Church Autonomy in Estonia

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I. Background

Today's religious picture in Estonia is a mosaic of different faiths and denominations. Along with traditional Christian churches, which have functioned in Estonia for centuries, many new religious movements have appeared.

In Estonia the right to freedom of religion is protected by the Constitution of 1992 and by international instruments that have been incorporated into Estonian law. Starting with protectinos from international instruments, Art 3 of the Estonian Constitution stipulates that universally recognised principles and norms of international law shall be an inseparable part of the Estonian legal system. Art 123 constitutes that if Estonian laws or other acts contradict foreign treaties ratified by the Riigikogu (parliament), the provisions of the foreign treaty shall be applied. Estonia is party to most of European and universal human rights documents. Are you going to describe the more important ones?

The Estonian Constitution also provides express protection to freedom of religion. Article 40 of Estonian Constitution sets forth that:

All persons shall have freedom of conscience, religion and thought. All persons may freely belong to churches or religious associations. There shall be no state church.
Every person shall have the freedom to practice his or her religion, either alone or in community with others and in public or in private, unless this endangers public order, health or morals.

Art 40 of the Constitution is supplementary to Art 45 concerning the right to freedom of expression, Art 47 concerning the right to assembly and Art 48 concerning the right to association. Art 9 paragraph 2 of the Constitution states that *The rights, liberties and duties listed in the Constitution, shall extend to legal persons, to the extent that this is in accordance with the general aims of the legal person, and with the nature of such rights, liberties and duties.*

The Churches and Congregations Act (hereinafter: CCA) determines a church, congregation or association of congregations as a legal person, and stipulates the legal bases for their activities. Churches, congregations and associations of congregations must register with the Ministry of the Interior. Churches, congregations and their associations are considered to be non-profit organisations. The CCA does not regulate activities of religious societies. The activities of religious societies are regulated by Non-Profit Organisations Act and they must be registered by court in Registry of Non-Profit Organisations and Foundations. The Ministry of Internal Affairs has elaborated a draft Act on Churches and Congregations (hereinafter: the draft-law), according to which the Estonian Church Registry (contraction name for the registry of churches, congregations, associations of congregations) and respective registry functions are delegated to the courts. The law does not regulate the activity of religious organisations that are not

registered. The main obstaclefor these entities would be the fact that they cannot present themselves as legal persons.[1]

Art 40 of the Constitution states *inter alia* that *there shall be no state church.* The 1920 Constitution of Estonian Republic set forth that *there should be no state religion.* Former statement followed more clearly the principle of separation of state and church. It was stated that all religious organisations have to be equally protected and no one of them can be preferred by state. All religious organisations including churches had equal status with other private legal persons.[2] The 1937 Constitution stipulated that *there is no state church* but added that the *state can grant status in public law to big churches*.

Estonia re-establishes its legal order on the principle of restitution, taking account the legal solutions before the soviet occupation, as well new developments and changed obstacles, European and International Law and principles. Although we can talk of the traditions based on European culture, the questions of autonomy of the church are debatable in Estonia and formation of solutions is the matter of time.

II Fundamental understanding of church autonomy

The term "Autonomy" is difficult to define, and as result, the question of autonomy in Estonia is more than unclear. Legal theorists from past and present have different opinions. The Autonomy in administrative law and theory is generally understood as the right to (1) self-government and (2) the right to issue regulations.[3] For autonomy both of these components have to be present. The right to issue regulations means delegation of legislation.[4] The opinions stem from different interpretations of Constitution. Maruste (the former Head of the Supreme Court of Estonia and present judge of Court of Human Rights in Strasbourg) and Truuväli (the Legal Chancellor of Estonia) are of the opinion that Constitution of Estonia does not allow delegated legislation. According to them state administration and autonomous corporations in public law have right to adopt only *intra legem* regulations (*Durchführungverordnungen*) on the bases of special delegation of authority.[5] In theory, researchers are of the opinion that *intra legem* regulations may only specify the regulation of areas, which are regulated by law.[6] The delegation rule must precisely specify the content of the corresponding authority, the purpose intended by and the scope of the regulation. The Supreme Court also supports this position. However, the Supreme Court hasn't said anything about regulations issued within internal competence. The prevailing position is that internal

