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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

JOINT OPINION

**ON THE DRAFT LAW
ON FREEDOMS OF CONSCIENCE AND RELIGION
AND
ON THE LAWS MAKING AMENDMENTS AND SUPPLEMENTS
TO THE CRIMINAL CODE,
THE ADMINISTRATIVE OFFENCES CODE
AND THE LAW ON THE RELATIONS
BETWEEN THE REPUBLIC OF ARMENIA
AND THE HOLY ARMENIAN APOSTOLIC CHURCH**

OF THE REPUBLIC OF ARMENIA

**by
THE VENICE COMMISSION
and
THE OSCE/ODIHR**

**adopted by the Venice Commission
at its 88th Plenary Session
(Venice, 14-15 October 2011)**

On the basis of comments by

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Ms Herdis THORGEIRSDOTTIR (Member, Iceland)
and
the OSCE/ODIHR Advisory Council on Freedom of Religion
and Belief**

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I. Introduction

1. By letter dated 23 August 2011, the authorities of Armenia have requested the assessment by the European Commission for Democracy Through Law (hereinafter, the "Venice Commission"), of the draft Law of the Republic of Armenia on Freedoms of Conscience and Religion, as well as draft amendments and supplements to the Criminal Code, Administrative Offences Code, and the Law on the Relations Between the Republic of Armenia and the Holy Armenian Apostolic Church. Subsequently, with the agreement of the Minister of Justice of Armenia, the Venice Commission turned to the OSCE Office for Democratic Institutions and Human Rights (hereinafter, the "OSCE/ODIHR") with an invitation to issue a Joint Opinion, in particular in view of previous Joint Opinions issued on this matter, described below.

2. On 23 June 2009, the Venice Commission, together with the OSCE/ODIHR, adopted a Joint Opinion (hereinafter, the "2009 Joint Opinion") on the Law on Making Amendments and Addenda to the Law on Freedom of Conscience and on Religious Organisations and on the Law Amending the Criminal Code of the Republic of Armenia (hereinafter the "2009 Draft Law").¹ This 2009 Draft Law examined in the 2009 Joint Opinion was, however, never enacted. In 2010, the Armenian authorities tabled a further draft Law on Making Amendments and Supplements to the Law of the Republic of Armenia on Freedom of Conscience and Religious Organisations. The 2010 draft Law, which was the subject of an Interim Joint Opinion by the Venice Commission and the OSCE/ODIHR dated 22 December 2010 (hereinafter, the "2010 Joint Opinion"),² was also never adopted. Instead, in 2011, the Armenian authorities drafted an entirely new "Draft Law of the Republic of Armenia on Freedoms of Conscience and Religion" (hereinafter, the "Draft Law"), which is the subject of the present Joint Opinion.

3. This Joint Opinion was drafted by the Legislative Support Unit of the OSCE/ODIHR together with the OSCE/ODHIR Advisory Council on Freedom of Religion and Belief, and Ms Finola Flanagan and Ms Herdis Thorgeirsdottir, who acted as rapporteurs on behalf of the Venice Commission.

4. This Opinion examines the Draft Law as well as draft amendments to three other laws, namely:

- the Draft Law of RA on making an amendment and a supplement to the Criminal Code of RA;
- the Draft Law of RA on making amendments and a supplement to the Administrative Offences Code of RA; and
- the Draft Law of RA on making a supplement to the Law of RA on the Relations Between RA and the Holy Armenian Apostolic Church.

5. This opinion, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011).

II. Executive Summary

6. It should be noted from the outset that the Draft Law represents a marked improvement compared to both the Current Law, and previous draft laws from 2009 and 2010. In particular, the Draft Law expressly provides that freedom of religion or belief is guaranteed to every person in the Republic of Armenia³ (and not only to Armenian citizens, as is currently the case). Furthermore, the Draft Law expressly guarantees the right to change one's religion or belief; the freedom to manifest religion or belief in public or private; the right to act according to one's religion in daily life⁴; and the liberty of parents and guardians to ensure the religious education

¹ Venice Commission registration number: CDL-AD(2009)036. OSCE/ODIHR registration number: Opinion no. 530/2009.

² Venice Commission registration number: CDL-AD(2010)054. OSCE/ODIHR registration number: Opinion no. 176/2010.

³ See Art. 1 and Art. 2 paragraph 1 of the Draft Law.

⁴ See Art. 2 paragraph 2 of the Draft Law.

of their children in conformity with their own convictions⁵ - all of which are fundamental aspects of freedom of religion or belief which are/were missing from the text of the Law currently in force and previous draft laws. In addition, Article 2.2 follows the format of Article 9 ECHR. The Draft Law also makes the liquidation of religious organizations a measure of last resort, applicable only when "other measures [...] are exhausted or the violations may not be eliminated otherwise"⁶ (see also paragraphs 86-89 below). If adopted, these new provisions would turn into law many of the key recommendations contained in previous OSCE/ODIHR-Venice Commission Joint Opinions, and the Armenian authorities should be commended for including them in the Draft Law.

7. At the same time, before the Draft Law can be said to be fully in line with international standards, certain additional changes should be made to its text, as detailed below. As will be seen from the comments that follow, there remain in the Draft Law certain fundamental problems which are essential to correct and several of these have already been the subject of comment in the previous Joint Opinions. In the interests of being concise, the focus of the analysis contained in this Opinion will be on those provisions which are problematic, rather than on the positive features of the Draft Law.

Key Recommendations:

- A. to amend Art. 4 paragraph 1 so as to expressly prescribe that the freedom to manifest religion or belief can be subjected only to such limitations as are prescribed by law, as well as being necessary in a democratic society, and to delete Art. 4 paragraph 2 of the Draft Law;
- B. to reconsider the prohibition on "acting in secrecy by religious organizations", contained in Art. 4 paragraph 1;
- C. to amend Art. 4 paragraph 3 and related provisions of the Draft Law as well as the proposed Art. 160 of the Criminal Code in line with international standards, so that they only prohibit "improper proselytism", and not "proselytism" in general; as an alternative, to consider deleting altogether references to "proselytism" and "advocacy influence" from the text of the Draft Law;
- D. to re-draft Art. 4 paragraph 5, which prohibits the activities of religious associations that exercise "supervision over the personal life, health, property and behaviour of their members";
- E. to re-draft the definition of "religious association" prescribed by Art. 5 paragraph 2 so as to ensure that it covers also inter-denominational associations (i.e., associations of associations);
- F. to amend Articles 5 and 6 so as to provide that religious associations having 25 or more adult members may, but are not obliged to, seek state registration and to expressly recognize that religious groups are also allowed to operate in Armenia;
- G. to ensure that the Law "On State Registration of Legal Entities" does not require religious organizations to set up specific organizational structures or procedures which could be inconsistent with their beliefs;
- H. to amend Art. 8 to ensure that the rights listed therein are not conditional upon the registration of the religious organizations, shall be enjoyed also by unregistered religious groups, and that the said list is an open-ended one;
- I. to reconsider the blanket ban on foreign financing of religious organizations, contained in Art. 9 paragraph 3 and in the proposed Art. 206 paragraph 2 of the Administrative Offences Code;

⁵ See Art. 2 paragraph 3 of the Law. It should be noted that the said provision, while being an almost *ad verbatim* quote from Art. 18 paragraph 4 ICCPR, could be further refined and brought into line with Art. 14 paragraph 2 of the UN Convention on the Rights of the Child, which provides that "State parties shall respect the rights and duties of parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right [to freedom of religion or belief] *in a manner consistent with the evolving capacities of the child.*" UN Convention on the Rights of the Child, adopted and opened for signature by the United Nations General Assembly Resolution 44/25 on 20 November 1989; entered into force on 2 September 1990; acceded to by the Republic of Armenia on 23 June 1993.

⁶ Art. 15 paragraph 4 of the Draft Law.

