РОЗДІЛ ПЯТИЙ

ЗАКОНОДАВЧЕ ЗАБЕЗПЕЧЕННЯ СВОБОДИ СОВІСТІ

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ЗАКОНОДАВЧЕ ЗАБЕЗПЕЧЕННЯ СВОБОДИ РЕЛІГІЇ В СХІДНІЙ ЄВРОПІ ТА УКРАЇНІ

Мені дуже приємно бути тут, побачити багатьох давніх друзів. Також сподіваюсь, що зустріну багатьох нових. Як одному з організаторів цієї конференції, хотілось б привітати всіх, хто приїхав на неї як із України, так і з-за її меж. Ті з нас, хто живе в інших частинах світу слідкують за Україною в даний момент і розуміють, що країна зараз знаходиться на роздоріжжі. Той напрямок, який вона обере у своєму розвитку, буде важливим не лише для України, але й для інших країн світу.

Існує багато вимірів і підходів, які повинна зреалізувати Україна. Одним із важливих є підхід до свободи релігії або віросповідань. Дуже приємно було слухати голову Держкомнацрелігії України Олександра Сагана, який говорив про розвиток державно-церковних відносин в його країні. Також було цікаво слухати пана Колодного, який говорив про значно довшу перспективу. З цих доповідей видно, що поняття релігії, свободи буття віросповідань є одним з найважливіших, за яким будуть оцінювати Україну при її входженні в Європу. Значно важливим є те, як країна ставиться до свободи релігії. Присутні на цій конференції люди відіграють значно роль у вирішенні цих проблем. Від них, а не тільки від лідерів країни, залежить реальне втілення політики державно-церковних відносин на регіональному, місцевому рівні.

Спеціальний доповідач від ООН з свободи релігії казав тут, що в Україні є розвиток у сфері забезпечення свободи релігії.Вона також знаходиться в колі уваги Організації безпеки і співробітництва в Європі. Якщо в країні справді існує свобода релігії, то у неї є справжні шанси на те, що й інші людські свободи також будуть поважатися. Коротше кажучи, ми впевнені в тому, що та політика України у сфері свободи релігії, про яку ми знали раніше і яка провадиться нині державною інституцією, очолюваною Олександром Саганом і багатьма іншими працівниками сфери державно-церковних відносин на місцях, які тут присутні, буде мати ще значно серйозніші позитивні результати. Вони будуть виходити за межі України. Я так розумію, що вирішення вами проблем свободи релігії будуть важливі не лише для України, а й будуть впливати на означені сфери суспільного життя інших країн..

Мене попросили поговорити про закони свободи релігії в Східній Європі, про компаративну перспективу. Насамперед хочу сказати, що жодна система державно-церковних відносин не є ідеальною. Протягом 2001-2002 років в країнах регіону значно більше уваги приділялось захисту релігійної свободи, було більше можливості для того, щоб зняти наявні в них певні релігійні обмеження, зокрема наявні ще обмеження на діяльність релігійних спільнот, які не є настільки небезпечними. При цьому обмежувалася їхня свобода. Домінуючі церкви часто впливають на стан релігійного життя країни, становлення відповідного законодавства, не розуміючи при цьому те, що в довгостоковій песпективі така поведінка зрештою дасть втрату довіри до них і вони не зможуть вже так сильно розвиватись.

Що ж потрібно Україні? Україні потрібні кращі ідеї, нові напрацювання у сфері свободи буття релігії.. Нові позитивні ідеї можуть привести її до кращого майбутнього.

Що ж може сприяти прогресу в Україні у сфері свободи релігійного життя? У зв'язку з цим доречно згадати, що в 2006 році у вас був вироблений новий проект Закону про свободу совісті, який за кордоном вважають одним із кращих в Східній Європі. Він був розроблений Мін'юстом України для того, щоб втілити рекомендації ПАРЄ з впровадження недискримінаційної системи церковної реєстрації. Я знаю, що багато з присутніх тут брали участь у створенні цього законопроекту. Він був не зовсім ідеальним. Венеціанська Комісія Ради Європи і Комітет ОБСЄ з свободи релігії розглянули його і запропонувала деякі уточнення цього законодавчого проекту. Конкретні рекомендації цих інституцій грунтуються на міжнародних стандартах і компаративних поглядах. При цьому Україна запропонувала один із кращих законів в цієї сфери в цій частині світу.

Проблеми, які існують з існуючими законами повинні реформуватися. Багатьох речей можна досягнути просто мудрим адміністративним впровадженням існуючих законів. Адже ми знаємо, що закон, особливо на місцях, може інтерпретуватися владними структурами по-різному. Вони можуть відкрити наявні в ньому можливості для демократизації сфери релігійного життя, а можуть навпаки - їх закрити. Тому дуже приємно знаходитись в Україні, де можна відчути в багатьох частинах країни, що всі намагаються щоб ці процеси працювали якомога краще.

