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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW REGARDING THE RELIGIOUS FREEDOM AND THE GENERAL REGIME OF RELIGIONS IN ROMANIA

on the basis of the comments by

Mr Giorgio MALINVERNI, (Member, Switzerland)
Mr Hans-Heinrich VOGEL (Member, Sweden)

I. Introduction

1. On 21 July 2005, Mr Adrian Lemeni, Secretary of State for Religious Affairs of Romania, requested the opinion of the Venice Commission on the "Draft Law regarding the Religious Freedom and the General Regime of Religions in the Republic of Romania" (CDL(2005)064). Messrs Giorgio Malinverni and Hans Vogel were appointed as rapporteurs.

2. The Ministry of Culture and Religious Affairs, together with the Association "Conştiinţă şi Libertate" (Conscience and Liberty), organised an international conference in Bucharest on 11-13 September 2005 on the religious freedom in the Romanian and European context. The conference devoted particular attention to the above-mentioned draft law. Participants in this conference included representatives of the cults and the religious associations active in Romania, as well as international experts. Mr Hans Vogel attended the conference on behalf of the Venice Commission.

3. The present opinion which was drawn up on the basis of comments by Messrs Malinverni and Vogel (CDL(2005)079 and 078) was adopted by the Commission at its … Plenary session (Venice, …).

II. General observations

4. These comments are based on the English translation of the Draft Law regarding the Religious Freedom and the General Regime of Religions in the Republic of Romania (CDL(2005)064) (hereinafter: the "draft law") transmitted by the Government of Romania. This translation may not accurately reflect the Romanian original version on all points. In order to avoid unnecessary misunderstandings, the Romanian text of the draft has also been taken into account, at least to the extent possible.

5. In Romania, constitutional provisions guarantee the freedom of religion and govern the legal regime of religious communities[1]. Various governmental decrees regulate this matter further. Decree n°177/1948 "for the General Regime of Religions", which has never been formally abrogated, remains the basic piece of legislation governing the status of religious communities although several of its provisions no longer seem to be implemented in practice. Decree n°177/1948 has been widely criticised due to its strong interference with the internal organisation of the religious communities as well as its extensive control over religious life in general. In Romania, religious communities are required to register. Registration can be obtained

[1] See *in particular Article 29 of the Constitution, entitled "freedom of conscience", which reads as follows :*

"(1) Freedom of thought, opinion and religious beliefs may not be restricted in any form whatsoever. No one may be compelled to embrace an opinion or religion contrary to his own convictions.

(2) Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect.

(3) All religions shall be free and organised in accordance with their own statutes, under the terms laid down by law.

(4) Any forms, means, acts or actions of religious enmity shall be prohibited in the relationships among the cults.

(5) Religious cults shall be independent of the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages.

(6) Parents or legal guardians have the right to ensure, in accordance with their own convictions, the education of the minor children whose responsibility devolves on them."

by governmental decision, but at present there does not seem to be a clear procedure for the registration of religious groups as religions, a state of affairs which has caused legal uncertainty.

6. Article 73, paragraph 3 lit. s of the Constitution, republished after the national referendum held in October 2003, now requires that the general status of religious communities be regulated by an organic law, which Parliament has to adopt by an absolute majority of the members of both the Senate and the Chamber of Deputies. The draft law constitutes a rather long and detailed legal basis providing for a three layer system, which classifies religious communities either as "cults", "religious associations" or "religious groups". A set of specific rights and obligations are attached to each of these categories. A religious association can be founded as such and be later recognised, through Government decision, as a cult. The status of cult is reserved for religious communities which have been active in Romania for a long time and have a large number of members, as well as stable institutions.

7. The draft law seems to be the result of extensive discussions between the Romanian Ministry of Culture and Religious Affairs – through the State Secretariat for Religious Affairs – on the one hand and the 18 cults which already enjoy recognition in Romania. There appears to be far reaching agreement that the relations between the State of Romania and religious communities within the country should in the future be regulated along the lines envisaged in the draft law, including through the proposed procedure of recognition and the classification of religious communities in three categories.

8. The Commission considers that, despite certain excessive interferences with the autonomy of the religious communities which would need to be addressed (see paragraphs 24-25, below), the draft law is likely to constitute a marked improvement as compared to the current situation, which is characterised by a lack of legal certainty. The draft law will in particular better circumscribe and limit the role of the Government in controlling the activities of religious communities, while reiterating - although at length - key elements of the freedom of thought, conscience and religion.

