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CURRENT CHALLENGES IN REALIZING THE FREEDOM OF RELIGION IN MONTENEGRO

Historical Aspect

The establishment of the church organization on the territory of today's Montenegro started already in the first centuries of the Christianity. Several dioceses of the unique Church of Christ were founded in various historical periods. The influences of Rome and Constantinople, the West and the East, were overlapping in this area for centuries.

The Orthodox Church organization is linked to the Saint Sava, the first Serbian Archbishop, and to the year of 1220, when he founded the Diocese of Zeta in this area (today's Metropolitanate of Montenegro and the Littoral) and the Diocese of Budimlje (today's Diocese of Budimlje and Nikšić). One part of that space belonged to the Diocese of Hum (today's Diocese of Zahumlje and Herzegovina) and to the Diocese of Dabar (today's Diocese of Mileševa). In these terms, the Orthodox Church organization is identical today. The Metropolitanate of Montenegro and the Littoral has never changed its church-legal subjectivity and its legal subjectivity throughout the history, it has not done it today, and not even in the year of 1920 when the Serbian Patriarchate of Peć – Serbian Orthodox Church was restored for the second time.

After the Ottoman conquest of Zeta, the Montenegrin metropolitans were the holders of the secular and spiritual power. Starting from the year of 1852, the spiritual and secular powers were separated. Secular sovereign prince was the head of the state, and the Montenegrin metropolitan managed church affairs only, since that time.

From 1852 until 1918, the Orthodox religion had the status of the national religion in Montenegro, and the Orthodox Church

had the status of the state Church. During the Berlin Congress held in 1878, Montenegro accepted the obligation to protect the religious rights of Muslims, and in 1886, Montenegro concluded the Concordat with the Holy See (the See of Rome), guaranteeing the rights of the Roman Catholics.

From 1918 until 1946, the system of the recognized churches and religious communities was applied in the Kingdom of Serbs, Croats and Slovenes/Yugoslavia, and as of the year of 1946 until today, the system of the separation of the churches and religious communities from the state has been applied. The Orthodox Church suffered great damage during and after the completion of the Second World War (WWII), since the Metropolitan Joanikije Lipovac (1890-1945) and more than 150 priests were killed. The greatest number of them were killed by the hand of Nazi-fascists and communists. After the war, the public authorities conducted systemic Atheist propaganda in all spheres of the social life and performed the prosecution of believers. More than 500 Orthodox temples were destroyed. The right to the freedom of religion existed on the paper only. Murders, arrests and prosecution of priests were continued even after the war. In the year of 1954, the Metropolitan Arsenije Bradvarović (1883-1963) was sentenced to 11,5 years in prison due to his religious beliefs.

Social Aspect

There are three traditional religions in Montenegro: Orthodox, Roman Catholic and Muslim religion. As of recently, there is a slight number of members of Jewish and Protestant religions. In accordance with the population census from the year of 2011, there are 72,07 % Orthodox Christians, 3,44 % Roman Catholics and 20,11 % Muslims in Montenegro. The rest are members of the Jewish and Protestant religions, and there are 1,91% atheists and agnostics.

In a spiritual sense, the Orthodox Christians belong to the Metropolitanate of Montenegro and the Littoral and to the Diocese of Budimlje and Nikšić, the Diocese of Zahumlje and Herzegovina and the Diocese of Mileševa, which are in liturgical and canonical unity with the Serbian Orthodox Church – the Patriarchate in

Belgrade. In a spiritual sense, the Roman Catholics belong to the Archdiocese of Bar and Kotor Diocese, Muslims belong to the Mushihat of the Islamic Community of Montenegro and Jews belong to the Jewish Community of Montenegro. (Protestants are divided in several groups and they belong to their various organizational units, which have acquired a legal subjectivity in the recent period – the Advent Christian Church, the Church of Jesus Christ of Latter-day Saints, Jehovah's Witnesses, etc.).

Legal Aspect

In the year of 2007, Montenegro adopted a new **Constitution,** which in the Article 14 regulates the separation of the religious communities from the state and stipulates that they are equal and free in performing religious rites and religious affairs. Article 46 of the Constitution regulates the right to the freedom of religion, in the manner that is not completely aligned with the Article 9 of **the European Convention for the Protection of Human Rights and Fundamental Freedoms**. Unfortunately, Montenegro is one of the former Yugoslav Republics, where the **Law on Legal Status of Religious Communities** as of 1977, from the Communist period, is still in force and it is anachronistic.

The Metropolitanate of Montenegro and the Littoral and other dioceses of the Serbian Orthodox Church have been publicly asking for years for the commencement of passing a new **Law on Legal Status of Churches and Religious Communities,** which would, on the one hand, in the spirit of history and legal-historical tradition of Montenegro and, on the other hand, in the spirit of the mandatory international norms regarding the freedom of religion or belief and social reality, regulate the issue of the realization and efficient protection of the right to the freedom of religion or belief in its individual and collective aspects.

Instead of this, the Government of Montenegro chose to regulate, by means of agreements, in a selective and discriminatory manner, primarily in relation to the Orthodox Church, the relations with the selectively chosen religious communities. Firstly, **the Fundamental Agreement between the Holy See and Montenegro** was concluded in 2011, which was followed by the

Agreement Regulating Mutual Relations between the Government of Montenegro and Islamic Community and **Agreement Regulating Mutual Relations between the Government of Montenegro and Jewish Community** in 2012.

The stated Agreements are not only different, but also mutually opposed (for example, the public-legal subjectivity has been acknowledged to the Roman Catholic Church, while the civic-legal subjectivity has been acknowledged to the Islamic Community and to the Jewish community). The constitutional norm about the equality of the religious communities was violated twice.

The Orthodox Church requested on several occasions that its legal position be regulated by means of an agreement, as well. Unfortunately, this did not take place due to the political, not legal reasons, since the Ministry of Human and Minority Rights tried to conclude the agreement with its influence on the internal church organization and autonomous canon law of the Church.

Current challenges

In the year of 2000, persons that do not have any kind of canonical legitimacy, along with acting of the security and political structures, established a new religious community under the title "Montenegrin Orthodox Church" in Montenegro. Miraš Dedeić, the former priest of the Ecumenical Patriarchate of Constantinople in Rome, who was excommunicated from the Church due to the proven canonical violations by the Patriarch Bartholomew, is its Head. The new community is not recognized by any of the Orthodox Churches in the world.

Such a new religious community acquired its legal status by means of a classic abuse of the Article 2 of the Law on Legal Status of Religious Communities. Having in mind the collective aspect of the right to the freedom of religion or belief, the establishment of a new religious community in itself would not be problematic. However, acting of such a new community is not only targeted against the Orthodox Church in Montenegro in a verbal sense, but it is often the case that physical attacks, aggression and violence are used in the attempt to try and perform the seizure (taking away)

of the Orthodox temples and monasteries from the Metropolitanate of Montenegro and the Littoral, which represent the church property on the basis of the public documents of Montenegro. The public authorities do not sanction such a criminal behavior, but they also allocate, from the state budget, to such a community, without clear criteria, the highest amounts of financial resources and, in this manner, it appears to be, in spite of the criminal activities, "the Government's new religious community".

In the middle of the year of 2015, the Government prepared the **Draft Law on Freedom of Religion,** and referred it to the public discussion in the period of annual leaves. The representatives of the churches and religious communities did not have their representatives in the Working group that prepared the Draft Law, which represented a serious violation of the obligatory regulations. Only the Government's officials were represented in the Working group.

The Draft Law caused a considerable disapproval by the public. Legal experts assessed it as retrograde, as compared with the Communist Law from 1977 and as non-aligned with the European Convention. The right to the freedom of religion was significantly reduced in both individual and collective aspects. It was a severe attack from the positions of the state authorities on the internal autonomy and internal organizational establishment of the churches and religious communities, and the Article 52 of the Draft Law is particularly problematic, since it stipulates a new nationalization, i.e. seizure, in favor of the state, of all sacral facilities that were constructed by believers until the year of 1918.

The Draft Law was opposed, through their objections, by the Orthodox Church, Roman Catholic Church and Islamic Community, along with the significant part of the professional public. We had a meeting with the representatives of the Venice Commission and OSCE/ODIHR and we submitted our objections in English language to them, the same ones that we are submitting to You, as well. In the end, in March 2016, the Government withdrew the Draft Law on Freedom of Religion from the procedure before the Venice Commission. Even after that, the violation of the prescribed procedure was continued, given that this issue has been on stand-by for almost three years.

Apart from the jeopardization of the identity, dignity, mission and property of the Orthodox Church in Montenegro by the members of the newly formed organization "Montenegrin Orthodox Church", a particular problem is also reflected in the fact that the state authorities have still not facilitated holding of religious instruction (teaching classes) in the public and private schools, which represents the breach of the rights of children to religious education, guaranteed by the international legal acts on human rights. Also, there is a discriminatory acting in terms of preventing the return or compensation of the sacral property to the Orthodox Church, Roman Catholic Church and Islamic Community, which was taken away from them by the Communist regime. Churches and religious communities have almost no kind of treatment in the public broadcasting service – the Radio and Television Montenegro. The status of priests and religious officers is not adequately regulated, and the Ministry of Interior has been enabling, for years already, the issuance of a temporary residence permit to the priests and monks of the Orthodox Church, who do not have the Montenegrin citizenship.

Conclusion and Proposals

We consider it necessary that the public authorities of Montenegro comprehend that the right to the freedom of religion or belief is one of the fundamental human rights and that believers can not be second-class citizens, because of their religious convictions. Due to this reason, a radical change of the public authorities' relation toward this issue is necessary.

In normative terms, it is necessary to start the preparation of the new **Draft Law on Legal Position of Churches and Religious Communities,** by the Working group, which would be composed of the representatives of the Government, international and national legal experts and the representatives of the churches and religious communities. The new Law must be completely aligned with the international legal acts, but also with the social reality of Montenegro. We are of the opinion that it is requisite, without setting any terms and interfering with the internal issues, to conclude **the Fundamental Agreement between the**

Government of Montenegro and Serbian Orthodox Church. It is necessary to pass **the Law on Restitution of Taken Away Property of Churches and Religious Communities and Compensation**. We, also, consider it necessary to enable the return of religious instruction (teaching) to the public and private schools, by means of changes to certain legal regulations and, then, to improve the legal and social position of priests and religious officers, as well as to enable the public broadcasting (media) service to promote, in a certain segment, the traditional values preserved and preached by the churches and religious communities.

In institutional terms, the public authorities must protect the legal order and rights for all, including the Orthodox Church. Each attack on the temples and safety of believers must be sanctioned in accordance with the legal regulations, instead of being tolerated, as it was the case so far. The rule of law must apply also in the cases when attacks on the Orthodox Church are perpetrated.

It is necessary to establish a permanent and constructive institutional dialogue between the public authorities and the representatives of the churches and religious communities for the purpose of spreading the general good of a person and community. The society characterized by religious tolerance as an important social feature can be built only on those grounds.

PRESS RELEASE
METROPOLITANATE OF MONTENEGRO AND THE LITTORAL AND THE DIOCESE OF BUDIMLJE AND NIKSIC
23 August 2015

The Ministry for Human and Minority Rights, besides the agenda proposed and published on its official website, submitted to the Government a **Draft Law on the Freedom of Religion** for the 122nd session on 30 July 2015. The Ministry's representative informed the media and public that the "Government [had] approved a Draft Law on the Freedom of Religion". The conclusion on the adoption of this Draft Law has not yet been published on the Government's official website.

And after an initial read of the Draft Law it is easy to conclude that the Draft Law should be rejected, as much for the non-transparent and discriminatory way it was prepared, as for its many unconstitutional provisions whereby it attacks the freedom of religion and other guaranteed human rights, especially the internal autonomy of the Church and religious communities.

1. It is our duty to point out the shameless violation of procedure by the Ministry during the preparation of the Draft Law. It is unusual that the Government has adopted the Draft Law because the practice up until now shows that the Government adopts a proposed law after the public discussion on the draft law has been held. We were deprived of an answer as to why in this case a different principle has been applied and why the Ministry has put the Government in the position of violating its own rules of procedure.

The Ministry has for years been announcing the adoption of a new Law, but this obligation is not complete. Minister Numanovic last year formed a working group for the preparation of the Draft Law. Not a single expert representative of the Church or other religious communities was included in the working group, even though the Orthodox Church, on many occasions, officially and in public, requested this. The Ministry never replied to these requests. On the other hand, the same Ministry has always done,

and still does, include in the working groups for the preparation of other draft laws in its jurisdiction, via public announcements, representatives of those organizations that this material relates to and whose position is determined in the legal system of Montenegro. Even though Minister Numanovic publicly promised this earlier, during the preparation of the Draft Law, the working group did not carry out a single meeting, not even of an informative nature, with representatives of the Orthodox Church. It is beyond doubt that the Draft Law has been prepared in an inadmissible, discriminatory way – and this by the Ministry responsible for protecting and promoting human rights.

2. By all accounts, the starting point of the Ministry and the working group is contained in the "Information" and not in a serious study with research and analysis, as is otherwise the case when preparing legal guidelines in Montenegro. The "Information" of the Ministry is replete with a whole series of inaccuracies, arbitrariness and tendentiousness. The Metropolitan of Montenegro and the Littoral, and the Diocese of Budimlje and Niksic have, both officially and publicly, directed their comments on and objections to the "Information". The Ministry has never replied to the stated objections.

The Church, religious communities, believers and the wider public have not to this day received answers to the many questions regarding the way the Draft Law has been prepared. It is still unknown whether foreign experts participated in the preparation of the Draft Law, as well as whether the Draft Law, before its submission to the Government, was sent to the Venetian Commission and other relevant international institutions that follow the method of preparation and adoption of regulations in the field of human rights. By all accounts, the Draft Law has been prepared in a non-transparent way with a shameful disregard of the existence of those whose legal position is thereby determined.

3. The Ministry announced the Draft Law with the program of public discussion on 3 August and determined that the public discussion should last until 14 September 2015. Without doubt, the issue of religious freedom is one of the fundamental human rights, and 80% of the population of Montenegro are believers. Hence, the question: why did the Ministry announce the Draft Law and

program of public discussion during the time of annual leave? This fact ridicules the call of the Ministry, addressed to the wider public at a time of annual leave, that it is included in the public discussion. Why are large cities, such as Niksic, Berane, Pljevlja, Bar, Herceg Novi, Budva, as well as other municipalities in Montenegro excluded from the public discussion?

4. The Church in Montenegro has been pointing out for years the need for adoption of a new Law and it is not opposed to the adoption of this legal act whereby the legal status of the Church and religious communities in this country would be regulated – on the contrary. For this very reason, we have so far organized many scientific gatherings, round-table discussions and public panel debates in which many eminent legal experts from Montenegro and abroad have participated. Many collections of works from these gatherings have been published, all duly and in a timely manner delivered to the representatives of the Montenegrin state authorities. The Ministry of Human and Minority Rights, judging by the non-transparent and discriminatory way the Draft Law was prepared, has behaved as if all this had not happened in the recent past. The content of the Draft Law, otherwise essentially opposed in its regulations to ratified international legal instruments on human rights, which are directly applied in Montenegro, the Constitution and many valid laws, confirms this unambiguously.

5. The Metropolitan of Montenegro and the Littoral, and the Dioceses of Budimlje and Niksic, Mileseva and Zahumlje and Herzegovina consider that Montenegro needs a modern, established Law, based on the foundations of civilization and universally acknowledged principles of international conventions, which will affirm the cooperative separation of the Church and religious communities from the state, and in a proper way protect the right to religious freedom.

Bearing in mind the discriminatory and non-transparent way in which this Draft Law has been prepared and adopted, as well its content which grossly interferes in the internal autonomy of the Church, and undermines the constitutional principle of the separation of churches and religious communities from the state, we consider that the Draft Law should be rejected. The Church will defend with all legal and legitimate means its centuries-long rights

from the aggressive legal violence, which in this way is being initiated by the Ministry of Minorities and Human Rights.

CONCLUSIONS OF THE ROUNDTABLE DISCUSSION OF THE METROPOLITANATE OF MONTENEGRO AND THE LITTORAL AND DIOCESES OF BUDIMLJE-NIKSIC, ZAHUMLJE-HERZEGOVINA AND MILESEVA

Participants of the roundtable discussion organized on September 1st 2015 in Podgorica by the Metropolitanate of Montenegro and the Littoral and Dioceses of Budimlje-Niksic, Zahumlje-Herzegovina, and Milesevo have reached the following conclusions:

1. It is evident that there is a great need for the adoption of the new law that will stipulate the manner of exercise and protection of the right to freedom or belief, as well as the legal status of churches and religious communities in Montenegro. Existing Law on Legal Position of Religious Communities from 1977 is an anachronistic representation of socialist perspective of freedom of religion or belief, consequently reflecting the position and role of churches and religious communities in society.

2. Montenegro is the only country created from the Former Socialist Yugoslavia that upholds the Law originating from the socialist era in which atheism is forced upon as the only sound and desired view of the world,life and humanity. Certain provisions of that Law have been used through all kinds of abuses to incite and generate social divisions in Montenegro.

3. The Metropolitanate of Montenegro and the Littoral and Dioceses of Budimlje-Niksic, Zahumlje-Herzegovina, and Milesevo have been suggesting over the years that there is a strong need for the adoption of the new law whose provisions shall, in accordance with ratified international legal acts and adherence to the constitutional right to the separation of church and state state, guarantee unobstructed exercise of right to freedom of religion or belief; moreover, it shall provide legal framework for unobstructed exercise of the mission of churches and religious communities with due respect of their respective historical role and social significance and their internal autonomy and identity.

4. Process of the preparation of Draft Law was marked with numerous discriminatory actions of the Ministry for Human and Minority Rights, in the first place through depriving the churches and religious communities of the right to participate in the process of preparation of the Law through the participation of their qualified representatives. Draft Law was also deprived of the professional support of the most eminent legal experts from the country and abroad. Lack of transparency is, after discrimination, the second characteristic of the preparation procedure of the Draft Law.

5. Adoption of the Draft Law was also characterized by numerous unacceptable procedural omissions, such as adoption of the Draft Law by the Government, insteadby the competent Ministry, as well as the incompatibility of the Draftwith binding legal and technical rules for preparation of legislation in Montenegro.

6. Draft Law, instead of being brought up to date in accordance with modern European laws, is in many ways worse than the 1977 Law. It prescribes registration of churches and religious communities that exist in Montenegro for 1700 years. The previous Law prescribed only the registration of newly founded religious communities.

7. Provisions of Draft Law thus abolish legal subjectivity of all churches and religious communities, cancel their centuries old and obtained rights, limit and narrow their religious mission, ban their right to independently manage their internal organization, enables aggressive state interventions in their internal matters, deprive them of their legally acquired proprietary rights over the places of worship and decimates the property they were left with after the post-war' nationalization as well as other kinds of confiscation of the property; it abolishes the present system of keeping records and introduces the system of registration of churches and religious communities. Furthermore, numerous provisions of the Draft Law are directly opposed to the Constitution and other relevant legislation of Montenegro, which are also not in line with the civilizational and European understanding of religion or belief, but they reflect ideological antagonism towards churches and religious communities. As a matter of fact, the Draft Law nulls

the provisions of three agreements signed between the Government of Montenegro on one side and Roman Catholic Church, Islamic and Jewish communities on the other. It is obvious that secular state aims to create a state religion subordinate to itself, through subordination of the institution of universal character to the etatistic and ideological interests of creation of new identity.

8. In particular, but not entirely, the Draft Law does not correspond to the legal order of Montenegro. Centuries old Churches were also deprived of their right to carry their own name, i.e. the name peculiar to them for 2000 years. Restitution of deprived property of churches and religious communities and remuneration are not even mentioned in this Act; moreover, this Act prescribes new nationalization never before being applied by any country that had ruled these areas (The Ottoman Empire, Old Montenegro, Austria-Hungary, the Republic of Venice, Yugoslavia…). The Draft Law supports seventy years long prohibition of catechism in public schools, and children are unrightfully deprived of their right to receive religious education in true and full extent.

9. Public hearing on the Draft Law was scheduled within the period of frequent vacations in only three roundtable discussions in Bijelo Polje, Kotor and Podgorica, even though the Ministry has been announcing and delaying the preparation and adoption of this law in Government's programs for several years. Absence of the Minister Suad Numanovic, even though timely invited to attend the roundtable discussion organized by the Church, or any other representative, or even the officials of the Ministry for Human and Minority Rights, directly show the relation of that Ministry towards the Church and freedom of religion or belief.

10. We invite the faithful, priests, monks, nuns, as well as all members of other socially responsible organizations to submit their objections to the Draft Law to the Ministry of Human and Minority Rights no later than September 14th this year. In this respect, legal team of our Metropolitanate and the Dioceses is at their disposal in terms of professional and other help.

11. Proposed Draft Law is impossible to correct after the public hearing nor it is possible to harmonize it with the existing law of Montenegro and binding international legal acts, because

such intervention would give an entirely new body of text that would have to be discussed in public hearing again.

Due to the aforementioned reasons, public debate being held, with anunbiased perspective and studying received comments and suggestions, we demand that the Ministry withdraws the Draft Law from the procedure, expand the Work Group with acknowledged experts and representatives of churches and religious communities, and start the preparation of the new Draft Law in order to create legal and proper framework through acknowledgement and guaranteeing of rights in the same scope for all churches and religious communities instead of just for one.

COMMENTS ON THE DRAFT LAW ON THE FREEDOM OF RELIGION DUE TO CONFLICTS WITH INTERNATIONAL LEGAL ACTS ON HUMAN RIGHTS

In line with the Program of Public Debate, the Legal Counsels of the Metropolitanate of Montenegro and the Littoral and the Dioceses of Budimlje–Niksic, Zahumlje, Herzegovina and Mileseva are, in a timely manner, submitting their comments on the Draft Law on Religious Freedom due to conflicts with international legal acts on human rights.

The Draft Law on Religious Freedom in a number of its provisions deviates from the relevant international conventions, standards and obligations of Montenegro in the field of human rights and freedom of religion, particularly in the enjoyment of that freedom within a community, as well as the legal personality of churches and religious communities. The Draft Law, both for this reason and for the reasons stated in the previous remarks that we submitted to the Ministry for Human and Minority Rights, causes grave concern to the Metropolitanate and Dioceses that, if adopted as proposed, the principle of non-discrimination would be seriously undermined. In this regard, this analysis of the Draft Law highlights the unsustainability of the proposed solutions.

1. The title of the law and terminology

In this regard, we emphasize that the Draft Law was prepared under the title "**Law on the Freedom of Religion**," although as many as 40 of the 55 articles that the Draft Law contains refer to religious communities, their rights, status, the process of acquiring legal personality, property, etc. The Draft Law does not contain in a single article the terms "church" and "priest," but exclusively the terms "religious community," "religious worker" and "religious official," which not only clearly demonstrates that the drafters of the Law do not possess even a basic knowledge of the field which the Law is supposed to regulate, but may also suggest that the intention of the drafters of the Law

was, to a great extent, to undermine the autonomy of churches and religious communities, which will be clearly indicated in the more detailed analysis that follows. In any case, for our Church, and for the majority of other churches, it is not acceptable for the title and text of the Law to omit terms that are central to churches' self-determination and self-definition, because the absence of such terms clearly suggests an absence of tolerance and respect for the beneficiaries of future legal solutions.

In particular, we point out that the **Guidelines for Review of Legislation Pertaining to Religion or Belief**,[1] among the core values to which international standards of freedom of religion refer, include tolerance and respect, in the light of which the legislation should be assessed, as well as the fact that "*in a world committed to respect for human dignity, mere toleration is scarcely enough; a climate of genuine respect is to be preferred.*" Moreover, such an approach by the drafters of the Law in its very title suggests that there is no intention to, at least in the terminology, acknowledge the existence of different forms in which churches and religious communities operate, whereby their own kind of equalization is imposed through legal means, which will particularly become evident in the articles of the Draft Law regulating the process of acquiring legal personality.

2. Establishment of and the concept of a "religious community"

According to Art. 3. para. 1 of the Draft Law, "citizens" of the same religion have the right to express their faith by establishing "religious communities," while according to Art. 15 of the Draft Law, a religious community may be registered if it has at least 50 adult believers who are Montenegrin citizens and have permanent residence in Montenegro. The current provisions of the

[1] Guidelines for Review of Legislation Pertaining to Religion or Belief prepared by the OSCE/ODIHR Advisory Panel of Experts on freedom of religion or belief in consultation with the European Commission for Democracy through Law (Venice Commission) adopted by the Venice Commission at its 59th plenary session (Venice, 18–19 June 2004), p.12.

Draft Law guarantee this right only to "citizens," i.e. adult nationals, whereas all persons in Montenegro who do not have Montenegrin citizenship are excluded in a discriminatory way from the enjoyment of the freedom of religion in a community, which would be realized by the establishment of a religious organization. This provision is in direct contradiction to Art. 2 of the **International Covenant on Civil and Political Rights**, to which Montenegro is a party, in which it is stipulated that "*each State Party to the present Covenant undertakes to respect and to ensure that all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind*," and one of the rights is the freedom of religion. The proposed provision is in contradiction to Art. 9 para. 1 of the **European Convention for the Protection of Human Rights and Fundamental Freedoms** which stipulates that "*everyone has the right to freedom of thought, conscience and religion*." The **European Court of Human Rights** in its practice is of the opinion that legislation cannot prevent the founders of religious communities being foreigners,[2] and in the **Joint Guidelines of the European Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities** it is clearly pointed out that, "*Since freedom of religion or belief is a right that is not restricted to citizens, legislation should not deny access to legal personality status to religious or belief communities on the grounds that some of the founding members of the community in question are foreigners or non-citizens.*"[3] A requirement according to which a religious community can be established only by citizens with permanent residence in Montenegro could be considered discrimination. These, unfortunately, are not the only examples of discriminatory

[2] ECtHR 5 October 2006, *Moscow Branch of the Salvation Army v. Russia*, Application no. 72881/01, para. 82.

[3] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 29.

distinctions which the Draft Law contains. The mentioned provision that restricts the right of foreigners to be the founders of a religious community does not relate directly to the Metropolitanate and Dioceses in Montenegro that have centuries-long continuity of existence.

Paragraph 2 of the Draft Law contains a definition of "religious communities." *Prima facie*, the definition of the term "religious community" cannot be argued only in the context of claims for the existence of a structure, organs and internal rules of the community. However, taking a deeper look at those provisions of the Draft Law, it may be seen that it stipulates that the community is established "for the public and private expression of religion, performance of religious observances and religious activities," which means that social and charitable activities are excluded from the goals of the activities of religious organizations, which is absolutely unacceptable.

3. Undermining of the autonomy of churches and religious communities

In several of its provisions, the Draft Law on the Freedom of Religion contains solutions which seriously undermine the autonomy of churches and religious communities, and create the legal basis for arbitrary state interference in their internal affairs. In the structure of the Draft Law, the first provision of this type is contained in Art. 4 para. 3 of the Draft. Although paragraph 2 item 2 of the same article provides for religious communities to independently decide on the appointment and powers of its religious officials and other religious workers, in para. 3 of the same article of the Draft Law, it deviates from autonomous deciding on appointments, since it stipulates that prior to the appointment or publication of the appointment of its highest religious dignitaries, a religious community shall confidentially notify the Government of Montenegro about this. The mentioned solution not only imposes an unreasonable and unjustifiable obligation on churches and religious communities which, instead of conducting their religious and other humanitarian and social activities, should become informants for the government, but it also

implies that without confidential notification of the Government it cannot make an appointment! Such a provision undermines the European Convention for the Protection of Human Rights and Fundamental Freedoms, as the European Court of Human Rights reiterated in several of its decisions, *inter alia*, that "*states should observe their obligations by ensuring that national law leaves it to the religious or belief community itself to decide on its leadership*."[4] A similar requirement in this regard is emphasized by the **Joint Guidelines of the European Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities**.[5] The Guidelines for Assessing Legislation Pertaining to Religion or Belief provide that with such legislation "*intervention in internal religious affairs by […] imposing bureaucratic assessment or restrictions with respect to religious appointments […] should not be allowed*."[6]

An extremely serious undermining of the autonomy of churches and religious communities can be seen in the provisions contained in Art. 11 of the Draft. According to para. 1 of this article, the territorial configuration of a religious community that is registered and operates in Montenegro cannot extend outside of Montenegro, while in para. 2 it stipulates that the headquarters of a religious community that is registered and operates in

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

[5] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 31.

[6] Guidelines for Review of Legislation Pertaining to Religion or Belief prepared by the OSCE/ODIHR Advisory Panel of Experts on freedom of religion or belief in consultation with the European Commission for Democracy through Law (Venice Commission) adopted by the Venice Commission at its 59th plenary session (Venice, 18–19 June 2004), par.F.it.1. p.17

Montenegro must be located in Montenegro. The mentioned provisions would undermine the right of churches and religious communities to their own internal rules governing their structure and organization, which is at the core of their autonomy.

Moreover, such provisions are not in line with the findings of the **UN Special Rapporteur on freedom of religion or belief** according to which "*registration should not depend on extensive formal requirements in terms of […] the review of the Structure of the community […]*,"[7] which was accepted by the Joint Guidelines of the European Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities.[8]

The **European Court of Human Rights** is of the view that the acquisition of legal personality of religious organizations cannot be denied on the basis that its headquarters are located abroad,[9] which is also accepted by the Joint Guidelines of the European Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities.[10] The Guidelines for Review of Legislation Pertaining to Religion or Belief provide that "*intervention in internal religious affairs by engaging in substantive review of ecclesiastical structures […] should not be allowed […]*"[11] by such

[7] *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, UN Doc. A/HRC/19/60, para. 56.

