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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW

ON THE INSERTION OF AMENDMENTS ON FREEDOM OF CONSCIENCE AND RELIGIOUS ORGANISATIONS

IN UKRAINE

on the basis of comments by

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I. Introduction

1. By letter dated 5 July 2006, the then Minister of Justice, Mr Holovaty, asked the Venice Commission together with OSCE/ODHIR to examine the draft law on "Freedom of conscience and religious organisations" (CDL(2006)062).

2. Mr G. Malinverni, member of the Venice Commission and Mr L.-L. Christians, Professor at the Catholic University of Louvain, Belgium were appointed and made their comments on the draft law. They analysed an English translation of the draft law provided by the Ministry of Justice (CDL(2006)062).

3. The advisory Council of ODHIR Panel of experts on freedom of religion or Belief prepared separate comments.

4. On 18 September 2006, a meeting took place at the Ministry of Justice in Kiev. It gathered the working group of the draft law, headed by Ms Gorbunova, Deputy Minister of Justice, government officials, representatives of the civil and religious society, Mr Robbers, expert, Professor, University of Trier, Germany and Mr Krapf on behalf of OSCE/ODHIR and a Venice Commission delegation consisting of Messrs Malinverni and Christians, Ms Granata-Menghini and Ms Caroline Martin.

5. The following opinion was drawn up on the basis of the comments by Messrs Christians and Malinverni and was adopted by the Venice Commission at its .. plenary session (Venice, ...).

II. Background of the draft law

6. The draft law is supposed to replace the current law on the freedom of conscience and religious organisations. It was prepared by the Ministry of Justice in order to implement the Recommendations of the Parliamentary Assembly of the Council of Europe (PACE) in particular Resolution 1466 (2005) on Honouring of obligations and commitments by Ukraine and explanatory memo thereto §§ 269 -271[1] whereby Ukraine undertook to introduce a non-

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[1] 269. Ukraine undertook to introduce a new non-discriminatory system of church registration and to find a legal solution for the restitution of church property. The present Law on freedom of conscience and religious organisations dates back to 1991. Despite the fact that it is regarded as one of the best freedom of religion laws in the region, some of its provisions lack clarity. The Law limits the forms in which a religious organisation can be created, limits the minimum number of founders to have the statute of the organisation registered to 10 adults (whereas the same requirement for other civic associations is 3 persons), bans creation of local or regional divisions without legal entity status, provides no possibility for granting legal entity status to religious associations, discriminates foreigners and stateless persons. There is a lack of clarity with regard to which organisations are registered by regional state administrations and which by the State Committee on Religious Affairs. The law also contains a number of other ambiguous provisions, which leave a wide discretion to the implementing authorities[207]. Hence, **the quite progressive law for the time of its adoption now requires significant rewording**[208]. At the same time, the current principle of registration of religious organisation statutes in order to obtain the legal entity status and the absence of a requirement for registration of religious organisations as such should be maintained in line with the Assembly's Recommendation 1556 (2002)[209].

270. The Ukrainian legislation still lacks effective legal tools for restitution of church property. So far restitution was carried out occasionally on the basis of the parliament's 1991 resolution and several presidential decrees. The legal problem of restitution mainly stems from the fact that religious associations[210] have no right to obtain a legal entity status and thus cannot possess property. Most of the organisations, which owned the property that should be restituted, ceased to exist and the Orthodox Church is represented by several

discriminatory system of church registration and to find a legal solution for the restitution of church property.

7. In addition to the Action Plan for the Honouring of Obligations and commitments of Ukraine to the Council of Europe (Decree of the President of 20 January 2006), the draft law is also provided for in EU-Ukraine Action Plan implementation measures 2005 and NATO-Ukraine Annual Target Plan for Ukraine for 2005.

8. The Ministry of Justice set up a working group consisting of the constitutional and law department within the Ministry, representatives of registered churches and confessions, NGOS, academics. The drafters strived to take into consideration foreign experience and international standards in order to facilitate the resolution of the problems pointed out by the PACE. The draft is currently being discussed by the public and religious organisations.

III. General remarks

9. The following opinion addresses the compatibility of the draft Law on Freedom of Conscience and religious organisations of Ukraine with the common practice of the European Convention on Human Rights about religious freedom. It also takes 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).