9. It is true that the classification of religious communities in three categories and the whole procedure of registration can be seen as cumbersome and that such a system is not indispensable at all to protect freedom of religion. The Commission is, however, aware that such a system is considered useful by many in the Romanian context, bearing in mind historical, social and other circumstances. The Commission is in particular sensitive to the fact that recognition of cults entails a number of rights implying significant financial state support. This may help to understand why certain strict guarantees are required from the cults, such as a long established presence and a minimum number of members.

III. Position of the draft law in the hierarchy of norms

10. The position of the draft law in the Romanian legal order is of crucial importance for its future interpretation. According to Article 73, paragraph 3 lit. s of the Constitution, the draft shall be enacted as an organic law, i.e. with a higher status than ordinary laws. The Commission understands that the form of the organic law is usually chosen to stress the social importance of the matter to be regulated. The adoption and subsequent modifications of an organic law require a qualified majority in Parliament, which ensures greater stability to this specific form of legislation.

11. The Commission is of the opinion that the draft law contains too many imprecise references to other laws. Expressions like "in the conditions of the law" or "according to the law" are frequently used, as is the case in Article 10, paragraphs 2, 3 and 4, Article 29, paragraph 1, Article 32, paragraph 2, Article 33, paragraph 2. Without more precise indications, it is not

possible to know to which other legal provisions the draft law intends to makes reference, which is harmful in terms of legal certainty and likely to complicate the future interpretation of the draft law. The drafters could therefore give consideration to avoiding such references by trying to govern, in an exhaustive way, the matter in the draft law itself. Furthermore, certain provisions like Article 38 and Article 39, paragraph 2 have no normative character whatsoever since they only serve as cross-references to other legislation.

IV. Religious entities

a. Recognition procedure

12. The status of "religious association" can be obtained by registration in a public register (see Articles 40 to 48 of the draft law). According to Article 40, paragraph 1 of the draft law, membership of *at least 300 Romanian citizens residing in Romania* is needed for such an association to be registered. This poses two problems: firstly, it may be difficult to fulfil for believers who belong to great religions of the world – as Hinduism or Buddhism – which may not have a great number of followers with Romanian citizenship residing in Romania. Secondly, the citizenship requirement seems at variance with the prohibition of discrimination on the basis of *inter alia* citizenship and national origin, a principle enshrined in a number of international instruments ratified by Romania. The drafters could therefore soften this requirement, both in terms of number and citizenship.

13. The requirements for recognition of cults are set out in Articles 17 and 18 of the draft law. According to Article 17 of the draft law, the status of cult can be acquired by those religious associations which, by activity and number of members, offer guarantees not only of durability and stability, but also of "public interest". In special circumstances, a provision of this kind may be reasonable concerning secular associations, but it does not seem reasonable in this context.

14. The membership requirement according to Article 18 lit. c of the draft law is at least 0,1 % of the population of Romania according to the latest census. With a population of 22.3 million this provision means the presence of at least 22.300 members, all of which have to be Romanian citizens residing in Romania.

15. The stability requirements are described in Article 18 lit. a and c of the draft law: any religious association which applies for the status of cult has to provide documentary evidence that it is constituted legally and has been functioning uninterruptedly on the territory of Romania for at least twelve years.

16. These high and rigidly written membership and stability requirements combined can make it very difficult for religious associations to acquire the status of cult. The very opportunity of including such precise numerical thresholds in the law can therefore be questioned. The use of more flexible criteria could have the advantage of reserving a margin of appreciation in specific circumstances. Should numerical criteria be maintained, the possibility of lowering them would deserve careful examination.

17. In view of the foregoing, the Commission takes the view that the draft law is characterised by a somewhat rigid legal framework religious communities have to cope with in order to obtain state recognition and develop their activities. Bearing in mind the general background of the draft law as well as historical, social and other circumstances prevailing in Romania (see paragraph 8, above), it seems that there remains at least some scope for reviewing the aforementioned legal requirements.

b. Simplified recognition procedure for eighteen cults

18. The 18 cults listed in the annex to the draft law can be recognised by summary proceedings and without providing some of the information which unlisted religious associations would have to provide to become recognised cults (see Article 49).

