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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**GUIDELINES FOR LEGISLATIVE REVIEWS
OF LAWS AFFECTING RELIGION OR BELIEF**

**OSCE/ODIHR PANEL OF EXPERTS
ON RELIGION OR BELIEF**

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Introduction

This document has been prepared for the purpose of providing guidance for members of the Panel of Experts on Religion and Belief (Panel) of the Office of Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE), who may be involved in either reviewing State legislation or providing consultations regarding laws pertaining to freedom of religion or belief. This draft incorporates comments received from members of the Panel as well as from members of the Venice Commission. The document is not designed to be a comprehensive statement of all relevant human rights standards related to freedom of religion or belief, but to provide an overview and suggestions for reviewers.

It is expected that it will continue to be revised over time. The Panel continues to welcome additional comments and suggestions. However, all such suggestions should be very specific and propose specific language either for inclusion or deletion, and suggestions should clearly note where in the Guidelines the changes should be made. Suggestions should be sent to the Rapporteur, Jeremy Gunn: JGunn@law.emory.edu.

I. Panel Procedures in Preparation for Review of Draft Legislation (or Consultation)

This section outlines the typical circumstances under which draft legislation affecting religion or belief may be reviewed by the Panel of Experts on Religion or Belief (Panel) of the Office of Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE). Although this section explains the typical circumstances under which a review is likely to take place, there are other ways in which States may solicit the Panel's assistance, including consultations to parliamentary committees or to State bodies. In addition, the Panel welcomes the opportunity to work cooperatively with other institutions, including the European Commission of Democracy through Law (Venice Commission) of the Council of Europe, to provide joint reviews of legislation affecting religion or belief. Depending on the circumstances, the procedures described below will change to reflect the participation of other entities assisting in the review or other State institutions soliciting advice.

The typical circumstances for Panel review of draft legislation by OSCE Participating States affecting religion or belief are as follows:

OSCE/ODIHR and State make initial contacts. The OSCE, through ODIHR, offers technical assistance and advice on legislative drafting following formal requests by interested participating States. In Decision No. 4/03 on Tolerance and Non-Discrimination, the OSCE Ministerial Council "commits to ensure and facilitate the freedom of the individual to profess and practice a religion or belief, alone or in community with others, where necessary through transparent and non-discriminatory laws, regulations, practices and policies. [It also encourages] participating States to seek the assistance of the ODIHR and its Panel of Experts on Freedom of Religion or Belief." In line with the above-mentioned documents, legislative reviews or analyses will only be conducted in a participating State only after receipt of an invitation or request for assistance from a relevant State body of that participating State. To the extent that a State is considering new legislation, but has not yet prepared a draft, the Panel also can provide consultations.

Panel member(s) identified to conduct review. Upon receipt of an invitation to review a law or a request for assistance from a relevant political institution, a decision will be made by ODIHR on whether to proceed. If it is decided to proceed, ODIHR will assign primary responsibility to a Panel member (or members) and the draft laws will be distributed immediately to all members of the Panel to allow them to comment and contribute from their perspective, thereby ensuring that the final review is a document of the Panel as a whole.

Translations of important texts. The draft law, as well as other important texts, will be translated by the ODIHR where necessary and provided to the Panel.

Identify the entire corpus of relevant law and practice. When reviewing a draft law, the Panel will also take account of the entire corpus of relevant law and practice (for example, constitution, Civil Code, Criminal Code, etc.) and examine in particular the effect of the draft law on how freedom of religion or belief is treated in the legal system.

Site visit (if possible). Wherever possible, an in-country assessment trip will be organized to gain an understanding of the entire corpus of relevant law and practice and to meet with government officials, parliamentarians, political parties, religious and belief groups, academics, and NGOs. Further to the OSCE policy of developing and supporting consultation with the public and increasing input from civil society into the legislative process.¹ Whenever possible and appropriate, a roundtable discussion will be held to facilitate public input into the process.

Identify issues of importance to the State and NGOs. Meetings with relevant State authorities will also be carried out to ascertain issues of importance to the State, as well as the aims the draft law is intended to achieve. The relevant State authorities will also be invited to nominate a focal point for further interaction on the review.

Consultations with OSCE Missions, Council of Europe, International Organisations. Meetings with the OSCE mission, which will be consulted from the start of the process, Council of Europe, and other international organisations present in the country, will also be carried out to ascertain their views.

Draft analysis by Panel member(s). Subsequent to the necessary consultations outlined above, the persons with primary responsibility for the draft will prepare a draft for circulation to the Panel.

Circulation of draft review to entire Panel. Every effort will be made to circulate the draft review as early as possible to all Panel members in order to give them time for additional comments to be included in the review. This will also give other Panel members the opportunity to suggest additional or alternative areas of focus at an early stage in the review.

Incorporate comments of Panel and prepare revised draft. The drafter will seek to incorporate all comments from the Panel to ensure that the final document reflects the consensus of the Panel as a whole. The revised review will be re-circulated to the Panel if appropriate, particularly if comments from an outside source, such as the European Commission for Democracy through Law of the Council of Europe (Venice Commission), have been solicited and incorporated, before the review is sent to ODIHR for final editing and delivery to the requesting authority in the participating State. Once a reasonable amount of time has passed for the requesting authority to consider the comments, it shall be circulated to other interested parties -- governmental institutions, parliamentarians, religious and belief groups, academia, NGOs, IGOs, etc. Where necessary, the review shall be translated by the ODIHR.

Follow-up visit (if possible). Where possible and practical, a follow-up visit will be organized to discuss the review with the requesting authority, governmental institutions, parliamentarians, political parties, religious and belief groups, academia, NGOs, IGOs, etc.

The Panel does not propose statutory language. The Panel's work is strictly advisory in order to assist in understanding international standards and OSCE Commitments of participating States. Throughout the process of preparing the comments, the Panel should refrain from proposing statutory language. It should limit itself to commenting on the language already formulated, pointing out deficiencies where necessary, and referring to international documents and commitments.

¹ Document on the Moscow Meeting, 1991, &18.1: Legislation will be adopted as the result of an open process reflecting the will of the people; see also Copenhagen Document, 1990, & 5.8.

II. Sources for standards to be used by the Panel

The sources of law identified below are among the most important to which Panel members will refer in conducting their reviews. Panel members will have a special interest in applying OSCE commitments when conducting reviews requested by OSCE Participating States.

A. International Conventions, United Nations, and UN Specialized Agencies

- International Covenant on Civil and Political Rights (1966) (ICCPR)
 - International Covenant on Economic, Social and Cultural Rights (1966)
 - Universal Declaration of Human Rights (1948) (UDHR)
- Relevant obligations from other international conventions
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)
- United Nations Human Rights Committee General Comment 22
- Reports of United Nations Special Rapporteurs
 - Other United Nations and specialized agency documents

B. Council of Europe

- [European] Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR)
- Other Council of Europe documents
- Decisions of the European Court of Human Rights (see Appendix II)²

C. OSCE

- Commitments and Concluding Documents of the OSCE process (particularly the 1989 Vienna 1989 Concluding Document)
- “Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities”
- Previous Panel legislative analyses
- Recommendations by the OSCE High Commissioner for National Minorities
- Other OSCE documents

D. Best practices of States

Examples from States may be cited as illustrative of good practices.

E. Scholarly writings

Writings of recognized scholars may be of value. For some scholarly writings, see Appendix III below.

² It should be noted that although the case law of the European Court of Human Rights is of importance for international human rights law, this does not imply that the domestic case law of civil law countries should be followed.

III. Substantive issues that typically arise in legislation

A. Preliminary review issues

1. *Whether legislation is necessary.* It is important to bear in mind that legislation may not be necessary with regard to many of the issues for which a State might be considering enacting laws. Sometimes special legislation dealing with religious issues is proposed because of public reaction to particular incidents that have stirred public emotions, but that might in fact be better addressed by normal criminal or administrative actions. If a religious group is involved in a fraud or assault, for example, it is not necessarily best to respond by enacting new laws on religion. It is worth considering, following this example, whether the laws on fraud and assault may be sufficient without adding a separate offence to cover religion. (See section III.G below.)

2. *The definition of "religion."* Legislation often includes the understandable attempt to define "religion" or related terms ("sects," "cults," "traditional religion," etc.) There is no generally accepted definition for such terms in international law, and many states have had difficulty defining these terms. It has been argued that such terms cannot be defined in a legal sense because of the inherent ambiguity of the concept of religion. A common definitional mistake is to require that a belief in God be necessary for something to be considered a religion. The most obvious counterexamples are classical Buddhism, which is not theistic, and Hinduism (which is polytheistic). In addition, terms such as "sect" and "cult" are frequently employed in a pejorative rather than analytic way. To the extent that legislation includes definitions, the text should be reviewed carefully to ensure that they are not discriminatory or that they prejudice some religions or fundamental beliefs at the expense of others.

