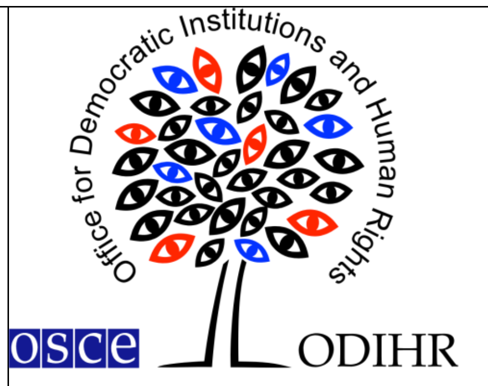
Warsaw, 7 November 2014 Opinion-Nr.: FOR-AT/264/2014 [RJU] www.legislationline.org	

OPINION

ON THE DRAFT FEDERAL LAW OF AUSTRIA AMENDING THE LAW ON THE RECOGNITION OF ADHERENTS TO ISLAM AS A RELIGIOUS SOCIETY

based on an unofficial English translation of the draft Law

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OSCE/ODIHR Opinion on the draft Federal Law of Austria amending the Law on the Recognition of Adherents to Islam as a Religious Society

I. INTRODUCTION

1. *On 17 October 2014, the Permanent Representative of Austria to the Organization for Security and Co-operation in Europe (OSCE) requested the OSCE's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) to provide an opinion that would review the draft Federal Law of Austria amending the Law on the Recognition of Adherents to Islam as a Religious Society (hereinafter "the draft Law").*
2. *By letter of 21 October 2014, the Director of the OSCE/ODIHR confirmed the OSCE/ODIHR's readiness to review the draft Law for compliance with OSCE commitments and international standards.*
3. *This Opinion has been prepared in response to the above-mentioned request.*

II. SCOPE OF REVIEW

4. This Opinion analyzes the provisions of the draft Law against the background of its compatibility with relevant international human rights standards and OSCE commitments.
5. The Opinion is based on an unofficial English translation of the draft Law and errors may therefore result.
6. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the draft Law or other laws in the area of the freedom of religion or belief or freedom of association that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

7. The OSCE/ODIHR welcomes the desire to update and modernize the Law. At the same time, certain provisions of the draft Law will need to be amended to bring the draft Law into line with international standards. In particular, conditions for recognition of Religious Societies need to be eased, and the wide range of grounds contained in the draft Law for the withdrawal of recognition of such Societies, and for the withdrawal of legal personality of their constituent communities of worship, should be significantly reduced. The draft Law should also provide more protection for the autonomy of the Religious Societies it seeks to regulate. In addition, provisions on the dissolution of existing associations should be removed from the draft Law, and the prohibition on foreign funding should either be removed or significantly more narrowly worded. Provisions affecting the freedom of peaceful assembly should be removed and dealt with under other, generally applicable legislation, and additional data protection should be provided in the recognition process.

1. Key Recommendations:

A. To consider amending the Basic Law to more closely reflect the definition

of freedom of religion or belief contained in international human rights instruments to which Austria is a party [par 12-16];

B. To remove provisions on the dissolution of associations with the purpose of spreading Islam [par 37-43];

C. To remove provisions which fail to respect the autonomy of Islamic Religious Societies [par 44-55];

D. To remove the ban on foreign funding of Islamic Religious Societies, or to replace it with a significantly more targeted provision [par 56-58];

2. Additional Recommendations:

E. To remove or clarify provisions on a positive attitude towards the state and society, and on disruptions in the relationship between Islamic Religious Societies and other religious communities [par 17-21];

F. To reduce and/or substantially amend the grounds upon which denial of recognition of Islamic Religious Societies may be based [par 22-30];

G. To reduce and/or substantially amend the grounds upon which recognition of Islamic Religious Societies may be revoked, or the legal personality of their constituent communities of worship may be withdrawn [par 31-36];

H. To clarify provisions of sanctions in the draft Law as to the authority imposing such sanctions, what they apply to, and their limits [par 59-60];

I. To remove provisions regulating the freedom of peaceful assembly from the draft Law [par 61];

J. To include provisions on data protection in the recognition process [par 62].

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards

8. This Opinion analyses the draft Law from the viewpoint of its compatibility with international standards that Austria has undertaken to uphold relating to the freedom of religion or belief and the freedom of association, as well as important OSCE commitments in this area.

9. Key international obligations in this area are contained in the International Covenant on Civil and Political Rights[1] (hereinafter "ICCPR"), in particular Articles 18 (freedom of thought, conscience and religion) and 22 (freedom of

[1] The International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966). The Covenant was ratified by Austria on 10 September 1978.

association) and, in connection with these two rights, Article 2 (obligation to respect and ensure rights without distinction of any kind). Moreover, the European Convention on Human Rights[2] (hereinafter "the ECHR") is likewise applicable, in particular Article 9 (freedom of thought, conscience and religion) and Article 11 (freedom of assembly and association) and, in connection to both these rights, Article 14 (prohibition of discrimination). Austria is also bound by the Charter of Fundamental Rights of the European Union,[3] in particular by Article 10 (freedom of thought, conscience and religion) and Article 12 (freedom of assembly and of association) as well as Article 21 (non-discrimination).

