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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON FREEDOM OF RELIGION, RELIGIOUS ORGANISATIONS AND MUTUAL RELATIONS WITH THE STATE

OF ALBANIA

Adopted by the Venice Commission
at its 73rd Plenary Session
(Venice, 14-15 December 2007)

On the basis of comments by

Mr Louis-Léon CHRISTIANS (Expert, Belgium)
Ms Angelika NUSSBERGER (Substitute Member, Germany)

I. Introduction

1. By a letter of 8 March 2007, the Minister of Culture Tourism Youth and Sports of Albania requested the assistance of the Venice Commission in the preparation of a law on religious issues and relations between religious communities.

2. At the end of October 2007, the Commission received the text of the draft law "On freedom of religion, religious organisations and mutual relations with the state" of the Republic of Albania and was requested to assess its compatibility with the applicable international standards. The Commission also received the text of three agreements between Albania and three religious communities of Albania (the Bektashi World Community, the Muslim Community and the Atocephamlous Orthodox Church of Albania; see CDL(2007)110).

3. Mr Louis-Léon Christians, expert from Belgium, and Ms Angelika Nussberger were appointed as rapporteurs.

4. The present opinion, which was prepared on the basis of their comments (CDL(2007)107 and 108 respectively), was adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007).

II. Basic aims and scope of the Albanian draft law

A. Objective and structure of the draft law

5. The draft law has a twofold aim. Its object is to regulate human rights questions linked to freedom of religion on the one hand, and questions concerning the status of religious organisations within the State on the other hand. The founding principles are "human dignity", "religious pluralism", "laicism" and "harmony of relationships between public institutions and religious organisations" (Article 5). It is to be highly welcomed that the law refers to international standards on several occasions.

6. The draft law is subdivided in six chapters: General provisions (I), freedom of religion and conscience (II), relations between the State and religious organisations (III), cooperation in the interest of citizens (IV), organisation of religious organisations and their legal entity status (V), and financial status (VI).

B. Basic notions

a. Freedom of religion – freedom of conscience – freedom of belief

7. The scope of the regulation is not clear. The title refers only to "freedom of religion", whereas throughout the law there are also regulations on "freedom of conscience" and "belief" or "religious belief". The definition given in Article 2 of the Law explains that "freedom of religion and conscience" is understood as "the freedom to choose, or not, a religion or a religious belief and to express it individually or collectively, privately or publicly".

8. Generally, in human rights documents, "freedom of religion" and "freedom of conscience" are dealt with separately. On the other hand, international standards guarantee the freedom of religion together with freedom of belief. The "belief" aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Both religion and belief are entitled to protection (see Guidelines, A 3).

9. This aspect is not clear in the Albanian draft law. The words "religious belief" and "belief" are used interchangeably (see e.g. Article 11 para. 1: "religion or religious beliefs" vs. Article 11 para. 2: "religion or beliefs"; Article 9 para. 1: "…act contrary to their religious beliefs … or be denied the right to express their belief individually or collectively …").

10. It is not clear whether the draft fully guarantees religious freedom for non-religious beliefs. For example, art. 9 (2) prohibits discriminatory actions only in respect of "a different religion".

11. The Commission considers that it would be helpful to check the wording used in the law and to make sure that both religions and other beliefs (such as atheism and agnosticism) should be protected. It could be appropriate to state expressly that this Law does not restrict the general right to religious freedom as guaranteed by the Constitution and the International Conventions.

b. Religious organisation – religious community – religious association – religious group

12. The draft law further regulates the status of religious organisations and makes a distinction between "religious organisation", "religious community", "religious association" and "religious group". According to the definition given in Article 2, a "religious organisation" is a "generic term covering both religious communities and associations".

13. The status of a "religious community" seems to be the most privileged one. It is "recognised by the State as a legal entity through the stipulation of a bilateral agreement, and registered in the Registrar of Religious Communities, Associations and Groups." (Article 2). But it is not clear if those elements (bilateral agreement, registration) are preconditions of the existence of a religious community. Article 16, in fact, explains that a religious community *can request* the stipulation of an agreement: the logical consequence of this provision must be that a religious community can exist before the conclusion of a bilateral agreement.

14. The Commission considers that it would be useful to review the definitions used in this context in order to make them clearer.

C. Substantive issues

a. Registration as a precondition for the exercise of freedom of religion

15. According to international standards, registration of religious organisations should not be mandatory. Individuals and groups should be free to practice their religion without registration if they so desire (Guidelines F.1).

