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(VENICE COMMISSION)

COMMENTS ON THE DRAFT LAW ON RELIGIOUS ORGANISATIONS IN SERBIA

By

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Report on the Draft Law on Religious Organisations in Serbia
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The European Court of Human Rights has often declared that the "freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[1]

It goes without saying that the freedom of religion is one of the basic legal and political principles upon which modern states are based. It is not by coincidence that it regularly appears so early in constitutions and international documents.[2] Thus, it has to be welcomed that the process which is to result in a legally regulated status of religious organisations, as well as of many other aspects of religious freedom which are part of the Draft Law on Religious Organisations, is taking place in Serbia.

It is true that – given its importance – the freedom of thought, conscience and religion is first and foremost a matter for the constitution. Having that in mind, the statutory regulation, in accordance with the established standards, is also necessary. The purpose of such a statutory regulation is an appropriate and effective execution of religious freedom, as well as a possibility of free operation for religious organisations. In this context, the efforts of the Serbian Government in establishing new foundations for the relations between the state and various religious communities are praiseworthy. It is our understanding that the government has initiated reforms within the whole educational system and has also begun the restitution of property or the compensation for former property owners, religious organisations included. The Draft Law on Religious Organisations is thus another step towards a better assurance of freedom of religion and belief in Serbia.

Practically every international convention, as well as any other source of law, guarantees the freedom of religion. This report is, however, based primarily on the articles of *European Convention on Human Rights and Fundamental Freedoms* (ECHR), on the case law of the European Court and on the documents issued by OSCE. The articles of the ECHR, which expressly refer to the freedom of religion, are in the first place Article 9 of the Convention, which guarantees the freedom of thought, conscience and religion, and Article 2 of Protocol No. 1, which safeguards the right to education. The protection, afforded by these articles, can be supplemented by that available under Article 14 of the Convention, which prohibits discrimination.[3]

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[1] Hasan and Chaush, v. Bulgaria**,** App. No. 30985/96, Oct 2000, § 60. See also: *Serif v. Greece*, no. 38178/97, § 49, ECHR 1999-IX, and the Kokkinakis v. Greece judgment of 25 May 1993, §§ 31 and 33.

[2] Cf. Lovro ŠTURM, "Church-State Relations and the Legal Status of Religious Communities in Slovenia", *Brigham Young University Law Review,* 607-650, p. 612.

[3] Cf. Elisabeth PALM, »Case Law of the European Court of Human Rights on the Freedom of Religion Guaranteed By The European Convention On Human Rights«, *XIth Conference of European Constitutional Courts,* Warsaw, 17-20 May 1999.

The Proposed Draft of the Law

ARTICLE 1
According to the **Article 1** of the Draft Law,

"[t] This Law sets forth and describes the content of the right to freedom of religion, guaranteed by the Constitution to the citizens of Serbia, and which includes:

- the freedom to publicly manifest belief in God and perform religious services;
- the right to preserve, develop and publicly display religious heritage and tradition;
- the right to publicly manifest a religious view of the world;
- the free development of religious education and religious culture. "

Hence it follows that the scope of this Draft Law is much broader than its title suggests, since it regulates the freedom of religion and not just the legal status of religious organisations. The drafter should therefore consider the desired direction, either by narrowing the scope of the law to the mere regulation of religious organisations, or by changing the title of the law in a way that would reflect the actual substance of the Draft Law.

Since the "freedom of religion" is guaranteed by the **Article 1** of the Draft Law, it would be preferable to mention the freedom of *belief* as well; this would broaden the protection of religious freedom secured by the Draft Law. Moreover, the use of *belief* would be in accordance with the international standards, since they typically speak of "religion *or* belief".

Article 1 of the Draft Law guarantees the freedom of religion "to citizens of Serbia" and to "all foreign citizens in Serbia". This is problematic, since Article 9 of ECHR guarantees the freedom of thought, conscience and religion to *everyone*. The case law of the Court makes it clear that it is not only the *individuals* who can rightfully claim the rights in Article 9 of ECHR; churches and other forms of religious organisations are likewise in principle entitled to the rights, vested in Article 9, and can accordingly file their applications in their own name.[4] Thus it would be better if the Draft Law would refer to "everyone" instead of to mere "citizens" of Serbia and "foreign citizens in Serbia".

