

## **State and Church in the european countries with an orthodox tradition**

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### INTRODUCTION

The last decade of the 20<sup>th</sup> century brought a bundle of challenges for the local Orthodox Churches of Eastern and South-Eastern Europe which are even in the eventful history of these Churches without precedent. With the exception of Greece and Cyprus they have to overcome the mental and moral devastations of the atheistic regimes. At the same time they have to deal with all aspects of the Western concept of freedom of religion without totally abandoning their own tradition. After all they have to find their way to the European integration which brings something like a crucial test for the future of the Eastern heritage of Europe. Let us not forget: It is an open question if this European integration, grounded by treaties concluded in the first Rome, in future will incorporate also the second Rome, whereas the third Rome presumably neither will be inside the European Union.

### *The State from an Orthodox point of view – Historical Experiences*

In order to define the relationship between the Orthodox Church and the sovereign power<sup>1</sup>, not only the well-known passages of the Bible and the texts of the Fathers of the Church are of importance, but also a variety of historic experiences are effective, ranging from the 1000-year-old Byzantine system until the necessity to cope with a totalitarian atheistic State in the 20<sup>th</sup> century and then to find a place in the democratic State.

Key passages in the Bible are 1 Petr 2, 13-15, where submission to every authority among men for the Lord's sake is postulated and especially the famous formulation of Rom 13, 1-5<sup>2</sup>. These passages commonly emphasise the duty to obey the State power as

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<sup>1</sup> Cf. Richard Potz – Eva Synek, *Orthodoxes Kirchenrecht. Eine Einführung*, Freistadt 2007, especially 155, where also further literature can be found.

<sup>2</sup> “Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels

an institution intended by God, and basically independent of any predominant religion. This position was supported by many of the Fathers of the Church and therefore Orthodox canonists are traditionally referring in this connection to Irenaios, Tertullian, Joannes Chrysostomos and especially to Augustinus who traced every political power back to the providence of God (De Civitate Dei, V, 1)<sup>3</sup>.

At the same time, passages in the Bible show a strong Judeo-Christian tradition of criticising of power and violence, and emphasise the difference between secular and religious tasks giving Caesar what belongs to Caesar and God what belongs to God (Mk 12, 13-17; cf. also some passages of the Acts of the Apostles such as 4, 19 and 5, 29, culminating in a wording repeatedly cited: "We ought to obey God, rather than men"). These texts often used in history in order to justify the autonomy of the sacred sphere and the Church could also be found in Orthodox Canon Law, for example as arguments for the prohibitions for priests and pastors to care for worldly affairs (cc. 6 and 83 of the Canons of the Apostles<sup>4</sup>).

After the coming-into-being of the Byzantine State Church the texts of the Bible needed to be reinterpreted. In late antique patristic writings, the tradition of existing criticism of State and sovereignty became more and more unimportant. Now, the question was put as to the relationship between the sacred and secular sphere in case of the reign of a Christian emperor.

The first classical text can be found in the Novel 6 of Justinian. It contains the decisive ideas of the *symphonia* of the sacred and secular power in an integrative Christian society.

The second important source is the *Eisagoge (Epanagoge)* composed under the Emperor Basileios I. at the end of the 9<sup>th</sup> century<sup>5</sup>. The Patriarch of Constantinople Photios delineated in the Prooemium and in the titles 2 and 3, dealing with the Emperor and the Patriarch, an ideal of the unanimity of both functions grading up the position of the Patriarch. The Emperor has to be an outstanding witness of Orthodoxy and piety, the Patriarch an "animated image of Christ".

The State consists in analogy to the human body of parts and limbs, of which the Emperor and the Patriarch are the most important and most necessary. Therefore peace and well-being of the citizens depend on the "*symphonia*" between kingdom and priesthood.

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against the authority is rebelling against what God has instituted, and those who do so will bring judgement on themselves".

<sup>3</sup> Cf. Nikodim Milasch, Das Kirchenrecht der Morgenländischen Kirche, 2nd edition Mostar 1905, 692s.

<sup>4</sup> C. 6: Let not a bishop, a priest, or deacon undertake the cares of this world; but if he do, let him be deprived.

C. 83: Let a bishop, or presbyter, or deacon, who goes to the army, and desires to retain both the Roman government and the sacerdotal administration, be deprived. For the things of Cæsar belong to Cæsar, and the things of God to God.

<sup>5</sup> Cf. Andreas Schminck, Studien zu mittelbyzantinischen Rechtsbüchern. Forschungen zur byzantinischen Rechtsgeschichte 13, Frankfurt a.M. 1986, 12s.

In this concept, the participation of political power in Church affairs was not only recognized, but the Orthodox emperor's commitment to protect the faith was asked for. This belief in the task of state power has been valid until the 20<sup>th</sup> century and is currently inspiring some fundamentalistic concepts in countries with an Orthodox tradition.

The second concept for the relation between the two powers is called *synallegeia* and can be traced back to the 2<sup>nd</sup> Council of Nikaia (787), the last Ecumenical Council recognized by the Orthodox Church, which in some canons stressed the principle of self-administration of the Church<sup>6</sup>. This notion has proven to be more flexible and in the context of modern statehood it could be seen comparable to the Western system of coordination.

The first real challenge to the system embodied in the Byzantine State law has been the confrontation with Islam. The millet-system of the Ottoman Empire<sup>7</sup> based on the Islamic concept of tolerance<sup>8</sup> transferred the responsibility for the Orthodox people to the ecclesiastical hierarchy. This political involvement brought the Orthodox Churches in a close connection with national interests (ethnarchic tradition). Especially in the Balkans, the concept of so-called "Confessional Nations" (Kirchennationen)<sup>9</sup> arose, implying a close unity of confession and nation. When this identification was transferred to the new Nation States in the 19<sup>th</sup> and 20<sup>th</sup> century, this concept brought many difficulties with which we are faced up to now. All these developments, of course, were in a certain contradiction to the Holy Canons mentioned above<sup>10</sup>.

From the 19<sup>th</sup> century on, a re-assessment of the relationship of State and Church had taken place. The new States claiming the right to self-determination were not able to refer exclusively to the imperial Byzantine State law, but, as a rule, established a system, where Byzantine traditions were connected with elements of the concept of established Churches in the West.

Although the Synod of Constantinople of 1872 clearly condemned nationalism and ethnophyletism, a splitting of Orthodoxy and an increasing tendency of its political misuse could not be avoided. Since that time many ecclesiastical and jurisdictional problems have been strongly connected with a differentiation in national Churches.

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<sup>6</sup> Soeg. in cc. 3, 6, 10 and 12.

<sup>7</sup> Millet was the specific term for a confessional community in the Ottoman Empire, which was a specific version of the Islamic dhimmi-concept. In the 19<sup>th</sup> century, with the Tanzimat reforms, the legally protected religious minority groups were called millets, cf. Benjamin Braude – Bernard Lewis (ed.), *Christians and Jews in the Ottoman Empire. The Functioning of a Plural Society*, 2 vol., New York und London 1982; Michael Ursinus, *Zur Diskussion um "millet" im Osmanischen Reich*, in: *Südost-Forschungen* 48 (1989), 195–207.

<sup>8</sup> In the territory of Islam (Dar al Islam) non-Muslims, that means the people of the book (Jews and Christians) have the status of a protected minority (dimmī).