10. In addition, Austria has entered into numerous commitments related to the freedom of religion or belief in various OSCE documents, notably in par 16 of the 1989 Vienna Document, which sets out key rights such as the right of communities of believers to recognition of their legal personality, the right to maintain freely accessible places of worship, and the right to religious education and training. Moreover, par 9.4 of the 1990 Copenhagen Document contains the general State obligation to respect the right to manifest one's religion or belief, either alone or in community with others, in public or in private, through worship, teaching, practice and observance, and obliges participating States to ensure that the exercise of these rights may be subject only to such restrictions as are prescribed by law and are consistent with international standards. Also, par 9 of the 2003 Maastricht Document emphasizes the obligation to uphold the principle of non-discrimination in the area of religion or belief and the duty of the State to facilitate the freedom of religion or belief through effective national implementation measures. These commitments were recently reaffirmed in a 2013 OSCE Ministerial Council Decision.[4] The freedom of association is also protected in key OSCE commitments (see, *inter alia*, the 1990 Copenhagen Document, par 9.3).[5]

11. The ensuing recommendations will also make reference, as appropriate, to other documents of a non-binding nature, such as the 2004 OSCE/ODIHR-Venice Commission Guidelines on Legislation pertaining to Religion or Belief[6] (hereinafter "the Freedom of Religion or Belief Guidelines"), the 2014 OSCE/ODIHR-Venice Commission Joint Guidelines on the Legal Personality

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[2] The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 3 September 1953. The Convention was ratified by Austria on 3 September 1958.
[3] Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, OJ/2000/C364/01, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf
[4] Kyiv 2013, MC Decision 3/13, Freedom of Thought, Conscience, Religion or Belief, available at http://www.osce.org/mc/109339.
[5] For an overview of these and other OSCE Human Dimension Commitments, see OSCE/ODIHR, Human Dimension Commitments, 3rd Edition, available at http://www.osce.org/odihr/76894
[6] Guidelines for Review of Legislation Pertaining to Religion or Belief, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in Consultation with the European Commission for Democracy through Law (Venice Commission) ('the 2004 Guidelines'). Adopted by the Venice Commission at its 59th Plenary Session in June 2004, CDL-AD (2004)028.

of Religious or Belief Communities[7] (hereinafter the "Joint Guidelines on Legal Personality"), the 1981 United Nations (UN) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (hereinafter "the 1981 UN Declaration")[8]; UN Human Rights Council resolutions, General Comments of the UN Human Rights Committee and reports of the UN Special Rapporteur on Freedom of Religion or Belief.

2. Preliminary Remarks

12. For those seeking to obtain legal personality for a religious or belief community, the Austrian legal system affords three types of legal personality. The first and most basic form of such legal personality is the association (*Verein*)[9] under the 2002 Associations Act (*Vereinsgesetz*), which is open to all types of associations, including religious or belief communities. The second is the Registered Religious Community (*Religiöse Bekenntnisgemeinschaft*) which is available under the conditions set forth by the Act on the Legal Status of Registered Religious Communities (*Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften*), which will be referred to hereinafter as the "1998 Religious Communities Act". The third is the Religious Society (*Religionsgesellschaft*) which finds its basis in Article 15 of the 1867 Basic Law.[10] The legal framework for recognition of such Religious Societies is provided by the 1874 Act concerning the Legal Recognition of Religious Societies (*Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften*) which will be referred to hereinafter as the "1874 Recognition Act".[11] Such Religious Societies generally have communities of worship (*Kultusgemeinde*) as their constituent elements, and shall have at least one such community of worship in accordance with Section 1, subsection 2 of the 1874 Recognition Act.[12]

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[7] Joint Guidelines on the Legal Personality of Religious or Belief Communities, adopted by the Venice Commission at its 99th Plenary Session in June 2014, CDL-AD(2014)023 available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)023-e

[8] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN General Assembly 25 November 1981, UN Doc. A/RES/36/55, available at http://www.un.org/documents/ga/res/36/a36r055.htm

[9] For Austrian legal terms, this Opinion uses the English-language translations used by the European Court of Human Rights in its case-law; see e.g. European Court of Human Rights (ECtHR) 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria,* application no. 40825/98.

[10] Basic Law on the General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm, available at http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1867_142
Article 15 provides that recognised churches and religious communities have the right to manifest their faith collectively in public, to organise and administer their internal affairs independently, to remain in possession of acquired institutions, foundations and funds dedicated to cultural, educational and charitable purposes, however, they are, like all other societies, subordinated to the law.
Article 16 entitles the supporters of non-recognised religious communities to domestic manifestation of their faith unless it is unlawful or contra bones mores.

[11] RGBl (Reichsgesetzblatt, Official Gazette of the Austrian Empire) 1874/68.

[12] It is noted here that the manner of citation of Austrian legislation will follow the approach of the European Court of Human Rights in ECtHR 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria,* application no. 40825/98.

13. Each of these types of legal personality carries with it a different status in national law. The Religious Society offers many privileges, such as the right to sit on regional education boards; the presumption that the Religious Society possesses the necessary qualifications to operate private schools and the exemption from military service for certain individuals involved in spiritual welfare or involved in religious teaching, as well as for students of theology who are preparing to assume a pastoral function and who belong to a recognised religious society. It also provides for the exemption of religious ministers from jury duty, deduction of income tax up to a certain amount for contributions, and exemption from real-estate tax for real property used for religious purposes.[13] The status in national law of "associations" and "Registered Religious Communities" is similar, but Registered Religious Community status additionally involves specific recognition as a religious community.

14. As to the conditions which must be fulfilled for recognition, these are also different for each of the three forms of legal personality open to religious or belief communities in Austria. Under Section 1 of the 2002 Associations Act, a minimum of two persons may set up a non-profit association, provided that certain formalities are complied with, such as giving the name of the association, its address, and an outline of the rights and duties of members. Under Section 3, subsection 2 of the 1998 Religious Communities Act, those seeking to obtain the status of a Registered Religious Community must comply with largely similar formalities, and, also set out the main principles of the religious community's faith and demonstrate that they have a membership of at least 300 individuals residing in Austria. These individuals may not be members of another Registered Religious Community or another legally recognized Church or Religious Society. Under Section 1 of the 1874 Recognition Act, in order to be recognized as a Religious Society, the teaching, services and internal organisation of an aspiring association, as well as the name it chooses, may not be unlawful or morally offensive and the establishment and existence of at least one community of worship satisfying the statutory criteria shall be ensured. Moreover, the respective founding instrument must contain provisions on the liquidation of the Religious Society, which shall also ensure that the assets acquired are not used for ends contrary to religious purposes.[14]

15. This Opinion does not purport to comment on the general legal framework in the area of religious or belief communities in Austria. It should be noted, however, that the current system of recognition of religious or belief communities has certain features which appear worthy of wider consideration and amendment. In particular, the system of recognition as a "Religious Society" appears legally necessary only because of Article 16 of the Basic Law, which states that "[t]he members of a legally not recognized confession may practice their religion at home, in so far as this practice is neither unlawful, nor offends common decency". This provision, in combination with Article 15 of

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[13] Ibid., at par 55.

