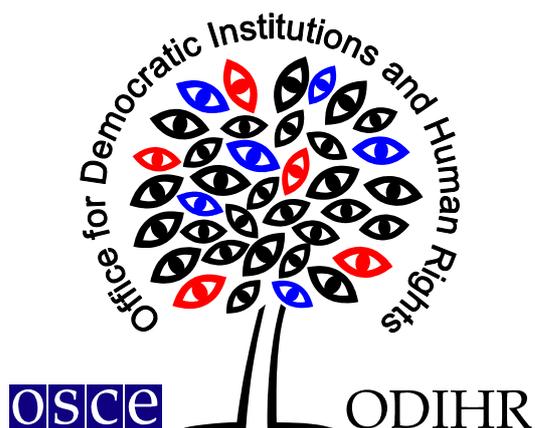


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## COMMENTS ON THE DOCUMENT

### «AGREEMENT CONCLUDED BETWEEN THE COUNCIL OF MINISTERS OF THE REPUBLIC OF ALBANIA AND THE RELIGIOUS COMMUNITY “ON ESTABLISHING MUTUAL RELATIONS”»

prepared by the OSCE/ODIHR Advisory Council  
on Freedom of Religion or Belief

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## **I. Introduction**

1. The OSCE/ODIHR Advisory Council on Freedom of Religion or Belief (the "Advisory Council") has been asked to review a document entitled "agreement concluded between the Council of Ministers of the Republic of Albania and the religious community «on establishing mutual relations»" (hereinafter referred to as the draft agreement). The document has been prepared - pursuant to the Albanian Prime Minister's Order n. 73, dated 25 April 2006, "On the establishment of the inter-institutional working group for the compilation of the draft agreement between the Council of Ministers and religious communities"- by a working group chaired by the Head of the Committee on Cults. [Note to translator: in English, "cults" is a pejorative term. We are assuming that the sense of "cults" is something like "religious communities." If the term in Albanian is a pejorative, this is also a problem that should be addressed.] These comments are based on an unofficial translation of the draft agreement completed as of August 2006.

The OSCE/ODIHR Advisory Council consists of several scholars from diverse geographical, political, legal, and religious backgrounds who make recommendations on matters concerning religion and freedom of belief. The Advisory Council is familiar with the broad range of laws that exist among OSCE's participating States. In revising the draft law the members of the Advisory Council who drafted these comments are aware of possible ambiguities that may arise from the difficulties of translation of the draft law into the English language.

## **II. Executive Summary**

The major findings of the comments are summarized here.

1. The draft agreement contains some provisions that meet high standards of international law and best practices in protecting the freedom of religion or belief; moreover it is at times a useful instrument to ensure religious freedom and tolerance and to provide positive conditions for manifesting religion or belief. However, we have some serious and significant reservations raised by its approach to shaping the relationship of the State with the religious communities in Albania.
2. The draft should be changed to make it clear that all religious communities have the real opportunity to enter into an agreement with the State.
3. Religious communities should be given an option to be registered in addition to that of entering into an agreement.
4. The availability of agreements for some religious communities should not become a means for restricting rights to other religious groups.
5. The draft law should make it clear that the State does not have broad discretionary power to decide whether it may enter into agreements.
6. The draft law should contain provisions setting forth the procedure and the grounds for entitlement to an agreement, as well as the available for appeals and remedies in case the agreement is denied.
7. National interests and national traditions cannot be invoked as limitations to the manifestation of religious freedom.

### III. Comments on the document under consideration

#### 1. Reference points of review

1.1 The comments are based on OSCE commitments that codify the fundamental right to freedom of religion or belief in international law.<sup>1</sup> The Republic of Albania is one of the OSCE's participating States.

The comments are likewise based on the relevant provisions of international treaties, most notably the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> and the case law of the European Court of Human Rights, the International Covenant on Civil and Political Rights,<sup>3</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>4</sup> the Convention on the Rights of the Child<sup>5</sup>. The comments are further based on United Nation declarations, most notably the Universal Declaration of Human Rights<sup>6</sup> and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>7</sup> They are also based on best practices.