<sup>9</sup> Emmanuel Turczynski, *Orthodoxe und Unierte*, in: Adam Wandruszka – Peter Urbanitsch (ed.), *Die Habsburgermonarchie 1848–1918 (Vol. IV: Die Konfessionen)*, Wien 1985, 399–478; esp. 405–428; Emmanuel Turczynski, *Konfession und Nation: Zur Frühgeschichte der serbischen und rumänischen Nationsbildung (Geschichte und Gesellschaft, 11)*, Düsseldorf 1976.

<sup>10</sup> Cf. fn 4.

The political re-orientation of the Balkan states not only led to the formation of established Orthodox Churches but a certain approach to Western systems of coordination can also be observed. Especially in the Austrian Monarchy this was the result of the confrontation with the concept of legally recognised Churches to which Nikodim Milasch gave some preference. Church and State meet on the same level as equivalent counterparts and should “develop activities in their respective fields according to their purposes”<sup>11</sup>. In doing so, the connection of both is considered necessary for the common good of the people and the State.

This mixture of *synallegeia* and coordination did not even presuppose an Orthodox State, because for religious law “the constitution of a State does not matter; it considers state power/sovereignty from a general point of view, irrespective of the confession of the head of State”<sup>12</sup>. As most classical authors of Orthodox canon law, Milasch emphasised that “in comparison with the Occident, not many disputes between Church and State in the territory of the Oriental Church” took place<sup>13</sup>. He saw the reason for this in the political claims of the Popes. “These conflicts having lasted for centuries between Church and state power resulted in the political theories in Church law of the 19<sup>th</sup> century, especially the separation of State and Church, which has never occurred in Oriental churches”<sup>14</sup>.

The confrontation with the antireligious totalitarian State in the 20<sup>th</sup> century, nevertheless, gave rise to completely new experiences and caused a complex situation. In theory, this State proceeded from a radical concept of separation, but in practice instruments of traditional Byzantine State control of Churches were used, in some parts supplemented by some borrowings from the Western absolutistic State Churches (Petrinic-Russian and Josephinistic-Austrian). Apart from the specific conditions under Muslim Rule, Orthodox Churches – with some exceptions like the Russian Old Believers – lacked experiences with conflicts with the State in general and with an antireligious State in particular. So they reacted mostly with a cautious and tacit attitude in political questions<sup>15</sup>.

There were also parts of the Orthodox Churches, especially members of the hierarchy, which used the small space for some activities under communist rule regardless of the ideological opposition. In return, they had to accept a political instrumentalization by the State, especially if it was about the commitment for socialistic peace policy asked for by the State. The result was the reproach of collaboration after the overthrowing of the communist regime had taken place. Nevertheless, one should not forget that massive suppression and

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<sup>11</sup> Milasch (fn. 3), 694.

<sup>12</sup> Milasch (fn. 3), 710.

<sup>13</sup> Milasch (fn. 3), 699.

<sup>14</sup> Milasch (fn. 3), 700.

<sup>15</sup> In this connection one should not forget that there was a remarkable resistance of the Greek and Bulgarian bishops against Nazi-racism during World War II; cf. Potz – Synek (fn. 1), 158 and Hans-Dieter Döpman, *Kirche in Bulgarien von den Anfängen bis zur Gegenwart*, München 2006, 68s.

countless victims created a climate of fear and mistrust, which was not so easy to overcome even after the end of communism.

### *New Challenges: 1989 and the Outcomes*

The end of communism and the following development gave rise to a very complex situation. The often quoted “religious rebirth” on the one hand has shown that the churches have overcome the challenge of the atheistic ideology better than expected by many observers. On the other hand, representatives of the churches not always cared for facilitating the transition to a free democratic State, but supported authoritarian-nationalistic tendencies within the politics of the respective State by referring to Orthodox traditions.

In this connection one has to keep in mind the fact that the political change in European Countries with Orthodox tradition was an enormous challenge for them when they were confronted relatively unprepared with all aspects of religious freedom existing in a pluralistic society. In all post-communist States, similar problematic fields often were the reason for conflicts during the last two decades. Some of these problems have a specific “Orthodox” character which means that they are particularly connected with the Orthodox tradition of the respective country.

## 1. THE ACCUSATION OF COLLABORATION WITH THE COMMUNIST GOVERNMENT

The reproach of collaboration for a long time was a burden for many Churches. It was one of the main reasons for the difficulties to restore communion between the Patriarchate of Moscow and the Russian Orthodox Church Outside Russia<sup>16</sup> and for a schism within the Bulgarian Church, where the process of consolidation was extremely difficult.

Since 1991 especially Patriarch Maxim of Sofia has been severely criticized for his subservience to the communist system. The new government created a Board of Religious Affairs that began to initiate reforms in the country’s religious institutions, using the traditional instruments of state interference. On May 26 1992 the Board declared the Holy Synod and Maxim’s election in communist times illegal because of being appointed by the communist government in an uncanonical manner. It was replaced with a provisional Synod under Metropolitan Pimen of Nevrokop with a mandate to convene a Sobor at the earliest possible date. The Board authorized this “Alternative Synod”, which at this time was supported by four out of thirteen Metropolitans and six out of sixteen bishops, to occupy the Synod building. The result was a schism in the Bulgarian Orthodox Church. On July 4, 1996 Metropolitan Pimen was installed as rival Patriarch and subsequently was anathematized by Maxim’s Holy Synod.

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<sup>16</sup> Cf. the joined website of the Russian Orthodox Church-Patriarchate of Moscow and the Russian Orthodox Church Outside Russia: <http://www.pravos.org> and Eva Synek, Zur Wiedervereinigung der Russischen Orthodoxen Kirche, to be published in: Österreichisches Archiv für Recht und Religion 2008.

Political interventions in religious affairs became a characteristic feature of Bulgaria each Parliamentary election had the consequence of a change in politics with regard to the competing religious communities<sup>17</sup>. So the parties often went to the Bulgarian Supreme Court or the Bulgarian Constitutional Court respectively asking for a decision in the case of the schism<sup>18</sup>.

From the 30<sup>th</sup> September to the 1<sup>st</sup> October 1998 an “extraordinary and enlarged synod” of the Bulgarian Orthodox Church was held in Sofia to solve the question on an inter-orthodox level. It was presided by the Ecumenical Patriarch Bartholomew I and attended by six other Patriarchs, including Patriarch Alexy II of Moscow and Patriarch Petros VII of Alexandria. The Synod reaffirmed Maxim’s position as Bulgarian Patriarch, received the repentance of the dissident bishops and declared an end to the schism.

The Synod was not completely successful because some dissident bishops again called their own “Alternative” Synod and “deposed” Patriarch Maxim. As time went on the original Holy Synod under Patriarch Maxim gained more and more support. The death of the Rival-Patriarch Pimen in 1999 brought a heavy backlash for the alternative group, and Pimen was not replaced by another Rival Patriarch.

Finally the new Law on Religious Denominations in Bulgaria of December 2002 was supposed to unify the Church through state law. It recognized the existence of only one Orthodox Church which became a legal person by the force of law with Patriarch Maxim as its head. § 1 of the Supplemental Provisions of this law rules that “persons who at the time this law enters into force have seceded from a registered religious institution in violation of its by-laws, cannot use an identical name nor use or operate with its property” (§ 1).