[14] Ibid., at par 48; it is the understanding of OSCE/ODIHR that the legal situation in Austria in respect of these issues has not changed since.

the Basic Law, which grants the right of public and collective manifestation of the freedom of religion or belief only to religious societies, would not appear to be in line with the subsequent treaty obligations entered into by Austria, such as the ECHR and ICCPR.

16. In essence, the starting point of the two provisions in the Basic Law appears to be that state recognition is a pre-condition for being allowed to practice religion in public. International human rights law, by contrast, takes as its starting point that the freedom of religion or belief may be exercised in public and in community with others, and permits state restrictions to these rights only if justified under strict conditions (cf. Article 9 ECHR and Article 18 ICCPR). International standards recognize that neither the collective nor the public exercise of the freedom of religion or belief in public is, or should be subject to prior recognition or permission by the State.[15] If this basic standard were transposed into the Basic Law, then it would not appear necessary to legally recognize religious societies (or recognized religious communities), since all religious groups and communities could then exercise their rights freely and in public without prior State permission. Specific legal acts could then still grant certain privileges to particular religious communities, e.g. tax benefits, or exemptions from certain state duties (as does the draft Law in question), while ensuring that all religious communities fulfilling certain pre-determined criteria have equal opportunities to obtain such privileges.[16] Consideration should thus be given to amending Articles 15 and 16 of the Basic Law to more closely reflect the definition of the freedom of religion or belief as contained in international instruments, such as, for example, Article 9 of the ECHR.

3. Recognition and Denial or Revocation of Recognition of Islamic Religious Societies

3.1 Grounds for Recognition of Islamic Religious Societies

17. The draft Law regulates the creation of Islamic Religious Societies and communities of worship in Austria. It grants a series of privileges to Islamic Religious Societies, including the provision of Islamic spiritual care (*religiöse Betreuung*) for members of the federal armed forces, individuals in penitentiary institutions, as well as individuals in hospitals and care homes (Section 11), protection of the observance of dietary requirements (Section 12), the creation of an Islamic studies section at Vienna University (Section 15) and the protection of Islamic cemeteries and burial sites (Section 16).

18. In its transitional provisions (Section 23, subsections 1 and 2), the draft Law specifies that those Islamic Religious Societies that exist when the Law is

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[15] ECHR, Article 9; ICCPR, Article 18; Joint Guidelines on Legal Personality, par 10, and the sources cited there.

[16] ECtHR 25 September 2012, *Jehovas Zeugen in Österreich v. Austria*, appl. no. 27540/05, par 32; ECtHR 10 December 2009, *Koppi v. Austria,* appl. No. 33001/03, par 92; ECtHR 9 December 2010, *Savez Crkava "Riječ Života" and others v. Croatia,* appl. no. 7798/08, par 85; the Freedom of Religion or Belief Guidelines, par F (2); Joint Guidelines on Legal Personality, pars 38-42; *Opinion on act ccvi of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary*, CDL-AD(2012)004, par 46.

passed (there are currently two) shall continue to be recognized as such, but that the changes in their founding instruments required by the then passed Law shall be made in time for the next elections of their elected bodies. It is also possible for new Islamic Religious Societies to be created.

19. The draft Law places the recognition of Islamic societies under the authority of the Federal Chancellor (Section 3). In order to obtain recognition as a religious society, the draft Law sets out a number of requirements. A religious society must have a stable, durable existence and it should be economically self-sufficient (Section 4, subsection 1). The elements of stability and durability are considered to be in place where the applicant society is a Recognized Religious Community and where at least 2/1000 (two in one thousand) of the population of Austria belong to the confession in question, i.e. around 17.000 individuals.[17] In addition, it must use its income and capital only for religious purposes, including charitable purposes (Section 4, subsection 2), it must have a positive basic attitude (*positive Grundeinstellung*) towards the State and society (Section 4, subsection 3) and there may be no unlawful disruption of the society's relationship to existing churches and religious societies and to other religious communities (Section 4, subsection 4).

20. Some comments may be made regarding the requirements for recognition as a Religious Society under Section 4. First, the requirement of having a basic positive attitude towards the state and society (subsection 3) appears to be rather vague. Such a generally worded provision is open to a variety of interpretations as to when such an attitude will be considered to exist, and thus risks being applied in an inconsistent manner. Moreover, it is not clear whether it refers to the attitude of the entire applicant society (which would be difficult to determine in practice), or part of it, or merely to the attitude of its leaders. It is recommended to clarify this provision further, in particular by stating how such a positive basic attitude shall be demonstrated, or to remove it from the draft Law as a requirement for recognition.

21. Second, the requirement that there be no unlawful disruption of the relationship to existing churches and religious societies, and to other religious communities (subsection 4) is also not clear. It is difficult to see when such a disruption would be considered to exist, and in particular what type of disruption would be considered significant enough to deny recognition as a Religious Society (seeing as such denial would need to be necessary in a democratic society to protect other vested interests of the State, such as public order, or the rights and freedom of others). Moreover, it is not apparent what would be considered a lawful disruption, and what would qualify as an unlawful disruption. Given the difficulties in defining these elements of Section 4, subsection 4, the current wording of this provision would likewise risk being applied in an arbitrary manner. It is recommended to remove, or to substantially clarify this ground for denial of recognition.

[17] The population of Austria in the 2013 census was 8.477.230; see http://www.statistik.at/web_de/statistiken/bevoelkerung/index.html.