16. The Albanian draft law does not contain any provision prohibiting the practice of a religion without registration.

17. For the exercise of individual freedom of religion, it does not seem necessary to be part of any registered religious organisation: the purpose of the draft law (art. 3 and articles 7-12) seems generally to protect the religious freedom of individuals even if they do not belong to a registered religion. More explicitly, art. 3 (c) and art. 7 (3) guarantee the freedom of the individual, "so that he/she is never obliged to be part of a religious organisation". Art. 24 also seems to protect all religious buildings without regard to any kind of religious registration.

18. No provision instead guarantees collective religious freedom for organisations which are either "non registered", or whose registration is pending. Moreover, art. 29 seems to expressly limit the core right to "perform religious rituals in accordance with its internal regulations" to "religious organisations" (i.e. registered ones [= art. 2 (3)]). In addition, both religious associations and religious communities seem to require registration as a legal entity (Article 2, 25), although this is not quite clear. Whereas Article 2 defines a "religious association" as a "group of religious people … registered", Article 28 states that "religious organisations can be registered …".

19. The Commission recalls in this respect that the wide margin of appreciation of Contracting States about Church/State regimes is not given a carte blanche (Guidelines, II/A/6): no legal regime of Churches-State relationships is exempted from the provisions of the ECHR, especially article 14 linked to article 9. Religious freedom has to be equally guaranteed to any religious community. Only distinctions which are reasonable in a democratic society may be acceptable.

20. A registration system that would be linked to more than basic requirements may only provide for some « non mandatory complements » (distinct from the basic core of the European guarantees) in order to ensure additional guarantees or positive supports for religions in society, in a non discriminatory way, such as financial support or religious teachings in public schools.

21. The Commission is of the view that it would be worth clarifying this point in order not to restrict the right to practice the religion without registration, which is guaranteed under Article 9 ECHR.

22. As concerns the refusal to register, or the termination of registration of a religious association, the European Court of Human Rights has clarified that 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 (see *Manoussakis and Others*, cited above, p. 1362, § 40, and *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 84, ECHR 2001-IX).

23. In *Cârmuirea Spiritual a Musulmanilor din Republica Moldova v. Moldavia (*judgment of 14 June 2005*),* the Court has unanimously held 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 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".

24. According to Art. 27 (5), Art. 28 (4) [and also art. 30 (2) and art. 36 (3) (a-d)], registration may be refused (or terminated) if: a) The documentation mentioned in this article is not complete; b) The doctrine, aims and organization stated in the bylaw or the regulations is in contradiction with the Constitution of the Republic of Albania or the legislation of the country; c) The activity exercised by this Organization jeopardizes public order and tranquility, rights of other persons, or spreads hate between people of different religions.

25. Whereas the reasons given in Article 28 para. 4 (a) (incomplete documentation) and Article 28 para. 4 (c) (issues of public order) are in accordance with the requirements defined by the European Court of Human Rights, it is not clear what additional requirements are set by Article 28 para. 4 (b). Which "legislation" is meant here? If the legislator is free to define reasons for refusal of registration that go beyond those mentioned in Article 28 para. 4 (a) and (c), this might be in contradiction with the jurisprudence of the European Court of Human Rights quoted above.

26. Even if the purpose of the proposed registration system may be accepted as legitimate, it is nevertheless necessary to require that any examination of religious doctrines, as provided by art. 28 (4) (b), should be based on factual and material evidence. "In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise" (*Hasan and*

Chaush v. Bulgaria [GC], no. 30985/96, § 84, ECHR 2000-XI). The ECHR reiterated in *Metropolitan Church of Bessarabia v. Moldova* (Appl. 45701/99, Judgment, 13 December 2001, §125) that while it cannot be ruled out that the programme of an organisation programme might conceal objectives and intentions different from the ones it proclaims, in order to verify that it does not, the Court must compare the content of the programme with the *actions* of the organisations and the *positions it defends.*

27. As for the possibility that an applicant Church, once recognised, might constitute a danger to public order and tranquility, or to the peaceful toleration among religious communities, a *mere hypothesis*, in the absence of corroboration, cannot justify a refusal to recognise it. For example, « Preaching ideas for religion intolerance » [art. 36 (3a)] seems a particularly sensitive criterion because of its vagueness and because of the risk of stereotypes. *Guidelines, F.1.* suggest that « Provisions that grant excessive governmental discretion in giving approvals should not be allowed; official discretion in limiting religious freedom, whether as a result of vague provisions or otherwise, should be carefully limited".