The comments have been prepared taking into account the Guidelines for Review of Legislation Pertaining to Religion or Belief that were prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief.<sup>8</sup>

1.2 The OSCE general commitment to freedom of thought, conscience, religion or belief articulated in Principle VII of the Helsinki Final Act reads:

VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

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<sup>1</sup> For a list of relevant OSCE commitments see OSCE Human Dimension Commitments: A Reference Guide [available in English or Russian at [http://www.osce.org/documents/gen/2001/07/15828\\_en.pdf](http://www.osce.org/documents/gen/2001/07/15828_en.pdf); last visited on August 15, 2006].

<sup>2</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms and its First Protocol, opened for signature by the Council of Europe on 4 November 1950, entered into force 3 September 1953 (hereinafter "ECHR"). The ECHR has entered into force for the Republic of Albania on 2 October 1996.

<sup>3</sup> International Covenant on Civil and Political Rights, adopted and opened for signature by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, entered into force 23 March 1976 (hereinafter "ICCPR"). The Republic of Albania has accessed to the ICCPR on 4 October 1991.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, entered into force 3 January 1976 (hereinafter "ICESCR"). The Republic of Albania has accessed to the ICESCR on 4 October 1991.

<sup>5</sup> Convention on the Rights of the Child, adopted and opened for signature by United Nations General Assembly Resolution 44/25 on 20 November 1989, entered into force 2 September 1990 (hereinafter "CRC"). The Republic of Albania has ratified the CRC on 27 February 1992.

<sup>6</sup> Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly Resolution 217A (III) on 10 December 1948.

<sup>7</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination adopted and proclaimed by United Nations General Assembly Resolution 36/55 on 25 November 1981.

<sup>8</sup> The Guidelines were adopted by the Venice Commission at its 59<sup>th</sup> Plenary Session (Venice, 18-19 June 2004), and were welcomed by the OSCE Parliamentary Assembly at its Annual Session (Edinburgh, 5-9 July 2004). The Guidelines have also been commended by the U.N. Special Rapporteur on Freedom of Religion or Belief. Report of the Special Rapporteur on Freedom of Religion or Belief to the 61<sup>st</sup> Session of the Commission on Human Rights, E/CN.4/2005/61 para. 57. The major international instruments relied upon are excerpted in Appendix I of the Guidelines. Guidelines, Appendix I, pp. 31-51. The Guidelines are available at [http://www.osce.org/publications/odihr/2004/09/12361\\_142\\_en.pdf](http://www.osce.org/publications/odihr/2004/09/12361_142_en.pdf) [last visited on August 15 2006].

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practise, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

This fundamental commitment has been repeatedly reaffirmed.

Principle 16.4 of the Vienna Concluding Document also has important implications for the law of religious associations. It provides that participating States will

respect the right of these religious communities to

- establish and maintain freely accessible places of worship or assembly,
- organize themselves according to their own hierarchical and institutional structure,
- select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State,
- solicit and receive voluntary financial and other contributions.

Principle 17 of the Vienna Concluding Document states that "participating States recognize that the exercise of the above-mentioned rights relating to the freedom of religion or belief [as detailed in Principles 16.1 through 16.11] may be subject only to such limitations as are provided by law and consistent with their obligations under international law and with their international commitments".

1.3 Of foremost importance for the protection of freedom of religion in Europe is the European Convention for the Protection of Human Rights and Fundamental Freedoms which the Republic of Albania has ratified on October 2 1996.

1.3.1 Article 9 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which contains the Convention's key substantive provision on freedom of religion or belief, reads:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

1.3.2 Limitations on freedom of thought, conscience, religion or belief, to the extent permissible at all, are only allowed with respect to manifestations of religion or belief. These limitations face a number of important qualifications and restrictions. The limitation must be "prescribed by law". The European Court of Human Rights has held that this phrase "does not merely refer back to domestic law but also relates to the quality of law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention".<sup>9</sup> Accordingly, this test can be referred to as the "rule of law constraint". Rules that are impermissibly vague may fail to meet this test.

The second constraint is the limited set of permissible justifications: limitations must be "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". This list narrows the range of state interests that can justify

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<sup>9</sup> European Court of Human Rights, case of Malone v. The United Kingdom, 82 Eur. Ct. H.R. (ser. A) at 32 (1984).

overriding religious freedom. It is important to note that national security interests are not alone sufficient.