[8] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 31.

[9] ECtHR 5 October 2006, *Moscow Branch of the Salvation Army v. Russia*, Application no. 72881/01, paras. 83–85.

[10] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 29.

[11] Guidelines for Review of Legislation Pertaining to Religion or Belief prepared by the OSCE/ODIHR Advisory Panel of Experts on freedom of religion or belief in consultation with the European Commission for Democracy through

legislation. If the Draft Law were adopted with the provisions contained in Art. 11 of the present text, this would not be in accordance with Art. 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief of 1981 which stipulates that "*the right to freedom of thought, conscience, religion or belief shall include the freedom […] to establish and maintain communications with individuals and communities in matters of religion and belief […] at the international level*."

It is important to point out that the adoption of the mentioned provisions would mean unduly restricting the rights provided in Art. 17 para. 1 of the Framework Convention for the Protection of National Minorities of the CoE – "*the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share a […] religious identity*," as well as para. 8 of the **Bolzano Recommendations on National Minorities in Inter-State Relations**.[12]

The Draft Law also contains other provisions that may undermine the autonomy of churches and religious communities, especially in the context of their registration, and these will be analyzed in the sections below.

4. Registration of Religious Communities

The Draft Law stipulates that religious organizations or organizational units of religious communities acquire legal personality by registration in the Register of religious communities. The way in which the process is regulated by the provisions of the Draft Law, however, suggests that the competent authorities have a wide margin of discretion in the assessment and approval for registration and that in this process very burdensome requirements for churches and religious communities are

Law (Venice Commission) adopted by the Venice Commission at its 59th plenary session (Venice, 18–19 June 2004), par.F.it.1. p.17.

[12] OSCE HCNM, the Bolzano Recommendations on National Minorities in Inter-State Relations, June 2008, para. 8.

stipulated, which also undermine their autonomy. In this way, the provisions of the draft do not correspond to the standards contained in the Guidelines for Review of Legislation Pertaining to Religion or Belief, according to which "*provisions that grant excessive governmental discretion in giving approvals should not be allowed […]*,"[13] nor are they in accordance with the Joint Guidelines of the European Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities, according to which "*any procedure that provides religious or belief communities with access to legal personality status should not set burdensome requirements*."[14] In the examples that follow it will be shown in what way and to what extent certain provisions deviate from the mentioned standards and further undermine the autonomy of churches and religious communities.

4.1. The name and symbols of religious communities

The solutions contained in the Draft Law regarding the name and characteristics of religious communities undermine their autonomy. The Joint Guidelines of the European Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities specifically stipulate that "*the state must respect the autonomy of religious or belief communities when fulfilling its obligation to provide them with access to legal personality by […] ensuring that national law leaves it to the religious or belief community itself to decide on […] its name and other symbols*."[15]

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[13] Guidelines for Review of Legislation Pertaining to Religion or Belief prepared by the OSCE/ODIHR Advisory Panel of Experts on freedom of religion or belief in consultation with the European Commission for Democracy through Law (Venice Commission) adopted by the Venice Commission at its 59th plenary session (Venice, 18–19 June 2004), par.F.it.1. p. 17.

[14] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 25.

[15] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR)

4.2. The decision on the establishment and re-registration of churches and religious communities

The Draft Law also contains in Art. 16 a clause, whereby the religious community shall, along with the application for registration, also submit a decision on its establishment. Given that a religious community, according to Art. 14 of the Draft Law, acquires legal personality by registration in the Register, it follows that churches and religious communities will again have to make a decision on establishment, resulting in a break in the continuity of its legal personality, which they will be able to regain after registration. Such a solution is firstly humiliating, bearing in mind the centuries-long continuity of legal personality and activity that individual churches and religious communities in Montenegro have, but it is also legally unsustainable, as it represents a serious undermining of legal security and opens up a number of dilemmas relating to the property that churches and religious communities already own in accordance with the legislation of Montenegro, and relating to legal matters that have already been concluded. Since the application must also include a new decision on establishment, it is clear that these churches and religious communities also have to be established again! In this way, the transitional provisions do not guarantee the rights of existing churches and religious communities, which is a requirement stipulated in many international documents.[16] The Joint Guidelines of the European

Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para.31

[16] Guidelines for Review of Legislation Pertaining to Religion or Belief prepared by the OSCE/ODIHR Advisory Panel of Experts on freedom of religion or belief in consultation with the European Commission for Democracy through Law (Venice Commission) adopted by the Venice Commission at its 59th plenary session (Venice, 18–19 June 2004), par.F.it.1. p.17; European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 36; *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, UN Doc.A/HRC/19/60, para. 57.

Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities specifically provide that, "*in cases where new provisions to the system governing access to legal personality of religious or belief communities are introduced, adequate transition rules should guarantee the rights of existing communities. Where laws […] fail to protect the vested interests of religious or belief organizations (for example, requiring reapplication for legal personality status under newly-introduced criteria), the state […] must demonstrate the objective reasons that would justify a change in existing legislation, and show that the proposed legislation does not interfere with the freedom of religion or belief more than is strictly necessary in the light of those objective reasons […]*."[17]

Bearing in mind the given examples of the undermining of the autonomy of churches and religious communities that are provided by the Draft Law, we are of the opinion that the state has failed to demonstrate objective reasons that would justify changes to the existing legislation, nor is it indicated that the new legislation does not impinge on the freedom of religion. The proposed provision would seriously jeopardize the existing rights and legitimate interests of churches and religious communities with a previously acquired legal personality, which is the intention of the drafters of the Law, as expressed in other articles.

Such a conclusion cannot be refuted either by the provision of Art. 17 of the Draft Law according to which the organizational part of the religious community that operates in Montenegro, whose headquarters are located abroad and which has so far not been registered with the competent authorities in Montenegro, along with the application from Art. 16 shall also attach the decision of the competent authority regarding that religious community, for registration. On the contrary, this provision gives rise to additional concern and further undermines the autonomy of

[17] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 36.

churches and religious communities. Interpretation of this provision leads to the conclusion that it would be debatable whether the organizational units of the Serbian Orthodox Church and the Roman Catholic Church, which exist in Montenegro, could be registered at all since Art. 14 of the Draft Law stipulates that the headquarters must be in Montenegro. They would be obliged to submit the decision on their re-establishment which, according to Art. 16, must be provided with the application, and to submit the "decision of recording" of the competent authority of the whole Church.

4.3. Pointless conditions for registration of religious communities

The provisions of the Draft Law contain provisions which are completely pointless and which can form the basis for further arbitrary action by the authorities in the registration process. In question is a provision that stipulates that, along with the registration form, the basic religious texts of the religious communities shall be attached "in the authentic text." It is absolutely pointless and in a way humiliating to require Christian churches to submit the text of the Old and New Testaments to the administrative authority. There is no doubt that the Draft Law could and must also take into account the particular historical differences that exist between old churches and religious communities on the one hand, and new religious movements on the other, if in nothing else, then certainly in the obligation to submit basic religious texts, which, at least as far as Christian churches are concerned, are well known. Also, it is not clear what the drafters had in mind when they stipulated the obligation to submit the basic religious texts "in the authentic text." Does such a decision authorize the state administration authority to assess whether a religious text is authentic, which, of course, represents an unpermitted violation of the freedom of religion, or is the meaning of the provision that the religious texts should be submitted in the original language in which they were written, which for Christian churches is completely pointless?

5. Banning of activities

The Draft Law on the Freedom of Religion contains provisions banning the activities of religious communities (Art. 21). The Draft Law does not envisage any less stringent sanctions, but rather exclusively relates to the banning of the activities of religious communities and thus, when considered in principle, is not in accordance with the **Joint Guidelines of the European Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities**, which stipulates that such a sanction, "*considering the wide-ranging and significant consequences that withdrawing the legal personality status of a religious or belief organization will have on its status, funding and activities, any decision to do so should be a matter of last resort*."[18] In the mentioned provisions of the Draft Law, particular attention is drawn to the part which stipulates that a religious community shall be prohibited if it encourages not only national and religious, but also *other forms of discrimination*, as well as if it stirs up not only national and religious, but also *other forms of hatred*. Since it is very questionable whether a religious organization, in stating its religious teachings and its views on certain issues (e.g. its views on marriage or the gay population), is committing discrimination, and bearing in mind that the concept of *other forms of hatred* is very broad and rather vague, the view can be generally held that the principle of proportionality and subsidiarity is being undermined in the restriction of the freedom of religion. Art. 9 para. 2 of the European Convention stipulates that the freedom of religion may be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or for the protection of the rights and freedoms of others. The requirement

[18] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 33.

that the limitation should be prescribed by law implies that the legal provision stipulating the restriction should be adequately receptive and predictable, which requires it to be formulated with sufficient precision to enable individuals and communities, if necessary also with advice, to regulate their own behavior,[19] which, for the given reasons, is not the case with the provision of Art. 21 of the Draft Law. Of course, in both cases, especially in terms of *other forms of hatred*, the competent authorities are left with broad discretionary powers, particularly bearing in mind that according to para. 2 of the same article, the procedure to prohibit the activities of a religious community shall be initiated at the competent court by the state administration.

6. Property and revenues of religious communities

Issues relating to the property and income of religious communities are regulated in several provisions of the Draft Law. The main feature of these provisions is that it does not allow religious communities to perform any kind of cultural, economic or other activities, and that state control over their revenues and expenditure is such that it undermines their autonomy. Although Art. 26 para. 1 of the Draft Law provides that a religious community may obtain the funds for carrying out its activities from the revenues from its own property, donations and contributions of natural and legal persons, and funds received from international religious organizations of which it is a member and from other legal activities and activities of a non-profit basis, the scope of that provision is narrowed to a large extent by the provision of Art. 27 para. 2 of the Draft, which provides that the property of a religious community can only be used to carry out religious observances and religious activities, the construction and maintenance of religious and buildings and for charitable purposes. Thus, according to the

[19] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 7.

provisions of Art. 27 para. 2 of the Draft Law, a religious community would not be able to perform any non-profit economic activities, such as, for example, agricultural production on land which is owned by it and for feeding monks, the organization of pilgrimages and religious trips, etc. Such a solution truly has no legitimate justification and not only impinges on freedom of religion in a certain way because it prevents their normal activity, but it also pushes religious communities to the margins of social life. Moreover, in several provisions of the Draft Law it is stipulated that a religious community should keep records on certain types of income – e.g. records of income from its own property (Art. 26 para. 2 of the Draft Law), or fees, that is, recompenses that religious officials receive for religious activities and observances (Art. 37 para. 2). Such records, by themselves, are not problematic and may contribute to better consideration of finances within the religious community itself. What is problematic, however, is that the obligation to keep such records is imposed by law, in particular because Art. 41 of the Draft Law stipulates that the monitoring of the legality of the acquisition and earmarked expenditure of the religious community's funds shall be carried out by the competent authority, without specifying to whom, or to which body it is referring. If that authority is a state authority or public administration body, and the chances are that the intention of the drafters of the Law lies in this direction, then this is a very gross undermining of the autonomy of religious communities, because the purpose of the expenditure of funds is still an issue that lies within the scope of autonomy of the religious community and no state control in this sense is acceptable. Also, Art. 41 of the Draft Law has no systemic or logical connection with Art. 5 of the Draft, according to which a religious community shall independently manage its property and funds on the basis on its own autonomous regulations.

7. Religious spiritual care

Several provisions of the Draft Law provide for religious spiritual care in the army, the police, institutions for serving sentences, and healthcare and social institutions. The way in which

the provisions of the Draft Law regulate these issues is cause for some concern. First of all, the holder of the right to religious spiritual care is determined in a different way. According to Art. 38 of the Draft Law, a *religious community* has the right to offer religious spiritual care to believers serving in the army and the police, while the holders of the right to religious spiritual care in institutions for serving sentences, in healthcare and social institutions are the *persons* who are in them, in custody or serving a penal sentence, i.e. the *persons* who are accommodated in them. Such a different determination of the holder of the right to receive religious spiritual care can cause a number of problems in exercising this right, and does not contribute to the legal certainty of religious communities, or of the persons who require spiritual care. What is especially worrying and in a way not in accordance with the standards of the enjoyment of human rights, are the provisions whereby the manner of exercising the right to spiritual care is regulated by the directions of the competent organ of state administration. The directions of the state administration organs in the Montenegrin legal system have the nature of a bylaw, so that the manner of exercising this right is not regulated by law, which is the standard for human rights, but by a bylaw which leaves a wide margin of discretion to the state administration organs and may lead to different ways of regulating the way this right is exercised in different contexts. Such a solution is not in accordance with the Constitution of Montenegro which stipulates that the law, in accordance with the Constitution, regulates the way in which human rights and freedoms are exercised.

8. Religious instruction and religious schools

The Draft Law also regulates issues related to religious instruction and religious schools. A general feature of these provisions is to regulate these issues in very few words, with excessive and unjustified state interference and, in certain cases, in a way contrary to the standards and undoubted social needs that exist in the sphere of education. This will be shown in the following examples.

8.1. The venue for holding religious instruction

The Draft Law in Art. 42 para. 1 stipulates that religious instruction may be conducted only in buildings in which religious observances and religious activities are performed. Such a solution is narrower than the standards that already apply to religious instruction. The evident intention of the drafters of the Law is in this way to strengthen the decisions that the socialist government adopted after World War II, whereby religious instruction was banished from public educational institutions. While we deplore this approach, we emphasize that in the mentioned provision of Art. 42 para. 1 of the Draft Law, contrary to the standards that exist in this area, the possibilities of holding religious instruction are reduced. Specifically, the mentioned provision is not in accordance with the provisions of Art. 6 of the **UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief of 1981** which stipulates that "*the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedom […] to teach a religion or belief in places suitable for these purposes*." It is really not clear why only buildings in which religious observances and religious activities are performed are considered premises suitable for performing religious instruction, and why the performance of religious instruction also in other places that are suitable for this purpose, such as, for example, camps organized by religious groups, summer schools taking place in a rented space, spiritual discussions in public halls, etc. should be prevented. The solution contained in the Draft Law is yet another example of prevention of the achievement of freedom of religion.

8.2. The participation of minors in religious instruction

According to the provisions of Art. 42 para. 2 of the Draft Law, the participation of minors in religious instruction requires the consent of a parent or guardian, as well as the minor's own consent if the child is older than 12. The mentioned provision, particularly in the part that stipulates the consent of a child older than 12 years, in our opinion, may jeopardize or even render

pointless the performing of religious instruction and the rights of parents or guardians to provide their children with religious education in accordance with their religious beliefs guaranteed by Art. 18 (4) of the **International Covenant on Civil and Political Rights** which provides that: "*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions*." Hence, the right to participate in religious instruction is an integral part of the freedom of religion, just as the right, for example, to change religion also is, which is clearly provided in Art. 1 para. 2 of the Draft Law. While the right to consent to participate in religious instruction is recognized for a minor that has attained 12 years of age, the Draft Law actually stipulates that all persons of 12 years of age or more have the right to enjoy and make decisions also on other aspects of the freedom of religion, including changing faith. We consider that it is quite reasonable and desirable that minors be consulted regarding religious instruction, in order to take into account the interests of the child, but we are of the opinion that 12 years is not a sufficiently old age at which a minor can decide and give consent on such a sensitive and important issue for his/her own development as religious instruction or a change of faith. Our position is based on two arguments:– **1.** The provision regarding age is not compatible with other provisions contained in national legislation on the right of juveniles to decide on other important matters in their lives, such as, for example, employment or marriage; **2.** The provision of a sufficient age for consent to participate in religious instruction, and thus decide on other aspects of the freedom of religion, is also not compatible with international and comparative standards. Although Art. 14 para. 1 of the **Convention on the Rights of the Child**, to which Montenegro is a state party, stipulates that "*States Parties shall respect the right of the child to freedom of thought, conscience and religion*," in para. 2 of the same article it stipulates that "*States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child*." This approach

has resulted in no single provision of any international legal instrument in the field of human rights explicitly providing for the right of a child to change his/her religion or expressly stipulating the child's age at which he/she would have to be consulted. The **UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief** stipulates in Art. 5 para. 2 that "*every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians […]*," and taking into account the expressed wishes of the child in terms of faith is linked to Art. 5 para. 4: "*In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes […] in the matter of religion*." In comparative law there are examples where the state even stipulates the obligation of a child under a certain age, for example 15 years, to belong to the religious community of his/her parents.

8.3. The impossibility of establishing other educational institutions

The Draft Law provides that religious communities may only establish religious schools for the education of religious officials. It is absolutely incredible that the Draft Law does not provide the possibility for churches and religious communities in Montenegro to establish general educational institutions, when such a right and practice exist in all civilized countries of the world. Why, for example, would a church or a religious community not be able to establish and run a high school, college or university, particularly if it can already, within the scope of its social and humanitarian activities, establish relevant institutions, as is provided in Art. 35 of the Draft Law? We are of the opinion that the absence of explicit provisions, whereby it would be provided in the Draft Law that religious communities are able to establish other educational institutions, bears witness to the intention of the drafters of the Law to deny such a possibility, and thus marginalize religious communities and diminish and devalue their social activity and role.

8.4. Teachers in religious schools

Article 47 of the Draft Law stipulates that education in religious schools may be taught only by Montenegrin citizens (para. 1), and in exceptional cases a foreigner may teach in a religious school under conditions stipulated by a special law. Given that such a special law that would regulate the right of foreigners to teach in religious schools in Montenegro does not exist, it remains that the point of the mentioned provision of the Draft Law is to completely prevent foreigners from being teachers in religious schools in Montenegro. Such a solution actually prevents, for example, small religious communities in Montenegro from establishing a religious school and prevents the creation and maintaining of relationships with individuals and communities in matters of religion at the international level, which contradicts Art. 6 of the **UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief of 1981**. The mentioned provision testifies to the almost panic level of fear that the drafters of the Law have of maintaining contacts with individuals and communities in matters of religion at the international level. Such a xenophobic approach to matters of faith cannot and must not be present in a society that is committed to European values and principles. *"If the government can dictate who teaches a particular religion, then the government can dictate what the content of that religion is.*" In the mentioned point of the Draft Law the authorities do not dictate personally who may teach a particular religion, but rather they dictate the obligation with respect to citizenship, so the Draft Law aims to carry out its own kind of Montenegrinization of all religions, which is, of course, a completely ridiculous, but also very dangerous, approach which undermines the fundamental values of human rights!

9. Confiscation of the property of religious communities

The Draft Law in its transitional provisions contains a solution, on the basis of which the religious buildings and land belonging to churches and religious communities will be taken away from them! The provisions of Art. 52 actually refer to

confiscation and nationalization of religious buildings. It is unbelievable that the Montenegrin authorities, which actually for many years have refused to carry out restitution of the property that the communist government confiscated after the Second World War, of which the largest part belonged to the Metropolitanate and Dioceses of our Church, are making provision for and intend to carry out the confiscation and nationalization of religious buildings. Since the largest number of religious buildings in Montenegro, actually those that were built before 1 December 1918, are actually owned by our Church, it is clear that the mentioned provisions are primarily directed against our Church, that is, the Draft Law is being introduced precisely in order to confiscate its religious buildings and all the real estate belonging to those buildings. This refers to buildings the right of whose ownership is lawfully registered in the appropriate real estate cadastre in the name of the organizational units of our Church, and this has been done in the same way as for all other natural and legal entities in Montenegro. The mentioned provisions of the law are contrary to all standards of the rule of law and human rights, both those relating to legal certainty and security of property, as well as those dealing with the standards of the freedom of religion. It is incredible that, according to the provisions of the Draft Law, religious buildings – which it is expressly stated were built with the contributions of believers or, as the Draft Law points out, deliberately avoiding the proper terms, by "a joint venture of citizens" since believers built religious buildings by "joint ventures" precisely for the Church to which they belonged, and solely to satisfy their religious needs – are subject to a new nationalization and confiscation. Also, the mentioned provisions of the Draft Law, in particular those providing for confiscation and nationalization of religious buildings that were built from state public revenues, demonstrate the intention of the authorities to show that the Metropolitanate and Dioceses of our Church came as some kind of intruder into Montenegrin social life after 1 December 1918, when the Kingdom of Serbs, Croats and Slovenes was created, which in no way corresponds to the historical facts. Although the Draft Law governs the registration of religious communities and therefore should allow them to more easily

acquire legal personality, without which maintaining the continuity of ownership of religious facilities – as one of the key aspects of the organized life of the community – would be impossible or at least extremely difficult, as stated in the **Joint Guidelines European Commission for Democracy through Law and the OSCE/ODIHR on the Legal Personality of Religious Communities** ("*A number of key aspects of organized community life in this area become impossible or extremely difficult without access to legal personality. These include […] maintaining the continuity of ownership of religious edifices […]*,")[20] the Draft Law provides for just the opposite – a break in the continuity of ownership of religious buildings. It is important that the ownership of Orthodox religious buildings and other real estate in Montenegro has never been in dispute, since there has been no religious community from which a property has been taken by government intervention and given to our Church, nor has there been within our Church in Montenegro, as the owner of Orthodox religious buildings, any internal divisions that have resulted in disputes over property, which eloquently testifies to the legitimate registration of property rights in the relevant real estate cadastres. However, even if ownership were disputed, or if hypothetically there existed some religious communities from which property had been allegedly taken away and given to our Church, or some group that broke away from our Church, even then the provisions of the Draft Law would go against international standards, and in particular the recommendation contained in the **Guidelines for Review of Legislation Pertaining to Religion or Belief**, whereby "*To the extent that laws deal with such issues, it is important that they be drafted and applied as neutrally as possible and without giving undue preferential treatment to favored groups*." We consider that the state would be, in this way, in a position to carry out such preferential treatment so as to give religious buildings that would

[20] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 20.

be taken from our Church to other religious or quasi-religious communities, even those newly formed and those formed by the state at its own discretion. Otherwise, the question that is begged is: what does a secular state want with religious buildings?

CONCLUSION

Bearing in mind the mentioned arguments, we are of the opinion that the Draft Law on the Freedom of Religion not only is not in line with, but has also been made in direct opposition to the binding provisions of international legal acts which have been ratified and which, pursuant to the provisions of Art. 9 of the Constitution of Montenegro, take precedence over national legislation. Judging by the content of the Draft Law, it can be concluded that the drafters of this Law have actually succeeded only in making it so that in a number of provisions it contradicts the binding provisions of international conventions on human rights.

The Law on the Freedom of Religion would, if adopted in its present draft text, seriously jeopardize religious freedom, the autonomy of churches and religious communities and the principle of non-discrimination, particularly at the expense of our Church and its believers. These reasons can only have as a consequence the withdrawal of the Draft Law from further procedure. Our Church is ready to assist the authorities in drafting a new text that would meet international and European standards of freedom of religion and respect for the rights and legitimate interests of the churches and religious communities.

REMARKS ON THE DRAFT LAW ON FREEDOM OF RELIGION DUE TO CONFLICTS WITH LEGAL SYSTEM OF MONTENEGRO

I REMARKS ON THE PROCEDURE OF FORMING THE WORKING GROUP AND THE PROCEDURE OF PREPARATION OF THE DRAFT LAW

The working group for drafting the Law on Freedom of Religion was formed by a decision of the Minister for Human and Minority Rights No. 01-1920/14 of 11 July 2014. During the formation of the Working Group, the Ministry departed from its past practice that has applied for years and is still applying with regards to legislative acts in the field of their competence. Despite a formal request made by the Orthodox Church, the representatives of the Church and religious communities were not included in the Working Group nor were experts and relevant representatives of civil society, despite the binding public invitation.

The Metropolitanate and the dioceses were not officially informed by the Ministry that the Working Group had been formed. The official representatives of the Roman Catholic Church and of the Islamic Community declared publicly and timely their legal interest to take part in the Working Group (reported in the daily "Dan", November 30, 2014).

In accordance with the decision of the Minister, the Working Group included the following members: **Mubera Kurpejović**, Director of the Directorate of Higher Education at the Ministry of Education, **Djorđina Lakić**, Director of the Compensation Fund, **Slavica Bajić**, Deputy Secretary of the Secretariat for Legislation, **Srdjan Spaić**, Advisor of the Prime Minister and the Chair **Ivan Jovović**, the former acting Director General of the Directorate for Relations with Religious Communities at the Ministry for Human and Minority Rights.

Bearing in mind the fact that the Director General for Relations with Religious Communities Ivan Jovović was relieved

of that duty by the decision adopted by the Government at the 81st session of 18 September 2014, it is still not known whether Jovović participated in the Working Group and whether he is still a member. The new acting Director General of the Directorate for Relations with Religious Communities Dragutin Papović was appointed to that post by the decision adopted by the Government at the 96th session of 15 January 2015.

At the meeting with the representatives of the Ministry on September 8, the representatives of the Metropolitanate and the dioceses requested that they be informed verbally who chaired the Working Group for drafting the law, that is, whether the duty was performed and whether it is still performed by Ivan Jovović regardless of the fact that he was relieved of the duty of the Director General of the Directorate for Relations with Religious Communities, or, another person was appointed to the post.

The representatives of the Ministry and the Working Group at this meeting (**Dragutin Papović, Srdjan Spaić and Mersudin Gredić**) did not want to respond to the question but suggested that the representatives of the Metropolitanate submit a formal request to the Ministry. On that occasion, it was pointed out to the representatives of the Ministry and the Working Group that these data were necessary for a better participation in the public debate and verbally requested that the information be delivered as soon as possible upon receiving the request, due to time restrictions. On the same day, September 8, 2015, the Legal Council of the Metropolitanate submitted a request registered under No. 18 to the Ministry requesting the following information:

1. Did Ivan Jovović participate in the Working Group for drafting the text of the Proposal for the Law on Freedom of Religion, which was formed by the Ministerial decision No. 01-192014 of 11 July 2015, as Chairman of the Working Group?

2. If Jovović, due to the dismissal from the office of Acting Director General of the Directorate for Relations with Religious Communities of the Government of Montenegro, did not participate in the work of the aforementioned Working Group, provide a copy of the decision by which the new Chair of the Working Group was appointed?

3. Did Minister Numanović fulfill the obligation imposed by the Government Conclusion of 27 August, whereby he was tasked of forming an expert team which would follow the public debate and participate in the preparation of the Proposal for the Law on Freedom of Religion (if so, provide a copy of that decision).

Instead of the requested information, the Secretary of the Ministry Mersudin Gredić submitted a response to the Legal Council of the Metropolitanate on 11 September 2015, suggesting to the Council to send a request to the Ministry in accordance with the Law on Free Access to Information, although there was no mention of it at the meeting of 8 September. The foregoing shows that, not even in a formal meeting with representatives of the Ministry, can the Church, religious communities and the general public obtain any information as to the Chair and the members of the Working Group as if they were part of a "witness protection programme" under special protection mesures!?!

For these reasons, the Ministry is obliged to respond to the questions listed above, because it has been clearly established that, during the intensive work of the Working Group, the position of the Head of the Organization Sector for Relations with Religious Communities in the Ministry remained vacant for four months.

The decision of Minister Numanović of 11 July 2014 to establish a Working Group, was never published on the official website of the Ministry. In addition, the decision as the administrative act was never delivered to the Church and religious communities as stakeholders who timely expressed their legal interest in it so that they may eventually be able to initiate an administrative dispute in accordance with legal regulations.

The decision on forming the Working Group does not contain a legal remedy, i.e., it is not made in accordance with Art. 200 of the applicable **Law on Administrative Procedure**. The Church and all others who have expressed legitimate interest in this act as stakeholders are in this way deprived of their right to a remedy which is guaranteed by Art. 20 of the **Constitution of Montenegro**. We are faced here with an illegal and non-transparent behaviour and treatment and causing damage to the Church and religious communities by this administrative act. The

content of the decision was, and this applies only to the identity of the members of the Working Group, made available to the public through the media (The Daily "Dan", October 9, 2014), i.e., six months after its adoption.

Not only does the Working Group not include expert representatives of the Church and religious communities, whose position is to be regulated by the Law, but also it was not formed in accordance with the Procedure for Cooperation between the State Administration Authorities and NGO ("Official Gazette of Montenegro", no. 7/12).

After the formation of the Working Group, Minister Suad Numanović publicly promised "a consultative process with religious communities whose representatives will be able to make a full contribution to finalizing the text via comments and suggestions" of the Draft Law (The Daily "Dan", 22 December 2014). However, this did not happen as was publicaly promised and in a way fitting to a democratic society.

In the period between the formation of the Working Group on 11 July 2014 and adopting the Draft Law by the Government of Montenegro on 30 July 2015 whereby disregarding the legal procedure, the Ministry for Human and Minority Rights held only one meeting with our representatives which was informative rather than consultative on 23rd February 2015 in which there was no mention of the provisions of the Draft. At the meeting, the representatives of the Ministry headed by Minister Suad Numanović informed the Church representatives only of general issues related to the need for the new law, as can be seen in the official minutes of the representatives of our Church of 23 February 2015.

On this occasion, Minister Numanović promised that after discussions with representatives of religious communities, the draft text of the Draft Law would be submitted to our Church and other religious communities so that we were able to submit suggestions and criticism. The Minister also promised that after that public debates would be held in which citizens would be able to participate. However, this did not happen. The churches and religious communities did not receive the draft text of the Draft Law, as previously publicly promised by Minister Numanović, but

were acquainted with its content only after it had been adopted by the Government of Montenegro on 30 July 2015 (outside its competence) and published on the official website of the Ministry, which represents a precedent of its kind.