In July 2004 referring to § 3 of the Supplemental Provisions of the Denominations Act the Bulgarian Government finally intervened in favour of Patriarch Maxim and his Holy Synod. In a nationwide operation priests from the Alternative Synod were forcibly evicted from churches and other properties, which the Holy Synod claimed for being illegally occupied. When Patriarch Maxim celebrated his 90<sup>th</sup> birthday in October 2004, most of the activities of the Alternative Synod had ceased.

But that was not the end of the story of the Bulgarian schism. Meanwhile the case of the “Alternative Synod” and the actions of July 2004 are subjects of an application to the ECHR<sup>19</sup>.

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<sup>17</sup> The Muslim Community of Bulgaria was in a similar situation. In the conflict between the two competing groups two complaints were submitted to the ECHR and in both cases Bulgaria was sentenced: Hasan and Chaush v. Bulgaria (ECHR 26. 10. 2000, 30.985/96) and Supreme Holy Council of the Islamic Community v. Bulgaria (ECHR 16. 3. 2005, 39.023/97).

<sup>18</sup> In 1992 for example, after an appeal by the original Holy Synod, the Constitutional Court ruled the Board's intervention unconstitutional and referred the applicants back to the Supreme Court to decide which Synod was legitimate. The latter, in a first decision ruled the original synod invalid for having missed the Board's deadline for registration by one day. In a further appeal in the same year the Supreme Court ruled in a second decision even both Synods invalid, the original one for not observing the Orthodox canon law and the alternative synod because the Board had no right to register a Synod which was not elected by church members.

<sup>19</sup> Cf. <http://www.christiantoday.com/article/bulgaria.orthodox.church.appeals.to.european.parliament.for.r>

## 2. THE EMERGENCE OF THE TRUE ORTHODOX CHURCH MOVEMENT

The turmoil following the collapse of communism also was the reason that in most of the countries a traditionalist form of Orthodoxy gained more and more adherents. In Russia underground-communities were the initial points for the growing movement of “True Orthodoxy”<sup>20</sup>, which is in close connection to Old Calendarist Groups in Greece<sup>21</sup>, Bulgaria and Romania.

In Moldova the State Service for Religious Denominations refused to register the “Church of the True Orthodox-Moldova” despite repeated court orders to do so. That quest for registration was brought before the European Court of Human Rights. So five years after being sentenced by the ECHR for denying legal status to the Bessarabian Orthodox Church, the Moldovan government was sentenced again for refusing to grant legal status to another local religious community. On February 27, 2007 the ECHR ruled in favour of the applicants and compelled the government to register the “Church of the True Orthodox-Moldova”<sup>22</sup>. In the middle of 2008 this Church remained unregistered.

## 3. FREEDOM OF MISSION

Religious freedom also means freedom of mission for Western Christian denominations and New Religious Movements. The transformation states are often in a vulnerable international position regarding their law on religion. The lobbying of Western religious groups had great impact on the relevant legislation. There was also the influence of Western scholars from the EU and the USA. Last but not least, one should not forget in this context the measures and possible sanctions set down by the US-International Religious Freedom Act of 1998. So something like a “New War for Souls” started<sup>23</sup>.

It has also to be stressed that mission, evangelization and proselytism have different connotations in the Christian denominations:

“Eastern Orthodox churches have a well-defined theology that undergirds their stance on evangelism, stressing unity and Eucharistic celebration more than evangelistic proclamation. For Orthodox believers, membership in the church is often

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einstatemet/9487.htm [01.07.2008]).

<sup>20</sup> In Russia there are several groups calling themselves “True Orthodox Church”.

Now the most important seems to be the “Russian True Orthodox Church” claiming to be the canonical successor of the “Patriarch Tikhon’s Catacomb Church” (cf. [http://dormitionchurch.homestead.com/RTOC\\_english\\_html.htm](http://dormitionchurch.homestead.com/RTOC_english_html.htm) [01.07.2008]).

<sup>21</sup> True Orthodox or Genuine Orthodox Church is also a name used for Old Calendarist groups in Greece. The founding of the Old Calendar Churches of Greece was a reaction to the introduction Gregorian calendar in Greece in 1924. Now there are existing in Greece three greater Old Calendarist communities and up to ten smaller one’s. (Cf. the links which can be found on <http://www.geocities.com/joesuaiden/trueorthodox/toclinks.html#2>) [01.07.2008]).

<sup>22</sup> Cf. *Biserica Adevărat Ortodoxă din Moldova and others v. Moldova* (952/03).

<sup>23</sup> Cf. the project at Emory University: „The Problem of Proselytism in Russia”. The papers were published by John Witte – Michael Bourdeaux, *Proselytism and Orthodoxy in Russia. The New War for Souls*, New York 1999.

connected to belonging to a particular body of people, and frequently tied to ethnic or nationalistic groups. The Eucharist and social witness of the church are seen as the prime ways of sharing the Gospel, and proclamation is relegated to an equal or even subordinate role. Any interreligious competition is especially decried<sup>24</sup>.

This theological background and the lack of experience with the advantages of religious freedom, the lack of knowledge and respect regarding the local religious traditions on the Western side respectively, brought many difficulties for the development of the law on religion especially in countries with an Orthodox tradition. Confronted with these challenges the Orthodox Churches tend to demand the traditional protection by the state and to ask for restrictions for the activities of foreign missions. It is remarkable that no other constitution has reproduced the prohibition of proselytism contained in Art. 13 of the Greek Constitution<sup>25</sup>. In Moldova the “Law on Denominations” provides a prohibition of “excessive proselytism”, which “is considered to be any attempt to pressure one’s religious convictions by force or abuse of authority” (Art. 1/1)<sup>26</sup>.

In this context it has to be underlined that the regulations of the special laws for denominations and especially the administrative practice in most of the countries with an Orthodox tradition are more or less restrictive regarding foreign mission. Therefore ministers of a foreign religion are often subject to a stricter regime for their work.

In Ukraine “the clergy, religious preachers, educators and other representatives of foreign organizations” who are not citizens can carry out their activities only within the religious organization that invited them and with the consent of the government authority (Art. 24 of the Ukrainian Law on Freedom of Conscience and Religious Organizations). Moreover, they must procure a special visum and they have the obligation to be registered with the local authorities<sup>27</sup>.

In Russia “Religious organizations have the exclusive right of inviting foreign citizens for purposes of professional activity, including preaching and religious activity in those organizations in accordance with federal legislation” (Art. 20 para 2 of the Russian Federal Law on Freedom of Conscience and on Religious Associations)<sup>28</sup>.

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<sup>24</sup> Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*. This article was a contribution to the project at Emory University: “The Problem of Proselytism in Russia”. Cf. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=762467](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=762467) [01.07.2008]. Cf. also: Philip Walters, *The Russian Orthodox Church and Foreign Christianity. The Legacy of the Past*, in: Witte-Bourdeaux (fn. 25), 31-50; Petros Vassiliadis, *The Universal Claims of Orthodoxy and the Particularity of its Witness in a Pluralistic World*, in: Emmanuel Clapsis (ed.), *The Orthodox Churches in a Pluralistic World- An Ecumenical Conversation*, Brookline (Mass.) 2004, 192-206; Christopher Duraisingh, *Christian Mission in a Pluralistic World*, in: Emmanuel Clapsis (ed.), *The Orthodox Churches in a Pluralistic World. An Ecumenical Conversation*, Brookline (Mass.) 2004, 207-218.

<sup>25</sup> Art. 13 para. 2: “All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited”.

<sup>26</sup> Cf. Cole Durham – Silvio Ferrari, *Laws on religion and the State in Post-Communist Europe* (Law and Religion Studies 2), Leuven 2004, 201.