- J. to reconsider the rule mandated by Art. 12 that [all] “activities of a religious organization shall be public” and eliminate the requirement that religious organizations must post on the website information on their annual proceeds and expenses;
- K. to ensure, in Art. 13 paragraph 2, that religious organizations will be afforded reasonable procedures and time limits for eliminating detected violations;
- L. to prescribe that liquidation will be applicable only for the commission of serious or repeated violations, which may not be eliminated otherwise and reconsider the inclusion of bankruptcy among the reasons justifying the liquidation of a religious organization;
- M. to delete Art. 205 paragraph 3 of the Administrative Offences Code, which prescribes administrative liability for the leader of a religious group who avoids registering a group having more than 25 adult followers;
- N. to reconsider the list of “exclusive missions” provided in the draft supplement to the Law on the Relations Between the Republic of Armenia and the Holy Armenian Apostolic Church;

Additional Recommendations:

- O. to amend the title of Art. 4 so that it reads “Restrictions on the freedom to manifest conscience, religion and belief”;
- P. to re-draft the definition of “religious association” prescribed by Art. 5 para 2 so as to ensure that it covers also inter-denominational associations (i.e., associations of associations);
- Q. to expressly prescribe that the state authorities which will regulate and mediate between religious organizations shall act in a neutral and impartial manner;
- R. to ensure, in Art. 13 paragraph 2, that religious organizations will be afforded reasonable procedures and time limits for eliminating detected violations;
- S. to clarify Art. 9 paragraph 2 and its rules on the use of property by religious organizations;
- T. to amend Art. 10 so as to protect the confidentiality of confessional communications in all religions;
- U. to re-draft the aggravating clause contained in paragraph 3 of the proposed new Art. 160 paragraph 1 of the Criminal Code;
- V. to ensure that the list of information which religious organizations must publish annually is the same under Art. 12 paragraph 2 of the Draft Law and under the proposed Art. 206 of the Administrative Offences Code; and
- W. to provide adequate training to law enforcement and judicial personnel on the differences between proper and improper proselytism.

III. The Legal Context

8. The Draft Law and the related amendments to the other laws raise several issues touching upon the linked rights of freedom of thought, conscience and religion, as well as the right to freedom of expression and opinion and freedom of association, and the right to non-discrimination, which are safeguarded by both the international treaties to which the Republic of Armenia is party and the constitutional and national laws of the Republic of Armenia.

A. At the International Level

9. The Republic of Armenia is party both to the European Convention on Human Rights⁷ (hereinafter, the “ECHR”) and the International Covenant on Civil and Political Rights⁸ (hereinafter, the “ICCPR”).

10. Article 9 of the ECHR states:

“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

⁷ Signed on 4 November 1950, entered into force on 3 September 1953 and ratified by the Republic of Armenia on 26 April 2002.

⁸ Adopted by UN General Assembly resolution 2200A (XXI) on 16 December 1966, acceded to by the Republic of Armenia on 23 June 1993. The Republic of Armenia also acceded to the Optional Protocol to the ICCPR on the same date.

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."

11. Article 18 of the ICCPR is almost identical in wording to Article 9 of the European Convention, stating:

"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.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

B. At the national level

12. The Constitution of the Republic of Armenia, as amended in 2005⁹, provides for freedom of religion and the rights to practice, choose, or change religious belief. It recognizes *"the exclusive mission of the Armenian Church as a national church in the spiritual life, development of the national culture, and preservation of the national identity of the people of Armenia"*. The Constitution and the Law on Freedom of Conscience and Religious Organizations currently in force establish the separation of church and state, but grant the Armenian Church a specific status as the national church of Armenians¹⁰ and provide it with certain privileges that are not available to other religious groups.

13. According to Article 6 of the Constitution, international treaties are a constituent part of the legal system of the Republic of Armenia. If a ratified international treaty stipulates norms other than those stipulated in the domestic laws, the norms of the treaty shall prevail.

14. Article 8 paragraph 1 of the Constitution states:

"The church shall be separate from the state in the Republic of Armenia.

The Republic of Armenia recognizes the exclusive mission of the Holy Armenian Apostolic Church as a national church, in the spiritual life, development of the national culture and preservation of the national identity of the people of Armenia.

Freedom of activities for all religious organizations in accordance with the law shall be guaranteed in the Republic of Armenia. The relations of the Republic of Armenia and the Holy Armenian Apostolic Church may be regulated by the law."

15. Article 26 of the Constitution furthermore provides:

⁹ Available online at <http://www.president.am/library/constitution/eng/?chapter=2&pn=2>.

¹⁰ See Law of the Republic of Armenia on the Freedom of Conscience and on Religious Organizations (CDL (2009)065), Article 17.

“Everyone shall have the right to freedom of thought, conscience and religion. This right includes freedom to change the religion or belief and freedom to either alone, or in community with others manifest the religion or belief, through preaching, church ceremonies and other religious rites. The exercise of this right may be restricted only by law in the interests of the public security, health, morality or the protection of rights and freedoms of others.”

16. Article 3 of the Constitution expressly declares that:

“The human being, his/her dignity and the fundamental human rights and freedoms are an ultimate value. The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of the international law. The state shall be limited by fundamental human and civil rights as a directly applicable right.”

17. The principle of equality is protected in Article 14 paragraph 1, stating:

“Everyone shall be equal before the law.

Any discrimination based on the ground such as sex, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or other personal or social circumstances shall be prohibited”.

18. The “Law of the Republic of Armenia on the Freedom of Conscience and on Religious Organizations” (CDL (2009)065) (“hereinafter, the “Current Law”), currently in force, was adopted on 17 June 1991 and has been in force since then, with some amendments made in 1997.

19. The “Law of the Republic of Armenia Regarding the Relationship between the Republic of Armenia and the Holy Apostolic Armenian Church” (hereinafter, the “HAAC”), adopted on 5 May 2007, regulates the special relationship between the State and the Church.

20. Previous OSCE/ODIHR-Venice Commission joint Opinions addressed the acknowledgement of the special historical role of the HAAC in the Republic of Armenia, commenting that this was not *per se* impermissible but should not be allowed to lead to or serve as the basis for discrimination against other religious communities that may not have the same kind of specific status. The 2009 Joint Opinion commented as follows:

“20. In a country where there is a marked link between ethnicity and a particular church such as exists in Armenia (98% are ethnic Armenian; 90% of citizens nominally belong to the HAAC), there is a strong risk of discrimination against other religions. To guard against this possibility there is a particular need to protect pluralism in religion which is an important element of democracy.

21. [...] The privileges expressly accorded to HAAC in this legislation make it particularly necessary to ensure that there are guarantees elsewhere that the state will accord all necessary rights to other religions. HAAC is acknowledged as part of the Armenian identity, but it must not be allowed to suppress other religions in maintaining this identity.”

21. It is not entirely clear from the Current or Draft Law how the HAAC fits into the general scheme of laws on religious organisations though it is mentioned in Article 6 and in Article 17 (c) of the Current Law, and appears to hold a privileged position. As no information was provided on the “Relationship Law” referred to in the paragraph above, it is not possible to comment specifically, though the principles regarding equality of treatment between religions in the paragraphs above remain relevant.¹¹

¹¹ Moreover, it should be borne in mind that, as emphasized by the U.N. Human Rights Committee, “The fact that a religion is recognized as a state religion or that it is established as official or traditional

IV. Analysis of the Draft Law

A. Guarantees for ensuring the freedoms of conscience, religion and belief

22. Article 2.1 guarantees the freedom of conscience, religion and belief to every person in the Republic of Armenia. Both Article 18 of the ICCPR and Article 9 of the ECHR protect the exercise of the above rights in worship, teaching, practice and observance. In addition, the United Nations Human Rights Committee in its General Comment on Article 18.1 of the ICCPR has drawn the attention of States parties to the fact that the freedom of thought and the freedom of conscience are equally protected with the freedom of religion and belief.

23. Article 2.2 specifically permits manifestation of religion or belief through "*church ceremonies or other rights of religious worship*". Nonetheless it omits the words "*practice and observance*" from the right to profess one's beliefs through teaching and worshipping". The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts. Both in European Convention jurisprudence as well as in the interpretation of the UN Human Rights Committee these rights are to be broadly construed. They are seen as also protecting non-religious beliefs, such as pacifism¹², which is seen as falling within the ambit of the right to freedom of thought and conscience because it is a "philosophy"¹³.

