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**Opinion 664/2012**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON ACT CCVI OF 2011  
ON THE RIGHT TO FREEDOM OF CONSCIENCE AND RELIGION  
AND THE LEGAL STATUS OF CHURCHES, DENOMINATIONS AND  
RELIGIOUS COMMUNITIES**

**OF HUNGARY**

**On the basis of comments by**

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**Mr Jan VELAERS (Member, Belgium)**

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## I. INTRODUCTION

1. On 20 January 2012, in reply to a letter by the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, the Minister of Foreign Affairs of Hungary, Mr János Martonyi, requested the Venice Commission to provide opinions on the newly adopted Hungarian laws on the judiciary, religious freedom and the elections to Parliament.
2. The present Opinion deals with Act CCVI on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities (CDL-REF (2012)009), hereinafter referred to as the "Act".
3. The Venice Commission appointed Mr Christoph Grabenwarter, Mr Jan Velaers and Mr Vojin Dimitrijevic as rapporteurs. They worked on an English translation of the Act provided by the authorities.
4. On 20-21 February 2012, a delegation of the Commission, composed of Mr Vojin Dimitrijevic, Mr Wolfgang Hoffmann-Riem, Mr Christoph Grabenwarter, Ms Hanna Suchocka and Mr Jan Velaers, accompanied by Mr Thomas Markert, Mr Schnutz Dürr and Ms Caroline Martin from the Secretariat, visited Budapest and met with, in relation to the above-mentioned Act (in chronological order), the Minister of Foreign Affairs, Mr János Martonyi; several religious associations members of the Ecumenical Council of Churches in Hungary and other religious communities; the President of the Constitutional Court, Mr Peter Paczolay; the Minister responsible for church related issues, Mr Zsolt Semjén; the Committee on Human Rights, Minority, Civic and Religious Affairs of the Parliament as well as with NGOs. In addition, some members of the delegation had the opportunity of meeting with representatives of small churches likely to lose their status according to the Act. The Venice Commission is grateful to the Hungarian authorities for their excellent co-operation in the organisation of this visit and for the explanations provided.
5. *The present opinion was discussed at the Sub-Commission on Fundamental Rights (Venice, 15 March 2012) and adopted by the Commission at its ... plenary session (Venice).*

## II. PRELIMINARY AND GENERAL REMARKS

6. The following opinion intends to raise key aspects of the Act with regard to the fundamental rights protected by the Hungarian Fundamental Law (hereinafter the "Constitution") as well as by the European Convention on Human Rights (hereinafter, the "ECHR") and the International Covenant on Civil and Political Rights (hereinafter, the "ICCPR") to which the Republic of Hungary is a party.
7. When examining the Act, the rapporteurs also bore in mind the main European principles laid down in the OSCE/ODIHR-Venice Commission Guidelines for legislative reviews of laws affecting religion or belief<sup>1</sup>, hereinafter referred to as OSCE/ODHIR-Venice Commission Guidelines.
8. The opinion takes into account the outcome of the discussions that took place and explanations made during the mission to Budapest. This mission gave the experts the opportunity of getting more acquainted with the context of the Law, the concerns of the State and the concerns addressed by religious representatives.

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<sup>1</sup> CDL-AD(2004)028, adopted by the Venice Commission (Venice, 18-19 June 2004).

9. This opinion should also be seen in the context of the Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session (Venice, 17-18 June 2011)<sup>2</sup>. By letter of 9 January 2012 addressed to the President of the Venice Commission, the Hungarian Deputy Prime Minister, Mr Tibor Navracsics, kindly provided explanations on the adoption of the cardinal acts referred to in the Fundamental Law (Constitution).

10. The Act constitutes the last step of an entirely new legal regime, which replaces the previous one, governed by the 1989 Constitution and the Act no. IV of 1990 on Freedom of Conscience and Religion and Churches. Under the 1990 Law, 100 persons could request registration of a church from a court, as long as they presented a charter of organisation with a self-organisational structure and a declaration that the founders intended to pursue a religious activity. More than 300 churches had been registered under the 1990 Law in Hungary before the summer of 2011 when a new cardinal law (Act. No. c 2011) was adopted, withdrawn by Parliament on 19 December 2011, just before a decision of the Constitutional Court invalidated the Act on procedural grounds<sup>3</sup>.

11. The Act under consideration was adopted on 30 December 2011 and entered into force on 1<sup>st</sup> January 2012.

12. The rapporteurs were informed about the speedy process in which the text was tabled and adopted within Parliament. The draft of the current Act was first read, in a general reading, on 23 December 2011 and was passed on 30 December 2011, along with many other laws on the last day of the parliamentary session of the year. The procedure followed has regrettably not permitted any consultation with the opposition or with civil society at large.

