11. The imposition of a requirement of state registration is not in itself incompatible with freedom of thought, conscience and religion, but where (as here) domestic law requires official recognition in order to allow a religious group to obtain the legal personality necessary to allow it to function effectively, the State must be careful to maintain a position of strict neutrality and be able to demonstrate it has proper grounds for refusing recognition.

30. Whether refusal to register will give rise to an issue falling within the scope of Article 9 (and Article 14 taken with Article 9) will be dependent on the impact of Article 7: that is, whether the refusal to register involves an interference with individual or collective manifestation of belief.

31. The European Court of Human Rights has had occasion to consider the effects of non-recognition in a number of cases. 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’.⁷ This principle applies also to the conferring of a range of privileges (rather than rights) which may follow from formal recognition.⁸ In *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, grant of legal personality as a private-law entity (a registered religious community) but not of the status of a public-law entity (a religious society) was found to have violated Article 14 taken with Article 9: the number and nature of privileges and advantages accorded recognised public-law entities was substantial enough to give rise to Article 9 considerations, and since one of the

envisaged in part 1 of this Article committed: publicly or by mass media, with violence or threat of violence; by abuse of official position; by an organized group, are punished with imprisonment for the term of 3 to 6 years.

⁶ *Metropolitan Church of Bessarabia and Others v. Moldova*, ECHR 2001-XII, at para. 118.

⁷ Appl. No. 53072/99, *Alujer Fernandez And Caballero Garcia v. Spain*, decision of 14 June 2001.

⁸ Such as recognition of exemption from military service: see e.g. *Lang v Austria*, no 23459/03, 19 March 2009 [judgment not yet final].

criteria for assessing whether the community constituted 'a religious society' had been applied in an arbitrary manner, the conclusion was that the difference in treatment had not been based upon an 'objective and reasonable justification'.⁹

32. According to the current Law and the proposed amendments, there are five existing qualifications with an additional sixth ground to be inserted.¹⁰

33. In general it can be said that Article 5 presents a set of requirements that appear to be met by the HAAC. The comment at paragraph 20 above concerning the link between ethnicity and a particular church on the one hand and the opportunity where such a link exists for discrimination on the other hand, is particularly pertinent in the context of Article 5.1 as amended. This Article does not therefore promote pluralism of religion.

34. While a State is 'entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population',¹¹ it may not go further and appear to be assessing the comparative legitimacy of different beliefs¹²; further, 'the State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom'¹³. Any interference must thus correspond to a 'pressing social need'. It is not clear how most of the prescribed qualifications could be said to be 'necessary'.

35. Sub-paragraph 5 (a) (*a religious organisation can be denied registration by an Executive body if it appears necessary to do so to protect the health, morality, or rights of others, etc*) seems on its face to be compatible with the Convention.¹⁴ 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.¹⁵

36. The following sub-paragraphs instead call for individual comment:

(b) *The religious organisation is based upon historically recognised Holy Scriptures*: This is potentially incompatible with the requirements of Article 9 of the European Convention on Human Rights. The Commission and Court have not found it necessary to date to give a definite interpretation to what is meant by 'religion', but the key point is that 'historically recognised scriptures' do not form part of this test. In the case-law, what may be considered 'mainstream' religions are certainly readily accepted as belief systems falling within the scope of the protection.¹⁶ However, older faiths such as Druidism which have no 'holy scriptures' also qualify¹⁷ as do religious movements of more recent origin such as Scientology,¹⁸ the Moon Sect¹⁹, the Divine Light Zentrum²⁰

⁹ No 40825/98, 31 July 2008, paras 92-98.

¹⁰ It is not clear why the exceptions in Article 5 Section 2 of the existing law are only applicable to ethnic minorities which have a national doctrine. Others must also be able to function. There is no obvious valid reason why only a national doctrine should qualify for this exception. Limitations which are discriminatory on their face cannot be said to be necessary.

¹¹ *Manoussakis and Others v. Greece*, judgment of 26 September 1996, Reports 1996-IV, at para. 40.

¹² *Hasan and Chaush v. Bulgaria* [GC], no 30985/96, ECHR 2000-XI, para. 78.

