Strasbourg, 30 November 2007

CDL (2007)107*

Opinion no. 429 / 2007

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

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

OF ALBANIA

by

Mr Louis-Léon CHRISTIANS
(Expert, Belgium)

**This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The following report includes a range of remarks regarding the adequacy of the draft Law on "Religious Organisations in Albania", as well as of three agreements with particular religious communities, vis-a-vis the common practice of the European Convention of Human Rights about religious freedom. The present Report also takes into account 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**]** ("*Guidelines*").

State margin of appreciation

2. As a principle affirmed by the European Court of Human Rights, Contracting States have a great margin of appreciation, "particularly with regard to establishment of the delicate relations between the Churches and the State" (Cha'are Shalom Ve Tsedek V. France , Appl. N°27417/95, Judgement, 27 june 2000, sp. n° 84). Fu rthermore, even a State Church system cannot in itself be considered to violate art. 9 of the European Convention (Darby v. Sweden, Appl n° 11581/85, Judgement, 23 october 1990). The large diversity of Churches-State regimes in European countries legitimates a large range of regulatory options and limits in proportion the critical capacity of any international observation. Nevertheless, a growing number of interpretations of the EHCR provided by the ECourtHR will progressively influence each of the European Church-State regimes (e.g. *Metropolitan Church of Bessarabia v. Moldova*, Appl. 45701/99, Judgment, 13 December 2001 ; *Cârmuirea Spiritual a Musulmanilor din Republica Moldova v. Moldavia*, Appl. 12282/02, 14 June 2005 ; *Scientology v. Russia*, 5 April 2007, Appl. 18147/02). The following remarks have to be interpreted within this framework.

The registration system : distinction between registered and non-registered religions

3. The draft law mainly addresses the **legal status of *registered* religious organisations**. Art. 2 (3) defines « religious organizations » exclusively as two kind of necessarily registered organisations : « religious communities » and « religious associations ». Both are defined as registered.

4. No specific or general terms in the draft have been proposed to designate non-registered religions. A broad concept of « religion » might be found in Art. 13 (2) and would seem to be distinguished from the concept of « religious organisation », but this point remains questionable.

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

6. But no provision guarantees collective religious freedom for « non registered » organizations or organisations before this registration has been achieved. Moreover, art. 29 seems to expressly limit to « religious organisations » (i.e. registered ones [= art. 2 (3)]) the core right to « perform religious rituals in accordance with its internal regulations".

7. The large margin of appreciation of Contracting States about Church and State regime is not given a carte blanche (Guidelines, II/A/6). No legal regimes of Churches-State relationships are exempted from the provisions of the European Convention, especially those enacted by article 14 linked to article 9. A Church and State regime cannot restrict the field of the European common guarantees of the freedom of religion. This is of a particular importance about individual religious freedom and religious freedom of non registered religious organisations.

Religious freedom have to be equally guaranteed to any religious community. Only reasonable distinctions with regard to a democratic society would have to be admitted.

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

9. But the application of art. 9 of the European Convention may not be subordinated to a *disproportionate* registration system. The guarantees provided by art. 9 of the European Convention must benefit to "everyone". If the drafted registration system is likely to limit the full guarantees of religious freedom by a system of prior authorisation, it has to be justified along the criteria provided by art. 9 (2) ECHR.

10. The purpose of the drafted registration system indirectly results from Art. 27 (5), Art. 28 (4) [and also art. 30 (2) and art. 36 (3) (a-d)] providing that the registration may be refused (or terminated) if (b) The doctrine, aims and organization stated in the Bylaw or the regulations is in contradiction with the Constitution of the Republic of Albania or the legislation of the country ; (c) The activity exercised by this Community jeopardizes public order and tranquility, the rights of others, or spreads hate between existing religious Communities ».