13. According to the Hungarian authorities, the previous regulation had created an “untenable situation” in which more than 300 churches were registered. Several among them seemed to have been registered for economic or tax benefits rather than for conducting religious activities. The authorities, by enacting a complete new legal regime, have mainly sought to take measures against the abuse of freedoms of conscience and association and to reduce the number of registered churches operating in the country, while guaranteeing the freedom of religion.

14. The Act under consideration has drawn up a list of 14 churches to be recognised. This list was amended by another proposal for recognising additional organisations, bringing the list to 27 churches. It resulted in 32 churches being recognised by Parliament in a hearing that took place on 28 February 2012.

15. The primary goal to diminish the number of organisations that would benefit from official recognition as churches and, hence, from various benefits and privileges not granted to other groups, has undeniably been achieved. Since 29 February 2012, more than 300 previously registered churches had to launch a whole new process of registration either in order to still get recognition as a church or as a religious association.

16. Contracting States to the ECHR 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<sup>4</sup>.

17. The Venice Commission recognises that there is legitimate concern to eliminate the abuse of religious organisations, which have operated for illicit and harmful purposes or for personal gain. The limitation of number of recognised churches together with reasonable criteria may be

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<sup>2</sup> CDL-AD(2011)016, see also document CDL(2011)058 Position of the Government of Hungary on the opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) transmitted by the Minister for Foreign Affairs of the Republic of Hungary on 6 July 2011

<sup>3</sup> Decision 164/2011 (XII.20) AB decision

<sup>4</sup> CDL-AD (2006)030, § 12

legitimate as well. Whether to enact a whole new legislation on freedom of religion and beliefs, with new demanding registration criteria for churches, constitutes a proportionate response, remains to some extent debatable. Whether more tailored actions and regulations would not have been sufficient, could still be considered. One of the main justifications for this new Act is the need to prevent the so-called “business churches” from abusing the possibility of receiving public funding. The Act could have focused on the financial advantages, without applying the same criteria for the recognition of churches and the acquisition of legal personality.

18. The Venice Commission would like to recall that the right to freedom of religion and conscience covers more elements than merely granting privileges, state subsidies and tax benefits to recognised churches. Freedom of thought, conscience and religion is one of the foundations of a “democracy society”<sup>5</sup>. It is so important that it cannot be derogated from even in times of emergency and that in comparison with other rights and freedoms, it cannot be restricted on national security grounds.

19. The freedom of thought, conscience and religion (Article 9 ECHR<sup>6</sup> and 18 ICCPR<sup>7</sup>), is a complex right, which is closely linked to and must be interpreted in connection with the freedom of association (Article 11 CEDH and 22 ICCPR), and the right to non discrimination (Article 14 CEDH and 26 ICCPR).

20. The Venice Commission stresses that even if the margin of appreciation of the State is large and even if countries have found various solutions to overcome the issue, this must not be used to undermine European guarantees on this point<sup>8</sup>. This concern will form the basis for the forthcoming analysis.

21. From a comparative perspective, the Act may be seen as providing a generous framework that permits the recognition of a relatively high number of churches in comparison to other European countries. Furthermore, it must be mentioned that the Hungarian authorities have repeatedly underlined that their intention was not to limit the freedom of religion as such in their country. In this regard, it is true that fundamental principles are rightly provided for in the Constitution<sup>9</sup> and that Section 1 of the Act guarantees the right to freedom of conscience and religion to everyone.

22. However, although few in number, some important issues remain problematic and should be considered further by the Hungarian authorities.

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<sup>5</sup> ECHtR, *Kokkinakis v. Greece* judgment (25 May 1993, Series A No. 260-A, p. 17, paragraph 31).

<sup>6</sup> Article 9 CEDH reads : “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 and private, to manifest his religion and 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 on public order, health or morals, or for the protection of the rights and freedoms of others.*”

<sup>7</sup> Article 18 ICCPR reads “1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or freedom of his choice.*

3. *Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or fundamental rights and freedoms of others.*

<sup>8</sup> CDL-AD (2006)030, § 12

<sup>9</sup> The new Constitution of Hungary guarantees to everyone the right of freedom of thought, conscience and religion in its Article VII. According to its second paragraph, State Churches shall be separate and Churches shall be autonomous, the State shall cooperate with Churches for community goals. More generally the Constitution leaves the rules of fundamental rights and obligations to be laid down in Acts (Article I.3) and foresees requirements for limitations to fundamental rights. The protection of equality is protected under Article XV of the Constitution.

### **III. ISSUES UNDER REVIEW**

#### **A. FREEDOM OF RELIGION AND CONSCIENCE**

##### **a) Freedom of conscience**

23. The Venice Commission notes that Section I of the Act only guarantees expressly “the right to freedom of conscience and religion”, without guaranteeing “the right to freedom of thought” or the right to freedom of “conviction” more generally.

