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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON

THE DRAFT LAW ON CHURCHES AND RELIGIOUS COMMUNITIES OF THE REPUBLIC OF SERBIA

By

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The following report addresses the compatibility of the draft Law on Churches and Religious Communities of the Republic of Serbia, as it is in April 2006, with the common practice of the European Convention on Human Rights about religious freedom. The present report is also taking into account the main European principles of the Guidelines for Review of Legislation Pertaining to Religion or Belief, prepared by the OSCE/ODIHR Advisory Panel of Experts on the Freedom of Religion or Belief in consultation with the Venice Commission (CDL-AD(2004)028). The present report also takes into account the Commission's previous opinion of March 2005, on a previous draft of the law (CDL-AD(2005)030).

1. The scope of the Law

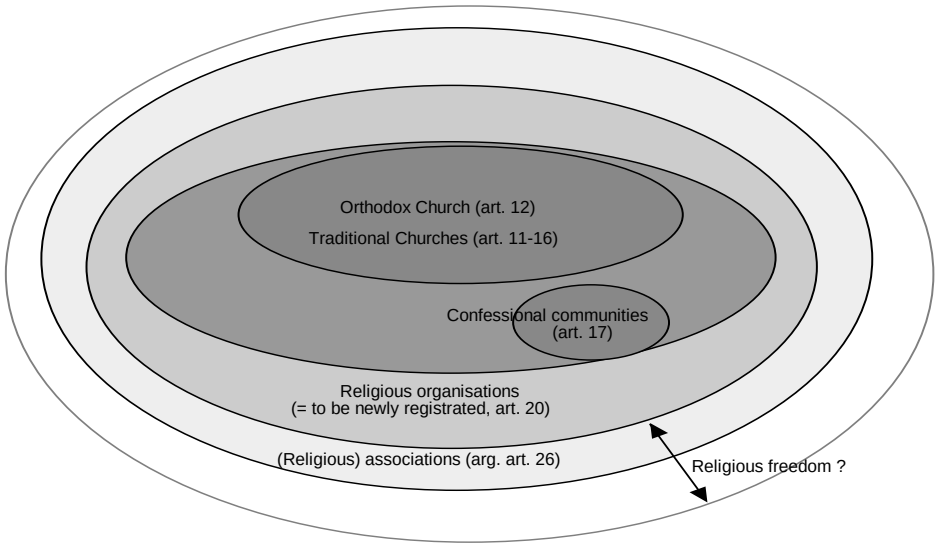
1.1. The draft law mainly addresses the **legal status of registered religious organisations**.

The legal rationale is even more related than previously to the registration and legal status of religious organizations. For such an administrative system to benefit from the European principle of a specially large margin of appreciation left to Contracting States in Church and State issues, two main requirements have to be fulfilled.

1.1.1. *The registration system should not become a requirement for basic rights of religious freedom*. At least, it is an issue of proportionality. (i) A high level of intrusiveness by the registration requirements could only be linked with secondary rights, such as a special financing support. (ii) A low level of intrusiveness might be linked with less secondary rights. Some new interpretations of the EHCR provided by the ECourtHR will progressively influence each of these levels of Church-State regimes, especially, for example, about legal personality.

1.1.2. *The registration system has to be non discriminatory* not only in A(i) regime but also in A(ii) regime (Art. 14 ECHR).

The following organigrams of the draft law have to be interpreted within this framework.



This 2006 organigram is less complex than the 2005 one (below). The legal condition of the Orthodox Church has been revised. But some concerns remain about (1.2.) the uncertain influence of non-registration upon some basic guarantees of freedom of religion and about (1.3) the risk of a discriminatory application of some provisions of the draft .

1.2. **No subordination of the basic guarantees of freedom of religion** to a too intrusive regime of registration.