3.2 Grounds for Denial of Religious Society Status

22. Under Section 5, subsection 1 (1), the Federal Chancellor shall deny the request for recognition as an Islamic Religious Society where this is, in relation to its doctrine or the application thereof, necessary in a democratic society for the protection of public security, public order, health or morals or for the protection of the rights and freedoms of others. The same subsection goes on to note that these grounds will be considered to exist in cases of incitement to illegal behavior; an impediment to the psychological development of minors; a violation of psychological integrity, or where psychotherapeutic methods are used, especially for the purposes of religious indoctrination. Additionally, subsections 2 and 3 provide that recognition as a Religious Society shall also be denied where the applicant society's constituent instrument does not meet the requirements of Section 4 or violates Section 6, which lists a range of issues that must be covered in the constituent instrument (such as the society's name, seat, acquisition and loss of membership, rights and duties of members, its doctrine, internal organization, traditions, etc.).

23. The grounds for denial to recognize an Islamic Religious Society mentioned in Section 5, subsection 1 (1) appear to be worded as examples of measures which may be considered necessary in a democratic society in the interests of, e.g., public (or national) security, public order, or the rights and freedoms of others.[18] Violations of the psychological integrity of individuals in general, and of minors in particular, as well as the use of psychotherapeutic measures for the purposes of religious indoctrination, certainly appear to be of legitimate concern, and would be relevant in deciding whether a measure is 'necessary in a democratic society'. At the same time, it is difficult to ascertain what type of behaviour would be considered grave enough to constitute such violations, or measures in practice, which may also be difficult to prove (or disprove, depending on where the burden of proof lies). Moreover, it may be difficult to determine in practice whether such violations or measures are undertaken by individual members of an applicant society, or by the society as a whole. There is a risk that such refusal of recognition, a measure affecting many different individuals, would be targeting an entire community, rather than those individuals engaging in these practices.[19] The provision as it stands now would appear to be insufficiently clear to meet the international principle of legality, which requires that any interference with the right to freedom of religion or belief shall be narrowly and clearly worded. It is thus recommended to remove, or to substantially revise the referenced examples of grounds for denial of legal personality contained in subsection 1 of Section 5, subsection 1.

24. Under Article 5 subsection 1 (2), recognition as a Religious Society shall also be denied if the requirements set out under Article 4 of the draft Law are not met. Given the unclear nature of these requirements, and the wide range of possible interpretations of what they mean (see pars 20-21 supra), the relevant provisions in Article 4 should be substantively amended or deleted.

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[18] It is noted here that these provisions mirror the content of Section 5, subsection 1 of the 1998 Religious Communities Act.
[19] Cf. Joint Guidelines on Legal Personality, par 34.

25. Under Section 5, subsection 1 (3), denial of recognition is also possible if the constituent instrument of an applicant society does not meet the requirements of Article 6 of the draft Law. This provision, in its subsection 1 (5), requires that a Religious Society's constituent instrument must contain a statement of its doctrine, including a text with the core source of its religious faith, which shall be in the German language, and must be separate from existing legally recognized religious societies, confessional societies, or religious societies covered by the draft Law. The draft Law specifies the core source of the Islamic faith as the Qur'an.

26. With regard to this particular provision, the relevant explanatory note attached to the draft Law specifies that the translation of the religious text "represent(s) an important source of clarification for future questions concerning whether a religious teaching is distinct from pre-existing teaching". However, it is questionable whether a state body, in this case the Federal Chancellor, is able to, or should be involved in determining the nature of a religious teaching, and whether it is the same or different from other such teaching.

27. In this context, it is recalled that, at the international level, "there is a trend towards extricating the State from doctrinal and theological matters". [20] A State should be very reluctant to involve itself in any matters regarding issues of faith, belief or the internal organization of a religious group.[21] Moreover the European Court of Human Rights has recently reaffirmed that "the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed."[22] It is thus not up to the State, but rather up to the religious entity itself to determine the nature of its religious teachings, and interpret them accordingly. In light of the above, it would not appear appropriate for the Federal Chancellor to determine whether the religious teaching of an applicant society is distinct from pre-existing teaching or not. Any such determination would constitute an interference with the essence of the right to freedom of religion or belief, which would not be justifiable under international law standards.

28. In addition, the various legal acts on recognition of other Religious Societies in Austria do not contain a similar provision. To introduce such a requirement only for Islamic Religious Societies appears, therefore to be a potentially discriminatory treatment of these societies, and would require very compelling reasons.

29. It is also noted here that Islamic Religious Societies are already recognized (under the currently applicable 1912 Law on Islamic Religious Societies, and, with respect to the Alevi community, by a Law of 22 May 2013). To impose this new requirement on them constitutes a change in their existing legal position. As the Joint Guidelines on Legal Personality note, where laws operate retroactively or fail to protect vested interests of religious or belief

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[20] The Freedom of Religion or Belief Guidelines, at D; cf. ECtHR 26 October 2000 *Hasan and Chaush v Bulgaria,* appl. no. 30985/96, par 62: *Metropolitan Church of Bessarabia v. Moldova,* appl. no. 45701/99, pars 118 and 123.

[21] the Freedom of Religion or Belief Guidelines, at D.

[22] ECtHR1 July 2014, *S.A.S. v. France*, appl. no. 43835/11, par 55.

organizations, the state is under a duty to demonstrate what objective reasons would justify a change in existing legislation, and show that the proposed legislation does not interfere with the freedom of religion or belief more than is strictly necessary in light of those objective reasons.[23] Since the draft Law already foresees the continued existence of two recognized Islamic Religious Societies, it is difficult to see why, with regard to these Religious Societies, it would be necessary for them to translate the Qur'an, and submit the translated text to the scrutiny of the Federal Chancellor.

30. Given the concerns raised above, it is therefore recommended to remove the provision requiring the submission of a German translation of the Qur'an from Section 6, subsection 1 (5).

3.3 Grounds for Revocation of Religious Society Status

31. Section 5, subsection 2 of the draft Law regulates the revocation of the recognition of Islamic Religious Societies and their constituent communities of worship. It provides that the Federal Chancellor shall revoke the recognition of a Religious Society, or the legal personality of a community of worship, where they no longer fulfill the criteria for such recognition under Sections 4 or 8 respectively (Section 5, subsection 2 (1)). The Federal Chancellor may also revoke recognition where a ground for denying recognition continues to exist despite his/her request to end this situation, and where the constituent instrument of the religious society or the statute of a community of worship is violated, or where obligations related to recognition are not fulfilled, despite the request to do so (subsection 1 (2) and (3)).