19. Recognition will, however, not be automatic and not necessarily granted. According to Article 49, paragraph 3 of the draft law, recognition is granted for the statutes and canonical codes of any applying cult only on the condition that they do not affect by their content national security, order, health, public morality or human fundamental rights and liberties. It is not clear why this provision has been deemed necessary for recognition of the well known cults listed in the annex. It should be clarified that there is no intention of improper exploitation of this provision as an instrument to deny recognition under the new law to any of the cults listed in the annex.

c. Respect for the autonomy of religious communities

20. When dealing with the legal status of religious communities, it is of the utmost importance that the State take particular care to respect their autonomous existence. 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[2].

21. In this regard, certain provisions of the draft law can be viewed as questionable state interferences, whose necessity in a democratic society is not established. For example, according to Article 18 lit. c of the draft law, documentation has to be provided by religious associations seeking state recognition concerning the applicant's "*own confession of faith and the organisation and functioning statute […]; its structure of central and local organisation; the mode of rule, administration and control; […] the statute of their own personnel […]; the main activities which the cult cares to undertake with a view to reaching its spiritual goals*". There is no indication in the draft law why and for which purpose this information has to be provided by the applicant, how detailed the information has to be and for what use it could be for the Government in reaching a positive or negative decision on the recognition's application. The same holds true for Article 41, paragraph 2 lit. b. Article 23 of the draft law, which deals with staff members recruited by cults, also seems too far-reaching in this context.

d. Position of the Romanian orthodox Church

22. The prevailing attitude, expressed in a general comment of the UN Human Rights Committee, is that states can acknowledge the special role that a particular church or denomination has played in their society, or even proclaim a religion to be its State religion, provided that this does not lead to discrimination based on religious beliefs[3]. Against this background, Article 7, paragraph 2 of the draft law does not raise any particular problem, in particular because it simply stresses the important role of the Romanian Orthodox Church, as well as the important role played by other recognised churches and cults.

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[2] *See* Hasan and Chaush v. Bulgaria *[GC], no. 30985/96, § 62, ECHR 2000-XI; see also* Metropolitan Church of Bessarabia and Others v. Moldova, no. 45701/99, *§ 118,* ECHR 2001-XII*).*

[3] *"The fact that a religion is recognised as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population shall not result in any impairment of the enjoyment of any … rights …" General Comment 22 (48), adopted on 20 July 1993. Para. 9.*

e. Judicial protection

23. One of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 ECHR must be seen not only in the light of Article 11 ECHR , but also in the light of Article 6 ECHR[4].

24. Article 31 of the draft law states that cults' possessions ("goods" in the draft law) cannot be the object of claims and that related disputes between recognised cults have to be solved through friendly settlement. This provision therefore seems to exclude - or at least seriously limit - the possibility for individuals and recognised cults to make use of judicial remedies as regards cults' possessions.

25. The Commission notes that at present, legal disputes on religious buildings between the Greek-Catholic Church and the Orthodox Church shall be settled by a joint commission made up of representatives of both cults according to Article 3 of Law-Decree N° 126/1990 "on certain measures pertaining to the Greek-Catholic Church of Romania". Some Romanian tribunals consider that this provision excludes any competence from the judiciary in this field, while others take the view that Article 3 of Law-Decree N° 126/1990 obliges applicants to exhaust the avenue of the joint commission first, but does not exclude a subsequent competence from the judiciary. The question of the compatibility of this arrangement with the European Convention on Human Rights, in particular with the right of access to a court (Article 6 ECHR), the right to freedom of religion (Article 9 ECHR) and the right to an effective remedy (Article 13 ECHR), is currently pending before the European Court of Human Rights[5].

26. In view of the foregoing, the Commission would simply like to stress that Article 31 of the draft law is likely to raise issues of compatibility with the European Convention on Human Rights. This is in particular the case as the scope of Article 31 of the draft law is wider than that of Article 3 of Law-Decree N° 126/1990 since it concerns all recognised cults and covers all religious possessions, i.e. not only religious buildings. Depending on future developments within the European Court of human Rights, it may therefore prove necessary to review Article 31 of the draft law should this provision remain unchanged before its adoption by Parliament.

27. Articles 19 and 20 of the draft law contain useful procedural guarantees applicable to the examination of applications aimed at obtaining cults' recognition. It is in particular welcome to provide for the right to lodge an appeal with the competent judicial authority against a Government's decision either granting or refusing recognition, in accordance with the Law of Administrative Litigation No 554/2004. It would be equally important to provide for a the same right in Article 21, which authorises the Government to withdraw the quality of recognised cult in certain cases.