¹³ *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, 5th October 2006, at para 62.

¹⁴ See for discussion of whether there indeed exists a positive obligation upon States to so determine, *Leela Förderkreis E.V. and Others v. Germany* no 58911/00, 6 November 2008, para 99 [judgment not yet final].

¹⁵ See Case of Religionsgemeinschaft der Zeugen Jehovah's and Others v. Austria, no. 40825/98, 31 July 2008, final 31 October 2008 § 75, Metropolitan Church of Bessarabia and Others, cited above, § 113.

¹⁶ See, e.g., Appl. No. 20490/92, *ISKON and 8 Others v. United Kingdom*, decision of 8 March 1994, DR 76-A, p.90.

¹⁷ Appl. No. 12587/86, *Chappell v. United Kingdom*, (1987) DR 53, p. 241.

¹⁸ Appl. No. 7805/77, *X. and Church of Scientology v. Sweden*, decision of 5 May 1979, DR 16, p.68.

¹⁹ Appl. No. 8652/79, *X. v. Austria*, decision of 15 October 1981, DR 26, p. 89.

and the teachings of Osho.²¹ (However, whether the Wicca movement did so appears to have been left open in one case, and thus where there is a doubt as regards this matter, an applicant may be expected to establish that a particular 'religion' indeed does exist).²² It is thus not clear why qualification of a 'religious organisation' must be based upon historically recognised Holy Scriptures.

- (c) *Its doctrines form part of the internationally contemporary religious-ecclesiastical communities*: Similar concerns as noted above are also of relevance here. Religious communities must have the right to register as religious organizations also when their doctrines do not form part of "the international contemporary religious-ecclesiastical communities". Freedom of religion or belief does not depend on the condition that one's religion or belief is internationally or contemporaneously acknowledged. Even when the status of a religious organization should entail a specific, elevated position in the legal order there is no obviously valid reason why such a condition should be necessary in a democratic society to achieve one of the legitimate aims required for a limitation of these freedoms. Furthermore, the phrase itself seems open to differing interpretations and may thus lead to arbitrary decision-making
- (d) *It is free from materialism and is intended for purely spiritual goals*: 'free from materialism' and 'purely spiritual goals' both involve important qualifiers ('free' and 'purely') and thus also could lead to potentially arbitrary interpretation. A religious body may have a legitimate need to engage in certain commercial activities as a means of furthering its 'spiritual goals' (particularly if external financial assistance is precluded by section 13 when an organisation's 'spiritual centre' is outside Armenia) and thus arguably may not be 'free' from material considerations. While it may be permissible to require that religious associations not be "profit-making organizations that distribute profits to employees or officials", they should not be prevented from acquiring funds to pursue their non-profit activities.
- (e) *It has at least 500 members*: The 1991 Law required an organisation to have at least 50 members, a figure which has already been extended to a requirement of 200²³ members. Now a figure of 500 members is proposed. There is no existing guidance on the compatibility of requirements for significantly greater numbers of adherents where this has an effect upon collective manifestation of faith, but the higher the number of adherents required for registration (both in real terms, or as a percentage of the community), the more difficult a State may find it to provide an adequate justification for this increase. The OSCE Guidelines for Review of Legislation Pertaining to Religion or Belief²⁴ specifically state: "High minimum membership requirements should not be allowed with respect to obtaining legal personality." Furthermore, it is not clear what the reason is for raising the threshold from 200 to 500 at this point. (It is understood that the original amendment was to raise the threshold to 1,000) In the absence of a reason linked to one of the permissible limitations set out in Article 9(2) ECHR, the new limitation is discriminatory and disproportionate. Indeed, the threshold of 200 probably suffers from the same difficulty.

²⁰ Appl. No. 8118/77, *Omkananda and the Divine Light Zentrum v. United Kingdom*, decision of 19 March 1981, DR 25, p. 105.

²¹ *Leela Förderkreis E.V. and Others v. Germany*, 58911/00, 6 November 2008, para 81 [judgment not yet final].

²² E.g., Appl. no. 7291/75, *X v United Kingdom*, (1977) DR 11, 55 [concerning the 'Wicca' faith].