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[1] Compatibility of Estonian Law with the Requirements of the European Convention on Human Rights. Council of Europe. April 1997, p 88.
[2] Maddison, E. Usu ühingute ja nende liitude õiguslik iseloom. Eesti Politseileht. Nr. 11 (221) 13. märts 1926, 161-162.
[3] Regulation is viewed as generally binding precept issued in a definite form which governs an abstract number of cases and impersonally creates rights and duties. Thus, a regulation is substantive law.
[4] Merusk, K. The Right to Issue Regulations and its Constitutional Limits in Estonia. Juridica International. Law Review University of Tartu, 1996, p. 42.
[5] Maruste, R., Truuväli, E.-J. Juridica nr. 7, 1995.
[6] Merusk, K. The Right to Issue Regulations and its Constitutional Limits in Estonia. Juridica International. Law Review University of Tartu, 1996, p. 38.

matters of an administrative organisation may be subject to *praeter legem* regulations on the basis of the general delegation of authority. The regulations of this type do not substitute of laws in a specific area, but their effect only extends to the limit where regulation by law commences. Autonomous subjects have the right to issue *praeter legem* regulations (*gesetzesvertretende Verordnungen*) on the bases of a general delegation of authority.[7] The right to give *praeter legem* regulations is in theory restricted with the autonomy of the subject. The regulations adopted within the autonomy do not have to be in accordance with regulations of state Government or ministries, but they have to be in accordance with the constitution and principles of the delegating law and laws that regulate analogue questions. If the state gives additional obligations or rights, which go beyond the autonomy, then regulations adopted within these additional obligations or rights have to be in accordance also with regulations of Government or ministries. Also these additional responsibilities belong to supervision and co-ordination by the administration of the state.[8] These additional responsibilities can be for example the registration of marriages by church, social care etc. Preferred position is that for avoiding the conflicts the competence of Government and autonomous subjects have to be clear.[9]

III The normative frame of Church Autonomy

1. Art 10 paragraph 2 of the Churches and Congregation Act (CCA) states that Board of the Church and Association of Congregations have the right to adopt acts which regulate their activities. At first it has to be mentioned, that from a linguistic perspective it is a badly formulated provision. It leaves uncertain, whether the Board has the right to regulate its own or organisation activities. This is a matter of the inaccuracy of the legislator and in practise that provision has been interpreted as the right to regulate Church or Association of Congregations activities. Art 10 paragraph 2 excludes from aforementioned right the Boards of the congregations (both congregations of churches and so-called single congregations) and religious associations. Art 2 of the CCA gives legal definitions of following:

1) A *church* is congregation or association of congregations which has Episcopal structure and is didactically bind by three common church confessions, functioning on the bases of a statute under elected or appointed leadership of a board and registered as provided by law.
2) *A congregation* is voluntary association of natural persons confessing the same faith, functioning on the basis of statute under elected or appointed leadership of a board and registered as provided by law.
3) *A association of congregations* is voluntary association of at least three congregations confessing the same faith, functioning on the basis of statute under elected or appointed leadership of a board and registered as provided by law.

Art 3 of the CCA states that:

[7] Merusk, K. Kehtiv õigus ja õigusakti teooria põhiküsimusi. Tartu, 1995.
[8] Ibid.
[9] Ibid.

4) *A religious society* has only partly the same characteristics as congregation. Natural persons will found the religious societies and foundations of their activities will be regulated by non-profit organisations act.

It is not hard to see that these legal definitions are problematic. They course problems of interpretation and implementation and practical determination of religious organisations under these legal definitions. The interpretation of terms and phrases like: (1) didactically bound by three common church confessions, (2) Episcopal structure, (3) partly the same characteristics as congregation etc., are difficult for lawyers and for theologians as well. For example there was case in administrative practice, where the ministry of internal affairs refused to register the Estonian Christian Church, because their name seemed to be too general and they did not mention Episcopal structure in their statute. After the church renamed itself to Estonian Christian Pentecostal Church and established *pro forma* an Episcopal structure in their statute, the ministry registered them.

One might conclude that the legislators tried with criteria (1) and (2) to separate organisations confessing Christian faith from others. Term "kirik" (*church, kirche*) has been traditionally used for Christian organisations. Term "kogudus" (congregation) has been traditionally used for congregations of a church. Before adoption of 1993 CCA there was a debate whether the extension of term "kogudus" (congregation) to other faith s would be insulting for them.