24. Moreover, the protection afforded with the right to freedom of thought, conscience and religion in both Article 9 of the ECHR and Article 18 of the ICCPR is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. As Article 2.2 of the Draft Law protects the "*right to act in conformity with one's religion or belief in daily life*", it is very relevant to add the terms "*practice and observance*" in the text. The term practice unlike worship may include not only ceremonial acts, as pointed out by the Human Rights Committee but "also such customs as the observance of dietary regulations, the wearing of distinctive clothing [. . .], participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications"¹⁴. It is therefore strongly recommended, in order to align the various elements of the freedom with Article 9 ECHR and Article 18 of the ICCPR, to include specifically the words "*practice and observance*" in the text of Article 2.2.

25. In the light of the above, it would also be desirable to restore the reference to international treaties contained in the 2009 Draft Law, so as to affirm them expressly (see paragraph 22 of the 2010 Joint Opinion).

26. Article 2.3 "*Guarantee[s] the liberty of parents and guardians to ensure the religious education of their children in conformity with their own convictions*". Such a provision did not

or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant [ICCPR], including articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under Article 26." U.N. Human Rights Committee, General Comment No 22 (48), paragraph. 9, adopted by the U.N. Human Rights Committee on 20 July 1993, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

¹² *Kokkinakis v. Greece*, A 260-A para 31 (1993).

¹³ *Arrowsmith v UK*, No. 7050, 19 DR 5 (1978) Com Rep paras. 69-71; CM Res DH (79) 4.

¹⁴ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18):. 07/30/1993. CCPR/C/21/Add.4, General Comment No. 22.

appear in the previous drafts. This statement of law is in principle correct and in line with Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights,¹⁵ which provides regarding education that the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.. Nonetheless protection of a mature child's freedom of religion is also required. There is no specific age at which a child becomes entitled to make his or her own decisions on matters of religion or belief, but the guarantee to parents and guardians should at very least be limited to children in primary and secondary education and to minors¹⁶. Furthermore, the Draft Law should guarantee that children may not undergo constraint and oppression which would injure their belief or other rights (see United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly of the United Nations, resolution 36/55 of 25 November 1981, article 5.3).

27. Article 2.4 guarantees the "*freedom of religious associations*". It is not exactly clear what is intended by this provision, since the freedom of association guaranteed by Article 11 ECHR is guaranteed to the individual whereas here the guarantee appears to be given to the association. This may simply be an error of translation and therefore it would be helpful to clarify or rephrase this provision in order to reflect more accurately the guarantee contained in Article 11 ECHR in the context of religion.

28. At the same time, guaranteeing the right of religious associations when the right to freedom of association is guaranteed on the whole in Article 11 of the ECHR and Article 22 of the ICCPR may evoke the question whether this provides scope for state preference of one religion over the other or a preferred status of a religious establishment. The legal significance of the above guarantee has to do with the permissibility of limitations on religious associations when professing beliefs in community with others or publicly. As stated in Article 9.2 of the ECHR, the public exercise of the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are "necessary in a democratic society in the interests of public safety or for the protection of public, health or morals, or for the protection of the rights and freedoms of others".

29. Additionally, when looked at in connection with the different legal status of religious organisations in the Republic of Armenia (Article 5, Chapter 3 of the Draft Law), the above provision seems futile as religious associations that are not legally registered are in fact not allowed to operate within the Republic of Armenia

30. Article 3.1 guarantees equality before the law in the context of religion and belief and prohibits "*discrimination based on the religious affiliation of a person or attitudes towards the religion thereof*".

31. Article 3.2 prohibits restrictions on the freedom of conscience, religion and belief and its manifestation, except where provided for by Article 4 of the Draft Law. "*[R]eligious persecutions, inciting religious enmity or stirring up hatred*" are also expressly prohibited. The Article provides that there will be administrative or criminal liability in cases provided for by law.

32. Nevertheless, this article does not refer to specific laws that prohibit religious persecutions, inciting religious enmity or stirring up hatred. It is a general article dealing with these matters but which does not itself define the prohibited conduct adequately or refer to another specific law which does so for the purposes of creating criminal or administrative liability. Offences such as incitement to hatred require careful definition. The Venice Commission is aware from its previous work on related laws of the Republic of Armenia that article 226 of the Criminal Code creates offences and penalties for incitement to hatred. Specific reference should therefore be made to this law if it is still in force or its replacement and to the administrative or criminal liability created. The rapporteurs are unaware of what, if any, specific provision has been introduced with a view to prohibiting "religious persecutions". In addition, "religious

¹⁵ Adopted by the Council of Europe on 20 March 1954, Paris.

¹⁶ Under the United Nations Convention on the Rights of the Child, ratified by Armenia on 20 November 1989, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

persecutions" is a vague and unsatisfactory concept when used for the purpose of limiting a fundamental freedom and creating criminal and administrative liability, unless it is defined elsewhere in another law providing for criminal liability. Clarification of these matters would be helpful.

B. Restrictions on the freedom to manifest conscience, religion and belief

33. In order to ensure consistency with the title of Chapter 2, as well as conformity with international standards, the title of Article 4 should be "Restrictions on the freedom to manifest conscience, religion and belief". The underlined words are currently missing from the title of Art. 4, and should be added.

34. Art. 4 paragraph 1 provides for what is commonly known as the "limitations clause" to the freedom to manifest religion or belief and sets out the circumstances in which restriction of the freedom is permitted. These are listed as "*where it is necessary for the protection of public security, health, morality or the rights and freedoms of others in a democratic society.*" This list of possible reasons for restriction generally accords with the list of restrictions contained in Article 9.2 ECHR. However, as pointed out in the Joint Opinion, restrictions may not be imposed other than where they "*are prescribed by law and are necessary in a democratic society...*" Compared to international standards,¹⁷ this is an insufficient justification for a limitation based on one of the listed reasons if it is not also "*prescribed by law*" and "*necessary in a democratic society*" according to the jurisprudence of the European Court of Human Rights¹⁸. Freedom of thought, conscience and religion comprise part of the essential foundation of a democratic society and pluralism requires that "*a balance must be achieved which ensures the fair and proper treatment of minorities and avoids the abuse of a dominant position*"¹⁹.

Prescribed by law

35. The "*prescribed by law*" element of the limitations clause is crucial as it safeguards commitments to the rule of law, including the value of legal certainty. It aims to ensure that only those limitations can be imposed on the freedom to manifest religion or belief, that have a basis in domestic law, and it furthermore requires that the law itself be adequately accessible and foreseeable, and contain sufficient protection against arbitrary application.²⁰ It is therefore strongly recommended that Art. 4 paragraph 1 be amended so as to expressly provide that the freedom to manifest religion or belief can be subjected only to such limitations as are prescribed by law, as well as "*necessary in a democratic society*" for the protection of the already enumerated interests.

Necessary in a democratic society

36. In order to be "*necessary in a democratic society*" the limitation of the freedom must correspond to a pressing social need, be proportionate (i.e. there must be a rational connection between public policy objective and the means employed to achieve it and there must be a fair balance between the demands of the general community and the requirements of the protection of an individual's fundamental rights), and the justification for the limitation must be relevant and sufficient. In *Kokkinakis v Greece*²¹, the European Court of Human rights held that the application of a Greek law criminalising proselytism did pursue the legitimate aim of the protection of the rights and freedoms of others. However, the Court found it not to be necessary in a democratic society because it could not be justified by a "*pressing social need*".

37. Article 4.1 is a general provision which gives little indication of what is and what is not actually prohibited. This applies particularly to restrictions based on protection of "*the rights and*

¹⁷ See Art. 9 paragraph 2 ECHR and Art. 18 paragraph 3 ICCPR.

¹⁸ CDL-AD(2008)032 Joint Opinion on Freedom of Conscience and Religious Organizations in the Republic of Kyrgyzstan, paragraph 11.

¹⁹ *Young, James and Webster v UK (1981)* 4 EHRR 38 paragraph 63.

²⁰ See, *mutatis mutandis*, the case of *Sunday Times v. the United Kingdom (no. 1)*, ECtHR Judgment of 26 April 1979, (Application no. 6538/74), paragraph 49.