##### **b) The limitation of religious activities**

24. The Venice Commission notes that according to Section 7.3 of the Act, a church may only conduct religious activities, “which are not contrary to the Fundamental Law, do not conflict with rules of law, and do not violate the rights and freedoms of other communities, or human dignity.” These are broad notions and in particular the reference to “rules of law” includes all kinds of legal rules which exist in the country.

25. International Human Rights instruments identify the circumstances in which a State may legitimately limit religious freedom. Article 9. 2 of the ECHR and Article 18.3 of the ICCPR set strict limitations clauses; laws must satisfy three criteria:

- Limitations have to be imposed by law;
- Limitations have to preserve one of the interests explicitly mentioned in Article 9. 2 ECHR or in Article 18.3 ICCPR i.e.: public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others;
- Limitations have to be “necessary in a democratic society”. An interference with the religious activities of churches is only necessary when there is a “pressing social need” and when the measure taken is “proportionate to the legitimate aim pursued”.

26. This means that only such legal rules, which are in accordance with these requirements, can be used to restrict the activities of churches. When interpreting the notion of “rules of law”, the Hungarian courts will therefore have to interpret this provision in the light of these requirements, which are also part of the rules of law applicable in Hungary, to avoid the violation of international standards. The use of less broad terms in the law would have been preferable.

#### **B. CHURCHES AND RELIGIOUS GROUPS**

27. The Act introduces, in the legal order of Hungary, distinctions between churches and other categories of religious groups. Before analysing the recognition requirements and the recognition procedure of churches, it is worth recalling substantive issues linked to the principle of recognition or non recognition of churches in the light of fundamental rights.

##### **a) Recognition cannot be a prerequisite to establish a Church**

28. According to Section 7 .1 of the Act “A church, denomination or religious community (hereinafter referred to as “church”) shall be an autonomous organisation recognised by the National Assembly consisting of natural persons sharing the same principles of faith; shall possess self-government and shall operate primarily for the purpose of practicing religious activities.”

29. The wording of this Article seems to imply that a church, a religious community denominated as a church, shall not be entitled to be established and to conduct religious activities in Hungary “without recognition by the National Assembly”. If this is the meaning of Section 7, it violates Article VII of the Hungarian Constitution. Likewise, it constitutes an infringement to international standards under several aspects.

30. International instruments not only guarantee the individual freedom of religion, but also the freedom to adopt a religion “in community with others”. This latter freedom implies the right to establish a church or a religious community, without having to be recognised previously by a State authority.

31. The European Court of Human Rights has specifically stated: “Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. 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 which Article 9 affords.”<sup>10</sup>

32. Thus, the Venice Commission deems the obligation in the Act to obtain recognition by the Hungarian Parliament as a condition to establish a church as a restriction of the freedom of religion.

33. As a restriction, it should then be assessed with regard to the criteria for restriction clauses provided for under Articles 9.2 ECHR and 18.3 ICCPR. In the opinion of the Venice Commission, whether an obligation to have prior recognition of a two-third majority of the Hungarian Parliament in order to establish a church in Hungary may be justified in the light of international standards is questionable.

34. As the Venice Commission has already stated on other occasions, registration of religious organisations should not be mandatory *per se*<sup>11</sup> and “individuals and groups should be free to practice their religion without registration if they so desire”<sup>12</sup>.

#### **b) The acquisition of legal personality**

35. There is now extensive persuasive authority from the European Court of Human Rights that there is a right to acquire legal entity status, and that the legal entity status thus made available must be sufficient for a religious community to carry out the full range of its affairs<sup>13</sup>.

36. The European Court of Human Rights has stated<sup>14</sup> that “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 that right would be deprived of any meaning”.

37. The European Court of Human Rights has consistently held the view that a refusal by the domestic authorities to grant legal-entity status to an association of individuals amounts to an interference with the applicants’ exercise of their right to freedom of association.<sup>15</sup> Where the organisation of the religious community was at issue, a refusal to recognise it has also been found to constitute interference with the applicants’ right to freedom of religion under Article 9 of the Convention.<sup>16</sup>

38. Moreover, according to the European Court of Human Rights, in order to allow a religious group to obtain the legal personality, the State must be careful to maintain a position of strict neutrality and be able to demonstrate it has proper grounds for refusing recognition.<sup>17</sup>

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<sup>10</sup> ECHR, 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, § 61.

<sup>11</sup> OSCE/ODIHR-Venice Commission Guidelines, 17. See also CDL-AD(2007)041, § 15.

<sup>12</sup> CDL-AD (2004)028

<sup>13</sup> ECHR, 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, § 61, See *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 52 et passim, 17 February 2004, and *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, § 31 et passim); See *Metropolitan Church of Bessarabia and Others v. Moldova*, n° 45701/99, § 105, ECHR 2001-XII).

<sup>14</sup> ECHR, 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, § 61.

