МАТЕРИАЛЫ ВЕНЕЦИАНСКОЙ КОМИССИИ СОВЕТА ЕВРОПЫ

Журнал продолжает знакомить читателей с комментариями к заключениям Венецианской комиссии Совета Европы. На этот раз мы публикуем комментарий консультанта Министерства юстиции Республики Сербии Майи Прелич к Заключению Венецианской комиссии на проект закона Республики Черногории «О свободе религии и вероисповедания и правовом статусе религиозных объединений», который вызвал оживленную дискуссию на 119-й Пленарной сессии Венецианской комиссии, в частности, по вопросам собственности церквей и монастырей Сербской православной церкви.

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ПРАВОВОЙ АНАЛИЗ НОВОЙ ЗАКОНОДАТЕЛЬНОЙ ИНИЦИАТИВЫ В ОТНОШЕНИИ РЕЛИГИОЗНЫХ ОБЩИН В ЧЕРНОГОРИИ

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Каждое территориальное изменение, выражающееся в присоединении одного государства к другому путем создания нового международного образования или роспуска уже существующих государств, влечет ряд последствий иного рода. Благодаря своему расположению и разнообразному национальному составу Балканы были местом бурных событий на протяжении всей истории. За последние сто лет на этой территории было создано, преобразовано и прекратило свое существование более десяти государств. Вслед за тенденцией к объединению всех южнославянских народов, которая была реализована путем образования Королевства Сербов, Хорватов и Словенцев в 1918 г., последние три десятилетия продемонстрировали обратную тенденцию, приведшую к постоянным дроблениям и разделением. Исчезновение, мирное или нет, как побочный эффект всегда оставляет некоторые нерешенные вопросы. Нередко для разрешения ряда из них, которые по своей природе могут быть очень деликатными, требуется много времени. Также довольно часто в силу различных политических причин государства, опираясь на совершенно нетрадиционные средства, пытаются разорвать всякую связь со своим прошлым и историей. Международное сообщество должно быть опорой стабильности и реагировать в ситуациях, когда такие действия конкретного государства явно идут в противоположном направлении от установленных европейских стандартов и демократических принципов. Автор статьи анализирует новый законопроект о свободе религии или убеждений и правовом статусе религиозных общин, который был представлен Правительством Черногории 17 мая 2019 г., уделив особое внимание его недостаткам и пробелам, особенно с точки зрения международного права и судебной практики Европейского суда по правам человека.

Ключевые слова: конфискация имущества, религиозные общины, Европейская конвенция о защите прав человека и основных свобод, Европейский суд по правам человека, Венецианская комиссия.

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LEGAL ANALYSIS OF THE NEW LEGISLATIVE INITIATIVE REGARDING RELIGIOUS COMMUNITIES IN MONTENEGRO

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Each territorial change that is reflected in the annexation of one state to another by the creation of a new international entity or the dissolution of already existing states carries with it a number of consequences of a different kind. Due to its location and diverse national composition, the Balkans has been a place of turbulent events throughout history. Over the last hundred years, more than ten states have been created, transformed and ceased to exist in this territory. Following the tendency for the unification of all South Slavic peoples, which was done by the formation of the Kingdom of Serbs, Croats and Slovenes in 1918, the last three decades have been characterized by the reverse trends that have led to constant fragmentations and separations. Dissolution, whether

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peaceful or not, as a side effect always leaves some unresolved issues behind. Often it may take a long time for some of these issues, which by their nature can be very delicate, come up. It is also not the rare case that, for various political reasons, states, by relying on entirely non-traditional means, try to tear down every link with their past and history. The international community should be a pillar of stability and respond in situations where such actions by a particular state clearly go in the opposite direction from established European standards and democratic principles. In this paper, the author will analyze the new Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities that was established by the Government of Montenegro on May 17, 2019 and will point out its deficiencies and gaps particularly from the perspective of international law and jurisprudence of the European Court of Human Rights.

Keywords: confiscation of the property, religious communities, European Convention on Human Rights, European Court of Human Rights, the Venice Commission.

