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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**MONTENEGRO**

**OPINION**

**ON THE DRAFT LAW ON FREEDOM OF RELIGION OR BELIEFS  
AND LEGAL STATUS OF RELIGIOUS COMMUNITIES**

**Adopted by the Venice Commission  
at its 119th Plenary Session  
(Venice, 21-22 June 2019)**

**on the basis of comments by:**

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## **I. Introduction**

1. On 24 August 2015, the Ministry for Human and Minority Rights of Montenegro sought the Venice Commission's opinion on a draft Law on Freedom of Religion of Montenegro (CDL-REF(2015)032). Following criticism expressed by the rapporteurs during the visit, the Montenegrin authorities abandoned the said draft law and expressed the wish to withdraw the request for the opinion. The Commission accepted this request pending the preparation of a new draft law.

2. By a letter of 17 May 2019, Mr Mehmed Zenka, Minister of Human and Minority Rights, requested an opinion from the Venice Commission on a new draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities (hereinafter, "the draft law") (CDL-REF(2019)014).

3. Mr Nicolae Esanu, Mr Jan Velaers and Mr Ben Vermeulen acted as rapporteurs. On 23-24 May 2019, a delegation of the Venice Commission composed of the three rapporteurs accompanied by Ms Simona Granata-Menghini, deputy secretary of the Venice Commission and Mr Ziya Caga Tanyar, legal officer at the Secretariat, travelled to Podgorica. The delegation met with the Deputy Prime Minister and Minister of Justice, the Minister of Human and Minority Rights, the Minister of the Interior, the Minister of Foreign Affairs, the President of the Parliament, representatives from both the parliamentary majority and the opposition, the Protector of Human Rights and Freedoms, the Director General of the Directorate for Relations with Religious Communities of the Ministry of Human and Minority Rights, the Director General for Multilateral Relations of the Ministry of the Interior, the President of the Supreme Court, NGO representatives, representatives of the five religious communities, the President of the Association of Lawyers, as well as academics. The Venice Commission is grateful to the Montenegrin authorities for the excellent preparation of the visit.

4. The present opinion is based on the English translation of the draft law provided by the Montenegrin authorities. Some of the issues raised in the present opinion may find their cause in the translation rather than in the substance of the provisions concerned.

5. The present opinion was prepared on the basis of the contributions of the rapporteurs and on the basis of the information provided by the interlocutors during the visit. It was examined by the sub-Commission on Fundamental Rights at its meeting on 20 June 2019 and was subsequently adopted by the Venice Commission at its 119<sup>th</sup> Plenary Session (Venice, 21-22 June 2019).

## **II. Background**

### **A. Legal Background**

6. The Constitution of the Republic of Montenegro guarantees the right to freedom of thought, conscience and religion in its Article 46, para. 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 coactively 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 his religious and other beliefs. Paragraph 3 concerns the restrictions to the freedom to express religious beliefs and stipulates that the 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.

7. The Constitution neither recognises any state religion, nor any traditional religious community in Montenegro. Article 14 states that "religious communities shall be separated from

the state” and guarantees equal rights and freedom in the practice of ceremonies and religious rites and affairs for all religious communities. Moreover, according to Article 50 of the Constitution, competent courts may prevent dissemination of information and ideas via the public media in order to prevent propagating racial, national and religious hatred or discrimination.

8. The exercise of the freedom of religion and the status of religious communities is currently regulated by the 1977 Law on legal position of religious communities<sup>1</sup> (hereinafter, “1977 Law”). This law provides for the legal and regulatory framework for the establishment and termination of religious communities, contains the rules concerning places and premises where religious ceremonies may be conducted and establishes the framework for the founding of religious schools. Under Article 3 of the 1977 Law, “religious communities shall be separated from the state”. Religious communities, considered as legal entities under civil law, may be established only by citizens, by reporting, within 15 days, the establishment – or termination – of a religious community to the competent municipal authority in charge of internal affairs (art. 2(2)). Religious ceremonies performed in a group and religious activities may be performed in churches, temples and official premises of a religious community as well as in yards and cemeteries adjacent to those facilities. Any performance of religious activities/ceremonies in other premises accessible to the public that the religious community uses in accordance with the law depends on the prior approval of the competent municipal authority (art. 9(3)). Also, the participation of foreign citizens in religious ceremonies and performance of religious activities by foreigners is only possible upon authorisation of the competent municipal authority (art. 16).

9. The 1977 Law also lays down the legal framework concerning the founding of religious schools and sets forth the rules concerning their staff. According to Article 18, religious communities may establish schools only for clerics and residences for students of such schools and set up the schools’ program and curriculum. Such schools are outside the education system of Montenegro as they are managed directly by the religious community. The religious schools established for clerics may be attended only by those who finished mandatory elementary education (art. 18(2)). Foreign citizens may teach in those schools upon approval of the competent municipal public authority. The Law also establishes rules concerning the funding of and collection of contributions for religious communities, as well as rules concerning the remuneration of clerics for the performance of religious ceremonies at the request of an individual (art. 23 and 24). Finally, according to art. 5 of the 1977 Law, any misuse of religious communities and their institutions as well as religious activities and/or religious sentiments for political purposes shall be prohibited.

10. According to the 2017 International Religious Freedom Report of the U.S. Department of State,<sup>2</sup> approximately 72 percent of the population is Orthodox. Local media estimate the Serbian Orthodox Church accounts for 70 percent of the Orthodox population, while the Montenegrin Orthodox Church represents the remaining 30 percent. The census reports 19.1 percent of the population is Muslim, 3.4 percent Roman Catholic, and 1.2 percent atheist. Additionally, 2.6 percent of respondents did not provide a response, and several other groups, including Seventh-day Adventists (registered locally as the Christian Adventist Church), Buddhists, Jehovah’s Witnesses, other Christians, and agnostics together account for less than 1 percent of the population. The Jewish community numbers approximately 350.

11. “Fundamental agreements” have been signed between the Government of Montenegro and a number of religious communities defining the legal status of the respective community and regulating their relations with the state. The first Fundamental agreement concerned the Holy See and was concluded in 2011. This was followed by the Agreement Regulating Mutual

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<sup>1</sup> OGSRM 9/77, 26/77, 29/89, 39/89, OGRM 27/94, 36/03

<sup>2</sup> U.S. Department of State, Bureau of Democracy, Human Rights and Labor, International Religious Freedom Report for 2017 – Montenegro.

Relations between the Government and Islamic Community and the Agreement Regulating Mutual Relations between the Government and Jewish Community in 2012. Those agreements do not replace the requirements imposed by the legislation, such as registration. No similar agreement has been signed with the Serbian Orthodox Church or the Montenegrin Orthodox Church to date.

## **B. Historical Background**

12. The following account of the historical background is primarily based upon the information provided by the authorities of Montenegro. The Archbishop of Cetinje, Metropolitan of Montenegro and the Littoral, fundamentally disagrees with this version.

13. The Kingdom of Montenegro was proclaimed by Prince Nicholas of Montenegro on 28 August 1910. He was the ruler of Montenegro from 1860 to 1918, reigning as sovereign prince from 1860 to 1910 and as king from 1910 to 1918. The Kingdom of Montenegro, which was a constitutional monarchy, was allied with the Triple Entente and was occupied by Austria-Hungary from January 1916 to October 1918. On 28 November 1918, the "Podgorica Assembly", an *ad hoc* body, adopted a resolution deposing king Nicholas and unifying Montenegro with the Kingdom of Serbia. On 1 December 1918, the Kingdom of Yugoslavia was created (the Kingdom of Serbs, Croats and Slovenes) and both Serbia and Montenegro became part of this Kingdom.