The 1993 CCA was drafted very much on the bases of 1934 Churches and Religious Societies Act. Art 15 of the 1934 Churches and Religious Societies Act stated that deliberative organs of churches and associations of religious societies had the right to issue regulations within the own sphere or competence of church or association of religious societies. That kind of right was not given to single religious societies and to congregations of the church.[10] But the 1934 Act didn't try to give the legal definitions of different religious organisations. It was up to religious organisation to determine whether it wants to be church or religious society or association of religious societies and organise itself according to this. The 1934 Act set forth special provisions for churches. The churches had been given additional rights but as well restrictions, which will be discussed further. 1925 Religious Societies and their Associations Act just devised all religious organisations into two categories: (1) religious societies and (2) associations of religious societies. Under that law the churches were associations of religious societies.[11] In the draft Law of the new CCA there is added one more legal definition - "convent".

On the bases of the above the legal definitions in present Estonian law seem not to have a reasonable basis, and are unfair to congregations (It has to be mentioned that exclusion of church congregations may be justified with the structure of the church, but exclusion of single congregations is questionable) and religious societies. When I once asked from one "founding father," what was the purpose of these legal definitions? It was explained that these have an educational goal. As Estonia was for fifty years so-called an atheistic country, people have forgotten the basic terms, it is necessary to educate people with the help of the law. I would just say that it is problematic.

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[10] Kliiman, A. - T. Kehtiv Haldusõigus. Tartu. 1934, 57.
[11] Meder, W. Ülevaade Eesti kirikuõigusest. Õigus nr 1 1938, 14.

Thus, the first questions which arises on the bases of Estonian legislation, are:
1) Whether it has justification to leave some religious organisations from the right to self-government and the right to issue regulations on their own affairs?
2) Is it possible legally define different religious organisations?
3) Does the legal definitions have any sense?
4) If the legal definitions have any sense, on what characteristics should religious organisations be separated?

2. Art 10 of the 1993 CCA is problematic from the other aspect as well. Art 10 states that Board of the Church and Association of Congregations has right to adopt acts, which regulate their activities. A literal interpretation leaves open what kind of acts are these Boards entitled to issue: single acts or regulations or both. Also it is not clear whether the "their activities" mean activities within the autonomy or whatever activities of the Church or Association of Congregations. S*ensus verborem est anima legis*. Of course, on the bases of systematically interpretation of issuing regulations outside the autonomy can contradict the general principle of rule of law and the principle of reservation of law (*Gesetzvorbehalt*). The Art 6 paragraph 3 of the draft of new CCA states that Boards of a church, congregation, association of the congregations and their agencies and the head of the convent have right to adopt acts concerning activities of religious organisation in accordance with the statute (bylaw). The draft-law expands the right to issue acts to congregations (church congregations and single congregations) and to the head of a convent.

In the draft-law there is an attempt to set more clearly the limits to autonomy. Art 6 paragraph 3 states that aforementioned boards may issue acts in accordance with the statute (by-law). The competence to issue acts (regulations) will be determined by statute (by-law). Art 6 paragraph 1 of the draft-law determines the main activities of church, congregation, association of congregation and convent. The main activities of aforementioned are: confession and manifestation of their own faith primarily in the form of service, religious meetings and offices; confessional or ecumenical moral, ethical, educational, cultural, diaconal, social rehabilitation or other activity outside of the characteristically church or congregation confessional offices or services. These provisions of the draft-law are not very precise, but probably it is not possible exactly specify the limits to autonomy in law. The real boundaries of autonomy can be determined by practise, as well court practise.

The other aspect is that the delegation of authority to issue regulations must in theory set out the (1) content of authority (i.e. the issues to be governed by a regulation), (2) its purpose (i.e. the purpose to be served by a regulation), and (3) its scope.[12] The issue is whether these three may be set forth in statutes (by-laws) of religious organisations or law its self has to expressly provide them. Art 2 paragraph 4 of the present CCA states that main activities of church and congregation are: confession and manifestation of their faith primarily in the form of services, religious meetings and offices.

The further questions that arise on the bases of Estonian present and proposed law and legal theory are:

[12] Merusk, K. Op. cit., 41.