10. The opinion also takes into account the outcome of the discussions and explanations that took place during the meeting at the Ministry of Justice on 18 September 2006.This meeting gave a valuable opportunity to the experts to get more acquainted with the context of the draft law, the concerns of the State, the needs addressed by religious representatives, and contributed to eliminate misunderstandings caused by the translation. It also offered a precious opportunity to the experts to present and explain their comments in light of international requirements and standards. The analysis of the draft law by the OSCE/ODHIR Advisory panel and by the Venice Commission appeared to be convergent and complementary. It was thus agreed that both institutions would jointly endorse a list of recommendations which are to be drawn up upon receipt of the responses provided by the Ministry of Justice of Ukraine.

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organisations. This leads to an *ad hoc* restitution practice[211] totally depending on the local authorities' preferences and which in most cases entails not the return of the ownership rights but transfer of property into a gratis rent. **We, therefore, call on the Ukrainian authorities to elaborate clear rules on the restitution of religious property.**

271. According to the 2005 Report by Quaker Council for European Affairs, the 1999 Law on Alternative Civil Service requires revision since it explicitly restricts the right to conscientious objection to religious grounds; non-religious conscientious objectors (COs) have no chance of obtaining CO status. In 2001, the United Nations Human Rights Committee called upon the Ukrainian government to "widen the grounds for conscientious objection in law so that they apply, without discrimination, to all religious beliefs and other convictions and that any alternative service required for conscientious objectors be performed in a non-discriminatory manner"[212]. The Ukrainian government is, however, not known to be considering widening the grounds for recognition. Consequently, non-religious COs can only avoid military service by bribing draft officials or by not responding to call-up orders[213].

11. The draft law is the result of wide-ranging discussions among all interested parties: the Venice Commission welcomes this drafting method, considering that this approach is of great importance in the field of laws related to freedom of religion or belief.

12. When examining the draft, the experts bore in mind that the European court of Human rights (ECtHR) has stated that a Church system would not in itself be considered as contrary to the European Convention on Human Rights (ECHR).[2] Moreover, Contracting States to the Convention benefit from a specifically large margin of appreciation with regard to Church and state relationships and with regard to the choice of their policies and regulations in this field. However, even if the margin of appreciation is large and even if various solutions have been found throughout the countries, the European guarantees must not be undermined because of this: the following remarks have hence to be interpreted within this framework.

13. In general ,the draft law can be seen as a liberal and favourable framework for the exercise of freedom of religion. The Venice Commission welcomes this positive development.

14. Few, though extremely important, issues remain however problematic and should lead to further consideration and improvements in the law, in order for it to meet all requirements of international standards**.**

IV. Topics under review /Substantive comments

A. Freedom of religion

15. Article 9 of the ECHR[3] and the related case law of the European Court constitute the paramount landmark in the field of freedom of religion.

16. The guarantees provided by Article 9 ECHR must benefit "everyone", even atheists. The Commission welcomes the fact that the draft correctly states that religious freedom is guaranteed to everybody, citizens or not.

17. The Commission suggests, however, to add in the draft law (article 3) that freedom of religion comprises the right to have, but also not to have any beliefs.

18. According to international standards, the guarantees of freedom of religion are not subordinated to any kind of specific system of registration of religious groups; they must benefit any religious group without any conditions of affiliation or registration. The Venice Commission understands from the draft that the registration seems not to be a formal condition or a prerequisite for the collective exercise of religious freedom.

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2 See Darby v. Sweden, Appl N° 11581/85, Judgment, 23 October 1990.

3 Article 9 ECHR reads:

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

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

19. Nevertheless, in the view of the Commission, in the draft law the rights and status of unregistered religion remain unclear. Indeed, the draft seems to link the legal personality of an organization to a proper administrative registration; in addition to that, there are very few hypotheses where legal personality is not mandatory, hence it might be deduced that the possibilities for unregistered groups to practice their faith freely are somewhat unduly limited.

20. In this regard, it would appear from the current draft that foreign religions (especially those not already represented in Ukraine) which would not go through the registration process in order to obtain legal personality they may not be interested in, can nevertheless practice their faith collectively and freely. If this were not the case, it would be contrary to the ECHR requirements.

21. According to the EctHR,[4] religious freedom in a democratic society also implies the pacific coexistence of various religious groups. It implies a positive obligation for the state to launch policies in order to improve tolerance and to offer an appropriate legal framework for this purpose. The wording of Article 1.14. of the draft would match this requirement.

22. Article 9.3 of the draft provides that "the same individuals may create only one religious society". Article 11.5 of the draft provides a similar limitation. This would be an important limitation to religious freedom not only at the individual level but also in general, which could not be considered as necessary in a pluralist democratic society. The Venice Commission would recommend that this limitation be deleted.