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Historical and political background

In order to get a proper interpretation of a legal regulation, it is necessary, first of all, to know the purpose of its adoption. Teleological interpretation is a key way of understanding legal norms, since it starts from the social and political goal that a particular provision is supposed to achieve. However, simple knowledge of these goals is not enough without deeper understanding of the current circumstances in the country of regulation, its tradition and historically relevant data. In this regard, prior commencing the analysis of the Draft law, it is of essential importance to give a brief historical account of the facts and events that are indirectly led to the adoption of the Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities by the Government of Montenegro in the current form.

Following the referendum held on May 21, 2006, Montenegro declared its independence, and the State Union of Serbia and Montenegro ceased to exist. Even before that event, the growing political current in Montenegro showed a continued tendency to strengthen Montenegrin independence and break all ties with the Republic of Serbia. The promotion of new national symbols (flags, anthems and coat of arms) in 2004 was a first step in the process of the “reshaping” of its identity. It can be noted that one fundamental confusion occurred in Montenegro, as the state consciousness is being promoted into a national one and thus for some time now the Montenegrin nation has been trying to proclaim itself.¹ However, this is not a solitary example that a new state structure tends to produce a new national consciousness². As language and church are one of the most important determinants of a nation as a phenomenon, it is through their artificial transformation that the creation or proclamation of a new nation initiates. Consequently, compared to the Constitution of the Republic of Montenegro from 1992, in which as an official language in Montenegro was

proclaimed “Serbian language of Iekavian dialect”³, the new Constitution of Montenegro from 2007 stated that the official language shall be Montenegrin, while Serbian, Bosnian, Albanian and Croatian shall be in the official use⁴. Furthermore, in 2009 the first orthography of the Montenegrin language was presented, in which the new two letters and voices were introduced into the Serbian alphabet used until then. After the transformation of the language, the question of the church, as a crucial feature of national identity, has arisen.

The Montenegrin Orthodox Church was founded in 1993 and has the status of a non-governmental organization. It is not canonically recognized by other Eastern Orthodox Churches. Its founders were, above all, fighters for Montenegro's sovereignty, so in this field there is also evident confusion between state and national, or more precisely, religious consciousness and identity. Since it is based on the political divisions of the people and not on religious grounds, the newly established church has not acquired a large number of believers. Its activities are primarily focused at public and open criticism of the Serbian Orthodox Church while the activities of a religious nature are sporadic⁵. However, the ruling political elite in Montenegro strongly supports this organization, since it is certain that its strengthening would weaken the Serbian Orthodox Church in Montenegro, which would also lead to a further diminishing of links with the Republic of Serbia. Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities from 2019 certainly represent a mean by which the Montenegrin government wants to pave the way for the strengthening of the Montenegrin Orthodox Church by reducing the power of the Serbian Orthodox Church. One of the most drastic measures foreseen in the Draft Law is the potential

³ Art. 9 of the Constitution of Montenegro. *Official Gazette of Montenegro*, no. 48/1992.

⁴ Art. 13 of the Constitution of Montenegro. *Official Gazette of Montenegro*, no. 1/2007.

⁵ Djukanovic D. “Идентитетска питања“ и линије унутрашњих подела у Црној Гори. [“Identity Issues” and Internal Division Lines in Montenegro]. *Međunarodni Problemi* = *International Problems*, 2014, no. 3-4, p. 412.

¹ Milosavljevic B. Народ, држава и нација (Анализа основних појмова наше савремене политичке терминологије) [The People, State and Nation (Analysis of the Basic Concepts of Our Contemporary Political Terminology)]. *Luča*, 1995, p. 3.

² Ibid.

“nationalization” of the property of the Serbian Orthodox Church, which will be discussed below.

(Non)compliance of the Draft law with International and Domestic Law

The focus of the analysis will be on the provisions of Article 62 of the Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities, as well as on the provision of Article 63 related to them. This Law affects fundamental human rights and freedoms, so its content and the consequences that its implementation would cause, have to be considered from that perspective.

Draft Article 62 (1) (VI Transitional and Final Provisions) states that “religious 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.” According to the second paragraph “religious 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.”