Що стосується можливості адміністрування чи використанням законів з релігії, то все тут залежить від обраних цілей, яких надто багато. Релігійні цілі будуть значно продуктивнішими, коли вони використовуються для покращення релігійної діяльності, а не тільки для контролю за нею. Тут важливо не втратити той соціальний капітал, який несуть релігійні інституції. Релігія відіграє важливу роль у сфері гуманітарної допомоги. Тому ми говоримо про необхідність покращення волонтерської допомоги, загального поля суспільної діяльності конфесій.

Зазвичай існують способи регуляції релігії за певними критеріями. Коли закони забороняють дуже багато, то менш небезпечні релігійні групи менш небезпечні просто перестають працювати. Але більш небезпечні групи йдуть у підпілля, а там їх державі значно важче контролювати. Відтак закони, які щось забороняють, не завжди є ідеальним способом регулювання. Потрібно розуміти, що закони з реєстрації і органи реєстрації є не лише активними і ефективними лише в уточненні, засвідченні проблемної діяльності. До того ж, не лише реєстраційні органи оцінюють негативні результати діяльності релігійних груп, а ще й поліція, частіше - засоби масової інформації.

Тепер зосереджу свою увагу на деяких стандартах, які з'явились останнім часом і які я хотів би згадати в моїй доповіді. Перш за все вважаю, що закони про обов'язкову реєстрацію релігійних спільнот не допустимі. Свобода релігії – це людське право, яке не залежить від дозволу держави. Тому обов'язкова вимога реєстрації не є можливою, бо ж це порушує людські права. Звичайно, більшість організацій прагнуть зареєструватися тому що значно простіше в сучасному корпоративному світі мати статус юридичної організації. Цей статус дуже зручний для більшості релігій. Він є аспектом інтегрованої свободи релігійних віросповідань і свободи асоціювань.

По-друге, органи асоціативні і релігійні не можуть визначати нечіткі положенням, які можуть бути дані офіційними особами. Необхідно, щоб вони давали чіткі вказівки для того, щоб можна було використовувати статусу юридичної особи повсюдно.По-третє, статус юридичної особи не повинен використовуватись для дискредитації інших різноманітних організацій і релігійних груп. Право на релігійні свободи належить всім.

По-четверте, процес надання юридичного статусу таким організаціям не повинен бути способом маніпуляції ними офіційними органами. Вони повинні регулювати такі стосунку протягом короткого терміну, який зазвичай не переважає одного місяця. П'яте, статус організації не повинен бути таким, що відкликається, якщо в цієї організації з'являються якісь проблеми. Наприклад, статус можна відкликати, але необхідно щоб вони

мали можливість захищати свій статус. Так, багато релігійних організацій України мають закордонні штаб-квартири, точніше – свої зарубіжні центри. Але це недостатній привід для того, щоб позбавляти їх юридичного статусу, виганяти з країни, як це нещодавно трапилось в Росії.

Державні органи не можуть грати в ігри, які організації потрібно дозволити зареєструвати, а які – ні. Релігійні групи повинні мати можливість виявляти свої вірування, ці вияви повинні бути законними. Вияви таких релігійних моментів стають легітимними. Якщо ж деякі вияви релігійності викликають стурбованості, то це не повинне призвести до заборони цих релігійних спільнот. Державні органи не повинні дискримінувати окремих осіб або релігійні груп, дискримінувати їх на тій основі, що їхня штаб квартира знаходиться за межами країни. Будь-які можливі обмеження релігійної діяльності повинні бути ретельно розглянуті.

Я тут не встиг подати вам всі ті принципи демократичного розвитку релігійного життя, які розглядаються в тексті моєї доповіді, яка буде надрукована. Я все ще вірю, що Україна є тією країною, де ми побачимо одну з провідних юрисдикцій в пострадянському просторі. Дуже радий, що я пов'язаний з вами хоча б невеличким чином і постійно дізнаюсь хоча б дещо з того, що ви робите.

Текст-анотацію українською мовою до видруку
підготував А.Колодний

Cole DURHAM

I. Introduction. It is a great pleasure for me to be back in Ukraine at this beautiful time of year. I am extremely grateful for the hard work of Professor Kolodny, Lyudmila Filipovich, and so many others that have worked with them over the years, who have again made this kind of event possible. It is a particular pleasure to see Oleksander Sagan, and to have his support for this important event.

Those of us living in other parts of the world are watching Ukraine at this time, understanding that the country stands at the cross-roads, and that the direction in which it moves will be important not only for Ukraine, but for many other parts of the world. There are many dimensions to choices Ukraine will make, but one of the most important is its approach to freedom of religion or belief. This is perhaps not obvious. Other issues, such as approaches to national defense, energy policy, economic development, democratization, and so forth, may capture media headlines. But in very important ways, it is the direction of the country with respect to freedom of religion or belief that will send the deepest signal about the direction in which the country is moving.