<sup>27</sup> Cf. Durham – Ferrari (fn. 27), 325.

<sup>28</sup> Cf. Durham – Ferrari (fn 27), 295.

In Bulgaria according to § 35 nr 5 of the Religious Denominations Act foreign religious ministers who are invited by a registered religious denomination cannot stay in the country without a permission of the State Directorate on Religious Denominations<sup>29</sup>. A similar regulation is given in § 5 of the Macedonian Law on Denominational Communities and Religious Groups of 1997<sup>30</sup>.

In Moldova foreign religious workers must register with the State Service for Religious Affairs and other governmental bodies<sup>31</sup>.

#### 4. RESTITUTION CLAIMS

In all countries there were demands of restitutions and it was a well-known issue since the democratic revolutions whether restitution of church property would be performed by a special law or by a general law on restitution. This problem, in principle is not a question pertaining solely or especially to countries with an Orthodox tradition. Only in Ukraine and Romania<sup>32</sup> where the restitution-claims were raised in connection with the re-organisation of the Catholic Eastern Churches persecuted in communist times, there is a peculiar connection to the Orthodox tradition of a country.

In some cases, for example in Moldova, the question of restitution is connected with the changing decisions of the governments regarding different competing orthodox jurisdictions.

#### 5. NEW BORDERS - NEW JURISDICTIONS

Because of new delimitations of frontiers, in some countries after 1989 new inner-orthodox conflicts of jurisdiction have broken out. The frequent changes of borderlines brought great difficulties for Orthodox Churches in the Nation States with an Orthodox tradition. In particular the concept of the identity of political and ecclesiastical frontiers for local Churches based on c. 34 of the Canons of the Apostles (“It behoves the Bishops of every nation to know the one among them who is the premier (*protos*)”) was difficult to hold up when political frontiers were changed so often.

The first challenge was the building of new Nation States after the decline of the Ottoman Empire and the building of the Baltic States after the end of the Russian Empire. All the declarations of autocephaly respectively autonomy followed the concept that ecclesiastical and political borderlines should in principle be in conformity.

<sup>29</sup> Cf. Durham – Ferrari (fn 27), 88.

<sup>30</sup> Cf. Durham – Ferrari (fn 27), 190.

<sup>31</sup> Cf. <http://www.state.gov/g/drl/rls/irf/2007/90189.htm> [01.07.2008].

<sup>32</sup> For Romania cf. Romanița Iordache, Church and State in Romania, in: Law and Religion in Post-Communist Europe, in: Silvio Ferrari – Cole Durham (ed.), Law and Religion in Post-Communist Europe (Law and Religious Studies 1), Leuven 2003, 250ss.

The second challenge was the integration of different autocephalous or autonomous Churches as a consequence of the political unifications after the First World War, especially in Romania and Yugoslavia.

As a result of the dissolutions in Middle and Eastern Europe we are witnessing now a third challenge since 1989, affecting mainly the Patriarchates of Moscow and Belgrade.

After the dissolution of the Sowjet-Union the canonical territory of the Russian Orthodox Church/Patriarchate of Moscow exceeds the borders of the Russian Federation. According to the Statute of the Patriarchate of Moscow of 2000 (Art. I, 3) “the jurisdiction of the Russian Orthodox Church shall include persons of Orthodox confession living on the canonical territory of the Russian Orthodox Church in Russia, Ukraine, Byelorussia, Moldavia, Azerbaijan, Kazakhstan, Kirghizia, Latvia, Lithuania, Tajikistan, Turkmenia, Uzbekistan and Estonia, and also Orthodox Christians living in other countries and voluntarily joining this jurisdiction”<sup>33</sup>. This list contains all the Successor-States of the Sowjet-Union except Georgia.

In Estonia this claim caused a controversial with the Ecumenical Patriarchate<sup>34</sup> and in Moldova with the Metropolis of Bessarabia which is linked to the Patriarchate of Bucharest.

When Estonia regained its sovereignty in 1990, approximately 40% of the population were of Russian origin. So the great majority of the Orthodox believers were ethnically Russians and only a minority were ethnically Estonians. Most of the orthodox believers with Estonian background oriented themselves towards Constantinople. In doing so they were supported by the Estonian State which recognized the “Estonian Apostolic-Orthodox Church” as the sole legal successor of the Estonian Orthodox Church of the time between the two World Wars. The registration of the local Orthodox Church oriented towards the Moscow Patriarchate (since 1993 a Self-Governing Church within the Moscow Patriarchate) however was denied<sup>35</sup>.

So a clash was provoked between Constantinople and Moscow. When Constantinople formally was re-activating the autonomy of the Estonian Church the Patriarchate of Moscow was reacting even with the suspension of the communion with Constantinople. The agreement finally found was a compromise which from a canonical point of view is not satisfying and, therefore, often is criticized by canonists and theologians. Considering the situation of the local Orthodox people nevertheless it seemed to be the only acceptable solution at this moment: The individual communities were *kat'oikonomian*<sup>36</sup>

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<sup>33</sup> The official English translation of the statute of the Russian Orthodox Church-Patriarchate of Moscow of 2000 can be found under <http://www.-mospat.ru/index.php?mid=162> [01.07.2008].

<sup>34</sup> The Ecumenical Patriarchate is claiming the jurisdiction in the diaspora according to a wide interpretation of c. 28 of the Council of Chalcedon.

<sup>35</sup> Cf. Alexej Klutschewski, *Religionsrecht in Estland unter besonderer Berücksichtigung der Orthodoxie*, in: *Kanon XX/2008*, 75–117.

<sup>36</sup> For the fundamental principle of *oikonomia* in orthodox canon law cf. Hamilkar D. Alivizatos, *Die Oikonomia nach dem kanonischen Recht der Orthodoxen Kirche*. Hg. u. eingel. v. A. Belliger, Frankfurt

authorised to opt for one of the two competing jurisdictions. This was rather a diaspora-solution<sup>37</sup> than a solution for a canonical territory, where according to canon law a strong monohierarchical concept (“One bishop, one city”<sup>38</sup>) is the rule. By all means there are coexisting now two orthodox jurisdictions in a country which is seen by the Patriarchate of Moscow as part of its canonical territory.

As a consequence of the judgement of the ECHR regarding the Moldovan conflict of two jurisdictions the Estonian Government also gave up its resistance against the registration of the Moscow-oriented Estonian Orthodox Church.

After Moldova had declared independence in 1991, the question of ecclesiastical jurisdiction became virulent. Besides the “Self-Governing Church of Moldova” belonging to the Jurisdiction of the Patriarchate of Moscow with the great majority of believers, the Metropolis of Bessarabia, orientated to the Patriarchate of Bucharest, was reactivated in 1992 after a number of priests had broken away from the Moldovan Orthodox Church.

The succession dispute was politically charged because of raising the question of orientation towards Moscow or Bucharest, a question reflecting the general political situation of the country.

In 2001, the Government declared the Moldovan Orthodox Church the successor of the pre-World War II Romanian Orthodox Church for purposes of Church property. Meanwhile the ECHR in the judgement of 13. 12. 2001 noted that as the applicant Bessarabian Church „had not been recognised it could not operate. In particular, its priests could not take divine service, its members could not meet to practise their religion and, not having legal personality, it was not entitled to judicial protection of its assets. Accordingly, the Court took the view that the Moldovan Government’s refusal to recognise the applicant church constituted interference with the right of that church and the other applicants to freedom of religion, as guaranteed by Article 9 § 1<sup>39</sup>. As a consequence, the Metropolis of Bessarabia was officially recognized in 2002, after years of being denied recognition.