3. *Religion or belief.* International standards do not speak of religion in an isolated sense, but of "religion or belief." The "belief" aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus atheism and agnosticism, for example, are generally held to be equally entitled to protection to religious beliefs. It is very common for legislation not to protect adequately (or to not refer at all) to rights of non-believers. Although not *all* beliefs are entitled to equal protection, legislation should be reviewed for discrimination against non-believers.

4. *Religious "extremism."* The question of religious "extremism" and state security has, during the last few years, been increasing in importance. There is no question that some groups and individuals, acting in the name of religion, have been involved in political violence. Regardless of whether their motivation is sincere and religious, or political and manipulative, it is an issue to which states understandably and appropriately need to respond. The concern, of course, is that States may use "extremism" as a rationale not only for responding to groups that are genuinely violent and dangerous, but that they may use the rhetoric of "extremism" to suppress legitimate religious expression or to target groups whose beliefs may simply be different or unusual. With regard to legislation, it is important that laws focus on genuinely dangerous *acts* or commission of *violence*, and not unduly grant police powers to the State to suppress groups that are merely disfavoured or unusual.

5. *Inter-relationship of human rights norms.* International standards pertaining to freedom of religion and belief do not arise solely from clauses in covenants, conventions, and documents addressing religion and belief specifically. They come also from other clauses, such

as those pertaining to association, expression, and rights of parents. For example, some European Court of Human Rights cases that with important implications for religion do not necessarily rely on article 9, but on other grounds. Important examples include Hoffmann v. Austria (1993).

6. *Margin of appreciation.* International standards generally, and the European Court of Human Rights specifically, presume that there is a “margin of appreciation” that must be respected that allows States to enact laws and implement policies that may differ from each other with regard to different histories and cultures. While this margin of appreciation should be respected, it should not be interpreted with a degree of latitude that would permit the undermining of the substance of human rights values. While laws of different States do not need to be identical and while they should be allowed some flexibility, this flexibility should nevertheless respect the important underlying rights.

B. Basic values underlying international standards for freedom of religion or belief

Broad consensus has emerged within the OSCE region on the contours of the right to freedom of religion or belief as formulated in the applicable international human rights instruments. Fundamental points that should be borne in mind in addressing legislation in this area include the following major issues.

1. *Internal freedom (forum internum).* The key international instruments confirm that “[e]veryone has the right to freedom of thought, conscience and religion.” In contrast to manifestations of religion, the right to freedom of thought, conscience and religion within the “forum internum” is absolute and may not be subjected to limitations of any kind. Thus, for example, legal requirements mandating involuntary disclosure of religious beliefs are impermissible. Both the UDHR (art. 18) and the ECHR (art. 9) recognize that the protection of the internal forum includes the right to change one’s religion or belief. The U.N. Human Rights Committee’s General Comment No. 22 (48) on Article 18 states that “freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including, inter alia, the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief.” ***In any event, the right to “change” or “to have or adopt” a religion or belief appears to fall within the domain of the absolute internal freedom right, and legislative provisions which impose limitations in this domain are inconsistent with internal freedom requirements.***

2. *External freedom (forum externum).* Everyone has the freedom, either alone or in community with others, in public or private, “to manifest his [or her] religion or belief in worship, observance, practice, and teaching.” ICCPR, Art. 18.1. As suggested by this phrase, the scope of protected manifestations is broad. Thus, legislation that protects only worship or narrow manifestation in the sense of ritual practice is inadequate. Also, it is important to remember that it is both the manifestations of an individual’s beliefs and those of a community that are protected. Thus, the manifestation of an individual’s beliefs may be protected even if the individual’s beliefs are stricter than those of other members of the community to which he or she belongs. Recognizing this fact, however, does not imply that the beliefs of a community as a collectivity do not also warrant respect. Manifestations of religion or belief, in contrast to internal freedom, may be limited, but only under strictly limited circumstances set forth in the applicable limitations clauses. Limitations are permissible only if warranted under these limitation clauses, as described in section III.G below.

3. *Equality and non-discrimination.* States are obligated to respect and to ensure to all individuals subject to their jurisdiction the right to freedom of religion or belief without distinction of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national or other origin, property, birth or other status. Legislation should be reviewed to assure that any differentiations among religions are justified by genuine objective factors and that the risk of prejudicial treatment is minimized or better, totally eliminated. Legislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for ongoing discrimination.

4. *Neutrality and impartiality.* As stated by the European Court of Human Rights in *Metropolitan Church of Bessarabia v. Moldova*, "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. . ."³ Among other things this obligation includes an obligation to refrain from taking sides in religious disputes. When faced with religious conflicts, "the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."⁴ In legislation dealing with the structuring of religious communities, the neutrality requirement "excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed." Accordingly, "[s]tate measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, . . . constitute an infringement of the freedom of religion." Similarly, "where the exercise of the right to freedom of religion or of one of its aspects is subject under domestic law to a system of prior authorisation, involvement in the procedure for granting authorisation of a recognised ecclesiastical authority cannot be reconciled with the requirements of paragraph 2 of Article 9." In general, the neutrality requirement means that registration requirements that call for substantive as opposed to formal review of the statute or charter of a religious organisation are impermissible.

5. *Non-coercion.* No one shall be subject to coercion that would impair his or her freedom of religion or belief. This aspect of freedom of religion or belief protects against practices that use compulsion to go beyond reasonable persuasion, either by *improperly inducing* an individual to change a religion or belief, or *improperly preventing* an individual from changing religions or beliefs. As a historical matter, the adoption of this provision was prompted more by concerns about legal and social pressures that would prevent a person from changing religions than by worries about missionary work, but the norm applies to use of compulsion in either direction. Although it may be permissible for a State to enact a law preventing bribes or other extreme material inducements, legislation should be reviewed to ensure that the proposed measures are designed to protect people from unwarranted pressures on people to change religions rather than unwarranted State pressures on people *not* to change religions. The non-coercion requirement also extends to legal requirements such as oath taking, flag salute requirements, or other State-mandated activities which force an individual to express or adopt beliefs inconsistent with those held by the individual. Coercive features of legislation should be reviewed with particular care.

6. *Rights of parents and guardians.* States are obliged to respect the liberty of parents, and, when applicable, legal guardians of children to ensure the religious and moral education of

³ *Metropolitan Church of Bessarabia v. Moldova*, & 116 (ECtHR 2001).

⁴ *Id.*, citing *Serif v. Greece*, & 53 (ECtHR 1999).

their children in conformity with their own convictions, subject to providing protection for the rights of each child to freedom of religion or belief consistent with the evolving capacities of the child. This protection is spelled out with particular clarity in Article 5 of the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief and Article 14 of the Convention on the Rights of the Child. Legislation should be reviewed to assure that the appropriate balance of autonomy for the child, respect for parent's rights, and the best interests of the child are reached. Problematic in this regard are provisions that fail to give appropriate weight to decisions of mature minors, or that interfere with parental rights to guide the upbringing of their children. There is no agreed international standard that specifies at what age children should become free to make their own determinations in matters of religion and belief. To the extent that a law specifies an age, it should be compared to other State legislation specifying age of majority (such as marriage, voting, and compulsory school attendance).

7. *Toleration and respect.* Principle 16(b) of the OSCE's Vienna Concluding Document provides that participating States will "foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers." Legislation should be assessed with regard to its compliance with this commitment. In general, in a world committed to respect for human dignity, mere toleration is scarcely enough; a climate of genuine respect is to be preferred. Although there is no requirement that the teaching of tolerance be included within any particular statute or statutory scheme, it may be appropriate to suggest the possibility of including such provisions.

8. *Right to association.* OSCE commitments have long recognized the importance of the right to acquire and maintain legal personality.⁵ Because some religious groups object in principle to State chartering requirements, a State should not impose sanctions or limitations on religious groups that elect not to register. However, in the contemporary legal setting, most religious communities prefer to obtain legal personality in order to carry out the full range of their activities in a convenient and efficient way. Because of the typical importance of legal personality, a series of decisions of the European Court of Human Rights recognized that access to such a status is one of the most important aspects of the right to association,⁶ and that the right to association extends to religious associations.⁷ Undue restrictions on the right to legal personality are, accordingly, inconsistent with both the right to association and freedom of religion or belief. (For registration of religious or belief associations, see section III.F below.)