Art. 63 of the Draft Law provides: “The public administration authority responsible for property issues shall identify religious buildings and land owned by the state, in the sense of Article 62 of this Law, 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”, while the second paragraph states: “Public administration authority responsible for cadaster affairs shall register the rights referred to in Paragraph 1 of this Article within 60 days from the date of submission of the request.”

The cited provisions are in many aspects in direct contradiction with the European Convention for the Protection of Human Rights and Fundamental Freedoms as interpreted by the European Court of Human Rights. Their eventual application would violate the rule of law, as a basic principle of democracy.

The two articles (art. 62 and 63) of transitional and final provisions, completely and in a very drastic way regulate issues that do not relate at all to freedom of religion and belief and legal position of religious communities, which should be the exclusive subject of this Law. Namely, Article 1 of the Draft Law clearly states 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. Moreover, paragraph 2 of the same article stipulates that the state shall guarantee unimpeded exercise of the freedom of thought, conscience and religion. It is indisputable that the property of religious communities is a prerequisite for the exercise of these freedoms. Going beyond the subject matter of the

Draft law, Articles 62 and 63 regulate property issues prescribing the confiscation of religious facilities without compensation, a measure which is unacceptable in modern democratic society.

In order for a general act to be considered a law, substantively and not only formally, the provisions of such an act must be sufficiently precise and predictable to enable the subjects to whom the law applies to know their rights and obligations, so that they can not find themselves in a situation that due to unclear, imprecise, and insufficient norms, they are denied with the exercise and protection of their legal interests and guaranteed rights⁶.

The European Court of Human Rights has repeatedly stated in its decisions that “A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen — if need be, with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”⁷. The Court, in addition to establishing an autonomous concept of law from the angle of the European Convention for the Protection of Human Rights and Fundamental Freedoms, through its practice is constantly pointing to the need for the law to meet the basic criteria of the rule of law. In this respect, the Court sets out certain features which ensure the quality of the legal norms, which must characterize the laws and other general legal acts of the signatory country of the European Convention. Such a view of the Court can be found, inter alia, in the decisions in *Silver and Others v. United Kingdom* 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 of 25 March 1983, as well as the judgment in *the Sunday Times v. The United Kingdom* 6538/74 of 26 April 1979⁸. In its decision *Hasan and Chaush v. Bulgaria*, the European Court considered the need for precision in formulating the provisions of the law and stated: “For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise”.

The draft provision of Article 62 lacks clarity, precision, determination and acceptability. Specifically, this article refers to facilities that were “built or obtained from public revenues of the state or were owned by the state

⁶ Decision of the Constitutional Court of the Republic of Serbia IY3-299/2011 from January 17, 2013.

⁷ Olsson v. Sweden (No. 1), no. 10465/83, judgement from March 24, 1988.

⁸ Decision of the Constitutional Court of the Republic of Serbia IY3-299/2011 from January 17, 2013.

until 1 December 1918", without specifying a timeline from when. In this sense, the question arises whether this provision also applies to religious buildings that were founded/built centuries ago, such as the Cetinje Monastery, founded in the 15th century. The historical fact is that in 1485, the founder of the Monastery of Cetinje, presently the seat of the Archbishop of Cetinje and Metropolitan of Montenegro and the Littoral, Ivan Crnojevic, deeded his property to the Monastery⁹. Also, in 1665, the founder of the Ostrog Monastery, Vasilije, Metropolitan of Zahumlje and Herzegovina, deeded his property to the Ostrog Monastery. There is no strictly limited period to which this provision applies, which harms its precision. This fact is crucial, because according to the art. 62 the Montenegrin government bases its right on the legal presumption of the source of financing of religious objects, which, according to the legal text, came either from public revenues or from joint investment of the citizens. However, without going deeper into history, the obvious question arises: "What exactly was "public revenue" in XVI or XVII century, considering that Montenegro was not continuously an independent country throughout the history and that the borders of the country substantially changed through history?" For example, present borders of Montenegro encompass large territories that were not part of Montenegro prior to December 1, 1918. Previous question is even more appropriate for the legal concept of "joint investment of the citizens". Furthermore, naturally arises next question: "Who and how will prove that religious buildings were constructed or that the land was acquired from the state's public revenues or that religious objects were built by joint investments of citizens until December 1, 1918?", having in mind the fact that in the period up to 1918 to which the Law is bound, neither the identity of the territory nor the identity of the statehood of Montenegro has existed¹⁰.