14. Until the annexation of the Kingdom of Montenegro into the Kingdom of Yugoslavia in 1918, the autocephalous Montenegrin Church operated in Montenegro (art. 40 of the 1905 Constitution of the Principality of Montenegro). In 1920, referring to the decision of "Podgorica Assembly", regent Karađorđević issued a decree by which the Montenegrin Autocephalous Church was annexed to the Serbian Orthodox Church. Therefore, after 1920, the Serbian Orthodox Church was considered as the sole Orthodox body in Montenegro, with its main administrative center in Cetinje monastery.

15. The Montenegrin Orthodox Church was established on 31 October 1993 by Antonije Abramović who was subsequently appointed as the Metropolitan of Montenegro and the head of the Montenegrin Orthodox Church. The Montenegrin Orthodox Church, although not canonically recognized by other Eastern Orthodox Churches, claims succession to the autocephalous Montenegrin Church which was active until the annexation of the Kingdom of Montenegro into the Kingdom of Yugoslavia in 1918 and the take-over by the Serbian Orthodox Church in 1920. According to the Montenegrin Church, the referendum of 12 May 2006 which established the independence of Montenegro should be considered as cancelling the so-called "1918 Podgorica Assembly resolution" and the royal decree in 1920 of the regent Karađorđević restoring the state of affairs before 1918. The Serbian Orthodox Church denies that the 1993 Montenegrin Church is the rightful successor of the autocephalous Montenegrin Church and claims that the autocephalous church participated in the creation of the Serbian Orthodox Church and merged with it.

16. In 2001, the Montenegrin Orthodox Church was officially registered as an NGO.

17. The Serbian Orthodox Church in Montenegro is registered neither as an NGO nor as a religious community under Article 2 of the 1977 Law and does not have formal legal personality. However, in the context of the issuing of temporary residence permits to foreigners to perform religious services in Montenegro, the Serbian Orthodox Church obtained on 22 August 2016 a document containing the opinion of the Ministry of the Interior, stating that as the Metropolitanate of Montenegro and the Littoral and other Orthodox eparchies of the Serbian Orthodox Church already existed at the time when the 1977 Law entered into force, it did not have the obligation to notify the authorities of Montenegro under Article 2 of that law of the

establishment of a religious community. The document states that “in other words, the Law currently in force as well as the previous Law on Legal Position of Religious Communities adopted in 1953 in the Federal Peoples’ Republic of Yugoslavia merely confirm the legal personality of the Metropolitanate and other Orthodox eparchies in Montenegro”. According to the Ministry of the Interior, “even though these communities do not submit the application for registration [...] they still have their own legal personality since the Law confirms the undisputable fact that certain churches and religious communities have been present in Montenegro over time and they have performed their religious activities in compliance with the laws.”

18. In November 2018, the Montenegrin Parliament adopted a resolution on the occasion of the centenary of the Podgorica Assembly, by means of which the decisions of the Podgorica Assembly of 1918 were invalidated.

### III. Standards

19. The draft law will be analysed from the point of view of its conformity with international standards, primarily with the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, “ECHR”) as interpreted by the European Court of Human Rights (hereinafter, “ECtHR”).

20. Article 9(1) ECHR provides that “*everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*” The conditions for restriction to this right are established in Article 9(2) ECHR which provides that “*freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are 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.*” The list of possible restrictions is exhaustive. Article 9 must be read in conjunction with Article 14 ECHR which prohibits the discrimination on any ground, including sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

21. Similar provisions can be found in Article 18 of the International Covenant on Civil and Political Rights<sup>3</sup> (hereinafter, “ICCPR”), Article 12 of the American Convention on Human Rights<sup>4</sup> and Article 10 of the Charter of Fundamental Rights of the European Union.<sup>5</sup>

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<sup>3</sup> Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. 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.

<sup>4</sup> Article 12

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

22. In view of this analysis, the 2004 Joint Guidelines for Review of Legislation Pertaining to Religion or Belief and the 2014 Joint Guidelines on the Legal Personality of Religious or Belief Communities of the Venice Commission and OSCE/ODIHR will be used too.

#### **IV. Analysis**

##### **A. The process of preparation of the draft law and public consultation**

23. During the meetings in Podgorica, the delegation was informed that in addition to some limited consultations which took place during the preparation of an earlier draft law on freedom of religion in 2015, a number of roundtables were held in 2018 with the participation of religious communities, non-governmental organisations and academics which led to the publication of a report by the Ministry of Human and Minority Rights. Also, private meetings were organised separately by the Ministry with religious communities in the process of preparation of the current draft. It is understood that during the separate private meetings, the draft was examined article by article and some of the suggestions made by the religious communities were taken into account in the preparation of the last version of the draft. The Serbian Orthodox Church however claimed that it was not consulted, whereas the Government informed the rapporteurs that it refused to cooperate. Some interlocutors including NGO representatives underlined the limited scope of the consultation process, but also acknowledged the difficulties met in the organisation of these consultations, which were due, according to them, to the existing tensions between religious communities leading sometimes to forms of hate speech, which was not conducive to an open dialogue on the issues dealt with by the draft law. Moreover, the delegation was also informed that the Office of the Protector of Human Rights and Freedoms had been given the latest version of the draft at a very late stage, so that it did not have an adequate opportunity to submit comments to the Government in this process.

24. Without taking a position about these controversies, the Venice Commission stresses the need for inclusive and efficient consultations with the public, including representatives of religious communities, despite the difficulties which may be encountered because of the above-mentioned existing tensions among some religious communities. Moreover, the Venice Commission also recommends that the Office of the Protector of Human Rights and Freedoms be consulted by the Government and the possible comments which may be submitted by that Office to the Parliament be taken into account in the finalisation of this draft law.

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2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

<sup>5</sup> *Article 10*

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right.

## **B. Scope of the freedom of religion or belief in the draft law**

25. In line with the relevant international standards, the title of the draft law and the provisions under the first chapter (“I. Basic Provisions”) do not speak of religion in an isolated sense, but of “*religion or belief*” and therefore the draft law does not only guarantee the freedom of religion, but also the freedom of non-religious or non-theistic/atheistic beliefs. This scope is further clarified in the first paragraph of Article 4 of the draft law which provides that “[f]reedom of religion or belief protects theistic, non-theistic and atheistic beliefs, as well as the right, acting in line with one’s own conscience, not to manifest any religion or belief.” This is a clear improvement compared to the 1977 Law on legal position of religious communities. However, a number of draft provisions under the first chapter concerning key aspects of organised community life in this area do not explicitly mention “belief communities” or “other organisations based on people’s beliefs” but refer exclusively to “religious communities”. Draft Article 6, for instance, when defining the collective dimension of freedom of religion or belief, states that a “*religious community is a voluntary, non-profit association of persons belonging to the same religion, established for the purpose of public or private manifestation of religion [...]*” without indicating that non-theistic/atheistic beliefs also enjoy the collective dimension of that right. It is therefore recommended that the draft law defines the “belief communities” (preferably under draft Article 6) and clarify that all the principles and rules set forth concerning the religious communities are also valid for “belief communities”.

