



ADF INTERNATIONAL

From: Paul Coleman, Executive Director, Senior Counsel
To: National Assembly of Bulgaria
Date: 1 June 2018
Re: **Draft Bills № 854-01-34/04.05.2018 and № 854-01-35/09.05.2018**

(a) Introduction

1. ADF International is a global legal organization that advocates for religious freedom before national and international institutions. As a legal alliance of more than 3,000 lawyers dedicated to the protection of fundamental human rights, it has been involved in over 500 cases before national and international forums, including the European Court of Human Rights and Inter American Court of Human Rights. ADF International has also provided expert testimony before several national parliaments, as well as the European Parliament and the United States Congress. As well as having ECOSOC consultative status with the United Nations (registered name “Alliance Defending Freedom”), ADF International has accreditation with the European Commission and Parliament, the Organization of American States, and is a participant in the FRA Fundamental Rights Platform and the Organization for Security and Co-operation in Europe.
2. As this memorandum explains, the European Court of Human Rights (“ECtHR”) and other international and regional human rights bodies have consistently recognized the need for churches and religious organizations to operate freely without State intervention. This essential freedom, enshrined in Articles 9 and 11 of the European Convention on Human Rights (“the Convention”) is necessary for the proper functioning of religious institutions and even democracy itself.¹
3. National legislation that falls foul of the ECtHR’s high standards on freedom of religion will result in violations of the European Convention on Human Rights and other international human rights instruments.

(b) The Fundamental Nature of Freedom of Religion

4. Freedom of thought, conscience and religion is a fundamental human right not only enshrined in Article 9 of Convention, but also in many other seminal international and

¹ *Holy Synod of the Bulgarian Orthodox Church and Others (Metropolitan Inokentiy) v. Bulgaria*, Application nos. 412/03 and 35677/04, judgment of 22 January 2009, § 119.

regional human rights treaties and non-binding documents,² including Article 18 of the Universal Declaration of Human Rights (1948), Article 18 of the International Covenant on Civil and Political Rights (1966) and Article 10 of the Charter of Fundamental Rights of the European Union (2000).

5. The ECtHR has elevated the rights guaranteed by Article 9 as being one of the cornerstones of a democratic society and one of the vital elements that make up the identity of believers and their conception of life.³ Accordingly, Article 9 has taken the position of a substantive right under the European Convention.⁴ Indeed, of all the qualified rights in the Convention, Article 9 is the least qualified.⁵ Similarly, the United Nations Human Rights Committee has stated that freedom of thought, conscience and religion is a “profound” and “far reaching” right of a “fundamental character”; one which State Parties may not suspend or derogate from even in times of public emergency pursuant to Article 4.2 of the ICCPR.⁶
6. In both United Nations treaties and the European Convention on Human Rights, the right to freedom of religion includes the freedom to have or to adopt a religion or belief of one’s choice, and freedom, either individually or in community with others and in public or private, to manifest one’s religion or belief in worship, observance, practice and teaching.
7. Moreover, as developed within the jurisprudence of the ECtHR, freedom of religion is not limited to individuals but also extends collectively to religious communities and associations.⁷ Indeed, as explained by the ECtHR, without the protection for religious communities, any protection for the individuals who comprise those communities becomes threatened.⁸

(c) Church Autonomy and State Neutrality

8. The case-law of the ECtHR and a number of international human rights documents make clear that the heart of freedom of religion is the concept of church autonomy and state neutrality – allowing churches and religious organizations to have full control over their internal processes and to be free from State intervention.
9. For example, in 1988 the Parliamentary Assembly of the Council of Europe (PACE) produced an extensive list of recommendations on the situation of churches and

² For example, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981; UN Resolution on the Elimination of all forms of religious intolerance 1993; OSCE Vienna Concluding Document 1989, Principle 16.

³ See *Kokkinakis v. Greece*, Application no. 14307/88, 25 May 1993, § 31.

⁴ See *Vojnity v. Hungary*, Application no. 29617/07, judgment of 12 February 2013, § 36.

⁵ See Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, 2001, p. 137. Evans also points out that when the Convention was being written, the final draft of Article 9(2) was the narrowest of the proposed articles.

⁶ HRC, General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (1993).

⁷ See Julian Rivers, *The Law of Organized Religions*, Oxford University Press, 2010, pp.50-71.