²³ The "undated" version of the amendments (in what is referred to as "Article 5") refers to "200 believers"; the "revised" version refers to replacement of "200" by "500". The implication is that the Law has already been changed, but initially at least, there was no proposal to increase the number of adherents.

²⁴ The Guidelines were prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief and adopted by the Venice Commission of the Council of Europe at its 59th Plenary Session (Venice, 18-19 June 2004).

(f) *In the event of Christian belief, they shall believe in Jesus Christ as God and Saviour and accept the Holy Trinity: The provision is an undue intrusion into the freedom of doctrine and teaching, and into religious autonomy..* It clearly will prohibit the registration of certain Christian churches such as Unitarians who do not accept the Holy Trinity. It will also discriminate against certain 'new' faiths, many of American origin. It is difficult to see how such a provision, if enacted, would allow the State to claim it was maintaining a position of 'strict neutrality' in matters of faith let alone demonstrate how it has proper grounds for refusing recognition on this basis. This is entirely objectionable.

37. These provisions are likely to make it difficult for other, non-traditional, religious organisations to penetrate Armenian society. As the Court has stressed, 'the exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom', with States enjoying only a limited margin of appreciation.²⁵ In any event, 'the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate'.²⁶

38. It must be stressed at this point that any religious group must have access to legal personality status *if it wishes to avail of it*. The rights mentioned in Article 7 of the existing law must be also guaranteed and accessible for smaller religious groups, and most of them must also be accessible even for individuals, because they are normal manifestations of freedom of religion or belief also of individuals. The freedom to manifest one's religion or belief is guaranteed by Article 9 ECHR and Article 18 ICCPR "alone" as well as "in community with others" and "in private" as well as "in public". In this sense, it is important to remember that individuals should be free to carry out these activities without any entity status at all, if they so choose. In fact, for a variety of reasons, most groups will prefer to avail themselves of legal entity status, but such status should not be mandatory. As stated by the OSCE Legislative Guidelines, "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."²⁷

39. It must be noted in this connection that the relationship between the status as a religious organization and the general association law of the Republic of Armenia is not sufficiently clear. It is not clear whether a religious community that does not have the status as a religious organization can function as an association with legal entity status pursuant to general provisions²⁸, and that, if organized as such an entity, it would be able "to exercise the full range of religious activities and activities normally exercised by registered non-governmental legal entities". In the discussions on this point that were held on the occasion of the visit in the Republic of Armenia, various views on this issue were held by Armenian officials.

40. It must be stressed, in connection with the list of the prerogatives of the registered religious organisations in Article 7 of the current law, that it is not clear whether it purports to be a definitive list of the rights and privileges of recognised religious organisations – that is, whether this section thereby excludes religious organisations from other activities. It should be made clear that this list is illustrative only of the legal rights of recognised religious groups and is without prejudice to other forms of collective manifestation of belief required by their faith. In particular, the right of proselytism (discussed below) must extend to individual members and to religious groups.

²⁵ *Moscow Branch of the Salvation Army v. Russia*, above, at para 76.

²⁶ *Moscow Branch of the Salvation Army v. Russia*, above, at para 92.

²⁷ OSCE Legislative Guidelines, Section II (F).

²⁸ The law of the Republic of Armenia "on public organizations" (adopted on 4 December 2001) provides that the minimum number of physical persons required to found an organisation to be registered is two.

41. Further, as concerns membership of the religious organisations, it must be noted that the 'undated' version proposes that only adults can become members of a religious organisation; while the 'revised' version of the proposed amendments makes no reference to age. In light of the impact of non-registration upon collective manifestation of belief, no minimum age for membership should be required. It is not appropriate for the state to determine the conditions of membership in a religious organization. The state may provide that minors cannot be members of a legal entity, but if this is the intent, the provision should not be worded so as to suggest that there is something inappropriate about theological membership doctrines that contemplate membership at younger ages. It must be noted however that underage persons may be members of registered associations, subject to certain conditions.²⁹

42. Finally, it is not clear why the exceptions in Article 5 Section 2 of the current law are only applicable to ethnic minorities which have a national doctrine. Others must also be able to function. There is no valid reason why only a national doctrine should qualify for this exception. Limitations which are discriminatory on their face cannot be said to be necessary.³⁰

Article 9 (amending Article 8 of current law)

43. This provision makes it a criminal offence to proselytise. This prohibition is contained in the Part of the Act entitled 'Rights of Religious Organisations' although its import is to *deny* rather than to affirm collective rights.