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1998; John H. Erickson, *Oikonomia in Byzantine Canon Law*, in: Kenneth Pennington – R. Sommerville (ed.), *Law, Church and Society. Essays in Honour of Stephan Kuttner*, Philadelphia 1977, 225–237; Jerome Kotsonis, *Problèmes de l’économie ecclésiastique*, Gambroux 1971; Lewis Patsavos, *The Canonical Tradition of the Orthodox Church*: [www.orthodoxa.org/GB/orthodoxy/canonlaw](http://www.orthodoxa.org/GB/orthodoxy/canonlaw); Spiros N. Troianos, *Akribeia und Oikonomia in den heiligen Kanones*, in: *Ius ecclesiasticum vehiculum caritatis*, Vatican 2004, 181–198.

<sup>37</sup> The Austrian Law on external affairs of the Greek-Oriental Church from 1967 on the one side has adopted the legal opinion of the Ecumenical Patriarchate that the orthodox diaspora in principal is under the jurisdiction of Constantinople, rejecting at the same time the claims of the Moscow Patriarchate. Therefore the public-law status of the Metropolis of Austria which is under the jurisdiction of the Ecumenical Patriarchate is explicitly recognised, but there is no possibility for recognising any other orthodox diocese. On the other side the individual orthodox community for itself has to decide in its statute to which jurisdiction it is belonging (cf. Richard Potz, *30 Jahre Österreichisches Orthodoxengesetz*, in Carl G. Fürst – Richard Potz – Spyros Troianos (ed.), *Kirchenrecht und Ökumene – Festgabe Panteleimon Rodopoulos*, Kanon XV/1999, 222–240.

<sup>38</sup> Cf. John Rinne, *One bishop – One City*, in: Kanon VII/1985, 91–109.

<sup>39</sup> *Metropolitan Church of Bessarabia and Others v. Moldova* (45701/99).

In February 2004, the Supreme Court of Moldova repealed the Government's 2001 decision in favour of the Moldavian Orthodox Church. After an appeal submitted by the Government, the Supreme Court rescinded its February ruling, considering the Moldovan Orthodox Church once again the legal successor to the pre-World War II Romanian Orthodox Church. The Metropolis of Bessarabia, being endorsed by the ECHR, did not accept this decision. So on March 14, 2007, the Bessarabian Orthodox Church finally was recognized by the "State Service for Religious Affairs" as the historical, spiritual and canonical successor of the Romanian Orthodox Church that had existed before 1946. But this recognition did not solve the issue of the property rights associated with this decision, so that this question is still open at the moment.

As a result of the Yugoslavian secession wars the canonical territory of the Serbian Orthodox Church was also politically divided. Therefore, the Patriarchate of Belgrade is demanding the political territory of all the former Yugoslavian republics as its canonical territory<sup>40</sup>. In two of these new States, in the former Yugoslavian Republics of Macedonia and Montenegro the attempt was made to establish an independent local Church.

This process started already in the time of Yugoslavia, when in 1958, referring to the historical importance of the Patriarchate of Ohrid the Church of the former Yugoslavian Republic of Macedonia reached the recognition of an autonomous status by the Patriarchate of Belgrade. In 1967 the Macedonian bishops finally declared their Church autocephalous, but there was no acceptance by the other autocephalous churches<sup>41</sup>. All attempts to restore the ecclesiastical communion with Belgrade have collapsed so far.

After the dissolution of Yugoslavia a similar process started in Montenegro, following the tradition of the sovereign principality Montenegro and its autonomous Church before 1918. Like in other cases there was backing for this movement by secessionist politicians. In 1998 the Bulgarian Rival-Patriarch Pimen ordained a Metropolitan, who, however is totally isolated within Orthodoxy. Whereas the goal of political independence of Montenegro was reached after the referendum of 2006, the development on ecclesiastical level seems to be open. Most of the believers continue to recognize the Serbian Patriarch as their hierarchical head<sup>42</sup>.

In the Ukraine the acquisition of independence after the dissolution of the Sowjet-Union was followed by an inner-Orthodox schism. This schism is deeply rooted in the special situation of this country with its socio-political tripartition. The result of the long lasting and politically overlaid conflicts is that there are now three separate Orthodox jurisdictions in Ukraine:

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<sup>40</sup> For the specific relationship between the Orthodox Christian faith and the national identity especially in the case of the Serbian tradition cf. Christos Mylonas, *Serbian Orthodox Fundamentals*, Central European University Press 2003.

<sup>41</sup> Cf. Stefan Kostovski, *Church and State in Macedonia*, in: Ferrari – Durham (fn. 33), 200ss; Slavko Dimevski, *History of the Macedonian Orthodox Church*, Skopje 1989.

<sup>42</sup> Cf. Potz – Synek (fn. 1), 130s.

The Ukrainian Orthodox Church still linked to the Moscow Patriarchate is concentrated in the Eastern parts of the Ukraine, dominated by ethnical Russian population. The Ukrainian Orthodox Church-Kievan Patriarchate is concentrated in the central parts of the Ukraine. The Ukrainian Autocephalous Orthodox Church is the smallest one mostly concentrated in western Ukraine. After the death of Patriarch Dimitry in 2000, this church has not elected a successor in the hope of achieving reconciliation with the other Orthodox churches in Ukraine.

## 6. ORTHODOXY AND DEMOCRACY

After the end of communism, the Orthodox Churches in the transformation countries are not only confronted with a democratic state, governed by the rule of law, but also with the necessity to find and develop a theological opinion regarding this system.

Officially, the European Orthodox Churches acknowledge the democratic legal system. Sometimes even a special emphasis is given to the fact that the democratic system can be based on the orthodox doctrine focusing on the Eucharistic Community and the Conciliatory Ecclesiology. As in the democratic state, in Orthodoxy, “Common problems [...] are treated conciliatory and in synods by means of democratic principles, even in the most difficult crises of its life”<sup>43</sup>.

But also voices are heard which criticize democracy in principle. They are opposed to a basic social consent of a free democracy, based on the free market of ideas, mistrusting each imported political system, an attitude which was developed during the times of communist suppression. In doing so, even the return to the old system of an Established Church, in the sense of the Classical doctrine of *symphonia*, has been considered – very often connected to a certain Royalist nostalgia. Obviously “some Russian Orthodox people consider the contemporary state regime and socio-political atmosphere very unfavourable to Orthodoxy -- to the extent that romantic notions about the restoration of the monarchy have become popular, based on the pious belief that the monarchy, until it was destroyed in 1917, guaranteed the existence of Holy Russia”<sup>44</sup>. In this question the political consent is far-reaching and includes even communists<sup>45</sup>.

It is not always an easy task to opt for an alternative where institutional entanglements with the state must be replaced by a social commitment as actor in civil society, thereby redefining the principle of *synallelieia*. Accordingly, there are only a few experiences in Orthodox countries of reform. Positive experiences with democracy and pluralism are currently transferred from diaspora-Orthodoxy into the panorthodox discussion. On the

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<sup>43</sup> Grigorios Larentzakis, Der Beitrag der Orthodoxie für Europa: [http://www.orthodoxie.net/de/Texte/Texte\\_Varia/Larentzakis\\_OrthodoxieEuropa\\_de.htm](http://www.orthodoxie.net/de/Texte/Texte_Varia/Larentzakis_OrthodoxieEuropa_de.htm). [01.07.2008].