11. ECHR considers that States are entitled to verify, even by a whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety (see *Manoussakis and Others*, cited above, p. 1362, § 40, and *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 84, ECHR 2001-IX). In *Cârmuirea Spiritual a Musulmanilor din Republica Moldova v. Moldavie (14 June 2005), the ECHR unanimously «* considers that the requirement to obtain registration (…) served the legitimate aim of allowing the Government to ensure that the religious organisations aspiring to their official recognition by the State were acting in accordance with the law, did not present any danger for a democratic society and did not carry out any activity directed against the interests of public safety, public order, health, morals or the rights and freedoms of others. (…) Without such a document the State could not determine the authenticity of the organisation seeking recognition as a religion and whether the denomination in question presented any danger for a democratic society. The Court does not consider that such a requirement is too onerous and thus disproportionate under Article 9 of the Convention ».

12. Even if the purpose of the drafted registration system may thus be prepared to be accepted as legitimate, it is nevertheless necessary to require that any examination of religious doctrines, as provided by art. 28 (5) (b), should be documented by factual and material evidences. « In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise » (*Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI). The ECHR reiterates in *Metropolitan Church of Bessarabia v. Moldova*, n° 125, that while it cannot be ruled out that an organisation's programme might conceal objectives and intentions different from the ones it proclaims, to verify that it does not, the Court must compare the content of the programme with the organisation's *actions* and the *positions it defend.*

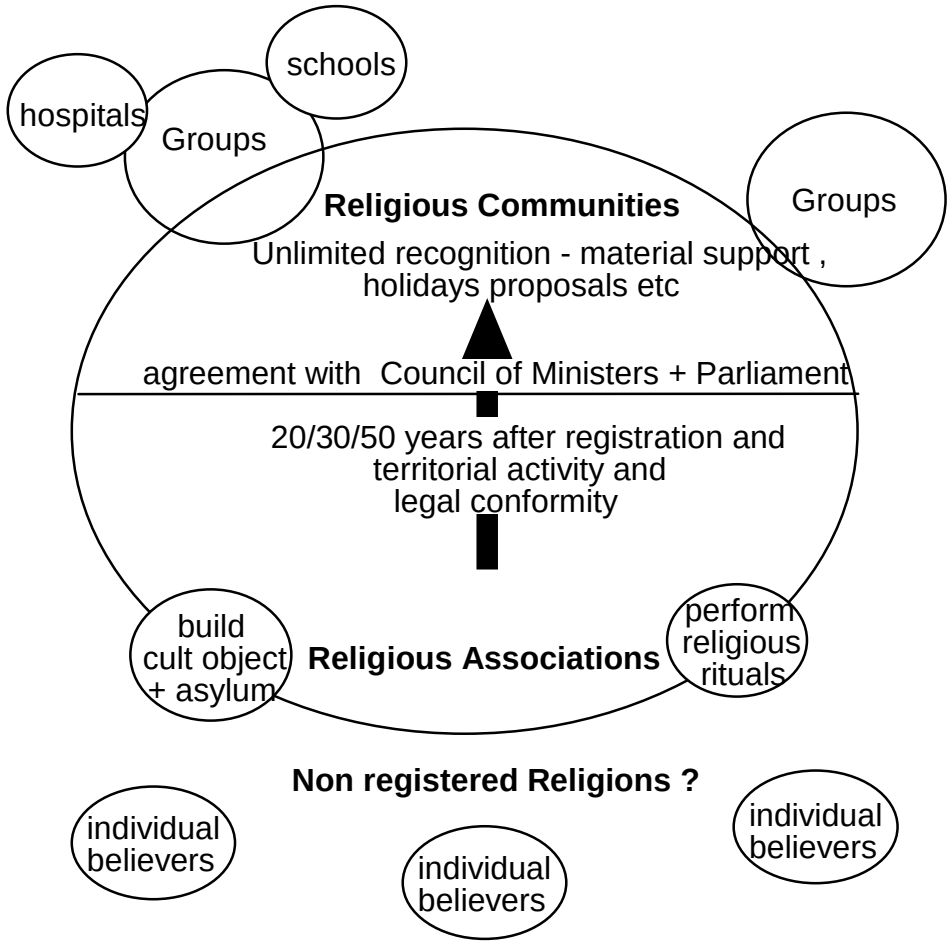
13. As for the possibility that an applicant Church, once recognised, might constitute a danger to public order and tranquility, or to the peaceful toleration among religious communities, a *mere hypothesis*, in the absence of corroboration, cannot justify a refusal to recognise it. For example, « Preaching ideas for religion intolerance » [art. 36 (3a)] seems a particularly sensitive

criteria because of its vagueness and because of the risk of stereotypes. *Guidelines, F.1*. suggest that « Provisions that grant excessive governmental discretion in giving approvals should not be allowed; official discretion in limiting religious freedom, whether as a result of vague provisions or otherwise, should be carefully limited".