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[4] *See*, mutatis mutandis, Sidiropoulos and Others v. Greece, *judgment of 10 July 1998, Reports 1998-IV, p. 1614, § 40; see also* Metropolitan Church of Bessarabia and Others v. Moldova, no. 45701/99, *§ 118,* ECHR 2001-XII*).*

[5] *See decision on admissibility taken on 25 May 2004 by the second Section of the Court*, Paroisse Gréco-catholique SÂMBĂTA BIHOR c. Roumanie*, no. 48107/99; according to the Government of Romania, the somewhat peculiar solution provided for by Article 3* of *Law-Decree N° 126/1990 is justified by the need to prevent the risk of social troubles in a sensitive domain, especially in communities where both Greek-Catholics and Orthodox coexist (see same decision under C, item 1). The judgement on the merits has not been issued yet.*

28. According to Article 26 of the draft law, the cults can have their own organs of religious trial for matters of internal discipline, and in these matters the statutory and canonical provisions are exclusively applicable. While noting that this provision shows particular respect for the autonomy of religious communities, the Commission nevertheless stresses that such a broad exclusion of general procedural guarantees may not fully comply with the requirements of article 6 ECHR.

f. Miscellaneous

29. Section 5 of Chapter II of the draft law deals with the educational system organised by cults. Under the Law on Education, cults have the right to teach religion in public schools and this right is reiterated in Article 39, paragraph 1 of the draft law. In this context, it would be useful to clearly state in the draft law itself that attendance to religious lessons within the public school system is not compulsory.

30. According to Article 48, paragraph 1 of the draft law, in proceedings regarding the acquisition or loss of the status of religious association, the presence of the prosecutor is compulsory. There is no mentioning of the (public) prosecutor elsewhere in the draft law and it should be clarified in which capacity and for which purpose the prosecutor should participate in the specific proceedings under Article 48 of the draft law.

V. Drafting issues

31. The draft law is quite long and rather detailed, in the opinion of the Commission, bearing in mind the nature of the matter to be regulated. While some provisions could be drafted in a more concise way, others could simply be deleted. The draft law would thereby be more easily accessible to those concerned.

32. Shortening the draft law could also include the regrouping of redundant provisions. For example, restrictions on freedom of religion and the activities of religious communities, which are expressed in Article 2, paragraph 2 as well as in Article 5, paragraph 3 of the draft law, are largely identical[6]. The possibility to exercise freedom of religion in community with others ("collectively" in the draft law) is spelled out both in Article 2, paragraph 1 and Article 5, paragraph 1 of the draft law. The distinction between religious associations and religious groups is mentioned in Article 5, paragraph 2 and Article 6 of the draft law. Principles pertaining to taxation law and cults are enshrined in Article 10, paragraph 2 and Article 11 of the draft law. The cult's right to self-organisation on the basis of internal statutes is provided for in Article 8, paragraph 2 and 3 and Article 14, paragraph 2 of the draft law.

33. The appropriateness of maintaining certain provisions, which express self-evident principles for which a normative endorsement may be superfluous, should be reconsidered. Such provisions include Article 9, paragraph 5 of the draft law, which provides for the possibility for the State to sign partnership agreements with recognised cults; Article 13, paragraph 1 which recalls that relations between cults are based on mutual respect and understanding; Article 32, paragraph 3, which provides for the possibility to dismiss a teacher for severe infringements to a cult's doctrine or morale; Article 33, paragraph 2 and Article 34, which recall that cults are competent to draw up school curricula for their own institutions of education.

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[6] *The wording of such restrictions should be brought in accordance with Article 9, paragraph 2 of the European Convention on Human Rights (this is not the case at least as far as the English version of the draft law is concerned).*

VI. CONCLUSIONS

35. The draft law has been the object of a commendable consultation process with representatives of several religious. It contains provisions which, in principle, constitute a satisfactory framework for the exercise of religious freedom in Romania, both by individuals alone and in community with others. The draft law remains, however, based on a rather rigid frame in that it classifies religious communities into three legal categories, with strict numerical requirements.

36. Increased effort should be made to fully respect the autonomy of religious communities - including in terms of self-organisation - which is an essential prerequisite for the freedom of religion. Furthermore, provisions dealing with judicial protection should be strengthened so as to better ensure the right of access to a court. It is recommended that these and other suggestions made in the present opinion be reflected in future amendments, so as to improve the overall quality of the draft law and ensure its full compliance with international standards in this field.