44. Both the current Law and the Criminal Code prohibit proselytism. "Proselytism" is nowhere defined at present, although section 8 of the 1991 Law specifically provides that it does *not* include any of the "clearly prescribed rights" listed in section 7. The rights prescribed by section 7 do not include the right to proselytise: their focus is upon the provision of teaching, etc to *existing* members or believers ("their faithful"). The generally accepted definition of proselytism involves the attempt to convert an individual from one faith (or none) to another. In short, the existing Law is intended to restrict 'teaching' (a form of "manifestation" of belief specifically referred to in Article 9 of the European Convention on Human Rights) to existing adherents of a faith. This is certainly a major defect in Armenian law as it stands at present. The right to try to persuade others of the validity of one's beliefs is implicitly supported by the reference in the text of Article 9 of the European Convention on Human Rights to the right 'to change [one's] religion or belief'. As the European Court of Human Rights noted in *Kokkinakis v Greece*, the right to try to convince others to convert to another faith was included within the scope of the guarantee, "failing which ... "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter". In other words, the right to proselytise clearly falls within the scope of Article 9 and is thus protected. But it is not an absolute right and a State can limit the right on considerations of public order or the protection of vulnerable individuals against undue exploitation.³¹

²⁹ See Article 6 of the law on public organisations: "(...) An underage person, up to 14 years old, may become a member of an organization on his/her will based on the written statement of his/her legal representative. If an underage person, from 14 years old to 18 years old, in the order prescribed by law is not recognized as a person with an ability to act, he/she may become a member of an organization based on his/her application with the written consent of his/her legal representative. The organization's charter may envisage specific stipulations regarding the rights and obligations of its underage members."

³⁰ See U.N. Human Rights Committee, General Comment 48(22), para. 8.

³¹ The jurisprudence of the European Court of Human Rights distinguishes between 'proper' and 'improper' proselytism, a distinction reflected in other measures adopted by Council of Europe institutions such as Parliamentary Assembly Recommendation 1412 (1999) on the illegal activities of sects which calls for domestic action against 'illegal practices carried out in the name of groups of a religious, esoteric or spiritual nature', the provision and exchange between states of information on such sects, and the importance of the history and philosophy of religion in school curricula with a view to protecting young persons.

45. The “revised” version proposes that this existing incompatibility is to be remedied. This is clearly to be welcomed, but with qualifications. As noted, Section 1 (according to the ‘revised’ version of amendments) of the Law is now to specify that freedom of conscience will also include the right to change belief. To this end, the ‘revised’ version (but not the ‘undated’ version) proposes significant redefinition of proselytism insofar as in future it will only constitute an offence when one (or more) of five factors can be established (that is, “preaching influence” involving one or more of “material encouragement”, “physical or psychological pressure or compulsion”, incitement to religious hatred, “expression of offences... towards other persons or religion”, or two or more attempts at proselytism.)

46. While some of these five factors relate to what may fairly be deemed ‘improper proselytism’, not all do so. In consequence, the attempts to restrict the scope of the offence of ‘proselytism’ do not go far enough. First, the offence should be clearly defined as one of “improper proselytism”, to clarify that proselytism per se does not constitute an offence. In *Kokkinakis v Greece*, while the Strasbourg Court accepted that a prohibition on proselytism was prescribed by law and could be said to have had the legitimate aim of protecting the rights of others, it could not accept that the interference could be justified as necessary in a democratic society. A distinction had to be drawn between “bearing Christian witness” or evangelicalism and “improper proselytism” involving undue influence or even force, especially upon weak and vulnerable members of society. The former was accepted by Christians as part of the Christian church’s mission; the latter was incompatible with respect for belief and opinion. The failure of the domestic courts to specify the reasons for the conviction meant that the state could not show that there had been a pressing social need for the conviction, and thus the sentence had not been proportionate to the aim of the protection of others.³²

