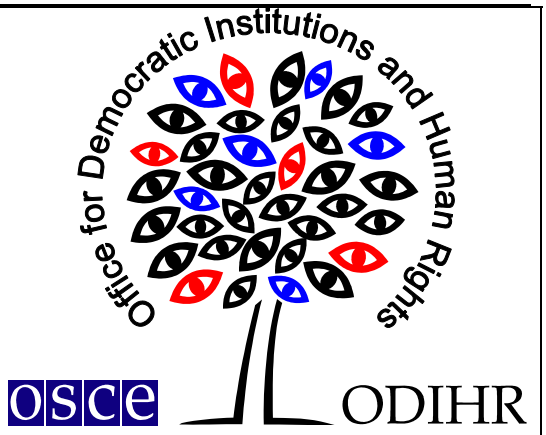
Warsaw, 7 July 2005 Opinion-Nr.: FoRB – MK/033/2005 (Adv Council on FoRB/AC/MASz) www.legislationline.org	

COMMENTS

ON THE MACEDONIAN DRAFT LAW ON RELIGIOUS COMMUNITIES AND RELIGIOUS GROUPS

Prepared by the OSCE/ODIHR Advisory Council

On Freedom of Religion or Belief

I. INTRODUCTION

1. *The OSCE/ODIHR Advisory Council on Freedom of Religion or Belief (the "Advisory Council") has been asked to review the Macedonian draft Law on Religious Communities and Religious Groups (hereinafter referred to as the Draft Law) which has been submitted to the ODIHR in June 2005. These comments are based on an English translation of the Draft Law.*

II. SCOPE OF REVIEW

2. This is not a comprehensive review, but rather a comment on the Macedonian draft Law on Religious Communities and Religious Groups which is limited to a number of key issues that arise from the draft.

3. The comments have been prepared taking into account the Guidelines for Review of Legislation Pertaining to Religion or Belief[1] that were prepared last year by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in Consultation with the European Commission for Democracy Through Law (Venice Commission).[2] These Guidelines are based on the relevant provisions of international treaties,[3] UN Declarations,[4] case law of the European Court of Human Rights, and OSCE

[1] Available at http://www.osce.org/odihr/?page=publications&div=intro&subdiv=religion_belief [last visited on 4 March 2005].
[2] The Guidelines were adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), and were welcomed by the OSCE Parliamentary Assembly at its Annual Session (Edinburgh, 5-9 July 2004). The Guidelines have also been commended by the U.N. Special Rapporteur on Freedom of Religion or Belief. Report of the Special Rapporteur on the Freedom of Religion or Belief to the 61st Session of the Commission on Human Rights, E/CN.4/2005/61, para. 57. The Advisory Panel has been restructured and expanded over the past year, and the Advisory Council that has prepared this document is a subunit of the larger Advisory Panel that has been tasked with undertaking the kinds of reviews contemplated by the Guidelines. Because of the shortness of time in preparing for a roundtable to be held in Belgrade on March 17, 2005, it has been necessary to compress the process of preparing this analysis.
[3] *See, e.g.*, International Covenant on Civil and Political Rights, adopted and opened for signature by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, entered into force 23 March 1976 (hereinafter "ICCPR"); International Covenant on Economic, Social and Cultural Rights,

commitments[5] that codify the fundamental right to freedom of religion or belief in international law.[6]

III. EXECUTIVE SUMMARY

4. The major findings and concerns of the Comments are summarized here, with notes indicating where these major points are more fully addressed in the Comments.

1. The Draft Law contains serious deficiencies regarding purpose, form and structure that demand comprehensive amendments or the creation of a new draft on this issue. The main purpose of a law on the Freedom of Religion and Belief must be to facilitate and not to obstruct the exercise of the respective internationally recognized rights.

2. The Draft Law falls short of addressing basic structural issues regarding the freedom of religion or belief. It does not make clear that all persons enjoy these rights and that the acquisition of a registration is not a prerequisite for the exercise of the freedom of religion and belief. Furthermore, the Draft Law does not provide mechanisms to allow all religious groups to obtain legal personality.

3. The definition of religious 'communities', 'groups' and 'gatherings' in the Draft Law and the relationship between them needs to be clarified. [9-13]

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adopted and opened for signature by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, entered into force 3 January 1976 (hereinafter "ICESCR"); Convention on the Rights of the Child, adopted and opened for signature by United Nations General Assembly Resolution 44/25 on 20 November 1989, entered into force 2 September 1990 (hereinafter "CRC"); European Convention for the Protection of Human Rights and Fundamental Freedoms and its First Protocol, opened for signature by the Council of Europe on 4 November 1950, entered into force 3 September 1953 (hereinafter "ECHR").