We would like to especially point to the fact that the Ministry, prior to beginning work on the preparation of the Draft Law, had not prepared and submitted to the Government for approval an adequate Strategy that would define the strategic objective of improving the status of believers in Montenegro and enabling them to exercise their rights. Meanwhile, the Ministry proposed and the Government adopted the strategies on minority policy, gender equality, improving the situation of Roma and Egyptian communities, improving the quality of life of LGBT persons etc. Unfortunately, the Strategy on the improvement of the status of believers in exercising their right to freedom of religion was not a subject of interest to the Ministry. Since there was no such **Strategy**, an **Action Plan** is missing either.

Instead of a serious Strategy and an Action Plan, the Ministry entered the process of preparing the Draft Law based on the **Information on the Need to Adopt the Proposal for the Law on Freedom of Religion**, which was submitted to the Government of Montenegro on 26 June 2014. It has not been reported so far that a matter of such gravity and importance, as is preparation of a law governing complex social relations, has been based on Information only, without an adequate strategy, an action plan and evaluation of the impact of a new regulation (RIA).

Judging by the contents of the decision of the Minister Numanović of 11 July 2014 and (in)actions of the Ministry, the preparation of the Draft, started in a discriminatory and non-transparent manner, with a grave violation of the rights of the Church and religious communities, whose legal status is to be regulated, as well as believers whose manner of exercising the right to freedom of religion is thereby regulated.

II REMARKS ON THE PROCEDURE FOR ADOPTING THE DRAFT LAW

The draft law was adopted by the Government of Montenegro at its 122nd session of 30 July 2015. According to current regulations in Montenegro, competent ministries as organs of the state administration shall prepare legislation within the field of their competence.

During a non-transparent and discriminatory preparation and the adoption of the Draft Law on Freedom of Religion by the government of Montenegro outside its competence, the Ministry for Human and Minority Rights violated several provisions of the **Rules of Procedure of the Government of Montenegro** ("Official Gazette of Montenegro", no. 3/12 and 31/15), which stipulates the method of preparation, proposal and adoption of legal acts in different stages.

The provision of Art. 32 of the Rules provides that "**the proponent shall prepare the material for consideration by the Government in accordance with these Rules of Procedure**". Thus, the Ministry as the proponent of the regulation within the area of its competence, which is prescribed by a provision under Art. 24. of the **Decree on the Organization and Functioning of the State Administration** ("Official Gazette of Montenegro", no. 5/12, 25/12, 44/12 – other regulation, 61/12, 20/13, 17/14 and 6/15), had no legal basis to submit to the Government the Draft Law on Freedom of Religion for adoption since public debates had not been conducted.

The provision of Art. 32, para 2 of the Government Rules of Procedure specifies that "**during the preparation of laws and other regulations, the proponent of a law**", which is the Ministry in this case, "**shall prepare them in accordance with the Legal and Technical Rules established by the Secretariat for Legislation**." According to its structure and content, the Draft Law on Freedom of Religion has not been not made in accordance with the Legal and Technical Rules for drafting regulations which was established by the Secretariat for Legislation in 2010 ("Official Gazette of Montenegro", no. 2/10).

The provision of Art. 33 of the Government Rules of Procedure stipulates that the proponent, in this case the Ministry, "**in the process of preparing laws and other regulations shall conduct a regulatory impact analysis (RIA) in accordance with the regulation of the Ministry of Finance.**" Paragraph 2 of the same Article provides that "**if the proponent considers that in the process of preparing a law or other regulations RIA should not be performed they are required to provide special explanation**." It is unknown as of yet whether the Ministry for Human and Minority Rights conducted a regulatory impact analysis of the proposed legislation in accordance with the Government Rules of Procedure, nor is it known whether the Ministry deemed this important activity unnecessary during the preparation of the regulation.

Bearing in mind the above mentioned, the question arises:

1. Did the Ministry implement the procedure of regulatory impact analysis of the regulation which it endeavoured to prepare and, if so, when?

Judging by the content of the Draft Law, for the preparation of this important legislation the Ministry used nothing but newspaper articles and statements by some persons that have long advocated unacceptable, anti-European and aggressive state interventions within the sensitive area of human rights, primarily within the field of the right to freedom of religion.

In terms of the regulatory impact analysis of the regulation, we still do not have answers to the following questions:

1. Defining the problem: what problems should the proposed act solve? What are the causes of the problems? What are the consequences of the problems? What legal entities are damaged, in what way and to what extent? How would the problem evolve without changing the regulation (the "status quo" option)?

2. Objectives: Which objectives are achieved by the proposed regulation? Indicate the compliance of these objectives with the existing strategies and programmes of the Government, if applicable.

3. Options: what are the possible options for meeting the objectives and solving the problems by considering the "status quo" option and the recommendation to include a non-regulatory option except when there is an obligation to adopt the proposed legislation? The preferred option is to be explained.

4. Impact analysis: Who and how will be influenced by the regulation? List positive and negative, direct and indirect impacts? What costs will be incurred on the application of the regulations and paid by citizens and businesses (especially SMEs)? Do the positive effects of making the regulation justify the costs it will create? Does the regulation encourage the creation of new companies in the market and market competition? In addition, an assessment of administrative burdens and barriers to businesses should be made.

5. Fiscal Impact Assessment: Is it necessary to secure financial resources from the state budget for the implementation of the regulation and in what amount? Provide explanation as regards the provision of financial resources (one time only or over a certain period). Does the implementation of the regulation create international financial obligations? Are the necessary financial resources provided in the budget for the current fiscal year or are they planned in the budget for the coming fiscal year? Does the adoption of the regulation provide for the adoption of bylaws which will result in financial obligations? Will the implementation of the regulation generate revenue for the budget of Montenegro? Provide explanation of the methodology that was used in calculating the financial costs/income. Were there any problems in the precise calculation of financial costs/income? Did the Ministry of Finance make any suggestions as regards the draft/proposal of the regulation? Were the remarks obtained from the Ministry of Finance included in the text of the regulation?

6. Consultations with stakeholders: Was external expert support used and, if so, in what way? Which groups of stakeholders were consulted, at what stage in the RIA process and how (public or targeted consultations)? What are the main results of the consultations? Which proposals and suggestions of stakeholders were accepted or not accepted?

7. Monitoring and evaluation: What are the potential obstacles to the implementation of the regulation? What measures will be taken during the application of the regulation to meet the objectives? What are the main indicators against which to measure the fulfillment of the objectives? Who will be in charge of the monitoring and evaluation of the implementation of the regulation?

Furthermore, the provision of Art. 34 , para 1 of the Government Rules of Procedure stipulates that "**the material for consideration and decision by the Government must be submitted in the form of: a proposal for a law, other regulation or general act, which the Government submits to the Parliament.**" It is evident that it is not a draft law but a proposal for a law that must be submitted to the Government.

The provision of Art. 35 of the Government Rules of Procedure stipulates that the report on the conducted public debate must be submitted to the Government with a Proposal for a Law. In the present case, the Ministry failed to submit anything to the Government along with the Draft Law, because nothing but the Draft was made.

When submitting the Draft Law to the Government for adoption, the Ministry ignored the provisions of Art. 35, para 2 and para 3 of the Rules of Procedure of the Government, which stipulates that "**the proponent shall, along with a proposal for a law, submit a report on the public debate which was conducted in accordance with the Government's regulation**", and that, **"along with the proposal for a law on which public debate was not conducted, the proponent shall submit an explanation why the public debate was not conducted**." In this case, it is not even a proposal, but a draft law.

The Government may, in accordance with the provisions of Art 35, para 3 of its Rules of Procedure, and only in the case when a Ministry submits a proposal for a law (not a draft) on which public debate was not conducted, "**adopt it as a draft and oblige the proponent to conduct a public debate, in accordance with the Government regulation**". In this case, the Ministry did not submit a proposal to the Government, but a Draft Law and, therefore, there was no legal basis for the Government to adopt a

Draft Law as a draft and, after that, for the Ministry to conduct a public debate on the Draft Law.

Given that the Ministry submitted to the Government a draft on which, at the time of submission, a public debate was not conducted, it can be concluded that in this case the provision under Art. 36 of the Government Rules which stipulates that "**the Government may submit to the Parliament a law regulating issues of special importance in a form of a draft law**" was not obeyed. In this case, the Draft Law was not submitted to the Parliament by the Government, but the Ministry, after the Draft was adopted by the Government, outside its competence, began the process of conducting public debates.

The abuse of authority and violation of binding regulations by the responsible persons in the Ministry, primarily the Minister himself, who is, pursuant to Art. 4, para 1 of of the **Law on State Administration**, responsible for his own and the performance of the Ministry, led to a situation where the Draft Law was adopted by the Government outside its competence and the due process, and not by the Ministry, within its competence and in the manner prescribed. In addition, after adopting the Draft Law by the Government outside its competence, the public debate programme was decided by the Ministry, which did not adopt the Draft Law, and not the Government which adopted it!?!

At the 122nd session of 30 July 2015, when the Draft Law on Freedom of Religion was adopted outside its competence, The Government of Montenegro adopted the Conclusion no. 08-1942 and in item 3 thereof it entrusted the Ministry for Human and Minority Rights with "**preparing and submitting to the Government for its next session a proposal for the formation of expert teams that will follow the debate, as well as participate in the preparation of the Proposal for a Law on Freedom of Religion**".

However, due to the negligence and failure of the Ministry to fulfill the obligations laid down, at its 124th session of 27 August, the Government had to adopt the amendment to the previously adopted Conclusion. The amendment to the Conclusion stated that "**the Minister for Human and Minority Rights is entrusted to form an expert team that will follow the public debate and**

participate in the preparation of the Draft Law on Freedom of Religion".

From the above-mentioned, it is concluded that the Ministry did not fulfill the obligation within the prescribed period, that is, for the 123rd Government Session of the 20th of August it did not prepare and submit for approval a proposal for the formation of expert teams. The Ministry did not inform the interested public for what reasons it had not fulfilled the prescribed obligation. It is particularly concerning that even in the phase of the public debate on the Draft Law the importance of expert support is so downgraded.

The Ministry did not adequately implement item 5 either, of the Conclusion of the Government of July 30. The Ministry was instructed to "**before, during and after the public debate on the Draft Law on Freedom of Religion, in order to harmonize views on the preparation of the Proposal for the Law on Freedom of Religion, maintain direct communication with representatives of religious communities**".

The aforementioned indicates that the Ministry for Human and Minority Rights persists in violating the established procedures for the preparation of legislation and thus threatens the very foundation of the rule of law and legal security of citizens. A wise Latin proverb "Quod ab initio vitiosum est, non producit effectum" (translated beautifully by our pioneer 19th century jurist Valtazar Bogišić) is fully applicable to the process of preparation, drafting and adoption of the Draft Law.

Given that the Draft Law was prepared in a non-transparent and highly discriminatory manner, and that it was adopted in contravention of the Rules of Procedure of the Government, we suggest that the draft law be withdrawn from the procedure in its entirety, and then, in accordance with the applicable rules and past practice, proceedings be instituted for preparing and adopting the draft law so as to eliminate the irregularities in the previous procedure and forestall adverse consequences.

III REMARKS ON THE TITLE OF THE DRAFT LAW AND THE TERMS USED IN THE DRAFT LAW

The title of the draft law does not correspond to its content. It contains only the freedom of religion to which the fewest provisions are dedicated, and the legal status of churches and religious communities is dropped out although most of the provisions are dedicated to it. It is true that freedom of religion is a human right that citizens can use individually or collectively. There is no doubt that the manner of use, as well as the content, scope and limitations of the right to freedom of religion, regulated by Art. 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and Art. 46 of the Constitution of Montenegro, should be regulated by law in more detail. However, the question of defining the legal status of churches and religious communities is an entirely different legal issue. This is the issue to which the greatest attention is paid in the Draft Law, but that matter as the most important and the most comprehensive is excluded from its title, which makes it not only unacceptable but also humiliating for our Church and all other communities that are organized as churches.

The title of the Law is also not in accordance with the legally binding Legal and Technical Rules for Drafting Regulations of the Secretariat for Legislation of 2010 (hereinafter referred to as the Rules). According to the Rules, the title of the law "**should be short and express in concise terms the subject matter it governs**". In this case, the title is short, but it does not express the subject matter the law governs. For lawyers there should be no dilemma when choosing between the brevity of the very title of a regulation and the conciseness of expression of the subject matter it governs (as an example we provide a longer title of the **Law on the Provision of International Legal Assistance in Criminal Matters,** which, despite containing more words, succinctly expresses the matter which regulates).

There is no doubt that Art. 14 of the Constitution of Montenegro defines the term "religious community". There is no prohibition or restriction nor a rational reason because of which the title and the text of the law should not contain the term "church".

There are several existing regulations in Montenegro, which contain the term "Church". The makers and the proponents of the Draft Law ignored the obligation under the Rules of mandatory use of the terms and phrases that are already contained in other laws while drafting a new law.

There are three traditional religions in Montenegro (Orthodoxy, Roman Catholicism and Islam) of which two are churches and one is a religious community. There are also several smaller religious communities, which are also organized as churches. It is an undeniable fact that the largest number of believers in Montenegro are institutionally organized within churches. This fact needs to be recognized as indisputable. We point out that the legal term "religious community" is not acceptable for the Orthodox Church in Montenegro, because it changes and infringes its identity, its historical continuity and legal personality. The Church is, in the expression, presented in a wrong and unacceptable context that offends the religious feelings of its clergy, monkery and congregation. In the proposed method, the term "Church" is legally banished from the legal system of Montenegro, which, perhaps, was one of the intentions of the makers and proponents of the Draft Law.

Freedom, in all its segments, as a God-given, natural right of man cannot depend on the adoption of a law. This can be seen from the legal system of Montenegro where there is no law on freedom of expression, law on freedom of assembly, freedom of the press law, law on freedom of creativity etc.

***Proposal*: The title of the law should be amended as follows: *the Law on Freedom of Religion and Legal Position of Churches and Religious Communities*.**

IV REMARKS ON THE STRUCTURE OF THE DRAFT LAW

The structure of the Draft Law is not in accordance with the applicable Rules (Chapter I – drafting regulations; subchapter 2 – systematics of laws) which, in terms of the structure of the law that is being prepared, stipulates that "the content of a law must be

classified by systematizing the provisions by their similarity, according to the following schedule:

a) basic provisions;
b) central provisions;
c) penal provisions;
d) transitional provisions, and
e) final provisions."

The proposed Draft Law consists of 6 chapters:

I – Basic Provisions;
II – Registration of religious communities;
III – The rights and obligations of registered religious communities and their believers;
IV – Religious instruction and religious schools;
V – Penal provisions;
VI – Transitional and final provisions.

If we bear in mind the structure of the Draft Law a question arises of which chapter is the chapter with the central provisions. And, does the Draft Law contain one chapter with the central provisions or is there more than one such chapter? This fact speaks for itself, and the analysis of the content of particular provisions in the text that follows confirms strongly to what extent are the makers and the proponent of the Draft not only strangers to the matters concerning churches and religious communities, but also to the very legal order which entrusted them with carrying out public duties, including the public authority for initiating, preparing and proposing to the Government draft laws within the scope of their competence.

How is it possible for a draft law not prepared in accordance with the binding Legal and Technical Rules to enter a procedure for adoption at the Government session of July 30, 2015. Is it possible to conduct a public debate on such a draft law? What is the point of a public debate when even experts in nomotechnics cannot with certainty determine which of the three separate chapters (except for general, penal and transitional and final provisions) of the Draft Law is the chapter with the central provisions?

This is a unique case in drafting legislation in Montenegro for a draft law to have three chapters with the central provisions

instead of one, of which, it seems, "the most central" appears to be the chapter with the penal provisions. How can a draft law be discussed in which all the provisions of the chapter with the basic provisions are the subject matter of the chapter with the entral provisions? In addition, what should be the subject matter of the chapter with the basic provisions does not appear in other chapters, and even if it did – it would be in the wrong place.

Throughout the entire text of the Draft there is no clearly defined subject matter to be governed by the law; there are no principles (not even the principle of separation of churches and religious communities from the state) based on which the subject matter is regulated; the relations of this act with other laws within a single legal system are not defined, and the meaning of the terms used is also never defined.

In addition, the makers and the proponents of the Draft Law, judging by its content and structure, seem not to know that a chapter with the central provisions may contain the so-called subchapters. The Draft Law does not contain a single sub-chapter, and there should have been, in our view, at least five or six of them.

The makers and the proponents of the Draft Law were apparently also not aware of the fact that, in line with the Rules, the central provisions should be systematized according to an established and binding schedule as follows:

1) substantive provisions (rights and obligations, prohibitions, competences, that is, powers, as well as mutual relations between the subjects of the rights and subjects of the obligations);

2) provisions on the exercise of rights and fulfillment of obligations prescribed by law (procedural provisions);

3) organizational provisions (establishment of appropriate organs and bodies if it is provided for their establishment and their competence);

4) Provisions on supervision (determination of the state administration responsible for the supervision, etc.), and

5) other provisions depending on the nature of relations that are regulated.

The structure of the draft law is not prepared in accordance with **the Legal and Technical Rules, which we will demonstrate**

in the following text, thereby rendering the proposed Draft Law completely unacceptable in legal and technical terms, and for that reason also, it should be withdrawn from the procedure while the work on a new draft law in a new, transparent and non-discriminatory procedure should be entrusted to legal experts.

V REMARKS ON THE BASIC PROVISIONS OF THE DRAFT LAW

The basic provisions chapter of the Draft Law comprises 12 articles. Most of the provisions of the Draft Law show how the ordering authority (the Ministry) and the makers (the Working Group members) see the exercise of the right to freedom of religion and the status of churches and religious communities in the state and society. The spirit of most of the provisions of the Draft Law does not correspond to the historical importance and social role that churches and religious communities have had in the Member States of the European Union. The provisions of the Draft Law are rigid and in complete contradiction with the statements of the Ministry officials concerning regulation of relations with churches and religious communities in a modern way.

The abovementioned assessment that the Draft Law has not been prepared in accordance with the Legal and Technical Regulations is also confirmed in the chapter with the basic provisions. The Rules stipulate that the chapter with basic provisions should "**determine the content of the law in general terms, and, where appropriate, the principles underlying the relations in the area the law governs; regulate the relation of the law with other laws and regulations within a single legal system and provide explanation for certain terms used in the law, if necessary.**"

All the provisions, which according to the Rules should not be in the chapter with basic provisions, found their way into it, but what is missing conspicuously are the very provisions that should have been in this chapter. Instead of the principles, instead of the regulation of the relations between the law and other laws within a single legal system of Montenegro and the explanation for the

terms and expressions used, the chapter with the basic provisions of the Draft Law defines the rights and the concept of religious communities, sets the framework for their internal autonomy, prescribes obligations, determines the way of operation of religious communities, introduces bans and restrictions, regulates the issue of their internal organization and seat, provides for the possibility of signing an agreement with the state and determines the body that will oversee the implementation of the law!?!

The abovementioned alone is sufficient for the Draft Law to be withdrawn from procedure due to its non-compliance with the Legal and Technical Rules of the Secretariat for Legislation, which are binding for ministries during preparation of regulations.

Art. 1 of a law should, according to the Rules, always express, in general terms, the content of the law, i.e., matters which the law regulates and the relations governed by the law. Instead, Art. 1 of the Draft Law prescribes the manner of exercising the freedom of religion which is in absolute contradiction with the Rules.

Art. 2 of the Draft properly regulates the right to conscientious objection, but that provision has no place in the chapter with the basic provisions.

Art. 3 para 1 of the Draft regulates the right of citizens "of the same religion to manifest their faith by establishing a religious community". Neither should that provision, nor the others of the same Article be in the chapter with the basic provisions. In terms of the content of this provision, the objection is that it limits the right of citizens to only those citizens "of the same religion" to establish religious communities. In this way, without any reason and need it prescribes a restriction that is contrary to the nature and content of the right to freedom of religion in accordance with Art. 9 of the **ECHR** and Art. 46 of the **Constitution of Montenegro**.

The provision of Art 3 para 1 of the Draft Law cannot be considered without linking it with the provision of Art. 15 of the Draft Law according to which a religious community can be registered only if it has at least 50 adult believers who are Montenegrin citizens and have permanent residence in Montenegro. All foreigners, including those who, in accordance

with legal regulations, have been granted temporary or permanent residence in Montenegro, are with the proposed provision unduly deprived of the right to freedom of religion in the collective aspect.

Item 2 of the same Article regulates the term "religious community". That provision is also out of place in the chapter with the basic provisions. In terms of its contents the objection is that it considers only those religious communites that are "being established" but not those that have already been established, existing and operating in Montenegro. Montenegro is not a country in which there are no churches and religious communities at the time of preparation and adoption of this law. The law-makers should respect the fact of the existence and acquired legal personality and make a clear distinction between those churches and religious communities that exist at the time of the enactment of the law, which have acquired legal personality and whose legal status is to be governed by the law and religious communities to be established in the future. They should also standardize the legal framework for the latter.

A "religious community" is defined as "a voluntary and non-profit association" which is an inadequate definition. First of all, instead of "an association" it should state "an organization" and along with non-profit and voluntary it should be added that churches and religious communities which within the performance of their religious services and activities advocate for spiritual values, human dignity in private and public life and social progress are also organizations that benefit the general public.

Art. 4 para 1 and para 2 of the Draft proclaims the freedom of religious communities to perform religious rites and religious affairs and defines their independence in decision-making on certain issues. This provision should have no place in the chapter with basic provisions. It has already been mentioned that some terms are objectionable, such as a "religious worker" and "interreligious" organizations. It is evident from these and other terms used in the Draft that the Working Group and the Ministry as the proponent of the draft are utterly unfamiliar with the area of religious life they are dealing with.

The term "religious worker" does not exist in the legal system of Montenegro. The positive law of Montenegro has long

used the terms “a priest and a religious official” and not a “religious worker”. According to the Rules, when drafting new regulations expressions should be used which already exist in other legislation. Unfortunately, neither is this area nor this part of the Rules familiar or known to the makers and the proponent of the Draft Law.

In addition, the term “interreligious organization" under Art. 4 para 2 and para 4 of the Draft Law is also unclear. It is undisputed that there are interreligious organizations abroad (e.g. The World Council of Churches, The Conference of European Churches, etc.), which is not the case in Montenegro. Judging by the proposed provisions, churches and religious communities in Montenegro can only link with “interreligious organizations”, but not with other churches and religious communities, which represents an unjustified and unacceptable restriction and interference in the internal autonomy of churches and religious communities in Montenegro. The proposed provision is contrary to the provisions of Art. 3 of the Draft Law.

For the Orthodox Church, Art. 4 para 3 of the Draft is also unacceptable which stipulates that “prior to the appointment, i.e. announcement of the appointment of the highest religious leaders, a religious community shall confidentially notify the Government of Montenegro (hereinafter: the Government) about that”. First of all, it is unclear what the makers and the proponent of the Draft meant by “the highest religious leaders”. This is also one of the negative effects of the fact that the chapter with the basic provisions contains no provision which explains the meaning of the terms used in the proposed regulation.

The proposed provision could only be acceptable for the Roman Catholic Church since there is no election but only appointment of bishops and archbishops. In the Orthodox Church, it is impossible to make such a commitment because bishops and metropolitans are not appointed but elected by the Holy Synod, which means that this procedure is entirely different from the method of appointment of Roman Catholic bishops.

The inapplicability of this provision is best seen in the example of the recent election (not the appointment) of the Reis of the Islamic Community. The public and the media had learned of this election before the Government knew of it although in

accordance with the Agreement with the Islamic Community the Government should have been informed about the election of the Reis on a confidential basis, that is, prior to the announcement of the name of the selected candidate. The question arises: What is the consequence of the act and what are the sanctions because the public and the media were informed about the election before the Government? Why is it so, given the enormous number of sanctions in the Draft, that in the penal provisions (Chapter V) a fine or other penalty is not prescribed for violating the provision?

An obligation cannot be imposed by this law on all churches and religious communities that only the Roman Catholic Church is able to fulfill due to the nature and methods of performing this process, which, of course, should be respected in terms of its internal organization. For this reason, such a provision (in a place where it belongs, not in the chapter with basic provisions) must be reformulated in such a way that churches and religious communities shall inform the Government of Montenegro in an appropriate manner and out of respect of the election or appointment of dignitaries. An article explaining the meaning of the terms used should be added whereby it is explained that dignitaries are the Metropolitan, the Orthodox Bishop, the Roman Catholic Archbishop, the Roman Catholic Bishop, the Reis, etc.

Art. 5. is also out of place in the chapter with the basic provisions. It cannot read “its own autonomous regulations” but either “its own” or “autonomous” regulation.

Art. 6 also does not belong to the chapter with the basic provisions but the chapter with the central provisions. The makers and the proponent of the draft are unfamiliar with the provisions of the Law on the Protection of Cultural Heritage (“Official Gazette of Montenegro", no. 49/10). The proposed provision regulates the “goods representing the cultural heritage of Montenegro”. However, the makers and the proponent of the Draft Law do not know the meaning of “cultural heritage” under the Law on the Protection of Cultural Heritage. In Article 11, para 1, item 9 of the Law on the Protection of Cultural Heritage, cultural heritage is defined as “a set of property inherited from the past which people recognize as a reflection and expression of their values, beliefs and traditions, which are constantly evolving, including all aspects of

their surroundings resulting from the interaction between humans and nature in time, regardless of the ownership".

The legal concept of cultural heritage confirms to what extent the makers and the proponent of the Draft are not familiar with the legislation of Montenegro. The applicable recently adopted Law on the Protection of Cultural Heritage does not provide for the prohibition of taking away of cultural heritage but the protected cultural property which is by decision of the competent authority and in accordance with the legislation under a special legal regime. Bearing in mind what it means in a legal sense, even if someone had the intent and desire to take it away, cultural heritage could not possibly be alienated nor taken out of Montenegro. Also, it is unnecessary to repeat in this Draft provisions from other laws which regulated the relations in a much better way. This is, unfortunately, also not known to the makers and the proponent of the Draft Law. A particular problem arises when the proposed provisions of the Draft drastically alter the provisions of the Law on the Protection of Cultural Heritage, which does not fall within the domain of the competence of the Ministry for Human and Minority Rights, but the Ministry of Culture.

The entire Art. 7 of the Draft should be deleted from the chapter with the basic provisions. It should be in the chapter with the central provisions instead. As for Para 1 of this Article it is clear what is meant by "legal system" and "public order", but not at all clear what, in terms of the proposed provision, constitutes "public morality". There was no reason to devote adequate attention to this issue here.

It should be borne in mind that churches and religious communities, especially traditional religions in Montenegro, cherish their own moral teachings. What is meant by "public morality" today in many ways represents the very negation and abolishment of all the fundamental moral teachings of the Orthodox Church and other traditional churches and religious communities in Montenegro.

The proposed provision, formulated in this way, essentially means that churches and religious communities would have to put their moral law second to "public morality" which is increasingly based on immorality and all that is directly opposed to the

primordial moral law and ethics of man and human society. This is also interfering with the internal autonomy of churches and religious communities. For this reason, the term “public morality”, because of its opposition to the moral law of the Church, as well as the moral laws of other traditional religious communities to which the majority of believers in Montenegro belong, should be omitted because it is quite enough for the state and society that churches and religious communities act in accordance with the legal system and public order.

Art. 7, para 2 of the Draft Law has not been adequately formulated, as in this way it prohibits churches and religious communities from even comparing the differences in their own belief in relation to that of other religions and religious communities. The proposed provision is more than humiliating for churches and religious communities, primarily those traditional ones in Montenegro, because in this way they are, in fact, treated as potentially socially dangerous organisations to be prevented from acting "to the detriment of other rights and freedoms of believers and citizens".

Churches and religious communities are, in this way, in fact, denied the right to religious preaching and spiritual enlightenment of their faithful, and even protection from the aggressive missionaries and propagators of the destructive, god-opposing and man-opposing satanic sects. In practice, this could, for example, mean that the representatives of the Islamic Community would not have the right to preach against Wahhabism and radical Islamism, as acting to that an effect could be regarded as "action against another religious community or religion", which would be "to the detriment of other rights and freedoms of believers and citizens" – according to the solutions proposed in the Draft Law.

In Art. 7, para 3 of the Draft Law, the makers and the proponent of the Draft Law have, at the turn of the 21st century, revived the so-called **Kanzlerparagraph**, Bismarck’s legacy from the late 19th century, in combination with the provision taken from the socialist Constitution of 1974. The area of political activity is already regulated by the Constitution and the relevant laws. Pursuant to Art. 54, para 1 of the Constitution of Montenegro, political organisation is only prohibited in state bodies, which

means that the provision proposed in Art. 7, para 3 of the Draft Law, is contrary to the constitutional provision mentioned above. On the other hand, priests and religious officials who are adult citizens of Montenegro and who have at least two years of residence in Montenegro, have active and passive voting rights. The provision given in Art. 7, para 3 of the Draft Law entails drastic, flagrant and unconstitutional infringement of the political rights and freedoms of priests and religious officials as a target and targeted population of Montenegrin citizens. Beside the fact that the proposed provision is in conflict with Art. 45 and Art. 54, para 1 of the Constitution of Montenegro, it is also in contradiction with Art. 8, para 2 of the Draft Law, which provides that "no one can be prevented, on account of being member of a religious community, to exercise the rights which he/she has as a citizen under law." This is a textbook example of the inner collision of the norms stipulated in two articles, which are situated next to each other (Art. 7, para 3 and Art. 8, para 2 of the Draft Law).