9. *Right to effective remedies.* Parties asserting religious claims have rights to effective remedies. This is rooted in general rule of law conceptions, but has found specific embodiment in a number of international norms. Among other things, as indicated by provisions such as ICCPR article 2, States have a general obligation to give practical effect to the array of norms spelled out in international human rights law. More specifically, provisions such as ECHR articles 6(1) and 13 require the effective remedies be made available. The European Court has sustained the right of a religious community to acquire legal personality on the basis of ECHR

⁵ See, for example, Principle 16(c) of the Vienna Concluding Document.

⁶ *Sidiropoulos v. Greece* (ECtHR 1998); *United Communist Party of Turkey v. Turkey*; (ECtHR 1998); *Gorzelik v. Poland*, & 55 (ECtHR 2001).

⁷ See, for example, *Hasan and Chaush v. Bulgaria*, & 62 (ECtHR 2000); *Metropolitan Church of Bessarabia v. Moldova*, & 118 (ECtHR 2001)

article 9, construed “in light of” article 6.⁸ Particularly significant in this area is that religious organisations be assured of prompt decisions on applications and a right to appeal, either in the legislation under consideration or under applicable administrative review provisions spelled out in separate legislative enactments.

C. Religion and education (including financing)

Primary and secondary education is one of the most complicated areas pertaining to rights of religion or belief. (Post-secondary education raises similar issues, though they typically are less complex versions of the issues that arise in primary and secondary schools.) Laws involving education should be reviewed to identify these and other issues raising concerns regarding international standards and OSCE commitments. Among the most common (interrelated) issues are the following:

1. Parental rights related to education of their children. It is generally recognized that parents have the right to determine the religious education of their children.⁹

2. State financing of religious education (both within State and community schools and religious and other private schools). There is a wide variety of State practices regarding State financing of religious education both within State schools and private religious schools. The most obvious potential issue is whether the financing, when provided, is offered on a non-discriminatory basis.

3. Religious, ethical, or humanist education in State and community schools. There is a wide variety of State practices regarding religious, ethical, and other forms of ideological education in State schools. When considered in conjunction with the rights of the parents (see section III.B.6 above), it is presumably the case that children cannot be required to take instruction in denominational or ideological education against their parents’ wishes, though general education about religions, beliefs, and ethics generally is permissible. Some States require students to take either religious or ethical (life studies) education, which presumably is a permissible approach, though States should be sensitive to the religious and ideological concerns of parents on behalf of their children and should seriously consider providing opt-out possibilities when the education may interfere with deeply held religious and ideological beliefs. (The State may, however, take positions against extreme ideological positions, such as Fascism and anti-Semitism.)

4. State authorization of private religious or philosophical schools. It presumably follows from section III.B.6 above that parents should be able to educate their children in private religious schools or in other schools emphasizing ideological values. Certainly the dominant practice among OSCE participating States is to allow for private religious and ideological schools, though the State is permitted to establish neutral criteria for the teaching of standard subjects such as mathematics, history, science, and languages. The State also permissibly may regulate teacher certification. The difficulty may arise when the State discriminates between religious or ideological groups that are permitted to operate schools and those that are not. For example, some States may permit religious schools to be operated only by “registered religions.”

⁸ Metropolitan Church of Bessarabia v. Moldova, &118 (ECtHR 2001); Canea Catholic Church v. Greece (ECtHR 1997).

⁹ See for example General Comment 22 & 6; ECHR protocol 2 art. 2; 1981 Declaration art. 5; Vienna Concluding Document 16.7; and section III.B.6 above.

Although it is possible to imagine cases where it would be acceptable to require that religious schools be operated only by registered religions, such a requirement becomes presumptively unacceptable wherever State policy erects discriminatory obstacles to registration for some religious groups. It is important to evaluate whether laws are neutral and non-discriminatory.

5. Rules pertaining to hiring and firing teachers and other school personnel on grounds of religion or belief. Cases involving the hiring and firing of teachers and other school personnel at schools (both State and private) when religion or belief is a factor can be very complicated and fact specific. Religious schools, for example, may require that employees must be members of the religion and may wish to terminate those who leave the religion or engage in conduct that officials deem to be contrary to the ethos of the school. There are many State practices in this regard and it is a continually evolving area of the law. (See also sections III.D and IV.H below.)

6. Religious symbols (and attire) in State schools. There are three principal issues that are likely to arise regarding religious symbols in State schools. First, there is a variety of State practices regarding prohibitions on teachers or other school personnel wearing religious attire while teaching. Second, there is a variety of State practices regarding the placement of religious symbols in classrooms. Third, an issue that has been growing in significance is State prohibition of school children from wearing religious attire -- an issue recently sparked by the Islamic headscarf. International instruments do not speak clearly to these issues, though caution should be offered and general guidelines of promotion of tolerance and non-discrimination should be weighed.

D. Autonomy/self-determination of religious/belief organisations

States have many different practices regarding autonomy (or self-determination) of religious and belief groups. These range from situations where the State formally has authority over the doctrines of established churches to States that are very reluctant to involve themselves in any matter that might be considered “internal” or “doctrinal” to a religious organisation. There is a trend towards extricating the State from doctrinal and theological matters, and this trend will likely continue. It is reasonable to suggest that the State should be very reluctant to involve itself in any matters regarding issues of faith, belief, or the internal organisation of a religious group. However, when the interests of religious or belief groups conflict with other societal interests, the State should engage in a careful and nuanced weighing of interests, with a strong deference towards autonomy, except in those cases where autonomy is likely to lead to a clear and identifiable harm. (For example, if the doctrine of a religious group prohibited individuals from leaving the group, the State might well intervene to prevent the group from using physical compulsion to enforce its doctrine. It is particularly important to consider autonomy as a situation where a limitations analysis should be conducted with care. (See section III.G below.) It should be noted that autonomy issues are particularly likely to arise in contexts where religious or belief organisations are engaged in activities such as operating hospitals, schools, or businesses and where individuals assert that the organisations discriminate (on grounds such as gender or membership in the religion). Although differential treatment may be permissible, it is appropriate to draw attention to the competing values of religious autonomy for institutions and the right of citizens to be free from discrimination on the grounds of religion – particularly when the employers receive public financing or tax deductions for their activities.

E. Clergy/religious leaders

States often enact laws that apply to members of the clergy. (The term “clergy” is broadly understood to identify religious leaders or officials in all religions.) Among the most common (and often interrelated) issues are the following:

1. State benefits to clergy. Many States provide benefits to recognized members of the clergy. The types of benefit that may be available are exemption from military service; the right to perform State-sanctioned marriages; access to provide pastoral care at prisons, hospitals, schools, and the military; salaries paid by the State; and the right not to testify in court (for example “priest-penitent privilege”). Though benefits such as these are part of many State practices, the concern always will be whether such benefits are offered in a neutral way to all religious and belief groups. The procedures for identifying who is a member of the clergy may be a complicated issue involving both secular and religious laws. Some religions have lay ministries where many in a group are considered “clergy,” whereas others may be hierarchical and require theological training and certification. Laws should be reviewed with reference to favouritism or bias among different groups. (See section III.K below.)

2. Social security and tax laws relating to clergy. Laws relating to taxation and retirement benefits may raise specific issues relating to the clergy. Although there are virtually no international standards pertaining to this issue per se, provisions should be reviewed with respect to equality, non-discrimination, and autonomy.

3. Limitations and disabilities on political activities. Some States restrict clergy from participating in activities that are open to other citizens, such as holding political or other State offices. Such laws often reflect particular historical developments within countries and should be reviewed with care.

F. Laws governing registration of religious/belief organisations

1. Registration of religious/belief organisations. Religious association laws that govern acquisition of legal personality through registration, incorporation, and the like are particularly significant for religious organisations.¹⁰ The following are some of the major problem areas that should be addressed:

- Registration of religious organisations should not be mandatory, although it is appropriate to require registration for the purposes of obtaining legal personality and similar benefits.
- Individuals and groups should be free to practice their religion without registration if they so desire.
- High minimum membership requirements should not be allowed with respect to obtaining legal personality.
- It is not appropriate to require lengthy existence in the State before registration is permitted.

¹⁰ See 2001 Seminar on “Freedom of Religion or Belief in the OSCE Region: Challenges to Law and Practice” (http://www.osce.org/documents/odihr/2001/06/1523_en.pdf) and Council of Europe Commissioner for Human Rights Seminar Concerning Church-State Relations In The Light Of The Exercise Of The Right To Freedom Of Religion ([http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/CommDH\(2001\)15_E.asp](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/CommDH(2001)15_E.asp)).