⁸ See *infra* paras 9-14.

freedom of religion in Eastern Europe, many of which touched upon the right of church autonomy.⁹

10. In the year following the PACE resolution, the Organization for Security and Cooperation in Europe (OSCE) held its third summit in Vienna, Austria. The Vienna Concluding Document (1989) dedicated a number of paragraphs to freedom of religion, and once again respect for church autonomy was a key component of this freedom. Principle 16.4 states:

In order to ensure the freedom of the individual to profess and practise religion or belief, the 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.

11. In 2004 the OSCE together with the Venice Commission produced “Guidelines for Review of Legislation Pertaining to Religion or Belief.”¹⁰ In section 2(F)(1) the guidelines state: “Intervention in internal religious affairs by engaging in substantive review of ecclesiastical structures, imposing bureaucratic review or restraints with respect to religious appointments, and the like, should not be allowed.” Most recently, the OSCE has reaffirmed these foundational principles in its 2014 Guidelines on the Legal Personality of Religious or Belief Communities. Based on OSCE Commitments, the guidelines provide that:

It must be noted that the autonomous existence of religious or belief communities is indispensable for pluralism in a democratic society and is an issue that lies at the very heart of the protection that the freedom of religion or belief affords. It directly concerns not only the organization of these communities as such, but also the effective enjoyment of the right to freedom of religion by all their active members. When the organizational life of the community is not protected by the freedom of religion or belief, all other aspects of the individual’s freedom of religion become vulnerable.¹¹

12. Similarly, the European Union has recognized the unique protections required for churches and private organizations that have an ethos based on religion or belief in EU law.¹² The EU has also stated that it will condemn “legislation that provides for discriminatory treatment of persons or groups belonging to different religions and

⁹ Recommendation 1086 (1988) on the situation of the Church and freedom of religion in Eastern Europe. For example, recommendation 10(i) referred to “the right of religious associations to unhindered existence and recognition under the law” and 10(iii) called for the provision of “the right to free election of church officers and bodies without interference.”

¹⁰ Organization for Security and Co-operation in Europe, Guidelines for Review of Legislation Pertaining to Religion or Belief (28 Sept. 2004).

¹¹ Organization for Security and Co-operation in Europe, Guidelines on the Legal Personality of Religious or Belief Communities (2014), para. 18.

¹² See section 4(2), Council Directive 2000/78/EC.

beliefs, as well as the discriminatory application to such persons and groups of nominally neutral legislation.”¹³

(d) ECtHR Jurisprudence

13. In the last fifteen years, the European Court of Human Rights has heard a number of cases that centre on the issue of church autonomy and state neutrality. Beginning in 2000, in the seminal case of *Hasan and Chaush v. Bulgaria*, the ECtHR held that the State had wrongfully interfered with the internal life of the Muslim community by removing Mr. Hasan as Chief Mufti of the Bulgarian Muslims. In its judgment, the ECtHR made several striking observations regarding the nature of Article 9:

The Court recalls that religious communities traditionally and universally exist in the form of organized structures. They abide by rules which are often seen by followers as being of divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one’s religion, protected by Article 9 of the Convention.

Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers’ right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.¹⁴

14. The ECtHR went on to state that, “[F]acts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers’ freedom to manifest their religion within the meaning of Article 9 of the Convention.”¹⁵ Accordingly, the ECtHR held that the respondent State had violated Article 9 of the Convention. The Court’s decision in *Hasan and Chaush* significantly developed the complementary principles of State neutrality and church autonomy and has since been reinforced in later decisions.

¹³ EU Guidelines on the promotion and protection of freedom of religion or belief, FOREIGN AFFAIRS Council meeting, Luxembourg, 24 June 2013, section 6.

¹⁴ *Hasan & Chaush v. Bulgaria*, Application no. 30985/96, judgment of 26 October 2000, § 62.

¹⁵ *Id.*, at § 78.