In addition, the whole Art. 8 of the Draft Law has no place in the chapter with the basic provisions – it should be located in the chapter with the central provisions. It is not disputed that such a provision can exist, at an adequate place, but it should be written in a better style and without the cumbersome expressions.

Art. 9 of the Draft Law also has no place in the chapter with the basic provisions – it should be located instead in the chapter with the central provisions. This provision is already regulated in the **Law on Prohibition of Discrimination** ("Official Gazette of Montenegro", no. 46/10 and 18/14). It is not clear whether the proposed provision applies to the prohibition of discrimination within the churches and religious communities and their internal, autonomous affairs, or to citizens who are to be protected from discrimination on account of their religious beliefs. The question is: **are only the churches and religious communities recognised as centres of inciting religious hatred and intolerance in the Montenegrin society? Why doesn't Art. 9 of the Draft Law prohibit spreading anti-religious hatred and intolerance as well?**

Neither should Art. 10 of the Draft Law be positioned in the chapter with the basic provisions; rather, it should be part of the

chapter with the central provisions. It is evident that the spirit of the Draft Law rests on the anti-religious view that religion is exclusively a "private matter of man." Bearing in mind Art. 46, para 2 of the Constitution of Montenegro, which stipulates that "no one is obliged to declare their religious or other beliefs", the question is whether it is meaningful to have such a provision in the Law. This provision is imprecise as well, as it does not define who can collect and process data on the religious beliefs of individuals, i.e. whether this applies to churches and religious communities or government bodies. Churches and religious communities always have an individual before them with his/her religious beliefs and, while performing certain religious rites at the request of the faithful, such as baptism, wedding or other ceremony, they take information for the purpose of keeping church records, in accordance with their internal rules. The makers and the proponent of the Draft Law are not aware of the fact that religious beliefs can change, especially through theological reflection and discussion, while remaining, at the same time, within the same religion.

Neither should Art. 11 of the Draft Law be in the chapter with the basic provisions; rather, it should be part of the chapter with the central provisions. The provision stipulated in para 1 of this article flagrantly interferes with the internal structure, ie. the internal autonomy of churches and religious communities. This provision is contrary to the provision given in Art. 4, para 2 of the Draft Law, which defines the freedom of a religious community to decide, among other things, on its internal organisation.

In the legislation of modern European states, there are no such provisions which infringe on the internal organisation issues of churches and religious communities. Nowhere in the legislation of modern European states can one find the term "territorial configuration of a religious community." The term configuration is commonly used to denote terrain, and cannot be applied to churches and religious communities as they have no territorial configuration but, instead, inner structure. The proposed provision, in fact, denies the principle of territoriality as the essential property of a state. Thus, contrary to legal logic and legal principles, we are dealing with an attempt to re-define the religious relations inside and outside the territory of Montenegro.

On the same grounds and the same ambition rests Art. 11, para 2 of the Draft Law, which stipulates that "the seat of a religious community which is registered and operates in Montenegro must be in Montenegro." Of the five words in the second part of the paragraph, two refer to Montenegro, which in itself speaks of the complete absence of style and legal-technical skills of the law-makers. This provision too blatantly interferes with the internal affairs of churches and religious communities, and, also, by denying the principle of territoriality, it expresses the ambition to regulate the relations in other countries. The inapplicability of this provision is best reflected in the example of the Roman Catholic Church, whose seat is in Vatican. In this way, the applicable provisions of the **Law on Ratification of the Fundamental Agreement between the Government of Montenegro and the Holy See from 2012** are derogated.

Just after such a provision, Art. 12 of the Draft Law, which does not belong here either, defines the possibility of signing an agreement between the government and a religious community. No provision of the Draft Law defines the status of the three agreements from 2011 and 2012, which the Government of Montenegro signed with the Roman Catholic Church, Islamic and Jewish Communities. **What is the status of these agreements in relation to the proposed law?** Also, there are no provisions defining the need that the agreements to be signed between the Government and a church or religious community, must comply with the laws and legal order of Montenegro. There is no doubt that numerous provisions of the Draft Law are contrary to the provisions of the three above-mentioned agreements signed by the Government of Montenegro. **The proposed provisions of the Draft Law completely make void and derogate the three agreements signed by the Government and one church and two religious communities, and that was, by all accounts, the very aim of the makers and the proponent of the Draft Law.**

And, at the end of the chapter with the basic provisions, in Art. 13, the Draft Law defines that the supervision over the implementation of the law falls under the competency of the state administration (ministry) for human rights and freedoms. The rules of the Secretariat for Legislation clearly stipulate that the

provisions on supervision must be located in the chapter with the central provisions, not the chapter with the basic provisions. This provision should indeed have its place; it is a good solution that the overall competence, including the records, be transferred to the Ministry for Human and Minority Rights.

VI REMARKS ON THE CHAPTER "REGISTRATION OF RELIGIOUS COMMUNITIES"

This chapter, the second largest in the Draft Law, comprises 12 articles. Although the chapter is entitled "The registration of religious communities," it also contains the provisions on banning the activities of religious communities. In addition, the provision defining the order for conducting an investigation against a religious official somehow also found its way into this chapter, although it does not belong there either.

Again defying all logic, instead of starting the chapter by defining the churches and religious communities based in Montenegro, the makers and the proponent of the Draft Law started with a provision on churches and religious communities, i.e. their organisational units, based abroad. Article 14 of the Draft Law recognises two types of religious communities: "**religious community**" and "**organisational part of a religious community whose seat is abroad**". The Ministry is obliged to explain what the legal difference between the two types of religious communities is and why it has been introduced.

In addition, without any justifiable reason or need, this provision denies the legal personality of churches and religious communities in Montenegro acquired earlier in line with the applicable regulations, which means that all existing legal entities in the area of religious activities are formally and practically abolished. This provision essentially denies the public-legal personality of the Roman Catholic Church and civil-legal personality of the Islamic and Jewish Communities, which they acquired earlier in line with the law, and confirmed through the agreements signed with the Government of Montenegro.

The above provision does not define which legal status (public-legal or civil-legal) religious communities acquire when

entering the Registry of Religious Communities. Given that the Ministry opted for skipping this very important fact, the interpretation of the said provision is that all religious communities, including the Roman Catholic Church, will only be able to acquire the status of a civil-legal entity in the legal system of Montenegro after the entry into the Registry of Religious Communities. Bearing this in mind, it can be concluded that the stated provision is in conflict with Art. 2, para 1 and 2 of the **Law on Ratification of the Fundamental Agreement between Montenegro and the Holy See** ("Official Gazette of Montenegro – International Agreements", no. 7/12). If the proposed provision is retained in spite of these remarks, there will be unprecedented situation, i.e. the Roman Catholic Church will have two different legal personalities: civil-legal, under this Law, after entry in the Registry of Religious Communities, and public-legal, under the Law on Ratification of the Fundamental Agreement between Montenegro and the Holy See!?! Which of these two legal personalities of the institution, when and how, will apply? What kind of problems will this jumble of contradictions produce in legal transactions? All this shows how unfamiliar the makers and the proponent of the Draft Law are with the subject of laws of Montenegro.

It is not logical that Article 14, para 2 of the Draft Law finds itself here, either. Given that it establishes a system of registration for churches and religious communities, defining the Registry of Religious Communities as "public records" in paragraph 2 of this article is particularly problematic.

The provision stipulated in Art. 14 of the Draft Law establishes a new system, i.e. system of registration of religious organisations, as opposed to the present system of records. The registration system, in itself, is not problematic, if it respects the previously acquired legal personality of churches and religious communities. However, this is not the case. Such a provision makes all the so far acquired legal personalities of Churches and religious communities null and void, as well as the religious tradition and the history of Montenegro. Thus, the traditional churches and religious communities are unjustly deprived of their acquired and recognised rights. In short, the basic starting point for

the makers and the proponent of the Draft Law is based on the view that churches and religious communities do not exist as legal entities and that they should enter the process of registration as if they did not have a status of legal entities in the legal system of Montenegro, although they in fact have an earlier acquired and repeatedly confirmed legal personality. Apparently, the makers and the proponent of the Draft Law are not familiar with the maxim which dates all the way back to Valtazar Bogišić: **whatever you have lawfully acquired once, you cannot lose it even if the law should change**. In this case, as elsewhere in the Draft Law, this principle has been demonstrated to work to the contrary.

The provision proposed under Art. 14 of the Draft Law has nothing to do with the provision stipulated in Art. 51 of the Draft Law, which only declaratively states that the Ministry for Human and Minority Rights will take over the data from the Ministry of Interior on religious communities applied with that authority, within 30 days from the date of entry into force of this law. This provision does not provide for any rights of the religious communities which have previously applied to the MoI and thus acquired their legal personality, pursuant to Article 2 of the Law on Legal Status of Religious Communities from 1977, or which had legal personality before the date of entry into force of that Law.

Art. 14, para 3 of the Law is also mispositioned and we wonder how it found itself there in the first place.

The makers and the proponent of the Draft Law need to explain why they decided to abandon the current system of records on religious communities and introduce a new system of registration. What are the advantages and the disadvantages of both systems? Also, the public should get an answer to the question whether this concept of registration for churches and religious communities actually narrows down and unnecessarily restricts the collective aspect of freedom of religion, and why the legally acquired rights of churches and religious communities are abolished.

Bearing in mind both aspects (the individual and the collective) of the right to freedom of religion, as well as the importance of unrestricted exercise of that right and operation of churches and religious communities in a modern society and

democratic state, we are of the opinion that, for Montenegro, the better and more acceptable system is that of records on churches and religious communities.

The provision defined in Art. 15 of the Draft Law essentially confirms the aforesaid remarks. This provision stipulates four conditions for registering a religious community and acquiring legal personality: existence of at least 50 believers, of legal age, with Montenegrin citizenship and residence in Montenegro. These conditions are cumulative.

The proposed provision deprives foreigners with temporary residence in Montenegro of the right to establish a religious community and adequately exercise the right to freedom of religion, which is contrary to the **European Convention for the Protection of Human Rights and Fundamental Freedoms.** Also, the right to religion is denied to foreigners without the approved temporary residence in Montenegro, which is not in line with the European Convention and also the **International Covenant on Civil and Political Rights**. Bearing that in mind, it is superfluous to say that also the asylum-seekers are denied the right to freedom of religion in Montenegro. It is quite clear that, contrary to the Conventions and the Constitution of Montenegro, the Draft Law allows certain people – the citizens of Montenegro, but not all people, the right to religion in individual and collective aspect.

Whereas Art. 13 of the Draft Law extinguishes the earlier acquired legal personality of churches and religious communities in Montenegro, Art. 14 of the Draft Law discontinues and negates the historical and spiritual continuity of churches and religious communities, especially those traditional ones, which have existed for centuries with their legal personality. Naime, historical and still existing churches and religious communities, which have kept their historical identity, continuity and legal personality, are negated by such a provision and forced to be founded again and "registered" so as to acquire what they have had for centuries – their legal personality.

For example, it is an indisputable fact for all historians that the Zeta Episcopacy, the later Zeta and Montenegrin Metropolitanate, as well as the Metropolitanate of Budimlje, were founded by Saint Sava in 1220, in the area of the today's

Montenegro. However, with the stated provision, such indisputable historical facts are denied and the orthodox episcopies find themselves in a situation to have to be founded again, although they were founded 800 years ago, in order to acquire a new legal personality despite having the earlier acquired legal personality. As envisioned by the makers and the proponent of the Draft Law, their founders would be deleted and replaced by new ones – 50 adult believers with Montenegrin citizenship and residence in Montenegro.

The same situation is, for example, with the Archdiocese of Bar, established in 1089 by a papal bull. Beside this historical fact and its rights confirmed in the legal system of Montenegro by the currently valid **Law on Legal Status of Religious Communities** from 1977 and the **Law on Ratification of the Fundamental Agreement between Montenegro and the Holy See** from 2012, the Archdiocese of Bar would have to be re-established for registration, i.e. it would have to re-acquire the previously acquired legal personality and this would have to be done by 50 adult believers who have Montenegrin citizenship and residence in Montenegro. The same is the case with the Diocese of Kotor and the Islamic Community, as well as the recently established Jewish Community.

Therefore, pursuant to Art. 16, para 3 of the Draft Law, at least 50 persons who meet the prescribed requirements will have to, despite the existence of previous, historic and legally confirmed decisions and facts testifying to their centuries-long existence, make a new decision on the establishment of metropolitanate, archdiocese, diocese and meshihat. The proposed solution additionally directly interferes with the internal organisation of the Orthodox Church, bearing in mind that metropolitanates and dioceses are founded by the Holy Synod of Bishops, and not citizens. The same is with archdiocese and diocese, as these are founded by a decision of the Pope and not citizens everywhere in the world. The proposed provision denies the application of autonomous regulations of churches and religious communities and flagrantly interferes with their rights and freedom to make independent decisions on their internal organisation from Art. 4,

para 1, item 1 of the Draft Law, so, in this case, we have a textbook example of the inner collision of norms.

Art. 16, para 1 of the Draft Law, although mispositioned according to the Legal and Technical Rules, provides that the registration process is initiated by submitting an application. The makers and the proponent of the Draft Law are not familiar with the fact that the registration system requires requests to be submitted, whereas the system of records requires applications to submitted – there is an important difference between request and application for both lawyers and non-lawyers. Thus, according to the proposed provision, the registration process is initiated by an act which is specific to the system of records.

Secondly, the administrative procedure (the registration procedure is regulated by the rules governing administrative procedure) is initiated at request or *ex officio*, not on application. It is obvious that the makers and the proponent of the Draft Law are not only unaware of the provisions of the current **Law on General Administrative Procedure** (in effect until 1 July 2016), but they are also unfamiliar with Art. 98 of the new **Law on Administrative Procedure** (whose implementation starts from 1 July 2016 in Montenegro). Hence, it is more than inappropriate that Art. 25 of the Draft Law should stipulate that "the issues not regulated by this law shall be governed by the provisions of the law regulating the administrative procedure". The proposed provision of the Draft Law would result in a situation in which initiating the procedure for registering a religious community would be regulated in a manner contrary to the manner provided by the Law on Administrative Procedure. This is also a case of the inner collision of the Draft's norms. On account of the aforesaid, the authorised representative of a church or religious community cannot submit an application for entry to the competent ministry for the purpose of registration, as the Draft Law wrongly foresees, and instead must submit a request.

Art. 16, para 2 of the Draft Law prescribes requirements which an application for registration must contain. It is evident that these provisions have been copied from the laws of other states. The conditions should be carefully reformulated. They even

require the representative of a church or religious community to have several personal signatures, not just one.

What is meant in the Draft Law by the obligation to submit the "basic religious texts of a religious community in the authentic text" to the Ministry? What do the makers of this Draft Law mean by "authentic religious text"? Does this mean that the Orthodox and the Roman Catholic Churches must make an extra effort to find the oldest copy of Bible and submit it to the Ministry? Does this mean that the Ministry can assess that it is not an authentic text? Does this mean that the Orthodox Church should submit dozens of its basic religious texts to the Ministry – the Scriptures, the Canons of the Holy Apostles, Ecumenical and Local Synods, and the Holy Fathers, 12 menaia, 2 octoechos, 3 triodia, a typicon, church rubric, book of prayers, book of needs, missal, canon and other books of divine service containing fundamental texts underlying the orthodox faith? Who will read these in the Ministry and assess whether they are authentic? Does the Ministry have the staff trained for such an activity? Will members of the Jewish Community in a special way, as befits, have to violate their religious rules when they bring the Jewish Torah and Talmud for review and reading in the Ministry? The same is true of the Koran and the Islamic Community.

The provision defined by Art. 17 of the Draft Law is directly inspired by the media speculation and ideological accusations that the Orthodox Church is not entered the system of records on churches and religious communities in Montenegro. Aside from the fact that the makers and the proponent of the Draft Law are unaware of the fact that the Mitropolitanate submitted an application to the competent authority – Ministry of Interior of Montenegro, informing it on the existence and activities of the Orthodox Church in Montenegro (application no. AEM 361 dated 7 March 2012; record no. from the Ministry 01-08/12-3538 dated 8 March 2012), it can be concluded that this provision too violates the internal authonomy of the Church and its right to its own internal organisation.

The proposed provision introduces additional obligations for the registration of churches and religious communities whose seat is abroad, which is not the case with the religious communities

existing in Montenegro which have not previously submitted an application to the competent authority, as the latter are not obliged to submit a decision of their competent authority to be entered in the Registry. It is evident that we are dealing with a conscious and deliberate attempt targeted at a single social group, i.e. the orthodox believers and their Church, who are thus being discriminated against.

The provisions stipulated from Art. 18 to Art. 23 of the Draft Law were made as if there were no Law on Administrative Procedure. Suffice it to cite an example from Art. 18 of the Draft Law, which prescribes a deadline of 60 days for passing a decision on registration of a religious community in the Registry. This period is inconsistent with the provisions of Art. 114 and 115 of the new **Law on Administrative Procedure**, which sets the deadline for passing a decision at 30 days from the initiation of the administrative procedure, and extends it to 45 days for complex administrative matters. If the Ministry does not decide within the deadline prescribed by the Law on Administrative Procedure, this will be the case of a positive presumption and the entry into the Registry will be considered completed.

The above said confirms that the makers and the proponent of the Draft Law are not sufficiently familiar with the legal matters and regulations in effect. For this and other reasons mentioned, all the provisions from Chapter II of the Draft Law (except for Art. 24 and 25) should be rejected and, applying the system of records, drafted again and placed appropriately so as to comply with the provisions of the binding international legal acts on human rights, Consitution of Montenegro and the applicable laws.

VII REMARKS ON THE CHAPTER "RIGHTS AND DUTIES OF REGISTERED RELIGIOUS COMMUNITIES AND THEIR BELIEVERS"

The Draft Law obviously makes a distinction between registered and unregistered religious communities. A huge problem with the Draft Law is the fact that there are no provisions regarding the non-registered religious communities (except for the

prohibition of their work as per Art. 21, para 4 of the Draft Law). There is no rational explanation as to why the makers and the proponent of the Draft Law have neglected this important issue, especially if one takes into account the fact that many religious movements and communities (especially the satanist sect, the Wahhabi movement, etc.) act without any apparent intention of acquiring legal personality. Such destructive religious groups have very often acquired their legal entity by registering in line with the legislation on non-governmental organisations and civil associations, so as to enable the flow of money and acquisition of property. Why is there no provision prohibiting religious activity through other organisational aspects such as non-governmental organisations? This also shows that the makers and the proponent of the Draft Law are insufficiently familiar with the complex matter of different forms of religious activity in modern societies and states (a sufficient example is that of the NGO "Christian Movement" from Podgorica, for which it is not known whether it is a non-governmental organisation or a religious community, because it is a non-governmental organisation in its form, but it shows elements of a religious organisation in its mode of operation).

Unregistered religious communities, as noted in the Draft Law, should be given due attention in the regulation, as there are many formal-legal and practical ways in which they can achieve many rights in the legal system without any knowledge of the competent ministry about it. Instead, Art. 21, para 2 and 3 of the Draft Law foresee a procedure for the prohibition of activities of churches and religious communities in the same way as for non-governmental organisations. This is the measure which is foreseen for churches and religious communities, including those historical one, by the Draft Law.

On the other hand, the Draft Law stipulates the rights and duties of registered religious communities. This chapter, although mispositioned according to the Legal and Technical Rules (it should have been a subsection of the chapter with central provisions), contains provisions which are adequate and reasonable, but are also in need of removing legal and technical

imprecisions (Art. 29, 30, 31 /without para 5/, 32, 35, 36, 37 /without para 2/, 38, 39 and 40 of the Draft Law).

Art. 26, para 1 of the Draft Law stipulates that a religious community, inter alia, may generate revenue from "international religious organisations whose member it is". Why are churches and religious communities deprived of the right to receive revenues from international religious organisations whose members they are not? It is not clear either why revenues may only be received from international religious organisations and not other international organisations. This provision actually prohibits churches and religious communities from receiving donations from abroad, even from international organisations which are not religious in nature. Such a prohibition is not adequate for a democratic society and state which tends to develop international cooperation at all levels. The proposed prohibition did not exist even in the time of communism.

Pursuant to Art. 26, para 2 of the Draft Law, religious communities are obliged to keep records of the funds they generate for performing their activities. Neither could have such a provision been found in the laws of the socialist period. The proposed provision interferes with the internal affairs of churches and religious communities, which are already regulated by their autonomous regulations. Besides, what is the meaning of this provision in case a church or religious community does not fulfil the said obligation? On the one hand, this obligation is prescribed for churches and religious communities, and, on the other hand, no penalties are prescribed for a failure to fulfil it. The approach demonstrated clearly indicates the intention of the makers and the proponent of the Draft Law to disturb churches and religious communities in performing their regular spiritual mission and religious activities. From a legal point of view, it is superfluous to say that this provision too lacks system quality.

Art. 27, para 2 of the Draft Law stipulates that the assets of religious communities can only be used for religious and charitable purposes. This provision also blatantly interferes in the internal autonomy of churches and religious communities in Montenegro. On the other hand, it introduces an unjustified restriction to churches and religious communities as legal entities in the legal

system of Montenegro. This Law cannot prevent churches and religious communities with the status of legal entities to exercise their rights arising from other regulations. The proposed provision essentially negates the rights of churches and religious communities as legal entities. Judging by the numerous provisions of this Draft Law, churches and religious communities may only acquire the status of legal entities so as to be controlled by the state in all respects, even in their internal affairs. Such an approach denies all existing legal principles and legal institutes.

Art. 28, para 1 of the Draft Law provides that the immovable and movable property owned by a religious community be entered or registered in the name of a religious legal entity based in Montenegro. This provision expresses the ambition of regulating property relations contrary to the provisions of the **Law on Property Relations** ("Official Gazette of Montenegro", no. 19/09) and the **Law on State Survey and Cadastre** ("Official Gazette of Montenegro", no. 29/07 "Official Gazette of Montenegro", no. 32/11, 40/11 and 43/15). What do the makers and the proponent of the Draft Law mean by "movable property owned by religious communities" which should be entered or registered in the name of religious legal entities based in Montenegro? Apart from cars and obtaining license plates and traffic licenses, there are no other movable properties owned by religious communities which are registered or entered in the name of religious legal entities. With what state authority are the movable properties of churches and religious communities to be registered or entered? Does this mean that churches and religious communities should register, i.e. enter their books, vestments, crosses, gospels, epitrachelia, car tyres, office desks, chairs, shelves etc., with some other, still unknown, state authority? The makers and the proponent of the Draft Law seem not to know that the churches and religious communities are already registered as holders of property rights to the largest number of their immovable properties, all in accordance with legal regulations. The provision is not harmonised with the legal system of Montenegro. The proposed provision is inspired by false allegations spread by some media that the Orthodox religious buildings and other immovable properties belonging to them, are registered in the name of the Patriarchate of Belgrade in the public

cadastral documents of Montenegro (although they are not), instead of being entered in the name of the Metropolitanate and the Diocese as legal entities in Montenegro. Instead of determining the actual state of the matter from public records, the makers and the proponent of the Draft Law have relied on media reports and ideologically driven statements of the irresponsible individuals, which speaks volumes of the quality of preparations undertaken by the Working Group in charge of drafting this regulation.

Art. 28, para 2 of the Draft Law stipulates that the "right of use" of the immovable and movable property owned by the state can also entered in the name of a religious community. Judging by the proposed provision, it seems that the makers and the proponent of the Draft Law are unaware of the fact that, according to the applicable Law on Property Relations in Montenegro, the notion of the “right of use” no longer exists. This “right” existed in the socialist period, which was essentially opposed to ownership rights. In addition, this provision advocates the ideological and legally untenable thesis that the state is the owner of the property of churches and religious communities, which has no historical or legal basis.

Restrictiveness and rigidity are reflected in Art. 30 of the Draft Law as well. Bearing in mind that the proposed Draft Law regulates numerous relationships which fall under the competency of other laws, and does so contrary to the way they regulate them, then the question arises: why hasn’t the Draft Law, for example, proposed exemption of churches and religious communities from paying taxes, contributions and other duties?

In Art. 31 of the Draft Law we find the legal term "religious official", instead of the legal term "priest and dignitary", which has been deprived of its rightful place in the Law. The Draft Law recognises two categories of religious persons – religious workers and religious officials. What do these two terms mean? Who belongs to the first category and who belongs to the latter? Why is the term “priest”, apart from that of Church, denied the right of existence in the Draft Law? It is entirely possible that the makers and the proponent of the Draft Law considered that it would be "natural and logical" to delete the term "priest" in this law, as they

had already done so with the term "Church", because, as is known, there is no priest without the Church!

What is also problematic is Art. 31, para 5 of the Draft Law, which introduces the so-called positive discrimination for religious communities with a small number of members, in case of a possible allocation of funds from the state budget. The provision is vague and leaves an extremely large area to the competent authority to arbitrarily resolve such cases. What are the parametres and criteria of the competent authority to determine that a religious community has a small number of believers, bearing in mind the fact that for the registration purposes of each religious community, be it large or small, all that is needed are 50 signatures of the founders? How will the existence of a small number of believers of a religious community be determined, if 50 signatures of the founders are submitted at registration? The proposed provision creates opportunities for various forms of abuse when allocating funds from the state budget, which is something we have witnessed over the past years. For these reasons, we are of the opinion that this provision should have no place in the Draft Law.

Judging by Art. 33, para 2 of the Draft Law, the makers and the proponent are not famialir with the fact that, under current legislation, no licence is needed for adaptation in terms of the applicable laws. The proposed provision is contrary to the regulations governing the field of construction. Also, the proposed provision, contrary to the Law on Protection of Cultural Property, expands the jurisdiction of authorities responsible for the protection of cultural property to all religious objects, i.e. even those which are not protected by law and which do not have the status of protected cultural property by law.

Art. 33, para 3 of the Draft Law does not bring anything new, because it treats the consideration of the expressed religious needs for construction while developing spatial plans by the competent authorities. This question has already been regulated. The contribution of this Draft Law, had there been good will, could have been to stipulate that the obligation of the competent authority, when preparing spatial plans, is to make sure that the expressed religious needs are necessarily taken into account, if they

are not contrary to the public interest. Unfortunately, this is not the case here.

Art. 34 of the Draft Law stipulates that "religious community has access to public broadcasting media and other media, and the right to independently conduct its own information-providing and publishing activity on a non-profit basis, in accordance with law". In addition to abolishing the earlier acquired status of legal entities to churches and religious communities, which includes their right to establish their own publishing and information-providing institutions, the Draft Law, against all logic, legal principles and applicable laws, disables them also from taking part in the legal transactions and exercising their rights which arise from other regulations defining the information-providing and publishing activities for legal entities in Montenegro. The provision defined in Art. 34 of the Draft Law clearly demonstrates this with its discriminatory and civilisation-wise unacceptable content. The proposed provision simply makes it impossible for churches and religious communities to pursue their mission.

Art. 35 of the Draft Law narrows down the rights of churches and religious communities exclusively to establishing institutions for social and humanitarian activities. What are the motives and reasons why the makers and the proponent of the Draft Law decided to treat churches and religious communities in such a discriminatory manner? Why are churches and religious communities prohibited from establishing cultural, scientific, sport and economic institutions in line with the relevant laws? Does the stated provision actually require the abolishment of such institutions established earlier by the church and religious communities in line with the then applicable laws, which enjoy the status of legal entities in Montenegro?

Art. 37, para 2 of the Draft Law, which provides for the obligation of religious communities to keep records on the income of religious officials, is non-sensical as well. The proposed provision, for the umpteenth time in the Draft Law, interferes with the internal issues which are otherwise regulated by autonomous regulations. The proposed provision is unfeasible and unsustainable. What is the meaning of this provision and what are the legal consequences of non-fulfillment of the said obligation?

Does this obligation only apply to religious officials and not to priests?

Art. 39 and 40 of the Draft Law define the religious spiritual care in prisons and hospitals, which are defined as "individual and collective". The makers and the proponent of the Draft Law have an obligation to respond to the question: what is, in terms of the Draft Law, meant by "shared religious spiritual care"? Does this mean that the prison, hospital and social institutions, as well as the army and police units, should be converted into a polygon for propaganda and winning over believers by one or another church or religious community? Does this mean that all religious communities, especially if we take into account Art. 39 and 40 of the Draft Law, must necessarily be granted the right to conduct religious spiritual care in such institutions, even if they do not have their believers in them? This provision permits it, but the consequences are unforeseeable. Besides, this matter cannot be regulated a by-law – an instruction or a rulebook – but only by the law, which is not the case here; this, in addition to other shortcomings, represents a serious flaw of the proposed provision.

The provision from Art. 41 of the Draft Law, which envisages the control of the legality of generating and purposeful spending of the funds of religious communities also grossly interferes into the internal affairs of churches and religious communities. It is undisputable that the government can control the purposeful spending of the funds which it has granted, but this cannot apply to the funds which churches and religious communities have generated themselves. This provision too was inspired by ideological and antireligious texts depicting churches and religious communities as (semi)criminal organisations functioning beyond the legal framework of Montenegro.

VIII REMARKS ON THE CHAPTER "RELIGIOUS INSTRUCTION AND RELIGIOUS SCHOOLS"

This chapter is composed of 6 articles. According to the Rules, this chapter too could not be a separate chapter, but only a sub-section of the chapter with the central provisions.