- Other excessively burdensome constraints or time delays prior to obtaining legal personality should be questioned.
- Provisions that grant excessive governmental discretion in giving approvals should not be allowed; official discretion in limiting religious freedom, whether as a result of vague provisions or otherwise, should be carefully limited.
- Intervention in internal religious affairs by engaging in substantive review of ecclesiastical structures, imposing bureaucratic review or restraints with respect to religious appointments, and the like, should not be allowed. (See section III.D above)
- Provisions that operate retroactively or that fail to protect vested interests (for example, by requiring re-registration of religious entities under new criteria) should be questioned.
- Adequate transition rules should be provided when new rules are introduced.
- Consistent with principles of autonomy, the State should not decide that any particular religious group should be subordinate to another religious group or that religions should be structured on a hierarchical pattern. (A registered religious entity should not have “veto” power over the registration of any other religious entity.)

2. *Privileges and benefits of religious/belief organisations.* In general, out of deference for the values of freedom of religion or belief, laws governing access to legal personality should be structured in ways that are facilitative of freedom of religion or belief; at a minimum, access to the basic rights associated with legal personality -- for example, opening a bank account, renting or acquiring property for a place of worship or for other religious uses, entering into contracts, and the right to sue and be sued -- should be available without excessive difficulty. In many legal systems, there are a variety of additional legal issues that have substantial impact on religious life that are often linked to acquiring legal personality -- for example, obtaining land use or other governmental permits, inviting foreign religious leaders, workers and volunteers into a country, arranging visits and ministries in hospitals, prisons and the military, eligibility to establish educational institutions (whether for educating children or for training clergy), eligibility to establish separate religiously motivated charitable organisations, and so forth. In many countries, a variety of financial benefits, ranging from tax exempt status to direct subsidies may be available for certain types of religious entity. In general, the mere making any of the foregoing benefits or privileges available does not violate rights to freedom of religion or belief. However, care must be taken to assure that non-discrimination norms are not violated.

3. *Dissolution provisions.* Religious organisations should be encouraged to provide adequately for what happens in the event of either voluntary or involuntary dissolution of a legal entity of the organisation. Voluntary dissolution should be allowed. Dissolution provisions should be consistent with registration provisions, in that the standards for access to and retention of legal personality should be broadly similar. Care should be taken to avoid vague provisions that allow discriminatory treatment of unpopular groups.

G. Limitations clauses (public order, health, etc.)

International human rights instruments and State constitutions typically identify not only the right of freedom of religion or belief, they also identify the circumstances where a State legitimately may limit the manifestation of those rights. The internal freedom rights of conscience and belief may never be limited by the State. (See section III.B.1) Thus the European Convention on Human Rights (ECHR), for example, contains a “limitations clause” that allows for the restriction of religious manifestations that are “prescribed by law and [that are] necessary in a democratic society in the interests of public safety, for the protection of public order, health

or morals, or for the protection of the rights and freedoms of others.” (ECHR, art. 9.2) The ICCPR’s stated limitations require that they be “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” (ICCPR, art. 18.3)

The standard international analysis, which may vary depending on the country and the status of ratification of international instruments, makes three basic inquiries. First, is the limitation prescribed by law, meaning is it sufficiently clear as to give notice of what is and is not prohibited? Second, is the purported basis for the limitation among those that are identified in the limitations clause? (Note that “national security” is not a permissible limitation under ECHR art 9.2 or ICCPR art. 18.3.) Third, is the limitation proportionate to the public interest that is served?¹¹ Laws must satisfy all three inquiries. The European Court of Human Rights as well as the U.N. Human Rights Committee in the latter’s General Comment 22 state that limitations should be construed strictly.

Article 4(2) of the ICCPR provides that States may make no derogation from the right to freedom of religion or belief, not even in times of public emergency. In this regard, the right to freedom of religion or belief is accorded even higher priority than freedom of expression or freedom of association. This does not mean that other State interests may never override freedom of religion or belief. But it does mean that even during times of public emergency, this fundamental right can be overridden only if this is warranted under the applicable limitations clause.

The reviewer should identify which limitations clauses apply according to applicable international treaties, OSCE commitments, State constitutions, and laws. State laws should be evaluated for internal consistency (is the draft limitation inconsistent with the State constitution?) and are State laws consistent with international obligations?¹²

H. “Foreign” issues

1. *Visas*. States properly have authority to impose regulations concerning entry into their country by foreigners. Typically this involves granting visas of differing kinds. Countries may have legitimate reasons for excluding particular individuals from their borders. If individuals from particular religious belief backgrounds fall within neutral criteria (such as by constituting security risks or likely criminal behaviour), they legitimately may be excluded. However, if a State creates purely religion-based categories for exclusion, this may be inconsistent with the required religious neutrality of the State. Moreover, since such restrictions may make it difficult for a particular belief community to staff its organisation as it sees appropriate, such restrictions may in fact operate as an intervention in internal religious affairs. Thus, visa rules that specifically aim at religious exclusion, particularly discriminatory exclusion, should be carefully scrutinized.

2. *Fund transfers*. As with visas, States have a variety of legitimate reasons for regulating fund transfers of various types. However, provisions that discriminate against religious groups on religious grounds should not be permitted.

¹¹ The core concept of proportionality is sometimes illustrated graphically in the metaphor of using a sledgehammer to crack open a nut. The tool will no doubt accomplish the task of smashing the shell, but at the inevitable cost of destroying the meat as well. .

¹² For international obligations, see especially the ICCPR (art. 18.3), General Comment 22 (¶ 8), the Declaration on the Elimination of All Forms of Intolerance (art. 1.3), the Vienna Concluding Document (Principles 17 and 25), the Moscow Concluding Document (¶ 28.6), the ECHR (art. 9.2), and the case law of the European Court of Human Rights.

I. Proselyting/missionary activity

The issue of proselytism and missionary work is a sensitive one in many countries. However, it is important to remember that, at its core, the right to express one's views and describe one's faith can be a vital dimension of religion. The right to express one's religious convictions and to attempt to share them with others is covered by the right to freedom of religion or belief. Moreover, it is covered by the right to freedom of expression as well. At some point, however, the right to engage in religious persuasion crosses a line and becomes coercive. It is important in assessing that line to give expansive protection to the expressive and religious rights involved. Thus, it is now well-settled that traditional door-to-door proselytizing is protected (though the right of individuals to refuse to be proselytised also is protected).¹³ On the other hand, exploiting a position of authority over someone in the military or in an employment setting has been found to be inappropriate.¹⁴ If legislation operates to constrain missionary work, the limitation can only be justified if it involves coercion or conduct or the functional equivalent thereof in the form of fraud that would be recognized as such regardless of the religious beliefs involved.

J. Financing of religious/belief groups/general economic activity

Many issues arise regarding the financing of religious and belief organisations. Among the most important issues are:

1. *The permissibility of accepting gifts and the ability to solicit funds.* There is a variety of State practices with regard to permission to accept gifts and solicit funds. Some States give wide latitude for raising funds while others carefully limit amounts that can be received and how funds can be raised. The principal international guidelines would suggest that although the State may provide some limitations, the preferable approach is to allow associations to raise funds provided that they do not violate other important public policies. The laws should be established in a non-discriminatory manner.

2. *Tax exemption.* It is very common, though not universal, for the State to provide tax benefits to non-profit associations. The benefits typically are of two types: first, direct benefits such as exemption from income and property taxes, and second, indirect benefits that allow contributors to receive a reduction in taxes for the contribution. There is little international law regarding these issues, though non-discrimination norms apply.

3. *Tax system for raising funds.* Some States allow religions to raise funds through the State tax system. For example, a (religious) public law corporation may have an agreement with the State whereby the latter taxes members of the religion and then transfers the proceeds to the religion. The two difficulties that frequently arise in such systems are first, whether such arrangements are discriminatory among religion and belief groups, and second, whether individuals who do not wish to have taxes taken from them for the religion to which they belong may opt-out. While international law does not prohibit such taxing systems per se, individuals presumably should be able to opt-out of the taxing system (though the opt-out might entail loss of membership in the religion).

¹³ Kokkinakis v. Greece, (ECtHR 1993).

¹⁴ Larissis v. Greece (ECtHR 1996).

4. *State financing.* Many States provide both direct and indirect financing for religious and belief organisations. In addition to the indirect (but very real) benefits that come from tax exemptions and tax deductions, a variety of funding systems operate, including: paying salaries (or providing social benefits) for clergy; subsidizing religious schools; allowing organisations to use publicly owned buildings for meetings; and donating property to religious organisations. In many cases, State-financing schemes are directly tied to historical events, (such as returning property previously seized unilaterally by the State), and any evaluations must be very sensitive to these complicated fact issues.

K. Special issues of prisons, the military, hospitals, and other State institutions

Several issues arise related to public institutions, including prisons, the military and state-operated hospitals. In addition to the question of clergy access to such institutions in order to conduct pastoral work (see section III.E above), and to the rights of employees (see sections III.D. and IV.H), there are questions about the rights of religious expression of people who are housed within the institutions. It is expected that the rules governing the rights of religious expression will, of course, depend on the nature of the institution.

