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COMMENTARY: Away with legal discrimination - Serbia shouldn't follow Austria

By Dr. Reinhard Kohlhofer, Rechtsanwalt, Vienna-based Austrian lawyer <http://www.kohlhofer.at>

The Serbian draft law on religion follows Austria's hastily passed 1998 law in dividing religious communities into different categories with differing legal rights, thus institutionalising religious discrimination, comments Dr. Reinhard Kohlhofer, an Austrian lawyer specialising in religious freedom, in this personal commentary for Forum 18 News Service <http://www.forum18.org>. The Austrian law is a bad example for Serbia to follow, Dr. Kohlhofer argues, having been severely criticised by international lawyers, and also being the subject of a European Court of Human Rights (ECtHR) case, with a decision expected in the next few months. In a 1993 case involving Greece, the ECtHR ruled that "freedom of thought, conscience and religion is one of the foundations of a democratic society" and that "the pluralism indissociable from a democratic society .. depends on it." Dr. Kohlhofer goes on to state that there is no justification for states to legally discriminate between or against religious communities, and that democracy demands nothing less than the elimination of all forms of legal discrimination.

The current draft religion law in Serbia, made public by the Ministry of Religions in July, draws on dangerous precedents elsewhere in Europe, notably in my native Austria, as it divides religious communities into different categories with differing rights. The Serbian draft intends to create a system of "state churches", a major step back to the constitutional and social situation that governed many parts of Europe in the 19th century, but which lingers on today, setting a dangerous precedent. The classification of religious communities leads to a de facto preservation of the "state supported authority of official churches", which in its present form constitutes a quasi-religious "apartheid system".

Most privileged in Serbia's draft law - "primus inter pares" - is the Serbian Orthodox Church, while six other religious communities, most of them linked to a special ethnic group in Serbia, have lesser rights. An even lower category, religious associations, are subject to special requirements and investigations, while last in the queue are communities registered under the law on associations (see F18News 30 July 2004 http://www.forum18.org/Archive.php?article_id=380).

For the past 10 years there have been efforts to adopt a new law on religion in Serbia to replace the 1976 law, which has been abolished. Several drafts - both for the then Federal Republic of Yugoslavia and for the Republic of Serbia - failed to be adopted. Although these drafts were criticised by many human rights experts and international organisations for the preference given to the Serbian Orthodox Church, the "traditional" religions - first and foremost the Serbian Orthodox Church - opposed the drafts as being too liberal.

Yet these draft bills were in accord with international guidelines and the established case law of the European Court of Human Rights (ECtHR) in Strasbourg. Hence, they would have constituted an important step towards an adequate law on religion appropriate for a modern, pluralistic democracy. I have expressed this opinion several times in recent years to the Serbian government, as well as to the then government of the Federal Republic of Yugoslavia.

The draft presented now - agreed with the Serbian Orthodox Church - is diametrically opposed to the former drafts and is a big step back to the times of the state-supported authority of official state churches, which was believed to be a thing of the past.

In attempting to strengthen the privileged position of the Serbian Orthodox Church and to give preference to the traditional churches and religious communities of the different ethnic groups, the draft prejudices all Serbia's other religious communities, especially the "new" religious communities and those not linked to a particular ethnic group. Such a system of classifying religious communities with different rights is not only in clear violation of the constitution of Serbia and Montenegro, but violates international norms.

When Romania sought to adopt a similar law in 2003, the United Nations Special Rapporteur on Religious Intolerance, Professor Abdelfattah Amor, was blunt in his comments to the authorities, pointing out that "the principle of freedom of religion or belief, as enshrined in international human rights law, is difficult to reconcile with a formal or legal distinction between different kinds of religious or faith-based communities insofar as such a distinction in their status must imply a difference in rights or treatment, which may, in some cases, constitute discrimination that is incompatible with the exercise of human rights."

In particular, Professor Amor complained that financial contributions to "recognised" religions are not available to "non-recognised" religions, while "non-recognised" religions are not entitled to build places of worship and cannot provide religious instruction in state schools in the same way as "recognised" religions.

"The problem is not just that such discrimination may be contrary to international human rights law, particularly since it is not certain that the criteria used by the authorities to decide whether a religion should be recognised are objective from the viewpoint of international law," Professor Amor warned the Romanian government, "but that such discrimination amounts to restrictions that may, in certain circumstances, constitute a violation of the right to freedom of religion or belief." He urged the Romanian government to abolish the distinction between "recognised" and "non-recognised" religions.