Art. 42, para 1 of the Draft Law stipulates that religious instruction can be conducted only in the premises in which religious rites and religious affairs are performed. This provision, in fact, strengthens the prohibition of performing religious instruction in public schools which was introduced after the Second World War.

The proposed manner of instruction undermines the provision under Art 18, para 2 of the **Law on Ratification of the Fundamental Agreement between Montenegro and the Holy See**, which stipulates that "taking into account the multi-religious structure of the state, as well as the ongoing process of legal reform, the possibility of studying the Catholic faith in public schools may be regulated by a future agreement between the parties". In addition, the proposed provision, which was almost literally copied from Art. 17 of the Law on the Legal Status of Religious Communities from 1977, prohibits churches and religious communities from religious instruction in other premises and public venues (e.g. spiritual discussions, conversations about faith with young people, children's spiritual academy etc., as these activities belong to the religious education of youth).

If the provision from Art. 42, para 1 of the Draft Law is viewed in connection with Art. 44, para 1 of the Draft Law, which treats "registered religious community", then one can conclude that religious instruction can be performed by an unregistered religious community in the premises used for religious rites and religious affairs. This also speaks volumes of the proposed Draft Law and its lacking of system quality; it is superfluous to say anything of the consequences of the religious instruction performed by unregistered religious communities, most frequently those destructive ones, such as satanist sects, which are on the rise on the global and local level.

Furthermore, Art. 42 para 3 of the Draft is nothing but a literally copied Art. 18 para 3 of the Law on Legal Status of Religious Communities (1977). The way this provision has been worded humiliates the Church and religious communities, since, based on its content, one may infer that the Church and religious communities are against schools and education of children. Throughout the history of Montenegro, the Orthodox Church has

made an immeasurable and invaluable contribution to the development of literacy and education. Provisions of Art. 42, para 2 and Art. 43 of the Draft, as well as the provisions of paragraphs 1 and 3 from Art. 42 of the Draft, are not compliant with international acts on freedom of religion, as we have already pointed out in the remarks related to non-compliance of the Draft Law with those acts and international standards.

Art. 44 para 1 of the Draft stipulates that "registered religious community" can establish schools at all levels of education for the education of religious officials, except for primary education. Such stipulation imposes an unacceptable restriction on the rights of churches and religious communities with the capacity of legal entities in Montenegro. In this regard, the provision is discriminatory. The proposed provision, in fact, prohibits churches and religious communities from establishing other schools at secondary or tertiary (higher) education level in accordance with legal requirements in the field of education. This right has been recognized to churches and religious communities in many countries in the region and in the European Union (for example, in Zagreb there is the Orthodox Secondary School, founded by the Metropolitanate of Zagreb and Ljubljana, and this school is included in public schools of secondary education level). The aforementioned provision formally and in effect derides the capacity of churches and religious communities as legal entities in legal transactions.

The provision of Art. 44 para 3 of the Draft Law stipulates that educational syllabi, as well as subjects and textbooks in religious schools must not be in conflict with the Constitution and law. This provision is meaningless as well if one takes into account the starting point of the makers and proponents of the Draft Law according to which churches and religious communities will be vested with the capacity of legal entities only after the decision has been issued and entry in the Registry has been approved by the competent authority. This provision unveils the ultimate anti-civilization and anti-state perception of churches and religious communities, as it indubitably presupposes that religious school, founded by the Church or a religious community, are centers of

anti-constitutional and anti-state action where future enemies of the state of Montenegro are trained and educated!?!

With no real need or a substantial reason, the proposed provision of the Draft Law establishes one of many demonstrated mechanisms of state protection and maintenance of constitutional order, characteristic only of totalitarian regimes! And who are the "villains" the state should be protected from – churches and religious communities! The in-depth analysis reveals that by proposing this law the makers and the proponent of the Draft Law substantially undermine the overall social, and not only legal system in Montenegro.

The obligation defined in Art. 44 para 3 of the Draft, related to education syllabi, the content of textbooks and reference books, indicates that a secular state, is trying, under the guise of "fight for the Constitution and law," to exercise influence on churches and religious communities by imposing obligations they must meet which are in many aspects contrary to their religious teaching. Had the formulation "except for those educational syllabi, content of textbooks and handbooks related to religious instruction" been added to the provision, it would have made sense, but again without linking syllabi, textbooks and handbooks of religious schools to secular constitution and even more secular laws.

On the other hand, even tycoons with suspicious capital may establish secondary schools and tertiary education institutions in Montenegro, but not the Church and religious communities – age-long cornerstones of literacy and education. Moreover, this provision curtails and restricts the right of churches and religious communities to establish students' dormitories only for those students who attend religious schools. **Does the proposed provision of the Draft law mean that the Catholic Church in Podgorica, should the proposed provision remain in this document, will have to close down the dormitory it has owned for decades?** The proposed provision is directed against high school and university students who can not get accommodation in state owned students' dormitories. This provision, as it stands now, is absolutely inadmissible and unacceptable.

The provision from Art. 45 of the Draft envisages the introduction of supervision by the Ministry of Education over

syllabi compliance. By doing so, for the umpteenth time, religious affairs are interfered with and the autonomy of churches and religious communities is undermined. This provision rests on the anti-civilization perception of the makers of the Draft that religious schools are centers of anti-constitutional and anti-state action where future “enemies of the state” of Montenegro are trained and educated!?!

In addition to that, and in line with the spirit and employed approach, the provision of Art. 46 para 2 of the Draft does not provide for the same status of licensed religious schools in the legal system as all other public school institutions at the same educational level.

The provision from Art. 47 of the Draft Law is more restrictive than the provision from Art. 20 of the socialist Law on the Legal Status of Religious Communities (1977). It would be more natural and logical if formulation "and foreigners with temporary residence permit or permanent residence in Montenegro" were added to the Art. 47 para 1 of the Draft, and if the whole paragraph 2 of that article were omitted, since it is vague and it might cause additional problems in exercising rights.

IX REMARKS ON THE CHAPTER “PENAL PROVISIONS”

The chapter with penal provisions or, more precisely, with two articles which regulate misdemeanors and fines, is the only chapter of the Draft Law which is, based on its form and the place it occupies, in compliance with the Rules. The makers and the proponent of the Draft have qualified as a misdemeanor the following:

1. actions of a religious community which are not in accordance with the legal system of Montenegro, public order and morality;

2. actions of a religious community that are directed against other religious communities and religions;

3. political activity of religious communities and abuse of religious feelings for political purposes;

4. compelling a citizen to become or remain a member of the religious community and to participate or not to participate in manifesting religion;

5. preventing a citizen to exercise their rights guaranteed to them by law because of their belonging to a religious community;

6. compelling or preventing a citizen to make a contribution to a religious community on the basis of its autonomous regulations;

7. establishment of religious schools for primary education.

The aforesaid misdemeanors are punishable by a fine for legal entities amounting from 500 up to 20 000 euros. Futhermore, a fine amounting from 30 to 2 000 euros has been prescribed for a responsible person (in legal entity) and a natural person for the misdemeanor under numbers 2 and 3 (Art. 48 para 2 in the Draft Law). And the stipulated fine imposed on entrepreneurs for the misdemeanor under number 4 (Art. 48 para 1, items 2 and 3 in the Draft Law) ranges from 150 to 6 000 euros.

In addition to that, Art. 49 of the Draft Law sanctions as misdemeanor the following:

1. performing religious instruction of a child contrary to the decision of the child pursuant to Art. 42 para 2 of the Draft and punishable by a fine ranging from 30 to 2 000 euros;

2. performing religious instruction by religious officials outside religious facilities and during classes in public schools with prescribed fine in the amount of 30 to 2 000.

The proposed fines are in accordance with the Law on Misdemeanors ("Official Gazette of Montenegro", no. 1/11 and 32/14), but, given the content and meaning of the provisions of Art. 24 of that regulation, the makers and the proponent of the Draft have treated all the aforesaid misdemeanors solely as **serious misdemeanors**. It is not clear why petty or more serious misdemeanors have not been regulated. All that speaks volumes not only about the absence of legal sensibility in this case, but about the ambition of makers and proponents of the Draft, made evident at a dozen of places in that act, to rigidly “defend the state and society from churches and religious communities”, in a manner characteristic of totalitarian consciousness and anti-theistic belief.

Regulated and sanctioned misdemeanors from Art. 48 and 49 of the Draft Law do not correspond to logic and common sense. The best example of this is the provision from Art. 48, para 1, item 4 of the Draft, which prescribes a fine for a legal entity (registered church or a religious community) which "establishes a religious school for primary education", and in relation to Art. 44 para 1 of the Draft. How can a religious community establish a primary school, and that of a religious character, which would be regarded as “a school for primary education” within the meaning of legislation in the field of education? Do the makers and proponents of the Draft even know how and under what conditions primary schools in Montenegro are established? And how a church or a religious community, even if it wanted, could do that? And, has it ever occurred to anyone?

The aforemesaid provisions from Art. 48 and 49 of the Draft clearly stipulate what "misdemeanors" are punishable by fines as more serious forms of misdemeanors. But for the makers and the proponent of the Draft Law, according to the content of the Draft Law, the following is not regarded as a misdemeanor:

1. preventing, hindering or obstructing a citizen to manifest religion or belief either individually or in community with others, in public or in private, through a prayer, preaches, religious rites and custom (Art. 1 para 2 of the Draft);

2. preventing, hindering or obstructing a citizen and a child to take part in religious instructions and teaching (Art. 1 para 2 of the Draft);

3. preventing, hindering or obstructing a citizen to nurture and develop a religious tradition (Art. 1 para 2 of the Draft);

4. preventing, hindering or obstructing a citizen to refuse to carry out a military or any other duty which involves use of weapons (Art. 2 of the Draft);

5. preventing, hindering or obstructing a citizen to manifest his/her faith by establishing a religious community (Art. 3 para 1 of the Draft);

6. preventing, hindering or obstructing citizens, members and representatives of a church or religious community to independently decide on the internal organization, education,

composition, powers and functioning of the bodies of religious communities (Art. 4, para 2, point 1 of the Draft);

7. preventing, hindering or obstructing citizens – members and representatives of a church or religious community to independently decide on the appointment and powers of their religious officials and other "religious workers" (Art. 4, para 2 point 2 of the Draft);

8. preventing, hindering or obstructing churches, religious communities, their members and representatives to decide independently on the rights of their believers, provided that they do not interfere with their religious freedom (Art. 4, para 2, point 3 of the Draft);

9. preventing, hindering or obstructing churches and religious communities, their members and representatives to connect and participate in interreligious organizations with the seat in Montenegro or abroad (Art. 4, para 2, point 4 of the Draft);

10. preventing, hindering or obstructing churches, religious communities, their members and representatives to manage their property and financial assets independently based on their own autonomous regulations, in accordance with law (Art. 5 of the Draft)

11. practicing direct or indirect discrimination against citizens based on religious convictions (Art. 9 of the draft);

12. encouraging antireligious hatred and intolerance (Art. 9 of the Draft);

13. unauthorized and unlawful collection and processing of data on religious beliefs of citizens (Art. 10 of the Draft);

14. preventing, hindering or obstructing churches, religious communities, their representatives and members to use the property of a church or religious community to conduct religious rites and religious affairs (art. 27 para 2 of the Draft);

15. preventing, hindering or obstructing churches, religious communities, their representatives and members to carry out construction, reconstruction and renovation of religious facilities in accordance with law (Art. 33 para 1 of the Draft);

16. preventing, hindering or obstructing access to churches, religious communities and their representatives by means of public broadcasting (Art. 34 of the Draft);

17. preventing, hindering or obstructing churches, religious communities and their representatives to establish social and humanitarian institutions in accordance with the law (Art. 35 of the Draft);

18. preventing, hindering or obstructing churches, religious communities and their representatives to perform religious rites outside religious facilities, in accordance with the law (Art. 36 para 2 of the Draft);

19. preventing, hindering or obstructing citizens, priests and religious officials to exercise their right to perform religious rites in homes of believers or in public places, in accordance with the law (Art. 36 para 3 of the Draft);

20. preventing, hindering or obstructing priests and religious officials to receive a reward for religious affairs and religious rites from a person who invited them to perform a religious rite (Art. 37 para 1 of the Draft);

21. preventing, hindering or obstructing citizens to offer a reward to priests and religious officials whom they invited to perform religious affairs and religious rites (Art. 37 para 1 of the Draft);

22. preventing, hindering or obstructing churches, religious communities and their representatives to provide religious spiritual care to their believers who are serving in the Armed Forces of Montenegro and the police (Art. 38 para 1 of the Draft);

23. preventing, hindering or obstructing members of the Armed Forces of Montenegro and the police to exercise their right to religious spiritual care during their service (Art. 38 para 1 of the Draft);

24. preventing, hindering or obstructing churches, religious communities and their representatives to provide religious spiritual care to believers who are in detention or serving a prison sentence, or who are committed to juvenile detention facilities or correctional centres (Art. 39 para 1 of the Draft);

25. preventing, hindering or obstructing the believers who are in detention, or serving a prison sentence, who are committed to juvenile detention facilities or correctional centres to exercise their right to religious spiritual care (Art. 39 para 1 of the Draft);

26. preventing, hindering or obstructing churches, religious communities and their representatives to provide religious spiritual care to persons admitted to a health care institution or a social care institution (Art. 40 of the Draft);

27. preventing, hindering or obstructing the believers who are admitted to a health care institution or a social care institution to exercise their right to religious spiritual care (Art. 40 of the Draft);

28. preventing, hindering or obstructing a priest or a religious official to perform religious instruction in the facilities in which religious rites and religious affairs are performed (Art. 42 of the Draft);

29. preventing, hindering or obstructing children to attend religious instruction at the facilities in which religious rites and religious affairs are performed (art. 42 of the Draft);

30. preventing, hindering or obstructing parents to perform religious instruction of their child in accordance with their religious beliefs, without prejudice to a child's physical and mental integrity (Art. 43 of the Draft)

31. preventing, hindering or obstructing churches, religious communities and their representatives to establish religious schools at all educational levels, except institutions for primary education, for the purpose of educating priests and religious officials (Art. 44 para 1 of the Draft);

32. preventing, hindering or obstructing churches, religious communities and their representatives to establish dormitories for high school and university students in order to provide accommodation to students of religious institutions (Art. 44 para 2 of the Draft);

33. preventing, hindering or obstructing churches, religious communities and their representatives to autonomously determine educational syllabus and curriculum, the content of textbooks and reference books, as well as conditions for teaching staff in religious schools which they have established (Art. 44 para 2 of the Draft);

34. preventing, hindering or obstructing churches, religious communities and their representatives to exercise their right to obtain a license for a religious school in accordance with the law (art. 46 para 1 of the Draft);

35. preventing, hindering or obstructing churches, religious communities and their licensed schools to exercise their right to receive funding from the state budget proportionate to number of students, in accordance with the law (Art. 46 para 2 of the Draft);

36. preventing, hindering or obstructing Montenegrin citizens to perform teaching in religious schools (Art. 47 para 1 of the Draft);

37. preventing, hindering or obstructing foreigners to perform teaching in religious schools, in accordance with the law (Art. 47 para 2 of the Draft);

38. spreading anti-religion propaganda directed against churches and religious communities etc.

All of the abovementioned points out that the manner of exercising freedom of religion is not only undetermined and vague, but it is not legally protected by means of prohibiting legal norms and sanctions either. According to the provision from Art. 10 para 1 of the Constitution of Montenegro, which stipulates that "in Montenegro, anything not prohibited by the Constitution and the law shall be free", one may infer that most of these misdemeanors the Draft Law fails to mention will go unpunished, to the detriment of citizens, believers, churches and religious communities, priests and religious officials, and, finally, legal order and Montenegrin society as a whole. By failing to impose prohibitions or prescribe adequate penalties for such misdemeanors, the makers and the proponent of the Draft have actually created an ideal space to prevent, hinder or hamper the exercise of rights to freedom of religion and human rights violations.

It can be said that the aforementioned and unsanctioned misdemeanors, (many of which have been seen and committed against the churches, religious communities, priests, religious officials and citizens as believers in the past years, and especially during the past few decades) are not only permissible but preferrable behavior, as they will not be prohibited and sanctioned. This is particularly evident in the age of widespread secularization, which has, very often, been imposed as the only proper view of world and life and which, in this and in similar ways, is established and forcefully imposed as "the new religion" of a contemporary

man. It is by means of the manner presented in the Draft Law that, inter alia, such anti-religious activity is fostered and instituted.

Likewise, the draft law, within the penal provisions, does not specifically determine responsibility and sanctions of a competent authority and authorized officials when it comes to enforcing the proposed provisions. In addition to that, a whole series of misdemeanors are missing, since many, rather significant provisions for the exercise of freedom of religion, have not been included in the Draft Law.

The provisions from Art. 48 and 49 of the Draft Law indicate that the unacceptable selection of misdemeanors related to the exercise of freedom of religion has been made, thus inflicting harm on citizens, churches, religious communities and legal system. Therefore, it would not be inappropriate if the Draft Law were entitled **The Draft Law on Unpunishable Violation of the Right to Freedom of Religion**. On the grounds of all the aforementioned reasons, the provisions from Art. 48 and 49 of the Draft are unacceptable.

X REMARKS ON THE CHAPTER "TRANSITIONAL AND FINAL PROVISIONS"

This chapter, with its 6 articles is not in compliance with the Rules either, since it should have been divided into two separate chapters.

The provision of Art. 51 para 1 of the Draft provides for "taking over data" on registered churches and religious communities. At first glance it is not clear, given that based on the Law on the Legal Status of Religious Communities (1977) a system of records of religious communities was set up, why "data" are taken over, and not the complete 38-year-old records of the Ministry of Interior which are part of the system of public records. But if one takes into account the spirit and content of the Draft, it becomes very clear that the goal of its makers and proponents is to create a legal vacuum in order to deprive churches and religious communities of all rights that they have lawfully gained through implementation of the previous system, and the system which were implemented before the exisiting one. In practical terms, the

proposed provision has no other purpose or use value besides the one indicated above.

The provision of Art. 51 para 2 of the Draft has no logical connection to the provision from paragraph 2 of the same article. On what sources do makers and the proponent of the Draft base their findings that the internal religious act of existing churches and religious communities are not in compliance with the conditions for entry into Registry under Art. 16 of the Draft? Bearing in mind the fact that a number of provisions of this Draft has been created by adapting the provisions of the laws of certain countries in the region, then the question is, why, since they have already employed the copying approach, they have not copied this provision accurately.

Based on the provision of Art. 52 of the Draft, proposed regulation can be entitled **the Law on Nationalization of Religious Facilities and Religious Property**. First of all, the question arises whether the makers and the proponent of the Draft had in mind borders of Montenegro in 1918 when they came up with this provision. If that is what they had in mind, then it means that these provisions apply outside of Montenegro as well, i.e. to religious facilities and church property in Metohija, which, up to 1918, was part of the Kingdom of Montenegro. Furthermore, it means that these provisions do not apply to the area from Herceg Novi to entrance to Bar, since this area was not part of the Kingdom of Montenegro until 1918. That is the historical aspect.

From a legal point of view, there is no doubt that this is a provision that is unacceptable and contrary to the provisions governing proprietary ownership relations in Montenegro. With what right are suddenly contributions and endowments of believers to the Church made a state property and what lies behind such ambition? The proposed provision cancells the provisions of the three agreements that the Government of Montenegro has signed with one church and two religious communities. The proposed provision is contrary to the Law on Protection of Cultural Property, if one takes into account the legal concept of "cultural heritage". This provision states and provides for "determination" of those facilities and land, although there is a more appropriate term for both of these words - immovables – should we refer to the division

of property in civil law on immovable and movable. It is scandalous that the rightful owners of Church property - churches and religious communities - are deprived of proprietory rights through an unlawful unilateral "determination" by one state administration body and all this happens at a time when talks on the restitution of confiscated property of churches and religious communities are on the rise, which is not even mentioned in the Draft.

Following the preceding provision, the provision of Art. 53 of the Draft is not in compliance with the legislation in force as well. The proposed provision, in fact, denies the constitutional division of powers into legislative, executive and judiciary, in accordance with Art. 11 of the Constitution of Montenegro, and grants judicial power to the Property Administration, as a state administration body and part of the executive branch, which is a scandal and an unheard precedent. It is evident that the makers and the proponent of the Draft Law is not familiar with the provision of Art. 58 of the Constitution of Montenegro which stipulates that "property rights shall be guaranteed. No one shall be deprived of or restricted in property rights, unless when so required by the public interest, with rightful compensation." Likewise, the makers and the proponents of such provisions are not familiar with the fact that a holder of proprietory rights can not be deprived of his/her rights "with force of law", but solely through legal affairs or by a court decision (except in the case of expropriation, but that is not the case here).

Ignorance of the rules is for the umpteenth time demonstrated in Art. 53(2) of the Draft law, even with respect to the deadline which is not in accordance with the Law on (General) Administrative Procedure. Churches and religious communities as legal owners of immovable property - religious facilities and land that belong to them – are entirely deprived of even the right to participate in proceedings as a party, which is without precedent, since the Draft stipulates that these proceedings are to be carried out without their participation in order to deprive them of their rights . Even if the setting from Art. 52 and 53 of the Draft is correct, which it is not, it is evident that the makers and the

proponents of such provisions are not familiar with neither the legal nature nor the legal repercussions of adverse possession.

The provisions of Art. 52 and 53 of the Draft are nothing but a plunder of religious facilities and other immovables, as the Bishop of Kotor accurately noted in a public statement. It is an example of utter lawlessness demonstrated in an absolutely unacceptable manner; hence the proposed provisions are simply inadmissible.

XI REMARKS ON PLAN AND PROGRAMME OF PUBLIC DEBATE ON THE DRAFT LAW ON FREEDOM OF RELIGION

On 3 August 2015, The Ministry for Human and Minority Rights, in accordance with the Decree on the Procedure and Manner of Conducting Public Debates in Preparing Laws ("Official Gazette of Montenegro", no.12/12) initiated a public debate and extended a public invitation addressed to "citizens, religious communities, professional and scientific institutions, public authorities, the Capital City, the Royal Capital and municipalities, professional associations, political parties, trade unions, minorities' councils, non-governmental organizations, the media and all other interested organizations, communities and individuals " to engage in a public debate on the Draft Law on Freedom of Religion. Thus, the Ministry adressed the call, **public invitation** that is, to all and sundry, and the public debate programme envisaged holding three roundtables in Bijelo Polje (on September 7), Kotor (on September 10) and Podgorica (on September 14).

First of all, it should be noted that only three of all other municipalities in Montenegro have been chosen to host a public debate on such an important regulation which refers to the absolute majority of citizens of Montenegro. It remains unclear which criterion representatives of the Ministry adopted when they determined the towns (municipalities) to host roundtables. It is particularly unclear if one takes into account the provision of Art. 9 para 1 indent 1 of the aforesaid Decree which does not specify the minimum and maximum number of roundtables, which may be

organized within the public debate on a regulation. **The Ministry is obliged to explain according to which criterion only three towns have been selected and why more roundtables discussions have not been organized on such an important regulation.**

The premises representatives of the Ministry have chosen for holding public gatherings – roundtables – have not been chosen in a careful and a responsible manner. A conference room of the hotel "Franca" with 120 seats has been chosen as a venue for the debate in Bijelo Polje, the Assembly hall Byzantine with 50 seats as a venue for the debate in Kotor, while the so-called Small Hall in the old Government building with about 50 seats has been chosen as a venue for the debate in Podgorica, the town with the largest population in Montenegro. **How is it possible that the Ministry has decided to hold a roundtable in Podgorica in a hall which is half the size of the hall in Bijelo Polje?**

Furthermore, in its public invitation announced on 3 August 2015, the Ministry stated that the roundtable in Podgorica will be held in the so-called Government Hall, but the notification of the Ministry, submitted to the Metropolitanate under no. 01-023-1039/15-1, dated on 11 September 2015, stated that the roundtable in Podgorica will be held in the so-called Small Hall in the old building of the Government. Due to the enormous interest of citizens who wanted to be informed on the content of the Draft Law at roundtables in the public debate, and having in mind the fact that there is a large hall with several hundred seats in the old building of the Government, **the Ministry is obliged to provide the reasons behind the decision to, contrary to the provisions of the aforementioned Decree, deny interested public the right of access to the roundtable in Podgorica, even after the infamous experience in Bijelo Polje and Kotor.**

Obviously, representatives of the Ministry have not made a good estimate of an unprecedented, enormous interest of citizens in the Draft Law, sparked significantly by the print and electronic media in Montenegro, which made this subject a topical issue and kept it in the center of their media activities for days. There is no doubt that the Ministry bears special responsibility.

In its public response on 7 September 2015, the Ministry stated that the public invitation for participation in public debates and roundtables was addressed to **"all citizens, male or female, members of all religions, as well as all interested people in Montenegro"**. Thus, everyone who wanted to attend and feels that s/he should attend the roundtables organized by the Ministry was invited. However, on 8 September 2015, the Ministry issued a public statement pointing out that the purpose of the roundtables is "to hear professional opinions of interested parties and subjects, not to organize a mass meeting". This statement is contrary to the public invitation of the Ministry which was already addressed to all and sundry, and contrary to previously stated point that the public invitation of the Ministry was addressed ""all citizens, male or female, members of all religions, as well as all interested people in Montenegro". How is it possible that the purpose of one roundtable differs from the purpose of the other rountable within the same public debate on the same subject, and run by the same organizer?

The Ministry has committed a discriminatory act over publicly invited citizens who have not been allowed, despite the fact that they have been publicly, duly and properly invited several times by the Ministry, to attend a public meeting – roundtable – in a public space. In line with the provision from Art. 10 para 1 of the aforementioned Decree, which stipulates that organizers of public hearings or debates are obliged to provide access to the roundtable to persons with disabilities, it is quite understandable and clear that the Ministry, as the organizer, had an obligation to provide access to everyone invited, including persons with disabilities . In this respect, and bearing in mind all the facts, **the Ministry is obliged to explain why it has violated the binding provisions of the aforementioned Decree and prevented the interested public i.e. a vast number of citizens from exercising their right to more comprehensive exchange of information with the Ministry and the right to participate in preparation of laws (Art. 3 of the Decree).** Never has a public authority violated this right of citizens and interested public in such a manner.

In a press release on 8 September 2015, with intent to deprive the citizens and interested public of the right of access to a roundtable, for the purpose of exercising their legitimate rights, the Ministry called them to "submit their opinions to the address of the Ministry." With what right and on what basis does the Ministry have the right to determine who is competent and who is not competent to take part in a debate since the citizens' competence or expertize as the interested public is not prescribed as a prerequisite for free access and participation at a roundtable discussions within public debate on a Draft Law? Not only is this kind of attitude and discriminatory conduct towards citizens and overall vast public unacceptable but it also deserves condemnation.

It is necessary to bear in mind that the provision of Art. 9 para 1 indent 1 of the aforementioned Decree stipulates that a debate on a law text is, inter alia, conducted by "organizing roundtables, panel discussions, presentations, etc.". Therefore, the Ministry has the right, within the public debate on a certain regulation, to organize professional, narrower meetings attended by experts invited to express their opinions and views by means of a different type of call,. But, the Ministry, for some inexplicable reasons, has not taken up that opportunity and is obliged to explain why it has not organized any panel discussion or presentation in the course of the public debate.

Moreover, the Ministry did not make an effort to organize a televised debate and presentation of the Draft Law on public service broadcaster RTCG. Had any of these options – holding a panel discussion, organizing presentations or a televised debate – been used, perhaps the number of interested citizens who wanted to gain access and take part in roundtables would have been dramatically reduced. The Ministry is obliged to explain why none of these options has been taken.

Roundtables in Bijelo Polje and Kotor were postponed due to bad estimates and irresponsibility of the Ministry as their organizers (**Note**: The remarks have been made before the roundtable planned to be held in Podgorica). For this reason, it must be noted that, solely due to the abovementioned reasons and acts of the Ministry which have no justification or legal grounds, a public debate was not successfully completed in accordance with

the mandatory programme, which only underlines the fact and favours the attitude that the Draft Law should be withdrawn from the procedure, since the interested public was in many ways denied the right to participate in public debate. Therefore, the objective of the public debate on the Draft Law on Freedom of Religion has not been attained in accordance with the aforesaid Decree and the defined Programme.

It is evident that the Ministry for Human and Minority Rights has found itself in a situation none of the ministries has ever been placed in ever since public debates are organized. In that way, along with the perennial failure to meet the commitments related to this regulation, the Ministry has hindered the implementation of the 2015 Government Agenda and inflicted considerable harm to the Government and the state of Montenegro. Other social reprecussions of such an approach need not be specifically stated.

By employing the demonstrated approach and by displaying irresponsible attitude towards citizens and all interested subjects, and especially by means of a form and content of the Draft Law, the Ministry has gone beyond the pale. For the first time, a representative of the Ministry did not respond to the invitation to participate at the roundtable, which was (just like many times before, when other regulations that, more or less, concerned the Church were discussed) organized by the Metropolitanate and the Diocese. On 8 September 2015, the representative of the Ministry offered the following verbal explanation to the representatives of our Church: **"By taking part at your roundtable we would devalue our roundtables"**. This only adds to the illustration of a conduct which is utterly unacceptable and comnpletely unseemly in a democratic society.

