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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.*

## **European standards for granting legal personality to religious communities and related human rights**

The problems described in the general introduction above are addressed by various guarantees under the Convention. The question of legal personality for religious communities in general (Articles 9 and 11), the right of religious communities to private property (Articles 9 and P 1-1), the right of religious communities of access to court (Article 6) and finally with a view to the issue of the Ecumenical Patriarchate the question of "Church autonomy", i.e. the right of a religious community, in particular of a Church under article 9 to define its internal ecclesiastical concepts and denominations.

### 1. Granting legal personality

1. In general, granting legal personality to an association is a topic under the freedom of association as it is guaranteed under Article 11 of the Convention. In recent years the ECtHR has made it clear that freedom of association in religious context is also protected by Article 9. 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. 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.

2. In the context of religious communities the rights under Article 9 ECHR are involved.

Article 9 ECHR reads 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.

3. 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 organised community, without arbitrary interference by public authorities.<sup>1</sup> 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

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<sup>1</sup> ECtHR, *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

of Article 11,<sup>2</sup> 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".<sup>3</sup>

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.<sup>4</sup> 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".<sup>5</sup> 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".<sup>6</sup> 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."<sup>7</sup> 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."<sup>8</sup>

4. A systematic approach to Articles 9 and 11 of the Convention leads to the conclusion that the freedom to manifest a religion or belief is not an exclusively individual right. The case law of the ECtHR makes it clear that this freedom has also a collective dimension, recognized in Article 9 by the words "in community with others".<sup>9</sup> Consequently, religious communities and 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.

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<sup>2</sup> *Ibidem*.

<sup>3</sup> ECtHR, *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 62.

<sup>4</sup> 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.

<sup>5</sup> ECtHR, *Hassan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 62.

<sup>6</sup> *Ibidem* and ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 103.

<sup>7</sup> ECtHR, *Svyato-Mykhaylivska Parafiya v Ukraine*, judgment of 14 June 2007, § 114.

<sup>8</sup> ECtHR, *Hassan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 78.

<sup>9</sup> European Court of Human Rights (ECtHR), *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

5. This interpretation is also in conformity with Article 34 ECHR, which expressly provides for the possibility of non-governmental organisations 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.<sup>10</sup> 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”.<sup>11</sup>

The ability “to establish a legal entity in order to act collectively in a field of mutual interest” is one of the most important aspects of freedom of association, without which - according to the ECtHR - that right “would be deprived of any meaning”.<sup>12</sup> In the *Hasan and Chaush* judgment the ECtHR made explicit reference to the fact that religious communities traditionally exist in the form of organised structures. Therefore, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. 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.<sup>13</sup>

6. Based on this understanding confirmed by the ECtHR the problem of legal personality of religious communities can be formulated in two ways leading basically to the same requirements under the Convention: First, it may be asked whether there is positive obligation to create a legal framework which provides for proceedings and requirements to register and obtain legal personality. The second - more traditional - question would be whether refusal to grant legal personality amounts to an interference and, in the affirmative, whether the interference was justified under the conditions of Article 9 para. 2 of the Convention. These two ways of approaching the problem of legal personalities concern basically two sides of the same coin, the requirements of the Convention being substantially the same (see among others *Lopez Ostra ...*).

7. With a view to Article 11 the Court has consistently held the view that a refusal by the domestic authorities to grant status as a legal entity to an association of individuals amounts to an interference with the applicants' exercise of their right to freedom of association (see *Gorzelik*, cited above, § 52 et passim, and *Sidiropoulos*, cited above, § 31 et passim). In particular, the ECtHR found, that 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.<sup>14</sup> The mere fact that they have been offered some kind of an alternative

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<sup>10</sup> ECtHR, *Cha'are Shalom Ve Tsedek v. France*, judgment of 27 June 2000, § 72.

<sup>11</sup> Commission, *X. v. United Kingdom*, D&R 22 (1981), p. 27 at p. 34.

<sup>12</sup> ECtHR, *Moscow Branch of the Salvation Army*, judgment of 5 October 2006, § 71

<sup>13</sup> ECtHR, *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, § 62.

<sup>14</sup> ECtHR, *Özbek and Others v. Turkey*, judgment of 6 October 2009, § 35.

does not mean that there is no interference, if that alternative does not offer them the same legal status.<sup>15</sup>

8. The same principle applies to collectivities with religious purposes. This was confirmed in the judgment in the case of *Metropolitan Church of Bessarabia and Others* where the Court came to the following conclusion:

“In the present case the Court observes that, not being recognised, the applicant Church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practise their religion and, not having legal personality, it is not entitled to judicial protection of its assets.