23. It stems from article 9 ECHR, read jointly with article 14 ECHR,[5] that religious freedom has to be equally guaranteed to any religious community.

24. Distinctions are only allowed if they are reasonable, if they rely on regular objective criteria and are provided by law in a sufficiently precise manner and if proportionate to the needs of a democratic society. Otherwise those distinctions could be read as discriminatory. In this regard, the wording of some provisions of the draft law may lead to discriminatory distinctions or discriminatory conducts by the administration. For instance, it stems from the draft that "foreign religions not represented in Ukraine" (article 17.4) face a pejorative system, the designation of "all Ukrainian" (article 11.4; section V.7) religions is subject to extremely strong conditions, the need of an "historical justice or legacy" as provided for in article 25.7 could be considered as providing discriminatory conditions. Moreover the reference to the inviolability of the secret of the "confessional" as it is provided in article 3.5 of the draft law, is linked to religions of the Christian world; a more general concept would be advisable in order to avoid any risk of discrimination.

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4 See Serif v. Greece, 14 December 1999, §53.

5 Article 14 ECHR reads: "Prohibition of discrimination

The enjoyment of the rights and freedom set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

B. Conscientious objection

25. While the ECHR does not provide formally for a general right to conscientious objection, the European Court of Human Rights has considered that it is indirectly guaranteed by Article 9 ECHR read conjointly with Article 14 ECHR [6] .

26. The draft law, particularly the phrasing of 4.5, provides for a prohibition of conscientious objection which might be considered as too broad. The Venice Commission would hence recommend specifying more clearly the framework and conditions of conscientious objection.

C. The right of freedom to belief and religion of the children

27. Article 3.4 of the draft provides that minors may participate in religious education and training upon their consent. Under international standards parents have a right to rise their children in conformity with their own religions and convictions. Nevertheless it also recommended that as from a certain age the consent of the child should be taken into account, The Venice Commission considers that in this case the age limit should be lower than the age of the majority. The experts were told during the meeting that the term "minor" in the draft law referred to the legal meaning of minor under the civil code of Ukraine, which refers to persons who are between 14 and 18 years old. In order to avoid any misunderstanding the Venice Commission would recommend specifying explicitly at which age a child may chose its own belief.

D. Autonomy of religious organisations

28. The involvement of the State in Church issues may vary from country to country. Nevertheless the relationship between the State and the Churches as well as the margin of appreciation by the State are framed by the requirements and rights ensuing from Article 9 and 14 ECHR.

29. According to the ECtHR there is a general principle"that the autonomous existence of religious communities is indispensable for pluralism in a democratic society."[7]

30. The internal organization of a religious group is a matter of autonomy of any religious group. The system foreseen by the draft law seems in this regard ambiguous and likely to infringe the principle of autonomy. For instance article 9.4 of the draft provides that the "highest body" of a religious society is a "general assembly"; this provision interferes with theological issues like the structure of the Church itself and would hence constitute a violation of the Church's autonomy.

31. Moreover the legal consequences that may derive from this requirement which concerns religious societies and not religious institutions (see article11.6) are useless and unclear. The

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[6] See Thlimenos v. Greece? 6 April 2000, §44 "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fait to treat differently persons whose situations are significantly different".

[7] See Supreme Holy Council of the Muslim Community v. Bulgaria, Appl. No. 39023/97, Judgment, 16 December 2004.

same applies to the issue of the complexity of the registration process and to the unclear legal implications of the various designations created by the law (see comments under registration).

32. Church autonomy implies the faculty for churches and religious organisations to benefit from a specific legal status and hence for instance it entails the right to recruit freely. The possibility for these institutions to recruit only believers should be possible and not be prohibited as it is under draft article 4.3. The Venice Commission would recommend that this provision be rephrased.

33. The specificities of the function of a clergyman should be taken into account in their status; the Venice Commission would recommend taking this element into consideration in the drafting of article 27.3.

34. As regards financial issues related to the autonomy of Churches, the Venice Commission considers that the right to ask and receive voluntary donations is inherent to religious activities and should not need to be foreseen by law, as it is provided for in article 24.8 of the draft.

35. On the other hand, the wording of article 24.9 preventing religious organisations from imposing « mandatory taxes on believers » remains ambiguous and would be controversial if it refers to a theological question and not only to the legal implementation of such a religious tax. The Venice Commission would recommend that the meaning of this prohibition be clarified.