Main Recommendation 1

The legal status of non-registered organisations, especially for individual rights, should be clarified.

Along with art. 9 (2) ECHR, clear material and proportionate evidences, and not mere hypothesis, should be required in order to justify any refusal of registration.



Distinction between Religious Communities and mere Religious Associations (or Organisations)

14. **Coherence of definitions.** As already mentioned, the term « religious organisations » seems to be a technical concept (a) including both « Religious communities » and « Religious associations », and (b) requiring a previous registration. However, it has to be made sure that the draft law (or perhaps its English translation) respects the coherence of the definitions provided with in article 3. For example, about termination, art. 30 seems to consider « religious organisations » as a distinct concept from « religious communities » (addressed in article 36). Another kind of example might be found in article 38, about fiscal facilities : it is not sure that article 38 only addresses « religious communities ».

15. **Registration of Religious Associations** : Art. 28 provides the specific criteria for registration as a religious « organisation ». The main sensitive criteria, mentioned in art. 28 (4) (b-c), have already been discussed.

16. **Registration of Religious Communities :** Art. 31 explicitly lists the criteria for recognition as **Religious Communities** : mainly, operating in the territory, during 20/30/50 years after being registered as religious organisations, being continuously in accordance with constitution and legislation during this period of time, and finally after having successfully negotiated a contractual agreement with the Council of Ministers, and ratified by the Parliament. Modalities of administrative registration are provided in article 27, as well as additional requirements, as the necessity « for the name of the religious community to be **different from the name** of any other religious community » [art. 27(3)(a)].

17. This last criteria should be clearly separated from a public pressure for religious unification, considered as a breach of European Convention by the ECHR, *Hasan and Chaush v. Bulgaria*, 26 October 2000, no. 30985/96, and *Metropolitan Church of Bessarabia v. Moldova, cited,* n° 123.

18. **Comparative Legal Status of Religious Communities and (simple) Religious organisations :** acquiring legal personality seems to be the main consequence of the first level registration (art. 25), besides specific rights art. 29 seems to provide with.

19. From the comparison between Art. 30 (1) (a) and art. 32, an ambiguity might result about two kinds of duration of registration : for religious Organizations, a *limited term* or registration would seem possible, (or even necessary), but the draft provides for an *unlimited time* for Religious Communities' activities. It would be useful to clarify the doubt about this distinction.

20. Art. 29, already mentioned, seems particularly confusing, as pointed out by a special footnote in the draft : what are clearly the specific prerogatives of religious communities v. any religious « organisations » ? For example, what about building (or organizing) orphan' centres, or asylum (art. 29 (c)) or general material support (art. 13 (5)) versus specific prerogatives of Religious Communities provided by articles 18, 20, 21, 22, 39 ? It might be also useful to correct the ambiguity of both art. 29 and art. 13 (5).

21. Is it really intended by the draft that • art. 23 (free expression in the media), • art. 33 (collective autonomy), • art.34 (relations with foreign movements) provides specific rights only for Religious Communities and not of other Religious Organisations ? Such potential general restrictions to basic rights would be suspected of breaching the standards of art. 9 (1) ECHR, and should be then specially justified and balanced with regard to art. 9 (2) ECHR.

22. For example, it would be doubtful that a general restriction of free expression of religious Organisations might fit the European Convention standards. In a judgment of 10 july 2003,

Murphy v. Ireland, Appl. N° 44179/98, the EcourtHR • recalls that "fr eedom of expression constitutes one of the essential foundations of a democratic society. As paragraph 2 of Article 10 expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane"; • clearly affirms that « No restriction on freedom of expression, whether in the context of religious beliefs or in any other, can be compatible with Article 10 unless it satisfies, inter alia, the test of necessity as required by the second paragraph of that Article. In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Court has, however, consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation » (§§ 65-66).