<sup>44</sup> Vladimir Feodorow, Religious Freedom in Russia today, in: The Ecumenical Review, October 1998, [http://findarticles.com/p/articles/mi\\_m2065/is\\_4\\_50/ai\\_53631773?tag=artBody;coll](http://findarticles.com/p/articles/mi_m2065/is_4_50/ai_53631773?tag=artBody;coll) [01.07.2008].

<sup>45</sup> Cf. the quotations from the RF State Duma of September 19, 1997, cited by Lev Simkin, Church and State in Russia, in: Ferrari – Durham (fn 33), 266.

occasion of a plenary session of the Russian Orthodox Church Bishops' Council, Metropolitan Hilarion of Eastern America and New York, the First Hierarch of the Russian Orthodox Church Outside Russia, dwelt on the experience of his Church with the democratic system that "could benefit the Church in Russia"<sup>46</sup>.

There is an increasing tendency to reflect these ideas also in the Orthodox European countries of origin and "to view democracy and globalization as competitive, pluralizing conditions that offer opportunities, rather than simply challenges to Orthodoxy"<sup>47</sup>. A responsible attitude towards the multi-confessional presence of religions in the public space, both from the part of the Orthodox Churches and of the political authorities, to find new solutions for settling the mutual relations is needed. The Orthodox Churches have to think about their positions in different fields of ethics, such as medical ethics, bioethics, ecology immigration and integration etc.

Here, the Russian Orthodox Church has undergone a considerable development during the last years<sup>48</sup>. The Church offers – as most of the Western Churches have already done for many years – to be a partner of the State concerning social question whatsoever:

"Naturally, the Russian Orthodox Church seeks to extend the sphere of its socially significant efforts. The Church is ready to join efforts with the state and secular society in every possible field. Some of the areas of church-state cooperation have already been identified by life itself because these areas have come into practice everywhere. These areas are peacemaking, restoration of architectural monuments (not only churches), charity and social programs, and cultural and research work. It would appear perfectly natural) for the state and major religious associations to cooperate on issues concerning public morality, large-scale social policy, crime prevention, and foreign and media policies. This list can be continued endlessly. Indeed, the religious factor has an influence on all areas of society because believers are present everywhere, from nuclear centers to sports clubs. Therefore, responsible authorities must hear the voice of believers and consider the real role of religion in the life of the country"<sup>49</sup>.

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<sup>46</sup> Metropolitan Hilarion inter alia remarked: "For ninety years of existence in separation from our Church, we had to, like it or not, learn to co-exist and interact with diverse governmental structures' ... 'In countries where the Church works in a society guided by Western European norms of democratic system but has not yet accustomed herself to them, the experience of the Church Abroad, which learnt to exist in a situation of society governed by law during the last century, could be useful'... 'the basic principle for the Church's work in a democratic society lies in achieving or maintaining a maximum freedom from the state's interference in her life'. The function of a state should lie first of all in 'establishing or maintaining the conditions necessary for a free existence of the Church'".

A report of the text is available under <http://www.mospat.ru/index.php?page=41580> [01.07.2008].

<sup>47</sup> Elizabeth H. Prodromou, *Orthodox Christianity and Pluralism. Moving beyond Ambivalence?*, in: Emmanuel Clapsis (ed.), *The Orthodox Churches in a Pluralistic World- An Ecumenical Conversation*, Brookline (Mass.) 2004, 36.

<sup>48</sup> Cf. the Social Concept of the Russian Orthodox Church, concluded at the Jubilee Bishops' Council of the Russian Orthodox Church, Moscow 13.-16. 8. 2000. For the English translation see: <http://www.mospat.ru/index.php?mid=90>. Cf. also Inna Naletova, *Symphony Re-considered: The Orthodox Church in Russia on Relations with Modern Society*, in: *Österreichisches Archiv für Recht und Religion* 48/2001, 99 – 115.

<sup>49</sup> Vsevolod Chaplin, *Law and Church-State Relations in Russia*, in: Ferrari – Durham (fn. 33), 293.

### *The Constitutional Fundament of Church and States relations*

With the exception of Greece – being the first Orthodox member-state to the EU (1981) – and Cyprus, which at least have been spared the dramatic experiences with a communist regime, all of the European countries with an Orthodox tradition had to find their way to a democratic and constitutional State since the political change of 1989. It is important to note that freedom of religion and the status of churches and religious communities by all means were crucial points in the discussions of the constituent phase of all the countries in transition.

#### *2.1. The Guarantees of Religious Freedom*

With the end of the communist system, in all reform-countries religious freedom was granted in the form of the classical liberal concept of the “first generation of human rights”. It is notable that freedom of religion as an individual right has been included in all the communist constitutions (except Albania). So the discrimination of religion was more a question of ideological reasoning, which had consequences for the application of the restriction clause and the corresponding administrative practice guided by the interest of the State Party. A specific ideological transformation occurred insofar, as everything which was not strictly forbidden was considered to be allowed in the sense of the principle *in dubio pro libertate*.

Meanwhile constitutional changes were carried out in most of the States which included new legislation in the field of fundamental rights and freedoms. As far as the guarantees of religious freedom as an individual right are concerned they were formulated in a very similar way so that we can find a common standard. Freedom of religion as a fundamental human right encompasses the possible options in the sphere of conscience and religion in all of the constitutions. That means that the freedom of having or not having a religion, of changing it, the freedom of religious expression, of worship and of religious practice in individual and collective forms are guaranteed according to international standards.

The wording of these human rights guarantees is regularly taken from the UN-Universal Declaration of Human Rights and the corresponding Covenants, the European Convention of Human Rights or from the CSCE-Documents.

But there are also special regulations which seem to be characteristic for States with an Eastern Orthodox tradition.

As already mentioned, not any constitution of a new democracy has reproduced the well-known Art. 13 of the Greek Constitution or even the weaker and religiously neutral formulation of Art. 18 sect 5 of the Constitution of Cyprus prohibiting, the use of physical or moral compulsion for the purpose of making a person change or preventing him from changing his religion<sup>50</sup>.

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<sup>50</sup> Cf. Achilles Emilianidis, Law on Religion in Cyprus, in: Kanon XX/2008, 7–22, esp. 17ss.

A second peculiarity on constitutional level are regulations maintaining religious peace in the society by referring explicitly to tolerance and reciprocal respect among believers of different religions and prohibiting the promotion of religious conflicts. Such provisions can be traced back to times of communism, where they were meant to be ways and means of prohibiting religious activities. In the post-communistic era, they can be used to protect traditional forms of religions. No doubt, they are reflecting national political problems, where it is about to control political and social conflicts containing also religious problems.

On the one side, these provisions in principle could be included in the constitutional framework of a democratic religious neutral system. On the other side, there is of course the risk that such regulations were used by the administrative apparatus to restrain freedom of religion for non-traditional groups with reference to public order and the rights and freedoms of other citizens.

Such an explicit prohibition of religious discrimination and to inflame religious hatred and intolerance is found for instance in the Constitution of Bulgaria according to which the State is obliged “to assist in the maintenance of tolerance and respect among the believers from different denominations, and among believers and non-believers” (Art. 37 sect. 1).

According to Art. 49 of the Serbian Constitution “any inciting of racial, ethnic, religious or other inequality, or hatred shall be prohibited and punishable”.