26. Secondly, draft Article 1(1) provides that “*freedom of thought, conscience and religion, guaranteed by the Constitution and the confirmed and published international agreements, shall be exercised in line with this Law.*” This provision, however, should not be understood and applied in the sense that individuals have solely and exclusively the concrete rights indicated in the law on freedom of religion, which therefore would limit the constitutional provisions and the provisions of international conventions. It should be reminded that the existence of legislation is not a pre-condition in order for individuals to enjoy the fundamental rights which are guaranteed in international human rights treaties and constitutional provisions.<sup>6</sup>

27. In this connection, draft Article 8(1) appears to contain a restriction clause that “*[r]eligious community shall act in line with the legal order of Montenegro, public order and morals.*” It should be emphasised, firstly, that this provision presupposes the legal order itself being in compliance with the freedom of religion as guaranteed in the Constitution and the international human rights treaties. Secondly, compared to the restriction clause under draft Article 3(1) and Article 9(2) ECHR, the restriction clause in draft Article 8(1) appears to be too broad. Moreover, although protection of “public order” and “morals” are two legitimate aims mentioned under Article 9(2) ECHR restrictions, as indicated under draft Article 3(1) and Article 9(2) ECHR, should also be “necessary in a democratic society”, which criterion is not mentioned under draft Article 8(1). It is recommended that draft Article 8(1) be redrafted in line with the restriction clauses under Article 9(2) ECHR.

28. Further, according to draft Article 8(2) “*[a]ctions of the religious communities shall not be directed against other religious communities and religions, and shall not harm other rights and freedoms of believers and citizens.*” Although “protection of the rights and freedoms of others” is a legitimate aim in the sense of the second paragraph of Article 9 ECHR, it should be reminded that the freedom to manifest one’s religion includes, in principle, the right to try to convince one’s neighbour, for example through “teaching”, failing which “freedom to change [one’s] religion or belief”, enshrined in Article 9 ECHR, would be likely remain a dead letter.<sup>7</sup> Article 9 ECHR does not, however, protect every act motivated or inspired by a religion or belief. It does not, for example, protect improper or abusive proselytism, such as the offering of material or

<sup>6</sup> See, for instance, CDL-AD(2004)028 Guidelines for legislative reviews of laws affecting religion and belief (11 June 2004), p. 6.

<sup>7</sup> ECtHR, *Kokkinakis v. Greece*, application no. 14387/88, 25 May 1993, para. 31.

social advantage or the application of improper pressure with a view to gaining new members for a Church.<sup>8</sup> The task of the authorities, including the domestic courts, is to determine whether the measures taken against those religious communities who “directed their actions against other religious communities and religions” are justified and proportionate. In order to do this, they must weigh the requirements of the protection of the rights and liberties of others against the conduct of the applicants.<sup>9</sup> Therefore, it is recommended that draft Article 8(2) explicitly mentions that the prohibition is limited to *improper/abusive* proselytism and that the restrictive measures which may be taken by the authorities under this provision should respect the criterion of “necessary in a democratic society”.

29. Lastly, under draft Article 6, a religious community is defined as a “*voluntary, non-profit association of persons belonging to the same religion, established for the purpose of public or private manifestation of religion, exercise of religious ceremonies and religious affairs (...)*”. Considering that “manifestation of religion” is largely defined under draft Article 4(2) as “prayer, sermon, practice, or in some other manner”, the use of the term “religious affairs” in draft Article 6 is ambiguous and superfluous and its deletion is recommended. Moreover, the “non-profit” character of religious communities in the definition provided under draft Article 6 should not be understood as prohibiting every income-generating activity by religious communities. Otherwise, the provision under draft Article 40 which provides that “religious community shall pay taxes (...)” does not make any sense. Furthermore, such a general prohibition would seriously hamper the functioning of religious communities, and would restrict their freedom of religion disproportionately.

### **C. Registration of religious communities**

30. According to the 2014 Guidelines, “religious or belief communities should not be obliged to seek legal personality if they do not wish to do so”. Indeed, “[t]he choice of whether or not to register with the state may itself be a religious one, and the enjoyment of the right to freedom of religion or belief must not depend on whether a group has sought and acquired legal personality status”.<sup>10</sup> In line with this standard, draft Article 19 clearly provides that “[r]egistration of a religious community shall not be mandatory” (para. 1) and that “[r]eligious communities decide freely whether they will request to be entered into the register or not” (para. 2). During the meetings, the authorities also stressed that the registration is not a pre-condition for the enjoyment of the right to freedom of religion or belief. The approach taken by the draft law and the authorities is welcome. In addition, the Venice Commission stresses that the voluntary character of registration does not mean that religious communities may operate outside the legal system. In modern democracies, the constitutional limits to the state power over religious communities cannot be considered as a barrier to the assertion of the authority of the democratic state. Religious communities are not situated above or outside the national legal order: they have their place – although a special one, safeguarded and protected by specific fundamental rights - within that order.<sup>11</sup> It is noteworthy for example that OSCE participating States, in paragraph 16.3 of the 1989 Vienna Document, committed themselves to “grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their States, recognition of the status provided for them in their respective countries”.

31. The draft law provides for two different procedures for registration: first, according to draft Article 24, religious communities that are reported and registered with the public authority under

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<sup>8</sup> ECtHR, *Larissis v. Greece*, application no. 23372/94, 24 February 1998, para. 45.

<sup>9</sup> *Ibid.*, para. 46.

<sup>10</sup> CDL-AD(2014)023, Guidelines on the legal personality of religious or belief communities, para. 21.

<sup>11</sup> See ECtHR, 13 February 2003, *Refah Partisi (the Welfare Party) and Others v. Turkey*, Application nos. 41340/98 41342/98, 41343/98 and 41344/98, paras. 117 et seq.

the 1977 Law on legal status of religious communities and are active in Montenegro on the date of coming into force of this law, shall be entered into the inventory of existing religious communities by submitting an application. The second procedure is laid down in draft Article 21 and concerns the proper registration of religious communities which are not registered under the 1977 Law.

32. Draft Article 25(3) addresses specifically the “part of the religious community with the religious center abroad, acting in Montenegro” which “shall obtain the status of a legal person in Montenegro upon entry into the Register or the Inventory”. It follows that in case the religious community with its center abroad is already registered under the 1977 Law, it shall obtain the legal personality status upon entry into the Inventory (draft art. 25(3) combined with draft art. 24), and in case it was not registered under the 1977 Law, it shall obtain the legal personality upon entry into the Register under the new law (draft art. 25(3) combined with draft art. 21).

33. The Commission recalls in the first place that as the freedom of religion or belief 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 foreign or non-citizens, or that its headquarters are located abroad.<sup>12</sup> Unless this is a translation issue, it appears from the wording of draft Article 25(3) that obtaining legal personality upon entry into the Register (registration) or the Inventory is an obligation for religious communities with the center abroad (shall obtain the legal status). The compulsory character of the registration of religious communities with the center abroad would be in contradiction with the provision of draft Article 19 (“Registration of a religious community shall not be mandatory. Religious communities decide freely whether they will request to be entered into the register or not.”) and that of draft Article 28(1) in fine which clearly states that “[this law] (...) shall not prevent the operation of non-registered religious communities or the ones that are not recorded in the Inventory”. It is not clear in the draft law whether or not draft Article 25(3) concerning religious communities with the center abroad is envisaged as an exception to the principle of voluntary character of the registration under draft Articles 19 and 28(1). In any case, the Venice Commission reiterates that religious or belief communities should not be obliged to seek legal personality if they do not wish to do so, and that this is also valid concerning religious communities with their center outside the territories of the country concerned. During the meetings in Podgorica, following a question raised by the delegation, the authorities underlined that draft Article 25(3) does not impose any general obligation on religious communities with their center abroad to register or to enter into the Inventory. It is however recommended that the wording of draft Article 25(3) be amended in order to clarify in the provision that the entry into Register or Inventory of religious communities with the center abroad is a possibility but not an obligation.