Since this Draft Law, according to its **Article 1**, guarantees the freedom of religion, it would be appropriate if the law would in the same manner – that is, expressly – give assurances of the so called internal freedom, which covers the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*. In addition, the law protects those acts which are intimately linked to these attitudes, such as the acts of worship or devotion, which are aspects of the practice of a religion or belief in a generally recognised form.[5]

It seems that the internal freedom, which is absolute and may not be subject to limitations of any kind, was left out from this article and the rest of the Draft Law. The law mentions merely the rights, found in the second part of the Article 9(1) of EHCR, which confers the so-called external freedom, namely the right to "manifest religion or belief in worship, teaching, practice and observance". It seems impossible that the drafter of this text has left out the personal sphere of religious freedom intentionally.

[4] Cf. X. and the Church of Scientology v. Sweden, No. 7805/77, Dec. 1979.

[5] Van Den Dungen v. Netherlands, App. No. 22838/93 (Feb. 1995), § 1.

If the drafter decides to keep the scope of the law as broad as it is, that is, if the Draft Law continues to "set forth and describe the content of the right to freedom of religion," the law should expressly guarantee the internal freedom, *forum internum,* as well.

ARTICLE 2

Article 2(1) states that

> "Freedom of religion is actualized in traditional Churches, historical Religious Communities, Confessional Communities and religious groups. (Hereinafter all these are referred to as **"religious organisations".**)"

It seems that, according to the Draft Law, the religious freedom can only be realized through the membership in religious organisations; again, the *forum internum* is left out.

The next paragraph, **Article 2(2)** of the Draft Law, states that

> "Religious organisations are public organisations […]"

Several Contracting States have decided to grant registered religious communities the status of legal person of public law. This provision is problematic only in connection with other Articles of this draft law: **Article 2(1),** which states that the religious freedom is actualized in *religious organisations* (namely traditional Churches, historical Religious Communities, Confessional Communities and religious groups), and **Article 5,** which states that the "religious organisations are public organisations and possess the attributes of a legal entity." Thus it seems that the Draft Law denies religious freedom – which is *inter alia* "a freedom to manifest one's religion […] in community with others, in public and within the circle of those whose faith one shares"[6] – to all those religious communities which are *not* recognised and registered as such, or perhaps do not want to acquire legal personality and with it the status of a public organisation. While the Draft Law does not deny that freedom to such organisations *expresis verbis,* it will become clear in the comments to the subsequent articles (see comments on the **Articles 7-18**) that it does not guarantee religious freedom to those religious groups which are not registered and do not have the attributes of legal entity.

It was in the case of *Metropolitan Church of Bessarabia and Others v. Moldova* that the court was considering the situation, where only recognised denominations had a legal personality and only those religions recognised by a government decision could be practised.[7] The Court noted that in such a system, "in the absence of recognition the applicant Church", who was not granted status, "may neither organise itself nor operate."[8] Even as the government was asserting that it was tolerant towards the unrecognised Church, the Court took the position it could not

> "regard such tolerance as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned."[9]

It is well possible to imagine a legal system in which only registered religious communities can exercise the freedom of religion or belief and where a religious community can obtain the status

[6] Hasan and Chaush v. Bulgaria**,** App. No. 30985/96, Oct. 2000, § 60.

[7] Metropolitan Church of Bessarabia and Others v. Moldova, App. No. 45701/99, Dec. 2001, § 129.

[8] Metropolitan Church of Bessarabia and Others v. Moldova, App. No. 45701/99, Dec. 2001, § 129.

[9] Metropolitan Church of Bessarabia and Others v. Moldova, App. No. 45701/99, Dec. 2001, § 129.

almost automatically. But even such a system would not be in accordance with Article 9 ECHR, since it would not assure the freedom of religion and belief to all those religious groups that *choose not to be registered* and become legal entity respectively, e.g. that choose not to be subject to privileges and obligations which result from a registration.