Of specific importance is the third constraint: limitations must also be "necessary in a democratic society". The European Court of Human Rights has found that democratic society necessarily presupposes religious pluralism. In articulating the importance of freedom of religion or belief, the European Court has noted that it is "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".<sup>10</sup> Similarly, the Court has acknowledged the significance of the "pluralism, tolerance and broadmindedness without which there is no democratic society".<sup>11</sup>

The Court has recognized the importance of a margin of appreciation of cultural difference that State authorities have in this area. This is vital to the gradual process of European integration while maintaining respect for difference in relation to religious and cultural matters. Nonetheless, the Court has made it clear that in delimiting the margin of appreciation that applies to religious freedom issues, it "must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society".<sup>12</sup> With this background in mind, the Court has construed the "necessary in a democratic society" requirement to mean that the limitation in question must be "justified in the circumstances of the case by a pressing social need" and that the contested measure must be "proportionate to the legitimate aim pursued".<sup>13</sup> Moreover, in assessing whether a restriction is proportionate to the legitimate aim pursued, "very strict scrutiny" must be applied.<sup>14</sup>

1.3.3 Often times, freedom of religion or belief is closely linked with the freedom of association.

Article 11 of the ECHR, dealing with freedom of association reads:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

The European Court's 1998 decisions in *United Communist Party of Turkey v. Turkey*<sup>15</sup> and *Sidiropoulos & Others v. Greece*<sup>16</sup> have further elaborated on freedom of association. In the *Sidiropoulos* case the Court stated categorically that "the right to form an association is an inherent part" of the right to freedom of association and that

citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of

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<sup>10</sup> See European Court of Human Rights *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31, see also *Buscarini and Others v. San Marino [GC]*, no. 24645/94, § 34, ECHR 1999-I.

<sup>11</sup> European Court of Human Rights, *Manoussakis and Others v. Greece*, case no. 59/1995/565/651 paragraph 41.

<sup>12</sup> *Ibid.*, paragraph 44.

<sup>13</sup> *Kokkinakis*, cited above A 260-A (1993), paragraph 50.

<sup>14</sup> *Manoussakis*, cited above paragraph 44.

<sup>15</sup> 30 January 1998.

<sup>16</sup> 10 July 1998.

association, without which the right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions.<sup>17</sup>

As with limitations on manifestations of religion, the Court emphasized that in assessing the right to association, exceptions in ECHR (article 11(2))

are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.<sup>18</sup>

1.3.4 Depending on their structure, religious association provisions may also violate non-discrimination provisions of the ECHR (articles 1, 14).

1.4 One of the predominant and most relevant provisions of international law protecting the right of freedom of religion or belief is ICCPR (article 18).

1.4.1 ICCPR (article 18) reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In 1993, the U.N. Human Rights Committee issued its General Comment No. 22 (48) which provides a detailed official interpretation of the meaning of ICCPR (article 18). The General Comment begins by noting that "[t]he right to freedom of thought, conscience and religion ... is far-reaching and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others". It notes that "the fundamental character of these freedoms is ... reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4(2)".

The General Comment further notes that limitations on freedom of religion, to the extent permissible at all, are only allowed with respect to manifestations of religion:

Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations

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<sup>17</sup> Sidiropoulos, paragraph 40.

<sup>18</sup> Ibid.

whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19(1). No one can be compelled to reveal his thoughts or adherence to a religion or belief.

Similarly, "[t]he freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted". This is consistent with the notion that internal beliefs themselves may not be regulated, and also follows from the fact that these matters are addressed separately in article 18(2).

The General Comment pays particular attention to the permissible restrictions on manifestations of religion.

In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination ... Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. ... [P]aragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.

It is important to note that any limitations on the right to manifest one's religion or belief must be prescribed by law, serve one of the purposes listed in ICCPR (article 18(3)), and be necessary for attaining this purpose. This means that interference with this right must be set down in formal legislation or an equivalent norm in a manner adequately specified for the enforcement organs. There must be adequate certainty of the scope of the limitations.