In this regard, the people at this conference play a particularly important role, because it is not the formal statements from national leaders that will prove most significant, but the actual implementation of policy at the regional and local level. In our tightly connected world, infringements of religious freedom in Ukraine come immediately to the attention of co-religionists in other countries, who rapidly communicate these concerns to their own national leaders. When other countries assess the direction in which Ukraine (or any other country) is actually moving, it is not lip-service to globally shared ideals of religious freedom that count, but credible reports of what is actually happening on the ground. These are the developments that come to the attention of the U.N.'s Special Rapporteur on Freedom of Religion or Belief. These are the developments that are the focus of the Organization for Security and Cooperation in Europe (OSCE). These are the developments that are brought to the attention national leaders everywhere. Certainly in my own country, these developments are viewed as one of the strongest indicators of where a country really stands. If the right to freedom of religion or belief is being protected, it is likely that all other human rights are being protected as well. Where religious

liberty violations are occurring, nothing else is really safe. Of course, these principles are followed not merely to impress others, but because they are principles of justice, and as such will benefit the lives of the people they protect, and will contribute to peace and stability in the countries that implement them well. In short, the policies framed in Oleksandr Sagan's office and implemented by many of the others who are here will have implications far beyond the religious realm. My own sense is that they will be important not only for Ukraine, but can be significant for other parts of Europe and throughout former Soviet space.

II. The Trend Toward Undue Restrictions on Religious Freedom In my remarks today, I have been asked to address religion laws of Eastern Europe in comparative perspective. I need to be honest and tell you that wherever one looks, there are problems. No legal system is perfect. For some time, particularly since 9/11, the pendulum has been swinging in Eastern Europe as in other parts of the world toward reduced protections of religious freedom. Concerns for heightened security are often used as a basis for increased restrictions on religious freedom, even though many such restrictions go too far, and in the long run compound rather than solve the very problems of security they are supposed to solve. Worries about religious extremism are often used to justify restrictions on legitimate groups and practices. Stereotypical images of so-called "dangerous sects" are invoked in drafting restrictive legislation that is often vague and excessively broad, giving officials discretionary latitude to treat less popular but non-dangerous groups in discriminatory ways that unfairly restrict their freedom. Dominant churches give into the temptation to draw on state power to strengthen their own positions, not understanding that in the long run, such conduct leads to loss of credibility, respect, and in the end, to loss of the very support they seek to strengthen. I could spend all my time giving incidents of such problems in country after country, including, I should add, my own. But this would not provide a helpful comparative overview. After all, what is needed in Ukraine is not information from other countries that can be used to justify problematic practices, but ideas of best practices that can lead to a better future.

III. Recommendations for Future Reforms.

A. Build on Prior Legislative Efforts With that in mind, let me focus on comparative insights that I believe could help move Ukraine forward. In this regard, it is worth remembering that in 2006, Ukrainians developed a draft law that was widely regarded abroad as one of the best pieces of draft legislation on religious freedom to emerge from Eastern Europe in recent memory. The draft was prepared by the Ministry of Justice in order to implement recommendations of the Parliamentary Assembly of the Council of Europe (PACE) by introducing a non- discriminatory system of church registration.[159] Many of you here were involved in creating that draft. It was not perfect. Reviews by the Venice Commission of the Council of Europe and by the OSCE's Advisory Council on Freedom of Religion or Belief, suggested a number of vital improvements as well as numerous refinements. These suggestions constitute a rich inventory of concrete recommendations based on international standards and comparative perspectives. With that draft and the associated comments, Ukraine was well on its way to having one of the most enlightened laws on religion in this part of the world. The draft was derailed as part of a shift in politics, but could still serve as a very effective starting point for renewed reform efforts.

B. Draw on International Experience Whether or not such reforms go forward, much can be learned from international and comparative sources that guided that legislation. While there are problems with the legislation in force that should ultimately be reformed, many things can be accomplished by wise administration of the current laws. In this regard, it is important to remember that international instruments are not merely idealistic theoretical documents, but draw on years of practical experience from numerous countries around the world. I will not take the time of those here to reread and to explicate the general provisions from international instruments. The general standards are set forth and explicated in great detail in the Deskbook that I had the

[159] PACE Resolution 1466 (2005) on Honouring of obligations and commitments by Ukraine and the explanatory memo thereto, §§ 269 -271.

opportunity to help edit.[160] Relevant OSCE Standards have been collected in a volume that collects the human rights commitments of OSCE participating States, which is available online.[161] These are well-known and need not be repeated here. The standards that apply particularly with respect to the law of religious associations are elaborated in considerable detail in the "Guidelines for Review of Legislation Pertaining to Religion or Belief" (the "OSCE Guidelines")[162] that were produced by the OSCE's Advisory Panel on Freedom of Religion or Belief in 2004.[163] The Guidelines are available in English and Russian, and can be accessed on the OSCE Website.[164] An appendix to the Guidelines quotes the language of all the major international commitments that protect freedom of religion or belief.