Thus it is becoming an international standard that the registration of a religious organisation should *not* be mandatory – individuals and groups should be free to practice their religion without registration, if they so desire.[10] The freedom of religion is not limited to legal entities.

Similarly, in *Hasan and Chaush v. Bulgaria*, the Court noted that the freedom of religion should be interpreted "in the light" of freedom of assembly and association.

> "Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. 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."[11]

Since some religious groups object in principle to the idea of state chartering requirements, a state should not impose any sanctions or limitations on those religious groups that elect not to register.[12]

ARTICLES 3-4

This section should be welcomed, since it guarantees the autonomy of the religious organisations.

ARTICLE 4

Article 4(5) states:

> "Concerning the enforcement of decisions and judgements passed by the competent bodies of religious organisations, and only at their request, the public authorities are obliged to extend relevant administrative and executive assistance."

The Court and the Commission have so far both concluded that state laws, empowering churches to levy taxes, do not represent a breach of the ECHR Article 9.[13] Since the scope of Article 4(5) is potentially much broader than mere tax collection, the Draft Law should put specific limitations on the type of decisions and judgements that the state has to enforce. In addition, the Draft Law should guarantee that individual religious freedom may not be violated by any type of coercion.

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[10] Guidelines for Review of Legislation Pertaining to Religion or Belief, Adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), p. 17.

[11] Hasan and Chaush v. Bulgaria**,** App. No. 30985/96, Oct. 2000, § 60.62.

[12] Guidelines for Review of Legislation Pertaining to Religion or Belief, Adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), p. 17.

[13] Darby v. Sweden, Report of the Commission, App. No. 11581/85, May 1989, E. & G.R. v. Austria, App. No. 9781/82 (1984), Gottesmann v. Switzerland, App. No. 10616/83 (1984).

ARTICLE 5

Article 5 of the Draft Law once more states that the religious organisations are public organisations. See comments on the **Article 2** and on the **Article 7-18** of the Draft Law.

ARTICLE 6

Article 6 states that

> "Religious organisations, as well as every citizen, has the right to publicly express critical comments on the teachings or practice of others, but no one may challenge the guaranteed freedoms and rights of others, nor may he propagate falsehoods, prejudices and intolerance toward religious organisations or against citizens who do not declare themselves as believers."

The Court has often recalled that the freedom of expression constitutes one of the essential foundations of a democratic society. Subject to Article 10(2), 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 that offend, shock or disturb.[14]

In addition to this, the Court has held a position that the freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, have to be interpreted narrowly; the necessity for any restrictions has to be convincingly established.[15]

Whereas Article 10(2) of the Convention leaves little scope for restrictions on political speech or on debate of questions of public interest, *a wider margin of appreciation* is generally available to the Contracting States when regulating freedom of expression in relation to the matters, liable to offend intimate personal convictions within the sphere of morals or, especially, of religion.[16]

It is also well established that those who choose to exercise their freedom to manifest their religion, irrespectively of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept others who deny their religious beliefs, and even those who propagate doctrines, hostile to their faith.[17]

However, the manner in which religious beliefs and doctrines are opposed or denied, is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right, guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases, the effect of particular methods of opposing or denying religious beliefs can actually inhibit those, who hold such beliefs, from exercising their freedom to hold and express them.[18]

The Court also acknowledges that in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements for the protection of the rights of

[14] Thorgeir Thorgeirson v. Iceland, App. No. 13778/88, June 1992, § 63.

[15] Observer and Guardian v. the United Kingdom, App. No. 13585/88, 26 Nov. 1991, § 59.

[16] Wingrove v. the United Kingdom, App. No. 17419/90, 25 Nov. 1996, § 58.

[17] Otto-Preminger-Institut v. Austria, App. No. 13470/87, 20 Sept. 1994, § 47.