From the above facts, it follows, firstly, that the source of funding for religious buildings cannot be determined, and secondly, that the term "public revenue" referred to by the legislature is completely vague due to the lack of state and border identity and cannot be identified. Moreover, the draft Law is based on the presumption of the continuity of the investment of state money in religious objects and land used by religious communities in the territory of present Montenegro. It is not clear where such an assumption comes from when a General Property Law enacted by the Kingdom of Montenegro in 1888, which had been applied in Montenegro until 1945 clearly provides for the distinction between the state, personal and religious property. Article 716 of General Property Law stipulates that churches and monasteries are the owners of

ecclesiastical movable and immovable property, separate and independent from state property¹¹. The absolute proof that, contrary to the legal assumption of the Draft Law, there is continuity of ownership rights of religious communities in Montenegro is that the town of Cetinje still today, on the basis of a contract concluded decades ago, pays lease for the use of some of the Monastery's real property.

Second paragraph of the art. 62 regarding joint investment of the citizens as a source of financing the construction of the religious buildings in the territory of Montenegro by 1 December 1918 is even more problematic. There was no such a thing as a "joint investment of the citizens" in the XV century. What would it exactly mean? And isn't it inferred that, if "citizens" collected moneys to build a church, they meant it be the property of the church and not of the state? And who is to prove what was on the "citizens" minds in XVI century? Furthermore, who were the "citizens" of a non-existing country with no certain borders? Citizens of the Ottoman Empire, or of the Austro-Hungarian Empire?

From the above analysis, it is evident that art. 62 of the Draft Law does not fulfil even the minimum of the standard. The request for the clear formulation of norms is considered an integral part of the rule of law, otherwise it is being threatened the principle of legal certainty, and in particular the requirement for uniform application of law¹².

Draft articles 62 and 63 of the Draft Law, also, lead to the violation of the right to an effective remedy from the Article 13 of the European Convention. Not only that the Draft Law does not provide an effective legal remedy against the decisions of administrative bodies, but did not require any legal remedy. In judgement *Sociedad Anónima del Ucieza c. Espagne* in relation with the violation of the article 1 of Protocol 1, the European Court of Human rights states: "In assessing the proportionality of the interference, the Court also regards the degree of protection (the right to property) offered against arbitrariness by the procedure applied". It is clear that the procedure prescribed in the art. 63 of the Draft Law is completely arbitrary. Moreover, these provisions do not indicate which legal proceedings should be carried out, or which legal proceedings precede the "nationalisation" of property of religious communities. The legal position of religious communities in this process is not regulated at all. It cannot be inferred from the provisions what their

⁹ Erdeljanovic J. Стара Црна Гора — етничка прошлост и формирање црногорских племена [Old Montenegro — Ethnic Past and Formation of Montenegrin Tribes]. Serbian Royal Academy, 1926. P. 219.

¹⁰ Erdeljanovic J. Op. cit.

¹¹ Art. 14 of the General Property Law provides: "Other than persons, owners of property may also be: King's Court, townships, churches, state and legal entities, allowed by the law to be legal entities", while Art. 716 states: "Owners of property are: orthodox churches, monasteries and other religious institutions recognized by church laws and church authorities, not in collision with the state laws. The same is applicable to other Christian religions acknowledged by the state."

¹² Decision of the Constitutional Court of the Republic of Serbia IY3-51/2012 from May 23, 2013.

rights and obligations are. In this respect, these provisions are in extreme conflict with Article 6 of the European Convention, which guarantees the right to a fair trial.