C. Keep Objectives of Religious Association Laws in Mind Whether one is revising or applying religious association laws, it is important to keep their overall objectives in perspective. Religious association laws have proven to be much more productive in facilitating religious activity rather than controlling it. Unduly restrictive laws in this area result in significant loss of social capital. Religious organizations play a powerful role in inculcating altruism and other personal characteristics that enhance social stability, productivity and other forms of social capital such as increased volunteerism, social commitment, integrity, and general creativity. This impact is felt not only within religious organizations, but in other social settings as well. While religion can have negative as well as positive effects, it is socially wasteful to regulate religion in ways that unnecessarily curtail its positive effects. When laws are too restrictive, the effect is that legitimate law abiding groups are prevented from operating, whereas the more problematic groups simply go underground, and if anything, are more difficult to track and deal with.

Think by comparison about how modern legal systems attempt to regulate pollution. They do not have a general rule that says no corporation may be registered until it proves that it will not pollute. Rather, corporations are allowed to register on a fairly straightforward and efficient basis. Some laws are passed that prohibit particular kinds of polluting activity, following rule of law principles. Only those that actually cause pollution suffer the consequences. It should also be noted that many of the most effective anti-pollution rules involve not criminal or administrative sanctions, but economic incentives and other strategies. The point is, registration laws are not the most effective means of regulating bad practices. Anti-pollution regulations are more carefully targeted so that the positive values of corporate activity can go forward. Negative activities are more carefully targeted. Only in extreme circumstances is non-registration or corporate dissolution the appropriate or necessary remedy.

It is important to understand that registration laws and registration authorities are not particularly effective in terms of identifying problematic behavior. Experience in other countries suggests that in general it is not registration authorities that identify such conduct, but police, neighbors, disgruntled insiders, and most frequently, the media. In short, if the issue is controlling problems, a more productive way to proceed is to relax registration rules, take advantage of them

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[160] Tore Lindholm, W. Cole Durham, Jr., and Bahia G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004).

[161] OSCE Office of Democratic Institutions and Human Rights, OSCE Human Dimension Commitments, Vol 1: Thematic Compilation (2d. ed. 2005), available at www.osce.org/publications/odihr/2005/09/16237_440_en.pdf. This document is also available in French (www.osce.org/publications/odihr/2005/09/16237_440_fr.pdf) and Russian (www.osce.org/publications/odihr/2005/09/16237_440_ru.pdf).

[162] The Guidelines were adopted by the Venice Commission of the Council of Europe at its 59th Plenary Session (Venice, 18-19 June 2004), and were welcomed by the OSCE Parliamentary Assembly at its Annual Session (Edinburgh, 5-9 July 2004). The Guidelines have also been commended by the U.N. Special Rapporteur on Freedom of Religion or Belief. Report of the Special Rapporteur on the Freedom of Religion or Belief to the 61st Session of the Commission on Human Rights, E/CN.4/2005/61, para. 57.

[163] The Advisory Panel has been reorganized and the body corresponding to the group that drafted the Guidelines is now called the Advisory Council for Freedom of Religion or Belief. I have had the privilege of being a member of both bodies.

[164] The OSCE Guidelines are available on a sub-page of the OSCE site (www.osce.org) devoted to the Office of Democratic Institutions and Human Rights and its publications. They are available in English and Russian.

to keep track of contact points with organizations, and then rely on other social monitoring mechanisms to deal with actual problems.

IV. Minimum Standards for Religious Association Laws under International Human Rights Law. The jurisprudence of the European Court of Human Rights provides a helpful guide to the minimum standards that religious association laws must meet if they are to comply with international standards, since they apply to a sophisticated yet extremely diverse set of legal systems, including those with both common law and civil law backgrounds. This overview document provides a brief summary of basic features of religious association laws that are called for both by the rule of law and by international human rights standards.