Furthermore, the interference must be necessary to attain one of the purposes listed in the ICCPR (article 18(3)). The restrictions must thus be proportional in severity and intensity to the purpose being sought and may not become the rule. This also means that the restriction must be proportionate in the given case.<sup>19</sup>

1.4.2 The ICCPR reinforces the substantive protections of freedom of religion by strongly articulating the obligation to equal treatment and non-discrimination. The ICCPR makes it very clear that State parties are obligated "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (ICCPR article 2(1)). Moreover, the Covenant does more than articulate a recommended ideal. It obligates State parties "to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (ICCPR article 2(2)) and to make certain that persons whose rights or freedoms are violated shall have effective remedies (ICCPR article 2(3)). Further, ICCPR (article 26) provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against

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<sup>19</sup> For these rules on the permissible restrictions cf. Manfred Nowak, U.N. Covenant on Civil and Political Rights. CCPR Commentary, 2<sup>nd</sup> revised edition, 2005, pp. 425-426; Sarah Joseph, Jenny Schultz, and Melissa Castan, The International Covenant on Civil and Political Rights, 2<sup>nd</sup> edition, 2004, pp. 507-508.

discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The U.N. Human Rights Committee has underscored the importance of non-discrimination in its General Comment No. 18 (37), which interprets the equality provisions of the ICCPR. In its view, "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights". While the Covenant itself does not define discrimination, the Human Rights Committee States, consistent with the general usage of this term in international law, that

"discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

General Comment No. 18 (37) also stresses that the Covenant is not limited in its reach to discrimination with respect to the protection of the substantive rights it enunciates.

While Article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, Article 26 does not specify such limitations. That is to say, Article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant.

ICCPR (article 27) affords particular protection against discrimination where "ethnic, religious or linguistic minorities exist". It provides that "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". The U.N. Human Rights Committee's General Comment No. 23 (50) on article 27 indicates that "the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party." The General Comment goes on to note that

Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under the article, it is not relevant to determine the degree of permanence that the term "exist" connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents.

1.5 The United Nation's 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, though not formally binding as a treaty obligation, distils many of the principles articulated in the ICCPR.

Article 2(2) of the 1981 Declaration defines "intolerance and discrimination based on religion or belief" as:

Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3 of the 1981 Declaration underscores the significance of the anti-discrimination norm established by article 2, noting that "Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedom proclaimed in the Universal Declaration of Human Rights..."

Article 6 of the 1981 Declaration spells out the implications of the foregoing religious freedom norms for a variety of recurrent and practical contexts that are vital to religious freedom. Article 6 provides:

In accordance with article 1 of the Declaration, and subject to the provisions of article 1(3), the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

## 2. Analysis and recommendations in general

In this part some of the points are highlighted that run through the draft agreement as whole. They are mainly focused on the nature of the draft agreement and its role in shaping the relationship of the State with the religious communities in Albania. They show that a Church-State system based on agreements may require some structural changes and corrections in order to comply fully with the provisions protecting religious freedom, religious pluralism and equal treatment of religious communities.

These comments are not comprehensive review, and thus there may be additional issues that are not fully addressed here. These comments address, however, some important and serious concerns that we recommend be taken into account.

2.1. A careful analysis of the draft agreement –in particular of articles 2, 7(1) and 8- leads to the following conclusion: once the draft agreement will be in force, religious communities will be recognized either (a) as non profit legal persons or (b) as religious legal persons. The option (b) appears to be reserved only to the religious communities which have entered into an agreement with the State; for all other religious communities only option (a) is available (the ability to obtain legal personality only according to the 2001 Law on Non-Profit Organizations).

Similar two-tier systems of Church-State relations have been adopted by some OSCE participating States and, if some human rights conditions are respected, the Albanian draft law also could be made compatible with the OSCE commitments and the provisions of international treaties regarding freedom of religion and equal treatment of religious communities. But, in the case under examination, there is an additional point to be taken into consideration. In the Republic of Albania, if the draft agreement comes into force, obtaining legal personality as a religious community will be dependent on the prior conclusion of an agreement, that is – impermissibly -- on a discretionary decision of the State. Under the draft law, the State would, improperly, have no obligation to conclude an agreement with a religious community and even no obligation to explain the reasons why it refuses the conclusion of the agreement. This is a serious problem that should be corrected.

It is here that there is a significant difference between the Albanian draft law and the pattern adopted in most OSCE participating States which have a two-tier system. As a rule, in other States there is a law which specifies the requirements a religious community must meet in order to obtain legal personality as a religious community. These requirements may be more or less consistent with religious liberty and equal treatment of religious communities but, at least, they provide a definite legal framework that gives religious communities the ability to know which conditions they have to meet in order to benefit from the law provisions and have the possibility to apply a court in case legal personality has been unlawfully denied to them. This option appears likely not to be available in the Albanian draft agreement which contains no reference to it and there are also doubts about whether the courts possess the necessary power to review such discretionary acts of the State.

