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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE LEGAL STATUS
OF NON-MUSLIM RELIGIOUS COMMUNITIES
IN TURKEY**

**AND THE RIGHT OF THE ORTHODOX PATRIARCHATE
OF ISTANBUL TO USE THE ADJECTIVE “ECUMENICAL”**

by

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**This document has been classified restricted on 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.*

Some provisional observations concerning the standards laid down in the European Convention on Human Rights as interpreted by the European Court of Human Rights

The question submitted to the Venice Commission raises several issues concerning European human rights standards.

Inter-relation of freedom of religion and freedom of association

The main issues under the European Convention on Human Rights (ECHR) are that of freedom of religion (Article 9) and that of freedom of assembly (Article 11).

Article 9 ECHR provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or 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 belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public order, health or morals, or for the protection of the rights and freedoms of others.

The freedom to manifest a religion or belief is not an exclusively individual right; it has also a collective dimension, recognized in Article 9 by the words "in community with others".¹ Consequently, collectivities such as churches are also to be regarded as subjects of this right which may claim to be the victims of alleged violations, irrespective of whether they have legal personality under domestic law. While the freedom of thought and conscience, and the freedom to choose a religion, are strictly personal, the right to freedom of religion has also a collective dimension, and indeed the functioning of churches and other religious entities depends on respect for this right. This interpretation is also in conformity with Article 34 ECHR, which expressly provides for the possibility of non-governmental organizations and groups of individuals claiming to be the victim of a violation of one of the rights set forth in the ECHR to lodge an application with the European Court of Human Rights (ECtHR). Issues concerning the legal status of a religious community affect both the members of that community and the community as a collectivity.² The right to freedom of religion of the individual members of a religious community and that of the community do not substitute for each other in the sense that the one is derived from the other; they have their own rationale. As the European Commission of Human Rights (Commission) held: "the right to manifest one's religion 'in community with others' has always been regarded as an essential part of the freedom of religion". The Commission held "that the two alternatives 'either alone or in community with others' in Article 9(1) cannot be considered as mutually exclusive, or as leaving a choice to the authorities, but only as recognising that religion may be practised in other form".³

The same holds good for Article 11 ECHR: both the individuals who have established or wish to establish an association and the established association may lodge a complaint on their own title concerning any limitation placed on the exercise of the right of freedom of association.

Article 11 reads as follows:

¹ European Court of Human Rights (ECtHR), *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

² ECtHR, *Cha'are Shalom Ve Tsedek v. France*, judgment of 27 June 2000, § 72.

³ Commission, *X. v. United Kingdom*, D&R 22 (1981), p. 27 at p. 34.

1. Everyone has the right to freedom of peaceful assembly and the freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The right under Article 9 to manifest one's religion in community with others presupposes the right to meet, to publicly give expression to common religious opinions and values, to associate freely and to have some form of organized community, without arbitrary interference by public authorities.⁴ Consequently, the freedom of thought, conscience and religion provided for in Article 9 is closely connected with both the freedom of association and the freedom of assembly of Article 11,⁵ as well as with the freedom of expression of Article 10. This means that the legal status of religious communities may raise issues both under Article 9 and Article 11. As the ECtHR held: "religious communities traditionally and universally exist in the form of organised structures" while Article 11 "safeguards associative life against unjustified State interference".⁶

The ECtHR has treated the freedoms set forth in Articles 9 and 10 as elements of Article 11 and considered their violation as constituting an additional argument for the finding of a violation of Article 11.⁷ Thus, the ECtHR held in the case of *Hassan and Chaush*: "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 the associated 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 Article 9 affords".⁸ Viewed from the other side, the organisational aspects of religious communities as associations form an integral part of Article 9. As the ECtHR held: "Were the organisational life of the [religious] community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable".⁹ In this respect it is also important to note that "the list of exceptions to freedom of religion and assembly, as contained in Articles 9 and 11 of the Convention, is exhaustive, they must be construed strictly and only convincing and compelling reasons can justify restrictions. The States have only a limited margin of appreciation in these matters."¹⁰ Moreover, the ECtHR has held that "but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."¹¹

⁴ ECtHR, *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

⁵ *Ibidem*.

⁶ ECtHR, *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 62.

⁷ ECtHR, *Young, James and Webster v. United Kingdom*, judgment of 13 August 1981, § 57. For the link between Article 11 and Article 10, see ECtHR, *Refah Partise (Prosperity Party) and Others v. Turkey*, judgment of 31 July 2001.

⁸ ECtHR, *Hassan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 62.

⁹ *Ibidem* and ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 103.

¹⁰ ECtHR, *Svyato-Mykhaylivska Parafiya v Ukraine*, judgment of 14 June 2007, § 114.

¹¹ ECtHR, *Hassan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 78.

Freedom of association of religious communities

The ECtHR has held that "the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have the right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions. Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association."¹² Indeed, as the ECtHR has held, the refusal by the authorities to recognise or register the organisational structure that a group of persons has chosen, may deprive them from the possibility to individually and collectively pursue their goals and thus to exercise their right to freedom of association.¹³ The mere fact that they have been offered some kind of an alternative does not mean that there is no interference, if that alternative does not offer them the same legal status.¹⁴ And with respect to religious communities the ECtHR has held "that a refusal by the domestic authorities to grant the status of a legal entity to an association of believers amounts to an interference with the right to freedom of religion under Article 9 of the Convention¹⁵ and to freedom of association¹⁶".