32. The reference to Section 4 applies to religious societies, and means that the Federal Chancellor shall withdraw recognition of legal personality of a Religious Society where its membership falls below the threshold of 2/1000 citizens. It would also apply if the Religious Society is not able to finance itself independently (subparagraph 1); where income and capital are used for purposes other than religious ones (religious purposes includes charitable giving for religious purposes) (Section 4, subsection 2); in the absence of a positive attitude towards society and the State (Section 4, subsection 3) or the presence of an unlawful disruption in the relationship to existing churches and religious societies or other religious communities (subsection 4). The reference to subparagraph 8 applies to the constituent communities of worship, and would mean that the Federal Chancellor would have to order their dissolution if they were no longer able to support themselves financially (Section 8, subsection 3) or if the community of worship's membership falls below 300 members (Section 8, subsection 4).

33. The provisions aimed at revocation of legal personality appear excessively broad in nature. International standards provide that the withdrawal of legal

[23] ECtHR 8 April 2014, *Magyar Keresztény Mennonita Egyház and Others v. Hungary,* application no. 70945/11, par 84 and 104; Joint Guidelines on Legal Personality, par 34, and the sources cited there.

personality should be a measure of last resort.[24] However, as they are currently phrased, revocation of a Religious Society's status, or revocation of the legal personality of a community of worship, may also occur in circumstances which would fall short of this threshold.

34. In relation to the latter, it appears that 300 persons is a fairly high threshold for a community of worship. Considering the relatively small size (in terms of population) of some municipalities in Austria, the relatively low percentage of Muslims in some areas, particularly outside the larger cities, and the wide variety of backgrounds of Muslims within Austria, many Islamic communities in Austria (including within the capital itself) may be smaller than this. Since they may not, under the draft Law, form any associations separate from recognized Religious Societies if they spread the religious doctrine of these Societies (*Verbreitung der Religionslehre*), this would mean that such smaller communities would have to operate without legal personality. In this context, it is noted that according to international standards, obtaining legal personality should not be contingent on a religious or belief community having a large minimum number of members.[25] It is therefore recommended to significantly reduce the minimum number of members required for legal personality of communities of worship. Moreover, Section 8, subsection 4, lists the preparation of a positive prognosis on the future development (presumably of the community of worship) through the Religious Society as one of the requirements for obtaining legal personality. While this could be a mere formality, such prognosis could at the same time be quite difficult to conduct; Section 8 also does not provide any indications of what such prognosis shall entail. It is recommended to clarify, or delete this point.

35. It is also noted that the grounds which are mentioned for revocation of Religious Society status may occur entirely inadvertently. The provisions of the constituent instrument of a Religious Society on the election of leaders may be violated, for example, when deadlines for their elections are missed by a day or two, or where other relatively minor or technical violations occur. Such minor infractions, which have no real negative effect, should not lead to the revocation of recognition of a Religious Society.

36. Finally, it is noted here that comparable legislation, such as, for example, the Law on the Israelite Religious Society, the Law on the Recognition of the external legal conditions for the Evangelical Church, or the Law on the Greek-Oriental Church, does not appear to contain any comparable provision which would result in revocation of legal personality. The restrictions placed on Islamic Religious Societies, and their constituent communities of worship, therefore appear not only disproportionate, but also greater than those placed on other, existing Religious Societies and therefore potentially discriminatory in nature. It is therefore recommended to reconsider the wide range of grounds for revocation of the legal personality of Religious Societies, and communities of

[24] Joint Guidelines on Legal Personality, par 33; cf. also ECtHR 8 October 2009, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, appl. no. 37083/03, para. 82; ECtHR 10 June 2010, *Jehova's Witnesses of Moscow and others v. Russia*, Application no. 302/02, para. 159.

[25] Joint Guidelines on Legal Personality, par 27.

worship in the draft Law, and to draft more targeted, narrowly worded provisions.

4. Dissolution of Existing Associations

37. Under the draft Law, the Federal Chancellor is, when issuing the decision to recognize Islamic Religious Societies, required to order the dissolution of all those associations whose purpose is to spread the religious doctrine of the recognized Religious Societies (Section 3, subsection 4). Moreover, the draft Law provides that such associations are to be dissolved by the Federal Interior Minister within six months of the entry into force of the draft Law (Section 23, subsection 3).[26]

38. Dissolution has significant consequences for the status of these existing associations and their ability to engage in activities. For this reason, dissolution should be a matter of last resort under international standards.[27] Dissolution of religious communities may therefore take place only in case of grave and repeated violations endangering the public order, or other protected interest, if no other sanctions can be applied effectively, and when the principles of proportionality and subsidiarity are complied with.[28]

39. With regard to the current draft Law, it is very difficult to see how this would be the case. The measure appears to be general in nature, and does not seem to apply to the specific, individualized circumstances of existing associations which spread religious doctrine covered by Islamic Religious Societies. In particular, it is not clear why all such associations should automatically be dissolved; this would appear to lead to a situation where only (larger) Islamic Religious Societies retain legal personality status, which would fail to recognize the diversity within the Islamic Community, and would essentially mean that the State decides that certain (larger) religious groups may spread Islam, and others may not. If a group of Muslims wishes to be organized in the form of an association in order to spread Islamic doctrine, then, based on international religion or belief standards, they should be permitted to do so. Only very weighty reasons could be adduced for, in individual cases, not allowing this, including imminent threats of violence, or of violations of the rights and freedoms of others. Such blanket dissolution measures would not appear to be, per se, necessary in a democratic society for the protection of public safety and order, or for other reasons adduced by international standards. It is therefore recommended to re-discuss this provision, and, ultimately, to remove it from the draft Law.

40. Moreover, it is assumed here that the provision also means that future applications for association status by groups seeking to spread Islam outside of recognized religious societies shall be refused. If this is the case, it is noted here

Comment [NT1]: Significant?

