Strasbourg, 16 December 2003

CDL-AD (2003) 20
Or. Eng.

Opinion no. 262 / 2003

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON FREEDOM OF CONSCIENCE AND RELIGIOUS ENTITIES

OF GEORGIA

Adopted by the Venice Commission
at its 57th Plenary Session,
(Venice, 12-13 December 2003)

on the basis of comments by:

Mr Vojin DIMITRIJEVIĆ
(Member, Serbia and Montenegro)

I. Introduction

1. By a letter of 21 October 2003, the acting Minister of Justice of Georgia, Mr Giorgi Tskrialashvili, requested the Venice Commission on behalf of the Georgian Government to prepare an opinion on the draft law on Freedom of Conscience and Religious Entities (hereinafter "the draft law").

2. Mr Vojin Dimitrijević was appointed to act as Rapporteur.

3. The present opinion was drawn up on the basis of his comments and was adopted by the Commission at its 57th Plenary Session (Venice, 12-13 December 2003).

II. General comments

4. The matter of principle is whether Georgia, or a modern democracy in general, needs a special law on the freedom of conscience and on religious communities. Freedom of thought, conscience and belief are constitutional matters *par excellence* and should in principle be governed primarily by the Constitution, whereas matters pertaining to religious communities and organisations pertain also to the freedom of association, which, on the basis of the constitution, can be governed by a general law on associations.

5. The decision on whether the situation in Georgia is such that a special act is needed is essentially political and should be left to the Georgian legislators.

6. The following specific comments proceed from the assumption that special legislation is considered to be necessary and are limited to matters that may raise serious concerns from the point of view of democratic principles and the protection of human rights. It must be pointed out that they might originate in misunderstanding caused by possible inaccuracies in the English translation.

III. Freedom of religion

<u>As regards Article 2 of the draft law</u>

7. The principle underlying universal and regional human rights treaties, including the European Convention on Human Rights (hereinafter "ECHR"), is that matters related to the protection of human rights shall be governed only by the Constitution and the laws. Bearing this in mind, the words "normative acts issued in accordance with the present law" should be deleted. In the above light, paragraph 2 appears unnecessary.

<u>As regards Article 3</u>

8. Sub-paragraph d appears superfluous. Sub-paragraphs a, b and c are principles and sub-paragraph d is a material prerequisite. Legislation should be in accordance with the above principles.

As regards Article 4

9. With reference to paragraph 3, it must be noted that possible restrictions of the freedom of thought, conscience and religion should be brought into accordance with the ECHR. Despite possible problems in the translation, the reference to "*democratic society*", contained in Art. 9 ECHR is certainly missing.

10. Paragraph 4 of Article 4 could be understood as allowing the legislator to "force" someone to declare his/her religious identity or attitude towards religion. This is vague and possibly dangerous.

As regards Article 5

11. The meaning of paragraph 5 is unclear. If it refers to the familiar case of conscientious objection, then the substitution of the duty of one citizen for the performance of another sounds dangerously similar to the mediaeval practice of hiring proxies for service in war.

As regards Article 7

12. The prevailing attitude, expressed in a general comment of the UN Human Rights Committee is that states can acknowledge the special role that a particular church or denomination has played in their society, or even proclaim a religion to be its State religion, provided that this does not lead to discrimination based on religious beliefs.[1] As it stands now, paragraph 1 of Article 7 of the draft law is a proclamation that Orthodox Christianity is the traditional religion in Georgia. The only normative effect of this proclamation is possibly contained in paragraph 2, which refers to the constitutional agreement between the Georgian State and the Apostolic Autocephalous Orthodox Church of Georgia, a concordat of sorts. The final sentence appears to prevent possible discrimination against other churches and their believers.

IV. Religious entities

As regards Article 9

13. As to paragraph 1, it is not clear why permanently residing aliens are excluded from membership in religious entities. Stateless persons, who are allowed to be members, are also legally aliens.

14. There is no reason for paragraph 2 to differ from the provision in Article 4 para. 3. Reference to democratic society is missing also here.

As regards Article 10

15. In respect of paragraph 2, it must be noted that whereas the conditions set under a and b can be fulfilled by short statements, those in c and d are practically impossible to satisfy. "Fundamental canon law norms", referred to under c, do not exist in some religious

[1] "The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population shall not result in any impairment of the enjoyment of any … rights …" General Comment 22 (48), adopted on 20 July 1993. Para. 9.

denominations in the form of canonical laws and codes. It is even more difficult to imagine proper compliance with d, expecting the entity to supply their statute containing "data on the outlines of the doctrine of the religion and the relevant practice, *inter alia*, a brief historical background of the religion and the entity in question, the forms and methods of its activities, the attitude towards family and marriage issues, education, the peculiarities of the attitude of the adherents towards health, limitation of the civil rights and obligations of those in the service of participating in the entity". If one imagines for a moment that this conditions should be fulfilled by a religious entity belonging to an old, revealed and well established world religion, one can realise the immenseness of the task facing a group of their followers trying to register in Georgia. Would they have to attach in full their basic holy scripts or to provide them in digested form? Bearing in mind the richness of religious teaching, writing and interpretation, who can undertake this task without considerable risk in their own religious community?

16. This is compounded by Art. 11 para. 4, expecting from international churches with centres outside Georgia (if this is what "in case the headquarters of the management body of the entity is abroad" means), to submit the "statute of the foreign religious entity … or the constitutional documentation, duly approved by the public body of the country where the entity is". According to Art. 11 para. 3 d, documentation should be provided "proving the fact of composition of the religious organization within the religious entity issued by the leading centre of the entity". Failure to do so is a ground for denial of registration under Art. 13 para. 1 a.

17. The main issue in this respect, however, is the following: what is the purpose of this provision and what authority will decide on the accuracy and quality of the response and what would be the effects of a negative decision. If the deciding authority is the Ministry of Justice, indicated in Art. 11 as competent for registration, will it be satisfied by any reference in the statute of a religious entity to matters quoted in this paragraph and decline to register entities with *incomplete* statutes, or will it refuse to register entities the statutes of which are contrary to the constitution or laws? From Art. 13 para. 1 b it appears that there is a possibility to refuse registration on the latter ground, which presumes that the registration authority possesses very highly trained personnel in matters of religion and that it is assumed that it is capable to judge in a qualified manner on the most fundamental issues covered in the basic scripts of a religion. Subparagraphs c and d should be reformulated or deleted.

18. Paragraph 3 c of Article 10 provides that there should be at least 100 founders. This provision contradicts paragraph 1 of Article 9 which stipulates that a religious entity can be formed by "not less than fifty individuals".

<u>As regards Article 15</u>

19. It is not clear why, under paragraph 1 b, courts are competent to terminate the activity of a religious entity if its activities "are in breach of the statute" (meaning the statute of the entity, not a legislative act). The statute of the entity is an internal, private act, approved by registration. Sanctions for its violation are those provided by itself and refer to members of the entity. They are not a matter of the State.