For practical purposes, most legal systems are highly deferential to the judgment of prison authorities and military officials regarding public safety and efficiency. Nevertheless, States are becoming increasingly sensitive to the rights of prisoners and soldiers to have access to religiously sanctioned foods whenever feasible. Some limited freedoms are often provided for the wearing of some types of religious attire, provided that it does not interfere with discipline in the prison or efficiency in the military. It is also advisable to permit, when reasonable, access to religious books and spiritual counselling. Ultimately limitations should be made only after a proper "limitations analysis," with the understanding of the reasonable possibility of heightened State security interests. With regard to state hospitals, where security concerns are much lower, the state should accordingly be more flexible and sensitive with respect to issues such as religiously sanctioned foods and attire.

L. Exemptions from laws of general applicability

There are many circumstances where individuals and groups, as a matter of conscience, find it difficult or morally objectionable to comply with laws of general applicability. Some people have religious objections to eating certain types of food and others insist on wearing particular clothing. For some, military service violates deeply held religious beliefs. Certain days of the week, and certain days on the calendar, have a vital religious significance that requires rituals be performed or that work must not be undertaken. Most modern democracies accommodate such practices for popular majorities, and many are respectful towards minority beliefs.

The laws governing possible exemption from laws of general applicability are in two basic forms. The first are in the form of general constitutional provisions or human rights instruments that defend generally rights of religion and belief and imply that exemptions should be provided when matters of conscience are implicated. The second form is much more specific and provides exemptions for particular actions, such as a statutory provision that exempts conscientious objectors from military service (usually with a requirement to perform alternative service). It is important that laws affecting religion and belief be drafted in a way that is cognizant of the general guiding principles of constitutional norms and human rights standards, and that specific statutory exemptions be drafted and applied in a way that is fair to those with conscientious objections but without unduly burdening those who do not have such objections.

Of the many issues that are likely to raise questions about exemptions from laws of general applicability, some of the most frequent are:

- *Conscientious objection to military service.* Although there is no controlling international standard on this issue, the clear trend in most democratic States is to allow those with serious moral or religious objections to military service to perform alternative (non-military) service. In any case, State laws should not be unduly punitive for those who cannot serve in the military for reasons of conscience.¹⁵
- *Food.* There are several foods that are prohibited by many religious and ethical traditions, including meat generally, pork, meat that is not prepared in accordance with ritual practices, and alcohol. In a spirit of promoting tolerance, the State could encourage institutions that provide food -- particularly schools, hospitals, prisons, and the military - to offer optional meals for those with religious or moral requirements.
- *Days for religious activities.* The two types of day that raise questions of exemptions are first, days of the week that have religious significance (for example, for Friday prayers and Saturday or Sunday worship), and second, calendar days of religious significance (Christmas, Yom Kippur, Ramadan). To the extent possible, State laws should reflect the spirit of tolerance and respect for religious belief.
- *Medical.* Some religious and belief communities reject one or more aspects of medical procedures that are commonly performed. While many States allow adults to make decisions whether or not to accept certain types of procedures, States typically require that some medical procedures be performed on children despite parental wishes. To the extent that the State chooses to override parental preferences for what the State identifies as a compelling need, and which States legitimately may choose to do, the laws should nevertheless be drafted in ways that are respectful of those who have moral objections to medical procedures, even if the law does not grant the exemption that they wish.
- *Other.* In addition to issues that have been noted elsewhere, other places in which objections may arise are in regard to refusing to take oaths or to perform jury service. To the extent possible, the State should attempt to provide reasonable alternatives that burden neither those with conscientious beliefs nor the general population.

IV. Other subjects that may arise in a wide variety of laws

The subjects identified above are those that are most likely to arise in a review of a general law regulating religious and belief activities. The following are some issues that may possibly arise, depending on the context and the type of law introduced.

A. Criminal and administrative law/penalties

Some States attach significant penalties (serious fines or imprisonment) to breaches of laws related to religion and belief activities. Although minor fines for minor breaches of an administrative regulation may be appropriate, it is not appropriate to punish a simple administrative mistake as if it were a violation of the criminal law or to make it punishable by punitive administrative penalties. Serious penalties for small registration mistakes, for example,

¹⁵ Recommendation Rec(1987)8 on conscientious objection to compulsory military service, adopted by the Council of Europe Committee of Ministers on 9 April 1987, at the 406th meeting of the Ministers' Deputies, [LINKhttp://cm.coe.int/stat/E/Public/1987/1987r8.htm](http://cm.coe.int/stat/E/Public/1987/1987r8.htm); <http://cm.coe.int/stat/E/Public/1987/1987r8.htm>. Commission on Human Rights resolution 1998/77; Commission on Human Rights resolution 2002/45.

would raise serious questions about whether the rights of religion and belief are being infringed by a pretextual reliance on the criminal law. Whereas serious penalties may be appropriate when the law is proscribing activities that are typically part of a traditional criminal code (such as prohibitions of murder, assault and battery, or theft), they are much less likely to be appropriate when there is a simple breach of an administrative procedure. So, for example, it presumably would be appropriate (though perhaps redundant) to enact a law that prohibits specifically physical assaults on the clergy or that prohibits using religious association status as a cover for a criminal enterprise. However, it presumably would be inappropriate to attach criminal penalties to a mere failure to register a religious association per se. State laws that include onerous registration requirements while attaching criminal penalties to a failure to register are particularly suspect.

B. National security/terrorism

While State laws pertaining to national security and religious terrorism may well be appropriate, it is important that such laws not be used to target religious organisations that do not engage in objectively criminal or violent acts. Laws against terrorism should not be used as a pretext to limit legitimate religious activity. (See section III.F.)

C. Land use/zoning

Laws relating to building, remodelling, or use of properties for religious purposes are likely to involve complicated State laws relating to land, property, and historical preservation. It is not uncommon for State officials (at the national, federal, or local level) to use such laws to restrict religious communities from operating religious facilities. The justifications for restrictions may appear to be neutral (such as regulating the flow of traffic, harmony with other buildings or activities, or noise restrictions), but are selectively enforced for discriminatory purposes against disfavoured religious groups. It is important that such laws both be drafted neutrally and applied neutrally and with a legitimate purpose.

D. Religious-property disputes

There are two classic religious-property disputes. The first is where the ownership of religious property is disputed as a result of a prior State action that seized the property and transferred it to another group or to individuals. This has been particularly problematic in many cases in formerly communist countries. The second case is where a dispute within a religious community leads to one or more groups contesting ownership rights. Both types of disputes, as well as other related issues, often involve historical and theological questions. Such disputes can be very complicated and demand expertise not only on strictly legal issues involving property, but also on technical questions of fact and doctrine. To the extent that laws deal with such issues, it is important that they be drafted and applied as neutrally as possible and without giving undue preferential treatment to favoured groups.

E. Political activities of religious organisations

States have a variety of approaches towards the permissible role of religious and belief organisations in political activities. These can range from the prohibition of religious-political parties, to preventing religious groups from engaging in political activities, to eliminating tax exemptions for religious groups engaging in political activities. While such issues may be quite complicated, and although a variety of differing but permissible laws is possible, such laws

should not be drafted in way either to prohibit legitimate religious activities or to impose unfair limitations on religious believers.¹⁶

F. Family law

Family law often intersects with issues related to religion or belief. Among the most frequent issues are marriage and child custody. With regard to marriage, State laws vary with regard to the relationship of a “religious” marriage and a “State” marriage. (The issue of the right of clergy to perform a valid marriage recognized by the State is discussed above at III.E.) Although different options are possible (such as requiring a State-approved civil marriage prior to a religious marriage), laws should not be enacted that restrict religious or belief organisations from performing a religious ceremony in addition to whatever other neutral requirements the State might impose (for example, the individuals having reached the age of majority and not being currently married to another person). Issues related to marriage that are likely to arise in the future will be State restrictions on arranged marriages and prohibitions on polygamous marriages that may be permitted under some religious doctrines. Child custody disputes may raise religious issues when the parents are of different religions and each wishes to raise the child in his or her own faith.¹⁷ Whereas statutes may not address such issues directly, they are likely to arise in court decisions. Laws should be reviewed for their neutrality and to insure that the best interests of the child are protected in a neutral way that does not assume the superiority of one religion over another.

There are several other issues that may arise where religious doctrines are in conflict with State laws. For example, State laws on inheritance may conflict with religious laws with regard to the right of one spouse to inherit the estate of the deceased spouse. Or, some States restrict the ability of couples of one religious belief to adopt children from other faiths or restrict the ability of members of some religions to adopt children at all because of the perceived dangers of the religion. Islamic law typically makes it much easier for a husband to divorce a wife than is permitted by State law. In all such cases, the State laws should be examined for neutrality and to determine whether limitations on rights to manifest religion are proportionate to legitimate State interests.