The constitution of Moldova forbids explicitly that religious cults in their mutual relationships use, express or incite to hatred or enmity (Art. 31 para. 3).

The constitution of the Russian Federation contains in Art. 13 the State’s commitment to tolerance and respect for members of the different confessions, as well as the prohibition of promoting religious conflicts.

## *2.2. The System of Law on Religion*

As to the corporative religious freedom, significant changes have taken place in the new constitutions since the beginning of the 1990ties in contrast to the communist system.

Regarding the new legal set-up of the relation between State and Church after 1989 the question was which of the models of the democratic world should be taken over. Two possible models were at the disposal, that of the United States and that of Western Europe, which regardless of the historically grown varieties has a basic commonness.

In the field of collective rights, and in particular with respect to the legal treatment of religious communities we can find fundamental distinctions between the system of the United States and the basis model of Western Europe.

The American model does not know any special status for religious communities, and therefore no legal difference can be made between religious communities regarding their historical or social importance.

The Western European models, however, normally provide a special legal status for religious communities according to general criteria. Special corporative or collective rights respectively reflect the diversity of religious communities (for reasons of history, number of adherents, social roots and so on) and in principle permit a specific cooperation between State and religious communities acting in common fields of interest as partners in civil society.

Faced with these alternatives, and after some initial uncertainties, most of the countries emerging from communism opted for the Western European model, considering it more corresponding with their own history and more suitable to their own social structure. This was in principle an understandable choice, but there was of course the question which of the various types of relations available within the Western European system of law on religion was preferred by the post-Communist countries with an Orthodox tradition.

The constitutions of most states with an Orthodox tradition indicate a separation of State and Church, excluding the existence of an Established Church. (Belarus: Art. 16, Bulgaria: Art. 13, para. 2, Macedonia: Art. 19, Russia: Art. 14, Serbia: Art. 11, Ukraine Art. 35 para. 3). The Russian Constitution furthermore expressly recognizes that the Russian Federation shall be a secular state. No religion may be instituted as state-sponsored or mandatory religion (Art. 14, para.1). Without an explicit commitment to a system, the Romanian Constitution guarantees the right to self-determination of religious communities, going hand in hand with a basic statement to support religious communities (Art. 29).

In principle, the countries with an Orthodox tradition neither have adopted the American system nor – within the framework of the European concepts – the French model of a stricter separation. In Greece two years ago, however, a remarkable attempt was set to change the system by adopting the idea of a strict separation of State and Church.

The “Greek Association for the Promotion of Human and Civil Rights” worked out a draft law with the heading “Regulations for the relationship between State and Church, regarding religious associations and the guarantee of religious freedom”. The text was presented to the presidency of the Greek Parliament on the 19<sup>th</sup> October 2005. Shortly after, members of the three great opposition parties, the Socialist Movement (PASOK), the Communist Party and the Coalition of the Radical Left formally brought in a draft law in Parliament following the text of the initiative.

These ideas provoked a vehement reaction on part of the Church and the governing political party rejected the draft immediately. Nevertheless, this initiative gave rise to pass some laws in the field of State-Church relations. A special emphasis deserves Art. 27 of the Law nr. 3467/2006, whereby the permission of the Ministry for Education and Religion is needed for the construction of a Church, a temple or an other house of worship, excepted buildings of the Greek Orthodox Church. An opinion of the Orthodox Metropolitan of the respective territory concerning buildings of other denominations is

not needed any more<sup>51</sup>. Thus the regulations of 1938 and 1939 were repealed according to which the permission for the erection of such a building was depending on the opinion of the Orthodox Metropolitan. Thereby one of the most controversial provisions of the Greek Law on Religion was abolished, which had led to a condemnation by the ECHR in 1996<sup>52</sup>.

Adopting the European “main-stream-system” on the one hand means that there is a separation between State and Church on the *institutional level*. On the other hand this system allows cooperation with individual religious communities as long as this special regulation is in accordance with other “spheres of justice”. According to a modern interpretation of the principle of separation of State and Church it is a grave misunderstanding to identify religious neutrality with the prohibition of referring to the religious dimension in all those social and cultural spheres of life, which the State is regulating nowadays. This European system easily can be harmonized with the model of *synallexia* and that is the reason why e.g. Vsevolod Chaplin therefore means that “the European experience is more acceptable for us than any other”<sup>53</sup>.

The special classification of one Church or a group of Churches and religious communities, however, inevitably raises the question of equality. A comparison of European legislation on religion shows that most of the countries recognize a special position for certain Churches and religious communities of social and historical importance as actors in civil society. Nevertheless, it is a delicate challenge guaranteeing that there is no difference in the status of religious communities as far as those legal positions are concerned which derive directly from the fundamental law of religious freedom. This task is especially difficult to cope with, when there is an absolute historical and social predominance of a certain religious denomination. Maybe one can call it a “law-on-religion-paradoxon” that, the more secularized a society is, the more a special legal status for religious denominations and cooperation between State and Church does not endanger religious freedom. And the more a society is religiously soaked the more a separation of State and religion is needed to secure freedom of religion.<sup>54</sup> This is a dilemma which can clearly be seen in the discussions about the special laws for religious denominations especially in the countries with an Orthodox tradition. Practically, all new regulations guarantee individual religious freedom as well as regulations of the legal status of religious communities<sup>55</sup>.

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<sup>51</sup> Cf. Spyros Trojanos, Die Gesetzgebung in religiösen Angelegenheiten in Griechenland. Aktuelle Fragen und Entwicklungen, in: Kanon XX/2008, 1–6.

<sup>52</sup> Cf. Manoussakis v. Greece, 26. 2. 1996, 59/1995/565/651.

<sup>53</sup> Vsevolod Chaplin (fn. 51), 292s.

<sup>54</sup> Cf. the discussion about the significance of European secularization in a global context: Grace Davy, Religion in Modern Europe, Oxford 2000; Jose Casanova, Beyond European and American Exceptionalisms: Towards a Global Perspective, in: Grace Davie – Paul Helas – Linda Woodhead (ed.), Predicting Religion, Aldershot 2002.

<sup>55</sup> Only the new Law in Kosovo due to the special conditions of the country contains no regulations on the legal status of religious communities. After the end of the last Yugoslavian secession war in 1999 there was a

### 2.2.1. *The special reference to Orthodox Church in the constitutional order*

Greece has undergone a considerable change in legislation on religious issues after its democratization in 1974. Regardless of this development as to the guarantee of religious freedom in principle, there are still structures of an Established Church on the basis of Art. 3 para. 1 of the constitution: “The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ”.

The meaning of this regulation is controversial. The reason for that lies in the interpretation of the term “επικρατούσα θρησκεία” which could be understood normatively or declaratorily<sup>56</sup>. The terminology has been found in all Greek constitutions since the 19th century. Up to 1975 there was no doubt that this formulation means an established Church in the tradition of an Orthodox State Religion enjoying special privileges and protection by the State.

But when in June 1975 a new Constitution came into force, the traditional expression for the Orthodox Church as “επικρατούσα θρησκεία” has been retained unchanged, the opinions of the jurists, however, were different. Some of them argued that the Orthodox Church continues to be State Religion. Another group held the view, that the expression in question had only a declaratory meaning, namely the official declaration of the fact that Orthodoxy is the religion of the overwhelming majority of the Greek population.