The Court therefore considers that the government’s refusal to recognise the applicant Church, upheld by the Supreme Court of Justice’s decision of 9 December 1997, constituted interference with the right of the applicant Church and the other applicants to freedom of religion, as guaranteed by Article 9 § 1 of the Convention.”

The fact, that leaders and members of a religious community use alternative forms of organising their religious life by alternatives to establishing an association with legal personality does not change the legal situation. 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].<sup>16</sup>

9. An interference with the rights under Article 9 of the Convention may only be justified if it pursues a legitimate aim and if the interference is “necessary in a democratic society” within the meaning of Article 9 para 2. According to the ECtHR States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety.<sup>17</sup> It can be derived from the case law of the ECtHR that restrictions of granting legal personality pursues the legitimate aims of protection of public order and public safety.<sup>18</sup>

10. It remains to be examined whether refusal to grant legal personality is “necessary in a democratic society”.<sup>19</sup> 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 is indissociable from a democratic society, which has been dearly won over the centuries, depends on it”.<sup>20</sup> 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.<sup>21</sup>

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<sup>15</sup> *Idem*, § 38. Also ECtHR, *G.M. v. Italy*, judgment of 5 July 2007, § 23,

<sup>16</sup> ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 113.

<sup>17</sup> *Metropolitan Church of Bessarabia and Others*, cited above, § 113

<sup>18</sup> See, *mutatis mutandis*, ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, judgment of 31 July 2008, § 76.

<sup>19</sup> Paragraph 2 of Article 11.

<sup>20</sup> ECtHR, *Kokkinakis v. Greece*, Judgment of 25 May 1993, § 31.

<sup>21</sup> ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, § 118; *Mirolubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

Moreover, 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."<sup>22</sup>

11. According to its settled case-law, the ECtHR leaves to States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary, but that goes hand in hand with European supervision of both the relevant legislation and the decisions applying it. In order to determine the scope of the margin of appreciation the ECtHR takes into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society.<sup>23</sup> Similarly, a good deal of weight must be given to that need when determining, as paragraph 2 of Article 9 requires, whether the interference corresponds to a "pressing social need" and is "proportionate to the legitimate aim pursued."<sup>24</sup>

12. Only in very exceptional situations, restrictions in granting legal personality to a religious community may be justified under Article 9 para. 2. In the Case of the *Jevova's witnesses* *.I.* Austria the Court held that - following the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in the domain of religions - requires that if a State sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner<sup>25</sup>.

Such exceptional circumstances exist, *e.g.* if the religion concerned is an extremely fundamentalist one, if it has certain goals which threaten State security or public safety, in particular if it does not respect the principles of a democratic secular State, 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.<sup>26</sup> States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities.<sup>27</sup> 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.<sup>28</sup> Moreover, State authorities may not determine themselves whether the religion concerned is a sincere and appropriate one, and to interpret its

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<sup>22</sup> ECtHR, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, § 40.

<sup>23</sup> *Kokkinakis*, § 31.

<sup>24</sup> see, *mutatis mutandis*, among many other authorities, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports* 1996-V, p. 1956, § 53

<sup>25</sup> *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, judgment of 31 July 2008, § 92

<sup>26</sup> ECtHR, *Serif, Refah Partisi Welfare Party' and Others*, judgment of 13 February 2003, § 91.

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

<sup>28</sup> ECtHR, *Mirulubovs and Others v. Lithuania*, judgment of 15 September 2009, § 80.

beliefs and goals;<sup>29</sup> the right to freedom of religion excludes assessment by the State of the legitimacy of religious beliefs.<sup>30</sup> What is at stake here is the preservation of pluralism and the proper functioning of democracy.<sup>31</sup> From the same requirement of neutrality – as well as from Article 14 – follows that State authorities have to treat all religious communities equally.<sup>32</sup>

In the light of the above principles it is doubtful whether a legal situation that restricts members of a religious community to register associations for the support of the community or establish foundations is in compliance with the requirements of Article 9 para. 2 of the Convention.

## 2. The right to self-determination of religious communities

The question of legal personality of religious community is without any doubt a crucial one within the context of the freedom of religion. However, on a number of occasions, when a religious community organises the life of a religion in a particular state, there may arise conflicts in other respects.

Freedom of religion includes a certain autonomy on the side of the religious community to decide on its own organisation, such as questions of internal structure, designating religious leaders, the election and education of the clergy, and not the least the official denomination of a religious group. This principle, also known under terms like “church autonomy” or the “right to self-determination” of churches and religious communities is guaranteed by various Constitutions of Member States (Art. 140 German Basic Law in connection with Art. 137 Weimar Constitution; Art. 15 of the Austrian 1867 Basic Law on the rights of citizens) and accepted by the case law of the ECtHR.