The roundtables organized by the Ministry were not held, putting the public debate on the Draft Law in question, as well as formulation of the Draft Law on Freedom of Religion which, per se, confirms the request to withdraw the Draft Law from procedure and to create a new law in accordance with applicable regulations. The public, to say the least, deserves a public apology of the competent minister not only because of that, but also because he attempted to shift his responsibility

and the responisibility of the Ministry onto the citizens of Montenegro who protested over not being able to gain access to and take part at roundtables organized by the Ministry.

CONCLUSIONS AND SUGGESTIONS

Having in mind all of the abovementioned, we believe the Draft Law is in profound and substantial disagreement with international acts, the Constitution and the laws in force in Montenegro, as well as with the achieved level of exercised rights. The Draft Law, as such, is primarily a reflection of the still present ideological experience of the right to freedom of religion, as well as the role, significance and legal status of churches and religious communities. What is particularly unsettling is that this approach came from the Ministry for Human and Minority Rights in the Government of Montenegro.

The proposed Draft Law blatantly violates the secularity of the state and the constitutional principle of separation of churches and religious communities from the state, interferes in their internal autonomy, revokes their previouosly attained legal personality, seizes their property, and grants the state powers characteristic only of totalitarian states and their legal and political systems.

Many provisions, characteristic of existence, internal organization, mission and activities of churches and religious communities, which, by the nature of things, had to be incorporated in the Draft Law, have been omitted. This was done with an aim to put believers, clergy, religious officials, churches and religious communities in a more difficult and unfavourable position and to hinder their activities in society and the state in order to prevent them from exercising freedom of religion in a manner this universal human right is exercised in democratic states and societies.

Despite all our best efforts, it is difficult to find provisions in the Draft Law which regulate the cooperation between the state and churches and religious communities for the common good of society and the state. Numerous provisions of the Draft Law are in mutual collision, and they are written with apparent absence of style and sense and with no regard for the beauty of the language or for the minimal sensibility to the specific qualities of churches

and religious communities as *sui generis* institutions in a modern society and state. This is not the way to build a modern state. By all accounts, believers, churches and religious communities have been recognized as a main disruptive factor in Montenegro in the process of the secularization of the society and deification of the state, as it may be inferred from the content of the Draft Law.

We feel the need to point out on this occasion, as we have done on many occasions so far, that the Orthodox Church on the territory of today's Montenegro has been present from the fourth century A.D., first under the name of the Diocese of Dioclea, Risan, Skadar and Rascia, at the time when the Eastern and Western Church were still one (before the East-West schism). The ancient Christian Diocese of Kotor and Bar maintained its continuity (from XI century) in the Archdiocese of Bar and Roman Catholic Diocese of Kotor, and the other ancient Dioceses have continuously existed since 1220 in today's form as the Diocese of Zeta (since 1346 the Diocese of Zeta was elevated to the status of a Metropolitanate by the decisions of the State-Church Council at the time of Emperor Dušan and Serbian Patriarch Joanikije), the Diocese of Budimlje, the Diocese of Hum and the Diocese of Raška, within the Archdiocese of Žiča, i.e. under the Patriarchate of Peć. In addition to change of names due to historical reasons (the Diocese of Zeta=Montenegro and Skenderia, Montenegro and the Highlands, today the Metropolitanate of Montenegro and the Littoral, the Diocese of Hum=today the Diocese of Zahumlje and Herzegovina, whose bishop was St. Basil of Ostrog; the Diocese of Budimlje=the Diocese of Zahumlje and Raška in the time of King Nikola, today the Diocese of Budimlje and Nikšić; the Diocese of Raška=the Diocese of Raška and Prizren, partly the Diocese of Mileševa, the Diocese of Dabro-Bosnia, today in Montenegro parts of the Diocese of Mileševa), all the aforementioned Dioceses were organic parts of the Patriarchate of Peć until its abolition in 1766 by Ottoman Turks. Since then until 1920, parts of the former Patriarchate of Peć were under jurisdiction of the Patriarchate of Constatinople while other parts under the name the Metropolitanate of Montenegro in the Principality/Kingdom of Montenegro, the Metropolitanate of Karlovac, the Metropolitanate of the Kingdom of Serbia from 1879, the Metropolitanate of

Bukovina and Dalmatia – managed their affairs independently (autonomously) in constant expectation of renewal of unity of the Patriarchate of Peć.

The decision on restoring the unity of the Patriarchate of Peć was first taken by the Synod of the Metropolitanate of Montenegro in the Kingdom of Montenegro on 16 December 1918. Then, by mutual consent of all other former Metropolitanates of the former Patriarchate of Peć, this church unity was attained in 1920 and confirmed by 1922 Tomos of the Ecumenical Patriarchate (with the inclusion of the other Dioceses of the Ecumenical Patriarchate in the the Patriarchate of Belgrade) and with consent of all the autocephalous Orthodox Churches in the world. A new constitution of the united Patriarchate of Peć/Belgrade, i.e. Serbian Orthodox Church from 1931, provided for the expansion of the Metropolitanate of Montenegro with parts of the former Dioceses of Zahumlje and Raška and the Dioceses of Nikšić, and with parts of the Metropolitanate of Peć and the Dioceses of Bay of Kotor. In the new Constitution the Metropolitanate was named the Metropolitanate of Montenegro and the Littoral, name which was previously used as well, and in 2000 the Diocese of Budimlje and Nikšic was renewed from the Metropolitanate. By restoring the unity of the Patriarchate of Peć, within the today's Serbian Ortodoh Church, the Orthodox Dioceses which have existed on the territory of present-day Montenegro for centuries, have preserved and maintained their unbroken continuity, identity, personality, property and full self-governance in accordance with centuries-long canon law and order of the Orthodox Churches.This continuity, legal personality and properietory rights have been recognized and confirmed by all governments and states through the ages, regardless of their changes and changes in state borders. Nothing more, but nothing less, does the Ortodox Church seek and expect from the government of current independent Montenegro and its bodies. The Ministry, as the proponent of the Draft Law, is obliged to show appreciation and respect for these facts which today refer to absolutely largest number of believers in Montenegro who are members of the Orthodox Church. No legal act shoud serve the purpose of falsifying and distorting history and interfere in the autonomous, internal right of the Church to its own self-

determination. No law should be misused for the purpose of social engineering, and never can or must the law that regulates future relations spin the wheel of history backwards. **Numerous provisions of the Draft Law have made us realize and understand, just like the representatives of other religious communities and wider public in Montenero have realised and understood and publicly stated, that the Draft Law on Freedom of Religion is primarily directed against the Metropolitanate and Dioceses of the Serbian Orthodox Church in Montenegro, and thus against all Orthodox believers – citizens of Montenegro, who, at their own free will, are members of the Metroplitanate and the Dioceses.**

We believe that moral and legal responsibility of the Ministry for Human and Minority Rights as the proponent of this legislation is to, upon consideration of all remarks and suggestions put forward at public debates, withdraw the Draft Law from the procedure. Harmonizing provisions of the Draft Law with international conventions, the Constitution and other systemic and procedural laws of Montenegro will inevitably lead to a completely new text unknown to citizens, believers, churches, religious communities and the general public. That is a key reason why it is necessary to withdraw the Draft Law from procedure. The second, equally important reason for the withdrawal of the Draft Law from procedure has to do with repercussions the Draft Law would have in Montenegrin society and legal order. Thus, such a legitimate and professionally reasoned request of our Church is not motivated by any political or party reasons. We believe that, upon the withdrawal of the Draft Law from procedure, work on the preparation of a Strategy and an Action Plan should be commenced and the Working Group should be expanded to include eminent lawyers and professional representatives of churches and religious communities.

We demand that the Ministry for Human and Minority Rights carefully consider all our remarks and proposals and respond to them in accordance with legal regulations.

REMARKS MADE BY:

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Bishop of the Diocese of Budimlje and Nikšić
and administrator of the Diocese of Mileševa
Joanikije, m.p.
Archimandrite Nikifor (Milović), m.p.
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ORTHODOX METROPOLITANATE OF MONTENEGRO & LITTORAL

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№ 28
3. December 2015

VENICE COMMISSION
OSCE/ODIHR

The Orthodox Church, which in Montenegro is embodied by the Orthodox Metropolitanate of Montenegro and Littoral and the Eparchies of Budimlje–Nikšić, Zahumlje–Herzegovina and Mileševa, has been publicly advocating and highlighting the need to pass a new **law on the freedom of religion and the legal position of churches and religious communities**, which would be in accordance with the European Convention on Human Rights and other international documents which regulate the right to freedom of thought, conscience and religion. In this area, the Church has in recent years undertaken many activities through the organising of several academic conferences and a professional dialogue on the theme of guaranteeing the right to freedom of religion and the relationship between the state and churches and religious communities, in which many legal experts from this field have taken part. In the conclusions from these gatherings, it has been already clearly emphasised that the Orthodox Church in Montenegro is not seeking for itself privileges or a special legal

status and that it does not support discrimination, but rather that its aim is for a principle of cooperative separation of churches and religious communities from the state to be implemented in the new law and for the best practice of modern European states to be applied.

The Orthodox Church informed the Government of Montenegro in 2012 about the necessity of preparing and passing a new law, and expressed its interest in providing an expert representative for the Working Group for preparation of the proposal for the law. The then Minister of Justice and Human Rights, Duško Marković, now the Deputy Prime Minister, by an act dated 25 June 2012 expressed understanding for including representatives of the Orthodox Church and other religious communities in the process of preparation of the proposal for the law, and expressed his belief that, in mutual trust and understanding, they would find the best way for representatives of religious communities to be involved in the development of this very important legal act. In the meantime, the Government was reshuffled, and the responsibilities of the Minister for Human and Minority Rights were taken over by the current minister, Suad Numanović, a medical doctor by profession.

The Metropolitanate in 2013, by means of an official document, informed the Ministry of its request to provide one expert representative as a member of the Working Group to work on the law. The Ministry did not respond to this document. In the meantime, Minister Numanović informed the public on many occasions that expert representatives of churches and religious communities would be included among the members of the Working Group. Besides this, Minister Numanović, with the decision dated 11 July 2014, formed the Working Group for work on the proposal for the Law on Religious Freedom. The Working Group consisted exclusively of representatives of the Government. The Ministry did not publish its decision, and the public only found out about it at the end of 2014.

The Ministry entered into the process of preparing the proposal of the law
without an adequate Strategy and Action Plan, only with a unilateral communication which was presented to the Government

in 2014. This departed from the practice which is usually applied and which, apart from this instance, has always been applied when regulations in the field of human rights are being passed.

Apart from the fact that representatives of stakeholders – churches and religious communities – were not included in the Working Group, the Ministry formed the Working Group contrary to the valid Regulations on the procedure for cooperation between state institutions and non-governmental organisations, dated 2012. The civil sector was not notified about the preparation of this law by means of a public call. Also, not a single expert outside the Government is included in the Working Group. Today, at the head of the Working Group is the historian Dr. Dragutin Papović, whose doctorate was on the subject of the ideology of the League of Communists of Yugoslavia. So then, the Working Group was formed in a non-transparent way and in a manner which is contrary to the regulations in force and practice up until now. The Ministry has already destroyed the entire basis of mutual trust and good intentions, right at the beginning of this process.

During preparation of the draft law, the Ministry opened discussions on the signing of an Agreement with representatives of our Church. While these discussions were in progress, the draft law was prepared behind the backs of the public and the stakeholders.

The consultative process with the representatives of churches and religious communities under the organisation of the Ministry was anything but what the process should be. Only one meeting was held (23 February 2015) at which our representatives were officially informed by representatives of the Ministry that they would be working on preparation of the law. The representatives of the Ministry on that occasion presented their official opinions and dilemmas without familiarising the representatives of our Church with the concrete results of the work of the Working Group.

The Government of Montenegro confirmed the draft law, contrary to the regulations of its own Rules of Procedure, on 30 July and the Ministry scheduled the public debate for the period of the summer holidays. The Ministry attempted to keep public influence to a minimum during the public debate. Only three roundtable discussions were foreseen to be held for the programme

of the public debate. Even though public interest in this law was high, especially because of media treatment of this act, the Ministry did not use a single other opportunity to inform the public of the content of the draft law. The Ministry's roundtable discussions were not adequately organised – small halls were chosen, and the roundtable discussions were scheduled during working hours, which triggered a revolt among citizens because of their inability to attend and access the roundtables within the public debate. The course of events which the Ministry took can sooner be called a simulation of public debate, in which the public, i.e. citizens, were denied access to the public debate by police cordons. The draft Law on Religious Freedom is the first such act to be protected from the public by the police during the public debate.

Our Church organised a professional roundtable discussion on 1 September 2015 in Podgorica to which representatives of other churches and religious communities, representatives of government institutions and legal experts were invited. The roundtable discussion was conducted successfully, and more than 30 participants voiced their opinions about the draft law. Representatives of the Ministry, although invited in a regular and timely manner, did not respond to the invitation to attend and participate in this roundtable discussion. Conclusions were adopted at the roundtable discussion, which were delivered to the Ministry, but to this day there has been no answer to these.

During the public debate secret documents also came to light to which neither the stakeholders nor the public, even through regularly submitted requests, were able to gain access. Specifically, the Government had instructed the Ministry to form an expert team that would follow the public debate. The Minister had, for no reason whatsoever, classified this decision as secret information. The decision of the Government to extend the public debate was also classified as secret information, and there are proofs from state institutions regarding this. In that period, the Ministry did not engage in a single activity, and refused many invitations from national television stations for a public debate about the draft law.

Our Church, realising the importance of this law and the anti-European solutions that it contains, undertook many activities during the public debate. Our experts put together a list of

comments running to 80 pages, and about 4,500 comments in written form were delivered to the Ministry from Orthodox monasteries, church assemblies, members of church boards and other church institutions, as well as more than 30,000 signatures of citizens demanding that the draft law be retracted from procedure and the process returned to a lawful course with a new Working Group in which representatives of the stakeholders, the civil sector and experts would be included.

The Ministry, according to the programme of public debate, had a duty to publish on its website and on the portal of the electronic administration a report from the public debate by 7 October, but that has not been done even now.

In summary, it is absolutely certain that the draft law was prepared in a non-transparent and discriminatory way, contrary to the law and without necessary dialogue. To this day the Ministry has not replied to a single one of the hundreds of questions submitted regarding the draft law.

Enough was said about the incompatibility of the draft law with international acts on human rights in the comments which were delivered to the Ministry and which have been translated into English.

The draft law does not correspond to the social reality of Montenegro, and along with it no explanation is provided and it is practically unworkable. It interferes in the internal structure of churches and religious communities in the most brutal way possible, restricts beyond measure the individual and collective aspects of freedom of religion, it reverses earlier obtained legal subjectivities, and breaks these communities' centuries-long continuity of existence and attacks their ownership rights over sacral buildings and the real estate that belongs to them and over which they have property rights. The provisions of the draft law essentially reverse the provisions of the agreement which the Government signed with the Roman Catholic Church and the Islamic Community. The comments from our Church are almost identical to the comments from the Roman Catholic Church and the Islamic Community. The spirit of the draft law is such that it stands essentially opposed to the spirit of the provisions from Article 17 paragraph 3 of the Lisbon Treaty.

Finally, once more expressing our interest in passing a new Law on Religious Freedom, we consider that it is extremely difficult to harmonise the current text of the draft law with international documents on freedom of religion, the Constitution of Montenegro and the social reality. Undoubtedly, the current Working Group in which there is not one expert from this area is in no state to carry out its work without the expert support of representatives of the stakeholders, the civil sector and experts from within the country and abroad.

Very. Rev. Velibor Džomic, Ph.D
Coordinator of the Legal Council

Strasbourg, 27 November 2015

CDL(2015)051*
Or. Engl.

Opinion no. 820/2015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

DRAFT JOINT INTERIM OPINION OF THE VENICE COMMISSION AND THE OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE/ODIHR) ON THE DRAFT LAW ON FREEDOM OF RELIGION OF MONTENEGRO

on the basis of comments by:
Mr Nicolae ESANU (Member, the Republic of Moldova)
Mr. Christoph GRABENWARTER (Member, Austria)
Mr Jorgen Steen SORENSEN (Member, Denmark)
Mr Jan VELAERS (Member, Belgium)
Mr Ben VERMEULEN (Member, the Netherlands)

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I Introduction

1. By a letter of 24 August 2015, the Ambassador Ms Božidarka Krunić, Permanent Representative of Montenegro to the Council of Europe, requested the opinion of the Venice Commission on the Draft Law of Montenegro on Freedom of Religion[21] ("the Draft Law").

2. Mr Nicolae Esanu (the Republic of Moldova), Mr Christoph Grabenwarter (Austria), Mr Jorgen Steen Sorensen (Denmark), Mr Jan Velaers (Belgium) and Mr Ben Vermeulen (the Netherlands) acted as rapporteur on behalf of the Venice Commission.

3. On 16-17 November 2015, a joint delegation of the Venice Commission and the OSCE/ODIHR visited Podgorica and held meetings with the representatives of religious communities and NGOs in Montenegro, the representatives of the Parliament, of the Ombudsman Office, of the Ministry for Human Rights and National Minorities, of the Ministry of Interior as well as the representatives of the European Union Delegation in Montenegro. The Venice Commission and the OSCE/ODIHR are grateful to the Montenegrin authorities and to other stakeholders, in particular to the Council of Europe Project Office in Podgorica, for their excellent co-operation during the visit.

4. Prior to and during the visit to Podgorica, the Venice Commission and the OSCE/ODIHR were informed by the Ministry for Human Rights and National Minorities that the Draft submitted to the Venice Commission was a preliminary version and that the authorities intended to amend this preliminary version on the basis of recommendations by the Venice Commission and the OSCE/ODIHR. It was thus decided to prepare as a first step, a joint interim opinion on this preliminary version of the Draft Law. The Venice Commission and the OSCE/ODIHR remain at the disposal of the Montenegrin authorities for any further assistance in the

[21] CDL-REF(2015)032 Draft Law of Montenegro on Freedom of Religion

matter.

5. The present joint interim opinion is based on the English translation of the Draft Law of Montenegro on Freedom of Religion provided by the Montenegrin authorities. Some of the issues raised may find their cause in the translation rather than in the substance of the provisions concerned.

6. The present joint interim opinion was prepared on the basis of the comments submitted by the experts above and adopted by the Venice Commission at its (…)th Plenary Session, in Venice (…)

II Background

7. The Constitution of the Republic of Montenegro guarantees the right to freedom of thought, conscience and religion in its Article 46(1) which stipulates: "*Everyone shall be guaranteed the right to freedom of thought, conscience and religion, as well as the right to change the religion or belief and the freedom to, individually or collectively with others, publicly or privately, express the religion or belief by prayer, preaches, customs or rites."* According to paragraph 2 of this provision no one shall be obliged to declare own religious and other beliefs. Paragraph 3 concerns the restrictions to the freedom to express religious beliefs and stipulates that freedom to express religious beliefs may be restricted only if so required in order to protect life and health of the people, public peace and order, as well as other rights guaranteed by the Constitution.

8. The Constitution does not recognise specifically any traditional religious community in Montenegro. Its Article 14 states that religious communities shall be separated from the state and shall be equal and free in the exercise of religious rites and religious affairs. The wording of Article 14 is different from Article

11 of the previous Constitution (1992)[22] in that Article 14 does not stipulate explicitly any particular religious community.

9. The legal position of religious communities is currently governed by the 1977 Law on Legal Position of Religious Communities[23]. This Law establishes the framework for recognition of religious communities and their relationship with the State. Religious communities may only be established by citizens. The founder of a religious community shall report, within 15 days, the establishment of a religious community and/or of its bodies or organisations to the competent municipal authority in charge of internal affairs in the territory of which the seat of the newly established religious community and/or its body or organisation is situated. According to the information provided during the visit in Podgorica, the competent municipal authority must file this registration with the Ministry of Interior which maintains the register for religious communities.

10. During the visit, the delegation was told by the representatives of the Ministry of Interior that there are currently 19 religious communities which are registered. The Serbian Orthodox Church is not registered under 1977 Law and does not have a legal personality. However, its legal personality appears to be recognised in the practice, since, the properties of the Serbian Orthodox Church are registered in the land registry at its own name.

11. There are many provisions in the 1977 Law which are similar to the provisions of the Draft Law on Freedom of Religion, subject to the present joint opinion. According to Article 11(1) of the 1977 Law, the performance of group religious ceremonies outside the place specified in the Law should be approved by the competent municipal authority at the request of the religious

22 According to Article 11 of the Constitution of 1992 "*The Orthodox Church, Islamic Religious Community, the Roman Catholic Church and other faiths shall be separate from State*".
23 OGSRM 9/77, 26/77, 29/89, OGRM 27/94, 36/03.

community (cf. Article 36(2) of the Draft Law). According to Article 18 of the 1977 Law religious communities may establish only religious schools for clerics and dormitory for students of such schools, manage them, set up school program and curriculum, and appoint teachers (cf. Article 44(1) of the Draft Law). Article 20 stipulates that a religious community may appoint citizens of the Socialist Federal Republic of Yugoslavia to teaching and other staff of cleric schools. Foreign citizens may teach in schools under paragraph 1 after the religious community obtains the approval of the competent municipal public authority (cf. Article 47(1) of the Draft Law).

12. According to an Explanatory Note provided by the authorities on 6 November 2015, a number of fundamental agreements have been signed between the Government of Montenegro and religious communities governing the rights and obligations of the latter: Fundamental Agreement between the Government of Montenegro and the Holy See, Agreement on matters of mutual interest between the Government of Montenegro and the Islamic Community and the Jewish community. The Explanatory Note also underlines that negotiations are underway on agreements between the Government and the Orthodox Churches in Montenegro, and the process is open for other religious communities as well. The authorities explained during the meetings in Podgorica that the entry into force of the Draft law on Freedom of Religion will not have an impact on the agreements already signed with religious communities.

13. The Explanatory Note further states that the 1977 Law was adopted during the socialist political system and today, Montenegro operates in significantly different legal, political and social conditions. Moreover, since the adoption of this Law, the international standards concerning the right to freedom of religion and belief have been further improved.

Thus, according to the Explanatory note, Montenegro has an obligation to its citizens to comprehensively regulate this area. It is also explained that in order to place all religious communities as far as possible into the same equal status, the Draft Law does not

single out any religious community on the basis of its historical duration, social role, number of believers, nor on any other basis, in order to avoid any form of discrimination.

14. On 26 November 2015, the authorities provided another explanatory note concerning the preparation and adoption stage of the Draft Law. It is explained that according to the Rules of Procedure of the Government of Montenegro (Article 35), the Government has two possibilities regarding the adoption of draft laws and the organisation of public debates: 1) the entity proposing the law (ministry) may, at the stage of developing the draft law, organise a public debate on the draft law or 2) the Government may, due to the importance and complexity of matters covered by a certain draft law, decide that it shall adopt the draft law and task the proposing entity to organise a public debate thereon. According to this explanatory note, the Draft Law on Freedom of Religion was adopted by the Government of Montenegro at its session of 30 July 2015 at the proposal of the Ministry of Human and Minority Rights and the public debate programme for this draft law was subsequently adopted. All of the stakeholders were allowed to take part in the public debate conducted in the period from 3 August to 30 September 2015, and to provide their suggestions, proposals, and comments.

15. Concerns have been expressed, however, during the meetings with religious communities in Podgorica as well as in press releases, as to the drafting process and noninclusive character of the working group formed by the Ministry for Human and Minority Rights. It is not usual, according to those concerns, that the government adopts a draft law before a public debate on the draft has been held; for this reason, the religious communities have been deprived of the possibility to make their contribution during the drafting process before the adoption of the text by the government as a draft law; the working group formed last year by the Ministry for Human and Minority Rights did not include any representatives of the religious communities despite several calls. The announcement of the public debate on the Draft Law during annual leave (30 July) was also criticised for diminishing the

effectiveness of the debate which started 3 days after the announcement (3 August).

16. In letters of 11 November and 26 November 2015 to the Secretariat of the Venice Commission, the Ministry gave an overview of the possible amendments in the Draft Law following the proposals, objections and suggestion submitted during the public debate (3 August-30 September). Those "possible amendments" will be referred to in the present opinion when necessary.

III Standards

17. The Draft Law will be analyzed from the point of view of correspondence with international standards and OSCE commitments, primarily with the International Covenant on Civil and Political Rights (hereinafter ICCPR), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) as interpreted by European Court of Human Rights.

18. Article 18 (1) of the ICCPR provides that everyone has the right to freedom of thought, conscience and religion, including freedom to have or to adopt a religion or belief of his/her choice, and freedom, either individually or in community with others and in public or private, to manifest his/her religion or belief in worship, observance, practice and teaching. The grounds for restrictions on the freedom of thought, conscience and religion are provided exhaustively in Article 18 (3) – necessity to protect public safety, order, health or morals or fundamental rights of others. But even in these cases the restrictions must be expressly prescribed by law and to be proportional.

19. ECHR provides in Article 9 (1) that everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief, in worship, teaching, practice

and observance. The conditions for restriction to this rights are established in Article 9 (2) which provides that the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and necessary in a democratic society in the interests of public safety, public order, health or morals, or for the protection of the rights and freedoms of others. This list of possible restrictions is exhaustive. Article 9 must be read in conjunction with Article 14 ECHR which prohibit the discrimination on any ground, including sex, sexual orientation, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

20. Similar provisions can be found in Article 12 of the American Convention on Human Rights and Article 10 of the Charter of Fundamental Rights of the European Union.

21. For analysis will be used OSCE/ODIHR and Venice Commission documents, including the *Guidelines for Review of Legislation Pertaining to Religion or Belief*, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the Venice Commission), adopted by the Venice Commission at its 59th Plenary Session in June 2004, CDL-AD (2004)028 (hereinafter the "2004 Guidelines") and the Joint OSCE/ODIHR and Venice Commission Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th Plenary Session in June 2014, CDL-AD (2014)023 ("2014 Guidelines").

22. According to the Guidelines, "*Legislation should be reviewed to assure that any differentiations among religions are justified by genuinely objective factors and that the risk of prejudicial treatment is minimized or totally eliminated. Legislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for discrimination*" (Guidelines, II.B., § 3).

23. The Guidelines also underline States' obligation of neutrality and impartiality in dealing with freedom of religion issues, which among other aspects, includes an obligation to refrain from taking sides in religious disputes (2004 Guidelines, II.B, § 4).

24. The 2013 Kyiv Ministerial Council Decision on the freedom of thought, conscience, religion or belief, called on OSCE participating States to "refrain from imposing restrictions inconsistent with OSCE commitments and international obligations on the practice of religion or belief by individuals and religious communities."

IV Analysis of the Draft Law

A The title and scope of the Draft Law as regards freedom of "belief"

25. As the Venice Commission and the OSCE/ODIHR underlined in their "Guidelines for Legislative Reviews of Laws Affecting Religion or Belief"[24] "[i]nternational standards do not speak of religion in an isolated sense, but of "religion *or* belief". The belief aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus atheism and agnosticism, for example, are generally held to be equally entitled to protection to religious beliefs". Article 1(3) of the Draft Law adopts this approach and states that "Freedom of Religion shall protect theistic, non-theistic and atheistic beliefs, as well as the right not to manifest and religion or belief". Thus the Draft Law also encompasses non-religious beliefs and organisations based on such beliefs.

26. Nevertheless, the Draft Law, entitled as "on the freedom

[24] CDL-AD(2004)028 Guidelines For Legislative Reviews of Laws Affecting Religion or Belief (hereinafter "the 2004 Guidelines"), adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), p. 4-5.

of religion", only addresses the freedom of religion and religious communities, and will replace the 1977 Law on the Legal Position of Religious Communities[25], which also deals with religious communities. Either the Draft law should be amended in its entirety in that the freedom of non-religious beliefs and their communities is also addressed, in which case the title of the Draft Law should also be amended as "on freedom of religion and belief", or Article 1(3) should be struck. In the latter case, it should be made clear in the Draft Law through which legal framework –for instance the Law on Non-Governmental Organisations- an equivalent protection of the freedom of –non-religious- beliefs is guaranteed as required by Article 9 ECHR in conjunction with its Article 14. The Venice Commission and the OSCE/ODIHR remind the international obligation of state authorities to review their legislation in order to prevent discrimination against non-believers[26].

27. Article 1(2) seems to provide that individuals and communities have only the rights expressly provided by this Article which enclose a limited catalogue of rights covered by the freedom of religion. In order to exclude any misinterpretation, the text must be redrafted in order to clarify that the list of rights under Article 1(2) is not exhaustive: it may state expressly that the freedom of religion can be exercised freely and only in another sentence, the provision can provide for possible restrictions to the right to freedom of religion.

B Registration of Religious Communities

1. Whether the registration is compulsory

28. Article 14(1) of the Draft Law states that "[a] religious community (…) shall acquire legal personality by registration in the register of religious communities, kept by the Ministry". Also, Section III (Articles 26-41) of the Draft Law is entitled "Rights and

25 See Article 54 of the Draft Law.
26 See 2004 Guidelines, p. 5.

Obligations of registered Religious Communities and their Believers". The combination of those Articles seems to imply that unregistered religious communities do not enjoy the right to freedom of religion and that the registration is a precondition for the benefit of those rights. Other provisions of the Draft Law, more specifically Article 21(4), seem to contradict this interpretation since it envisages the existence of "unregistered religious communities". Furthermore, Section I of the Draft law seems to guarantee collective religious freedom rights to any religious community, without requiring such a community to register and obtain legal personality.