1) Is it possible to set exact limits to autonomy in law?
2) Is it necessary to set limits to autonomy in law or these are so obvious (i.e. traditionally or on the bases of practise) that do not need any further determination?
3) If it is necessary to set limits to (the scope of/ internal competence) autonomy, should these limits be set forth in constitution, in law or lower acts, by-laws.
4) If it is necessary to set limits, how exact can these are not restrict the activities of the religious organisation?

3. As was stated in the beginning of this paper the autonomy consists of to main component (1) self-government and (2) right to issue regulations. Self-government in narrow interpretation can mean the church (or other religious organisation) right to determine the internal structure of the organisation. Legal definitions in Art 10 of the CCA try to determine general structure of church, congregation, association of congregation, but fail on the same reasons as stated in point 1 of this paper. Art 12 of the CCA sets forth that by-law of the church, congregation or association of congregations has to consist: (1) the name; (2) the place of the board; (3) structure and competence of the government, (4) order of formation of government; (5) term of governments authority; (6) status and hierarchy of clergy; (7) rules of adoption, amendment of the by-law and termination of activity; (8) obligatory offices; etc. Art 15 paragraph 1 of the CCA states that a person who has the right to vote at the local government elections and who is not punished in accordance with the Criminal Code, may be a member of the board of a church, a congregation or the association of congregations, and a clergyman.

Many basic requirements for democracy within the church and congregation are mandatory: openness of the membership, existence of an elected executive, equality of members before the law, right to participate in the elections to the executive and for official posts, right to leave the church or congregation by notifying beforehand the church or congregation executive (Art 8 and 9). Under the 1925 Religious Societies and their Associations Act, the internal management of churches was based on decentralisation and liberal democratic principles but under the 1934 Churches and Religious Societies Act, on the authoritarian and centralisation principles. The 1934 Act set forth special and detailed provisions for church management. For example: (1) the organs of church; (2) competencies of organs, clergy; (3) process of adoption and implementation of acts; (4) competence of church courts; (5) enforcement of court decisions etc. The authority of the administration of other religious organisations was more limited. [13]

The questions so far are:
1) Is it necessary to regulate church (religious organisations) structure?
2) If it is necessary, then to what extent?
3) If it is necessary, where should be they regulated: in Constitution, law, lower acts, by-law or in contracts or agreements with the church or other religious organisation?

IV Restrictions to autonomy

[13] Meder, W. Op. cit.

1) Art 15 of the Estonian Constitution states that every person shall have the right to bring a case before the court if his or her rights or liberties have been violated. Any person whose case is being tried by a court of law shall be entitled to demand the determination of the constitutionality of any relevant law, other legal act or procedure.

1993 Administrative Court Procedure Code sets forth that everyone, who believes that his or her rights have been violated with the act or activity of the organs or official of non-profit organisation, shall be entitled to bring case before the court. The organ that has under the law supervisory obligations over the activities of organs or officials of non-profit organisation is entitled to submit protest to the court. The acts what can be proceeded in administrative court are single-acts, not regulations, the substantive law, which regulate abstract number of cases and impersonally create rights and duties.

Positive law does not provide a clear solution for the type of the corporative regulations. Also it leaves open the possibilities to contest them. Nevertheless it is always possible to bring civil or criminal matters before the ordinary courts. Art 48 of the Estonian constitution states that all persons shall have the right to form non-profit associations and leagues; the termination or suspension of the activities of an association, league or political party, and its penalisation may only be invoked by a court, in cases where a law has been violated. This solution seems to be in accordance with the principles of democracy and the rule of law.

Art 16 of the 1934 Churches and Religious Societies Act stated that acts of the church or association of religious societies should be sent before publishing to ministry of internal affairs. The Ministry of internal affairs could suspend the enforcement of the act if it found that act to be in controversy with law or regulations or by-law of the church or association of religious societies. The Ministry of internal affairs had the right to veto acts of these religious organisations. The coming into force of regulations of church or other religious organisation does not depend today on previous approval of state official.

2) The general part of Estonian civil code Art 6 divides legal persons into private legal persons (non- profit organisations, foundations and profit organisations) and public legal persons (state and municipal government). Art 36 of the code states that legal person can be founded on the bases of the law or with the law. Although code does not mention any other public legal persons than state and municipal government, they can be founded and many of them are founded on the bases of law or with the law.