[4] Most notably, the Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly Resolution 217A (III) on 10 December 1948.

[5] For a list of relevant OSCE commitments which the Union of Serbia and Montenegro has accepted as a participating State in the OSCE, see OSCE Human Dimension Commitments: A Reference Guide, [available in English or Russian at http://www.osce.org/odihr/?page=publications&div=intro&subdiv=osce_hdc, last visited on 4 March 2005.]

[6] The major international instruments relied upon are excerpted in Appendix I of the *Guidelines.* *Guidelines*, Appendix I, pp. 31-51.

4. Numerous articles of the Draft Law are either uncertain or too restrictive and could be used as a justification to prevent normal and ordinary religious expression and education. The respective provisions should be amended or removed. [16-23, 25-27]

5. Art.31 limits the rights of religious groups and communities to collect voluntary contributions and suggests that non-registered groups do not have such a right at all. [24]

6. The registration procedure should be revised in order to satisfy the requirement of a “limitation prescribed by law” settled in Art.9 (2) of the ECHR:

    a. The provisions regarding the eligibility to seek registration are vague and could be applied in a way to exclude religious communities from registration. [29-31]

    b. Art.9 should be removed since it is unclear and could be used to put a ban of 50 years on acquiring the status of a legal entity by religious gatherings. [32]

    c. The Draft Law does not set out criteria regarding the request for registered status. In this respect, the Agency has too much discretion without any criteria in the Draft Law to govern it.[33-37]

    d. The Draft Law should ensure that the Council established under Art.17 does not participate in the decision making process concerning the registration or withdrawal of registration. [38]

    e. Art.15 dealing with the termination of registered status raises questions of proportionality. [39-40]

    f. The relationship between Art.15 and Art.16 (3) should be clarified. [41]

IV. COMMENTS ON THE LEGISLATION UNDER CONSIDERATION

1. THE GENERAL SCOPE OF THE DRAFT LAW

5. According to Article 1(1), the purpose of the Draft Law is to 'regulate the position, establishment and activities of religious groups and Communities and the realization of the freedom of beliefs, expression of religious and religious association'. [sic] Article 1(2) sets out a general guarantee of the right to freedom of conscience and religion for all men (which presumably refers to all persons) 'according to the constitution' and the 'highest international standards for human rights'. This, however, appears to be merely declaratory, since this is to be understood 'In sense with Paragraph (1)'. In other words, it is through Article 1(1) that the aims of Paragraph (2) are achieved. It appears, then, that this law purports to set out a comprehensive regulatory framework within which the freedom of religion or belief may be exercised.

6. It is commendable that the draft law acknowledges the importance of constitutional and highest human rights. Unfortunately this draft law falls short of this objective.

2. THE FREEDOM OF RELIGION OR BELIEF

7. International standards require that everyone within the jurisdiction of a state is entitled to enjoy the freedom of thought, conscience and religion, and to manifest the freedom of religion or belief – rights that may be limited only when they are "prescribed by law" and that such limitations are "necessary in a democratic society" in order to protect specific and limited state interests. It is now widely acknowledged that laws must provide a mechanism to allow religious groups to obtain legal (or juridical) personality in order to facilitate the practical enjoyment of this right.

8. Registration of religious groups may be acceptable when they genuinely facilitate religious life within a state, rather than impose restraints on it. It is acceptable for registration to be required in order that certain benefits be accorded to religious groups meeting certain fair and objective criteria, and they must be non-discriminatory in both

form and practice. It is clear that this Draft Law falls short of these requirements in numerous respects.

9. The Draft Law utilizes three classifications: Religious Communities, Religious Groups and, in Article 9, ‘Religious Gatherings’. The boundaries between these classifications (at least in the English translation) are unclear. It appears from Article 2 that Religious Communities and religious Groups are differentiated from each other on the basis of their institutional arrangements, that is, Religious Communities are identified by having a particular religious confession whereas Religious Groups are not. Article 9 then refers to ‘Religious Gatherings’ which may seek to become registered as a religious ‘Community’. The legal status of communities or groups is, however, only achieved through enrollment/registration, as provided for in Article 3(1) and in accordance with Article 8.