29. However, this interpretation seems difficult regarding the "organisational part of a religious community which located abroad" since Article 17 expressly provides that "organisational part of a religious community (…) which is located abroad, which so far has not been registered (…)" are required to apply for registration. This Article seems to deny to religious communities ecclesiastically linked with a religious community situated abroad the right to freedom of religion if they do not register.

30. In any case, it has to be underlined that under international human rights law, religious or belief communities should not be obliged to seek legal personality if they do not wish to do so[27]. The enjoyment of the right to freedom of religion does not depend on whether a group has sought and acquired legal personality[28]. As the Venice Commission and the OSCE/ODIHR considered in the Joint Opinion on Freedom of Conscience and

[27] CDL-AD (2014)023 Joint Guidelines on the Legal Personality of Religious or Belief Communities (hereinafter, "the 2014 Guidelines") adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014), para. 21.

[28] See the 2014 Guidelines, para. 10. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief,* 22 December 2011, A/HRC/19/60, para. 58: " (…) Respect for freedom of religion or belief as a human right does not depend on administrative registration procedures, as freedom of religion or belief has the status of a human right, prior to and independent from any acts of State approval".

Religious Organisations in the Republic of Kyrgyzstan, "[t]he decision whether or not to register with the state may itself be a religious one, and the right to freedom of religion or belief should not depend on whether a group has sought and acquired legal entity status"[29].

31. During the meetings in Podgorica, the authorities emphasised that under the Draft Law, the religious communities do not have the obligation to register and that registration is not a precondition for the enjoyment of the right to freedom of religion or belief. The Venice Commission and the OSCE/ODIHR welcome this approach. However, in order to prevent any abuse or confusion in the implementation of the Draft Law, it should be clearly spelled out that the registration is not compulsory and the Section III has to clarify that an unregistered community also enjoys the rights mentioned there.

2 Registration requirements

32. The autonomous existence of religious communities is an issue that lies at the very heart of the protection that the freedom of religion affords[30]. As the 2014 Guidelines underlined, "*the right to legal personality status is vital to the full realisation of the right to freedom of religion or belief. A number of key aspects of organised community life in this area become impossible or extremely difficult without access to legal personality*", for instance, maintaining the continuity of ownership of religious buildings, establishing and operating schools, being able to facilitate larger scale production of items used in religious customs and rites, the employment of staff and the establishment and

[29] CDL-AD (2008)032 Joint Opinion of the Venice Commission and OSCE/ODIHR on Freedom of Conscience and Religious Organisations in the Republic of Kyrgyzstan, para. 26.

[30] Cf. ECtHR, *Hasan and Chaush v Bulgaria*, application no. 30985/96, 26 October 2000, para 62; and more recently ECtHR, *Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, application nos. 412/03 and 35677/04, 22 January 2009 para 103.

running of (especially larger-scale) media operations.[31] Therefore, a refusal to recognise the legal personality status of religious or belief communities has been found to constitute an interference with the right to freedom of religion or belief as exercised by both the community itself as well as its individual members.[32] The conditions to acquire legal personality (i.e. the registration requirements) have to be assessed in the light of these considerations.

a. Re-registration issue

33. The first issue that should be examined under this heading is the impact of the entry into force of the Draft Law on the situation of the already registered religious communities under the 1977 Law on Legal Position of Religious Communities. According to Article 51 of the Draft Law "[a] *religious community that is registered in accordance with the Law on the Legal Status of religious Communities shall be obliged to harmonise its acts and submit the application for registration in accordance with this Law within six months as of the date of its entry into force*". This implies that the religious communities which are already registered under 1977 Law, will lose their capacity as legal persons and will have to go through a new registration procedure to regain legal personality[33].

34. As the 2014 Guidelines has noted, "*in cases where new provisions to the system governing access to legal personality of religious or belief communities are introduced, adequate transition*

[31] Joint Guidelines on the Legal Personality of Religious or Belief Communities, adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 20.

[32] ECtHR, *Jehova's Witnesses of Moscow and others v. Russia*, application no. 302/02, 10 June 2010, para. 101; ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, application no. 40825/98, 31 July 2008, paras.79-80, and ECtHR, *Metropolitan Church of Bessarabia v. Moldova,* application no. 45701/99, 13 December 2001, para. 105.

[33] According to Article 14 of the Draft Law « A religious community (…) shall acquire legal personality by registration in the register of religious communities, kept by the Ministry".

rules should be contained in legislation whenever new rules to the system governing access to legal personality of religious or belief communities are introduced. Where laws operate retroactively or fail to protect vested interests of religious or belief organizations (for example, requiring re-application for legal personality status under newly-introduced criteria), the state is under a duty to (...) demonstrate the objective reasons that would justify a change in existing legislation, and show that the proposed legislation does not interfere with the freedom of religion or belief more than is strictly necessary in the light of those objective reasons."[34] The Venice Commission and the OSCE/ODIHR consider that the obligation of a number of existing religious communities[35] that are already qualified as legal entities, to apply for re-registration in order to regain their legal personality, is a serious interference in the life and legal security of these communities and may amount to a breach of the freedom of religion in the absence of objective reasons for the re-registration procedure.

35. One technique to ensure continuity could be to simply state that those communities already recognised under the 1977 Law are automatically recognised by this draft Law and that the registration requirement therefore only applies to new religious communities. This rule should also apply to religious communities which, although not registered under the 1977 Law, have de facto been recognised as legal entities in the past, and have in practice been operating as such.

b. Substantive requirements

36. Articles 15 and 16(2)1 of the Draft Law stipulate the substantive conditions to be fulfilled in order to be registered. According to Article 15 "*[a] religious community can be*

[34] Joint Guidelines on the Legal Personality of Religious or Belief Communities, adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 36.

[35] According to the information submitted by the representatives of the Ministry of Interior during the meetings in Podgorica, the number of currently registered religious organisations under the 1977 Law is nineteen.

registered if it has at least 50 adult believers who are Montenegrin citizens and have permanent residence in Montenegro". Moreover, according to Article 16(2)1 the name of a religious community must be different from that of other religious communities and must not contain the official name of other states and its features.

37. The condition of citizenship will be addressed under the title "Discriminatory citizenship and territorial requirements" (Section IV.B.3 of the present opinion).

38. As to the requirement of "50 adult believers", in their 2004 Guidelines, the Venice Commission and the OSCE/ODIHR considered that high minimum membership requirements should not be allowed with respect to obtaining legal personality[36]. During the meetings in Podgorica, although the NGO representatives considered this number as high for smaller religious communities, the latter, also the smaller ones, did not put forth any particular criticism on this point. In its Opinion on the Draft Law on Amending and Supplementation of Law no. 02/L-31 on Freedom of Religion of Kosovo*[37], the Venice Commission considered that the requirement of "a minimum of fifty members, adult citizens of Kosovo* does not give rise to criticism, although no specific explanation was given to the Rapporteurs for setting the minimum number at fifty (other than an attempt to find a compromise between various views within the religious communities)". The minimum number requirement in the Draft Law does similarly not give rise to any particular criticism.

39. As to the name of the religious community, the 2014 Guidelines stipulate that "*the state must respect the autonomy of religious or belief communities when fulfilling its obligation to provide them with access to legal personality by […] ensuring that*

[36] CDL-AD (2004)028 Guidelines for Legislative Reviews of Laws Affecting Religion or Belief, adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004).

[37] CDL-AD(2014)012, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014), para. 68.

national law leaves it to the religious or belief community itself to decide on […] its name and other symbols."[38] It is of course legitimate to try to avoid a high risk of confusion between the name of the applicant community and the name of another registered community[39]. However, the requirement should not be strictly applied and too restrictive an approach should be avoided. The formulation of Article 15 on this point would benefit from being more specific, for example by stating that registration may be refused only if there is a very high risk that the name of an applicant community will be confused with the name of another registered community[40]. However, the requirement that the name of a religious community "must not contain the official name of other states" appears to be problematic, in particular, in the Montenegrin context, where the Serbian Orthodox Church, although not registered, is one of the most important religious communities in Montenegro. The provision should be reconsidered in the light of the principle of autonomy of religious or belief communities. In their letter of 11 November 2015 to the Secretariat of the Venice Commission, the authorities underlined that they are committed to recognise diversities in the names of religious communities and that the relevant provisions will be amended in order not to compromise the autonomy of religious communities. This is welcome.

c. Formal requirements

40. Article 16 of the Draft enumerates the formal conditions to be fulfilled for registration. It prescribes that the application has to contain 1) the name of the religious community; 2) the headquarters and address of the religious community in

[38] European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODHIR) Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para.31

[39] See, CDL-AD(2014)012, Opinion on the draft law on amendments and supplementation of law no. 02/L-31 on Freedom of Religion of Kosovo*, para. 38

[40] See, CDL-AD(2014)012, para. 38.

Montenegro; 3) the information on religious and other facilities used to perform religious rites and religious affairs; 4) the information on religious schools and homes for accommodation of persons attending the schools, social and humanitarian institutions, as well as informative and publishing activities of the religious community.

41. Moreover, the application also shall contain a) the decision on the establishment, with information on the persons referred to in Article 15 of this Law (name, personal identification number or identification card number, proof of citizenship and permanent residence), with their personal signature; b) information on the representative of the religious community (name, personal identification number or identification card number, proof of citizenship and permanent residence), with his personal signature; c) description of the basis of belief and autonomous regulations relating to its internal and territorial organisation and mode of action in Montenegrin language or language in official use which is used by the religious community to perform religious rites and religious affairs; d) basic religious texts of the religious community in authentic wording.

42. As has been pointed out in the 2014 Guidelines, "*any procedure that provides religious or belief communities with access to legal personality status should not set burdensome requirements*."[41] The authorities are of course entitled to ask the information which is necessary to identify the religious community and to verify whether this community meets the conditions for

[41] Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 25. The Joint Guidelines further specify: "Examples of burdensome requirements that are not justified under international law include, but are not limited to, the following: that the registration application be signed by all the members of the religious organization and contain their full names, dates of birth and places of residence, that excessively detailed information be provided in the statute of religious organization; (…) that the religious organization has an approved legal address or that a religious association can only operate at the address identified in its registration documents."

registration foreseen in the law. It has however to be avoided to ask information which does not serve these purposes. The requirement of excessively detailed information imposes an unnecessary administrative burden on the religious communities or could be interpreted as an attempt to control their activities and to gain information on the beliefs of the citizens.

43. The aforementioned requirements seem to be unnecessarily burdensome and it is doubtful that all of them could be considered as necessary in a democratic society in view of the legitimate aims enumerated in Article 9(2) ECHR. For instance, the reasons why the state has to dispose of information on "*religious and other facilities used to perform religious rites and religious affairs*" and on "*religious schools and homes for accommodation of persons attending the schools, social and humanitarian institutions, as well as informative and publishing activities of the religious community*" are unclear in the Draft Law. Similarly, it is entirely unclear for what reason the Montenegrin Authorities have to be informed on "*the basis of belief and autonomous regulations relating to its internal and territorial organization and mode of action in Montenegrin language or language in official use which is used by the religious community to perform religious rites and religious affairs*" and on the "*basic religious texts of the religious community in authentic wording*".

44. The requirements such as "to enclose the decision on the establishment" or "basic religious texts of the religious community" appear to be unjustified with regard in particular to the religious communities which already for centuries exist on the territory of Montenegro. Under international standards, it is not for the state to involve itself in evaluating the content of religious beliefs. Doctrinal and organisational matters, including the issue of which texts are authentic, are a matter for the religious community to decide for itself, not for the State.[42]

[42] The ECtHR has reaffirmed that "the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed";

45. Finally, these requirements are much more demanding when compared to the rules that regulate legal personality of non-religious organizations (Law on Non-Governmental Organizations)[43]. Without further justification, these conditions are not compatible with the freedom of religion and the prohibition of discrimination in Articles 9 and 14 ECHR.

46. In accordance with Article 20, changes to the data referred to in Article 16 (2) and (3) of the Draft Law, i.e. changes of address and changes in the information on religious and other facilities used to perform religious rites and religious affairs must be notified to the competent authority (the Ministry for Human and Minority Rights) within 30 days of these changes. Although it seems legitimate to require that the Ministry should (continue to) be aware of the contact address of a registered religious community, it is difficult to see why it would need to be updated regularly on all changes to facilities used to perform religious rites and affairs. This would impose a significant administrative burden on the religious community, which would not appear to be justified by a clear and identifiable need.

47. Article 18 of the Draft Law requires the Ministry to take the decision on the registration within 60 days starting from the date on which the application for registration is made. This provision has to be welcomed as "religious or belief communities have a right to receive prompt decisions on registration applications".[44] It is important to ensure in the practice that the

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see ECtHR, S.A.S. v. France, application no. 43835/11, 1 July 2014, par 55; cf. also Guidelines for Review of Legislation Pertaining to Religion or Belief, adopted by the Venice Commission at its 59th Plenary Session in June 2004, CDL-AD (2004)028, at D; ECtHR, Hasan and Chaush v Bulgaria, application no. 30985/96, 26 October 2000, para. 62; Metropolitan Church of Bessarabia v. Moldova, application no. 45701/99, paras. 118 and 123.

[43] Cf. Articles 9 et seq. of the Law on Non-Governmental Organisations ("official Gazette of the Republic of Montenegro", numbers 27/99, 09/02, 30/02; Official Gazette of Montenegro, number 11/07 dated 13 December 2007).

[44] ECtHR 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria,* Application no. 40825/98, paras. 78–80; CDL-AD(2012)004 *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion*

deadline for issuing the decision on the registration is respected by the authorities[45]. A system of automatic registration, in case the registration authorities do not respond to the applications within the statutory time-limit, may be considered to be introduced into the Draft Law.

48. Article 19 of the Draft Law requires the Ministry to refuse to register a religious community if the application is not in compliance with Article 16, §§ 2 and 3. This implies that each deficiency will be penalised with the rejection of the application. The decision of the Ministry on refusal of entry in the Register shall be final. It may be subject to an administrative dispute, but as this dispute only pertains the legality of the decision (Art. 1 of the Law on administrative Dispute) the court will not be able to decide on the reasonableness of the rejection. Given the importance of legal personality for religious communities, the refusal to register for what can be a mere administrative deficiency, is out of proportion. The law should foresee in the possibility for religious communities to complete the application.

C Discriminatory citizenship and territoriality requirements

49. According to Article 3(1) of the Draft Law, "*citizens of the same religion shall have the right to manifest their religion by establishing the religious community*". Probably the notion "citizens" stands for persons having the Montenegrin nationality. This provision is similar to Article 2(1) of the 1977 Law on Legal Position of Religious Communities, currently in force, which states that "*Citizens may establish religious communities*". However,

and the legal status of churches, denominations and religious communities of Hungary, para. 44.

[45] See CDL-AD(2014)043 Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds) as amended of the republic of Azerbaijan, adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014), para. 46.

freedom of religion is a right that is not restricted to citizens.[46] Therefore such a provision violates the Articles 1, 9 and 14 ECHR, which guarantee the freedom of religion, without discrimination, to everyone within the jurisdiction of the High Contracting Parties.

50. Another citizenship condition concerning the ability to register can be found in Article 15 of the Draft Law. This provision stipulates that only religious communities "*with at least 50 adult believers who are Montenegrin citizens and have a permanent residence in Montenegro*" can register and thus obtain legal personality. This condition likewise has to be questioned in the light of the aforementioned standards on freedom of religion and the principle of non-discrimination: the condition that 50 members have "*a permanent residence in Montenegro*" should be sufficient. As the European Court of Human Rights has ruled, the legislation should not deny access to legal personality to religious or belief communities on the grounds that members of the community are foreign or non-citizens[47]. Likewise the 2014 Guidelines have pointed out that, since freedom of religion or belief is a right that is not restricted to citizens, legislation should not deny access to legal personality status to religious or belief communities on such grounds.[48] In their letter of 11 November 2015 to the Secretariat of the Venice Commission, the authorities informed the Commission that this provision will be amended in order to recognise the right of non-citizens who have a permanent residence in Montenegro to establish religious communities in Montenegro. This would be a step in the right direction.

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[46] CDL-AD|(2012)022, Joint opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 92nd Plenary Session (12-13 October 2012), para 99; CDL-AD(2012)004, Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, adopted by the Venice Commission at its 90th Plenary Session, 16-17 March 2012, para 93.

[47] ECtHR, *Moscow Branch of the Salvation Army v. Russia*, Application no. 72881/01, 5 October 2006, para. 82.

[48] Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th Plenary Session (Venice, 13–14 June 2014), para. 29.

51. The Draft Law also contains several problematic requirements as to the territorial residence and operation of registered religious communities. According to Article 11(1) of the Draft Law the "territorial configuration" of a religious community registered and operating in Montenegro shall not extend outside of Montenegro. Articles 11 (2) and 16(1)2 of the Draft Law prescribe that the headquarters of a religious community registered and operating in Montenegro must be located in Montenegro. These provisions severely interfere in the internal organisational autonomy of religious communities. For instance, they exclude the possibility of churches that operate internationally to have a branch in Montenegro, as well as the operation in other countries by churches that have their headquarters in Montenegro. In fact, religious beliefs are not bound to any particular geographical location, and religious communities very often operate in a range of different states and across borders, as is their right.[49] Interferences of this kind violate the organisational freedom of religion, because they cannot deemed to be "necessary in a democratic society" for the purposes mentioned in Article 9, § 2 ECHR. As the European Court of Human Rights has ruled, the acquisition of legal personality of religious organizations cannot be denied on the basis that its headquarters are located abroad[50], a view also endorsed in the 2014 Guidelines[51]. Furthermore, they are not in line with the principle of non-discrimination.

D Restrictions on the freedom of religion

52. The Draft Law contains many problematic restrictions on the freedom of religion, concerning in particular, the appointment of religious leaders, activities of religious communities including the manifestation of their religious beliefs

[49] UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, para 6 (i); Vienna 1989, par 32.

[50] ECtHR *Moscow Branch of the Salvation Army v. Russia*, Application no. 72881/01, 5 October 2006, paras. 83–85.

[51] Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 29.

and performance of religious rites, the use of their property, spending of funds and religious instructions.

53. According to Article 4(2)2 of the Draft Law a religious community shall decide independently on "[…] *the appointment and powers of its religious officials and other religious workers*." Nevertheless, Article 4(3) prescribes that "*prior to the appointment, i.e. announcement of the appointment of the highest religious leaders a religious community shall confidentially notify the Government of Montenegro about that*." Neither the exact meaning of this provision, nor the aim the drafters pursue is clear. The drafters should in the first place decide whether the notification has to be made "prior to the appointment" or "prior to the announcement of the appointment." The text does not make this clear, but perhaps this lack of clarity derives from the translation.

54. A more substantial observation is that the reason why should the government be informed on the appointment of the highest religious leader, before this appointment has been made public is unclear. Both the appointment of a religious leader and the decision on the modalities of its announcement are aspects of the freedom of internal organisation of the religious communities. A limitation of this freedom can only be justified when it is "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Article 9, § 2 ECHR). It is very doubtful that this limitation corresponds to a "pressing social need" that could justify the above-mentioned obligation. If the provision aims at enabling the government to interfere or to exercise some influence on the appointment of the religious leaders (the authorities claimed during the meetings in Podgorica that this was not the case, without however further elaborating the aims pursued by this provision), then it obviously is not in compliance with Article 9 ECHR. As the ECHR has stressed, it is therefore solely to the religious or belief community

itself to decide on its leadership.[52]

55. Article 7 of the Draft contains several restrictions on the exercise of the freedom to religion of the religious communities. These limitations in general seem to be in compliance with Article 9(2) ECHR. Two of these reservations however merit further attention:

56. First, Article 7(2) bans activities "*directed against other religious communities and religions, or to the detriment of other rights of other rights and freedom of believers and citizens*." Although this provision can be justified "for the protection of the rights and freedoms of others" especially in a country which has witnessed serious tensions between the followers of different religions, it has to be underlined that while religious freedom is primarily a matter of individual conscience, it also implies the freedom to "manifest one's religion" including the right to try to convince one's neighbour, for example through "teaching". As the ECtHR stated in *Larissis v. Greece*[53], Article 9 does not, however, protect every act motivated or inspired by a religion or belief. It does not, for example, protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church. In other words, "a distinction has to be made between bearing […] witness and improper proselytism."[54]

57. Secondly, Article 7(3) prohibits "*political activities of a religious community and the abuse of religious feelings for*

[52] ECtHR, 22 January 2009, *Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria,* Application nos. 412/03 and 35677/04, para 120: "State measures favouring a particular leader of a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion."

[53] ECtHR, *Larissis v. Greece,* Application no. 23372/94, 24 February 1998, para. 45.

[54] ECtHR, *Kokkinakis v. Greece,* Application no. 412/03 and 35677/04, 25 May 1993, para 48.

political purposes". The 2004 Guidelines states that "*States have a variety of approaches towards the permissible role of religious and belief organisations in political activities. These can range from the prohibition of religious political parties, to preventing religious groups from engaging in political activities, to eliminating tax exemptions for religious groups engaging in political activities. While such issues may be quite complicated, and although a variety of differing but permissible laws is possible, such laws should not be drafted in way either to prohibit legitimate religious activities or to impose unfair limitations on religious believers*"[55]. Article 7(3) of the Draft Law would benefit from clarification: what are "political activities of a religious community"? Does this provision only apply to the activities of "religious communities" as such or does it also apply to (all) religious leaders, clergymen and even believers? Does the prohibition imply that they may not participate in a political debate, be a candidate for local, regional or national elections and hold a public office? And if so, how does this provision relate to Article 8(2) of the Draft Law which states: "*No one shall, because of the membership in a religious community, be prevented to use the rights to which he is entitled by the law as the citizen.*"

58. The Explanatory note provided by the Government speaks of the tendencies of some religious communities to actively participate in certain social events as advocates of political initiatives and the use of religious buildings for non-religious, political purposes. Despite these explanations, in its present wording the provision is not sufficiently precise in order to be in compliance with the condition set out Article 9(2) ECHR that a limitation of the freedom of religion has to be "prescribed by law". During the meetings in Podgorica, some religious communities criticised this provision as being too vague and being open to extensive interpretation.

59. Moreover, it is doubtful whether it is in compliance with

[55] CDL-AD(2004)028 Guidelines for legislative reviews of laws affecting religion or belief, p.17.

the condition that a limitation has to be "necessary in a democratic society". As the ECtHR considered in the case of *Metropolitan Church of Bessarabia and others v. Moldova*[56], while it cannot be ruled out that an organisation's programme might conceal objectives and intentions different from the ones it proclaims, the content of the programme should be compared with the organisation's actions and the positions it defends. Mere hypothesis, in the absence of corroboration, cannot justify restrictions on the exercise of the right to freedom of religion. Bearing in mind the principles of legality and foreseeability of legislation, it would be difficult for a religious community to adjust its behavior in light of such a vaguely worded provision. It is thus recommended to reconsider the intended purpose of this provision, and to either delete it, or formulate it in a narrower and specific manner.

60. The second paragraph of Article 7(3) prohibits *the abuse of religious feelings for political purposes*. This problematic as it is not clear what exactly "political purposes" means. It is neither clear to whom this provision is addressed. If the prohibition is addressed to politicians, it is questionable if this provision must be included in the Draft Law.

61. Article 27(2) of the Draft provides that the property of a religious community shall be used only to perform religious rites and religious affairs, construction and maintenance of religious facilities and charity. It is not evident on what grounds this limitation of the autonomy of the religious communities is justified. Furthermore, the words "religious affairs "and "religious facilities" lack sufficient clarity.

62. Article 33(4) of the Draft provides that requests for the construction of religious facilities shall only be considered if they have the approval of the supreme organs of a religious community in Montenegro. The drafters have to take into account that not

[56] ECHR, case of *Metropolitan Church of Bessarabia and others v. Moldova,* application no. 45701/99, 13 December 2001, para. 125.

every religious community is organised in a hierarchical way. The notion "supreme organ" should therefore be replaced by the notion "representative of religious community".

63. Article 36(2) of the Draft requires a prior notification "in accordance with the law" to perform religious rites and religious affairs out of religious facilities, in places accessible to citizens. It is not clear to which law this provision refers to. The representatives of the Ministry of Interior explained during the meetings in Podgorica that the law referred to in this Article, was the Law governing public assemblies and that the purpose of prior notification, to ensure the security of participants to religious rites. However, the obligation to perform religious rites and religious affairs only in religious facilities restrict the right to freedom of religion in a way which hardly can be considered in accordance with international standards. Although the procedure of prior notification may be justified in some cases the presumption that the religion can be manifested only in the limited places remains questionable. The obligation of all persons, even separate individuals, to give a prior notification for every performance of a religious rite or religious affair outside the religious facilities seems too burdensome.

64. Article 37 of the Draft Law states that a religious official who performs a religious rite may receive compensation from the person at whose request the ritual is performed. The religious community, according to the second paragraph of this provision, shall keep records of this income. During the meetings in Podgorica, the authorities explained, also in the context of Article 41 concerning "the supervision of the legality of the acquisition and purposeful spending of funds of religious community", that the aim of those provisions was to understand whether the tax provisions are applicable to the incomes. However, in Article 37, not only the freedom of religion of the religious community is at stake, but also the right of the individual believer not to reveal his religious activities.

65. In Article 41, firstly, the words "purposeful spending"

and “in accordance with the law” has to be clarified. Also, in case the purpose of the provision is to assess the applicability of tax provisions, as explained by the authorities, this should be treated in the specific law. It is assumed that other associations are not supervised in this manner, and if this is correct, then the current wording of Article 41 could be seen as discriminating against religious communities. At the same time, where public funds are used by a religious community, it may of course be legitimate for the State to ensure it has been spent in the required manner. It is therefore recommended to consider deleting this provision, or to amend it by specifying that such supervision applies only with regard to public funding.

E Prohibition to operate/Deletion from the register

66. According to Article 21 of the Draft Law a registered religious community shall be prohibited to operate if 1) it acts contrary to the legal order and public morals, encourage national, religious or other discrimination and violence or incites national, racial, religious or other hatred in order to provoke intolerance and persecution; 2) the purpose, objectives and methods of its religious activity are based on violence or use violence endangering the life, health or other rights and freedoms of this or other religious community, as well as other persons in a way that endangers human dignity. 3) it is found to carry out activities for profit, contrary to this Law.

67. Inclusion of this provision in the Section II on “Registration of a religious community” may be a source of ambiguity as to the nature of the sanction “prohibition to operate”, whether it implies that the religious community can no longer operate as a legal person, or whether it implies that the religious community as such has to cease its activities.

68. According to Article 21 (3) the provisions of this Article shall also apply to unregistered religious community if the reasons referred to in paragraph 1 items 1 and 2 of this Article exist. Since the reasons for prohibiting a registered religious community from

operating also apply to unregistered religious communities, the provision of Art. 21 implies that the religious community as such has to cease its activities and not mere withdrawal of legal personality. However, the provision may be removed from Section II.

69. The provision contains severe limitations of the freedom of religion. In the first place, it is not clear when the religious community as such is deemed to be responsible for having violated the legal order, having encouraged discrimination and violence etc. Does it require an action of the religious leaders, of the clergymen, of the believers? The provision lacks clarity and therefore does not meet the condition that the limitation has to be prescribed by law.

70. Secondly, although violent activities (Article 21(1)1) could indeed justify a ban, other non-violent activities may not meet the requisite standard for prohibition of a religious or belief community in international standards, which should be a matter of last resort.[57] In particular, if this provision is read as covering any activity that runs counter to the law ("the legal order"), this would also include relatively minor infringements, such as failure to send a change of address on time, to pay a fine within the set period, etc. However, the requisite standard for a ban is that there should be grave and repeated violations endangering public order, that no other sanctions can be applied effectively, and that overall, the measure is necessary in a democratic society and proportionate to a legitimate aim.[58] The provision, in its current wording is clearly not in compliance with the principle of proportionality, as it prescribes to most severe penalty – the prohibition to operate – for any violation provided in Article 21(1) of the Draft Law.

71. The following passage of the 2014 Guidelines, although it concerns the sanction of withdrawal of legal personality and not

[57] Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 33-34. par 33, and the sources cited there.

[58] *Ibid.*

the prohibition to operate, should be taken into account: "*considering the wide-ranging and significant consequences that withdrawing the legal personality status of a religious or belief organization will have on its status, funding and activities, any decision to do so should be a matter of last resort*." For that reason, in order to be able to comply with the principle of proportionality "*legislation should contain a range of various lighter sanctions, such as warning, a fine or withdrawal of tax benefits, which – depending on the seriousness of the offence – should be applied before the withdrawal of legal personality is completed*."[59]

72. It is therefore recommended to delete the phrase "acts contrary to the legal order and public morals" from Article 21. The Draft Law should set the threshold for prohibition much higher, and should also include a system of warnings and more gradual sanctions that should be applied before the sanction of prohibition is imposed.

73. It also appears unnecessary and disproportionate to ban a religious community because it carries out for-profit activities (Article 21, par 3). It is neither uncommon nor illegal for religious communities to seek to make profit by selling religious items or engaging in other legal activities to raise revenues. Where communities engage in such commercial activities, the State may legitimately tax those activities. In addition, where a religious community has obtained tax-exempt status, this status may be revoked if it is abused, provided the principle of proportionality is taken into account. Therefore, it would seem sufficient to withdraw such a community's tax-exempt status where such abuse occurs, rather than to ban the community, which should, as noted above, always be a matter of last resort. It is recommended to delete the possibility of banning a religious community for engaging in for-profit activities under Article 21 par 3.