<sup>15</sup> (see ECHR, *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 52 et ECHR, passim, 17 February 2004, and *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, § 31 et passim).

<sup>16</sup> (see *Metropolitan Church of Bessarabia and Others v. Moldova*, n° 45701/99, § 105, ECHR 2001-XII).

<sup>17</sup> CDL-AD(2009)036

39. The Venice Commission has already stated in another context, that reasonable access to a legal entity status with suitable flexibility to accommodate the differing organisational forms of different communities is a core element of freedom to manifest one's religion<sup>18</sup>.

40. Equally important, is that, if organised as such, an entity must be able "to exercise the full range of religious activities and activities normally exercised by registered non-governmental legal entities"<sup>19</sup>.

41. According to the Act and the pieces of information gathered in Budapest, the non-recognised Churches will be able to be registered as "religious association", the Law on association being amended for that purpose. This means that a religious community that does not have the status of a "Church", according to the Act, may obtain registration as an association with a legal entity status if it so wishes. This is important since it, nonetheless, offers a legal alternative for obtaining legal personality.

42. The Venice Commission welcomes the alternative possibility for a religious group to register as a "religious association" according the amendments to the Law on association. The Venice Commission has, however, not analysed this piece of legislation and is not in the position to assess whether the legal framework allows for the full range of religious activities and activities.

43. The Venice Commission notes that the time delay of one year which is foreseen in Section 14.5, concerning a popular initiative aimed at recognising an association as a church after the adoption of a (negative) resolution of the National Assembly is in conflict with International standards.

44. The Venice Commission would like to reiterate that time delays prior to obtaining legal personality should be avoided. There is no reason for introducing such a waiting period. Some of the requirements might be fulfilled in a much shorter period of time. The Venice Commission hence recommends shortening the time delay for launching a popular initiative aimed at recognising an association as a church

45. As will be seen below, the Act has introduced a registration system with very demanding criteria, which might lead to the unequal treatment of religious communities and introduce undue limitations on the freedoms of religion and of association. It is important to bear in mind that the extent to which the Act imposes undue limitations in the access to legal entity status, might be considered to be a violation of the right to acquire legal entity status.

### **C. THE RECOGNITION REQUIREMENTS**

46. On a number of occasions, the European Court of Human Rights has had to consider rules on the recognition of religions and the effects of non-recognition. Arrangements which favour particular religious communities do not, in principle, contravene the requirements of the Convention "providing there is an objective and reasonable justification for the difference in treatment and that similar [arrangements] may be entered into by other churches wishing to do so".<sup>20</sup>

47. This principle also applies to the conferring of a range of privileges (rather than rights) which may follow from formal recognition.<sup>21</sup>

48. In general, legal restrictions concerning recognition as a religious association have to meet the requirements of Article 9. 2 ECHR and of Article 14 ECHR taken together with Article 11 ECHR.

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<sup>18</sup> CDL-AD(2008)032, §33

<sup>19</sup> CDL-AD (2009)036, §39

<sup>20</sup> Appl. No. 53072/99, *Alujer Fernandez And Caballero Garcia v. Spain*, decision of 14 June 2001.

<sup>21</sup> Such as recognition of exemption from military service: see e.g. *Lang v Austria*, no 23459/03, 19 March 2009



49. OSCE/ODHIR-Venice Commission Guidelines have more specifically stated that high minimum membership requirements should not be allowed with respect to obtaining legal personality, that it is not appropriate to require lengthy existence in the State before registration is permitted, that other excessively burdensome constraints or time delays prior to obtaining legal personality should be questioned and that provisions that grant excessive governmental discretion in giving approvals should not be allowed<sup>22</sup>.

50. In view of the above principles, the recognition requirements provided for in the Act call for specific comments.

**a) The number of applicants' requirement**

51. According to Section 14, in order to be recognised as a church, an association has to initiate the registration by submitting a document signed by a minimum of 1000 individuals. The Law does not provide for a membership in the association as condition for the right to sign the document. Neither is it a requirement to be a citizen of Hungary in order to be able to sign the document, which is to be welcomed.

52. However, this condition may become an obstacle for small religious groups to be recognised. The difficulty arises primarily for religious groups that are organised as a matter of theology not as an extended church, but in individual congregations. Some of these congregations may be relatively small, so that having 1000 individuals who could sign the necessary document is difficult. During the visit to Hungary, the delegation learned that the Buddhist communities had to merge in order to reach the minimum size for the Law. Such a merger or co-operation may not always be easy for religious communities that have split sometimes centuries ago on grounds of basic questions of belief.

53. Although the Act does not explicitly require that only members of a religious community sign the document, it is clear that this condition constitutes an obstacle for small religious groups benefiting from the protection afforded by the Act.