10. This requirement sets up a series of confused relationships that needs to be clarified. It appears that Communities and Groups may acquire registered status in accordance with this law and that these are seen as separate forms of religious bodies that are differentiated by questions of internal institutional and/or confessional matters. This is acceptable. It does not seem to be the case that there is a ‘hierarchical’ relationship between Communities and Groups with the former enjoying a different set of benefits to the latter. This too is acceptable. There are, however, several problems.

11. A) According to Article 2(1), the definition of Religious Communities includes the element of their being engaged in the ‘practice’ of religion and religious rituals. The scope of the word ‘practice’ needs to be clarified. Although found in ECHR Article 9 and all statements of the Freedom of Religion or Belief, it is usually accompanied by ‘worship, teaching and observance’. It is possible that in the context of this law it might have a narrower meaning, and this needs to be explored. It is beyond the scope of these brief comments to do so in detail.

12. B) Article 2(2) defines religious groups as comprising those who ‘express certain religious beliefs and religious rituals’ and do not belong to an already registered religious community. This does not include the element of practice, and might also suggest that

those who were formally a part of a religious community cannot subsequently seek registration as a religious group. (It is unclear whether it is the ‘group’ or the individuals who comprise the group that must not be a part of an already registered community).

13. C) The idea of ‘religious gatherings’ in Article 9 is most unclear. It would seem that groups of believers may comprise ‘gatherings’ which do not have legal entity status but which are entitled to seek such status in accordance with that Article. This is very problematic as it suggests that these ‘religious gatherings’ may have no legal standing in their own right (except as claimants to registered status) and their capacity to enjoy the freedom of religion of belief in their own right is at best unclear. It is also unclear why ‘religious gatherings’ should only be entitled to seek registration as ‘communities’ and not ‘groups’.

14. It is clear that a number of basic structural issues need to be addressed. The Draft Law should make it clear that all persons enjoy the freedom of thought, conscience and religion and the freedom to manifest their religion or belief in the manner provided for in the OSCE commitments and the principal international obligations:

- It needs to be made clear that acquiring registered status is not a prerequisite for the enjoyment of the freedom of religion.

- The Draft Law should provide means through which all groupings of religious believers can acquire the degree of legal personality necessary for them to exercise this right.

- In terms of the current draft, the definition of religious ‘communities’, ‘groups’ and ‘gatherings’ and the relationship between them needs to be clarified.

3. THE CONTENT OF THE FREEDOM OF RELIGION

15. The Draft Law contains a series of articles which set out in greater detail aspects of the content of the freedom of religion.

3.1 RELIGIOUS RITUALS

16. Articles 18-21 concern religious rituals and other forms of religious expression. Article 18(1) says that these are to be conducted in 'temples, cemeteries and other premises' owned by the communities and groups. Article 18(2) is difficult to understand in translation, but presumably means that communities and groups may also perform rituals and acts of religious expression in other premises and public places provided that the rights and 'feelings' of others are not violated. The idea of 'feelings' of others is much too vague and could be used as a justification to prevent normal and ordinary religious expression. It should be greatly restricted or eliminated.

17. The second and closely related problem is that the Draft Law seems to provide that those 'gatherings' and other groups of believers who do not have registered status can only undertake religious acts in premises, whether owned or rented by them as collectives or individuals, subject to the same restrictions. Thus, it seems that non-registered groups do not have a right to perform religious acts in private or in public, if the religious 'feelings' of others are offended by their doing so. It may also be the case that unregistered groups are not allowed to own or rent premises for religious purposes. Similarly, it is not clear why in Article 21 an express right to organize outings to religious ceremonies and sacred places should be reserved to registered groups. Both Articles 18 and 21 appear to be seriously defective and should be narrowed or eliminated.

18. Article 19(1) concerns the involvement of juveniles in religious rituals and requires the consent of parent or tutors if the child is ten or younger. Arguably, this is a low age at which to presume full capacity. Another problem is what is meant by 'tutor'. If this is a reference to a guardian, etc., then it is acceptable, but it needs clarifying. There may be

difficulties because of the need to have the consent of both of the child's parents and this too may need revisiting.

19. Article 19(3) pertains to visits by religious officials to meet with persons in hospitals, prisons, and other facilities. It contains the vague restriction that visits must be consistent with "house rules or regulations." Although reasonable rules and regulations are permissible, they should never be allowed to discriminate among religious and belief groups, nor should they unnecessarily deny access to religious advisors.