28. In the Commission's opinion, both the status of non-registered religious organisations and the conditions for registration should be clarified. Any refusal of registration should be based on clear and material evidence.

b. Distinction between "religious organisation" and "religious community"

29. Although it seems to be evident from the draft law that the status of a "religious community" confers special privileges not connected with the status of a "religious organisation", the distinction is not really clear.

30. As already mentioned (paras. 12-13 above), the term "religious organisations" seems to be a technical concept (a) including both "religious communities" and "religious associations", and (b) requiring previous registration. However, it has to be made sure that the draft law (or perhaps its English translation) be consistent with the definitions provided with in article 3. For example, about termination, art. 30 seems to consider "religious organisations" as a distinct concept from "religious communities" (addressed in article 36). Another example may be found in article 38, about fiscal facilities: it is not sure that article 38 only addresses "religious communities".

31. As concerns registration, the criteria are set out in Article 28. The criteria set out in paragraph 4 have been discussed above (point a).

32. The modalities of administrative registration are provided in article 27, together with certain additional requirements, such as the necessity "for the name of the religious community to be different from the name of any other religious community" [art. 27(3)(a)].

33. This last criterion should not result in public pressure for religious unification, considered as a breach of ECHR (see Hasan and Chaush v. Bulgaria, 26 October 2000, no. 30985/96, and Metropolitan Church of Bessarabia v. Moldova, op. cit., § 123).

34. Article 31 explicitly lists the criteria for recognition as religious communities; it is necessary in the first place to have been operating in the territory, during 20/30/50 years after being registered as religious organisations, being continuously in accordance with the constitution and the legislation during this period of time. In addition, a bilateral agreement has to be stipulated with the Council of Ministers. At this stage, a legal remedy is provided in case of refusal. Subsequently, this agreement has to be ratified by Parliament by majority vote. For minority religions, it might be difficult to obtain such a majority vote. There is no legal protection against discrimination in this case.

35. As concerns the comparative legal status of religious communities and (simple) religious organisations, the acquisition of legal personality seems to be the main consequence of the first level registration (art. 25), besides specific rights which seem to be provided by art. 29.

36. From the comparison between Art. 30 (1) (a) and art. 32, there appears to be an ambiguity concerning two kinds of duration of registration: for religious Organisations, a limited term or registration would seem possible (or even necessary), whereas the draft provides for an unlimited time for religious communities' activities. This difference should be clarified.

37. Art. 29, as already mentioned, seems particularly confusing, as pointed out by a special footnote in the draft : what are clearly the specific prerogatives of religious communities v. any religious organisations? For example, what about building (or organising) orphanages, or asylums (art. 29 (c)) or general material support (art. 13 (5)) versus specific prerogatives of religious communities provided by articles 18, 20, 21, 22, 39 ? It would be useful to correct the ambiguity between art. 29 and art. 13 (5).

38. The wording of the draft law seems to provide that art. 23 (free expression in the media), art. 33 (collective autonomy) and art.34 (relations with foreign movements) are specifically attributed to religious communities only, and not to other religious organisations. Such a general restriction of fundamental rights would appear to be at variance with art. 9 (1) ECHR

39. With respect to the limitation of free expression in the media, for example, in the case of Murphy v. Ireland (10 July 1993), the Court recalled that "freedom of expression constitutes one of the essential foundations of a democratic society. As paragraph 2 of Article 10 expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane". The Court clearly affirmed that « No restriction on freedom of expression, whether in the context of religious beliefs or in any other, can be compatible with Article 10 unless it satisfies, inter alia, the test of necessity as required by the second paragraph of that Article. In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Court has, however, consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation » (§§ 65-66).

40. In conclusion, the Commission stresses that the fundamental rights guaranteed under Article 9 ECHR must not be made dependent on the recognition as a "religious community". The procedure of recognition should avoid any possibility of discriminating against any religion or belief. It would be appropriate to clarify the rights and prerogatives of religious communities versus religious organizations. It would also seem appropriate to add general statement that religious freedom is guaranteed to every individual and every religious organisations, even non-registered ones.

c. Questions of internal organisation

41. It is to be welcomed that interference in the internal organisation is prohibited by the draft law. This seems to be an absolute prohibition as no exceptions are mentioned (Art. 13 para. 3).