1. Registration Systems are Permissible. The first point to make is the obvious one that laws governing the creation, operation and dissolution of legal entities that religious communities can use in carrying out their affairs are permissible. States have a legitimate interest, which has been recognized as a public order interest, in verifying "whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population."[165] States have a right to look beyond the formalities of paper filings to assess these issues.[166] They also have a reasonable interest in knowing who is responsible for the organization and who to contact if there are problems. The difficulties arise when religious association laws are used to control and obstruct religious communities, as opposed to merely facilitating or receiving notice of their activities. Note that the fact that states may and should have religious association laws does not mean that it is appropriate to require registration as a precondition for engaging in religious activity. Such mandatory registration or "preapproval" requirements cannot withstand scrutiny under international human rights standards. They violate the essential notion of universally applicable human rights—that the rights are not created or bestowed by the state, but are inherent aspects of the status and dignity of being human—as well as the broad language of the Universal Declaration of Human Rights and other international instruments.[167]

II. Denial of Registration Interferes with Religious Freedom. It is precisely because legal entities have become so vital and pervasive as vehicles for carrying out group activities in modern societies that denial of entity status has come to be seen as an interference with freedom of religion and association. This is part of the reason why it is now so well-settled that religious communities have a right to acquire legal entity status. Accordingly, denial of legal entity status for a group of any size is itself a violation of international religious freedom standards.[168] Such denial can occur either at the point a group is initially seeking to acquire legal entity status, or at some later point, when re-registration is required or when dissolution proceedings are instituted. Inappropriate denial of access to registration may also result from provisions that call for more than a modest number of founders (ten or less is typical in most OSCE countries) for those religious groups who desire legal entity status but cannot meet the

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[165] Manoussakis v. Greece, ECtHR, App. No. 18748/91, 26 September 1996, para. 40-41.

[166] Moscow Branch of the Salvation Army v. Russia, ECtHR, App. No. 72881/01, Oct. 5, 2006, para. 94; Metropolitan Church of Bessarabia v. Moldova, ECtHR, App. No. 45701/99, 13 December 2001, para. 125.

[167] For a more extensive critique of mandatory registration requirements, see W. Cole Durham, Jr., Metropolitan Church of Bessarabia v. Moldova, ECtHR, App. No. 45701/99, 13 December 2001, para. 125.*Facilitating Freedom of Religion or Belief Through Religious Association Laws* [hereinafter "Religious Association Laws"] *in* Tore Lindholm, W. Cole Durham, Jr. and Bahia Tahzib-Lie (eds.), Facilitating Freedom of Religion or Belief: A Deskbook (Leyden: Martinus Nijhoff Publishers, 2004) 321, 385-88.

[168] The cases discussed in this document come from the European Court of Human Rights, applying the European Convention for the Protection of Human Rights and Fundamental Freedoms. But the relevant language of Article 9 ECHR is virtually identical with the parallel language of Article 18 of the International Covenant of Civil and Political Rights, and there can be little doubt that the European Court of Human Rights is one of the most persuasive (if not *the* most persuasive) interpreters of the relevant standards.

minimum threshold requirements.[169] A parallel problem arises from provisions setting minimum time-in-country provisions for eligibility to register.[170]

III. Religious Bodies are Rights Bearers. The European Court has repeatedly held that a "church or ecclesiastical body [or other religious community] may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention."[171] The ability to serve as a bearer of rights in this respect is not dependent on a formal grant of entity status by a state; in this sense, the right to entity status precedes and is subsequently secured by the grant of entity status.[172]

IV. Neutrality and Impartiality. Government officials and bodies dealing with religious groups have a "duty of neutrality and impartiality."[173] In particular, this means that substantive evaluation of religious beliefs is impermissible, including substantive evaluation of organizational structures (such as the use of military terminology and organizational forms in the *Salvation Army* case).

V. Reducing Arbitrary Discretion. Religious groups have particular claim to the more general right in a rule of law system to be free of the evils of arbitrary discretion.[174] The European Court has repeatedly stressed that the right to freedom of religion as guaranteed under the Convention excludes any discretion to review the substantive beliefs and practices of a religious community.[175] The temptation to engage in such impermissible review is particularly strong in dealing with registration issues, where officials charged with reviewing documentation relevant to acquisition of entity status may be inclined to assume authority over internal religious issues that should in fact remain beyond state purview. Note that the *Salvation Army* case indicated sharp constraints even on "formal review" of registration documents. Where the statute governing registration is insufficiently clear about what documents are required, officials need to give clear, prompt and reasonable indication of what is required. Formal review of required documents should not become an excuse for informal harassment and delay.

VI. Inappropriate Religious Influence. A particularly troubling form of arbitrary or discriminatory decision making arises in situations in which government officials allow one religious community to influence public decision making with respect to the rights of other religious communities. This problem was perhaps most evident in the *Metropolitan Church of Bessarabia* case.[176] There it was quite clear that behind-the-scenes collusion between government leaders and the Russian Orthodox Church (Moscow Patriarchate) was implicated in the state's refusal to register the Bessarabian group. In response, the Court pronounced a straightforward ban on such conduct: "where the exercise of the right to freedom of religion or of one of its aspects is

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[169] For further discussion of the problem of minimum memberships requirements, see Durham, *supra* note **Помилка! Закладку не визначено.**, at 388-90.

[170] See id., at 390-92.