[18] Otto-Preminger-Institut v. Austria, App. No. 13470/87, 20 Sept. 1994, § 47.

others, in relation to the attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place – especially in an era, characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than any international judge to give an opinion on the exact content of these requirements with regard to the rights of others. Likewise, they are generally speaking better equipped to comment on the "necessity" of a "restriction" intended to protect from such material all those, whose deepest feelings and convictions would be seriously offended.[19]

In *Wingrove,* the Court has laid down some criteria for assessing whether an attack on religion can still enjoy the protection under ECHR Article 10. The Court pronounced that the extent of insult to religious feelings must be *significant*, if the attack is to lose its protection. The high degree of profanation that must be attained constitutes, or is in itself, a safeguard against arbitrariness. It is against this background that any restrictions of freedom of expression must be considered.[20]

Several terms used by the Draft Law, such as “critical comments”, “falsehoods” and “prejudices”, are quite unusual from the perspective of any standard terminology, usually related to the ECHR Article 10. The terms such as “critical comments” and “falsehoods” are too vague and unspecified – and thus open to different interpretations, by which the freedom of expression could be narrowed.

ARTICLES 7-18

In **Articles 7-18,** the Draft Law defines in some greater detail those types of religious organisations, in which "[f]reedom of religion is actualized", as stated by **Article 2(1)**.

In **Article 7,** the Draft Law gives a honorific "declarative status of traditional Church” to those Churches which have centuries-long historical continuity in Serbia and which have contributed significantly to the development of European Christian culture. They also have in common that they all acquired legal subjectivity prior to the Second World War. These traditional Churches are, according to the Draft Law,

> the Serbian Orthodox Church and other Orthodox churches canonically established on the territory of Serbia; the Catholic Church (Roman Catholic and Greek Catholic), the Slovak Evangelical Church a.v., the Christian Reform Church and the Evangelical Christian Church a.v.

In **Article 8,** the Draft Law gives an additional "honorary precedence" to the Serbian Orthodox Church. This precedence stems from its "civilisational and nation-building role”, and from the “fact that it is the major religious community with its seat in Serbia". According to the Draft Law, this reflects its "historic and natural right and the self-assumed obligation to represent, before domestic and foreign authorities, the joint rights and harmonised viewpoints and interests of all religious organisations in Serbia."

It is generally compatible with ECHR to grant special status to certain religious communities. In *Darby v. Sweden*, the Commission said that a State Church system cannot in itself be considered

[19] Wingrove v. the United Kingdom, App. No. 17419/90, 25 Nov. 1996, § 58.

[20] Wingrove v. the United Kingdom, App. No. 17419/90, 25 Nov. 1996, § 60.

to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and had already existed there when the Convention was drafted and when they became its parties.[21]

However, the intention of the Draft Law is clearly not in establishing a state church, but more in manifesting the effort to maintain the legal continuity with respect to laws and contracts dating before the Second World War, which regulated the legal status of religious communities. Those provisions have been forcibly annulled during the communist regime.[22] The continuity is, in the same manner, recognised to the Islamic Community and the Jewish Community, which have the status of a "historical religious community."

According to the Draft Law, legal subjectivity and continuity shall be recognised to Confessional Communities, which are religious communities, whose common denominator is their registration pursuant to laws in force in the period from 1953 to 1993.

Again, as it was already indicated in comments on **Article 2** of the Draft Law, the drafter should reconsider the decision not to guarantee religious freedom to religious communities which choose not to register. Although **Article 17** is somewhat unclear, it becomes evident that the registration of religious groups – which are by definition of **Article 17** those "religiously-based association[s] of citizens which [have] not been registered to date through any law related to religious organisations" – is mandatory. As already stated, this interpretation follows from the definition of **Article 2(1),** which denotes "religious groups" with the term "*religious organisation*", and from **Article 5** of the Draft Law, which states that "[r]eligious organisations are public organisations and possess the attributes of a legal entity."

The second sentence of **Article 17** is somewhat puzzling, since it states that "[r]eligious groups acquire the right to registration with this Law." Since this provision speaks only of the acquired *right* of religious groups to register, there is some inconsistency with the notion that the religious organisations - religious groups included - are public organisations and possess the attributes of a legal entity.

Article 18 of the Draft Law grants religious organisations the right to form associations or alliances. In the second paragraph 18(2), the Draft Law expressly states that religious

> **"Religious organisations that enter into an association are required to file notice with the within 30 days of forming the association the relevant ministry so as to be recorded in the Register".**

The third paragraph 18(3) describes the requirements, which a notice, filed by an association of religious organisations, has to meet if the association is to be registered. Since both individuals and groups should be free to practice their religion without any registration if they so desire, any mandatory legal entity for religious associations is problematic.