36. As regards internal organization of religious organizations , and in particular with regard to the choice and protection of the name of a religious group, the draft law provides a range of conditions that are far too restrictive and intrusive: in order to see their name protected religious groups (registered or not) need to send an « information » to the State (article 14.7); the conditions laid down in order to use the term « Ukrainian » are extremely restrictive as well as the consequences of the formal prohibition to declare a religious name previously chosen by a previous group .

37. The issue of Church autonomy is also closely linked to the registration system provided by the draft law and the legal personality of religious groups. (see comments below).

E. The system of registration of religious organisations

38. The draft law has not yet decided whether religious societies need a minimum of three or ten members in order to obtain the status of a legal entity. While both minimums would be in line with international standards, the Commission along with the PACE recommendations would call for considering equalising the minimum number of founders of religious organisations to those of any public organisations.

39. The general system of registration provided by the draft law (articles 7-13) seems to be particularly complex (see enclosed drawing, hereafter, page 12) and unclear. The Commission considers this particularly problematic since this situation may lead to some discretionary abuses by the public administration.

40. Thus the complexity of typology created, each type having its own process of registration, can facilitate discretionary abuses by the public administration, especially at the local level.

41. This is all the more unsuitable since one could have deduced from the discussions during the meeting held on 18 September that one of the objectives of the drafters and hence of the draft law was to limit discretionary powers of local administrations.

42. The Commission therefore draws the attention of the drafters to the fact that mandatory local registrations as provided by the law could be problematic in this respect.

43. It is also worth mentioning that the more complex the general legal system is, the more difficult it is for the Churches to be really autonomous in their internal organisation.

44. This complex system of registration leads to subtle and rather unclear distinctions between religious associations, religious organisations and religious unions; it is moreover extremely difficult to understand the statutory consequences that may result from these three kinds of organisation. Hence the Venice Commission would recommend avoiding cumbersome distinctions especially when no statutory consequences are at stake.

45. Moreover the real freedom on non-registered religious organisations remains unclear, and would be contrary to the ECHR if non registered religious organisations could not practice their faith freely.

46. The Venice Commission strongly recommends that the complexity of the process of registration be reduced.

F. Termination of religious organizations

47. The European Court of Human Rights recognizes the right of the State to verify whether a movement or an association, having religious aims, carries activities which are harmful to the population.[8] Article 19.4 of the draft law lists the grounds for a court for prohibiting the activities of a religious organization. In view of the Venice Commission the drafting of this article raises serious concerns on several accounts.

48. Even though the decision of prohibition belongs to the judiciary, which is in line with ECHR requirements, the legal grounds of any prohibition provided for by the draft seem far too extensive, and hence would consequently narrow individual religious freedom.

49. The wording of this article is too vague. For instance the reference to a violation of a « constitutional human right and freedom » is too general and would therefore constitute a breach of the principle of legal certainty. The Venice Commission recommends avoiding vague references to constitutional rights and urges the drafters to specify more clearly what is prohibited and to list comprehensively the offences.

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[8] See Manoussakis v. Greece, Appl. N° 18748/91, Judgment, 26 September 1996, No. 40.

50. Furthermore the scope Article 19.4 is far too broad, it should be narrowed in order to comply also with the requirement of proportionality. The sanctions provided by the draft lack proportionality at several levels. The draft foresees for instance the prohibition of all activities of a religious group which seems more extensive in its consequences than a simple un-registration, or termination of registration. It might put a disproportionate threat on all activities of the believer.

51. Moreover it is unlikely to be considered as proportionate or necessary in a democratic society to prohibit all activities of a religious organization upon one act in breach of an unclear law of only one representative of this religious organization as it is foreseen by Article 19.4 of the draft.

52. The Venice Commission therefore strongly recommends redrafting the provisions dealing with the issue of termination of religious organization in order to comply firstly with the principle of legal certainty, by describing in a exhaustive way the acts prohibited, and secondly in order to comply with the requirements of proportionality when providing the sanctions of the violation of the law.

G. Property and Restitution

53. Articles 24 and 25 of the draft law deal with the issue of property of religious organisations.

54. According to draft article 24.1 religious organisations "have a right to possess, use and dispose of any property not excluded from civil circulation…".

55. Property right comprises three elements : the right to own, to use and to alienate a good.

56. The Commission would recommend clarifying the wording of Article 24 in order to make sure that the right to own immovable property is fully protected and foreseen by the draft law.