A special reference to Orthodoxy is further made, when the Constitution explicitly mentions Orthodox Canon Law, so that Canon law has a constitutional status:

“The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and

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great institutional vacuum and Kosovo was placed under international administration in accordance with Security Council resolution 1244 (1999). From the very beginning the situation of the Serbian Orthodox religious sites and institutions in Kosovo stood in the centre of political and legal considerations. It was clear, that these monuments are not only of greatest importance for the Serbian people in and outside Kosovo, but also part of European and world cultural heritage. So it was an urgent need to create a special protection for these sites. One of the greatest problems was and is that the Kosovo Serbs have chosen to stay outside the Kosovar political institutions and to maintain parallel structures in dependence of the government in Belgrade in many fields.

After a long discussion on June 19<sup>th</sup> 2006 the Legislative Committee of the Assembly agreed to consider further only the part of the draft law, which contained the regulations on religious freedom. The second set, consisting of the difficult issue of registration of religious communities was deferred until later.

This postponing has mainly two reasons. Regarding the issue of registration, there were great difficulties to bring the interests of the two traditional Churches and the Islamic Community on one side and the plurality of evangelical groups and new religious movements – which were very active in Kosovo – on the other side together. The second reason was that the legal status of the Serbian-Orthodox Church was closely linked with the question of the political status of Kosovo. So only a “Law on Freedom of Religion in Kosovo” was promulgated by the Special Representative of the Secretary General of the United Nations in Kosovo. Cf. Richard Potz, Kosovo – ein Religionsgesetz als Instrument der Friedenssicherung? in: *Österreichisches Archiv für Recht und Religion* 53/2006, 499–523.

<sup>56</sup> Cf. Spyros Troianos, Der Begriff herrschende Religion in der griechischen Rechtsordnung, in: *Österreichisches Archiv für Recht und Religion* 50/2003, 531–540.

sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928<sup>57</sup>.

A comparable regulation we can find in the Constitution of Cyprus which contains the guarantee of “the right to order and administer the internal affairs according to the Holy Canons and their specific Statute in force” to the Autocephalous Orthodox Church of Cyprus (Art. 110, para. 1).

After 1989 no other country with an Orthodox tradition has followed the Greek example on the constitutional level. Only in the constitution of Bulgaria – regardless the principle of separation (Art. 13 para. 2: “The religious institutions shall be separate from the state”.) – one can find an explicit reference to Orthodoxy as traditional religion: “Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria”. (Art. 13 para. 3). Such formulations without doubt imply the danger that Orthodoxy in administrative practice will be conceded an exceptional position, which includes more than in a religiously neutral State can be seen as a justified differentiation.

In Art. 19 para. 3 of the Macedonian Constitution the Macedonian Orthodox Church is explicitly mentioned beyond the religious communities and groups which are free to establish schools and other social and charitable institutions, by ways of a procedure regulated by law.

In Cyprus, the constitution does not contain a basic statement as to the specific relationship of State and Church, but the specific historic conditions – organisation in “Church Nations” according to the Ottoman dhimmi-System – have resulted in the fact that the adherence to the Greek Orthodox Church is listed among the criteria which are considered to be the basis of the membership in the Greek Community (Const. Art. 2, para. 1)<sup>58</sup>.

In most of the countries the Orthodox Church is explicitly mentioned in the special laws regulating the status of churches and religious communities (Bjelorus, Bulgaria, Macedonia, Moldavia, Romania, Russia, Serbia)<sup>59</sup>. In some cases there is also a reference made to other traditionally or historically recognised religions respectively such as Judaism and Islam (cf. Bjelorus, Bulgaria, Macedonia, Romania, Russia, Serbia).

According to the Bulgarian Law on Religious Denominations of 2002 (§ 10) the Orthodox Church “has a historical role in the Bulgarian state as well as current meaning in the state’s life” (Art. 10). In Romania, the Law on Religious Freedom and the General Regulations for Religious Denominations “recognize the important role of the Romanian-Orthodox Church and of the other Churches and religious denominations in the national

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<sup>57</sup> English Translation: <http://www.hri.org/docs/syntagma/artcl25.html#A3>.

<sup>58</sup> Cf. Emilianidis (fn. 53).

<sup>59</sup> The texts of the Laws can be found in Ferrari – Durham (fn. 27) and in Österreichisches Archiv für Recht und Religion, 53 (2006), vol. 3 (In German: Bulgaria, Macedonia, Romania, Serbia and Kosovo).

history of Romania and in the life of Romanian society". In Serbia, the Law on Church and Religious Associations of 2006 is mentioning the seven traditional Churches and religious communities in particular articles (Art. 11-15). This legislator's decision has a specific historical background. Only these seven communities before the World War II had acquired their legal status by particular laws and therefore were deprived, when the communists abolished the pre-war religious legislation. The new law proclaims that these Churches and religious communities have a legitimate right of restoring their previous legal status.

In the Russian Federation, the amended version of the Law on the Freedom of Conscience and Religious Associations of 2002 says in its preamble:

"The Federal Assembly of the Russian Federation, ... recognizing a special role of the Orthodox Church in the history of Russia, the formation and development of its spirituality and culture; having respect for Christianity, Islam, Buddhism, Judaism and other religions constituting an integral part of the historical heritage of the peoples of Russia, ..."<sup>60</sup>.

In Moldova on May 11, 2007 the Parliament passed a new Law on Religion, but it was returned to Parliament by the President of the Republic Vladimir Voronin because Orthodoxy was not explicitly mentioned as traditional religion and because of the provision that offers simpler registration rules to religious sects<sup>61</sup>.

## CONCLUDING REMARKS

As already mentioned Europeanization means for the Orthodox Churches a complex process which also involves the confrontation with the European Integration. After the round of enlargement of 2007 the European Union has four member-states with a strong Orthodox tradition (Greece, Cyprus, Romania and Bulgaria). So the Orthodox traditions of Europe have become an important part of the European integration process, a development which was repeatedly claimed by prominent Orthodox leaders in the last twenty years<sup>62</sup>.

For the concept of autocephalous and autonomous local Orthodox Churches the European integration might imply an institutional challenge. All the declarations of autocephaly and autonomy in the last two centuries were following the idea that political and ecclesiastical borderlines should in principle correspond with each other. Which consequences the European integration will have for a future "constitutional law" of the

<sup>60</sup> Cf. Durham – Ferrari (fn. 27), 279.

<sup>61</sup> Cf. <http://news.trendaz.com/index.shtml?show=news&newsid=948759&lang=EN> [01.07.2008].

<sup>62</sup> Cf. Christodoulos (Archbishop of Athens and all Greece), *Rooting of Joy and Hope: The Word and the Role of Orthodoxy in the European Union*, Athens 2001; Kevin Featherstone – Kostas Ifantis (ed.), *Greece in a Changing Europe: Between European Integration and Balkan Disintegration*, Manchester 1996; Effie Fokas, *Greek Orthodoxy and European Identity*, in: Achilleas Mitsos – Elias Mossialos (ed.), *Contemporary Greece and Europe*, Aldershot 2000, 275–300.

European Orthodox Churches therefore is an interesting question. It seems that the European integration opens a new dimension especially in the history of the Ecumenical Patriarchate. Obviously, Constantinople as a consequence of the European integration, is expecting a strengthening of panorthodox institutions. This could help to enforce also the position of the Ecumenical Patriarchate, which has always been the case when the Patriarchal See of the Second Rome was part of a greater political entity.