54. With regard to membership requirements for registration purposes as such, the Venice Commission, on several occasions, has encouraged limited membership requirements<sup>23</sup>. It has also, along with the Parliamentary Assembly of the Council of Europe's recommendations, called for considering equalising the minimum number of founders of religious organisations to those of any public organisations<sup>24</sup>.

55. The requirement under consideration aims to only benefit from the protection afforded by the Act and does not concern the registration of religious groups itself. A minimum of 1000 signatures out of a population of a 10 Million is not excessive<sup>25</sup>. The Austrian Constitutional Court, for instance, found that a higher threshold concerning memberships was not too high in the light of freedom of religion, and even accepted it as an admissible restriction under Article 9 ECHR<sup>26</sup>.

56. To the extent that the signature requirement does not deprive religious groups from access to legal personality as such, the Venice Commission believes that it may not be interpreted as being in breach of Article 9 ECHR.

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<sup>22</sup> CDL-AD (2004)028, F.

<sup>23</sup> See also CDL-AD(2008)032, § 32 (related to a membership requirement of 200) and CDL-AD(2009)036 (related to a membership requirement of 500). See also The OSCE/ODIHR - Venice Commission Guidelines that "High minimum membership requirements should not be allowed with respect to obtaining legal personality" (page 17).

<sup>24</sup> CDL-AD (2006)030, §38

<sup>25</sup> In Austria Section 11 of the Law on religious societies requires 2 pro mille of the total populations which means that a minimum number of some 16 000 members is required. Neither the ECtHR nor the Austrian Constitutional Court found that this threshold was too high in the light of freedom of religion, the latter even accepting it as admissible restriction under Article 9 ECHR.

<sup>26</sup> Explicitly Austrian Constitutional Court, 16 December 2009, VfSlg 18965/2009.

## b) Duration requirement

57. Section 14. 2 of the Act imposes a duration requirement of “at least 100 years internationally or in an organised manner as an association in Hungary for at least 20 years”.

58. This requirement is very rigid and makes it very difficult for non-traditional religions to be registered and recognised.

59. On several occasions, the Venice Commission has had the opportunity to comment on similarly combined requirements of high and rigidly written membership and stability requirements that make it very difficult for religious associations to acquire the status of church<sup>27</sup>.

60. The Venice Commission has repeatedly questioned whether such requirements are appropriate and found, in its Common OSCE/ODHIR Guidelines inappropriate the requirement of a lengthy existence in the State before registration<sup>28</sup>.

61. The European Court of Human Rights found “that the imposition of a waiting period before a religious association that has been granted legal personality can obtain a more consolidated status as a public-law body raises delicate questions”<sup>29</sup>. The crucial point being that the State must remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions.

62. In its judgment in the case of *Religionsgemeinschaft Zeugen von Jehovah v. Austria*<sup>30</sup>, the European Court of Human Rights had to assess whether the period of ten years an association that had already been granted legal personality had to wait before obtaining a more consolidated status as a public-law body, which implied an important number of privileges.

63. The Court accepted that a waiting period might be necessary in exceptional circumstances (e.g., in case of newly established and unknown religious groups). However, such a waiting period hardly appears justified in respect of religious groups with a long-standing international existence, that are long established in the country concerned and therefore known to the competent authorities. The possibility should exist for the authorities to verify whether an association fulfils the requirements of the relevant legislation within a considerably shorter period of time. The Court therefore detected a difference in treatment and as a result a violation of Article 14 ECHR taken in conjunction with Article 9 ECHR.

64. It is clear to the Venice Commission that the general requirement that an association must have existed internationally for at least 100 years, or for at least 20 years in Hungary, is excessive, both with regard to the recognition of legal personality<sup>31</sup>, and with regard to the other privileges granted to churches. This is hardly compatible with Articles 9 and 14 ECHR. Consequently, the Venice Commission recommends revising the duration requirement in accordance with the recent benchmark judgment of the European Court of Human Rights.

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<sup>27</sup> CDL-AD (2008)032 §32, CDL-AD (2005)037 §16

<sup>28</sup> See CDL-AD (2005)037, §16, CDL-AD (2008)032 §32

<sup>29</sup> ECtHR 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, No 40825/98, §§ 79, 97-99.

<sup>30</sup> ECtHR 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, No 40825/98, §§ 79, 98-99.

<sup>31</sup> The European Human Rights Court, in *Kimlya and Others vs. Russia* (Applications nos. 76836/01 and 32782/03, October 2009), found that the refusal to register Churches in Russia as religious organizations because they had not existed for 15 years as required by the 1997 Religion Law violated the rights of the applicants, in particular, it violated the provisions of Article 9 of the Convention (freedom of religion) in the light of Article 11 (freedom of association). The Court found that “the restricted status afforded to religious groups under the Religion Act did not allow members of such a group to enjoy effectively their right to freedom of religion, rendering such a right illusory and theoretical rather than practical and effective, as required by the Convention.