Comment [RU2R1]: I think weighty sounds better here

Comment [RU3]: Re-discuss sounds a bit strange-maybe 'to review this provision'?

[26] The provisions aimed at dissolution of Islamic societies not forming a part of recognized Islamic societies appears to mirror Section 2, subsection 4 of the 1998 Religious Communities Act, which requires dissolution of associations in the case of recognition of religious confessional communities under that Act.

[27] See above, footnote 24.

[28] Ibid.

that a refusal by the state to accord legal personality status to an association of individuals, based on a religion or belief, likewise amounts to an interference with the exercise of the right to freedom of religion or belief, in connection with the general right to freedom of association.[29] In order to justify a restriction to the right to access to legal personality, it must be shown under Article 9 of the ECHR and Article 18 of the ICCPR that an interference is prescribed by law; has the purpose of protecting public safety, (public) order, health, or morals or the fundamental rights and freedoms of others; is necessary for the achievement of one of these purposes and proportionate to the intended aim; and is not imposed for discriminatory purposes or applied in a discriminatory manner.[30]

41. Based on these criteria, and also the grounds already raised with regard to the dissolution of associations under pars 38-39 supra, it is difficult to see how a future refusal to grant association status to those seeking to spread Islam would be justifiable. The spreading of religious doctrine is clearly protected by international standards, and a very high threshold needs to be met before a refusal to seek legal personality status for this purpose can be justified. The measure contemplated in the draft Law, however, would apply to all such associations, without any individualized justification, and regardless of potential violations of law. It is also noted that the measure may be discriminatory in nature, as it applies only to Islamic associations, and not to other associations.

42. It could be argued that under current Austrian law, those wishing to spread Islam could seek Registered Religious Community status, or that they could apply for Religious Society Status. However, as noted above, applications for status as a Religious Society would require membership of two in 1000 individuals residing in Austria (i.e. around 17.000 individuals) whereas applications for status as a Registered Religious Community would still require 300 members. This places higher thresholds on those seeking status as an association for the purposes of spreading Islam, than on those seeking to associate for other purposes, which would constitute discrimination on the grounds of religion. In the absence of any justification for this, such treatment would violate Article 14 of the ECHR (prohibition of discrimination) in connection with Article 9 ECHR (freedom of thought, conscience and religion). Since the measure is a wholesale measure affecting all associations wishing to spread Islam, it is difficult to see how this provision could be considered proportionate to a legitimate aim, or necessary in a democratic society.

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[29] ECtHR 1 October 2009*, Kimlya and Others v. Russia,* appl. nos. 76836/01 and 32782/03*,* par 84; ECtHR 10 June 2010, *Jehova's Witnesses of Moscow and others v. Russia*, appl. No. 302/02, par 101; ECtHR 17 February 2004, *Gorzelik and Others v. Poland,* Appl. No. 44158/98, par 52 and ECtHR 1 July 1998, *Sidiropoulos and Others v. Greece*, appl. No. 26695/95, par 31; *Opinion on Legal Status of Religious Communities in Turkey and the Right of the orthodox Patriarchate of Istanbul to use the adjective "Ecumenical"* (12-13 March 2010), CDL-AD(2010)005, pars 6 & 9; *Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, the administrative offences code and the law on the relations between the Republic of Armenia and the Holy Armenian Apostolic Church of the Republic of Armenia by the Venice Commission and the OSCE/ODIHR*, CDL-AD(2011)028, par 64; Freedom of Religion or Belief Guidelines, par 8.

[30] Joint Guidelines on Legal Personality, pars 5 and 19 and the sources cited there.

Moreover, such blanket prohibition negatively affects, in particular, smaller groups within Islam which may wish to seek legal personality status, who are placed at a disadvantage vis-à-vis larger groups; this amounts to discrimination of minority communities.

43. More generally, the provisions on dissolution of existing association, as well as the provisions of Section 6 requiring the communities of worship to be accounted for as part of Religious Societies, albeit with respect for their diverse traditions (see in particular Section 6, subsection 1 (6) and (7)), appear to combine all Muslims in Austria under a single leadership, or at least under the leadership of certain larger Religious Societies recognized under the draft Law (see in particular section 7, subsection 1, which makes the Religious Society the religious community's "highest authority"). This fails to recognize the diversity which may arise within religious communities, including the Islamic community. In this context, it is noted that Islam is not a centrally organized hierarchical religion, and that many smaller groups exist which, in addition to the difficulties posed by acquiring legal personality status, would perhaps not even opt for such status, for example because they do not feel represented by the larger Religious Societies. Although the draft Law requires respect for diverse traditions to be anchored in the founding instruments, this still does not take into consideration that not all associations wishing to spread Islamic doctrine may want to exist within the framework of an existing Religious Society. For the above reasons, it is recommended to remove the provisions on the dissolution of associations with the purpose of spreading Islam from the draft Law.

5. Autonomy of Islamic Religious Societies

44. International human rights law provides for the autonomy of religious or belief communities.[31] States should ensure that national law leaves it to the religious or belief community itself to decide on its leadership[32], its internal rules[33], the

[31] ECHR 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania*, appl. no. 2330/09, par 136-138; ECtHR 12 June 2014, *Fernández Martínez v. Spain*, appl. no. 56030/07, par 127-130; Joint Guidelines on Legal Personality, par 31; *Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012)*, CDL-AD(2012)022 CDL-AD(2012)022, par 72; *Opinion on the Draft Law regarding the Religious Freedom and the General Regime of Religions in Romania adopted by the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005)*, CDL-AD(2005)037, par 20; *Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine adopted by the Venice Commission at its 68th Plenary Session (Venice, 13-14 October 2006)*, CDL-AD(2006)030, par30; Freedom of Religion or Belief Guidelines, section D.

[32] ECtHR 22 January 2009, *Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria,* appl. nos. 412/03 and 35677/04. par 118-121; see ECtHR 14 March 2003, *Serif v. Greece*, appl. no. 38178/97, pars 49, 52 and 53; ECtHR 26 October 2000, *Hasan and Chaush v Bulgaria,* appl. no. 30985/96, pars 62 and 78; ECtHR 13 December 2001, *Metropolitan Church of Bessarabia v. Moldova,* appl. no. 45701/99, pars 118 and 123; and ECtHR 16 December 2004, *Supreme Holy Council of the Muslim Community*, appl. No. 39023/97, par 96.