34. Secondly, according to draft Article 61(1) (transitional and final provisions) “[t]he Ministry shall take over from the public authority responsible for internal affairs the data on religious communities registered with that authority within 30 days from the date of coming into force of this Law”. However, draft Article 24 already provides for a procedure of entry into an Inventory of religious communities which are registered under the 1977 Law and the inventory is at the disposal of the Ministry, i.e., according to draft Article 17, the “public administration authority responsible for human rights and freedoms”. As such, draft Article 61(1) seems to be superfluous besides the provision of draft Article 24.

35. Thirdly, according to draft Article 61(3) under transitional and final provisions, religious communities that are already registered under the 1977 Law are required to submit an application for entry into the Inventory (as indicated under draft Article 24) within 6 months from

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<sup>12</sup> See, ECtHR, 5 October 2006, *Moscow Branch of the Salvation Army v. Russia*, Application no. 72881/01, paras. 83-85; 2014 *Guidelines on the legal personality of religious or belief communities*, para. 29.

the date of coming into force of the law. In case the religious community fails to do so, it shall not be considered as a registered religious community (paragraph 4 of draft Article 61). Although the authorities stated that the procedure under draft Article 61(3) is a simple procedure which requires only a submission to enter into the Inventory, in view of paragraph 3 of draft Article 24 which provides that the Ministry shall prescribe the contents of the Inventory, the Commission finds that the 6 months' deadline may prove to be rather short in practice. In addition, the provision is silent on whether or not the religious communities which fail to apply before the competent authority to be entered into the Inventory within 6 months, have still the possibility to apply for registration under draft Article 21. Although, during the meetings in Podgorica, the authorities stated that in case a religious community registered under the 1977 Law misses the six months' deadline under draft Article 61(3), it still has the possibility to register as a new religious community under draft Article 21, given the clear separation in the draft law between the procedures under draft Article 24 (Inventory for already registered communities under 1977 Law) and draft Article 21 (the first time registration of communities which are not registered under 1977 Law), the authorities' solution does not automatically result from the wording of those provisions. It is therefore recommended that either the 6 months' deadline is extended or draft Article 61 indicates without any ambiguity that those religious communities who are already registered under 1977 Law but fail to apply within the 6 months deadline, have the possibility to apply for registration under draft Article 21.

36. As previously mentioned, it is positive that the registration or entry into the Inventory is not compulsory and is not a condition of the enjoyment of the right to freedom of religion. On the other hand, the lack of registration or entry into the Inventory may deprive the religious community in question of certain rights that "in line with the legal order of Montenegro, belong exclusively to the registered or recorded religious communities" (draft Article 28(2)). The draft law fails to provide any detail, or precise references to other legislation which contains information on the rights which belong exclusively to the registered or recorded religious communities. It is therefore recommended that either the draft law gives details on the rights which are exclusively recognised to registered or recorded religious communities or a clear reference to other legislation containing this information is given in the draft law.

37. The Commission welcomes that draft Article 20 which provides that "a religious community may be registered if it has minimum 3 adult believers who hold Montenegrin citizenship and have residence in Montenegro (...)" does not make the registration contingent on having an excessive minimum number of members.<sup>13</sup> Moreover, according to the same provision, those adult members may also be "foreigners whose permanent residence in Montenegro was approved (...)" and is in conformity with the principle that legislation should not deny access to legal personality status to religious communities on the ground that some of the founding members are foreign citizens.<sup>14</sup> It is recommended that, besides foreign citizens, the provision also mentions stateless persons to be taken into account in the minimum number of community members for registration purposes under draft Article 20.

38. The Commission moreover notes that several provisions of the draft law refer to "the persons authorised to represent the religious community" (draft art. 21(1)), "the representative of the religious community" (draft art. 21(3)), "competent authority of that religious community" (draft art. 23) or "responsible authorities of the religious community" (draft art. 43(4)). The freedom of religion or belief implies the organisational autonomy of the faith or belief community. The draft law rightly does not interfere in the designation of the representatives of the community which is considered as an "internal" issue to the religious or belief

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<sup>13</sup> See, CDL-AD(2014)023, Guidelines on the legal personality of religious or belief communities, para. 27.

<sup>14</sup> *Ibid.*, para. 29.

organisation.<sup>15</sup> It could be useful in addition to provide procedures in case several persons claim to be the representative of the community in question, or in case the mandate of a representative is contested by the community itself. This could be all the more useful as very small communities can be registered (three believers according to draft art. 20), probably often without a strong organisation. In case existing specific legislation in force applies to the resolution of disputes concerning the representative of the community in question, such as the administrative procedure code as the authorities seemed to suggest during the meetings, this should be clearly indicated in the draft provision.

39. In addition, draft Article 21(2) § 1 provides that the “name of the religious community must differ from the names of other religious communities to the extent that allows for avoiding confusion or mistake in the identification due to resemblance with the name of another registered community;” The Venice Commission is of the view that it is legitimate for the state to try to avoid a risk of confusion between the name of one community and the name of another registered community. The provision of draft Article 21(2) § 1 is specific enough not to be in breach of the international standard concerning the autonomy religious communities to decide on their names and symbols.<sup>16</sup> It would be useful to provide in addition for a specific procedure in the draft law in case several communities claim to be entitled to the use of same/similar name.

40. Moreover, under draft Article 27(1), in case there is any change of data referred to in draft Article 21 concerning the registration of religious communities, the registered religious community shall “inform” the Ministry within 30 days from the date when the change took place. The second paragraph of draft Article 27, however, speaks of “registration” of changes, “in line with the provisions of this Law regarding registration of a religious community.” It is not clear whether the “information” of data changes is rather an informal notification, or whether the formal requirements of registration should be followed. The confusion is created by the use of different terms - “information”, “registration” - for the same procedure; the provision would benefit from further clarification for more consistency. In any case, the deadline of 30 days may in some cases prove to be rather short and should be reconsidered.

41. Lastly, there are a number of draft provisions which would benefit from clarification and more precision in the wording. For instance, draft Article 29 provides that the manner of establishment, status, bodies, financing etc. of the organisations that are not religious communities in the sense of this law, “and are established for the purpose of expressing the freedom of belief” shall be exercised in line with the law regulating the legal status of non-governmental organisations. The draft provision mentions only “freedom of belief” and not, as in draft Article 28, “freedom of thought, conscience (...) or belief”. The wording of draft Article 29 should be harmonised with that of draft Article 28. Further, draft Article 32 gives the authority to the State Prosecutor’s Office to instigate the procedure for the prohibition of operation of a religious community if the reasons referred to in Article 30(1) exist and if the legitimate aims referred thereto “could not have been achieved effectively by pronouncing a fine, denying tax reliefs or some other appropriate restrictive measure in a relevant procedure.” The Venice Commission understands and welcomes the underlying idea of proportionality in this draft provision: in case a more lenient measure is sufficient to achieve the legitimate aim pursued, then the State Public Prosecutor should refrain from instigating the procedure for the prohibition of the operation of this religious community. However, the use of some generic terms as “fine” or “some other appropriate restrictive measure in a relevant procedure” may be source of ambiguity in the implementation of this provision. It would be sufficient to indicate in the draft provision that the operation of the religious community may be prohibited (under the conditions

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<sup>15</sup> See, CDL-AD(2004)028 Guidelines for legislative reviews of laws affecting religion and belief (11 June 2004), “D. Autonomy/self-determination of religious/belief organisations”, p. 11.