The fact that Articles 11 has to be interpreted and applied in conjunction with Article 9 may imply that freedom of association and assembly derive from that connection a broader scope of protection. As is the case with other freedoms, the freedom of association and assembly may only be restricted to the extent "necessary in a democratic society".¹⁷ The ECtHR has held that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimensions, one of the most vital elements that go to make up the identity of believers and their conception of life (...). The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".¹⁸ In addition, the ECtHR has emphasized that the autonomy of religious communities is indispensable for that pluralism and for that reason forms a core element of the protection provided by Article 9.¹⁹

Only in very exceptional situations the fact that the association is a religious community may add to the necessity to place restrictions on it under the second paragraph of Article 11, *e.g.* if the religion concerned is an extremely fundamentalist one, or has certain goals which threaten State security or public safety, or infringe upon the rights and freedoms of its adherents. It should be stressed, however, that the State has to be neutral *vis-à-vis* religions and beliefs.²⁰

¹² ECtHR, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, § 40.

¹³ ECtHR, *Özbek and Others v. Turkey*, judgment of 6 October 2009, § 35.

¹⁴ *Idem*, § 38. Also ECtHR, *G.M. v. Italy*, judgment of 5 July 2007, § 23,

¹⁵ ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, § 105.

¹⁶ ECtHR, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, §§ 31 et sequ.

¹⁷ Paragraph 2 of Article 11.

¹⁸ ECtHR, *Kokkinakis v. Greece*, Judgment of 25 May 1993, § 31.

¹⁹ ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, § 118; *Mirulubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

²⁰ ECtHR, *Refah Partisi (Welfare Party) and Others*, judgment of 13 February 2003, § 91.

States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities.²¹ While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory powers and in its relations with the various religions, denominations and groups within them.²² Moreover, State authorities may not determine themselves whether the religion concerned is a sincere and appropriate one, and to interpret its beliefs and goals,²³ the right to freedom of religion excludes assessment by the State of the legitimacy of religious beliefs.²⁴ What is at stake here is the preservation of pluralism and the proper functioning of democracy.²⁵ From the same requirement of neutrality – as well as from Article 14 – follows that State authorities have to treat all religious communities equally.²⁶

Finally, the mere fact that the religious community concerned may have certain alternatives available to compensate for the interference resulting from State measures, "while it may be relevant in the assessment of proportionality, cannot lead to the conclusion that there was no State interference with the internal organisation of the [community concerned]".²⁷

Right to peaceful enjoyment of possessions; Article 1 of Protocol No. 1

Article 1 of Protocol No. 1 reads as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 1 of protocol No. 1 also provides for an individual as well as for a collective right. Collectivities like religious communities are also entitled to the peaceful enjoyment of their possessions. From Article 11 in conjunction with Article 1 of Protocol No. 1 a positive obligation could arise for the State to ensure the effective enjoyment of freedom of association by regulating the association's property rights.²⁸ In doing so, the State has a broad margin of appreciation to take into consideration the interest of protecting the *ordre public* and the interests of the members of the association concerned.²⁹

²¹ ECtHR [GC], *Cha'are Shalom Ve Tsedek v. France*, judgment of 27 June 2000, § 84.

²² ECtHR, *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

²³ ECtHR, *Mannoussakis and Others v. Greece*, judgment of 26 September 1996, § 47.

²⁴ ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, § 117.

²⁵ ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 119.

²⁶ ECtHR, *Supreme Holy Council of the Muslim Community v. ...*, judgment of 16 December 2004, §§ 76-85.

²⁷ ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 113.

²⁸ Cf. ECtHR, *Broniowski v. Poland [GC]*, judgment of ..., § 143.

²⁹ ECtHR, *Fener Rum Erkek Lisesi Vakfi v. Turkey*, judgment of 9 January 2007, § 52; *Özbek and Others v. Turkey*, judgment of 6 October 2009, § 36.

Article 1 of protocol No. 1 does not guarantee the right to acquire property.³⁰ The ECtHR has so far refrained from interpreting the right to freedom of association as creating an automatic right of access to private property.³¹ However, any restriction of the right to acquire and maintain property, as a restriction of the right to freedom of association, requires a legal basis that meets the requirements of accessibility, preciseness and predictability.³² In addition, for religious communities, Articles 9 and 6 play a role as well.

Right of access to court or of another effective remedy for religious communities

This right is also implied in Articles 9 and 11, read in conjunction with Article 6. As the ECtHR has held: "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 must be seen not only in the light of Article 11, but also in the light of Article 6".³³

If and to the extent that no "civil rights and obligations" or "a criminal charge" are involved, Article 13 of the Convention, in conjunction with Articles 9 and 11, and Article 1 of Protocol No. 1, guarantees "an effective remedy before a national authority". As the ECtHR has held, "domestic law ... must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting human 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 conferred on the competent authorities and the manner of its exercise."³⁴

Freedom of religious communities concerning the title/status of their leader

The right to freedom of association of religious communities also implies the right to determine, without State interference, the title or status of their leaders. As the ECtHR has held: "the personality of the religious leaders is of importance to the members of the religious community.

The Court's task is to examine whether [State regulations or State action in that respect constitute] an unlawful and unjustified State interference with the internal organisation of the [community concerned] and the applicant's rights under Article 9 of the Convention. It is certainly not the Court's task to determine the canonical legitimacy of Church leaders."³⁵

In this context, it may also be relevant that the ECtHR has held that "national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be".³⁶

³⁰ ECtHR, *Jantner v. Slovakia*, judgment of 4 March 2003, § 34.

³¹ ECtHR, *Appleby and Others v. United Kingdom*, judgment of 6 May 2003, § 47.

³² *Ibidem*, §§ 50 -57.

³³ ECtHR, *Svyato-Mykhaylivska Parafiya v Ukraine*, judgment of 14 June 2007, § 117.

³⁴ ECtHR, *Hassan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 84.

³⁵ ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 104.

³⁶ *Idem*, § 148.