3.2 RELIGIOUS EDUCATION OF COMMUNITIES AND GROUPS

20. Articles 22-29 relate to religious education by registered communities and groups, suggesting that non-registered believers may not do so. If this is the case, then the law is seriously defective as such groups must be free to educate their adherents within the framework of their own believe systems (subject to appropriate safeguards).

21. Article 22(2) contains the same problems as Article 18, described above, by prohibiting religious education in public premises (this is unclear) and in private homes if it offends the religious feelings of others. This is unacceptable for the reasons stated above, and it also suggests that believers cannot teach the tenants of their faith in their own homes if other find this objectionable. This must be revised and corrected.

22. Article 23-27 seems to address religious institutions and the education of those training for religious practice (i.e. as clergy). Assuming this to be the case, the restrictions placed on religious establishments and the degree of scrutiny of their curriculum and content appear to be too intrusive, as is article 26(3)-(4) concerning the conditions under which non citizens might be involved in teaching in such training establishments.

23. Articles 28 and 29, concerning the establishment of other forms of social or charitable institutions and the use of the media and of printed materials, are simply too vague and should be clarified.

3.3 INCOME OF COMMUNITIES AND GROUPS

24. Articles 30-32 cover various financial matters, and allow communities and groups to be eligible for support from government sources. This appears to provide a benefit to registered groups. Article 31 is problematic because it seeks to limit the right of religious groups and communities to collect voluntary contributions only in those places where religious rituals or acts of expression are expressly authorised under Article 18 (the numbering appears to be wrong at this point). This would prohibit door to door collections for general charitable or religious causes and appears overly restrictive. It also suggests that non registered groups may not conduct such activities at all (or indeed, collect financial contributions from their adherents!). Article 31 (5) appears to give individuals a right to bring lawsuits if they believe that others are violating the law, a provision that is very questionable and highly likely to be abused.

4. LIMITATIONS ON THE FREEDOM OF RELIGION

25. Article 6 requires that the activities of religious communities and groups be 'public'. The wording of this provision is very questionable, as it could easily be used against minority or disfavoured religions. This could be avoided in part by acknowledging that Article 6 must be interpreted in such a way as not to undermine Article 5 which is a welcome recognition of the internal autonomy of religious communities and groups. It is important that this is not seen as a means of limiting freedom of religion. Article 6(2) provides that the activities of communities and groups cannot be against 'citizens'. This is wholly inadequate, and the limitation on activities of religious communities and groups must extend to all those within the jurisdiction: it is not acceptable to say that the activities of registered groups was aimed at foreigners and so was acceptable. The limitation on activities not in accordance with 'international conventions' is very peculiar- and presumably relates only to those concerning human rights. Even this is unclear in scope and this entire section needs to be reconsidered. It would be better if the wording of Article 9(2) of the ECHR were used at this point.

26. To the extent that registered status is de facto a prerequisite for the enjoyment of the freedom of religion, Article 7 also gives cause for concern on a number of levels. First, it is capable of being used to stifle religious expression by believers and safeguards are needed in this regard. Secondly, Article 7(4) seems to grant a broad-ranging right of action to citizens that can lead to the de-registration of the community or group and this may also be capable of misuse. Third, there is a need to differentiate between the activities of *individual* members of religious communities and groups and those of the *communities and groups* themselves. At the moment, it appears that Article 7 is addressing the collective bodies, and it is important that the actions of individuals are not imputed to them in an unacceptable fashion.

27. Finally, Article 20 provides for a general restriction on the enjoyment of the freedom of religion on the authority of the ministry of the interior when reasons for 'special measures' exist. The grounds suggested seem to go far beyond those permitted under ECHR Article 15, and this article needs to be revised.

5. THE CURRENT SCHEME OF REGISTRATION

28. This section will make some comments on the scheme provided for in the current draft.

5.1 ELIGIBILITY FOR SEEKING REGISTRATION ACCORDING TO ART.3

29. Article 3(1) limits the right to establish communities and groups to citizens. The meaning of this is unclear. Does it affect those submitting the case to the agency, or does it relate to the membership of the gathering or organisation in question? This could also raise questions of discrimination.

30. Article 3(2) identifies 5 existing communities by name and, it seems, all others, and exempts them from the need to re-register. This is welcome, but may need some clarification in the light of Article 34, the meaning of which is unclear.

31. Article 3(3) is capable of being applied in such a way as to exclude some religious communities from registration, given the potentially subjective nature of the identification of a ‘religious confession’.