<sup>16</sup> CDL-AD(2014)023, Guidelines on the legal personality of religious or belief communities, para. 31.

provided in draft Article 30(1)) only if the legitimate aims cannot be achieved with less restrictive measures.

#### **D. Rights and responsibilities of religious communities and their believers**

42. According to draft Article 37(2) a “*religious community shall be held liable for its obligations with its overall property (...)*” The Venice Commission acknowledges that a general exemption of all religious buildings and movables from legal redress would be too broad and could lead to the infringement of creditors as religious communities would have an important discretion in defining any movable or immovable good as necessary for religious service. However, in the current version of the draft provision, a liability with “overall property” is too large and it does not provide for any guarantee that sufficient means remain available for an adequate performance of religious services. The authorities could consider to exempt for instance those ‘holy’ buildings and sacred movables necessary for elementary religious services from redress.

43. Under draft Article 46(3), in case religious ceremonies at the request of individuals – such as a family saint day, wedding, baptism, confirmation, circumcision, confession, consecration etc. - are held in a public place, they should be notified to the public administration authority responsible for internal affairs, in line with the law regulating the right to public assembly. The Venice Commission considers that due to the unconditional wording of this draft provision, this can be a cumbersome procedure for believers. The provision could benefit from further elaboration and indicate that the notification to the administrative authority is only necessary in case the religious ceremony may present a risk of obstructing the ordinary course of life.

#### **E. Religious teaching and religious schools**

44. As opposed to Article 18 of the 1977 Law on the legal position of religious communities, which provides that religious communities only may establish religious schools for clerics, draft Article 54(1) recognises the right of a religious community to establish schools at all levels of education, “*except for primary school, which is compulsory according to the law*”. Under draft Article 54(2), religious communities shall independently define the curriculum of their schools, the contents of the textbooks and manuals, as well as the requirements for their teaching staff. However, the curricula and the contents of textbooks and manuals should be in harmony with the Constitution and the law, according to draft Articles 54(3) and 55(1).

45. According to Article 2 of the First Protocol to the Convention, the State has to respect the rights of parents to ensure such education and teaching that is in conformity with their religious and philosophical convictions. On the basis of this provision, there are good arguments that in the name of parents religious communities in principle should have the possibility to establish primary schools. Such schools may be regulated appropriately to ensure educational quality and consistency, including for example by requiring conformity with state-approved curricula, books and materials. The freedom of religious communities to teach and to organise teaching in the setting of a private religious school is not explicitly contained in Article 2 Protocol 1 of the Convention, but is implied in the judgment in *Kjeldsen, Busk Madsen and Pedersen*<sup>17</sup> and the Commission report in that case. It is up to the authorities to justify the limitation contained in draft Article 54(1); Article 2 of the First Protocol to the Convention does not contain a restriction clause, but nevertheless allows for some kind of limitation,<sup>18</sup> that might be justified by the specific circumstances in Montenegro.<sup>19</sup> It is important to underline that in its case-law the

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<sup>17</sup> ECtHR, 7 December 1976, appl. nos. 5095/71, 5920/72; 5926/72.

<sup>18</sup> ECtHR, 10 November 2005, *Leyla Sahin*, appl. no. 44774/98, para. 154.

<sup>19</sup> ECtHR, 13 December 2011, *Dojan v. Germany*, appl. No. 319/08: ‘integrating minorities and avoiding the formation of religiously or ideologically motivated “parallel societies”’.

ECtHR pays particular attention to the need for protection of minors against any possible indoctrination at an age when they may be easily influenced.<sup>20</sup>

46. The draft law does not lay down any prohibition for pupils who have not yet finished the compulsory primary school to follow private religious classes run by religious communities, as according to draft Article 52 parents have the right to engage in religious teaching of their own child (while respecting the physical and psychological integrity of the child), provided that religious teaching may take only place during the period when students do not have classes at school. The participation of juveniles in religious teaching depends on the parent's or guardian's consent, as well as the consent of the juvenile if s/he is 12 years old or older (draft art. 51(2)). Therefore, the draft provision gives appropriate weight to decisions of minors.<sup>21</sup> Those provisions do not raise any particular criticism.

47. The right of the religious communities to establish religious schools is not limited under draft Article 54 to registered religious communities. Although under relevant international standards it may be acceptable to require that religious schools be operated only by registered religious communities, this requirement may prove to be problematic in the case of possible discriminatory registration requirements.<sup>22</sup> The recognition of unregistered religious communities' right to establish and operate schools is therefore positive and avoids such possible breaches of international standards.

48. Under the 1977 Law on legal position of religious communities (art. 20), the teaching personnel and other staff of cleric schools shall be citizens – of the Socialist Federal Republic of Yugoslavia – and the recruitment of foreign citizens by those schools is only possible upon the authorisation of the competent municipal authority. For the Venice Commission, this is an unnecessary limitation of the autonomy of religious and belief communities in selecting their teaching personnel in religious schools. It is therefore welcome that the draft article 57 does not impose such a condition on the teaching staff in religious schools apart from the requirement that the person holds a working permit as well as an accreditation or approval from the religious community that established the religious school.

## **F. Revenues of religious communities**

49. Under draft Article 35, a religious community shall ensure resources for the performance of its activities from the revenues based on its own property and religious services, endowments, legacies, funds, donations, resources from the international religious organisations the community is a member of, but also resources from the state budget and the budget of local self-government units. Many states provide both direct (for instance, paying salaries of the clergy, subsidizing religious schools etc.) and indirect (for instance, tax deductions) financing for religious and belief organisations. It is up to the Constitutional Court of Montenegro to ensure that the implementation of the provisions which allow allocation of resources to religious communities from the state budget and the budget of local self-government organisations is in conformity with Article 14 of the Constitution which provides that religious communities shall be separated from the state. It is important however to underline that the mechanism of allocation of resources from the state budget should ensure equal treatment of religious communities in line with the second paragraph of Article 14 of the Constitution (*Religious communities shall be equal and free in the exercise of religious rites and religious affairs*).

50. Further, it appears under draft Article 42 that the funds allocated from the state budget and the local self-government budget are limited to the activities promoting spiritual, cultural and state tradition of Montenegro, as well as for the support to social, health related, charitable and

<sup>20</sup> See, ECtHR, 17 June 2004, *Çiftçi v. Turkey*, admissibility decision, application no. 71860/01.

<sup>21</sup> See, *Ibid.*, II.B.6.

<sup>22</sup> CDL-AD(2004)028 Guidelines for legislative reviews of laws affecting religion and belief, III.C.4.

humanitarian activities of a particular interest. Draft Article 42 which limits the allocation of funds from the state and local budgets to certain activities could be merged with draft Article 35.

51. Draft Article 43(3) which states that “*in the development of spatial plans, the competent public administration authority, i.e. local self-government authority shall also consider the expressed needs of the religious community for the construction of religious structure*” is drafted in too absolute terms, unless this is a translation issue. It may prove to be difficult, if not impossible, to implement the obligation for the local authority to consider the expressed needs of each religious community for the construction of religious structures. It is recommended that this draft provision be redrafted in order for the local authority taking into account the expressed needs is a “prospect”, but not an obligation. Under draft Article 43(4), public authorities responsible for spatial planning and construction of buildings shall not consider the applications for construction of religious structures that do not have the consent of the “responsible authorities of the religious community in Montenegro”. This requirement appears self-evident.