Moreover, the draft agreement defers the final resolution of some very delicate and significant issues to further specific agreements to be concluded case-by-case with the religious communities which have signed the draft (framework) agreement (see for example art. 13, State financial assistance; art. 18 (6), establishment of educational institutions; art. 21 (4), mass media access; art. 26 (3), withdrawal from the agreement). In this way the conclusion of the draft agreement is far from being the final step in defining the relationship between the State and a religious community and the shortcomings highlighted in relation to the draft agreement risk to resurface at every step and to spoil the discipline of some central issues of the Church-State relations.

2.1.1. These remarks should not be read as necessarily criticising any Church-State system founded on agreements between the State and the religious communities. Several OSCE participating States have adopted systems of this type and, similarly to draft law of the Republic of Albania, have used agreements as a means to regulate the relations between the State and the religious communities (as is stated in article 10 (3) of the Constitution of the Republic of Albania<sup>20</sup>). Moreover, the draft

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<sup>20</sup> Art. 10 (5) affirms: “Relations between the state and religious communities are regulated on the basis of agreements entered into between their representatives and the Council of Ministers. These agreements are ratified by the Assembly”.

agreement has the structure of a framework agreement, which can be accepted by a large number of religious communities, including small ones. Finally, the preparation of the draft agreement is part of a process aimed at consolidating the enjoyment of religious freedom and extending it to a larger number of religious communities<sup>21</sup>.

But it would be improper to have a system of agreements characterized by an unchecked and unbalanced discretionary power of the State, which would increase the disparity of treatment and discrimination between religious communities.

Three guidelines, based on the relevant OSCE commitments and international law provisions, can help in avoiding this danger.

First, all religious communities should have the right to enter into an agreement with the State. Nothing in the Constitution of the Republic of Albania or in the text of the draft agreement would appear to limit this possibility to only a restricted number of religious communities. The Prime Minister's Order n. 73, dated 25 April 2006, "On the establishment of the inter-institutional working group for the compilation of the draft agreement between the Council of Ministers and religious communities", however, explicitly mentions only three religious communities (Muslim, Orthodox and Bektashi). If the possibility of entering into such agreements is limited to these religious groups (and to the Roman Catholic Church, which has already signed its agreement with the State), it would significantly weaken the commitment to respect the equality of the religious communities and to foster religious pluralism (which is indissociable from a democratic society, according to the European Court of Human Rights: see *supra* 1.3.2). If the proposed "agreement" path is pursued by Albania, it should be applied in such a way that it is not discriminatory against any religious group.

Second, concluding an agreement with the State should not be the only option a religious community has to enter into a legal relation with the State. Some religious communities, for example, do not want or are not able to conclude an agreement: that should not prevent them from obtaining a sound position in the legal system of the Republic of Albania. The fact that the conclusion of agreements is provided in the Albanian Constitution as the way to regulate the relations of the State with the religious communities should not become an obstacle to fulfilling OSCE commitments. In other countries, where an analogous provision exists (see for example article 8 (3) of the Italian Constitution), it has not been interpreted to be an exception to respecting the rights provided in general laws on religious communities.

Third, the agreement should not become an instrument to grant some religious communities rights which should be available to all religious communities (see *infra*, n. 2.4).

Specifying exactly how to apply these guidelines would exceed the mandate of the OSCE/ODIHR Advisory Council. OSCE's participating States offer different models. In some cases the discretionary power of the State has been limited through a detailed definition of the procedure to be followed to conclude an agreement (see *infra* n. 2.2). In other cases, States have defined through a law the legal position of all religious communities before concluding agreements with some of them. While this solution too can be open to criticisms because it inevitably implies a certain degree of differentiation between religious communities, it can be defended if these differences are due to the specific characteristics of each religious community and if there is a strong platform of common rights which enables all religious communities to live and develop. The Republic of Albania is entitled to make a choice among different models provided that it respects the engagements it has undertaken in the field of freedom of religion and non-discriminatory treatment of religious communities.

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<sup>21</sup> Up to now only the Roman Catholic Church can benefit of the "agreement between the Holy See and the Republic of Albania on the regulation of their mutual relations", signed on March 23, 2002.