5.2 THE CRITERIA AND PROCESS FOR ACHIEVING REGISTERED STATUS

32. The registration criteria are potentially the most troubling portions of the Draft Law, for two very different reasons. First, Article 9 provides that ‘religious gatherings’ may seek the status of a religious community only after a period of 50 years from the date of their primary registration, and seek to reapply after a 10 year period should this not be successful. As has already been said, there is no definition of a ‘religious’ gathering and so it is unclear what this refers to. If any aspirant group or community is a ‘gathering’ then this would place a 50 year bar on acquiring legal entity status and this manifestly unacceptable. However, it is equally unclear what is meant by ‘primary registration’, since this is not referred to elsewhere in the draft law. Nor is there any indication of an appeals procedure against a refusal to register, and the delay of 10 years before reapplying is also unacceptable. In short, this entire Article is unsatisfactory and clearly violates international standards and should be deleted.

33. This, however, does not remove all difficulties. The Draft Law is silent on the criteria which are to be employed by an Agency or Court in responding to requests for registered status. According to Article 12, registration forms must be submitted to the Agency within 30 days of the decision made by the body to seek registered status. It is very difficult to understand why this is necessary. The Documentation to be submitted is set out in Article 12 (2) and appears largely factual in nature, with the exception of the final clause asking for ‘other data and documents that will prove and justify the establishment of the same’, the meaning of which is not clear.

34. It appears from the text that the Agency or Court will have a great deal of discretion in relation to the request. This is confirmed by Article 11, which seems to provide that the Agency will determine the nature of the forms which need to be completed. According to

Article 3, the Agency will provide an opinion on the application which will be forwarded to the Court.

35. Article 13 is also unclear (possibly due to the English translation). That is, it is unclear whether the Court is required to accept the opinion of the Agency and either accept the group or community on the Docket or inform the applicant that its application has been unsuccessful, or whether the Court has a substantive role in reviewing the decision of the Agency, and if so, the relevant criteria.

36. Other aspects of Article 13 are also problematic, including Article 13 (4), according to which a failure to respond to a request within a potentially very short time period will be taken as a withdrawal of the request.

37. In sum, the Agency appears to have too much discretion to determine the material to be requested, and there are no criteria set out in the law which govern the exercise of its discretion on receipt of an application. The role of the Court in relation to the opinion of the Agency is unclear. This entire procedure runs of risk of not satisfying the 'prescribed by law' requirement for the purposes of international human rights law and should be revised.

38. These difficulties are compounded by Article 17, which provides for the establishment of a 'Council for inter-religious relations' within the Agency which is tasked with examining and providing comments on 'certain issues which have importance for a religious community and religious group, and which is comprised of representatives from religious communities and groups (i.e. registered bodies) and officials. It is obvious that a Council of this nature should not be used in the process of decision-making regarding requests for registration or termination. Although the Draft Law does not provide for this directly, it is important to ensure that this does not occur.

5.3 TERMINATION OF REGISTERED STATUS

39. There are also grounds for concern regarding the termination of registered status. These comments should be read in conjunction with the observations above regarding Article 7.

40. Article 15 permits the public prosecutor and the Agency to initiate a process for the termination of registered status on the grounds that either: (a) the data submitted at the time of registration was false, or (b) it is acting unlawfully. As regards the first ground, since the nature of the data in question is not set out in the law (but depends on the Agency), it is impossible to comment on the ground of false data but there are serious questions of proportionality here, and it is important to stress that registration should not be revoked for trivial reasons or discrepancies. There is a need to stress the materiality (seriousness and relevance) of the falsehood of date. In addition, the idea of 'falsehood' needs elaboration: is this mere 'inaccuracy' or more?

41. As to the second ground, it is clearly acceptable that a registration be withdrawn in some circumstances -- but not every unlawful act of an organization should be sufficient to allow forced de-registration, which is an extreme step. There is also a need for the relationship between Article 15 and 16(3) to be clarified, since this seems to suggest that the community or group will be deemed terminated automatically by operation of law and this appears inconsistent (and inappropriate).

6. CONCLUSION

42. This is an initial survey of the Draft Law, highlighting some of the most difficult features. It appears that the range of problems is serious, and the structural flaw deep; therefore, it would be advisable to set this draft aside and produce a new draft in the light of further consultations regarding the purpose, form and structure of appropriate legislation or to draft comprehensive amendments with respect to the above mentioned issues. Above all else, the purpose of religion laws must be to *facilitate the enjoyment of the rights of religion and belief* by the adoption of an appropriate regulatory framework and not to place unnecessary hurdles in the path of believers seeking to exercise their internationally recognized rights.