This acceptance is reflected in various judgments of the Court. It has noted in a number of cases, that the personality of the religious leaders is of importance to the members of the religious community, participation in the organisational life of the community is a manifestation of one’s religion, protected by Article 9 of the Convention. In the case of *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria* confirmed once more that under Article 9 of the Convention, interpreted in the light of Article 11, the right of believers to freedom of religion encompasses the expectation that the community will be allowed to function “free from arbitrary State intervention in its organisation.” The autonomous existence of religious communities was “indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords.” And: Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable (judgment of 22 January 2009, § 103).

In particular, as the ECtHR has held, the personality of the religious leaders is of importance to the members of the religious community. In this context, 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 respect the applicant’s rights under Article 9 of the Convention. However, it is not the Court’s task to determine the canonical legitimacy of Church leaders (ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 104).

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<sup>29</sup> ECtHR, *Mannoussakis and Others v. Greece*, judgment of 26 September 1996, § 47.

<sup>30</sup> ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, judgment of 13 December 2001, § 117.

<sup>31</sup> ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, judgment of 22 January 2009, § 119.

<sup>32</sup> ECtHR, *Supreme Holy Council of the Muslim Community v. ...*, judgment of 16 December 2004, §§ 76-85.

The right of self determination of a church, more precisely the right of a religious community, in particular of a Church to define its internal ecclesiastical concepts and denominations, includes the general right to decide on its organisational structure. This decision may imply the institution of branches or parishes on regional or local level as well as the integration of a national church or religious community in an international church or community or even in a worldwide organisational structure such as the (roman) catholic church. The legal basis of such organisational differentiation will be on the one hand the internal law of the community, such as ecclesiastical statutes, canon law etc. On the other hand there may exist statutes of single states or even international treaties concluded under public international law confirming certain structure, denominations etc.

Whenever a State decides to interfere with these "internal" aspects of organisation of a religious group it interferes also with its "autonomy" and therefore with the rights under Article 9 of the Convention. Decisions on the status of residence of clergy, the establishment of requirements for the education of clergy as well as conditions of opening a "school" for educating clergy may amount to an interference. The same is true for the prohibition of certain organisational decisions, e.g. the foundation of new divisions etc, or the prohibition of the use of a certain name or parts of a name for a religious group or church. Very often questions of names are linked - legally or sometimes only as a matter of fact - to the acceptance of certain religious groups, to their significance of the group, its tradition, its relation to founders of a religion, prophets etc. Sometimes questions of names may be the reason of disputes between competing groups in which state authorities may be involved, which may risk a violation of the rights under Articles 9 and 11 of the Convention if they do not respect the principle of neutrality vis-a-vis those religious groups.

In any case, a line must be drawn between behavior on the side of the state which amounts to an interference and acts or omissions that do not reach this level: while an explicit prohibition to use a certain name which forms part of the identity of a religion usually comes up as an interference with and possibly to a violation of the rights under Article 9, the use of a different name in the correspondence or at official events etc. may - depending on the particular circumstances - be a mere political question, not a legal issue under the Convention. The same is true when state authorities consequently suppress a word which reflects the specific leader of a church or religious group. However, such a policy of "re-naming", being a matter of political correctness, may reach the level of an interference when it is combined with other measures discriminating the religious group on grounds that are not in line with the Convention in particular with Article 14. In this context one has to bear in mind that the ECtHR has explicitly 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" (ECtHR, *Svyato-Mykhaylivska Parafiya v Ukraine*, judgment of 14 June 2007, § 117).

In case of an interference the respective act or omission must pass the proportionality test under Article 9 para. 2 of the Convention. In exceptional cases it may be justified to deny a religion to choose and use a certain name e.g. when it incites violence is in fact directed at endangering national security or the integrity of a state. In the appreciation of names no general line may be drawn from the case law of the ECtHR. However, in analogy to party prohibition cases, an overall assessment of the behaviour of the religion and in particular its religious leaders is necessary in order to come to a firm conclusion as to the "danger" of a religion for a democratic society within the meaning of paras. 2 of Article 8 to 11 of the Convention (see among others *mutatis mutandis* the judgment in the case of *Turkish Communist Party*, 30 January 1998, §§ 53 seq.). A peaceful religious leader accepting the state of his activity and cooperating positively with it in common matters such as education of clergy or religious education at school will be an argument against a legitimate interference with the organisation and/or choosing a name.