²¹ A 260-A (1993); 17 EHRR 397.

freedoms of others". Article 4.1 appears to confer discretion on the authorities to limit the freedom, without providing for procedures for the exercise of the discretion to impose limitations set out in the law. Article 11 provides that the Ministry of Justice regulates relations between the State and religious organisations and exercise other powers prescribed by the Draft Law. The procedure for the Ministry of Justice deciding on the imposition of restrictions on individuals or on religious organisations other than in the context of registration from a suspension, termination at liquidation are not elaborated at all.

38. If it is the case that restrictions on individuals or organisations can be imposed by the authorities by virtue of Article 4, it would be necessary to elaborate the process including by indicating who the deciding person or body is if it is to be a person other than the Ministry of Justice, how a decision is to be communicated and the reasons for it, and how the person or organisation affected can engage in the process and be heard. In the absence of these arrangements being set out it would be possible for arbitrary decision-making to occur in restricting a fundamental freedom. The principal of legality requires that there be a legal basis for the decision, that the rule of law be accessible and precise and that it be not arbitrarily applied. The process should also be open to the public.

39. It is also recommended that the terms "*public security, health, morality*" - unless incorrectly translated into English language - be replaced by the phrase "*public safety, public order, health or morality*". International instruments allow limitations on manifestations of religion where these threaten a concrete breach of public order or safety, but not where generalized claims of threats to national security are made²². To the extent that the phrase "*public security*" could be construed to include national security concerns that do not constitute concrete and imminent threats to public order or safety, it includes too much.

40. The prohibition in Article 4.1 on "*acting in secrecy by religious organizations*" is problematic. It is both vague and unclear in its extent and, in any event, excessively broad and may impermissibly restrict a range of manifestations of religion that should actually be protected. This includes also, besides the secrecy of confession (which is commendably protected by Art. 10), confidentiality in processes of selecting religious personnel, administering religious affairs, and conducting other confidential religious activities. It should be recalled that, as part of the exercise of the right to manifest their religion "in public or private"²³, and in order to highlight the sacred character of certain rituals or practices, some religious traditions include practices that are not open to the general public. Religious communities should be allowed to shape the contours of their sacred space, as long as there are no grounds to reasonably suspect that criminal or other activity constituting an imminent threat to public order is involved.

41. Besides this, who exactly is entitled to know the activities of religious organizations? Is it the population generally or only the State or the State in some of its manifestations? Lawful organisations of all kinds have an entitlement to conduct their affairs in private in certain respects. What aspects of the organisation's activities must not be secret? It would be an interference with the autonomy of the organization if the intention were that the State authorities have full access to all aspects of the operation and activities of the organization. It is however impossible to comment in any meaningful way on this prohibition in the absence of more specific details. Freedom of association as guaranteed by Article 11 ECHR will be relevant to consideration of this provision.

Proselytism

42. ODIHR and the Venice Commission have expressed clear opinions about proselytism provisions in earlier versions of draft laws. It is therefore disappointing that the provisions in this Draft Law contain several matters which are not in line with international standards.

43. The rapporteurs are fully aware of the difficulties created and perceived in Armenian society by proselytism. Historically, socially and politically it is understandable that, where

²² See the U.N. Human Rights Committee, *General Comment 22 (48)*, paragraph 8.

²³ See Art. 18 paragraph 1 ICCPR and Art. 9 paragraph 1 ECHR (emphasis added).

there is concern for the maintenance of traditional/state religion, influx of other beliefs or movements that proselytize is seen as a threat in the process of rebuilding national identity. Nevertheless, the Human Rights Committee has stated in relation to the fact that a religion is recognized as a state religion, or it is established as official or traditional or its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of other fundamental rights. Article 20.2 of the ICCPR states that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

44. If the State is determined to ensure that those holding religious beliefs are not disturbed in their beliefs by the activities of others, it must take into account that any limitation on proselytism or the manifestation of religion, which is a fundamental right, requires careful assessment. There is a thin line between the right to manifest one's religion and change one's belief and the right to religious expression, the right to impart and receive even offensive ideas that shock and disturb - yet these are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. It is essential that this aspect of the Draft Law be rewritten in light of the principles underlying freedom of thought, conscience and religion, the right to equality before the law and non-discrimination as well as the freedom of expression and the freedom to impart information and ideas.

45. Art. 4 paragraph 2 prohibits "*Advocacy influence on persons with other religious or doctrinal affiliation, which is incompatible with the respect for the freedom of conscience, religion or belief*". This statement is of a too general nature and prone to inappropriate interpretations, and is therefore open to abuse and arbitrary application. It can therefore not be used to ground any criminal or administrative liability. Furthermore, it is not clear how such improper advocacy influence is different and distinct from improper proselytism, as defined in the subsequent paragraph of Art. 4. According to the European Court of Human Rights (hereinafter, the "ECtHR"), it is only improper proselytism that is "*not compatible with respect for the freedom of thought, conscience and religion of others*"²⁴. Any other kind of "advocacy influence" aimed at changing the beliefs of others constitutes protected speech and religious practice. Therefore, and considering that restrictions on improper proselytism are in any case addressed by the subsequent paragraph of the Draft Law, Art. 4 paragraph 2 appears superfluous and should be deleted.

46. Art. 4 paragraph 3 defines the concept of "proselytism"²⁵. That definition is new to the Draft Law. In order to avoid a negative stereotyping of all forms of missionary activity, it is strongly recommended that Art. 4 paragraph 3, and other related provisions of the Draft Law, be amended and drawn with greater care so that they only prohibit "improper proselytism" and not "proselytism" in general. The same is true with respect to Article 4(4): only improper proselytism should "give rise to criminal and administrative liability". These changes would help clarify that traditional, non-coercive proselytism is perfectly legal, and in fact protected by law, as required by international standards. That is, standard door-to-door missionary work such as that conducted by Jehovah's Witnesses (as in the ECtHR case of *Kokkinakis v. Greece*²⁶) is protected, as are efforts at sharing beliefs in non-coercive contexts that resemble lectures or church sermons. The previous joint Opinions have explained at length that, under international human rights law, traditional non-coercive proselytism, or the right to

²⁴ See *Kokkinakis v. Greece*, ECtHR Judgment of 25 May 1993 (Application no. 14307/88), para. 48.

²⁵ "*any influence of religious advocacy on persons with other religious and doctrinal affiliation or views for the purpose of converting them to another religion, which is expressed by use or threat of physical or physiological violence on that person or a relative thereof, by providing material or social benefits or taking advantage of their needs, inciting enmity or stirring up hatred against another religion, belief or religious organisation, persecuting the person for two or more times, whereas in relation to a minor under 14 years of age - without the consent of the parents or guardians thereof*".

²⁶ *Id.* For an analysis of recent voluntary codes of conduct and their sense of appropriate missionary behavior, see Matthew K. Richards, Are L. Svendsen and Rainer O. Bless, "Voluntary Codes of Conduct for Religious Persuasion: Effective Tools for Balancing Human Rights and Resolving Conflicts," 6 *Religion and Human Rights* 151-183 (2011) (summarizing work of a variety of groups, including voluntary codes developed by the World Council of Churches and the Oslo Coalition on Freedom of Religion or Belief), available at <http://www.ingentaconnect.com/content/mnp/rhrs/2011/00000006/00000002/art00003>.

try to persuade others of the validity of one's beliefs, is a protected religious and expressive activity, and that the State may only prohibit "improper proselytism", such as that involving undue influence or force, especially upon weak and vulnerable members of the society²⁷.

47. More generally, while it appears to be in line with the definition of "improper proselytism" under international standards, the definition of proselytism is unduly complicated and difficult to understand; it appears to contain many elements, both discrete and interlinked.

48. First, the prohibition of proselytism by "*threat of physical or psychological violence on that person or a relative...*" is difficult to understand. It needs to be clarified in what particular circumstances threats against a relative would amount to an attempt to convert a third person. If the threat is against a "relative" this should be prohibited or amount to an offence in respect of the person directly threatened i.e. the relative. On the other hand, if threats of physical violence made for proselytizing purposes are, of course, a proper matter for prohibition and criminal liability, "*psychological violence*" would require more precise definition.