G. Broadcast media

Three of the principal issues that arise with regard to the broadcast media are ownership, access, and disparagement of (or incitement against) religious beliefs or identities. International standards typically are not specific with regard to broadcast media issues. Thus general principles of equality and non-discrimination are the basic guidelines. Religious and belief groups should presumably not be particularly disadvantaged from owning or operating media facilities. When the media is operated by the State, an equitable procedure should be allowed for providing various religious or belief groups’ access to the media. While States will have differing and often conflicting policies with regard to libel, hate speech, or disparagement of

¹⁶ The leading case of the European Court of Human Rights is *Refah Partisi v. Turkey* (2003), in which the Turkish courts had dissolved one of the largest Turkish political parties because of its alleged support for Islamic fundamentalism, including advocating the introduction of *Shariah* law in Turkey. The European Court held that although “a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy,” (& 100), it could be appropriate for a state to dissolve a political party if it appears that the party may be on the verge of obtaining political power (& 108) and if some of its proposals are against the State’s constitutional order (&& 59-60, 67, 93) or fundamental democratic principles. (& 98).

¹⁷ See, for example, *Hoffman v. Austria* (ECtHR 1993).

religious or belief groups, the laws should nevertheless be equitable and non-discriminatory. (See ICCPR, art. 20)

H. Labour

Three of the principal issues regarding the relationship between labour (employment practices) and religion or belief involve the hiring and other personnel practices of first, religious or belief groups, second, private enterprises, and third, State offices. To the extent that State laws prohibit discrimination on the basis of religion or belief, religious and belief organisations will likely seek exemptions for their own hiring practices so that they may hire and retain people whose sympathies correspond to the interests of the associations. A variety of legal approaches are possible. With regard to private (non-religious) enterprises, the typical standard will be to prohibit discrimination in such matters such as hiring. Employers may be allowed to restrict some manifestations of belief. States should not discriminate in personnel practices, though some States prohibit officials from wearing religious insignia.

I. Cemeteries

States have a variety of practices involving the relationship between religion and cemeteries. In some cases the State exercises complete control over the subject, and in others a great deal of responsibility is held by religious institutions. Although there are no clear rules governing the subject, the State should avoid discrimination among religious groups and permit, within reasonable grounds (particularly public health), the right to manifest religion and belief in this phase of the human condition.

V. Contents of text provided to the government or parliament

Each review of draft legislation should be adapted to fit the particular requirements of the State that has sought advice. However, as a general rule, the following thematic organisation suggests the order in which written reviews should ordinarily appear.

First, provide an affirmative statement about the importance of complying with international standards and OSCE commitments. A brief statement about international standards should be provided.

Second, identify the concerns that gave rise to the draft legislation. It is important that reviewers understand the concerns of the government or State that prompted the drafting of legislation. Although the reviewers need not agree or sympathize with those interests, it is very important that they be articulated in a way that shows that the concerns have been fully understood and appreciated.

Third, describe the information that was collected that constitutes the State-specific factual and legal basis for the recommendations. The review should identify, as appropriate, the individuals and groups that were consulted within the State, including State officials, government officials, parliamentarians, NGOs, religious persons, and others. The review should make clear that a serious and thorough attempt was made to gather information and that a variety of sources have been consulted.

Fourth, all relevant State laws should be identified. The reviewer should show familiarity with the relevant constitution, statutes, codes, and decrees. To the extent that judicial decisions are relevant, they should be identified as well.

Fifth, controlling international instruments should be identified. The relevant OSCE commitments should be identified, as well as the international instruments ratified by the State.

Sixth, identify positive features of the draft legislation. To the extent there are positive features of the draft, it is appropriate to highlight them.

Seventh, identify “neutral” provisions. This will help clarify the purpose of the analysis.

Eighth, identify problematic features. This is likely to be the core of the analysis and the longest portion. This can be done either by discussing the principle issues that are problematic, or by providing a section-by-section analysis. The analysis should be clear, non-argumentative, and constructive. The principal goal is to provide suggestions that will assist officials in understanding alternatives and appreciating international standards. It is important to remember that the Panel does not propose alternative statutory language. The Panel comments on drafts, but does not suggest its own wording.

Ninth, the draft should conclude by expressing appreciation for the confidence shown in the Panel and offer continuing cooperation and support.

APPENDIX I: Selected provisions from international instruments

-- to be supplied later --

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APPENDIX II: Leading Cases¹⁸

Arrowsmith v. UK
Application No. 7050/75
European Commission of Human Rights

The applicant was convicted under the 1934 Incitement to Disaffection Act, for having distributed leaflets to members of the armed forces endeavouring to encourage them not to serve in Northern Ireland. She claimed, *inter alia*, that this was an unjustifiable interference with her right to manifest her pacifist beliefs. The Commission concluded that pacifism as a philosophy fell within the ambit of the right to freedom of thought and conscience and was a form of belief the manifestation of which was protected by Article 9(1). However, the Commission also took the view that the 'practice' of a belief did not, for these purposes, cover each act which was motivated or influenced by it and that when actions did not actually express the belief concerned they cannot be protected by Article 9(1). On the facts of the case, the Commission concluded that the leaflets did not express pacifist views and were not distributed to the soldiers in order to further pacifist ideas. The acts in question were, therefore, not 'manifestations' of belief for the purposes of Article 9(1) which therefore had not been breached.

Buscarini v. San Marino
Application No. 24645/94
18 February 1999

The Applicants were elected to San Marino Parliament and requested permission to make their swearing-in oath without reference to the Holy Gospel, and swore the oath accordingly. This was declared invalid and applicants were required to swear the oath in full, including the reference to the Gospels, in order not to forfeit their parliamentary seats. This they did, complaining that this violated their freedom of religion.

The Court took the view that requiring the applicants to take the oath on the Gospels was tantamount to requiring elected representatives of the people to swear allegiance to a particular religion and this was incompatible with Article 9(1). It then had to consider whether this interference with the applicant's freedom of religion could be justified under Article 9(2) and concluded that it was contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs, and therefore could not be regarded as 'necessary in a democratic society'. In consequence, there had been a violation of Article 9.

¹⁸ All cases are from the European Court of Human Rights unless otherwise stated.

Canea Catholic Church v. Greece
Application No. 25528/94
16 December 1997

The Applicant Church sought to bring proceedings in the local Court but it was decided that the Church lacked legal personality so could not do so since it had not complied with the formalities required under the Civil Code. The Court took the view that the legal personality of the Greek Catholic Church had hitherto been unquestioned since the establishment of the Greek state and that the Church should not have been expected to comply with the formalities introduced by the Civil Code to acquire legal personality given that there had been nothing to suggest that it would one day be deprived of access to a court in order to defend its civil rights. There had, therefore, been a violation of the Church's right of access to a court under Article 6(1) of the Convention. It also noted that the Greek Orthodox Church and Jewish communities had been granted public law status and so their capacity to protect their property continued without the need for any formalities. Since there was no objective and reasonable justification for the difference of treatment, there had also been a violation of Article 14 in conjunction with Article 6(1).

Cha'are Shalom Ve Tsedek v. France
Application No. 27417/95
27 June 2000

The French authorities granted the Jewish Consistorial Association of Paris (ACIP), to which large majority of Jews in France belong, the exemptions from the regulations concerning the operation of slaughterhouses necessary for it be able to perform ritual slaughter of animals. The applicant association considered that ACIP standards in the certification of meat were not in accordance with their own ultra-orthodox religious prescriptions, which required meat to be glatt (particular kind of kosher) and so sought the necessary exemptions themselves. Their request was, however, rejected.

The Court accepted that ritual slaughter was a form of manifestation of religion (observance) but also considered that it was in the general interest to avoid unregulated slaughter of animals. The ACIP had been granted an exemption and the methods of slaughter involved were the same (the difference concerning the standards of inspection and certification of the meat). The Court took the view that there would only be an interference within the terms of Article 9 if it were impossible for ultra-orthodox Jews to obtain meat from animals slaughtered in accordance with their religious beliefs. However, it noted that the applicant association could in fact obtain supplies from Belgium and also from the ACIP itself and so there was in fact no violation of Article 9(1). The Court thought that the freedom of religion did not extend to the right to take part in person in ritual slaughter and certification. It also thought that had there been an interference, then that interference would have justified within the terms of Article 9(2) as being prescribed by law, pursuing a legitimate aim and not disproportionate.

The Court also felt that any difference in treatment between the ACIP and the applicant association was limited, pursued a legitimate aim and was proportionate, meaning that there was an objective and reasonable justification. In consequence, there was no violation of Article 9 in conjunction with Article 14.