Furthermore, there exists an apparent impermissible shifting of the burden of proof found in Article 62 of the Draft Law. The burden of proof is a principle that has been known since Roman law and means the obligation of a party in a trial to produce the evidence that will prove the claims they have made against the other party. From Art. 62 of the Draft Law follows that religious buildings and land remain in the ownership of religious communities only if they prove that the objects or land are not built or obtained from public revenues of the state or joint investments of citizens. This is contrary to well established principle of Article 6 of ECHR that the burden of proof should not be shifted from the party making a claim to the party opposing the claim, and especially not shifted from the inherently stronger party (the Government) to the weaker party, a religious community. The exception to the general principle is found only in a particularly sensitive type of disputes when it comes to discrimination or a mobbing in order to improve the procedural position of the victim¹³. The European Court of Justice has pioneered the establishment of this principle through its practice on discrimination issues, with an emphasis on sexual discrimination¹⁴. At first glance, it can be seen that the case we are dealing with in this paper does not fall into the above areas where the standard of shifting the burden of proof applies. This issue is particularly important given the factual situation and inherent difficulties contained in the request that religious communities prove their ownership of the real property based on the facts existing prior to 1918. This means that, with respect to some of the properties, the evidence (requested from religious communities) should relate back to XIII, XIV, XV, and etc. century. It should be noted that in most of the territory of today's Montenegro the Turkish deeds system of land ownership was applied (from the end of the 19th and the beginning of the 20th century), and only in one part (in the Boka Kotorska and part of the Littoral) a cadastre of real estate. The establishment of a real estate cadastre is still not completed in Montenegro and until 1958 cadastral books did not exist at all (except in Boka Kotorska and part of the Littoral).

Such provisions directly affect private property and clearly violate Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms, which states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

interest and subject to the conditions provided for by law and by the general principles of international law." The right of ownership, which is closely related to the protection of property, is a fundamental human right which, by its characteristics, is absolute, exclusive and permanent¹⁵. The European Court of Human rights has a wealthy jurisprudence on this issue. As each right, the right of private property, can, under precisely specified conditions, suffer certain limitations. The Court paid particular attention to these cases of deviation from the basic rule when the question of balance and the existence of a legitimate aim for which a restriction is imposed must be considered. It has established three principles that must be met in each case of the interference with the peaceful enjoyment of possession¹⁶. The first is the principle of legality in the sense that interference must be provided by "law" which fulfils the abovementioned demands of the rule of law. The second principle is that the interference must pursue a legitimate aim in the "public interest". The third principle is that it is necessary to strike a "fair balance" between conflicting claims. If the restriction does not meet the established criteria, the proclaimed civil right will be violated. In judgement *Sociedad Anónima del Ucieza c. Espagne* the European Court of Human rights states: "A measure of interference with the right to respect for property must, however, strike a "fair balance" between the demands of the general interest of the community and the imperatives of safeguarding the fundamental rights of the individual. The concern to ensure such a balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, which should be read in the light of the general principle enshrined in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the purpose of any measure depriving a person of his property or regulating the use thereof." This raises the question whether the restriction of property rights, which would consist in the seizure of property of religious communities by the state without any compensation, which is the highest degree of limitation of property rights by its nature and consequences caused, in the manner envisaged in the this Draft Law is in accordance with the requirements of the European Court of Human rights. There are several cases in the case-law of the European Court of Human rights

¹⁵ Randjelovic D. Стицање својине одржајем [Acquisition of property by adverse possession]. *Pravne teme = Legal issues*, 2014, vol. 2, no. 4, pp. 26—40.

¹⁶ Mole N., Kamber K., Liaki V. Ка делотворнијој примени Европске конвенције за заштиту људских права на националном нивоу — Водич за кључна начела и појмове Конвенције и њихову примену у домаћим судовима [Towards a More Effective Implementation of the European Convention for the Protection of Human Rights at National Level — A Guide to the Convention's Key Principles and Concepts and their Application in Domestic Courts]. The Aire Centar (Advice on Individual Rights in Europe), 2018. P. 27.

¹³ Reljanovic M. Специфичности доказивања мобинга у парничном поступку [The specificities of proving mobbing in civil proceedings]. *Analitika* — Center for Social research, 2015. P. 3.