49. Also, the *Guidelines for legislative reviews of laws affecting religion or belief*²⁸ (hereafter the "Guidelines") state that "*where legislation operates to constrain missionary work, the limitation can only be justified if it involves coercion or the functional equivalent thereof in the form of fraud that would be recognized as such regardless of the religious beliefs involved.*" Therefore, the provision of "*material or social benefits or taking advantage of [the] needs of [others] ...for the purpose of converting them to another religion...*" should only be prohibited where such coercion is present. This aspect of Article 4.3 should be amended and the text should not be misconstrued to prohibit legitimate charitable activity.

50. As pointed out above in relation to Article 3, incitement to hatred requires careful definition²⁹. To align with restrictions permitted under Art. 20 paragraph 2 ICCPR, the phrase "*inciting enmity or stirring up hatred against another religion*" should be changed to read "*advocacy of religious hatred that constitutes incitement to discrimination, acts of hostility, or violence*". The point is that it is not inciting enmity in the abstract that may be restricted, but engaging in advocacy of hatred that constitutes incitement to imminent overt action.

51. The 2010 Joint Opinion in addition commented, at paragraph 48, that "*it is exceptionally difficult to see how the making of two unwanted calls to or on an individual should constitute a criminal offence: but a persistent pattern of harassment most certainly should do so.*" It is again recommended that this provision in Article 4.3 be amended.

52. Furthermore - given the risk that even a careful definition of improper proselytism might be applied in an overly broad way, leading to inappropriate prosecutions - it is recommended that law enforcement and judicial personnel be given adequate training so as to be able to

²⁷ See *Kokkinakis v. Greece*, ECtHR Judgment of 25 May 1993 (Application no. 14307/88). The *Kokkinakis* case shows at the same time that defining the line between trying to persuade someone to believe something and using manipulative techniques or coercion can be difficult. It may be questioned, as did concurring Judge Martens in the *Kokkinakis* case whether Article 9 of the ECHR requires that the state adopt a position of neutrality between religions, even or perhaps especially where one religion enjoys a privileged position in national law. Improper proselytism would then be an offence against the criminal law, perhaps only that which would violate Article 3 of the ECHR: freedom from torture or inhuman or degrading treatment or punishment.

More recent case law of the ECtHR indicates that the basis of objection to non-coercive forms of proselytism and religious expression is not so clear. In *Otto-Preminger-Institute v. Austria and Murphy v. Ireland (Roy Murphy v Ireland, Admissibility Decision (Application No. 44179/98))*, the controversy regarding religious advertising in a divided society was scrutinized as religious expression under article 10 of the ECHR. The Court observed that an expression which was not on its face offensive could have an offensive impact in certain circumstances.

²⁸ CDL-AD(2004)028, *Guidelines for legislative reviews of laws affecting religion or belief* adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004).

²⁹ See generally CDL-AD(2008)026, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred.

correctly differentiate between proper and improper proselytism, and protect the former while prosecuting the latter.

53. Article 4.4, introducing criminal or administrative liability for proselytism "in cases provided for by law", should also be reconsidered. It is not clear what laws there are which provide for the criminal or administrative liability. Moreover, the definition of the criminal offence of proselytism contained in Article 2 of the Draft Law on making an amendment and a supplement to the Criminal Code of the Republic of Armenia (hereafter the "Draft Amendment to the Criminal Code") is not the same as the definition of proselytism in Article 4 of the Draft Law. There are more elements to the definition in Article 4.3 than in the Criminal Code (which for example does not contain any requirement of intent), and it is not clear why this should be so. These differences should be examined and clarified.

54. In particular, it should be clarified that there should be an intent to convert to another religion in order to commit the criminal offences insofar as they are created by this Article. The Criminal Code does not contain any requirement of intent and it may be that intention is expressly required in relation to relevant offences created by other laws but the rapporteurs cannot comment on these without seeing the texts.

55. Furthermore, it is not clear whether Article 4.4 creates criminal offences i.e. whether Article 4 itself is a "case[] provided for by law" or whether the offence is only contained in the Criminal Code.

56. It also bears recalling that most democratic legal systems do not regulate proselytism *per se*, except to the extent that other civil or criminal laws prohibit coercion, undue influence, or fraud more generally. Special laws targeting religious persuasion are likely to lead to discrimination and may result in unjust curtailment of legitimate manifestations of religion, while general laws are typically adequate to deal with conduct that rightly falls within the purview of international limitation clauses. For that reason, as an alternative to what was proposed above, Armenian authorities may also consider deleting altogether the references from the Draft Law to improper proselytism and advocacy influence, and instead address the prohibition of any improper conduct through general laws such as the Criminal Code and Administrative Offences Code.

57. Article 4.5 provides that "*[t]he activities of religious associations and organisations exercising or trying to exercise, in the course of their activities, supervision over the personal life, health, property and behaviour of their members, shall be prohibited in the territory of the Republic of Armenia.*" The comments in the 2010 Joint Opinion in paragraphs 53 and 54 in relation to this issue appear not to have been accepted

58. Many religious denominations, by their very nature, proffer guidance and direction to their followers in various aspects of life, which is a recognized and protected form of manifestation of belief through teaching. Moreover, many religions have religious orders in which individuals voluntarily submit to supervision by the authorized leaders of the order. This is the case when members live in monasteries or other orders. Also, in hierarchical churches, it is a standard form of religious governance, for higher-order leaders, to supervise lower orders and the laity. Undue control or interference by the organization leading to unlawful limitation of the rights or freedoms of its members - contrary to Article 17 ECHR - might however legitimately be prohibited and, in particular, any interference with members' freedom to change religion or leave the organisation.

59. The scope of Article 4.5 and the meaning of "*supervision*" are thus unclear and too broad and could be applied to legitimate manifestations of religion. It is essential that this provision either be dropped or, to ensure that it cannot be applied to such situations, redrafted with greater precision, in line with the comments made in the context of the 2010 Joint Opinion. The prohibition could apply, for instance, to the activities of religious organizations or associations which exercise *coercive control* - rather than mere *supervision* - over their followers.

C. Religious Associations

60. Chapter 3 introduces a more liberal definition of *religious associations*, and one that is better aligned with international standards. It also introduces a novel classification of religious associations, namely into *religious groups* – which consist of up to 25 adult followers and operate without state registration; and *religious organizations* – which comprise at least 25 adult members and are subject to mandatory state registration as legal entities.³⁰ The positive feature of this new classification is that it clarifies that religious associations (groups of up to 25 adult followers) can operate without registration in Armenia. Such express recognition has hitherto been missing from the text of the law (both the law currently in force and previously drafted amendments thereto), and was an issue repeatedly raised in previous joint Opinions of the OSCE/ODIHR and the Venice Commission. This positive improvement notwithstanding, several questions still remain regarding the newly proposed system of registration and operation of religious associations.

61. Of note, the novel classification introduced by the Draft Law parallels one in Russian Law which uses the term “group” to refer to associations of individuals that are informal and have not acquired legal entity status, and “organization” to refer to associations that have acquired legal entity status. In particular, the Russian law provides that groups with ten or more members may become organizations, but does not provide an upper limit on the size of groups that do not have entity status. Conversely, the Armenian Draft Law uses the distinction in an opposite way that mandates acquisition of entity status for any group with 25 or more members, which is inconsistent with international standards and may amount to an unnecessary restriction of freedom of association and freedom of religion rights.³¹

62. Art. 5 paragraph 2 provides that a “*religious association is a voluntary union of persons permanently residing in the territory of the Republic of Armenia, which is established for the purpose of jointly professing and disseminating their faith*”. This definition is serviceable for organizing typical religious communities, but fails to recognize that some religious organizations may span denominational boundaries in various ways (e.g., interfaith organizations or parachurch organizations that work inter-denominationally). This is a technical oversight that can be easily addressed by adding, at the end of this paragraph, a phrase such as: “*or for furthering the shared aims of a number of religious associations (i.e., an association of associations)*”.

63. At the same time, it is welcome that the Draft Law provides the right to form religious associations for the purpose, inter alia, of “*professing*” and “*teaching*”. When defining a religious association as one “*which is established for the purpose of jointly professing and disseminating their faith*”, Article 5 paragraph 2 implicitly acknowledges the right of religious associations to proselytize and addressed in paragraphs 43-57 above.