52. Religious servants exercising a religious ceremony or religious affair may receive a compensation from the person at whose request the ceremony is being performed (draft Article 47(1)). Under the second paragraph of draft Article 47, the religious community shall keep a record of those revenues “*in line with the law and the autonomous regulations of the religious community*”. The Venice Commission is not aware of whether or not the domestic law of Montenegro imposes on religious communities the obligation to register the identity of the person who requested the ceremony and paid the remuneration. If so, 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 guaranteed under Article 9 ECHR and his right to privacy guaranteed under Article 8 ECHR. It is therefore recommended that draft Article 47(2) clearly indicates the information that is to be registered by the religious community does not include the identity of the believer who requested the ceremony.

### **G. Properties of religious communities**

53. According to draft Article 62 (1) (VI Transitional and Final Provisions), “[r]eligious buildings and land used by the religious communities in the territory of Montenegro which were built or obtained from public revenues of the state or were owned by the state until 1 December 1918, and for which there is no evidence of ownership by the religious communities, as cultural heritage of Montenegro, shall constitute state property.” The second paragraph of the draft provision indicates that “[r]eligious buildings constructed in the territory of Montenegro based on the joint investment of the citizens by 1 December 1918, for which there is no evidence of ownership, shall constitute state property.” These provisions, as mentioned in Articles 62 and 63 and as confirmed by the authorities, only apply to cultural heritage property.

54. Draft Article 63 concerns the procedure to be followed in the implementation of draft Article 62: “[t]he public administration authority responsible for the property issues shall identify religious buildings and land owned by the state (...) make an inventory thereof and submit a request for registration of ownership rights of the state over that real estate in the real estate cadaster within one year from the date of coming into force of this Law.” Under paragraph 2 of this draft provision, “public administration authority responsible for cadaster affairs shall register the rights referred to in Paragraph 1 (...) within 60 days from the date of submission of the request.”

55. These draft provisions and their historical and factual background are rather vague and unclear. During the meetings, the interlocutors met by the Venice Commission delegation provided various, sometimes contradictory interpretation. It is of the essence that their meaning is clarified in the course of the legislative process. From the explanations of the authorities concerning the historical background of these draft provisions, the rapporteurs have inferred the following. Under the 1905 Constitution of the Principality of Montenegro, the state religion of

Montenegro was Eastern Orthodox and was embodied in the autocephalous Montenegrin Church (art. 40(1) of the 1905 Constitution). This Church did not depend on any foreign church or institution, but preserved the unity of dogmas with the Ecumenical Eastern Orthodox Church (art. 40(2)). In the Principality and later on in the Kingdom of Montenegro, the property used by religious communities was state property. The religious community had the right to use and enjoy the fruits (usufruct) of that religious property with the agreement of the Montenegrin state (jus utendi and jus fruendi). The jus abutendi (the right of ownership including the right to dispose of it) remained with the State. For instance, the sale of the religious property was subject to the authorisation of the Ministry of Interior/Education. During this period, the churches did not have their own budget and the state catered for their needs, and clergy-men were civil servants.

56. After the 1918 Podgorica Assembly, which deposed king Nicholas and unified Montenegro with the Kingdom of Serbia,<sup>23</sup> the autocephalous Montenegrin Orthodox Church for a short while continued to operate in Montenegro. Following the creation of the Kingdom of Yugoslavia (the Kingdom of Serbs, Croats and Slovenes) on 1 December 1918, which Montenegro became part of, the royal decree of regent Karađorđević of 1920, referring to 1918 Podgorica Assembly, incorporated the autocephalous Montenegrin Orthodox Church into the Serbian Orthodox Church and the properties used by it were de facto transferred to this latter church. According to the authorities, the 1920 royal decree was never published in the Official Gazette.

57. According to the information provided by the authorities, in 1941 all property was nationalised under the communist regime. In the 1960s, state property in Yugoslavia legally became “social property” which – when necessary – incorporated aspects of both private and state ownership, emphasizing the social nature of production and distribution.

58. From 1991 onwards, during the war which led to the disintegration of the Yugoslav state, several sacred properties which according to the authorities are part of the cultural heritage of Montenegro, were registered in the real estate cadaster in the name of various Serbian Orthodox Church legal entities, in some cases in the name of the Metropolitan bishop and in some cases even in the name of individual priests – allegedly without a valid legal basis. It seems that several historical churches as well as village churches which had been built in local communities by the believers through their financial support were registered in the name of various Serbian Orthodox Church legal entities in Montenegro, such as the Metropolitanate of Montenegro and the Littoral, the Diocese of Budimlje and Niksic, and various local churches. The Commission delegation was also informed that certain modifications of the external appearance and of the revered saints of certain historical churches were made by the Serbian Orthodox Church without seeking the permission of the authorities of Montenegro.

59. The authorities explained that under the Montenegrin domestic law, Article 28 of the 2009 Property Law stipulates the valid legal grounds for obtaining property rights (iustus titulus), which include, inter alia: by law; by legal contract, through heritage and by decision of a public authority (courts or state authorities). Registration with the cadaster should only take place if either of the four legal entitlements is provided.

60. The registered title with the cadaster creates a rebuttable presumption of ownership (praesumptio iuris tantum), an assumption taken to be true unless contested and proved before the courts otherwise. This presumption may be challenged within three years (Article 124a of the 2007 Cadaster Law). As to usucapio, Article 53 of the Property Law that the “bona fide and based on law possessor of real property, owned by other, becomes the owner of that property

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<sup>23</sup> Considered illegal by the Montenegrin authorities, as expressed in November 2018, when Parliament adopted a resolution by means of which the decisions of the Podgorica Assembly of 1918 were invalidated.

by usucapio (adverse possession), after the expiration of 10 years". Article 54 provides that "bona fide possessor of real property, owned by other, becomes the owner of that property by usucapio (adverse possession) after expiration of 20 years." The authorities explained that possession which is not based on bona fide but on theft, violence, abuse of power etc. does not validly entail usucapio. In addition, it was also explained to the delegation that under domestic law and consistent case-law the acquisition of social and state property through actual possession is not permitted. Indeed, possession that is not based on the law and on good intentions (bona fides), but on force, fraud or abuse of trust (Vis, Clam et Precario), the so-called "defective possession" (manljiva državina, Article 391 of the Property Law) does not constitute a valid ground for ownership through possession (usucapio; prescriptio longi temporis). In line with the legal regulations of Montenegro, such as the Property Law and the State Property Law, as well as the case law of the Supreme Court of Montenegro, such ownership through possession could not have represented valid grounds to obtain private property rights over social, i.e. state property, particularly when it comes to cultural resources, as resources of a general interest that enjoy special protection (Article 6. 10 Para. 1 Item 8 and Article 13, Items 14 and 15 of the 2009 State Property Law; Article 7, 20 and 22, Para. 2 of the 2009 Property Law). The authorities have also explained that the three years' time limit in Article 124a of the 2007 Cadaster Law does not apply to cultural heritage property in accordance with the constant case-law of the Supreme Court developed in the 1990s, being later codified in the 2010 Law on Cultural Heritage.

61. The Venice Commission observes that – as explained by several interlocutors during the meetings – the draft provisions in question may potentially cover an important number of cultural heritage religious buildings (*built or obtained from public revenues of the state or were owned by the state until 1 December 1918* (draft Art. 62(1); *constructed in the territory of Montenegro based on the joint investment of the citizens by 1 December 1918* (draft Art. 62(2)).