[171] Metropolitan Church of Bessarabia v. Moldova, ECtHR, App. No. 45701/99, 13 December 2001, para. 101; Cha'are Shalom Ve Tsedek v. France, ECtHR, App. No. 27417/95, 27 June 2000, para. 72 (addressing rights of a Jewish community).

[172] Thus, the Metropolitan Church of Bessarabia was able to assert Article 9 rights even though the state of Moldova had consistently refused to grant it legal entity status. *See also* Canea Catholic Church v. Greece, 27 EHRR
521 (1999) (ECtHR, App. No. 25528/94, 16 December 1997) (legal personality of the Roman Catholic Church protected despite lack of legal formalities creating the entity).

[173] Moscow Branch of the Salvation Army v. Russia, ECtHR, App. No. 72881/01, Oct. 5, 2006, para. 97; Metropolitan Church of Bessarabia v. Moldova, ECtHR, App. No. 45701/99, 13 December 2001, para. 116; Hasan and Chaush v. Bulgaria, ECtHR, App. No. 30985/96, 26 October 2000, para. 78.

[174] This was one of the early principles established in European Court jurisprudence. The leading case on this issue is Manoussakis v. Greece, ECtHR, App. No. 18748/91, 26 September 1996.

[175] *See, e.g.*, Moscow Branch of the Salvation Army v. Russia, ECtHR, App. No. 72881/01, Oct. 5, 2006, para. 92; Hasan and Chaush v. Bulgaria, ECtHR, App. No. 30985/96, 26 October 2000, para. 78; Manoussakis v. Greece, ECtHR, App. No. 18748/91, 26 September 1996, para. 47.

[176] The European Court faced a similar issue in Manoussakis v. Greece, ECtHR, App. No. 18748/91, 26 September 1996, para. 51.

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 [of the European Convention]."[177]

VII. Registration of "Non-Official" Religious Groups. International standards, including the European Convention, do not necessarily ban official or established state religions. However, as the U.N. Human Rights Committee has noted in its official commentary on the religious freedom provision of the International Covenant on Civil and Political Rights (Article 18), "[t]he fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers."[178] In particular, the state may not refuse to register one group or its representatives because it prefers a competing group. In *Metropolitan Church of Bessarabia*, the European Court rejected a number of arguments aimed at protecting the exclusive registration of the Orthodox Church affiliated with the Moscow Patriarchate. In support of its reasoning, the Court noted that "[i]n democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership."[179] In general, "state measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion."[180] Even though denominational differences may result in discord, that Court concluded that what is at stake in such cases "is the preservation of pluralism and the proper functioning of democracy . . . . Accordingly, 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."[181]

VIII. Formal Review Only. Because neutral state officials do not have a right to evaluate the substantive merits of religious beliefs, including beliefs about how religious life should be structured and organized, government officials dealing with registration of religious associations should not engage in more than formal review of registration submissions, with the exception that they can look beyond written submissions when there is clear evidence that denying legal entity status to the group is necessary to avert concrete threats to public health, safety, order, morals or the rights of third parties.[182] Provisions that allow disapproval of entity status because of doctrinal or organizational considerations constitute inappropriate state intervention in the internal affairs of a religious community.[183]

IX. Clear Standards. Religious association laws that comply with fundamental rule of law constraints avoid vagueness, retroactive re-registration provisions, and other features that open the door to excessive discretion in granting or dissolving legal entity status.[184]

X. Non-Discrimination. State officials may not discriminate against individuals or groups. This includes the obligation not to discriminate against individuals or organizations because they are foreign or based outside of the country.[185]

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[177] Metropolitan Church of Bessarabia v. Moldova, ECtHR, App. No. 45701/99, 13 December 2001, para. 117.
[178] U.N. Human Rights Committee, General Comment 22 (48), adopted 20 July 1993, U.N. Doc. CCPR/C/21/Rev.1/ Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/ Rev.1 at 35 (1994), para. 9.
[179] Metropolitan Church of Bessarabia v. Moldova, ECtHR, App. No. 45701/99, 13 December 2001, para. 117.
[180] Supreme Holy Council of the Muslim Community v. Bulgaria, ECtHR, App. No. 39023/97, 16 December 2004, para. 76; Serif v. Greece, ECtHR, App. No. 38178/97, 1999, paras. 49, 52-53; *Hasan and Chaush v. Bulgaria*, cited above, para. 78).
[181] Metropolitan Church of Bessarabia v. Moldova, ECtHR, App. No. 45701/99, 13 December 2001, para. 116, *citing* Serif v. Greece, ECtHR, App. No. 38178/97, 1999, para. 53.
[182] *See* Sidiropoulos and Others v. Greece, ECtHR, App. No. App. No. 26695/95, 10 July 1998, para. § 40)
[183] For further discussion of these issues, see Durham, *supra* note **Помилка! Закладку не визначено.Помилка! Закладку не визначено.**; at 398-99.
[184] See id. at 394-400.
[185] Moscow Branch of the Salvation Army v. Russia, ECtHR, App. No. 72881/01, Oct. 5, 2006, paras. 82-85.