### **c) Other requirements**

65. Section 14 contains additional requirements that are questionable under international standards.

66. Section 14.2 sets out conditions related to the possible threats of a religious group to “the Fundamental Law, any rule of law or “the rights and freedoms of others” (f), “national security” (g) or “the right to physical and psychological well-being of people, protection of life and human dignity” (h).

67. The reference to a potential conflict with the Fundamental Law or any rule of law, or to the violation of the rights and freedoms of others, constitutes a vague reference to virtually the entire body of legislation. In addition, it leaves too much discretion to the authorities and raises an issue of foreseeability<sup>32</sup>. Even though consistent practice both of the administration and of qualitative judicial review may complement this unfortunate drafting, it is recommended that the Hungarian authorities specify with greater precision which particular law an association should comply with in order to satisfy recognition requirements.

68. Moreover, the Venice Commission would like to remind the drafters that “national security” is not a legitimate restriction which can justify limiting the freedom of religion or beliefs under Articles 9.2 ECHR and 18.3 ICCPR<sup>33</sup>. It should therefore be deleted in Section 14.

69. The Venice Commission<sup>34</sup> also recalls in this context the case-law of the European Court of Human Rights according to which, while a State is “entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population”,<sup>35</sup> it may not go further and appear to be assessing the comparative legitimacy of different beliefs<sup>36</sup>.

70. The Venice Commission recommends deleting reference to national security in Section 14.2 and specifying with greater precision which particular law an association should comply with in order to satisfy recognition requirements.

### **D. THE RECOGNITION PROCEDURE ITSELF**

71. The Act foresees a recognition procedure which is entirely left to Parliament. This procedure is questionable for several reasons.

72. The Venice Commission is worried specifically about the absence in the Act of procedural guarantees for a neutral and impartial application of the provisions pertaining to the recognition of churches<sup>37</sup>.

73. Requests for acceding to church status have to be submitted directly to the Religious Affairs Committee of the National Assembly, which, eventually, submits a bill regarding the recognition to the National Assembly. The Bill of Recognition has to be adopted by a two-third majority of the Assembly.

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<sup>32</sup> See ECtHR, 3 April 2008, *Koretskyy v. Ukraine*, No 40269/02, § 48.

<sup>33</sup> See the General Comment of the Human Rights Committee on Article 18 of the ICCPR: “Restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed

<sup>34</sup> See also CDL-AD(2009)036, § 34

<sup>35</sup> *Manoussakis and Others v. Greece*, judgment of 26 September 1996, Reports 1996-IV, at para. 40.

<sup>36</sup> *Hasan and Chaush v. Bulgaria* [GC], no 30985/96, ECHR 2000-XI, para. 78.

<sup>37</sup> See ECtHR, *Metropolitan Church of Bessarabia v. Moldova*, § 116: “in exercising its regulatory power . . . in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial.”

74. According to the latest information at the disposal of the rapporteurs, Parliament adopted a Bill of Recognition on 28 February 2012, with 32 recognised churches<sup>38</sup>. It is entirely unclear to the rapporteurs and to the outside world, how and on which criteria and materials the Parliamentary Committee and Members of Parliament were able to discuss this list of 32 churches, to settle the delicate questions involved in the definition of religious activities and churches supplied in the Act, within a few days, without falling under the influence of popular prejudice.

75. The delegation was informed that the President of the Hungarian Academy of Sciences<sup>39</sup> had declined to assist the competent Parliamentary Committee by providing an opinion on the fulfilment of the conditions that a candidate for a church has to fulfil.

76. The foregoing leads to the conclusion that the recognition or de-recognition of a religious community (organisation) remains fully in the hands of Parliament, which inevitably tends to be more or less based on political considerations. Not only because Parliament as such is hardly able to perform detailed studies related to the interpretation of the definitions contained in the Act, but also because this procedure does not offer sufficient guarantees for a neutral and impartial application of the Act. Moreover, it can reasonably be expected that the composition of Parliament would vary, i.e. change after each election, which may result in new churches being recognised, and old ones de-recognised at will, with potentially pernicious effects on legal security and the self-confidence of religious communities.

77. It is obvious from the first implementation of the Act, that the criteria that have been used are unclear, and moreover that the procedure is absolutely not transparent. Motives of the decisions of the Hungarian Parliament are not public and not grounded. The recognition is taken by a Parliamentary Committee in the form of a law (in case of a positive decision) or a resolution (in case of a negative decision). This cannot be viewed as complying with the standards of due process of law.

78. Under this background, the very nature of the Act, which is a cardinal law, requiring a two-third majority, emphasises the democratic deficit of the procedure. It is worth recalling that when the Venice Commission considered, in its opinion on the Constitution, that “too wide a use of cardinal laws is problematic with regard to both the Constitution and ordinary laws” and that “when not only the fundamental principles but also very specific and “detailed rules” on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk” it was *inter alia* referring to the detailed rules for churches<sup>40</sup>.