62. (i) In the authorities' view, the entry into force of these provisions does not constitute a "deprivation of property" in the sense of Article 1 of the First Protocol to the ECHR nor a confiscation, since those immovables are part of the cultural heritage of Montenegro and ought not have been inscribed in the name of the religious communities, because under the prevailing legal principles and rules of Montenegro, they legally belong to the state. This also would explain the lack of any right to compensation in draft Articles 62 and 63. (ii) In addition, the authorities have stated that even if pursuant to this law the property title were transferred to the state, following a court decision annulling the relevant property title of the religious community in the land registry for lack of legal basis, this will not automatically affect the right of the religious community concerned to continue to use this property. (iii) Further, as the state is in principle responsible for the maintenance/preservation of the property which is part of the cultural heritage of Montenegro, in case of transfer of the property title to the state, the religious community will be compensated for the expenses it has made to preserve the property in question.

63. It is evidently not the task of the Venice Commission to assess the historical facts and background, nor to determine whether and which of the disputed immovable properties were erroneously/abusively registered in the 1990s in the cadaster in the name of the religious community concerned and can be said under Montenegrin law to belong in reality to the state. Nor is it up to the Venice Commission to formulate and apply rules of evidence with regard to this matter. That is the duty of the Montenegrin legislature and the Montenegrin administration and courts respectively.

64. The Venice Commission observes that the procedure described under draft Article 63 is an administrative procedure before the real estate cadaster: the public authority responsible for property issues shall identify the religious buildings owned by the state based on the criteria of

draft Article 62<sup>24</sup> and submit a request for registration of ownership rights on the state in the real estate cadaster within one year from the date of the entry into force of the law. According to the explanations provided to the delegation, in their submission to the cadaster, the authorities should challenge the property deed by claiming that the immovable property in question falls under the legal regime that applied to religious properties in general, according to which the property used by religious communities is state property and the religious community only has the right to use it and enjoy its fruits. This legal regime, as explained above, was applicable in Montenegro until the 1918 Podgorica Assembly (invalidated in 2018 by a resolution of the Montenegrin parliament), again between 1941 and 1960 (state property under the communist regime) and from 1960 onwards (social property). The public authority responsible for the cadaster should register the rights as requested within 60 days from the date of submission of the request.

65. The religious community in question will have the possibility to challenge the authorities' claim that the immovable property in question falls under the legal regime that applied to religious properties in general by bringing the evidence that the property in question constitutes an exception to the application of such general legal regime and that the actual registration at the cadaster has a legal basis. The religious community in question has the possibility to bring this evidence, first, in the framework of the administrative procedure before the cadaster. It was explained to the delegation that the religious community in question will be notified of the authorities' submission before the cadaster and will have the possibility to participate in the administrative procedure which will therefore be adversarial. Secondly, in case the evidence of ownership provided by the religious community in question is not accepted by the administrative authority responsible of the cadaster and its administrative appeal is not successful, the religious community will have the possibility to challenge the administrative decision concerning the registration of ownership rights of the state over that real estate before the administrative courts.

66. In the light of the explanations provided during the meetings, it is important to underline in the first place that in implementing the regime laid down in draft Articles 62 and 63, the existing principles and legal rules concerning the real estate cadastre and the registration of immovable property-based rights will be applicable. That means that the issue of registration of immovable properties as described under draft Article 63 will not be regulated by special rules specifically provided for this purpose. The rules which the draft law implies are the same rules which would be applied by the courts if the state or the local community that claims to be the owner of a religious building registered in the name of the Serbian Orthodox Church were to sue the latter before a civil court to have the property title ascertained. The possibility of suing the Serbian Orthodox Church in relation to each contentious religious building indeed exists, although it would be an expensive and very lengthy procedure which the draft law tries to avoid given the high number of cases in which it would have to be exercised. The procedure under Articles 62 and 63 of the draft law would also have the effect of avoiding a direct confrontation between local communities and religious communities or between religious communities, as the state in all procedures would be the respondent. It is in general unproblematic that a *lex specialis* designates a specific administrative and judicial procedure, if the substantive rules and the procedural criteria provide for a level of judicial protection equivalent to that of the civil court procedure. Civil courts may then step aside in the light of the equivalent protection by such administrative court procedure (which in Montenegro ends with the Supreme Court plus possibly an appeal to the Constitutional Court). Such equivalence should concern the substantive rules and the procedural safeguards and guarantees. Allocating all the cases to a specialised court may increase efficiency and consistency.

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<sup>24</sup> As the Venice Commission understands, the burden of proof of whether or not these criteria are fulfilled rests on the state authorities.

67. In principle, the general features of the procedure as described above do not raise any particular criticism. However, the Venice Commission does not have the possibility to examine each piece of legislation related in particular to property rights which may come into play in the implementation of those draft provisions. More specifically, the Venice Commission was not in a position to assess the above-mentioned law and practice on the presumption of ownership created by registration and on the – limits – of acquisition of ownership through possession (see para. 58 above). It is evident that the administrative and judicial procedures which will be used to inspect and to ascertain the property rights, including the implementation of other relevant legislation in this respect, should be in conformity with the requirements of Article 1 of the First Protocol to the Convention and Articles 6 and 13 ECHR as interpreted by the ECtHR in its case-law.

68. Moreover, the following observations and recommendations should also be made: firstly, although it was explained to the delegation that any evidence, including written documents or even testimonies may be brought by the religious community concerned in order to prove, in the administrative and the judicial procedure, the legal ground of the registration of the title deed in the cadaster, the draft provisions are completely silent on the standard of proof that may be used within those procedures. For instance, the draft provisions are silent on whether or not long-time bona fide possession can be considered as proof<sup>25</sup>, or whether or not the registration at the cadaster as such can be considered as a beginning of proof. The draft provisions should therefore provide the key standards of evidence which are to apply in the administrative and judicial proceedings in order to prove the property rights. The authorities explained that the - already - existing standards of proof in the codes of administrative and civil procedure will be used in the implementation of the draft provisions. In this case, a clear reference to the relevant provisions of these codes should be given in the draft provisions.

69. The draft provisions should mention explicitly the right of the religious community concerned to be notified of and participate in the administrative procedure before the public authority responsible for cadaster affairs. Furthermore, the Venice Commission has been informed that pursuant to Montenegrin law the appeal by the religious community in question before the administrative authorities, and before the courts afterwards has a suspensive effect on the registration of the change of title in the cadaster. Indeed, the registration of state property rights should take place only after the final decision is made. The wording of draft Article 63§2 should be amended accordingly to indicate that within 60 days the public administration responsible for cadaster affairs shall register not “the rights referred to in para. 1”, but “the state request for registration of ownership rights”.

70. The authorities explained that the transfer of the property of religious buildings and lands will not affect in principle the use that is made by the religious community of the property in question. This, in the Commission’s view, constitutes an important guarantee that the religious communities may pursue their religious activities in those edifices in line with their right to freedom of religion. However, this guarantee does not result from the draft law. Theoretically, therefore, once the administrative authority responsible for the cadaster registers the state as the owner of the property following the request under draft Article 63, an administrative eviction order may be issued. The Venice Commission therefore recommends that the draft law states expressly that the mere fact that the State is declared to be the owner of some religious

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<sup>25</sup> In the case of *the Holy Monasteries v Greece* (9 December 1994, Application no.13092/87; 13984/88), concerning legislation assigning to the State a large part of agricultural and forest property of the monasteries, the ECtHR considered that it attaches particular importance to the acquisition of property by adverse possession by the applicant monasteries notably in view of the fact that the monasteries were established long before the creation of the Greek State and accumulated substantial immovable property over the centuries, and that it was not possible to have title deeds registered before 19<sup>th</sup> century and legacies and inheritances registered before 1946.

property will not automatically affect the pre-existing right to use such property. However, this should not affect the state's right to impose strict conditions on the use of this property for the preservation and protection of the cultural heritage of the country, including the requirement that any alteration of the property requires previous state authorisation.