64. Article 5.3 in principle allows religious associations to be formed no matter how few members they may have. This is a welcome development as the 2010 Joint Opinion at paragraph 36(e) criticized the rule requiring an organisation to have at least 200 members. It is welcome also that a “religious group” which may consist of up to 25 adult followers is not required to register, whereas a “religious organisation” which is composed of 25 or more adult followers, is required to register. However, only religious organisations would appear to acquire legal entity status and religious groups lacking legal personality status do not enjoy the same protection as religious organizations (cf. Article 8 of the Draft Law). Paragraph 38 of the 2010 Joint Opinion stressed that “*any religious group must have access to legal personality status if it wishes to avail of it.*” Nevertheless, this matter has not been addressed in the Draft Law. Moreover, the registration procedure, criticized in the previous 2010 Joint Opinion, is still cumbersome (see below).

65. Art. 5 paragraph 4 provides that “[t]he following shall operate within the Republic of Armenia: (1) *The Holy Armenian Apostolic Church with its traditional organizations*; (2) *other religious organizations*”. An *ad litteram* reading of this provision would imply that “*religious*

³⁰ See Art. 5 and 6 of the Draft Law.

³¹ See, *mutatis mutandis*, the case of *Masaev v. Moldova*, ECtHR Judgment of 12 May 2009 (Application No. 6303/05), paragraph 26.

groups" (as distinct from "religious organizations") are not allowed to operate in Armenia. Such a conclusion would conflict with Article 5.3(1) and is clearly not intended. Article 5.4(2) should refer to "other religious associations" rather than "other religious organisations" or should be supplemented with an additional line referring to "religious groups", in order to expressly recognize that religious groups are also allowed to operate (without registration) in Armenia.

66. Furthermore, art. 6 prescribes mandatory state registration of "religious groups composed of 25 or more adult followers". Unless owing to imprecision in translation, this terminology is inconsistent with Art. 5, which defines the "religious group" as an association having up to 25 adult followers. The registration shall be made by the central body of the State Registry of the Ministry of Justice, upon submission of the statute of the religious organization, which must contain specific information, as well as other documents enumerated in the Law "On State Registration of Legal Entities". It is not possible to comment on the appropriateness of the documents required by Article 6.2 without knowing the terms of the Law "On state registration of legal entities". More generally, a definitive assessment of the newly proposed system of state registration of religious organizations cannot be made without an analysis of the Law "On state registration of legal entities. However, the law should not require the inclusion of excessively detailed information in the statute of the religious organisation. Refusal of registration on the basis of a failure to provide all information should not be used as a form of arbitrary refusal of registration. This is particularly important where registration is mandatory.

67. The Draft Law thus proposes a somewhat simplified system of mandatory state registration of religious associations comprising 25 or more adult followers, which in some ways is more progressive than the currently existing registration system. Many of the registration hurdles which were criticized in the previous Joint Opinions, now appear to have been removed. Thus, under the Draft Law, a religious organization's acquisition of legal status would no longer depend on it being based on "historically recognized holy scriptures", nor would it be contingent upon prior registration "by the Committee of Religious Affairs of the Council of Ministers", as currently mandated by the Law in force.³² Also significantly, registration could no longer be rejected if the statute of the religious organizations would contradict "the laws of the Republic of Armenia" - a currently existing legal provision which is arguably too vague to be sufficiently foreseeable and which leaves too broad a discretion to the implementing authorities.

68. At the same time, it is important to emphasize that the Law "On State Registration of Legal Entities" should not require organizational structures or procedures that are inconsistent with the beliefs of particular religious communities about how they should organize. This is an internal affair, often reflecting doctrinal commitments that should not be the concern of state institutions. To adequately reflect such aspects of religious freedom, the Draft Law could include a provision allowing appropriate accommodations of beliefs about such matters.

69. That having been said, to make it mandatory to register need not be an infringement of freedom of religion in conjunction with freedom of association³³. Without de facto freedom of association, freedom of religion loses its substance. The mandated obligatory registration of all religious associations having 25 or more adult members still raises human rights concerns. It must be borne in mind, as was mentioned in the previous Joint Opinions, that while all religious associations should in principle have access to legal personality status, "individuals and groups should be free to practice their religion without registration if they so desire"³⁴. The ECtHR has clearly held that making the practice of religion conditional on formal registration violates Article 9 ECHR. In the Court's view, holding the contrary "would amount to the exclusion of minority religious beliefs which are not formally registered with the State and, consequently, would amount to admitting that a State can dictate what a person must believe. The Court cannot

³² See Art. 5 and 14 of the 2009 Law on the Freedom of Conscience and on Religious Organizations of the Republic of Armenia.

³³ Gorzelick; Sidiropoulos and Others v. Greece judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1614-15, § 40.

³⁴ See the "OSCE/ODIHR - Venice Commission Guidelines for legislative reviews of laws affecting religion or belief", page 17. The Guidelines are available online at <http://www.legislationline.org/documents/id/15380> (English language version), and <http://www.osce.org/ru/odihhr/13994> (Russian language version).

agree with such an approach”.³⁵ Thus, requiring mandatory state registration of religious associations with 25 or more adult members would amount to an unjustified interference with the freedom to manifest religion or belief.

70. It is therefore recommended that Articles 5 and 6 of the Draft Law be amended so as to provide that religious associations having 25 or more adult members *may* (but are not obliged to) seek state registration, for the purpose of obtaining legal entity status and enjoying various associated benefits, such as tax exemptions. More generally, in order to ensure that the system of registration conforms to international standards, Armenian authorities are encouraged to take guidance from the principles prescribed by the *OSCE/ODIHR - Venice Commission Guidelines for legislative reviews of laws affecting religion or belief* regarding the registration of religious/belief organizations³⁶.

71. It should also be noted that the Draft Law does not contain information on what procedures are available in relation to the matter of registration. It therefore difficult to comment on whether they respect the rights of organisations and their members in the process and, in particular, whether a disappointed applicant can seek judicial review of failure to be registered.

D. Rights and Obligations of Religious Organizations

72. Chapter 4 prescribes the rights and obligations of religious organizations. It is not clear whether this means that religious groups or individuals also have these rights. In particular, Art. 8, which enumerates the “[r]ights of religious organizations”, raises the question of whether [unregistered] religious groups shall also enjoy said rights or not. Under international standards, most of the rights listed in Art. 8 should be enjoyed by unregistered religious groups, and even individuals, on a par with registered religious organizations. While the State may legitimately restrict certain benefits - such as tax exemptions on donations (Art. 8 paragraph 3) - to registered religious organizations only, there is no reason why unregistered religious groups should not enjoy such basic rights as, for instance: “to bring together their believers” (Art. 8 paragraph 1 subparagraph 1), “perform religious services, rituals and ceremonies” (Art. 8 paragraph 1 subparagraph 3), or indeed “engage in theological, religious, historical and cultural studies” (Art. 8 paragraph 1 subparagraph 6). These are normal manifestations of freedom of religion, guaranteed by Art. 9 ECHR and Art. 18 ICCPR. For that reason, Art. 8 paragraph 1 should be rephrased so as to clearly state that the rights listed therein shall be enjoyed not only by registered religious organizations, but also by unregistered religious groups.

73. For the same reasons, Art. 8 paragraph 4, which provides that the said rights “shall arise from the moment the relevant religious organization obtains state registration”, should be deleted. As stated above, the rights enumerated in Art. 8 are basic manifestations of freedom of religion or belief, and their exercise thus should not be made contingent upon state registration.

74. The phrasing of Art. 8 further raises the question of whether the list of rights enumerated therein is definitive and exhaustive or not - i.e., whether religious organizations are prohibited from engaging in any other activities. If answered in the affirmative, then this would constitute an unjust restriction of the right to manifest religious freedom. This is because the prescribed list of rights does not include such basic rights as, for instance, the right to carry out charitable

³⁵ See *Masaev v. Moldova*, ECtHR Judgment of 12 May 2009 (Application No. 6303/05), para. 26. See also Country visit of the UN Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, to the Republic of Moldova (1-8 September 2011), Press statement, Chisinau, 8 September 2011: “Although the 2007 Law on Religious Denominations and their Component Parts sets out the criteria for registering religious denominations, there still seems to be some uncertainty around the registration procedure. Members of religious minorities, most of whom have finally managed to achieve registration status, repeatedly complained about the procedure being cumbersome, time consuming and bureaucratic. Reportedly, they often did not understand the reasons for the refusal of their applications. Non-registered religious communities lack legal personality status which means that they cannot take collective legal action. It was clarified by the Ministry of Justice that they can nonetheless practice their religion freely, and that activities of such groups are not deemed illegal”.