79. The Venice Commission recommends amending the registration procedure so that the standards of due process of law are applied, neutral and impartial criteria are used and procedural guarantees are foreseen.

## **E. EFFECTIVE REMEDIES**

80. The possibility to appeal against refusal is essential.<sup>41</sup> In the OSCE/ODHIR-Venice Commission Guidelines it is clearly stated that “Parties asserting religious claims have rights to Effective remedies. This is rooted in general rule of law conceptions, but has found specific embodiment in a number of international norms”.

81. The ICCPR requires States to give practical effect to the array of norms spelled out in international human rights law. More specifically, provisions such as Articles 6.1 and 13 ECHR require that effective remedies be made available.

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<sup>38</sup> . According to the minister of Foreign Affairs 82 religious organisations currently operating in Hungary and not listed in the first Annex to the Act have submitted their request for registration as a church.

<sup>39</sup> Requested according to point a to c of Subsection (2) of the Act ( Section 14 (4).

<sup>40</sup> CDL-AD (2011) 016, § 24

<sup>41</sup> CDL-AD(2008)032, § 31 and 105

82. The European Court of Human Rights has sustained the right of a religious community to acquire legal personality on the basis of Article 9 ECHR, construed “in the light of” Article 6 ECHR. Particularly significant in this area is that religious organisations be assured of prompt decisions on applications and a right to appeal, either in the legislation under consideration or under applicable administrative review provisions spelled out in separate legislative enactments.”

83. It follows from this, that either an independent tribunal must decide on the registration or that there is a subsequent control of the decision by an independent court.

84. Since decisions on registration under the Act are taken by resolution of Parliament, they cannot be reviewed by the ordinary courts. During its visit to Budapest, the rapporteurs were orally informed that under the new Constitution a constitutional complaint may possibly be lodged against a (negative) resolution denying recognition as church. Provided the Constitutional Court finds that it is competent to review a Parliamentary Resolution under Section 14 of the Act and provided that the Constitutional Court would have full jurisdiction over all relevant questions of law and fact, it could be considered that the right to effective remedies is fulfilled.

85. However, the fact remains that religious associations do not have access to the ordinary courts in such cases but have to appeal directly to the Constitutional Court. They thus lose one degree of protection. This seems a further negative consequence of the registration system adopted by the Act, although there are precedents in other countries for direct review of such decisions by the Constitutional Court<sup>42</sup>.

86. The Venice Commission recommends that the Act specify explicitly which effective remedies are available.

## **F. DE-REGISTRATION OF EXISTING CHURCHES**

87. The Act has led to the loss of the legal status of more than 300 registered churches. According to the Transitional provisions<sup>43</sup> these churches will be qualified as “associations” as of 1 January 2012. They will have to declare their intention to continue or discontinue their activity by 28 February 2012 and initiate a registration process as “religious associations” by 30 June 2012. The failure to meet this deadline will result in forfeiture of their right to register.<sup>44</sup>

88. The Venice Commission has been informed that, as a consequence of the withdrawal of their legal status, the social, healthcare and educational services of several of these churches will also be lost as will lawful subsidies, without there being any adequate transitional rules.

89. This de-registration process with provisions that operate retroactively and fail to protect vested interests, by for instance requiring re-registration of religious entities under new criteria, cannot but be questioned<sup>45</sup>. It raises serious concern with respect to the case-law of the European Court of Human Rights on Articles 9 and 11 ECHR<sup>46</sup>.

90. The deprivation of the legal status of churches has to be considered as a limitation of the freedom of religion, which has to be justified in the light of the strict limitation clauses provided for in International instruments. The Venice Commission doubts that depriving churches of the legal status they enjoyed sometimes already for many years can be seen as “pressing social need” and “proportionate to the objective pursued” in the sense of International standards, without providing reasons that can justify this deprivation.

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<sup>42</sup> A recognition by law has also existed (and in fact still exists) in Austria for a long time.

<sup>43</sup> Section 34 of the Act.

<sup>44</sup> Section 35 of the Act.

<sup>45</sup> See OSCE-ODHIR Venice Commission, CDL-AD (2004)028, §F.

<sup>46</sup> ECHR, See Religionsgemeinschaft der Zeugen Jehovahs v. Austria, ECHR 31 July 2008, No. 40825/98, and ECHR, Metropolitan Church of Bessarabia and Others v. Moldova, No. 45701/99, § 105, ECHR 2001-XII).

91. It is also not clear to the Venice Commission that this deprivation can be considered “to be 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” (Article 9.2 ECHR), or “to be necessary to protect public safety, order, health, or morals or fundamental rights and freedoms of others” (Article 18 .3 ICCPR).