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[21] Darby v. Sweden, Report of the Commission, App. No. 11581/85, May 1989, § 45.

[22] Cf. Boris Milosavljevic, Relations between the State and Religious Communities in the Federal Republic of Yugoslavia. 2002 BYU L. Rev. 311- 340 (2002).

ARTICLES 19 AND 20

Articles 19 and 20 refer to the manifestation of religion, stating that

> "Religious organisations freely perform liturgies, religious services, spiritual missions and other activities in their own temples and other premises in their ownership",

and laying down the conditions for liturgy in public institutions. In **Article 19(2),** the Draft Law assures that "[l]iturgy, religious service and activities may be held also in rented premises." It is clear that "spiritual missions" have been left out of guarantees of § 2, but it remains unclear on what grounds does the Draft Law differentiate among particular manifestations of religion.

Certainly, a state can choose to put certain limitations on the right to manifest religious freedom. In *Kokkinakis v. Greece,* the Court stressed that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and to ensure that everyone's beliefs are respected.[23]

Of course, the reasoning of the Court does not stop here. Any interference has to be "prescribed by law", directed at one or more of the "legitimate aims" in Article 9(2) and "necessary in a democratic society" for achieving them.[24]

It was in *Kokkinakis* and in *Moussakis* cases that the court found violations of ECHR Article 9 by applying the criterion of necessity in democratic society. The Court has consistently left the Contracting States a certain *margin of appreciation* in assessing the existence and the extent of necessity of interference, but this margin is again subject to European supervision, embracing both the legislation and the decisions applying it.[25] However, the Court has often set two principles. First, all exceptions to the rule must be restrictively interpreted. And secondly, it is the task of the Court to determine whether the measures, taken at the national level, were justified and proportionate.[26]

Basic question concerning **Article 19** of the Draft Law is, whether there is a justified reason for the discrimination between different manifestations of religious practice, and especially, whether there is a reason that "spiritual missions" cannot be held in rented premises. The drafter should note that "religious faiths count teaching the faith amongst the principal duties of believers".[27] It seems that the manifestation of religious belief cannot depend on whether the religious community is an owner of certain premises or whether it is a mere tenant.

In his noted partly concurring opinion in *Kokinakkis* case, judge Pettiti has stressed that "a believer must be able to communicate his faith and his beliefs in the religious sphere as in the philosophical sphere. Freedom of religion and conscience is a fundamental right and this

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[23] Kokkinakis v. Greece, App. No. 14307/88, May 1993, § 33.

[24] Kokkinakis v. Greece, App. No. 14307/88, May 1993, § 36.

[25] Manoussakis and Others v. Greece, App. No. 18748/91, 26 Sept. 1996, § 44.

[26] Kokkinakis v. Greece, App. No. 14307/88, May 1993, § 47.

[27] Kokkinakis v. Greece, App. No. 14307/88, May 1993, (Martens, partly dissenting, § 15).

freedom must be able to be exercised for the benefit of all religions."[28] It certainly cannot be restricted on the basis of wealth of certain religious communities, or on the basis of their rights of ownership. The only limits on the exercise of this right are those dictated by respect for the rights of others.[29]

ARTICLE 23

Article 23 describes the role of priests in society. It states that "[t]he clergy are public servants." Once more, this is problematic, since it seems that the provision extends to every religious community. According to the Draft Law, *every* religious organisation becomes a public organisation **(Article 5)** and consecutively *every* cleric becomes a public servant **(Article 23),** even if a particular religious community does not view its vocation as such.

ARTICLE 24

Article 24 guarantees religious organisations the autonomy in appointing of the clergy and in performance of religious services; it further allows the clergy participation in all forms of public life. This is a commendable assurance, since the political system of the former SFRY took a hostile stance towards religion.

Article 24(2) also assures "immunity before public authorities." Since the Draft Law does not define the scope and nature of immunity before public authorities, this provision is problematic.