¹⁴ Farkas L., O'Farrell O. Reversing the burden of proof: Practical dilemmas at the European and national level. EU publication, 2015. P. 14.

in which religious communities lodged an application against a state which, through its actions, violated their property rights. It is clear from its jurisprudence that any interference with the property rights of the religious communities by the State can generally raise issues that fall within the scope of Article 1 of Protocol No. 1.1.1 to the European Convention on Human Rights and Fundamental Freedoms¹⁷.

This topic was specifically examined through the case of *the Holy Monasteries v. Greece*, initiated by two applications lodged by eight Greek Orthodox monasteries, which were founded between the 9th and 13th centuries¹⁸. The reason for submitting applications was that the State in 1987 adopted a law, which, according to the complainant, was inconsistent with the Constitution, and which allowed the state to, without compensation, deprive the Holy Monasteries of their property, accumulated over the centuries, even before the creation of the Greek State. The Law from 1987 modified the rules concerning management and representation of all monastic assets. These tasks were assigned to the Office for the Management of Church Property whose composition was inadequate because the majority of its members were to be appointed by the State. The Law further provided that, within 6 months of its publication, the State would become the owner of all monastic estate unless the monasteries could prove a right of ownership over the asset deriving either from a legal title duly registered, a statutory provision or from a final court decision against the State. However, as in the case we are analyzing, the possibility to prove the ownership does not have much sense having in mind the factual situation. In Greece only real-property transactions concluded since 1856 have had to be registered as well as the legacies and inheritances which have had to be registered only since 1946, and monasteries acquired their property long before those years. In addition, it was noted that, except in the Dodecanese, Greece does not have any official land survey that could serve as a mean of proof. Furthermore, the Law from 1987 stipulated that within two months of the expiry of the six-month period any legal or natural person in possession of one of the buildings “deemed to belong to the State” must transfer it to the head of the appropriate agriculture or forestry department, failing which the latter will make an administrative eviction order, against which further appeal would not have any suspensive effect. After examining the applicants' and the State's allegations and the facts of the case, the Court decided that there had been a violation. It concluded that by imposing a considerable

burden on the applicant monasteries deprived of their property, Law No. 1700/1987 does not preserve a fair balance between the various interests in question as required by Article 1 of Protocol No. 1¹⁹.

Given that the key features of this case are very similar to ours, of great use may be their comparative analysis. First of all, it is a matter of factual seizure of property by the state through a law that is inconsistent with the rest of the domestic legal order. Secondly, the seizure is in the “public interest”. In the case of *the Holy Monasteries v. Greece* that interest is determined as end of the illegal sale of the relevant land, its destruction and abandonment, while in the case of the analyzed Draft Law, according to the Montenegrin authorities, the “public interest” is the introduction of legal certainty in property relations and the preservation of Montenegro's cultural heritage. Thirdly, it is envisaged that the seizure of property in both cases has been done without providing compensation. Finally, there is the intention of the state to shift the burden of proof to the weaker party in both cases while the proving itself is already hampered by objectively well-known circumstances reflected in the real inability to prove property rights acquired centuries ago due to lack of evidence from that time. This comparative review is of great importance because, should the controversial Draft Law be passed, the Serbian Orthodox Church and other religious communities affected by it will be able to seek protection ultimately before the European Court of Human Rights.

Abovementioned provisions do not have a base in any international instrument, nor in the Constitution or in the existing legislative framework of Montenegro. The existing Law on State Property of Montenegro²⁰ does not stipulate that the State of Montenegro is the owner of sacred, religious buildings and land belonging to them. In addition, Montenegro has a Law on Expropriation²¹, as well as the Law on Property- Legal Relations²², which are applied when there is a dispute over ownership right, guaranteeing multilevel judicial protection to each legal entity.

If the Government of Montenegro believes that it has ownership rights with respect to any of the real property presently owned by religious communities, it should assert its claims before the court of law pursuant to the existing legal framework dealing with the rules of

¹⁷ Murdoch J. Freedom of Thought, Conscience and Religion. A guide to the implementation of Article 9 of the European Convention on Human Rights. *Human rights handbooks*, 2008, no. 9, p. 83.

¹⁸ *The Holy Monasteries v. Greece*, 10/1993/405/483-484. Council of Europe: European Court of Human Rights, 21 November 1994. Available at: <https://www.refworld.org/cases,ECHR,402a045b4.html> (accessed 20.09.2019).