Cyprus v. Turkey
Application No. 25781/94
10 May 2001

This case raised a broad range of issues arising out of the living conditions of Greek Cypriots in Northern Cyprus. The Court accepted that the “TRNC” authorities had not interfered as such with the right of the Greek-Cypriot population to manifest their religion either alone or in the company of others but took the view that the restrictions placed on their freedom of movement during the period under consideration considerably curtailed their ability to observe their religious beliefs, in particular by restricting their access to places of worship outside their villages and hindering their participation in other aspects of religious life, including the failure to approve the appointment of additional priests for the region in question.

Hasan and Chaush v. Bulgaria
Application No. 30985/96
26 October 2000

The first applicant was elected as Chief Mufti of Bulgarian Muslims in 1992 and was registered as such by the authorities. His leadership was, however, contested by the former Chief Mufti who in 1995 was recognized and registered as such by the authorities following a Decree issued by the Deputy Prime Minister of the newly elected government. The applicant claimed that this act of registration meant that there were now two separate organisations with separate leaderships, but authorities did not accept this. The first applicant was subsequently elected again to the post of Chief Mufti by a group of supporters, but the authorities refused to register him as their leader and continued to recognize the original Chief Mufti as leader of all Bulgarian Muslims until 1997.

The court took the view that participation in the life of the community is a manifestation of one’s religion, and that the believer’s right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. It was not necessary to decide whether requiring religious communities to be registered constituted an interference with the rights protected by Article 9 since the facts showed that the authorities had not acted in a neutral fashion but had favoured one faction of the Muslim community by granting it the status of the single official leadership, to the complete exclusion of the previously recognised leadership. Since state action favouring one leader of a divided religious community or undertaken with the purpose of forcing a religious community to unite under a single leadership against its own wishes constituted an interference with freedom of religion, there had been a violation of Article 9(1). As the relevant domestic law did not set out either procedural or substantive criteria by which the executive was to determine questions of registration where leadership was contested, but left them with an unfettered discretion, this interference was not ‘prescribed by law’ for the purposes of Article 9(2) and so there had been a violation of Article 9.

Kokkinakis v Greece
Application No. 14307/88
25 May 1993

The Applicant was a Jehovah’s Witness. He called at the home of the Cantor of the Greek Orthodox church in Sitia, Crete and engaged in a discussion on his beliefs with the Cantor’s wife. The Cantor informed the police. The Applicant was arrested and convicted of the criminal offence of proselytism, contrary to Law 1363/1938.

In what has become its standard approach, the Court expressed the view that “As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.” It also accepted, however, that there was a distinction to be drawn between bearing Christian witness and improper proselytism the former being true evangelism which was as an essential mission and a responsibility of every Christian and every Church whereas the latter represented a corruption or deformation of it, and could include offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need and was not compatible with respect for the freedom of thought, conscience and religion of others.

Applying this approach, the Court took the view that the applicant s conviction amounted to an interference with his freedom to manifest his religion or belief. Although that restriction was prescribed by law for the purposes of Article 9(2) and pursued the legitimate aim of protecting the rights and freedoms of others, on the facts of the case the Court thought that it had not been shown that the applicant s conviction had been justified by a pressing social need and so be necessary in a democratic society. Therefore, there had been a violation of Article 9.

Larrisis and Others v. Greece

Application Nos. 23372/94, 26377/94 and 26378/94

24 February 1998

The three applicants were officers in the Greek air force and followers of the Pentecostal Church. All three applicants had been convicted of under Law 1363/1938 for their activities in proselytising to junior members of the air force over whom they exercised a hierarchical authority. The second and third applicants were also convicted for their proselytising to civilians. The Court accepted that the convictions for proselytism amounted to an interference with the manifestation of the applicant’s religion. As in the Kokinakkis case, however, it took the view that Law 1363/1938 was sufficiently clear and pursued a legitimate aim of protecting the rights and freedoms of others. It also confirmed that Article 9 does not protect every act motivated or inspired by a religion or belief and does not protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church. Applying these principles, the Court concluded that the authorities were in principle justified in taking some measures to protect the lower ranking airmen from improper pressure applied to them by the applicants in their desire to promulgate their religious beliefs and given their nature, the measures taken did not amount to a breach of Article 9. However, as regards the convictions of the second and third applicants for proselytising to civilians, Court found it of decisive significance that the civilians whom the applicants attempted to convert were not subject to pressures and constraints of the same kind as the airmen and had not been the subject of any improper behaviour. These convictions, therefore, were not justified under the terms of Article 9(2) and so there had been a violation of Article 9.

Manoussakis v. Greece

Application No. 18748/91

29 September 1996

In 1982 the applicant sought to register a room as a place of meeting for Jehovah’s Witnesses, and renewed the request in 1983. In 1986, whilst this application was still pending,

proceedings were commenced against him for having established and operated an unauthorized place of worship, contrary to Law No. 1363/1938 and resulted in his conviction. The Court accepted that his amounted to an interference with the freedom to manifest religion in worship and observance. It took the view that it was unnecessary to determine whether this interference was prescribed by law for the purposes of Article 9(2), although it did accept that the restriction fulfilled a legitimate aim - that of the protection of public order, since states were entitled to verify whether a movement or association carried on, ostensibly in the pursuit of religious aims, activities which were harmful to the population. However, given the need to secure true religious pluralism, the state did not have discretion to determine the legitimacy of religious beliefs and an authorization procedure must be limited to ascertaining whether formal conditions are satisfied. Since the authorities had still not made a decision on the request for authorization, the applicant's failure to acquire authorization could not justify their conviction, which in consequence could not be considered proportionate to the legitimate aim pursued and was, therefore, not necessary in a democratic society and in violation of Article 9.

Metropolitan Church of Bessarabia and Others v. Moldova
Application No 45701/99
13 December 2001

In 1992 the applicant Church had separated from the Metropolitan Church of Moldova and applied to recognition under the 1992 Religious Denominations act but this had been refused. In 1993 the Metropolitan Church of Moldova subsequently applied for recognition and this was granted. In 1996 the Metropolitan Church of Bessarabia again requested recognition but this was again denied and the Supreme Court ultimately agreed with the Government that there had been no violation of the freedom of religion since the Orthodox believers remained free to exercise their faith within the Moldovan Church and that the would only aggravate the situation should the Government intervene in what was essentially an administrative dispute within a single church.

The Court noted that the Metropolitan Church of Bessarabia could not operate without recognition since its priests could not conduct services, its members meet or, not having legal personality, seek judicial protection of its assets. Thus the refusal to register amounted to an interference with the applicants' freedom of religion under Article 9(1). Leaving open the question of whether the grounds on which the refusal to register could be considered to be 'prescribed by law' for the purposes of Article 9(2), the Court considered whether that refusal pursued a legitimate aim and concluded that it did, insofar as it was for the protection of public safety and public order given the concerns that recognition might foster separatist tendencies within Bessarabia and that states were entitled to verify whether a movement of association carries on, ostensible in pursuit of religious aims, activities harmful to the population or public safety.

The Court accepted that where several religions co-exist, the state may impose restrictions in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. However, in state has a duty to remain neutral and impartial when doing so and its role is not to remove the cause of tension by eliminating pluralism but to ensure that the competing groups tolerate each other. Moreover, the state must not make assessments of the various forms of belief, nor may it favour particular sections of, or seek to unite, divided religious communities. Existing religious communities may not be involved in the procedure for granting recognition to others. The freedom of religion encompasses the expectation that believers will be allowed to associate freely, and that the religious community have accepted to juridical protection.

In applying these principles to the facts, the Court concluded that the Moldovan authorities had not acted impartially and neutrally, that there was nothing to warrant the conclusion that the applicants' aims were other than religious in nature. Given the serious consequences that flowed from the failure to recognize the applicants, the Court decided that there was a lack of proportionality between the measures adopted and the aim pursued and thus amounted to a violation of Article 9.

Murphy v. Ireland
Application No. 44179/98
10 July 2003

The applicant complained that the prohibition by the Independent Radio and Television Commission of the broadcasting of religious advertisements pursuant to the 1988 Radio and Television Act violated Articles 9 and 10 of the Convention. The Court considered the matter under Article 10. It accepted that there had been an interference with the freedom of expression, but thought this had been prescribed by law and in pursuit of the legitimate aims of ensuring respect for the religious doctrines and beliefs, these being issues of public order and safety together with the protection of the rights and freedoms of others. It also took the view that states were accorded a wide margin of appreciation when regulating the freedom of expression in relation to matters liable to offend personal convictions, and especially religion, there being no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on religious convictions. The Court also thought that forms of expression which were not in themselves offensive could have an offensive impact in certain circumstances. It noted that the restriction only applied only to religious advertising rather than religious broadcasting more generally and considered that it was reasonable for the State to believe it likely that even a limited freedom to advertise would benefit a dominant religion and so jar with the objective of promoting neutrality in broadcasting and of ensuring a 'level playing field' for all religions. It therefore concluded that there were relevant and sufficient reasons to justify the interference within the meaning of Article 10.