[33] *Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012)*, CDL-AD(2012)022, par 76.

substantive content of its beliefs[34], the structure of the community and methods of appointment of the clergy[35] and its name and other symbols.[36] In particular, the State should refrain from a substantive as opposed to a formal review of the statute and character of a religious organization.[37]

45. The draft Law foresees that Islamic Religious Societies shall be independent and enjoy autonomy in their own affairs (cf. e.g. Section 2). However, Section 2, subsection 3 of the draft Law also notes that such entities may not invoke their doctrine to avoid implementing State law, except where the State law in question foresees this possibility. The need for this provision may be questionable, given that all individuals are held to abide by the law of their country, and that Section 2 does not specify or make explicit references to the exceptions that it refers to. Consideration may thus be given to either making this provision more explicit, or to deleting it.

46. Under Section 17, subsection 1 of the draft Law, the constituent instruments of religious societies, as well as the statutes of their communities of worship and procedural documents based on these instruments and statutes, require, both for their valid adoption and amendment, the approval of the Federal Chancellor. Any such amendments only enter into force on the day after the Federal Chancellor has approved them (Section 17, subsection 3).

47. These measures constitute a very significant interference with the autonomy of Islamic Religious Societies in Austria, as it means that such societies will not be able to introduce even minor or essentially technical changes to their constituent instrument without the approval of the Federal Chancellor. The same applies to the statutes of their constituent communities of worship. As noted above, under international standards, the internal rules of religious communities are a matter for those communities themselves[38], except in cases where interference in the autonomy of a religious community is necessary in a democratic society and proportionate to a legitimate aim.

48. It is noted here that the draft Law under review aims to provide Islamic Religious Societies with certain privileges, which, as mentioned earlier, even go beyond the privileges granted to Religious Societies in general. For this reason, it may be legitimate to subject prospective Religious Societies to somewhat more intensive scrutiny than other such societies. However, the measures contemplated in Section 17 do not appear to limit the scrutiny of the Federal Chancellor in any way, and there is no indication that this scrutiny is merely

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[34] *Interim joint opinion on the law on making amendments and supplements to the law on freedom of conscience and religious organisations and on the laws on amending the criminal code; the administrative offences code and the law on charity of the Republic of Armenia by the Venice Commission and OSCE/ODIHR*, CDL-AD(2010)054, paras. 54 & 90. *Opinion on the draft law on the legal status of a church, a religious community and a religious group of "The former Yugoslav Republic of Macedonia", adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007)*, CDL-AD(2007)005, par 46.

[35] UN SR Report on Recognition, par 56.

[36] Joint Guidelines on Legal Personality, par 31.

[37] *Joint opinion on the law on freedom of religious belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR*, CDL-AD(2012)022, par 80.

[38] See above, footnote 33.

formal in nature.[39] No reference to the principles of proportionality or necessity is contained in Section 17, nor does this provision mention what shall happen if the Federal Chancellor should refuse to approve (changes to) constituent instruments of Religious Societies or statues of communities of worship.

49. In addition, neither the laws by which other Religious Societies are recognized, nor the 1874 Recognition Act, appear to contain similar provisions. This means that prospective Islamic Religious Societies are subject to greater State control than others, and places them at a distinct disadvantage towards other recognized Religious Societies.

50. It is therefore recommended to remove the power of the Federal Chancellor to approve of (changes to) constituent instruments of Islamic Religious Societies or the statutes of their constituent communities of worship. While the draft Law may require the Islamic Religious Societies to submit their constituent instruments to the Federal Chancellor, he/she should not have any influence over the contents of such by-laws, which should acquire effect based on an internal procedure of the Religious Society, but not based on the Chancellor's consent. The same applies to statutes of communities of worship.

51. Similarly, the draft Law appears to foresee the involvement of the Federal Chancellor in confirming the results of elections; he/she also serves as a complaints body under Article 20 in such cases. This creates a very significant involvement by the Government in the election of a Religious Society's leadership, which is difficult to justify under the principle of autonomy. It is recommended to reconsider the respective provisions in Article 20.

52. Furthermore, Section 11 contains quite explicit requirements for those persons wishing to exercise spiritual care. It should be noted that in principle, it is for a religious community itself to decide who may exercise spiritual care. Under Section 11, prospective individuals shall have at least 3 years of relevant professional experience and knowledge of the German language at the university-qualifying level [*Reifeprüfung*], and shall also have their main and actual residence in Austria. This restricts the scope of persons who will qualify for such tasks, and to an extent reduces the autonomy of the Religious Societies to select such persons themselves. It is unclear what the legitimate aim of such a provision would be, and even more why this would be necessary in a democratic society. Given these concerns, it is thus recommended to delete this provision.

53. Another interference with the principle of autonomy contained in the draft Law is the automatic dismissal of religious functionaries provided by Section 14 of the draft Law in case they have committed criminal acts, or have otherwise jeopardized public safety or order, health and moral, or the rights and freedoms of others. This constitutes a serious limitation of the right of religious communities "to select, appoint and replace their personnel in accordance with their respective requirements and standards" (Principle 16.4, Vienna Document).[40] Although this provision arguably pursues a legitimate aim, automatic dismissal would nevertheless constitute a disproportionate

[39] See above, footnote 37.
[40] Cf. also Joint Guidelines on Legal Personality, par 34.

interference with the autonomy of Religious Societies, since the societies themselves should decide on the appointment or dismissal of their functionaries. This provision should thus be reconsidered, and ideally deleted.