X1. Prompt Review Process. States committed to the due process features of the rule of law assure prompt decision in registration processes. The *Manoussakis* case made it clear that open-ended decision processes with unending review or reconsideration loops violate religious freedom standards.[186] The *Salvation Army* case further emphasized that denial of legal entity status violates religious freedom rights where courts or other administrative bodies do not give applicants clear guidance on what must be submitted at the outset of the filing process.[187] Successive requests for additional information inappropriately burden the right to entity status.[188]

XI1. Right to Appeal. Most religious association laws provide a right to appeal to a court, or if registration is in a court, to an appellate court. Failure to do so could easily run afoul of the right to access to court assured among other things by Article 6(1) of the European Convention.

XII1. Permissible Limitations Must Be Narrowly Construed. The foregoing points summarize the practical features that religious association laws should have in order to strike an appropriate balance between "facilitation" and "control" of religious communities and to comply with the rule of law and international human rights standards. Of course, the best paper provisions can be frustrated by officials bent on thwarting or circumventing human rights requirements, or using religious association laws to achieve excessive control over religious groups.

Leaving such cases of abuse aside, however, it is worth commenting briefly on the general principles that govern what types of constraints are permissible in religious association laws and what are not. The fundamental guide for decision under international law is provided by the so-called "limitation clauses" of the pertinent international instruments—most notably Article 18(3) of the International Covenant for Civil and Political Rights and Article 9(2) of the European Convention. Since these are essentially parallel, it will suffice to quote the limitation clause from the European Convention:

> 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.[189]

To the extent that creating legal entities for religious communities can be regulated at all, it is only permissible as a regulation of "manifestations" of religion, since it is only "manifestations that may be "subject to limitations."[190] To the extent religious association laws facilitate religious practice, they do not constitute a limitation at all. When they are used as a control mechanism, in contrast, they often do impose limitations. Such restraints are permissible only if they fall within the permissible range of limitations set forth in the limitation clause. Specifically, limitations on manifestations of religion are permissible only if three rigorous criteria are met.

First, limitations can only be imposed by law, and in particular, by laws that comport with the rule of law ideal.[191] Many of the constraints on religious association laws described above flow from this requirement. Thus, limitations may not be retroactively or arbitrarily imposed on specific individuals or groups; neither may they be imposed by rules that purport to be laws, but

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[186] Manoussakis v. Greece, ECtHR, App. No. 18748/91, 26 September 1996, para. 45.
[187] Moscow Branch of the Salvation Army v. Russia, ECtHR, App. No. 72881/01, Oct. 5, 2006, para. 90.
[188] *Church of Scientology Moscow v. Russia*, ECtHR, App. No. 18147/02, 5 April 2007, paras. 79-93.
[189] Article 9(2) ECHR.
[190] Matters relating to the internal forum, such as the internal holding of beliefs, changing beliefs, and so forth lie for the most part beyond the regulatory reach of the state. For more detailed discussion of internal forum issues, see Manfred Nowak and Tanja Vospernik, *Permissible Restrictions on Freedom of Religion or Belief*, in Lindholm, Durham & Tahzib-Lie, *supra* note 2, at 148-52; Malcolm D. Evans, Religious Liberty and International Law in Europe (Cambridge: Cambridge University Press, 1997), pp. 294-98.
[191] *See, e.g., Sunday Times v. the United Kingdom,* 30 Eur. Ct. H.R. (ser. A) at 30 (1979); *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) at 15 (1993); Carolyn Evans, Freedom of Religion under the European Convention of Human Rights (Oxford: Oxford University Press, 2001), pp. 138-142; Malcolm Evans, *supra* note 190, pp. 319-320.

are so vague that they do not give fair notice of what is required or they allow arbitrary enforcement.[192] Due process considerations, such as the rights to prompt decisions and to appeals, also reflect these basic rule of law requirements.

Second, limitations must further one of a narrowly circumscribed set of legitimating social interests. Recognizing that all too often majority rule can be insensitive to minority religious freedom rights, the limitations clause makes it clear that in addition to mustering sufficient political support to be "prescribed by law," limitations are only permissible if they additionally further public safety, public order, health or morals, or the rights and freedoms of others. Significantly, as the UN Human Rights Committee's official commentary on the parallel language of Article 18(3) of the ICCPR points out, the language of the limitations clause 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.[193]

The reference to "public order" as a legitimating ground must be understood narrowly as referring to prevention of public disturbances as opposed to a more generalized sense of respecting general public policies. Significantly, the term for "public order" in the French version of the ICCPR is not "ordre public" in the sense often used in French public and administrative law to refer to the general policies of the community, but rather "*la protection de l'ordre,*"[194] terminology suggesting concrete public disturbance and disorder.