Otto-Preminger-Institut v. Austria
Application No. 13470/87
20 September 1994

The Applicants complained that the seizure and forfeiture of a film which was allegedly disparaging of the Christian religion violated their freedom of expression, as protected by Article 10 of the ECHR. It was accepted that there had been an interference with the applicant's freedom of expression but the court considered this to have been necessary in the interests of public order and to protect the rights and freedoms of others. The Court said that whilst freedom of expression embraced matters which could shock, offend or disturb, those exercising that right did so subject to certain responsibilities which, in the context of religious opinions and beliefs, may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. In consequence, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided that be proportionate to the legitimate aim pursued. Given that there was no uniform conception of the significance of religion in society, the state had to be accorded a certain margin of appreciation when right of other persons when ensuring that there be proper respect

for a person's freedom of thought, conscience and religion and on the fact of the case the Austrian authorities had not overstepped that mark, so there had been no violation of Article 10.

Pretty v. UK
Application No. 2346/02
29 April 2002

The Applicant, who was terminally ill, wished to commit suicide with the assistance of her husband but was unable to attain an assurance from the authorities that this would not result in his being prosecuted. She argued that her belief in the notion of assisted suicide fell within the scope of Article 9 and that the refusal by the authorities to examine the matter on an individualised basis resulted in the restriction upon its manifestation being unjustified. The Court observed that not all opinions and convictions constituted beliefs for the purposes of Article 9. Her views did not involve a form of manifestation of a religion or belief through worship, teaching, practice or observance. Moreover, 'practice' did not cover every act motivated or influenced by a religious belief. There was, therefore, no violation of Article 9.

Razaghi v. Sweden
Application No. 64599/01
11 March 2003

The applicant had been refused asylum in Sweden and was to be returned to Iran. He claimed that he faced the prospect of being tortured in violation of Article 3 on his return on account of his having had a relationship with a married woman in Iran, in that he might be sentenced to be lashed for having offended public morals. He also claimed that he had recently converted to Christianity, and thus ran the risk of punishment for this which itself violated Article 9. The Court declared the application admissible in relation to Article 3, but took the view that the applicant's expulsion could not separately engage the Swedish Government's responsibility under Article 9, which would only be engaged to the extent that any alleged consequences in Iran of the applicant's conversion attained the level of treatment prohibited by Article 3.

Refah Partisi v. Turkey
Application Nos. 41340/98, 41342/98, 41343/98, 41344/98
13 February 2003

The applicant association was the largest of the parties elected to the Turkish Parliament in June 1995, which entered into a coalition government in June 1996. In May 1996, court proceedings were brought that resulted in the dissolving of the Refah Party, on the grounds that its support for Islamic law was contrary to the secular principles of the Turkish constitution. Its leaders were removed from their seats and banned from founding or from being leading members of any political party for five years. The case was considered under Article 11 rather than Article 9, but it nevertheless raises issues concerning the relationship between religion and the state.

The European Court decided that in democratic societies, in which several religions coexist, it might be necessary to restrict the freedom of religion in order to reconcile the interests of the various groups and to ensure respect for everyone's beliefs. The State was to be the neutral and impartial organiser of the exercise of various religions, faiths and beliefs and was to ensure mutual tolerance between opposing groups. It thought that the principle of secularism was in harmony with the rule of law and respect for human rights and democracy and attitudes

which did not respect that principle would not necessarily be accepted as being covered by the freedom to manifest one's religion and the protection of Article 9.

Freedom of religion was primarily a matter of individual conscience and operates in a sphere quite different from the field of private law, which concerns the organisation and functioning of society as a whole. Although political parties animated by the moral values imposed by a religion were not intrinsically inimical to the fundamental principles of democracy, the applicant's long-term policy of setting up a regime based on Sharia within the framework of a plurality of legal systems were incompatible with the concept of a democratic society; Since Refah had real opportunities to put its policies into practice, there was a tangible and immediate danger to democracy and so the restrictions placed upon it could be considered to meet a >pressing social need?. In consequence, there was no violation of Article 11.

Serif v. Greece

Application No. 38178/97

14 December 1999

The Applicant had been elected as Mufti of Rhodopi by members of his religious community. The State considered itself to be entitled to appoint the Mufti and had appointed another to this position. It refused to recognize the legitimacy of the Applicant's appointment, convicted him of the offence of having usurped the functions of a minister of a known religion, and having publicly worn the uniform of such a minister.

The Court took accepted that, since under Greek law Muftis had competence to conduct legally recognized marriage ceremonies and to adjudicate on certain family and inheritance disputes between Muslims, it could be argued that it is in the public interest that the State take special measures to determine the rightful office holder. However, there was no indication that the applicant had attempted to exercise the judicial and administrative functions attaching to the position of Mufti and punishing a person for acting as the religious leader of a group that willingly followed him could not be considered compatible with the demands of religious pluralism in a democratic society.

The Court took the view that, in democratic societies, the State did not need to take measures to ensure that religious communities remained or were brought under a unified leadership. Although it recognised that tension was possible where religious communities became divided, this was one of the unavoidable consequences of pluralism and the role of the authorities in such circumstances was not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerated each other. In consequence, there had been a violation of Article 9.

Sofianopoulos v. Greece

Application Nos. 1988/02; 1997/02; 1977/02

12 December 2002

The applicants claimed that the refusal of the Greek authorities to permit them to indicate their religious affiliation on their identity cards, even on a voluntary basis, interfered with their freedom to manifest their religion under Article 9. The Court expressed the view that an identity card could not be regarded as a means through which adherents of any religion or faith should have the right to manifest their beliefs. Identity cards were not essential for civil life or the functioning of the State and, where used, were merely a means of identification and for purposes of distinguished status in relations with the State's legal system. Religious beliefs, which were a matter of individual conscience and which might change over time, did not constitute information that could be used to distinguish an individual citizen in his relations with the State

and recording them in a document exposed the bearers to the risk of discrimination. The claim was, therefore, declared inadmissible.

Stedman v. UK

Application No. 29107/95

European Commission of Human Rights, 9 April 1997

The applicant's contract of employment was terminated because of her refusal to revised terms and conditions which would have required her to work on a Sunday which, she claimed, was an interference with her freedom to manifest her religious beliefs. The responsibility of the State was engaged, she claimed, because she was unable to seek redress for this before domestic courts. The Commission noted that the applicant was dismissed for failing to agree to work certain hours rather than her religious belief as such and was free to resign and did in effect resign from her employment. Although her refusal to work was motivated by religious convictions, this did not engage the protection of Article 9(1) and so the application was declared inadmissible.

Thlimmenos v. Greece

Application No. 34369/97

6 April 2000

The Greek authorities refused to permit the applicant's appointment as a chartered accountant because under Greek law no person convicted of a felony could be appointed as such and he had been subject to a criminal conviction for insubordination, having disobeyed an order to wear a military uniform because of his religious beliefs, being a member of the Jehovah's Witnesses.

The court accepted that the refusal to wear a military uniform was an exercise of the freedom of religion and so fell within the scope of Article 9. It took the view that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. Although the state had a legitimate interest in seeking to exclude certain classes of criminal offenders from practising as chartered accountants, a conviction for refusing to wear a military uniform on religious grounds did not carry with it any implication of dishonesty and so there was no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony. In consequence there was a violation of Article 9 in conjunction with Article 14.

Valsamis v. Greece

Application No. 21787/93

18 December 1996

The third applicant, the daughter of the first and second applicants, had been suspended from school for a day following her refusal to participate in School parade to mark the Greek National Day which, she claimed, was militaristic in nature and so ran contrary to her pacifist beliefs as a Jehovah's Witness. This raised issues under both Article 9 of the ECHR and Article 2 of the First Protocol to the ECHR. The Court reaffirmed that a belief (>conviction') denoted views that attain a certain level of cogency, seriousness, cohesion and importance' and confirmed that this embraced Jehovah's Witnesses, which comprised a >known religion' in Greece. In relation of Article 2 of the First Protocol, the state was forbidden to pursue an aim of indoctrination that might be regarded as not respecting parents' religious and philosophical

convictions. However, the court could see nothing in the parade which could offend the applicant's pacifist convictions and so there has been no violation of Article 2 of the first protocol. Likewise, it did not think that it amounted to an interference with the applicant's right to freedom of religion.

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APPENDIX III: Bibliography

-- to be attached later --