Art 20 of the CCA states that church, congregation and association of congregation are non - profit organisations. Non-profit Organisations Act and Churches and Congregation Act are related as *lex generalis and lex spesialis.* Thus, under Estonian law, the religious organisations (including churches) are private legal persons. Whether it is possible to consider them or some of them (for example churches or associations of congregations) as corporations in public law or public legal persons is not clear. Art 9 of the draft-law of new CCA sets special provisions for churches and their congregations and convents who performed before 16th July 1940 under by-law which was approved by the decision of Estonian Government. State will enter into agreement with these churches recognising them and their congregations and convents as public legal persons. Art 2 paragraph 1 of the 1934 Churches and Religious Societies Act stated that by-laws of churches who have members over 100 000 will be registered by Government. Churches who had membership over 100 000 were Estonian Evangelical Lutheran Church and Estonian

Apostolic-Orthodox Church. 1937 Constitution stated that *state can grant status in public law only to big churches*. Big churches were churches who had members over 100 000.

As was mentioned before public legal persons can under the general part of civil code be founded with the law or on the bases of the law. In positive law there is possibility to give status of public legal person with the law. General part of civil code and CCA are related as *lex generalis* and *lex specialis.* One possible interpretation of the draft-law is that public legal persons can be only these churches, their congregations and convents, which are expressis verbis, mentioned in Art 9 paragraph 1 of the draft-law. Does that kind of regulation have justification, is questionable.

Furthermore, Art 9 paragraph 4 of the draft-law states that state may (but do not have to) on the bases of proposal of ministry of internal affairs, enter into co-operation agreements with other religious organisations. This paragraph of Art 9 can be understood that co-operation agreements do not create the public legal person. In positive law, precedents have been created where public functions are delegated to persons in private law who exercise so-called public (state) administration.[14] In theory, the State interest is the public interest. So the object of these agreements have to stem from public interest.
(1) Does this make religious organisation registered under the private law, corporation in public law? Under the draft-law it is also problematic to say, (2) what is the real distinction between the church that will be public legal person and church that will have co-operation agreement with the state. Problematic is as well, (3) how proposed regulation will effect the autonomy of the church.

V Some areas of common interest of state and church

1. Education

According to Art 4 of the Law on Education, the study and instruction of religion in general education schools in Estonia is voluntary and non-confessional. The instruction is compulsory for the school if 15 pupils wish to be taught. The principles and topics of religious instruction are fixed in the study programme approved by the Ministry of Education. Religious instruction is thought in schools as an elective subject. Religious instruction is a subject where the views and contributions to the development of humanity of various religions are taught, and this thus provides knowledge of differing religions.

Instruction according to a confession is provided to children by Sunday and church schools operated by congregations.

Art 33 of the Basic and Upper-Secondary Schools Act provides an additional guarantee to parents who do not agree with the school regarding religious instruction, enabling them to refer to the school s Board of Guardians and to the person responsible for the state supervision of the school.

2) Manifestation of religion in prisons

[14] Merusk, K. The Present State and Development Trends of Estonian Administrative Law. Juridica International. Law Review University of Tartu. 1996, 21.

The realisation of religious freedom in prisons is regulated by Art 5 of the CCA, according to which the prisons must provide that their inmates, if they so wish, may manifest their religion according to their religious beliefs, if it does not disturb the institution, or the interests of the other inmates, and that the services are organised by a church or congregation, with permission from the local government or authority.

The Code of Execution Procedure forbids hindering the distribution of church or religious publications in prisons, and the prisoner may subscribe, at his or her own expense, and receive at the prison, religious publications from outside the prison.

Art 171 of the Code is problematic since meetings with the clergy may occur only with the permission of the prosecutor, investigator, or courts. the general rule should be that it is permitted to meet with the clergy unless the investigator, prosecutor or court forbids it in the interest of the investigation.

As Estonia is the party to European Convention on Human rights, the Convention practice allows the restriction of the rights of prisoners in prison in the interest of public safety, public order, health, morals, for the protection of the interests and rights of their fellow-prisoners.[15]

3. Treatment of Minority Religions

In order to promote the exercise of the right to freedom of religion, conscience and thought for national minorities the religious freedom of minorities is also regulated by the Cultural Autonomy for National Minorities Act.