15. In *Metropolitan Church of Bessarabia and Others v. Moldova*, the ECtHR ruled that the State could not interfere with the internal workings of a church even to ensure healthy and peaceful relationships among the adherents and clergy. Thus, any State measures that favour a particular leader or compel the religious community to be placed, against its will, under a single leadership, constitute an infringement of freedom of religion.¹⁶ Moldova refused to recognize and register the applicant church because it was not connected to the Russian Orthodox Church. The ECtHR held that the State had a positive obligation to ensure judicial protection of the Church while at the same time protecting the Church's autonomy.¹⁷ Citing *Hasan and Chaush*, the Court emphasized that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very centre of Article 9 protections.¹⁸ Moreover, it was held that "a State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs."¹⁹
16. Recently, in the case of *Holy Synod of the Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, the ECtHR reaffirmed this reasoning and correctly posited that if church autonomy was not protected, all other aspects of an individual's freedom of religion would become vulnerable.²⁰ In the *Holy Synod* case, the Court dealt with an internal dispute regarding leadership with a competing Synod developing out of the schism. The Bulgarian government – seeking to end the dispute and maintain religious unity in the predominately Orthodox country – drafted a new religions law which in essence stripped the alternative Synod of its legal personality and automatically registered the majority of the Synod of Maxim as the only lawful Orthodox Church in Bulgaria.
17. While the ECtHR held that it was a legitimate aim to seek the peaceful co-existence of members of the Bulgarian Orthodox Church, it could not do so by interfering with the internal workings of the church itself: "It follows that the unity of the Bulgarian Orthodox Church, while it is a matter of the utmost importance for its adherents and believers and for Bulgarian society in general, cannot justify State action imposing such unity by force in a deeply divided religious community."²¹
18. The following principles can therefore be taken from the ECtHR's jurisprudence on religious communities:
- Freedom of religion is a fundamental right – it is "one of the foundations of a democratic society" and is "one of the most vital elements that go to make up the identity of believers and their conception of life."²²

¹⁶ *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, judgment of 13 December 2001, § 117.

¹⁷ *Id.*, at § 118.

¹⁸ *Ibid.*

¹⁹ *Id.*, at § 123.

²⁰ *Holy Synod*, § 103.

²¹ *Id.*, at § 149.

²² *Kokkinakis v. Greece*, App. no. 14307/88, 25 May 1993, at para 31.

- Article 9 is a collective right – it can be exercised “in community with others, in public, and within the circle of those whose faith one shares.” Moreover, “participation in the life of the community is a manifestation of one’s religion, protected by Article 9 of the Convention”²³ and “an ecclesiastical or religious body may ... exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention.”²⁴
- Article 9 requires states to facilitate the “autonomous existence of religious communities.”²⁵
- Guaranteeing freedom of thought, conscience and religion under Article 9 assumes State “neutrality and impartiality.”²⁶
- Article 9 demands that religious communities be free from “arbitrary State intervention.”²⁷
- Any restrictions on Article 9 must correspond to a “pressing social need” and must be “proportionate to the legitimate aim pursued.”²⁸
- In light of the importance of the rights enshrined in Article 9 of the Convention, a difference in treatment will only be compatible with the Convention if “very weighty reasons” exist.²⁹
- Article 11 is similarly “a fundamental right in a democratic society and ... is one of the foundations of such a society.”³⁰
- The right to form associations is “an inherent part of the right set forth in Article 11.” Moreover, “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.”³¹
- Freedom of association is “particularly important for persons belonging to minorities.” Indeed, “forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights.”³²
- Exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify any restrictions.³³

²³ *Hasan & Chaush*, § 62.

²⁴ See *Kokkinakis* at § 31, *Cha'are Shalom Ve Tsedek v. France*, App. No. 27417/95, 27 June 2000, at para 72 and *Metropolitan Church of Bessarabia a.o. v. Moldova* App. no. 45701/99 13 December 2001 at para 118.

²⁵ *Hasan & Chaush* at §62.

²⁶ *Metropolitan Church of Bessarabia* §123.

²⁷ *Hasan & Chaush* § 62.

²⁸ *Serif v. Greece*, App. no. 38178/97, 14 December 1999, at para 49.

²⁹ See *Vojnity* § 36.

³⁰ *Djavit An v. Turkey*, App. no. 20652/92, 20 February 2003, at para 56.

³¹ *Sidiropoulos v. Greece* (57/1997/841/1047), 10 July 1998 at para 40.

³² *Gorzelik and Others v. Poland*, App. no. 44158/98, 17 February 2004 at para 93.

³³ *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Application nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, judgment of 8 April 2014, § 84.

19. Failure to comply with these principles will lead to violations of the European Convention on Human Rights.