Third, even if a particular limitation on freedom of religion or belief passes all the foregoing tests, it is only permissible as a matter of international human rights law if it is genuinely necessary. The decisions of the European Court of Human Rights in Strasbourg, which has had the most experience adjudicating the meaning of limitation clause language, have made it clear that in most cases analysis turns ultimately on the necessity clause. In the European Court's decisions, public officials defending a certain limitation can often point to legislation supporting it, and the legitimating grounds of Article 9(2) are broad enough that they can be used to cover a broad range of potential limitations. Insistence that limitations be genuinely and strictly necessary puts crucial brakes on state action that would otherwise impose excessive limitations on manifestations of religion.

1. Mandatory registration laws are not permissible. The right to freedom of religion or belief does not depend on acquiring legal entity status. Laws which penalize individuals or religious groups for engaging in religious activities without registering with the state violate their religious freedom rights.
2. For religious communities that desire to acquire legal entity status (which includes most religious communities in today's world), the right to such status is an integral aspect of the right to freedom of religion (and freedom of association). The registration process should not itself pose a major obstacle to acquiring entity status.
3. Religious association laws may not obstruct access to legal entity status, either by making its acquisition unduly difficult or its dissolution unduly easy. Vague provisions which make arbitrary or discriminatory decisions by officials possible are impermissible, and the state has an affirmative obligation to provide clear guidelines so that multiple applications for legal entity status are not necessary.

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[192] *Hasan and Chaush v. Bulgaria*, Eur. Ct. H.R., App. No. 30985/96 (Oct. 26, 2000), paras. 84-87; Carolyn Evans, *Freedom of Religion under the European Convention of Human Rights (Oxford: Oxford University Press, 2001)*, pp. 139-42.

[193] United Nations Human Rights Committee, General Comment No. 22 (48) on Article 18, adopted by the U.N. Human Rights Committee on 20 July 1993, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), para. 8.

[194] Carolyn Evans, *supra* note 191, p. 150.

4. The process for acquiring legal entity status may not discriminate against individuals or organizations because they are foreign or based outside of the country.
5. The process for granting entity status should not be subject to being manipulated by officials for purposes of delaying approvals. Officials should be required to respond to applications for entity status within a short time frame (typically not to exceed one month), and they should not be allowed to extend this period by repeated requests for additional information. Prompt appeals from denial of legal entity status must be available.
6. Entity status should not be revoked pending appeal.
7. Foreign status of the organizers and the fact that a religious organization has a foreign headquarters is not a permissible ground for denial of entity status.
8. State authorities may not force religious communities to play an endless guessing game in determining what will be required to allow registration.
9. The right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. Limitations on manifestations of religion are permissible under limited circumstances, but these are defined by the limitation clauses of international instruments in terms of secular concerns, not evaluation of religious beliefs.
10. State officials have a strict duty of neutrality and impartiality regarding religious communities. States have an affirmative duty to act in good faith and to fulfill their duty of neutrality and impartiality.
11. Both the threat of dissolution and unequal treatment of different communities in terms of access to entity status constitute interference with religious freedom.
12. Permissible Limitations Must Be Narrowly Construed.

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СВОБОДА СОВЕСТИ – ГАРАНТ ДЕМОКРАТИИ

Религиозная толерантность является одним из наиболее сложных феноменов. Во-первых, она касается утонченной сферы – человеческой души, затрагивание которой всегда требует труднодостижимого соблюдения общезначимой формулы «не обидь», следования категорическому императиву. Во-вторых, в ней одновременно задействовано несколько субъектов: микроуровень – индивиды; макроуровень – религиозные группы (деноминации, конфессии, мировые религии), формирующие межконфессиональную толерантность, а также толерантное отношение к светской социальной жизни; мегауровень – государство, выстраивающее свои отношения с религиозными организациями, и контролирующее взаимоотношения между религией и политикой.

Поэтому ученые стали классифицировать религиозную толерантность в силу её сложной структурированности. Немецкий религиевед середины прошлого века Г. Меншинг выделил «внутреннюю» и «формальную» толерантностью. Под *«внутренней» толерантностью* он понимал положительное признание «другой религии как подлинной и легитимной возможности встречи со священным» (См.: Хомяков М.Б. Пределы религиозной толерпантности // Актуальные аспекты проблемы толерантности в современном обществе. – СПб, 2004.- С. 182). Она ставит вопрос о возможности и границах религиозной толерантности на макроуровне, где рассматривается проблема об отношении одной религии к другой, т.е. межрелигиозных и межконфессиональных взаимоотношений. *«Формальная» толерантность* есть «западноевропейская» модель религиозной толерантности, при которой религия рассматривается как личное (частное)