1.2.1. Intrusiveness of the requirements for registration

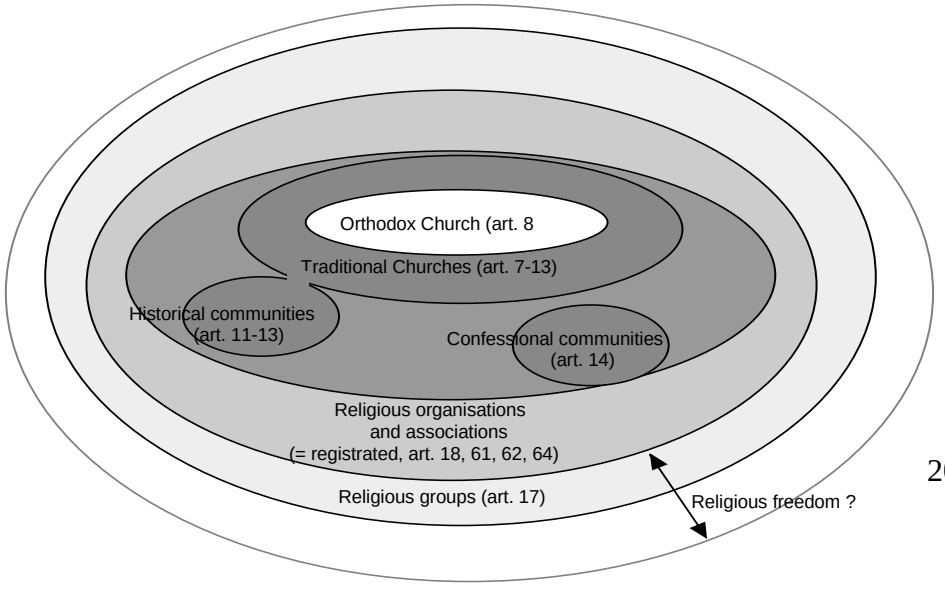
Art. 20 simplifies the procedure and explicitly provides a judicial review against a refuting decision (Art. 25).

The number of believers is lower than previously (1/100.000) and takes into account not only citizens but also permanent residents. But it remains unclear how to conciliate the requirement of individual signatures (Art. 20) with the general freedom of not to be coerced to declare his religion (Art. 2).

On the other hand, it remains also unclear whether "information on fundamentals of religious teachings, religious rites, religious goals and basic activities of religious organization" could become a too intrusive requirement.

1.2.2. Registration and basic rights

The general applicability of Art. 1, 2, 3 of the new draft has significantly improved the previous one on this topic. Nevertheless, among the specific restrictions pointed out by Art. 3, §2, it should be explicit that these restrictions, especially about offences of "instigation of intolerance" should be applied in a non discriminatory way.



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With more concern, it would be disproportionate that a specific registration is required in order to obtain some elementary rights such as legal personality (Art. 9 and 22), right to build some temples (Art. 34), rights to organize some services in the public square (Art. 33), education (Art. 37), publishing activities (Art. 45).

The application of Art. 9 ECHR may not be subordinated to any registration system. The guarantees provided by Art. 9 must benefit to "everyone" even atheistic and to any religious group without conditions of affiliation or registration (comp. Art. 2 first paragraph).

Therefore, it remains necessary to enact a provision that clearly shows that there is no confusion (nor subordination) between religious registration and general religious freedom.

Only some additional guarantees (distinct from the basic core of the European guarantees) may be subordinated to certain specific system of registration : for example, financial support or taxes exemptions,.

For example, the freedom to perform liturgies may not be reserved to registered religions. It is a general element of religious freedom. A similar evaluation should be held, with some balancement, for the rights to organise cultural activities (Art. 39), to construct religious edifices (Art. 45), to own movable or real property (Art. 55) or to receive gifts and collects (Art. 58).

2. Church Autonomy

2.1. The European Court permanently reiterates the general principle "that the autonomous existence of religious communities is indispensable for pluralism in a democratic society" (*Supreme Holy Council of the Muslim Community v. Bulgaria*, Appl. N° 39023/97, Judgment, 16 December 2004). This guarantee should be provided to all religious groups, even unregistered.

2.2. Some provisions of the draft are unmodified and refer to the necessity for the clergy and religious organisations to act "according to the autonomous legislation of Churches" (Art. 8, 28). It remains ambiguous whether these formulas respect the general guarantee of human rights for everybody.