2.2. The draft agreement completely lacks a procedural section that specifies (for example) who has the power to file an application for an agreement, which documents have to be submitted, which State bodies are for examining the applications, which steps have to be followed in examining them, how negotiations between the State and each religious community have to be conducted, on which grounds the State may permissibly reject the applications, what the time limit is by which the state must decide etc. As it has already been underlined, the process for concluding an agreement should be made more transparent in order to avoid any doubt that the conclusion of an agreement is improperly influenced by political considerations; if the draft agreement includes a section that specifies the procedure it would help in reducing the discretionary power of the State.

2.3. In some articles (see for example article 3 (d) and (c), protection of individual religious freedom; article 12, relations with foreign religious communities; article 19, social activities; article 20, charitable organizations; article 21, freedom of expression; article 23, right to property) the draft agreement confers rights which are manifestations of the general right of religious freedom and therefore are due to all religious communities, independently from any agreement with the State. While there is no prohibition to reaffirm these rights in an agreement between the State and a particular religious community, it is strongly recommended to make it clear that the rights stated in the draft agreement are available to all religious communities and are not limited to those who sign the draft agreement.

2.4. Some articles seem to suggest that the draft agreement governs the relationship between Albania and all religious communities, including those which are not part of the agreement (see in particular article 1, object of the draft agreement; article 4(1), agreement implementation). Although it is obvious that an agreement can bind only the religious communities which have signed it, it is preferable to avoid any misunderstanding and it is recommended to clarify this point in the draft agreement text.

### 3. Analysis and recommendations per article

In this part points are raised as they arise per article of the draft agreement. Since these comments are not a comprehensive review, further issues may be included in the draft agreement that can give rise to concern, but are not addressed here. Also, the following analysis does not address each article of the draft agreement explicitly; rather it highlights those provisions that most openly and directly solicit special comments.

#### 3.1. Article 2.

The first part of this article states that “The state shall recognize the religious communities as organized entities of natural persons, of religious people expressing the same religious feelings or beliefs [...]”. The expression “religious people” may be problematic as it is not clear who are “religious” (as opposed to “non religious”) people and it is also not clear who decides what beliefs are “the same”. It is suggested to delete the unnecessary words.

The second part of the article requires that the members of the religious communities “are enrolled in the registers of such communities”. As it is possible some religious communities do not have registers of their members, it is suggested to delete the reference to the registers.

The whole article could be reformulated in the following way: “The state shall recognize the religious communities as organized entities of natural persons who are members of such communities”.

### 3.2. Article 3.

At the letter b) this article mentions the “religious, educational, charitable and patriotic mission” of the religious communities. While some communities may deem that a patriotic mission is part of their religious mandate, some other may have different opinions on this point. The provision could be misread as an obligation of any religious community to perform a patriotic mission.

At the letter c) it is not clear the meaning of the terms “inviolability of the institutions of cult”. Does “inviolability” mean “independence”, “autonomy”, “freedom”? Is “institutions of cult” [TRANSLATOR – WE ARE ASSUMING THAT THE ORIGINAL WORD FOR “CULT” IN ALBANIAN IS NOT A PEJORATIVE TERM IN ALBANIAN.] a synonym of “religious communities”, of “institutions of religious communities”, of “institutions in charge of religious rites and ceremonies”? Adopting the same wording as found in ECHR (article 9(2)) could help in avoiding ambiguities and misunderstandings.

The letters d) and e) do not raise any objection regarding their content but the rights they ensure are part of the right of religious freedom guaranteed by art. 9 (1) ECHR to everybody. These letters could be misread as granting these rights only to the members of the religious communities who have signed an agreement with the State. This should be clarified..

### 3.3. Article 4.

The final part of this article should be read in the following way: “when are part of the religious community or take part in its practices”. [Silvio – I don’t understand this]

### 3.4. Article 8.

At the number 1 (d) of this article, no indication is given about the criteria leading the State Committee on Cults when it confirms that the applicant community has a “religious mission”. This evaluation cannot amount to an assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed, as such assessment has been excluded by the European Court of Human Rights as contrasting with the right to religious freedom granted by the ECHR. An indication of some criteria (for example, recognition of the applicant community as a religious community in other States, previous recognition by some other State bodies, etc.) could limit an otherwise boundless power of the State Committee on Cults.

### 3.5. Article 10.

The national interests and the national traditions mentioned at the number 3 of this article are not acceptable limitations to the statute and activity of a religious community, as they are not included among the limitations listed in article 9 (2) ECHR.