According to the Cultural Autonomy for Minorities Act, minorities are Estonian citizens who reside on Estonian territory, have long-term and permanent ties in Estonia, differ from Estonians due to their ethnic background, cultural distinctiveness, religion or language, and are driven by the desire to preserve as a group their cultural customs, religions or language, which is the basis for their common identity.

Section 3 of this Act guarantees a person belonging to a minority the right to preserve “his or her ethnicity, cultural customs, mother tongue and religion”. The Law stipulates a ban on the denigration, or hindering, of national cultural or religious customs.

4. Medicine

In Estonia, the area regarding the provision of medical assistance and the freedom of religion and thought is almost completely unregulated. This area includes such issues as mandatory vaccinations, and cases where parents refuse to allow, for religious reasons, an operation of their ill child.[16]

Only Art 5 of the CCA regulates the realisation of religious freedom in medical and care institutions. According to the law, medical and care institutions must make it possible for their residents, if they so wish, to practice their religion according to their religious beliefs, if this does not disturb the order in these institutions or the interests of the other residents.

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[15] Compatibility of Estonian Law with the requirements of the European Convention on Human Rights. Concil of Europe. April 1997, p 89.

[16] Ibid.

5. Defence forces

Freedom of religion in the defence forces is regulated by only one provision in Art 5 of the CCA, according to which the officer body of the unit shall guarantee the conscript the opportunity to manifest his religion, if he so wishes. It is not clear whether, or how, this freedom is realised in practice.
Alternate service in Estonia is regulated by the Defence Forces Act (RT I 1994, 23, 384). Section 10 of the Act stipulates that citizens, who refuse, on religious or moral grounds, to perform military service, are obligated to perform alternate service, according to the procedures prescribed by the Alternate Service Act.

Section 89 of the same Act stipulates that fulfilling the obligations of alternate service must not be in conflict with the religious or moral beliefs of the performers of alternate service, and they must not be obligated, against their wishes, to handle a weapon or other firearms, to practise their use, or participate in their maintenance, or to handle other means and substances, which are intended for the destruction of people or for rendering the enemy harmless.

By February 19, 1999 41 persons have refused to perform military service, 13 of them have performed alternate service. On those of 13 did so after the court judgement.[17]

6. Taxation

According to Art 20 of the CCA, the churches, congregations and congregations unions are non - profit organisations. On the basis of the income tax law[18] and with a Government regulation No 162 from 10th July 1996, the Estonian Government established the order, which regulates the list of non-taxable organisations.[19] All religious organisations, acting in Estonia, which have applied for registration in the list of non-taxable organisations, are registered in that list.

Furthermore, taking account the fact that sacral buildings of churches have usually the historic, cultural and artistic value, are the treasure of all people, the state aspires, at least to some extent to support the churches (or other religious organisations). The Government of the Republic also strives to find means to support single projects, for instance the renovation of organs etc.

Since there is no state church in Estonia, there are no direct church taxes. State supports financially Council of Estonian Churches (In the 1998 state budget 2 million EEK = 250 000 DM). Council decides according to its own statute, which churches it, admits to the membership. The members of the Council are the following: The Estonian Evangelical Lutheran Church, the Roman Catholic Church, The Estonian Christian Pentecostal Church, The Estonian Methodist Church, The Estonian Union of Evangelical Christian and Baptist Congregations, Estonian Congregation of St. Gregory of the Armenian Apostolic Church. The Orthodox Church applied for membership in 1993, but

[17] Ibid.
[18] RT I 1993, 79, 1184.
[19] RT I 1996, 48, 946.

did not get a positive answer. The Council of Churches decides upon the usage of many by itself.

7. Authorisation to Perform Marriage of Civil Validity

Today no church or congregation functioning in Estonia has the right or authorisation to register marriages. The ministry of Interior Affairs in conjunction with the Ministry of Justice and the Council of Estonian Churches has initiated principal negotiations on the feasibility of granting authorisation.[20]

[20] The Right to Freedom of Religion and Religious Associations. A Survey with Recommendations. Council of the Baltic Sea States. January 1999, p 26-28.