Some European countries in the past established a form of state recognition of religions in order to cooperate with religious communities, especially the dominant churches. This often led to discrimination against citizens, because of their religious belief or membership of a certain religious community. More recently, some of these countries, such as Sweden, have adopted new laws to end this classification of religious communities. Since taking office this year, Spain's new Socialist government has pledged to put all faiths on an equal footing, thereby ending the privileged position of the Catholic Church.

Austria, amongst other countries, for a long time successfully clung to a system of state recognition, allowing the de facto state-supported authority of official churches to continue. Non-recognised religious communities suffered serious discrimination, even giving them no opportunity to form a legal entity. The Czech Republic and Slovakia both lay down high thresholds for "newer" faiths to be recognised. In the Czech Republic, communities must have some 10,000 adherents to gain first-tier legal status, while Slovakia does not allow religious communities with fewer than 20,000 adherents to register, leaving small new communities 'out in the cold' with no legal status as religious communities.

Countries newly-adopting such a discriminatory approach in the wake of the collapse of Communist regimes at the end of the 1980s have included Lithuania (with a four-tier system) and Latvia, while Moldova is seeking to adopt a law recognising a few favoured religious communities with greater rights than others. In Macedonia, moves to adopt a new religion law have come to a standstill, and the last proposed new law was highly discriminatory.

In Austria, this sort of rigid system could not be maintained after a 1995 ruling by Constitutional Court that the Verwaltungsgerichtshof, an Austrian high court, had legal jurisdiction over the government's unwillingness to grant state recognition to previously unrecognised religious communities. The Verwaltungsgerichtshof then called on the government to make a decision over the request of the Jehovah's Witnesses for legal recognition. As a result, a new law on religious associations was passed in great haste in 1998. Under the 1998 law, a new 'second-class' category of religious communities was created, called a "Bekennnisgemeinschaft", or "confession community". The 1998 law grants such 'second class' religious communities, after strict government examination of their inner workings, religion teachings, harmlessness to society, etc., only the right to a legal personality. But, the law expressly denies to any "Bekennnisgemeinschaft" the rights possessed by the previously recognised 'first-class' religious communities, such as the right to provide religious instruction in state schools, the right to invite workers into Austria to act as ministers of religion, missionaries, or teachers, and the right to publish documents about their religious faith.

Under the 1998 law, new barriers were also introduced for those communities who seek 'first-class' status, such as the imposition of a further 10-year old waiting period and existence as a "Bekennnisgemeinschaft", as well as other hurdles which most of the recognised 'first-class' religious communities do not themselves meet.

It is clear that this Austrian legislation served as the model for the Serbian draft law, as well as for laws in other Eastern European countries. Such a model allows governments to meet the strong pressure from traditional churches to maintain their privileged position, enjoying powerful influence over the national authorities. But at the same time, it can also be used as a means of "legal" discrimination against small religious communities and especially "foreign" churches and religions.

The Austrian model is a very bad one to follow. It has been harshly criticised by experts on law and religion, both in Austria and abroad. The Austrian system, and especially the 1998 law's explicit discrimination against some religious communities, are being challenged at the European Court of Human Rights (ECtHR), with a decision expected within the next few months in a case brought by the Jehovah's Witnesses (Application No. 40825/98).

The Serbian draft law follows the worst example of legislation for religious communities in Western Europe. This is very short-sighted and will not only provoke new discussion and new legislation in the near future, but will also create doubts about the democratic and liberal development of Serbia and Montenegro, because - in the words of the 1993 ECtHR ruling in the case of Kokkinakis v. Greece - "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention [the European Convention on Human Rights]. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it." (For a religious freedom survey of Greece see F18News 17 May 2004 http://www.forum18.org/Archive.php?article_id=321).

Serbia and Montenegro would be well advised to implement a modern, liberal, law on religious communities in harmony with the best European standards, rather than drawing on a few bad examples of antiquated systems. All legal differentiation between and discrimination against religious communities should be eliminated. Nearly all European states have at the present time a religiously plural society, so differentiation between communities for historical reasons can no longer be justified. Even if religious communities differ in size or material resources, this should be no justification for the state to legally discriminate between or against religious communities. Democracy demands nothing less than the elimination of all forms of legal discrimination.

Reinhard Kohlhofer , contributed this comment to Forum 18 News Service. Commentaries are personal views and do not necessarily represent the views of F18News or Forum 18.

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