54. Similar arguments may be made regarding Section 21, subsection 2, which provides for court-appointed trustees in cases where an appointed leader of a Religious Society or a community of worship has exceeded his/her term of office by more than six months, or are otherwise not able to function as such. As stated in the previous paragraph, it should be up to a Religious Society itself to decide on its leadership, and not up to a court, or the Federal Chancellor (who may institute such proceedings before court). The current provision would thus not appear to be in line with the principle of autonomy of religious or belief communities. It is recommended to consider deleting this provision from the draft Law. At a minimum, should such a provision be maintained, previous consultations with remaining religious leaders, as well as the community in question, should be ensured to the maximum extent possible, so that the process of selecting a trustee fully reflects their needs and wishes.

55. Finally, it is noted that the draft Law foresees a curriculum for Islamic-theological studies at Vienna University (Section 15) to be taught by professors at that University. It is noted here that in principle, religious communities are free to set up their own religious education facilities in line with their autonomous status.[41] It appears, however, that the relevant curriculum would not be determined by the religious community itself, but would ultimately be controlled by the University. To ensure a wider autonomy over the curriculum, in line with international freedom of religion or belief standards, it is recommended to amend ensure that Section 15 allows for greater involvement of the Religious Societies, and other Islamic religious communities, in establishing the curriculum of Islamic-theological studies at the University, while taking into account the diversity of the Islamic community and teaching. This could be achieved, for example, by requiring wider consultations on the staff and the curriculum to be taught with relevant Religious Societies, and other Islamic religious entities. In addition, it is recommended to consider creating a proper faculty, rather than just a curriculum, on the issue of Islamic theology.

6. Foreign Funding

56. Section 6, subsection 2 provides that the means for normal activities aimed at satisfying the religious needs of its members shall be obtained by the Religious Society, its communities of worship, or its members from within the country. This would appear to ban Islamic Religious Societies from obtaining financial means from outside Austria.

57. International standards protect the right of religious communities to solicit and receive voluntary financial and other contributions from individuals and

[41] UN Human Rights Committee General Comment 22, par 4; Vienna 1989, par 16.8, Joint Guidelines on Legal Personality, par 15.

institutions.[42] This right is not absolute, however. Limitations to this right may be justified, if it is shown that the measure in question is necessary, proportionate to a legitimate aim, and non-discriminatory in nature.[43]

58. It is of course possible to imagine individual scenarios where a ban on specific forms of foreign funding may be justified, for example when such funding is being transmitted for the purpose of committing a criminal offence. However, the measure contemplated by the draft Law contains no limitation as to its scope, and applies to all foreign funding, whether it is given or received for lawful purposes or not. It is difficult to see how such a blanket ban could be justified as being 'necessary in a democratic society', considering how important it is for religious entities to receive a wide range of funding, including legitimate foreign funding (from charitable giving to funds to construct religious edifices, etc.). It is therefore recommended to either remove the ban on foreign funding, or to replace it with a more targeted provision, which specifies in detail which types of foreign funding shall be impermissible. This should be limited to cases where the receipt of such funding would constitute a criminal act, or where it would involve imminent dangers to national security, public order or the rights and freedoms of others.

59. Violations of this provision may, like other violations of the draft Law, be subject to various legal sanctions, including monetary fines under Section 22 of the draft Law. This provision states that the competent public authority may ensure implementation of decisions under the draft Law by annulling decisions that are in violation of the law, constituent instruments or organizational statutes of Religious Societies or their constituent communities of worship. The authority may then impose monetary fines at the appropriate level, or impose other measures foreseen by law. This provision does not include references to particular articles of the draft Law, and it is thus somewhat unclear which situations it applies to concretely, and which violations will lead to which levels of sanctions.

60. Considering the need for legal clarity and certainty in the draft Law, it is recommended to clarify in the draft Law which public authority may impose such sanctions, and which sanctions shall be imposed for which precise infractions. This latter addition could be achieved by including references to specific other provisions of the draft Law.

7. Freedom of Peaceful Assembly

61. The draft Law provides special regulation for public assemblies in two cases: Section 13, subsection 4 provides for a ban on public assemblies on certain Islamic holidays, banning „all avoidable activities that cause noise, as well as public assemblies, parades and processions, which could detract from the festivities.“ Section 19 mandates public authorities to prohibit assemblies and

[42] Vienna 1989, par 16.4; *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, par 6 (f); CDL-AD(2006)030 *Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine adopted by the Venice Commission at its 68th Plenary Session (Venice, 13-14 October 2006)*, par 34.
[43] Joint Guidelines on Legal Personality, par 5, and the sources cited there.

events for cultural purposes, "should they incur immediate danger for the interests of public security, order, health, national security, or the rights and liberties of other citizens." It is not clear why the draft Law regulates public assemblies in these particular cases, instead of leaving these cases to general legislation on public assemblies. In any event, any restrictions to the freedom of peaceful assembly should go no further than is prescribed by law and necessary in the interest 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. (Article 11 ECHR, Article 21 ICCPR). Especially in the case of Section 13, subsection 4, it is questionable whether any of the above apply, as this provision provides for a general ban on all avoidable activities which cause noise, which is a very broad restriction to the freedom of peaceful assembly, and may not always be considered 'necessary' in an individual, particular case. It is recommended to remove these provisions from the draft Law and to regulate matters pertaining to freedom of peaceful assembly through general laws regulating public assemblies, so as to ensure that all cases are dealt with individually, based on the specific circumstances of each case.

8. Privacy and Data Protection

62. The draft Law requires publication on the internet of various parts of the recognition process of Islamic Religious Societies. In particular, Section 3, subsection 2 requires publication of the receipt of applications for Religious Society status. Although this would certainly serve to enhance the transparency of the process, it does not appear to exclude the publication of personal data, such as the names and addresses of members and other personal information. This may constitute an excessive interference with Article 8 of the European Convention on Human Rights, which requires States to respect private and family life, home and correspondence. While it may be legitimate to publish some of this information, such as, for example, the names of leaders of the community seeking recognition, or the contact information of the prospective Religious Society, no limitation clause is provided in the draft Law as to the extent of the personal information which may be published in the recognition process. It is recommended to include provisions on protection of privacy and personal data in the provisions on publication of information on the recognition process on the internet, or to make explicit reference to applicable data protection legislation in those provisions.

[END OF TEXT]