47. Second, the definition of “improper proselytism” should be drawn with greater care. In *Kokkinakis*, the Greek courts in their reasoning had established ‘the applicant’s liability by merely reproducing the wording of [the legislation] and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means.’ The State thus could not show that ‘the applicant’s conviction was justified in the circumstances of the case by a pressing social need’, and thus ‘the contested measure ... does not appear to have been proportionate to the legitimate aim pursued or, consequently, “necessary in a democratic society ... for the protection of the rights and freedoms of others”.’³³ While in this case the European Court of Human Rights declined to provide a comprehensive definition of ‘improper proselytism’, it did refer to a 1956 World Council of Churches report in justification of the distinction between ‘proper’ and ‘improper’ proselytism:

‘[Bearing Christian witness or evangelicalism] corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. [‘Improper proselytism’] represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.’³⁴

³² *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, paras. 48-49.

³³ *Kokkinakis v. Greece*, above, at paras. 48-49.

³⁴ *Kokkinakis v. Greece*, above. Subsequently, in *Larissis v. Greece*, judgment of 24 February 1998, Reports 1998-I, 362, paras. 40–61, the Strasbourg Court accepted that a conviction of senior officers who were members of the Pentecostal faith for the proselytism of three airmen under their command was not to be a breach of Article 9 in light of the crucial nature of military hierarchical structures which could potentially involve a risk of harassment of a subordinate through abuse of influence by senior officers: the need to protect the prestige and

48. “Improper proselytism” should thus be defined more carefully: while it might possibly include the use of “material encouragement” and “physical or psychological pressure or compulsion” as proposed in the “revised” draft (i.e., subsections a and b), it is difficult to see how teaching with a view to convert an individual in which ‘hatred is formed’ (section c), ‘the expression of offences is applied towards other persons or religions’ (section d), or where a person is subjected on two or more occasions to unwanted attempts at proselytism (section e) can be said to constitute ‘improper proselytism’ within the (albeit limited) discussion of the concept by the Strasbourg Court. The formulation of ‘hatred’, etc (sections c and d) is better addressed by other means and should be restricted to cases in which a deliberate attempt to incite religious hatred can be proved, or at most, to cases in which the speaker has shown a wilful disregard for the likely consequences of the communication of expression. The current drafting suggests that intention is not required, and that the offence is committed whenever such ‘hatred’ is occasioned. This is too broad. Further, the avoidance of nuisance (section e) will only in rare situations be likely to warrant the imposition of criminal responsibility (it is exceptionally difficult to see how the making of two unwanted calls to or on an individual should constitute a criminal offence: but a persistent pattern of harassment most certainly should do so).

49. In any event, several terms – such as “material encouragement”, “psychological pressure”, “expression of offences” – are vague and unduly broad.

50. Third, the penalties for improper proselytism appear to be unduly harsh. At the same time as this liberalising measure permitting proselytism is introduced, it appears that the penalties for proselytism are to be increased significantly: the Draft Criminal Code, Art 162, now proposes that proselytism is to be punishable by a fine of 500 times the minimum salary or by one year’s imprisonment³⁵.

Article 11 (amending article 11 of current law)

51. This provision requires the consent of religious organisations in order to make use for commercial purposes of pictures of saints and of religious mysteries and buildings.

52. It is not clear which religious organization's consent is needed when several organisations have the same symbol or, saint. As for the cross, which would qualify as a religious symbol, this provision is likely to have a significant impact on the jewellery industry, and we suspect that this is unlikely to be intended. The draft provision – at least in its English translation - also makes the use of such symbols, etc. depend on the consent of the registered religious organizations even when the registered religious organization does not have anything to do with that religious symbol, the saint or the religious building or ‘religious construction’. Further, the draft amendment does not make any statement about the situation when a new saint or a new religious symbol is created. It is not clear what then happens with the prior use of such names.

Article 15 (amending Article 19 of current law)

53. It is not clear what is intended by the proposed addition to article 19. This provision is problematic, to the extent that it could be interpreted as banning all religious manifestations performed “in community with others.” Further, it could easily be read as prohibiting religious monasteries or religious orders in which such control is a most common feature. Internal

effective operation of the armed forces and to protect individual soldiers from ideological coercion provided adequate justification for the convictions.