### 3.6. Article 11.

Number 1: it is recommended to substitute the words “the religious people” with the words “their members”.

Number 2: it is recommended to substitute the word “elected” with the word “selected” (or another equivalent word) as some religious communities do not elect their heads. According to the principle 16.4 of the Vienna Concluding Document, religious communities have the right to “organize themselves according to their own hierarchical and institutional structure”.

Number 3: it is recommended to make use of the wording of the article 9 (2) ECHR in order to avoid any misunderstanding regarding the limitations to the religious activities of the community officials.

### 3.7. Article 12.

The rights mentioned in this article should be available to each religious community regardless of whether independently from the fact it has signed the draft agreement. These rights are manifestations of the right of religious liberty (see art. 6 (i) of the United Nations 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief) and it is not permissible to restrict them to the religious communities which have signed the draft agreement. It is recommended to clarify this point in the text of the article (see also the remarks at the point 2.4).

### 3.8. Article 17.

The meaning of number 2 of this article is not clear. It can be read in two ways: (a) as the right of every member of a religious community that has concluded the draft agreement to perform a religious marriage without civil effects. If so, this right is due to any person as it is part of the right of religious freedom: the enjoyment of this right cannot be restricted to the faithful of the religious communities with an agreement; (b) as the right of every member of a religious community who has concluded the draft agreement to perform a religious marriage with civil effects (that is the religious marriage is recognized by the State with consequent effects). While this second interpretation of the text is less likely, it cannot be completely excluded. It is recommended to clarify this issue. [Silvio – this isn’t clear to me. It seems that it is saying in English that EVERY MEMBER of the religious community has the right to perform marriages if the community itself has entered into the agreement. I assume that this is not what is stated in the draft law.]

### 3.9. Article 18.

The rights and obligations mentioned in the numbers 1, 2 and 5 of this article should apply to each religious community, independently from the fact it has signed or not the draft agreement. They are manifestations of the right of religious liberty and it is not permissible to restrict them to the religious communities which have concluded an agreement with the State.

The same remark applies also to the number 3 of this article. Once an educational institution of a religious community complies with the law for the pre-university education and the higher education of the Republic of Albania, it would not be permissible to refuse the recognition of the documents it issues for the sole fact it has not signed the draft agreement.

### 3.10. Article 19.

The right to perform social activities is not restricted to the religious communities which have signed an agreement with the State, but is due to all religious communities: this point should be made clear in the text of the article (see supra n. 2.4).

### 3.11. Article 20.

The right to establish charitable organizations is part of the right of religious liberty (see art. 6 (b) of the United Nations 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief) and all religious communities are entitled to it. It is recommended that the article is reformulated in a way to clarify this point, avoiding the impression that the enjoyment of this right depends on the conclusion of an agreement with the State (see also supra n. 2.4).

### 3.12. Article 21.

In number 1 of this article a reference could be added to the role that mass media can perform in protecting not only “the freedom of expression and conscience” but also the freedom of religion.

The rights conferred in the numbers 2, 3 and 4 of this article are an expression of the right of religious freedom due to all religious communities (see the United Nations 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, article 6 (d) ). It is recommended to make clear this point in the text of this article (see also supra n. 2.4).

Unless there is a flaw in the English translation, it is not clear which is the precise content of the number 4 (“The religious communities shall have the right to express themselves in the mass media”) and which is the difference with the content of the number 2 of this same article (“The religious communities shall have the right to freely express and disseminate their beliefs in the mass media”).

“Various types of information” is a broad and generic expression. Sometimes, for example, religious communities are bound by their religious teachings not to divulge certain information to the public that is considered to be sacred. It is recommended to specify and limit the types of information that the State Committee on Cults may request.

### 3.13. Article 23.

It is recommended to make clear that the right to ownership is part of the right of religious freedom and consequently is due to any religious community, including those communities which have not signed the draft agreement (see the remarks under 2.4).

### 3.14. Article 26.

Number 1 of this article is ambiguous. It might be read as conferring to any religious community the right to conclude special agreements even if the community has not concluded the draft agreement (which serves as a framework agreement). But this conclusion runs against other articles of the draft agreement. It is recommended to clarify this point, by adding that the right to conclude special agreements is given to religious communities which have signed the draft (framework) agreement.