³⁶ See the “OSCE/ODIHR – Venice Commission *Guidelines for legislative reviews of laws affecting religion or belief*, pages 16-17. See also Paragraph 38 of the 2010 Joint Opinion.

activities, the right to share beliefs and to attempt to persuade individuals from other religious traditions, or the right to an effective remedy, which should be enjoyed by all religious groups and organizations. It is recommended that Art. 8 be rephrased so as to clarify that the list of prescribed rights is only illustrative, and that religious associations (i.e., religious organizations and religious groups) may also carry out other activities as long as they do not violate the law. In this regard, it is important to remember that religious communities have the right to exercise the full range of religious activities³⁷, as well as those normally exercised by registered non-governmental legal entities³⁸.

75. Art. 9 paragraph 2 provides that “[r]eligious organizations shall be obliged to ensure the preservation and intended use of the facilities, areas and other property delivered to them by ownership, as well as of historical monuments owned by them”. This provision is not altogether clear, possibly as a result of translation. While it is of course perfectly legitimate for the State to impose restrictions on the use of historical monuments, it is difficult to see why all property owned by a religious organization should be used as originally “intended”. A religious organization should be allowed to eventually convert, for instance, a printing house which it has acquired, into a prayer house, as long as it complies with all necessary administrative procedures and set standards in that respect. Furthermore, if a religious organization (or group) is required to maintain a structure that is a historical landmark, even though it would prefer to change the nature of the land use, some compensatory payment or support may be appropriate. The respective provision should therefore be clarified.

76. Art. 9 paragraph 3 prohibits the financing of religious organizations “by foreign states, natural and legal persons”. In this regard, the OSCE/ODIHR - Venice Commission Guidelines for Review of Legislation Pertaining to Religion or Belief indicate that “[s]tates have a variety of legitimate reasons for regulating fund transfers of various types”. However, such a blanket prohibition on all foreign funding (especially also by foreign natural persons) is arguably unreasonable, and not “necessary in a democratic society”, as is required by Art. 4 of the Draft Law and Art. 9 paragraph 2 ECHR. It bears recalling that all OSCE participating States have committed to respect the right of religious communities to “solicit and receive voluntary financial and other contributions”³⁹, and that this right should be enjoyed without any unjust restriction⁴⁰. Similarly, the blanket ban on being funded by and funding of political parties appears to be excessive and should be reconsidered.

E. Relations between the State and religious organizations

77. Art. 10 provides that the church is separated from the State in the Republic of Armenia. Art. 10 paragraph 1, although not altogether clear (probably as a result of translation), appears to provide that the State and its authorities and representatives shall not interfere with the lawful activities and within the internal life of religious organizations. Art. 10 paragraph 3 (the correct numbering would be “paragraph 2”) reflects appropriate respect for religious practices with respect to confession, but is drafted with the prevailing Church in mind, and without reference to analogous practices in other religious denominations. It would be advisable to revise that section so as to ensure that the State recognises the confidentiality of confession or *other similar confidential communications* between adherents of a faith, and that ordained confessors or *corresponding officers in other denominations* shall be exempt from interrogation.

78. Art. 11 provides that the Ministry of Justice, as the “authorised body” of the Government, shall “exercise supervision over the activities of religious organisations.” It is important to note in this context that the State does not have unlimited authority to conduct searches and maintain surveillance⁴¹. Further, Art. 11 provides that the “authorised body” shall “participate, on

³⁷ See *Moscow Branch of the Salvation Army v. Russia*, ECtHR Judgment of 5 October 2006 (Application no. 72881/01), paragraph 74. See also *Church of Scientology Moscow v. Russia*, ECtHR Judgment of 5 April 2007 (Application no. 18147/02), paragraph 84.

³⁸ See *Svyato-Mykhaylivska Paragaphfiya v. Ukraine*, ECtHR Judgment of 14 September 2007 (Application no. 77703/01).

³⁹ See the OSCE Vienna Document (1989), Principle 16.4.

⁴⁰ *Ibidem*, Principle 17.

⁴¹ See *Tsavachidis v. Greece* (Grand Chamber, ECtHR, App. No.28802/95, 21 January 1999).

behalf of the State, as a mediator in the resolution of issues and disputes arising between the religious organizations of Armenia” (Art. 1 paragraph 1 subparagraph 5). Here it is important to underline that, under international law, “*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*”, and also that, when faced with religious conflicts, “*the role of the authorities [...] is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other*”⁴². It is recommended that the Draft Law expressly prescribe such duties of neutrality and impartiality for the state authorities which will regulate and mediate between religious organizations. The principles of neutrality and impartiality are of particular importance in a country like Armenia, where one religion appears to religion hold a dominant and privileged position. Moreover, the law should make it clear that the authorized body may only intervene in the regulation of disputes if the religious organizations or groups involved request such mediation, or otherwise when such intervention is strictly necessary in the interests of public safety, for the protection or public order, health or morals, or for the protection of the rights and freedoms of others.

F. Publicity of activities of religious organizations

79. Art. 12 appears to borrow what might be reasonable transparency rules for a secular civil society organization and automatically impose the same on religious communities. Thus, Art. 12 paragraph 1 mandates that “*[the] activities of a religious organization shall be public*”, ignoring the fact that under international law, religion can rightfully be practiced in public or private⁴³. This blanket requirement is excessive. It is therefore recommended to reconsider the respective provision.

80. The requirement to publish the specific information listed in Article 12.2 is probably justifiable but it is not clear whether this is the totality of the information required to be published. It may be justifiable as pursuing a legitimate aim in relation to services provided by religious organisations, such as running schools and hospitals, or where there is a specific complaint of unlawful behaviour, such as unlawful discrimination. Otherwise, the requirement for all activities to be public is likely to be an unwarranted interference in the autonomy of the organisation. Furthermore, the notion of being “public” is unclear and should be clarified.

81. As regards the financial disclosure obligations, required under Art. 12 paragraph 2 subparagraphs (1) and (2), these may infringe upon legitimate privacy rights of religious organizations. While it may be necessary or appropriate in taxation or other contexts for religious organizations to make appropriate disclosures to government officials obligated to treat such matters confidentially, it is an intrusion on the rights of religious communities to be compelled to disclose sometimes sensitive financial matters to the general public. Just as private individuals and private business entities have legitimate privacy rights in this area, so religious communities may have legitimate grounds for maintaining confidentiality with respect to financial transactions. It is therefore recommended to eliminate the requirement that religious organizations post on the website information on their annual proceeds and expenses, and to either delete subparagraphs (1) and (2), or to indicate that the information covered by those subparagraphs shall be disclosed to government officials charged with the obligation of protecting the confidentiality of that information.

⁴² See *Metropolitan Church of Bessarabia v. Moldova*, ECtHR Judgment of 13 December 2001 (Application no. 45701/99), paragraph 116.

⁴³ See Art. 9 paragraph 1 ECHR and Art. 18 paragraph 1 ICCPR (emphasis added).

G. Supervision over activities of religious organizations

82. Art. 13 paragraph 2 provides that “In case of detecting violations of the requirements of laws by a religious organisation, which may be eliminated through measures undertaken by the organisation, the authorised body shall send a written warning to the organisation by defining therein *the procedure and time limits* for eliminating the detected violations” (emphasis added).

83. Both the sending of a written warning to the organisation to eliminate violations of the requirements of laws and suspension of its activities for such violations are interferences in its autonomy. As far as the warning is concerned, it is worth recalling that, in its Opinion on the compatibility with universal human rights standards of the Warning addressed by the Ministry of Justice of Belarus to the Belarusian Helsinki Committee (CDL-AD(2011)026)⁴⁴, the Venice Commission analysed such a warning in the light of the freedom of association and freedom of expression and found it to be in violation of Articles 19 and 22 of the ICCPR and 10 and 11 of the ECHR. In its Opinion, the Commission found that “*the grounds invoked to justify issuing the Warning directed at the BHC do not stem from a pressing social need in a democratic society. They are disproportionate and the reasons adduced are neither relevant nor sufficient*”.