³⁵ It is not entirely clear what the existing penalties are: Art 162 seems to suggest (if proselytism constitutes an ‘encroachment on the rights of others’) that the offence is punishable by a fine of between 200 and 400 minimal salaries or by imprisonment for up to 3 months: but this provision refers to the ‘establishment or management of associations’.

organization within any church or other religious community would become impossible if the hierarchy should not be able anymore to exercise control of the personal life of the clergy or staff. A common binding teaching would become impossible.

54. Indeed, every religion tries to take some control over the consciousness, thinking, personal life, awareness, and behaviour of their members. Religions traditionally and virtually always teach how best to think and lead one's personal life. By their very nature, religions seek to have influence on the conscience of people. They often ask for property as gifts donations, etc. They often want to influence health by giving advice on how best to live a healthy and sound life.

Article 18

55. This provision is unclear. What may be required is re-registration of religious organizations that have been registered before coming into force of the draft amending law, while this is not said in the present text. It is not clear whether religious organizations that are registered and are in compliance with the provisions of the law will need to re-register anyway or whether they will remain registered without doing anything. While it is likely that they will not need to re-register, it must be noted that no procedure is provided in the law as to how to establish whether a previously registered religious organization does in fact comply with the requirements of the law as amended. This would mean that all religious organizations will be under the continuous threat of being de-registered.

56. Assuming that a religious organization does need to re-register in order to bring its charter into compliance with the current law, three months is an impossibly short time - both for the churches that need to redraft charter documents, and for the personnel in state offices who would have to process the documents thus generated. Greater clarity should be provided about exactly who will need to re-register, and a considerably longer time period should be allowed for the process.

57. The draft provision appears to provide that "the activity" of the religious organization "shall stop" pending registration. This requirement contributes to an understanding of the whole draft amendment law as prohibiting the activity of all religious communities that do not have the status as a religious organization. What might legitimately be caused to "stop", if anything, is only the status as a religious organization with the activity of the religious community then continuing in some other form of association. Furthermore, inadequate care is taken to protect the vested rights of organizations currently existing Pending their re-registration. If the legal entity of a particular organization is dissolved, what happens to property the organization has acquired?

IV. Analysis of the draft amendment to Article 162 of the Criminal Code

58. The first paragraph of the proposed new Article 162 is unduly vague to the extent that it renders punishable "encroachments on other rights of individuals". These "other rights" are not defined. They thus can be any other rights of individuals including contractual rights. These provisions should therefore be redrafted to specify these rights.

59. As concerns the criminalisation of incitement to refuse "civil duties", the said "civil duties", according to an explanation provided by the Armenian authorities, should be those which are referred to in Articles 45, 46 and 47 of the Constitution (obligation to pay taxes, duties and other compulsory fees; to take part in the defence of the Republic of Armenia in conformity with the procedure prescribed by the law; to honour the Constitutions and laws, to respect the rights, freedoms and dignity of others).

60. As concerns the obligation to take part in the defence of the State, an obvious question arises whether a religious association that believes that the legal obligation to undertake military service is contrary to an adherent's duties as a matter of religious faith could be so penalised in cases where the association actively promotes this belief and thus 'incites citizens to refuse to perform their civil duties'. The extent to which Article 9 imposes a duty upon state authorities to recognise exemptions from general civic or legal obligations is still open to some doubt in light of Article 4(3)(b) of the European Convention on Human Rights which makes specific provision for 'service of a military character'. However, virtually all European states which have military service obligations now recognise alternative civilian service in line with a clear European consensus that this is appropriate.³⁶ The issue is of some concern to Armenia in light of a pending case (that is, of *Bayatyan v. Armenia*)³⁷. This matter is distinguishable from a situation in which an individual who is a Jehovah's Witness is penalised for refusal to carry out military service.