71. It is positive that in case of registration of the ownership rights of the immovable property in the name of the state in the cadaster, the religious community which held the title previously should be compensated for the expenses it made to maintain/preserve the property in question. According to the authorities, this is based on the state responsibility of the maintenance of the property which is part of the cultural heritage of Montenegro. This refund obligation, however, should result from and be guaranteed by the draft provisions in question.

## **H. Sanctions**

72. Draft Articles 58 and 59 provide for fines which may be imposed on the religious communities for the misdemeanours indicated in the draft provisions. Those misdemeanours concern forcing a person to become and to remain member of a religious community or preventing a person from becoming and remaining member of a religious community; preventing a person from exercising rights due to belonging or not belonging to a religious community and a range of other misdemeanours concerning the breach of a number of rules with regard the religious teaching and religious schools (establishing religious school for primary education (draft art. 58(3) with reference to draft art. 54(1); parent or guardian engaged in religious teaching contrary to the decision of the child (draft art. 59(1) with reference to draft art. 51(2)); a religious servant who engages in religious teaching outside the religious buildings or appropriate buildings for this purpose as well as religious teaching during the period when students have classes at school (draft art. 59(2) with reference to draft art. 51(1) and (3)).

73. As the representatives of the Office of the Protector of Human Rights and Freedoms stated during the meetings in Podgorica, there is no apparent reason why these "punitive provisions" select one set of particular behaviour to be punished by imposition of a fine and other breaches of equally important rules are not mentioned in those provisions. For instance, the above-mentioned draft Article 32 implies that in some cases the dissemination of religious hatred (by reference to draft Article 30) may be punished by a fine. However, although this provision provides for a "fine" for dissemination of religious hatred, this is not mentioned under the punitive provisions. The delegation was also informed that other legislation, as for instance the law on anti-discrimination, already contains punitive provisions which may be applied with the regard to the exercise of freedom of religion and the activities of religious communities. The Venice Commission recommends that, if ever those punitive provisions remain in the draft law, they should be harmonised with the other relevant provisions not only of the draft law but also of other relevant legislation.

## **V. Conclusion**

74. The Venice Commission welcomes the genuine efforts of the Montenegrin authorities to replace the 1977 Law on legal position of religious communities which was prepared and adopted in the former regime, with a new Law on freedom of religion or beliefs and legal status of religious communities, in particular for two reasons: first, the modern state of Montenegro, after its independence in 2006 and under its Constitution adopted in October 2007, operates under conditions which fundamentally differ from the legal, political and social conditions during the Socialist Federal Republic of Yugoslavia. Secondly, since the adoption of 1977 Law, the international standards in the field of freedom of religion or belief have significantly developed. Providing a new legal framework for the exercise of the right to freedom of religion or belief which takes due account of the current and historical conditions of the country is today a necessity.

75. The draft Law on freedom of religion or belief and legal status of religious communities, examined in the present Opinion on the basis of international standards in this field, brings important positive changes to the existing, out-dated legislation: the title of the draft law and its different chapters do not speak of “religion” in an isolated sense, but of “religion or belief”, emphasising that the right also guarantees “non-religious” beliefs. The draft Law clearly provides that the registration of religious communities is not mandatory and is not a condition for the enjoyment of the right. Furthermore, it has a quite liberal approach to the conditions of registration of religious communities: even very small communities with only three members, including foreigners with a permanent residence in Montenegro, have the right to be registered in Montenegro. The draft law also respects the autonomy of religious communities to decide on their names and symbols. The same holds true concerning the regulations of the draft law regarding the right of religious communities, either registered or unregistered, to religious teaching and to establish religious schools. Throughout this opinion, the Venice Commission formulated a number of recommendations aimed at further improving and clarifying the draft provisions on these points.

76. Concerning the important issue of the properties of religious communities, the Venice Commission understands the concern of the Montenegrin authorities with regard to bringing legal certainty and addressing the issue of alleged illegal/abusive registration in the name of religious communities in 1990s of a number of religious immovable properties which may be part of the cultural heritage of Montenegro. This is all the more so, because the state – according to Article 78 of the Constitution - has the duty to protect natural and cultural heritage of the country. The Venice Commission welcomes in this respect that the solutions proposed in this draft law rely on long-standing legal principles of the Montenegrin legal order, and are not based on *ad hoc* rules, specific for this situation. The present opinion is limited to the examination of the provisions of the draft law on freedom of religion or beliefs and the legal status of religious communities. It is evidently not the task of the Venice Commission to assess the historical facts and the successive legal regimes to decide on the legal validity of the registrations in the 1990s’ in the name of religious communities. Moreover, the Venice Commission was not asked nor is its task to examine each piece of other legislation which may be applicable in the implementation of the draft provisions regarding the property rights.

77. The Commission stresses that the implementation and the interpretation of the relevant legislation, and the administrative and judicial proceedings which will be used to inspect and to ascertain the property rights, should be in conformity with the requirements of Article 1 of the First Protocol to the Convention and Article 6 ECHR as interpreted by the ECtHR in its case-law.

78. The Venice Commission is positive with regard to the endeavour of the authorities concerning the freedom of religion and belief of communities. However, it has identified a number of substantive issues, notably with regard to church property dealt with in draft Articles 62 and 63. It therefore makes the following recommendations to implement essential additional safeguards:

Concerning the process of preparation of the draft law and public consultation:

- The authorities should carry out inclusive and efficient consultations with the public, including representatives of religious communities, which is an important condition in order to reach as broad an agreement as possible on the issues dealt with by the draft law;
- The Protector of Human Rights and Freedoms should be consulted by the Government and the possible comments which may be submitted by this institution should be taken into account in the finalisation of the draft law.

Religious teaching and religious schools:

- Religious communities should have the possibility to establish also primary schools as long as such schools are regulated appropriately to ensure educational quality and consistency, including for example by requiring conformity with state-approved curricula, books and materials; however, there may exist convincing arguments why the authorities should not allow religious primary schools for the time being.

Concerning the property of religious communities:

- The draft law should provide sufficient detail and explanations so as to satisfy the requirements of foreseeability and accessibility as indicated in the specific case-law of the ECtHR on Article 1 of the First Protocol to the ECHR;
- The special procedure in Articles 62 and 63 of the draft law should provide protection equivalent to the ordinary procedure, both in terms of substantive rules and procedural safeguards and guarantees, so as to comply with Article 1 of Protocol No.1 and Article 6 ECHR;
- A clear reference should be given to the relevant provisions of the codes of administrative and civil procedure containing the standards of proof that will be used in the implementation of the draft provisions.
- Draft Article 63 should explicitly mention the right of the religious community concerned to be notified of and participate in the administrative procedure before the public authority responsible for cadaster affairs as soon as the public authority submits a request for change of title in favour of the state over religious property in the real estate cadaster;
- Registration of state ownership rights should only take place after a final (administrative or judicial) decision is made. Draft Article 63 §2 should therefore be amended to indicate that the public administration responsible for cadaster affairs shall register the state's request for registration of ownership rights (and not "the rights referred to in para. 1 of draft Article 63").
- The draft law should clearly mention that the change in the title over religious property will not automatically affect the pre-existing right to use such property. The state has at any rate the right to impose strict conditions on the use of the property in order to protect the cultural heritage;

79. The Venice Commission remains at the disposal of the Montenegrin authorities for further assistance in this matter.