42. On the other hand, however, it is requested that internal regulation should be in compliance with the legislation in force (Article 26 para. 3) and that every change in the internal regulations be reported to the State Committee of Cults (Art. 26 para. 5). Furthermore, the officials as well as changes in the management body have to be notified to the Council of Ministers before public nomination (Article 33 para. 3).

43. These provisions might undermine the guarantee against interference in internal affairs. The scope of the prohibition of interference in the internal organisation needs therefore be clarified.

d. Right to legal remedy

44. The draft law provides for a legal remedy before a court in the context of various rights of religious organisations (e.g. Article 15 para. 8, Article 31 para. 3). It is not clear why limitations of the freedom of religion related to "protests and gatherings" (Article 13 para 6) can be complained of only in front of the State Committee on Cults or in the respective public administration organisms (Article 13 para 7).

45. In this context, it should also be mentioned that the time-frame set for appealing the refusal of registration of a religious community is very short (Article 27 para. 8).

46. The Commission considers that it would be appropriate to provide for the right to a legal remedy on the basis of a general clause.

e. Data protection

47. According to the draft law the State Committee on Cults has the right to ask religious communities to provide "different data and information" (Art. 23 para. 5). This provision is very vague. It is not clear which data can be collected. Furthermore it is not clear how a misuse of such data is prevented. This might interfere with the right not to reveal one's religious beliefs guaranteed in Article 9 para. 6.

f. Dissolution of religious organisations

48. The draft law contains a very far reaching clause on the dissolution of a religious organisation. It shall be barred from the register "if it goes against the Constitution and the internal laws or does not exercise the activity for which it has been registered." That means that every single violation of whatever law might be – at least theoretically – a reason for dissolution (Article 30 para. 2). Even if the procedure has to be started by the District Prosecutor and the decision has to be taken by a court, this regulation seems to undermine the privileged position of religious organisations based on freedom of religion. It would be appropriate that dissolution should only be possible in case of grave and repeated violations endangering the public order and only as a last means, if no other sanctions can be applied. Otherwise the principle of proportionality would be violated.

49. The consequences of the termination of a religious community are very serious. According to the draft law, the assets and other rights are given to the persons specified in the statute. If they are not defined, they are given to the state (Art. 36 para. 4). This provision might interfere with the prohibition of expropriation (Article 1 of the First Protocol).

50. The regulation on the dissolution of religious organisations should therefore be redrafted in view of the principle of proportionality applied to restrictions on the freedom of religious and the right to property.

g. other specific concerns

51. The freedom of religious dissent seems to be limited by art. 7 (1), which limits the religious practice to that performed "in compliance with [the organisations'] doctrine and other internal rules".

52. The general right not to act contrary to one's religious beliefs or conscience, stipulated by draft art. 9 (1), seems to be contradicted by art. 10 (2) : "The free exercise of religion and conscience shall not justify the aberration of obligations that come as a result of the implementation of the law". Or, would it be intended to only apply art 10 (2) vis-à-vis legal duties and not with regard to private or contractual obligations ?

53. Art. 9 (6) creates a very broad exception to the right not to reveal one's religious beliefs. It is doubtful that a very vague notion of "legal rights or obligations" or "statistics" would be acceptable in this context.

54. Art. 19 (2) creates a general restriction to religious marriages or divorces, because of the obligation to a previous civil procedure. These restrictions are common in many European countries, and have so far not been examined by the European Court of Human Rights (see also Guidelines III, F).

55. Art. 21 does not provide for a specific status for religion-based distinctions within faith-based social activities. This lack of adaptation to specific bona fide qualities seems to be in contradiction with religious autonomy guaranteed by the draft law.

56. Art. 33 requires that religious communities notify changes in the management bodies, before public nomination of these officials. This priority seems to be in contradiction with religious autonomy guaranteed by the draft law.

D. Legislative technique

57. The draft law contains very detailed provisions on both the freedom of religion and the status of religious organisations. One danger of such a legislative technique might be that the interpreters stick to the text in a positivist way and exclude all the options not laid down in the text. One example might be Article 7 which enumerates in nine bullet points what the exercise of the freedom of religion includes. This enumeration does not include, for example, the internal freedom (*forum internum*). It might be argued that all that is not explicitly included is excluded. This list should be stated to be non exhaustive.