74. Finally, depriving such communities of their basic rights by deciding to prohibit them has grave consequences for the

[59] *Ibid.* para. 33-34.

religious life of all their members and, for that reason, care should be taken not to inhibit or terminate the activities of a religious community merely because of the wrongdoing of some of its individual members. Doing so would impose a collective sanction on the community as a whole for actions that in fairness should be attributed to specific individuals. The Draft Law should be amended so that any wrongdoings of individual leaders and members of religious organisations are addressed to the person in question through criminal, administrative or civil proceedings, rather than to the community and other members[60].

75. Article 23 of the Draft provides for the removal of a religious community from the Register *inter alia*, if by a final court decision "*it is found responsible for a criminal offense and is imposed the sanction of dissolution of a legal person*." It should be clarified for which criminal offenses the sanction of dissolution can be imposed. Moreover, the removal of the religious community from the Register when "4. The competent organ found that the data or enclosures to the application for the registration are incorrect." The law should foresee the possibility for religious communities to provide the Register the correct data and enclosures. Also, the above-mentioned principles concerning the proportionality of the sanction of "prohibition to operate" also apply in the context of Article 23 concerning the removal of the community from the registry.

F Religious instruction and religious schools

76. Article 42(1) provides that religious instruction shall be conducted only in facilities in which are performed religious rites and religious affairs. This prohibits for instance religious

[60] See Interim joint opinion on the law on making amendments and supplements to the law on freedom of conscience and religious organisations and on the laws on amending the criminal code; the administrative offences code and the law on charity of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, CDL-AD(2010)054, para. 99; Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, CDL-AD(2012)022, para. 92.)

instruction in educational institutions. This limitation of the freedom of religion is not in compliance with Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief of 1981 which stipulates that "*the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedom […] to teach a religion or belief in places suitable for these purposes*."

77. Article 44(1) provides that registered religious communities may establish religious schools *for education of religious officials*. It must be concluded *a contrario* that general educational institutions for primary, secondary and tertiary education may not be established by religious communities, and may not have a religious ethos, even if they fulfil the general quality standards set by law, and are financed by private. The explanatory note provided by the authorities provides that "*when establishing religious schools, it has been provided that they are to be organized for educating religious officials from the secondary level of education, and that they can be established only by registered religious communities."*

78. The 1977 Law on Legal Position of Religious Communities has a similar approach since its Article 18 provides that "*Religious communities may establish only religious schools for clerics* (…)".

79. The exclusion of religious communities to establish religious educational institutions is not compatible with the freedom of education as enshrined in Article 2 of the First Protocol to the ECHR. This provision contains the right of private organisations, groups and individuals to establish and run private educational institutions. Further, the 2004 Guidelines state that parents should be able to educate their children in private religious schools or in other schools emphasising ideological values, states being permitted to establish neutral criteria for the teaching

standards [61].

80. Another interpretation, that would exclude such a right, would not be compatible with the principles of religious, philosophical and educational freedom, pluriformity and state neutrality that are enshrined not only in Article 2 Protocol 1, but also in other Convention rights such as the freedoms enshrined in Articles 8-11 and the non-discrimination clause of Article 14.

81. According to Article 44(1) only registered religious communities may establish religious schools (…). As the 2004 Guidelines state "*although it is possible to imagine cases where it would be acceptable to require that religious schools be operated only by registered religions, such a requirement becomes presumptively unacceptable wherever State policy erects discriminatory obstacles to registration for some religious groups. It is important to evaluate whether laws are neutral and non-discriminatory*". Thus, the remarks made in this Opinion concerning in particular the discriminatory registration requirements should be taken into account when assessing the conformity of this requirement to international standards.

82. Article 42(2) of the Draft provides that participation of a minor in religious instruction shall require the consent of parents, i.e. guardians, as well as the consent of the minor himself if he is older than 12. Although, during the meetings in Podgorica, some religious communities expressed the opinion that consent of the minor should be taken if he/she is older than 15, this provision does not rise any particular criticism. The following passage of the 2004 Guidelines is relevant in this matter: "*Legislation should be reviewed to assure that the appropriate balance of autonomy for the child, respect for parents' rights, and the best interests of the child are reached. Problematic in this regard are provisions that fail to give appropriate weight to decisions of mature minors, or that interfere with parental rights to guide the upbringing of their*

[61] See para II.B.6 and II.C.3 and C.4 of the Guidelines for Legislative Reviews of Laws Affecting Religion or Belief, 2004.

children. There is no agreed international standard that specifies at what age children should become free to make their own determinations in matters of religion and belief. To the extent that a law specifies an age, it should be compared to other State legislation specifying age of majority (such as marriage, voting, and compulsory."[62] Consideration may be given to setting a more flexible standard, such as consideration of the wishes of the child in line with his or her evolving capacities.[63]

83. Article 47(1) of the Draft provides that teaching in religious schools may in principle be performed only by Montenegron citizens. Paragraph 2 of this provision provides for an exception for foreigners under conditions specified by a separate law. This appears to be an unnecessary limitation on religious or belief communities' autonomy to select teachers for religious schools, and may also cause practical problems for some communities in finding teachers, considering Montenegro's relatively small population (as was also confirmed by some religious communities during the visit in Podgorica).

G Property of Religious Communities

84. Article 52 of the Draft Law concerns the transfer of property of religious facilities and land used by the religious communities in the territory of Montenegro. It pertains to three types of properties: 1) Religious facilities and land which have been built or obtained from public sources of the state; 2) Religious facilities and land which have been in state ownership until 1 December 1918 as cultural heritage of Montenegro; 3) Religious

[62] Guidelines for Legislative Reviews of Laws Affecting Religion or Belief, 2004, para. II.B.6.

[63] Committee on the Rights of the Child, General Comment 12 (2009): "The more the child himself or herself knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child's development, but will steadily increase as the child is encouraged to contribute his or her views."

facilities which have been built on the territory of Montenegro from joint investments of the citizens until 1 December 1918.

85. Article 53 foresees the procedure to implement Article 52, providing that the organ of administration competent for property affairs shall be obliged, within one year as of the date of entry into force of the Law, to determine the religious facilities and land that, within the meaning of Article 52, are state property, to make a list of them and submit an application for registration of state ownership rights on these immovable properties in the "immovable cadastre" (land registry).

86. As explained by a range of interlocutors during the visit in Podgorica, the above provisions would potentially cover a very significant number of religious edifices, and a significant amount of land. At the same time, the Government denies that this provision would amount to a confiscation. However, the plain meaning of the wording ("shall be the property of the State"), combined with the fact that, as also confirmed by various interlocutors during the visit, many of the buildings and land of religious communities are not currently in the hands of the State (nor indeed, for that matter, necessarily in the hands of the religious communities which use the edifices), would appear to indicate the contrary. Rather, it appears to be quite clear that in many cases, a transfer of ownership will take place as a result of Articles 52 and 53, which means that property hitherto not owned by the State would need to be confiscated prior to becoming state property.

87. Two issues arise in this context. First, under Article 1 of the First Protocol to the ECHR (peaceful enjoyment of possessions), a confiscation of property of this type is only possible if it is in the public interest. Any interference with peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental

rights.[64] As the ECtHR has held, “compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden […]”. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable [...] only in exceptional circumstances. The right to peaceful enjoyment of possessions does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value.”[65] No compensation at all, however, is foreseen in the Draft Law.

88. Second, although a public interest must be served by all types of confiscation, a specific concern does arise when it comes to property which is in use by religious communities for the purposes of manifesting the collective dimension of the freedom of religion or belief. After all, as noted above, the issue is whether a fair balance is struck between the general interests of the community and individual rights; the latter would include the freedom of religion or belief. Article 9 ECHR provides that there is a right to manifest religion in community with others. This includes the right to maintain the continuity of ownership of religious edifices.[66]

89. Religious communities organise meetings, perform religious rituals, and conduct other religious activities, and require religious edifices for that purpose to ensure a meaningful existence and be able to conduct these and other collective manifestations of religion or belief. These edifices themselves may indeed be of greater historical and symbolic value to those communities.

[64] See ECtHR, *Sporrong and Lönnroth v. Sweden*, application no. 7151/75 and 7152/75, 23 September 1982, par 69.

[65] See ECtHR, Lithgow and Others v. the United Kingdom, application no. 9405/81, 8 July 1986, para. 121.

[66] 2014 Guidelines, para. 20.

Confiscation, even with compensation, but without adequate provision for the right of the respective religious community, for example the right to use religious edifices, would also raise issues under Article 9 ECHR, as it would arguably limit the ability to manifest religion or belief in community with others. It is noted that as currently phrased, the wording of Articles 52 and 53 does not take these highly sensitive considerations into account. It is therefore recommended to reconsider the wording of Articles 52 and 53 to take into account the rights and freedoms of religion communities, including the right to manifest religion or belief in their respective religious edifices.

90. By a letter dated 11 November 2015, the Ministry for Human and Minority Rights informed the Venice Commission that the issue of compensation of religious communities for confiscated property shall be governed by a separate law. It is recommended to include a specific reference to the need for specific legislation on this issue in the draft Law to ensure the issue of compensation is indeed dealt with properly. However, it is not possible to give a comprehensible and positive judgment on this issue until this compensation law is enacted.

91. Finally, by a letter of 26 November 2015, the authorities provided a note on "Explanation of Art. 52 and 53 of the Draft Law on Freedom of Religion". According to the note, Articles 52 and 53 of the Draft Law do not apply to religious facilities over which any religious community has the right of ownership based on a legal title for its acquisition and on the manner of its registration. The note further explains that the competent authority referred to in Article 53, will first examine whether any property right exists on religious facilities which fall under the categories of property referred to in Article 52, and if this is the case, Article 52 would not apply. As such, the procedure in Article 52 does not even constitute an interference into the right to peaceful enjoyment of possessions within the meaning of Article 1 of the First Protocol 1. It appears from the explanations given in the note that if the competent authority referred to in Article 53 finds, during the examination, that a religious community has ownership on a

property listed under Article 52, it should also examine the legality and regularity of the acquisition of this property by the religious community and of its registration into the land registry. The note further states that this provision also aims to "govern (...) the manner in which to restore legality and to eliminate numerous irregularities and illegalities regarding cultural properties (…)".

92. However, none of these explanations result from the wording of Article 52 and 53 of the Draft Law (see para. 83). In any case, the Venice Commission and the OSCE/ODIHR reiterate that the issue should be properly dealt with under a separate law which should provide for substantial and procedural guarantees in order to avoid any illegitimate interference in to the property rights of religious communities. Again, it is not possible to give a comprehensible and positive judgment on this issue until the specific law is enacted.

V Conclusion

93. The Venice Commission and the OSCE/ODIHR welcome the efforts of the Montenegrin authorities to replace the – out-dated- 1977 Law on the Legal Status of Religious Communities with a new Law on Freedom of Religion following the developments in legal, political and social conditions in which religious communities organise and operate.

94. However, as witness the several explanatory notes provided by the Government, giving explanations on possible amendments to the Draft Law on the basis of the proposals made during the public debate organised between 3 August and 30 September, many amendments seem to be (and should be) tabled, despite the adoption of the Draft Law by the Government on 30 July.

95. The Draft Law presents serious problems on many points that should be addressed with, concerning re-registration process, burdensome registration requirements, discriminatory citizenship and territorial requirements, disproportionate sanctions on the

religious communities (prohibition and removal from registry) and finally the issue of "confiscation" (Art. 52-53) and the property rights of religious communities.

96. The following main recommendations are to be made:

- Communities already registered under the 1977 Law may be automatically recognised and acquire legal personality. This rule should also be applied to the religious communities that have been de facto recognised as legal entities.

- Discriminatory citizenship and territorial requirements for registration of religious communities should be removed.

- The formal requirements for registration should be limited to those necessary to identify the religious community and to verify whether it meets the conditions for registration foreseen in the law. Unjustified requirements as information on "mode of action (…) used by the community to perform religious rites" or "basic religious texts of the religious community in authentic wording" should be removed.

- A range of various lighter sanctions, such as warning, a fine or withdrawal of tax benefits should be provided in Articles 21 and 23, to be applied for minor violations of the legislation before the most severe sanction, as the prohibition to operate (Art. 21) and withdrawal of legal personality (Art. 23), is applied.

- The Articles 52-53, in their current wording, provide for a procedure of confiscation of religious facilities without compensation and is in clear violation of the right to peaceful enjoyment of possessions. The explanations given by the Government in their letter of 26 November as to the real scope of this procedure are not supported by the current wording of these Articles. This issue should be properly dealt with under a separate law which should provide for substantial and procedural guarantees in order to avoid any illegitimate interference in to the property rights of religious communities.

DRAFT

THE LAW ON FREEDOM OF RELIGION[67]

I GENERAL PROVISIONS

Article 1

The freedom of religion guaranteed by the Constitution shall be exercised in accordance with this Law.

The freedom of religion shall include: the right of an individual to either alone or in community with others, in public or private manifest religion or belief through worship, teaching, practice and observance, the right to change religion, the freedom to participate in religious instruction and education, as well as the right to preserve and develop the religious tradition.

Freedom of religion shall protect theistic, non-theistic and atheistic beliefs, as well as the right not to manifest any religion or belief.

The state shall guarantee unrestricted exercise of freedom of religion.

Article 2

Freedom of religion shall include the right to refuse the performance of military or other obligations involving the use of weapons (conscientious objection).

The right to conscientious objection shall be exercised in accordance with the regulations governing the area of security and defense.

Article 3

Citizens of the same religion shall have the right to manifest their religion by establishing the religious community.

A religious community is voluntary, non-profit association of persons of the same religion, established for the purpose of public and private manifestation of religion, performance of religious rites and religious affairs and which has its own structure,

[67] *Text provided by the authorities of Montenegro*

organs and internal rules.

Article 4

A religious community shall be free to perform religious rites and religious affairs.

A religious community shall decide independently, in particular on the following:

1) internal organization, establishment, composition, powers and functioning of its organs;

2) appointment and powers of its religious officials and other religious workers;

3) the rights and obligations of its believers, provided they do not interfere with their religious freedom;

4) linking with or participation in interreligious organizations located in Montenegro or abroad.

Prior to the appointment, i.e. announcement of the appointment of the highest religious leaders, a religious community shall confidentially notify the Government of Montenegro (hereinafter: the Government) about that.

Article 5

A religious community shall independently manage its property and funds based on its own autonomous regulations, in accordance with the law.

Article 6

Goods representing the cultural heritage of Montenegro, and on which the right of ownership or right to use is owned by a religious community shall not be sold or taken out of the state without the consent of the Government.

Article 7

A religious community shall act in accordance with the legal system of Montenegro, public order and morality.

The activity of a religious community must not be directed against other religious communities and religions, or to the detriment of other rights and freedoms of believers and citizens.

Political activities of a religious community and the abuse of

religious feelings for political purposes shall be prohibited.

Article 8

No one shall, in any way, be forced to become or remain the member of a religious community or to participate or not participate in manifesting religion.

No one shall, because of the membership in a religious community, be prevented to use the rights to which he is entitled by the law as the citizen.

Article 9

Any form of direct or indirect discrimination based on religious beliefs or manifestation of those beliefs and incitement of religious hatred and intolerance shall be prohibited.

Article 10

Collecting and processing data on religious beliefs of an individual shall be performed in accordance with the law governing the protection of data on personality.

Article 11

Territorial configuration of a religious community registered and operating in Montenegro shall not extend outside of Montenegro.

The headquarters of a religious community registered and operating in Montenegro must be in Montenegro.

Article 12

Individual issues of common interest for Montenegro and one or more religious communities may be regulated by the agreement concluded between the Government and the religious community.

Article 13

Supervision of the application of this Law shall be performed by the organ of the state administration responsible for the issues of human rights and freedoms (hereinafter: the Ministry).

II REGISTRATION OF A RELIGIOUS COMMUNITY

Article 14

A religious community or organizational part of a religious community which is located abroad (hereinafter: a religious community) shall acquire legal personality by registration in the register of religious communities (hereinafter: the Register), kept by the Ministry.

The contents of the Register, as public records, shall be determined by the Ministry.

The Register shall consist of a database and a collection of documents. The database shall be kept in electronic form.

Article 15

A religious community can be registered if it has at least 50 adult believers who are Montenegrin citizens and have permanent residence in Montenegro.

Article 16

The application for registration of a religious community shall be submitted to the Ministry by the legal representative of the religious community.

The application referred to in paragraph 1 of this Article shall contain:

1) the name of the religious community, which must be different from names of other religious communities and must not contain the official name of other state and its features;

2) the headquarters and address of the religious community in Montenegro;

3) the information on religious and other facilities used to perform religious rites and religious affairs;

4) the information on religious schools and homes for accommodation of persons attending the schools, social and humanitarian institutions, as well as informative and publishing activities of the religious community.

To the application referred to in paragraph 1 of this Article shall be enclosed:

- The decision on the establishment, with information on the

persons referred to in Article 15 of this Law (name, personal identification number or identification card number, proof of citizenship and permanent residence), with their personal signature;

- Information on the representative of the religious community (name, personal identification number or identification card number, proof of citizenship and permanent residence), with his personal signature; and

- Description of the basis of belief and autonomous regulations relating to its internal and territorial organization and mode of action in Montenegrin language or language in official use which is used by the religious community to perform religious rites and religious affairs;

- Basic religious texts of the religious community in authentic wording.

Article 17

Organizational part of a religious community that operates in Montenegro, which is located abroad, which so far has not been registered with the competent authorities in Montenegro, shall enclose to the application referred to in Article 16 of this Law, the decision of the competent authority of that religious community for entering into the Register.

Article 18

The Ministry shall determine whether the requirements prescribed by this Law for registration of the religious community are fulfilled, within 60 days as of receiving proper application and the required documentation referred to in Articles 16 and 17 of this Law.

If the religious community fulfils the requirements for registration, the Ministry shall issue a decision on entering into the Register.

Article 19

The Ministry shall refuse to register a religious community if the person authorized to represent the religious community does not file an application for registration pursuant to Article 16

paragraphs 2 and 3 of this Law.

The decision of the Ministry on refusal of entry in the Register shall be final and may be subject to an administrative dispute.

Article 20

The religious community shall notify the Ministry of any change of data referred to in Article 16 paragraph 2 and 3 of this Law, within 30 days of change.

Registration of all changes shall be performed in accordance with the provisions of this Law on the registration of a religious community.

Article 21

To a registered religious community shall be prohibited to operate, if:

1) it acts contrary to the legal order and public morals, encourage national, religious or other discrimination and violence or incites national, racial, religious or other hatred in order to provoke intolerance and persecution;

2) the purpose, objectives and methods of its religious activity are based on violence or use violence endangering the life, health or other rights and freedoms of this or other religious community, as well as other persons in a way that endangers human dignity,

3) it is found to carry out activities for profit, contrary to this Law.

A state organ or organ of the state administration which find the existence of the reasons referred to in paragraph 1 of this Article shall within the competent court, without delay, initiate proceeding for prohibition of operation of the religious community.

In the case referred to in paragraph 2 of this Article, shall be applied *mutatis mutandis* the provisions of the law regulating the activities of non-governmental organisations.

The provisions of this Article shall also apply to unregistered religious community if the reasons referred to in paragraph 1 items 1 and 2 of this Article exist.

Article 22

In case of issuance of an order for investigation against a religious official for the criminal offense prescribed by the Criminal Code, the competent court shall notify the religious community.

Article 23

The Ministry will delete a religious community from the Register, if:

1) the religious community itself decides to dissolute;

2) by the final court decision is found the responsibility of the religious community for a criminal offense and is imposed the sanction of dissolution of a legal person;

3) the religious community ceases to exist in accordance with the provisions of this Law;

4) the competent organ founds that the data or enclosures to the application for the registration are incorrect;

5) based on a judicial decision is prohibited to the religious community to operate on the grounds referred to in Article 21, paragraph 1 of this Law.

The religious community shall be removed from the Register by the decision of the Ministry.

The decision of the Ministry referred to in paragraph 2 of this Article shall be final and may be subject to an administrative dispute.

Article 24

On the property of a religious community which is removed from the Register, after settlement of debts, shall be decided in the manner prescribed by the acts of the religious community.

If the acts of the religious community do not provide for the manner of acting, the property of the religious community shall become the property of Montenegro.

Article 25

On issues not regulated by this Law, shall apply the provisions of the law governing administrative procedure.

III RIGHTS AND OBLIGATIONS OF REGISTERED RELIGIOUS COMMUNITIES AND THEIR BELIEVERS

Article 26

A religious community shall provide funds, for carrying out its activities, from the incomes of its own property, donations and other contributions of natural and legal persons, funds of international religious organizations of which it is member and from other legal affairs and activities on non-profit basis, in accordance with the law.

On the incomes referred to in paragraph 1 of this Article the religious community shall keep the records.

Article 27

For its obligations a religious community shall be liable with its entire property, in accordance with the law.

The property of a religious community shall be used only to perform religious rites and religious affairs, construction and maintenance of religious facilities and in charity.

Article 28

Immovable and movable goods that are owned by a religious community shall be entered, i.e. registered on behalf of religious legal persons located in Montenegro.

On behalf of the religious legal persons referred to in paragraph 1 of this Article shall be entered as well the right to use the immovable and movable property owned by the state.

Article 29

A religious community can collect donations on the basis of its autonomous regulations, in accordance with the law.

No one can be forced or prevented to give donations referred to in paragraph 1 of this Article.

Article 30

A religious community shall pay taxes, contributions and other fees, in accordance with the law.

A religious community may be fully or partially exempt

from tax and other obligations, in accordance with the law.

Natural and legal persons who make donations to a religious community may be exempted from respective taxes, in accordance with the law introducing respective public income.

Article 31

A religious official shall have the right to health and pension and disability insurance, in accordance with the law.

A religious community may establish institutions for social, i.e. health and pension and disability insurance of religious officials, in accordance with the law.

The religious community shall be obliged to register religious officials who exercise rights under paragraphs 1 and 2 of this Article, in accordance with the regulations governing the payment of contributions.

The funds from the state budget for health and pension and disability insurance of religious officials may also be provided to the religious community referred to in paragraph 3 of this Article, in accordance with the law.

If in the state budget the funds are provided for the purpose referred to in paragraph 4 of this Article, the Government shall determine the amount of funds, where on a religious community with a small number of believers may apply the principle of positive discrimination.

Article 32

To a religious community may be granted funds from the state budget and local self-government budgets for activities promoting spiritual, cultural, national and the state tradition of Montenegro, as well as for supporting social, health and humanitarian activities of special interest, provided that they are performed without any form of discrimination.

Article 33

A religious community shall have the right to build religious facilities and perform renovation and reconstruction of existing ones, in accordance with the law.

Construction, renovation and reconstruction of religious

facilities shall be performed on the basis of permits and approvals required by the law and regulations governing the area of construction of facilities and protection of cultural goods, and with the professional supervision of a competent organ of the government administration.

A competent organ of the government administration or local self-government shall, when developing spatial plans, consider also the expressed needs of a religious community for the construction of a religious facility.

The organs of the state administration competent for affairs of spatial planning and construction of facilities shall not consider requests for the construction of religious facilities that do not have the approval of the supreme organs of a religious community in Montenegro.

Article 34

A religious community shall have access to public broadcasting services and other media, and the right to independently conduct its own informative and publishing activity on non-profit basis, in accordance with the law.

Article 35

A religious community, within its social and humanitarian activities, may establish relevant institutions in accordance with the law.

Article 36

Religious rites and religious affairs shall be performed in religious facilities.

As an exception to paragraph 1 of this Article, religious rites and religious affairs may be performed even out of religious facilities in places accessible to citizens, without approval, with prior notification to the organ of the state administration competent for internal affairs, in accordance with the law.

For religious rites that are performed at the request of citizens (family saint, wedding, baptising, circumcision, confession, consecration and the like) the notification referred to in paragraph 2 of this Article shall not be required, unless these rites

are performed in a public place.

Article 37

A religious official who performs a religious rite or religious affair may receive compensation, i.e. reward for religious affairs and religious rites, from the person at whose request the ritual, i.e. affair is performed, on the basis of autonomous regulations of the religious community.

About incomes referred to in paragraph 1 of this Article a religious community shall keep the records.

Article 38

A religious community shall have the right to religious spiritual care of its believers who are serving the Army of Montenegro and the police.

The manner of exercising the rights referred to in paragraph 1 of this Article shall be governed by the instruction of the competent organ of the state administration.

Article 39

A person who is in detention or serving a prison sentence, as well as the person who is in a juvenile institution or correctional home shall have the right to individual and collective religious spiritual care.

The manner of exercising the rights referred to in paragraph 1 of this Article shall be governed by the instruction of the organ of the state administration competent for the area of judiciary.

Article 40

A person who is placed in a medical institution or a social care institution shall have the right to individual and collective religious spiritual care, according to the house rules of that institution.

Article 41

Supervision of the legality of the acquisition and purposeful spending of funds of a religious community shall be performed by the competent organs, in accordance with the law.

IV RELIGIOUS INSTRUCTION AND RELIGIOUS SCHOOLS

Article 42

Religious instruction shall be conducted only in facilities in which are performed religious rites and religious affairs.

Participation of a minor in religious instruction shall require the consent of parents, i.e. guardians, as well as his consent if he is older than 12.

The religious instruction with pupils shall be performed only at the time when pupils do not have classes at school.

Article 43

Parents shall have the right to conduct religious instruction of their child in accordance with their religious beliefs, respecting its physical and psychological integrity.

Article 44

For education of religious officials a registered religious community may establish religious schools at all educational levels except primary education, as well as establish homes for accommodation of persons who are studying in these institutions.

The religious community referred to in paragraph 1 of this Article shall independently establish an educational program of the religious schools, the content of textbooks and manuals, determine the conditions for teaching staff.

Educational programs, as well as the contents of textbooks and manuals in religious schools shall not be in conflict with the Constitution and the law.

Article 45

Supervision in relation to compliance of educational programs and content of textbooks and manuals with the Constitution and the law shall be performed by the organ of the state administration competent for the affairs of education.

A responsible person in a religious school shall be obliged to make available all the information necessary for supervising organ referred to in paragraph 1 of this Article, as well as to correct

irregularities within the deadline set by this organ.

Article 46

A religious school established in accordance with this Law may perform publicly valid educational programs, if it obtained a license in accordance with regulations in the field of education.

A religious school that is licensed, i.e. accredited as an educational institution, shall be entitled to funding from the state budget, in proportion to the number of pupils, in accordance with the law.

Article 47

Teaching in religious schools may be performed only by Montenegrin citizens.

As an exception to paragraph 1 of this Article, a foreigner can teach in religious schools under conditions specified by a separate law.

V PENALTY PROVISIONS

Article 48

A fine of EUR 500 to EUR 20,000 shall be imposed for a misdemeanour on a legal person:

1) acting contrary to Article 7 of this Law;

2) who in any way forces another person to become or remain the member of a religious community, to participate or not participate in manifesting religion and not to use the rights to which he is entitled by the law as the citizen (Article 8);

3) who forces or prevents another person to give donations to a religious community on the basis of its autonomous regulations (Article 29 paragraph 2);

4) who establishes a religious school for primary education (Article 44 paragraph 1).

A fine of EUR 30 to EUR 2,000 shall be imposed for the misdemeanour referred to in paragraph 1 items 2 and 3 of this Article, on a natural person and responsible person.

A fine of EUR 150 to EUR 6,000 shall be imposed for the

misdemeanour referred to in paragraph 1 item 2 of this Article, on an entrepreneur.

Article 49

A fine of EUR 30 to EUR 2,000 shall be imposed for a misdemeanour on a natural person:

1) who is parent or guardian performing religious instruction contrary to the decision of the child (Article 42 paragraph 2);

2) who is religious official performing religious instruction contrary to Article 42 paragraphs 1 and 3 of this Law.

VI TRANSITIONAL AND FINAL PROVISIONS

Article 50

The regulation referred to in Article 14 paragraph 2 of this Law shall be delivered within 30 days as of the date of entry into force of this Law.

Article 51

From the organ of state administration competent for internal affairs the Ministry shall take over the data on religious communities that were registered with that organ until the entry into force of this Law, within 30 days as of the date of entry into force of this Law.

A religious community that is registered in accordance with the Law on the Legal Status of Religious Communities (Official Gazette of Socialist Republic of Montenegro, no. 9/77), shall be obliged to harmonize its acts and submit the application for registration in accordance with this Law within six months as of the date of its entry into force.

A religious community which does not act in accordance with paragraph 2 of this Article shall not be considered to be the registered religious community within the meaning of this Law.

Article 52

Religious facilities and land used by the religious communities in the territory of Montenegro and for which is found to have been built or obtained from public resources of the state or

have been in state ownership until 1 December 1918, as the cultural heritage of Montenegro, shall be the property of the state.

Religious facilities for which is found to have been built on the territory of Montenegro from joint investments of the citizens until 1 December 1918, shall be the property of the state.

Article 53

The organ of administration competent for property affairs shall be obliged to within one year as of the date of entry into force of this Law, determine the religious facilities and land that, within the meaning of Article 52 of this Law, are the state property, to make a list of them and submit an application for registration of the state ownership rights on that immovables in the immovables cadastre.

The organ of administration competent for cadastre shall be obliged to perform the registration of rights referred to in paragraph 1 of this Article within 60 days as of submission of the application.

Article 54

On the date of entry into force of this Law, the Law on the Legal Status of Religious Communities (Official Gazette of the Socialist Republic of Montenegro, no. 9/77) shall cease to be valid.

Article 55

This law shall enter into force eight days as of its publication in the Official Gazette of Montenegro.