92. The Venice Commission recommends redrafting the Act in order to avoid a de-registration process and provisions operating retroactively unless specific reasons can justify it. It also recommends deleting the provision on forfeiture, which constitutes an undue limitation to the right to access to legal-entity status.

### **G. EQUALITY AND NON DISCRIMINATION**

93. According to International standards,<sup>47</sup> States are obliged to respect and to ensure to all individuals subject to their jurisdiction the right to freedom of religion or belief without distinction of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national or other origin, property, birth or other status.

94. Legislation pertaining to religion and beliefs shall be reviewed to assure that any differentiations among religions are justified by genuine, objective factors and that the risk of prejudicial treatment is minimised or better, totally eliminated.

95. In view of these principles, the Act under consideration requires the following comments.

96. Churches recognised by the National Assembly enjoy a privileged treatment in many areas, as Sections 19 to 25 of the Act seem to reserve an impressive amount of rights and benefits to these churches.

97. The OSCE/ODIHR- Venice Commission Guidelines set out that in many legal systems there are a variety of additional legal issues that have substantial impact on religious life that are often linked to acquiring legal personality<sup>48</sup>. In many countries, a variety of financial benefits, ranging from tax exempt status to direct subsidies may be available for certain types of religious entity.

98. In general, the mere making any of the foregoing benefits or privileges available does not violate rights to freedom of religion or belief. However, care must be taken to assure that non-discrimination norms are not violated.”

99. The European Court of Human Rights, in its judgment in the case *Religionsgemeinschaft Zeugen Jehovas v. Austria*, considered that if a State confers substantial privileges to religious societies by a specific status it must then establish a legal framework which would give to all religious groups a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner.<sup>49</sup>

100. In view of this, the Venice Commission considers not only the unequal treatment of 32 churches on the one hand and the other religions on the other hand, worrying, but also the conditions these other religions have to comply with in order to acquire to the status of Churches.

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<sup>47</sup> See ODIHR-OSCE Venice Commission Guidelines, CDL-AD (2004)028.

<sup>48</sup> For example, obtaining land use or other governmental permits, inviting foreign religious leaders, workers and volunteers into a country, arranging visits and ministries in hospitals, prisons and the military, eligibility to establish educational institutions (whether for educating children or for training clergy), eligibility to establish separate religiously motivated charitable organisations, and so forth.

<sup>49</sup> ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (ECtHR, App. No. 40825/98, 31 July 2008), § 92.

101. Moreover, the Venice Commission questions whether the restricted status afforded to “religious organisations” (as compared to “churches”) may be discriminatory,<sup>50</sup> and could even render their enjoyment of the right to freedom of religion illusory and theoretical, rather than practical and effective, as required by the ECHR.<sup>51</sup>

102. The Venice Commission recalls that the authorities need to provide an objective and reasonable justification, to explain why each of the rights and benefits is only granted to the churches recognised by the National Assembly and why these rights and benefits are not granted to other churches.

103. Finally, the deprivation of the legal status of these churches and of the rights and privileges related to that status implies moreover that churches are not treated on an equal basis. Unless there is an “objective and reasonable justification” for it, this unequal treatment has to be considered discriminatory under international standards.

104. The Venice Commission recommends bearing in mind, when drafting legislation, that objective and reasonable justification must justify unequal treatment.

#### **IV. CONCLUSIONS**

105. Freedom of thought, conscience and religion is one of the foundations of a democratic society. In this respect, it may only be restricted by strict criteria set out in international instruments.

106. States benefit from a large margin of appreciation with regard to the relationship between the church and the state and with regard to the choice of their policies and regulation in this field. Although various types of solutions have been found throughout Europe, the European guarantees must not be undermined.

107. As a whole, the Act constitutes a liberal and generous framework for the freedom of religion as such. However, in several aspects, the Act falls short of international standards.

108. The Act sets a range of requirements that are excessive and based on arbitrary criteria with regard to the recognition of a church. In particular, the requirement related to the national and international duration of a religious community and the recognition procedure, based on a political decision, should be reviewed. This recognition confers a number of privileges to churches concerned.

109. The Act has led to a deregistration process of hundreds of previously lawfully recognised churches, that can hardly be considered in line with international standards.

110. Finally, the Act induces, to some extent, an unequal and even discriminatory treatment of religious beliefs and communities, depending on whether they are recognised or not.

111. The Venice Commission invites the Hungarian authorities to revise the Act in the light of the recommendations in this opinion. It remains at the disposal of the Hungarian authorities for any further assistance.

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<sup>50</sup> See ECHR, *Savez Crkava “Riječ Života” and others v. Croatia*, appl. no. 7798/08, para 85.

<sup>51</sup> See ECHR, *Kimlyá and Others v. Russia*, Judgment of 1 October 2009, para 86, citing *Hasan and Chaush v. Bulgaria*, para 62