58. Some of the regulations within the draft law are redundant. Redundancies might cause problems when they give rise for inconsistent interpretation. Thus, the limits to freedom of religion are mentioned several times throughout the text. But the formulations are not identical. Article 10 para. 1 provides: "The individual or collective exercise of religion or conscience shall only be restricted by law, with the purpose of guaranteeing public security, public order and social moral or in order to assure the observance of basic rights and freedoms of other individuals." Article 3 (d) provides that "the freedom of religion can not be subject to other restrictions other than those provided by law and which constitute the necessary measures taken by a democratic society for the protection of order, state, public moral and health or for the protection of the rights and freedom of others. Whereas "public security" is not mentioned in Article 3, "health" and "state" is not mentioned in Art. 10 para. 1. Such inconsistencies should perhaps be avoided. In this context it might also be mentioned that according to international standards the *forum internum* cannot be subjected to limitations of any kind.

59. Although the draft law contains a lot of details it very often refers to special legislation to be passed, to "the legislation" in general, or to decisions of the Council of Ministers. The latter is a

useful legislative technique helping to keep laws short and concise and delegating more detailed regulations to competent bodies. But it might be dangerous if important questions are not solved by the legislator himself. This applies for example to the regulation of the duties, composition and structure of the State Committee on Cults. It seems to be an essential question who is represented in this body (e.g. members of certain religious organisations, members of State bodies etc.). The controversies arising in this context should be solved by the legislator (Art. 14 para. 3).

60. Furthermore, questions concerning the very essence of the right to freedom of religion should also be regulated in the relevant law itself and not delegated to other legal acts. Otherwise the human rights protection granted in the law might be undermined. One example might be the regulation in Art. 24 according to which the state authorities do not have any right to intrude to religious buildings "except for the cases when it is required by the legislation …". That means that the legislator is free to reduce the protection provided for by the draft law.

61. The same might be true for example for the provision of Article 34 about the right to financial or material support from foreign entities or individuals. Here, too, the legislator has complete discretion to regulate this question as the right exists only as long as it is not "in contradiction with the legislation in force".

62. The Commission considers that it would be useful to review the definitions used in the draft law and to avoid redundancies und inconsistencies.

E. Agreements

63. The agreements repeat many of the provisions contained in the draft law. It is not clear why it is deemed to be necessary for the State and the religious communities to commit themselves by means of an agreement to ensure the freedom of opinion, consciousness (that is probably a mistake of translation; it should read "conscience") and religion (cf. Article 3 of all the three agreements), as the Constitution and the law have binding force themselves.

64. It should be mentioned that contrary to the draft law it is explicitly stated that objects of cult cannot "be expropriated, alienated or taken in any other way" (cf. Article 24 of the Agreement with the Muslim Community). Article 23 of the Agreement with the Autocephaly Orthodox Church and Article 23 of the Agreement with the Bektashi World Community are worded in a similar, but not identical manner.

65. It should also be underlined that the agreement with the Autocephalous Orthodox Church of Albania (art. 17) provides that "the matrimonial relationship and the divorce can be realised according to the family code provisions *and church canons*." This provision might be in contradiction with article 19 of the draft law 19,.

III. Conclusions

66. The Commission welcomes that the Republic of Albania has decided to regulate the difficult issues concerning the freedom of religion and the status of religious organisation in a special law.

67. The draft law "on freedom of religion, religious organisations and mutual relations with the state" should be improved by reviewing the terminology concerning "religion" and "belief", by elaborating on the differences between "religious organisations" and "religious communities" and by clarifying vague and inconsistent provisions that might be interpreted as limiting the freedom of religion in an undue manner.

68. The following, specific recommendations can be made:

- the legal status of non-registered organisations, especially for individual rights, should be clarified;
- the law should require that any refusal to register an association be based on clear material evidence;
- the rights and prerogatives of religious communities as opposed to religious organizations should be clarified;
- the internal consistency of the notions and concepts adopted by the draft (or at least, the English translation of the draft) should be revised;
- In order to avoid some self-restrictive ambiguities in the chapter II on Religious Freedom, it would be appropriate to provide explicitly that this law does not restrict the general right to religious freedom as guaranteed by the Constitution and the International Conventions and that religious freedom is guaranteed to every individual and every religious organisation, even non-registered ones.

69. The Commission remains at the disposal of the Albanian authorities for any further assistance on this matter.