Article 24(5) seems to be obsolete: it states that the clergy is "duty-bound to extend spiritual instruction and comfort to every individual who so requires […] in accordance with the teachings and canons of the clergyman's faith." Since the provision recognizes that the duties of clergy are subject matter for the relevant canons of clergyman's faith, its purpose is unclear.

ARTICLES 27-33

Articles 27-33 deal with social rights of the clergy. In general, these provisions are quite generous to religious communities, since the state guarantees that "health, social and pension insurance of clergy is settled from the state budget" and even gives a "clergyman working in undeveloped areas or impoverished environments in which he is unable to satisfy his personal or family material needs through salaried methods" the right to "file a request through the competent body of the religious organisation to receive a salary from the budget".

Payment for health, social and pension insurance is determined in proportion to the number of congregants. The principle of positive discrimination shall be applied to small religious communities.

These provisions are quite modern, since they facilitate the participation in a religious organisation. However, in **Article 31,** the Draft Law states that "the requirements and manner of exercising the societal rights as specified in Articles 27, 28, 29 and 30 shall be specified by separate agreements individually concluded by the state with each religious organisation." Hopefully, the state will find the political will and the resources to make such agreements on a non-discriminatory basis.

[28] Kokkinakis v. Greece, App. No. 14307/88, May 1993 (Pettiti, partly concurring).

[29] Kokkinakis v. Greece, App. No. 14307/88, May 1993 (Pettiti, partly concurring).

ARTICLES 38-44

Articles 38-44 regulate the cultural activities of a religious organisation, particularly the funding of various cultural activities. Special articles deal with the monasteries, "the living cultural memorials of particular importance for the people and the state" (Article 43). Important active Orthodox and Catholic monasteries are to be granted the status of institutions of exceptional religious, cultural and national importance, and are to be financed from state budget. Since the rationale for the state financing is the cultural importance of historical buildings, the provision does not constitute inequality on the grounds of religious belief.

ARTICLE 61

Article 61 lists the requirements of establishment. The review of this article should be read in light of comments on **Articles 2, 5 and 7-18**. If the drafters choose not to change the current direction of the Law, by which religious freedom is granted only to the registered religious organisations, almost every requirement in this article and in subsequent articles regulating registration could be problematic. It was already pointed out in previous comments that even a solution, by which the registration would be a mere formality, could hardly be in accordance with the standards set by ECHR Article 9 (see *supra* comments on **Article 2** of the Draft Law).

The position of religious communities, who would not meet the requirements, set by **Article 61** and subsequent articles of the Draft Law, would be similar to that from *Bessarabia* case, where "in the absence of recognition the applicant Church could neither organise itself nor operate."[30] We are assuming that in consecutive versions of the Draft Law, the religious freedom will be granted to *all* of the religious organisations, including those who are not registered. Consequently, we continue the review of this article from that perspective.

It is in principle appropriate to require a registration for the purposes of obtaining legal personality and similar benefits.[31] The registration requirements, official checking prior to registration and substantive control by the state, must be viewed from the perspective and in accordance with the stipulations of Articles 9(2) and 11 of the ECHR.[32]

In the first version that was handed for review, the Draft Law required 1000 signatures of adult members for a religious community to obtain the status of a religious organisation. In the second – and final, as the *Word* document file is named – version of the Draft Law, as well as in the original Draft Law in Serbian language, the number of required signatures is 700. It is the discretion of the states to determine the minimum membership required for the registration, given the required number is not too high.[33] The population of Serbia is 7.5 million and the number seems reasonable. (Again, given that religious freedom can be exercised without registration and legal status).

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[30] Metropolitan Church of Bessarabia and Others v. Moldova, App. No. 45701/99, Dec. 2001, § 129.

[31] Guidelines for Review of Legislation Pertaining to Religion or Belief, p. 17.

[32] Conclusions by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on the Seminar concerning Church-State relations in the light of the exercise of the right to freedom of religion, Strasbourg, 10-11 December 2001, § 4.

[33] Guidelines for Review of Legislation Pertaining to Religion or Belief, p. 17.