57. As regards restitution, since there are no international instruments on restitution of religious goods, the resolution of this question is left to the wisdom of the country and to the wisdom of religious organisations. Nevertheless such issues must be drafted and applied in as neutral a way as possible and without giving undue preferential treatment to any group; it is therefore essential to provide for a system of restitution which is not discriminatory.

58. The issue of restitution is not addressed by this draft. The experts were told that another draft law is currently under preparation which would respond to PACE requirements of "elaborating clear rules on the restitution of religious property." And that the Venice Commission will be consulted in this respect.

59. Indeed, it might be wiser to leave the entire question of restitution to a specific law. Unfortunately in view of the Commission the present drafting is already likely to anticipate or frame the settlement of the restitution issues at stake. For instance, the reference made in draft article 25.7 to a "historical legacy" may lead to an undue discrimination between religious communities.

60. The Commission would therefore recommend that the issue of restitution should be totally avoided in this law (including the right to use pending restitution) and that the issue addressed separately as soon as possible.

61. Moreover in the Commission's view, by the time a specific law on restitution has been adopted it might be recommendable to prevent the State from any restitution, the Commission would hence suggest a moratorium on any restitution issues.

62. The Commission remains at the disposal of Ukrainian authorities for any assistance in drafting the specific law on restitution.

V. Drafting comments

63. The following comments strive to draw the attention of the drafters to problems linked to drafting issues:

64. Legal certainty: As it has been pointed out above, several provisions of the draft law remain vague and unclear and should be rephrased in order to comply with the principle of certainty of the law. For instance when referring as in article 2.1 of the draft to "other legislative acts" it could be worth listing those acts. The same applies with regard to the reference in article 1.2 to international treaties.

65. Margin of appreciation : The Commission draws the attention of the drafters to the fact that this vagueness in the drafting may leave too wide a margin of discretion to state authorities. A law governing specific issues should be more precise than international general obligations and principles. This vagueness is all the more unsuitable since, according to the discussions which took place on 18 September, it seems that one of the purposes of this extensive regulation process was to reduce as much as possible the margin of appreciation of local State authorities.

66. Discrimination: In addition to the comments under item freedom of religion, church autonomy, and the registration system; one could also point out that draft article 5.7, which provides that religious organizations can participate in "social and political life," seems to be particularly unclear in its purposes and criterion. Depending on the philosophy of a political majority the definition of a "social participation" may vary and hence lead to some discrimination. The drafters are invited to take into account that the lack of precision of the wording of the draft law may lead to discriminatory conducts.

67. Objective criteria: When State involvement is at stake, the drafts lacks objective criteria for the implementation of the State policy, which might consequently become too costly for the State. For instance draft article 5.5 provides that the "state may fully or partly finance socially beneficial projects" without specifying any objective criteria. Such a commitment might be difficult to implement or extremely costly. Draft article 6.4 which provides that "teaching spiritual and moral as well as religious disciplines that are not accompanied by religious ceremonies and are purely informative may be conducted in state and municipal educational institutions provided that attendance of such courses is optional" also lacks the indication of the objective criteria for deciding. In the same line, draft article 25 sets out for all religious groups an unclear "right to use state-owned cult buildings".

68. Readability of the law : Over-regulations lead to unnecessary details, see articles 14.2, 14.5, 16 of the draft . It can even lead to unnecessary provisions since even conducts which would not need any regulation are instead regulated. For instance, article 23.2 providing that "religious organizations have a right to send believers abroad" is unnecessary; the same applies to article 24.8 of the draft. Imprecision also undermines the meaning of some provisions because of redundancies, for instance articles 28 and 29 seem to address the same issue.

69. Lastly, the drafters should bear in mind that this over-regulative approach may also unduly restrict the activities and organizational freedom of religious organizations (see comments above under freedom of religion , autonomy of the church).

VI. Conclusions

70. The draft law in general meets the requirements of international standards concerning freedom of religion or belief.

71. However, provisions governing the system of registration of religious organizations and their legal personality should be clarified in order to avoid restrictions to church autonomy and freedom of religion. The system of registration should be simplified.

72. The wording of several provisions is too vague and imprecise. This may infringe the principle of certainty of the law and moreover lead to discriminations and abuses, notably by the administration. It is recommended that attention be paid to the clarity of the wording and of the concepts used in the draft law. When necessary, objectives criteria should be specified.

73. The process of prohibition of a religious group as provided for in Article 19.4 should be reviewed in order to meet the international requirements of proportionality.

74. Specificities and varieties of religious life should be better taken into account.

Draft Law Ukraina 2006
figure by L.L. Christians