2.3 Concerning the enforcement of decisions passed by the competent bodies of religious organisations, draft Art. 7 provides that "For enforcement of the enforceable decisions and judgements passed by the competent bodies of Churches and religious communities, only at their request, the state shall provide adequate assistance in accordance with the law". It is not clear to which extent this provision is compatible with the individual religious freedom of clergy and clerics. In some hypothesis, confirmed by the case law of the European Commission of Human Rights, these individuals must be free to choose apostasy or exit instead of submission to a State enforcement of the canons of a Church.

Other issues concern the extent of a State judicial review of these ecclesiastical decisions in order to evaluate their conformity with the European Convention itself. In particular when some Church decisions have to be enforced by the State, the European Court of Human Rights has sometimes considered that the principle of Church autonomy have to be balanced with other human rights (see *Pellegrini v. Italy*, Appl. N° 30882/96, Judgment, 20 July 2001).

2.4. The acquisition of a legal personality is a basic requirement of autonomy, but it seems linked by the draft Law with the registration (Art. 22). It should be possible for even unregistered religious group to be a juridical person before such a "discretionary" registration (*Canea Catholic Church v. Greece*, Appl. No. 143/1996/762/963, Judgement, 16 December 1997). It should be clarified whether Draft Art. 26 is sufficient to provide this full legal effect.

3. Discriminations

The principle of equal treatment is better improved in the present draft than in the previous one. The notion of "equal footing" is guaranteed by Art. 31 or 46. The religious freedom of foreigners is clearly guaranteed by Art. 1.

But some concerns remain for example about the legal status of foreigners in Art. 5, or about the legal status of "other staff" in Art. 39. Draft Art. 39 provides about "appointment and dismissal of teaching and other staff", but it is not clear in international law if these two kinds of staff may be equally submitted for the principle of church autonomy and so absolutely exempted from any legal requirements of non discrimination.

Other concerns about some risks of discrimination are linked with the large extent of discretionary powers provided by the draft.

4. Discretionary powers

(a) First level:

The previous discretionary powers of the competent ministry in order to decide about the application for registration has been submitted, in the new draft, to judicial review. But the concrete tests for this review should be precised. The consideration for "administrative and court decisions relating to the registration procedure or activities of a religious organization *in one or more member states of EU"* constitute a wise principle of legal convergence but allows very large, unclear and even perhaps illegitimate criteria. It would be more suitable for Serbia to use the prerogatives of its own margin of appreciation in order to provide more precise criteria.

(b) Second level:

After the registration, many occurrences of discretionary powers remains explicit and could lead to some form of discrimination at a "second level" of public support.

Secondly, two provisions of the draft Law refer to "the request of members" (Art. 33) or to "a referendum" on local taxes (Art. 34, even it is about introducing a *voluntary* system a specified-purpose local taxes). These provisions could provoke some bias in favor of the dominant local Church and discrimination against local minorities.

Thirdly, some financial supports "may" be decided by "local public authorities" without any legal criteria (Art. 29, 30, 31, 32, 38, and 44), or with very flexible criteria (Art. 31, 38: pro-rata to the "number of congregation of Churches"; Art. 34 taking "into consideration the needs of Churches").

(c) Third level:

Art. 6 provides a large definition of church autonomy "Churches and religious communities have the right to independently regulate and conduct their order and organization and to independently conduct their internal and public affairs". It must be clear that the State have some positive obligations to guarantee basic human rights to everyone, even if he is a member of a Church. The notions of "internal and public affairs" of Art. 6 are to be understood in relationship with Art. 3. In order to facilitate such an interpretation, Art. 6 (and Art. 5) should be ideally moved before Art. 3.

(d) Fourth level:

According to Art. 47 the Minister is required to pass a separate regulation for implementation within 90 days. In order to be sufficiently informed, any international assessment should be also delayed in order to take into account this implementing regulations.

Main recommendations

Taking into account the improvements provided by the present draft, we recommend with priority

1. to restrict the discretionary powers provided by the draft law and to systematically include in the legal draft more precise criteria, instead of leaving them to be defined in a ministerial future provision, without any guidelines.

2. to make sure, in Art. 2, that the present draft does not restrict the general guarantees of religious freedom of non-registrated group, especially about legal personality.

3. to provide a more precise conception of the legal status of canon laws and ecclesiastical decisions.

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