Main Recommendation 2

It would be recommended to clarify the mutual rights and prerogatives of Religious Communities versus Religious Organizations, perhaps not by means of a distinction on formal rights, but by various selections of special administrative or material supports by the State (e.g. art. 41).

General provisions on freedom of religion and conscience

23. Three main concerns might be addressed with reference to chapter II on Freedom of Religion and Conscience.

24. As already mentioned, should be clarified the relations between the guarantees provided by chapter 2 and the registration system. For instance, which is the legal meaning and consequences of the wording « religious organisations » used within the framework of art 7 (1, 3, 7) but not used in art. 7 (2, 4, 5, 6, 8, 9) ?

25. The lists of rights explained and guaranteed by chapter II should be stated to be non exhaustive lists. Otherwise, some counterproductive legal effects might weaken the level of protection : a restrictive interpretation of each guarantee could lead to the opinion that rights which are not explicitly affirmed are in fact denied by the law.

26. It is not clear whether the draft fully guarantees religious **freedom for non religious beliefs.** For example, art. 9 (2) prohibits discriminatory actions only « with a different religion ».

23. Main Recommendation 3
In order to avoid these ambiguities, it might be suggested
(a) to adopt a negative formula : "This Law does not restrict the general right to religious freedom as guaranteed by the Constitution and the International Conventions".
(b) to enact that religious freedom is guaranteed to every individual and every religious organisations even non-registered.

Specific concerns

27. The **freedom of religious dissent** seems to be limited by art. 7 (1) by limiting the practice to those performed « in compliance with their doctrine and other internal rules".

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

29. Art. 9 (6) creates a very broad exception to **the right not to reveal** one's religious beliefs. It is not sure that any legal rights or obligations or statistics could so easily restrict such a core requirement of religious freedom.

30. Art. 19 (2) creates a general restriction to **religious marriages or divorces**, because of the obligation to a prior civil proceeding. Nevertheless, these restrictions are common in many European countries, and up to now, were not discussed by the European Court of Human Rights (see also *Guidelines III, F*).

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

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

Main remarks on the three specific agreements

33. The three agreements are built on the same model, and seem to be non discriminatory.

34. A first general remark is about the redundant character of the agreements vis-à-vis the draft law. For instance, the issue of financial support (agreement, art. 13) remains an optional system, as within the draft itself.

35. Due to their own style, the agreement's provisions cause difficulties to discern what remains a simple repetition of the draft from some new legal provisions.

36. Only one exception might be pointed out, about family law and marriage proceedings in the agreement with Autocephaly Orthodox Church of Albania : art. 17 provides that « the matrimonial relationship and the divorce can be realized according to the family code provisions and church canons. » This provision might be in contradiction with draft law art. 19, by merging the two normative systems.

Main conclusive remarks

The present draft globally meets the European Standards on Religious Freedom as well as the Requirements of the OSCE-CoE Guidelines. In particular, the system of registration seems to be guaranteed by sufficient procedural controls and judicial reviews at each level of power and decisions.

We recommend with priority that:

- the legal status of non-registered organisations, especially for individual rights, should be clarified;

- Pursuant to art. 9 (2) ECHR, clear material and proportionate evidence, and not mere hypothesis, should be required in order to justify any refusal of registration ;

- the mutual rights and prerogatives of Religious Communities versus Religious Organizations should be clarified, perhaps not by means of a distinction on formal rights, but by various selections of special administrative or material supports by the State (e.g. art. 41) ;

- the internal coherency of the notions and concepts adopted by the draft (or at least, the English translation of the draft) should be revised;

- In order to avoid some self-restrictive ambiguities in the chapter II on Religious Freedom, it might be suggested
(a) to adopt a preliminary negative formula : "This Law does not restrict the general right to religious freedom as guaranteed by the Constitution and the International Conventions" ;
(b) to stipulate that religious freedom is guaranteed to every individual and every religious organisations, even non-registered.