84. In the light of the above, it is essential that these events (warning and/or suspension) occur only in relation to violations of significance or magnitude. However, the complete lack of detail in the Draft Law as to the type of violation that might incur these penalties means that there is a serious danger of arbitrary decision-making by the authorised body. To safeguard against unfettered executive discretion, the Draft Law should either prescribe with greater precision which procedure and time limits the authorised body may impose, or at the very least specify that these procedures and time limits shall be “reasonable”.

H. Suspension and termination of activities of religious organizations

85. Chapter 8 regulates the suspension and liquidation of religious organizations. Whilst suspension may only occur on the order of a court, unfortunately there is nothing in the Draft Law which sets out the basis on which the court must make its decision, nor the procedure. It should also be expressly stated that the organisation is entitled to be served with the relevant documents, and appear and be heard at the court application.

86. It is commendable that, under Art. 15, liquidation is a sanction of last resort, to be applied “*where other measures for eliminating or preventing the violation are exhausted or the violations may not be eliminated otherwise*” (Art. 15 paragraph 4). This provision would turn into law a key recommendation contained in the 2010 Joint Opinion.

87. Art. 15 paragraph 1 subparagraph (2) provides that a religious organization may be liquidated “as a result of bankruptcy, as prescribed by law”. This provision raises the question of whether it is really necessary in a democratic society. While one might liquidate a for-profit company at the time of bankruptcy, it is not clear why a religious organization should be liquidated at this point. It may remain a community of believers - even if it is a bankrupt community. It is recommended to reconsider this provision.

88. To further ensure that liquidation will be applied only in cases where the gravity of violations will call for such a sanction, it is recommended that Art. 15 paragraph 2 subparagraph 2 be slightly amended so as to prescribe that liquidation will be applicable in case a religious organization commits such serious or repeated violations of the requirements of laws, which may not be eliminated through measures undertaken by the organization. Otherwise, it would appear for it to be possible that a religious organisation could be liquidated for any violation that is not eliminated. Liquidation because the organisation provided “*false data of an essential nature*” during the registration process is also excessive and unduly vague. It does not appear even that the false data can be corrected nor is there a requirement that the false data was intentionally provided. Also, when implementing Art. 15 paragraph 2 subparagraph 2, care

⁴⁴ See also CDL-AD (2010) 053rev, *Opinion on the Warning addressed by the Ministry of Justice to the Belarusian Association of Journalists*, adopted by the Venice Commission at its 85th Plenary Session.

needs to be taken to avoid punishing the organization and its believers for actions attributable only to a single or small group of leaders or members.

V. Analysis of the draft amendments to the Criminal Code

89. Art. 2 of the Draft Law on Making an Amendment and a Supplement to the Criminal Code of the Republic of Armenia will supplement the Criminal Code with a new Article 160.1 on “*Proselytism*”. As was mentioned above, in order to avoid wrongful prosecution of traditional non-coercive forms of proselytism - which is protected under international law - it is strongly recommended that the name of the offence be changed to “*improper proselytism*”.

90. It is further noted, as previously mentioned, that the definition of “proselytism” given in the draft amendments to the Criminal Code does not require the purpose of the act to be the conversion of others to another religion, which is contained in the definition provided by Art. 4 paragraph 3 of the Draft Law. In the interests of legal certainty and foreseeability, it is recommended that the two definitions be aligned and made consistent.

91. The aggravating clause contained in paragraph 3 of the proposed new Art. 160.1 also raises questions. This clause provides for enhanced punishment when “proselytism” is committed “*with motives of national, racial or religious hatred or fanaticism*” - apparently disregarding the fact that the definition of the basic crime of “proselytism” already contains the similar element of “*inciting enmity or stirring up hatred against another religion, belief or religious organization*”. It is thus unclear in which cases the aggravated form of Art. 160.1 paragraph 3, rather than the basic form of Art. 160.1 paragraph 1, would apply. To ensure legal certainty and prevent arbitrary application of the law, the respective provisions should be redrafted.

92. It is noted that the punishment prescribed for “proselytism” - a fine of up to 300-fold the minimum salary, or detention of up to two months, for the “simple”, or non-aggravated, form of the offence (paragraph 1) - is lower than that which was proposed in previous draft laws. The lowering of the proposed punishment is commendable and conforms to recommendations put forward in previous Joint Opinions, which have criticized the earlier proposed punishments for being too severe.

VI. Analysis of the Draft Amendments to the Administrative Offences Code

93. Art. 2 of the Draft Law on Making Amendments and a Supplement to the Administrative Offences Code of the Republic of Armenia will amend Art. 205.3 of the Administrative Offences Code and prescribe administrative liability for the leader of a religious group for avoiding to register the group with more than 25 adult followers (or for including obviously false information in the documents submitted for registration), punishable by a fine of 600- to 1.000-fold the minimum salary. Again, the terminology used here is inconsistent with Art. 5 of the Draft Law, which defines “religious group” as “an association consisting of *up to 25 adult followers*” (emphasis added). More importantly, this provision may constitute an unjust interference with the freedom of association and with the freedom to manifest religion or belief.⁴⁵ As enunciated in the *OSCE/ODIHR – Venice Commission Guidelines for legislative reviews of laws affecting religion or belief*, “*individuals and groups should be free to practice their religion without registration if they so desire*”⁴⁶ - regardless of how small or large their group may be. The quoted provision should therefore be deleted.

94. Art. 4 of the Draft Law will amend Art. 206 of the Administrative Offences Code and prescribe an offence of failing to publish specified information by the religious organization. It is noted that the list of information to be published as required by the proposed Art. 206 of the Administrative Offences Code is not fully consistent with the list of information which must be published under Art. 12 paragraph 2 of the Draft Law on Freedom of Conscience and Religion. In particular, the proposed Art. 206 of the Administrative Offences Code requires the publication

⁴⁵ See *mutatis mutandis*, the case of *Masaev v. Moldova*, ECtHR Judgment of 12 May 2009 (Application No. 6303/05), paragraph 26.

⁴⁶ See the “OSCE/ODIHR – Venice Commission *Guidelines for legislative reviews of laws affecting religion or belief*, page 17.

of, *inter alia*, “the number of sittings of supreme and governing bodies held during the preceding year”. This information is not required to be published under Art. 12 paragraph 2 of the Draft Law, and should therefore be deleted from the proposed Art. 206 of the Administrative Offences Code.

95. For the reasons given above, the proposed Art. 206 paragraph 2, which imposes fines for receiving financial assistance “*by religious organizations from foreign states, natural or legal persons*”, and Art. 206 paragraph 4, which imposes fines for “[e]xercising supervision ...”, should also be reconsidered.

VII. Analysis of the Draft Supplement to the Law on the Relations between the Republic of Armenia and the Holy Armenian Apostolic Church

96. The draft supplement to the Law on the Relations between the Republic of Armenia and the Holy Armenian Apostolic Church prescribes a list of “exclusive missions” of the Holy Armenian Apostolic Church. Among other things, the “exclusive missions” include “freely preaching and disseminating its religion”; “building new churches”; “contributing to the spiritual education of the Armenian people”; and “undertaking charitable and benevolent activities”. Since they are listed as “*exclusive missions of the Holy Armenian Apostolic Church*”, it is understood that other religious associations will not be allowed to engage in such activities. Such a restriction would violate international standards on freedom of religion or belief and on the prohibition of non-discrimination. It bears recalling that, while international law does not oblige States to provide an identical status to all religious communities,⁴⁷ it nonetheless regards all advantages granted exclusively to one religious community as unjustified unless they are based on a legitimate justification and remain proportionate⁴⁸. It is difficult to conceive of a reasonable justification for why the activities enumerated above should not be exercisable also by other religious associations besides the Holy Armenian Apostolic Church. It is therefore recommended to reconsider the respective provision.

⁴⁷ See *The Canea Catholic Church v. Greece*, ECtHR Judgment of 16 December 1997 (Application no. 25528/94), paragraph 47.

⁴⁸ See *Cha'are Shalom ve Tsedek v. France*, ECtHR Judgment of 27 June 2000 (Application no. 27417/95), paragraph 87.