61. Further, the repeated imposition of penalties upon those who refuse to carry out such service may also give rise to other considerations: in *Ülke v Turkey*, the Court determined that the repeated punishment for refusal to serve in the military had amounted to treatment in violation of Article 3 since domestic law failed to make provision for conscientious objectors was 'evidently not sufficient to provide an appropriate means of dealing with situations arising from the refusal to perform military service on account of one's beliefs'.³⁸ However, while distinguishable, the case may also be somewhat analogous insofar as the repeated imposition of sanctions on a religious organisation for promoting a central precept of their beliefs may well be considered an unjustifiable interference with the European Convention on Human Rights.

62. According to the explanation provided by the Armenian authorities, the duty to take part in the defence of the State would comprise both the military and the alternative service, which would exclude the aforementioned problems.

63. It is likely that the term "proselytism" in the draft provision would refer to the term proselytism as described in the draft amendment to the current Law of the Republic of Armenia on the Freedom of Conscience and on Religious Organizations. As has been shown (see paras. 47-49 above), the definition provided in the draft amendment is extremely problematic. This also affects the draft amendment of Article 162 Criminal Code of the Republic of Armenia.

V. Conclusions

64. The draft laws under consideration take some important steps to improve the precision and the range of human rights guarantees as required by international commitments.

65. However, they raise several concerns and would require redrafting. The law which is currently in force would also require more extensive amendments than those proposed by the draft law under consideration.

³⁶ And see Committee of Ministers Recommendation No. R(87) 8 and Parliamentary Assembly Recommendation 1518 (2001); further, Parliamentary Assembly Opinion No. 221 (2000) concerning Armenia's application for membership of the Council of Europe notes that the State undertook to introduce a law on alternative service in compliance with European standards.

³⁷ No 23459/03, declared partly admissible on 12 December 2006.

³⁸ No 39437/98, 24 January 2006, at paras 61 and 62. (Cf para 73 where the Court refused the applicant's request to request the State to enact legislation recognising conscientious objectors, noting this was a matter for the State under the supervision of the Committee of Ministers to determine the means for meeting its obligations under the Convention.) See also *Lang v. Austria*, no 28648/03, (19 March 2009) [not yet final], at para 25: As the privilege at issue is intended to ensure the proper functioning of religious groups in their collective dimension, and thus promotes a goal protected by Article 9 of the Convention, the exemption from military service granted to specific representatives of religious societies comes within the scope of that provision.

66. The main problems raised by the provisions under consideration are the following:

- the law (both the current one and the draft amendments to it) should specifically refer to “everyone”, and not merely to “citizens”. This usage should also be consistent: rights should be enjoyed (individually and collectively) by all, irrespective of nationality or citizenship;
- the scope of freedom of conscience, religion or belief (e. g. Article 1) should be adjusted;
- the law should make clear that those religious communities which are not registered as a religious organization can have access to legal entity status under general provisions (e.g., under association law). If legal entity status cannot be provided for them under general provisions, they should be given access to legal entity status under the registration process of the Law of the Republic of Armenia on the Freedom of Conscience and on Religious Organizations (e. g. Article 5);
- the requirements for registration as a “religious organisation” require extensive redrafting. The definition of Christianity should be deleted. The minimum number of members necessary for an organisation to be registered must not be increased;
- in section 7, it should be made clear that the list of rights is illustrative only of the legal rights of recognised religious groups and is without prejudice to other forms of collective manifestation of belief required by their faith;
- the offence of proselytism should be reworded to ensure the offence is clearly defined as one of “improper proselytism”; the definition of ‘improper proselytism’ should be drawn with greater care; and the penalties for improper proselytism should be reconsidered as they could appear to be unduly harsh;
- it should be acknowledged that Art 162 of the Criminal Code (as amended) should not permit the imposition of sanctions on a religious organisation such as the Jehovah’s Witnesses for stating that its members should refuse to undertake military or appropriate alternative civilian service as this teaching involves the promotion of a central precept of the beliefs of this organisation;
- the provision on usage of religious symbols, names, etc. (Article 11 Section 2) should be redrafted;
- possible discriminations between religious communities should be avoided;
- the prohibition of control (Article 19) should be redrafted or deleted.

67. The Venice Commission, the Directorate General of Human Rights and Legal Affairs and the ODIHR Advisory Council on Freedom of Religion and Belief stand ready to continue to assist the Armenian authorities.