ARTICLE 62

Article 62 does not state whether registration is a mere formality or a matter of discretion of a competent ministry. It seems that the purpose of the drafter was an obligatory conferring of legal personality by a competent ministry, if requirements of Article 61 are met. However, Article 62 causes some uncertainty with regard to the discretion of the state. This uncertainty violates ECHR Article 9.

What is similarly disturbing is the lack of appeal for religious organisations, rejected in the process of registration.

ARTICLE 65

Article 65 regulates erasure of religious communities from the register. This provision is problematic, since there is no appeal for deleted religious organisations.

Some Final Remarks Concerning the Constitutional Aspects of the Draft Law

The following short paragraphs review the conformity of the Draft Law with the Constitutional Charter of the State Union of Serbia and Montenegro, as well as with the Charter on Human and Minority Rights and Fundamental Freedoms (hence: Charter), the English versions of which were provided by the Venice Commission. Somewhat more attention is paid to the the Charter on Human and Minority Rights and Civil Freedoms, since it functions as an integral part of the Constitutional Charter of the State Union of Serbia and Montenegro.

In respect to the Charter on Human and Minority Rights and Fundamental Freedoms, not much else can be said as was already mentioned in relation to the Draft Law and the ECHR. Regarding its guarantees of freedom of thought, conscience and religion (Article 26), the Charter on Human and Minority Rights[34] is a modern document, accordant with the ECHR. Furthermore, the human and minority rights guaranteed by universally accepted rules of the international law, as well as by the international treaties in force in the state union, are guaranteed by this Charter and are directly applicable (Charter, Article 26).

Article 26 of the Charter is a matter of utmost importance for this discussion. It combines Article 9 of ECHR as well as Article 2 of Protocol No. 1, which safeguards the right to education. In no circumstances can the freedom of thought, conscience and religion be derogated (Charter, Article 6(9)). Thus, the comments that were laid out in this report, regarding the accordance of the Draft Law and the ECHR, are generally also valid for the discussion of the accordance of the Draft Law with the Charter.

Article 27 of the Charter states that "[r]eligious communities shall be equal and separate from the state". Autonomy and the right to establish religious schools and charity organisations is also guaranteed (Article 27(2) and (3)).

After examining the Charter, one - inter alia - apparent purpose of the Draft Law becomes clear: the Draft Law steers the course that the Serbian legal system is taking as far as the Church-State relationship is regarded. The standard and quite general provision, assuring state and church separation (Article 27(1) of the Charter), is yet to obtain its contents through the Draft Law.

[34] Adopted by the National Assembly of the Republic of Serbia, the Assembly of the Republic of Montenegro and the Federal Assembly.

It is obvious that the drafter has left behind the radical State-Church separation, which was typical for the former Communist countries, SFRY included. In the SFRY, the freedom of conscience and religion was not understood as a legally guaranteed autonomy of the individual. On the contrary, its primary function was to hinder and prosecute religion.[35] Its consequence was the expulsion of religious communities into the intimacy of private life. In SFRY strict separation of the state and the religious communities actually meant laicising every activity that relates to the welfare of an individual: education, upbringing, culture, media, economy, politics, etc.[36]

Separation does not mean exclusion.The Church and the State can be separated, yet may at the same time cooperate in many ways, in order to realise a welfare-state principle. The Draft Law clearly presents an attempt to introduce the idea of a positive tolerance, which makes the room for the religious needs of society.[37] The Draft Law proposes a sort of "middle of the road" approach between that of a church state and that of a strict
separation between religious communities.

However, some deficiencies were shown in this report, which could be summarised as a lack of guarantees of religious freedom to every religious organisation and indeed everyone. Although the Draft Law declares that the state has no inclination towards a particular religious organisation, some points of concern had to be made, principally regarding the legal status of the minor religious communities, be they old or new. Still, the general direction of the Draft Law should be welcomed.

[35] Cf. Lovro ŠTURM, Primerjalno pravna analiza ustavnih določb in zakonodaje evropskih držav, working paper, Ljubljana: 2003, p. 10.

[36] Lovro ŠTURM, Primerjalno pravna analiza ustavnih določb in zakonodaje evropskih držav, p. 10.

[37] Cf. Gerhard ROBBERS, »State and Church in Germany«, in: State and Church in the EU, p. 60.