¹⁹ *The Holy Monasteries v. Greece*, 10/1993/405/483-484. Council of Europe: European Court of Human Rights, 21 November 1994. Available at: <https://www.refworld.org/cases,ECHR,402a045b4.html> (accessed 20.09.2019).

²⁰ Law on State Property. Official Gazette of Montenegro, no. 21/2009 and 40/2011.

²¹ Law on Expropriation. Official Gazette of the Republic of Montenegro, no. 55/2000, 12/2002, 28/2006; Official Gazette of Montenegro, no. 21/2008, 30/2017, 75/2018.

²² Law on Property-Legal Relations. Official Gazette of Montenegro, no. 19/2009.

civil procedure, property rights and cadaster register. To do so as proposed in the Draft Law is impermissible confiscation in clear violation of the basic human rights of religious communities and their members. To the extent that the Government believes that the property and procedural laws should be changed when applied to religious communities — than it should propose such changes of the legal framework (without discrimination as compared to other citizens) and justify those to the public in appropriate democratic, inclusive and transparent law-changing-enacting procedure. To attempt to change those laws (only as applied to religious communities) by enacting two imprecise articles in transitional provisions of a law dealing with religious freedoms — is a clear violation of the human rights of religious communities and their members.

Importantly, by the existing legal rules, any proceeding is to be brought before a competent court (As required by Art. 6 of ECHR). Strikingly opposite to this provision is Article 62 of the Draft Law, providing for the taking of the property from a religious community by an act of “public administration authority”.

In particular, Articles 62 and 63 of the Draft Law are squarely contrary to the provisions of Law on Cadaster, Art 124a, which provides in relevant part: “If one is of the opinion that a registration of an ownership right in the Cadaster of Immovable Property one's ownership right is infringed, he/she may request a deletion of the registration and reinstatement to the previous state by way of a complaint to a competent court. The complaint referred to in paragraph 1 of this Article may be lodged within three years from the day the registration is made.” On the other hand the Draft Law, Art. 62 and 63 allow that, for religious communities (as opposed to the other holders of property titles), the registration of ownership may be questioned irrespective of the three year time bar (statute of limitations) applicable to all other citizens and legal entities.

Putting aside all the past allegations regarding inviolability of private property in the modern world, it is impossible not to look back at the traditional legal institute of *usucapio* that existed even in Roman law. Articles 62 and 63 of the Draft Law are squarely contrary to the Law on Property Rights, Articles 53 and 54, which provide for acquiring of ownership by the *usucapio* (adverse possession). Article 53 provides: “Bona fide and based on law possessor of real property, owned by other, becomes the owner of that property by *usucapio* (adverse possession) after the expiration of 10 years”. This means that a bona fide possessor, who bases his possession on law, after 10 years of possession is registered as the owner in Cadaster, instead of the previously registered owner. Article 54 provides: “Bona fide possessor of real property, owned by other, becomes the owner of that property by *usucapio* (adverse possession) after expiration of 20 years.” This means that, after 20 years, a bona fide possessor even without possession based on law, is

registered in Cadaster as the owner, instead of previous owner. Of course, it may be done only by the means of a judgment of the court of law, where all of the procedural safeguards exist for both parties. No act of the “public administration authority”, like in Art. 62 of the Draft Law, may suffice. Cited provisions of the Law on Property Rights are directly contrary to Articles 62 and 63 of the Draft Law, which provide for the inquiry into the status of ownership of real property for more than 100 years ago, e.g., from 1918 back to 1219 (when Monastery of Cetinje was founded). It is undeniable that religious communities in the territory of Montenegro have continuously used religious objects and land for more than a hundred years, which means at least ten times longer than the required legal period.

If one state wants to carry out a sort of nationalization of religious objects and lands used by religious communities in its territory, this would imply that in this particular case it is a theocratic state, not a state where religious communities are separated from the state and where there is autonomy to regulate issues that are important for the functioning of religious communities. Article 14 of the Constitution of Montenegro, in contrast, it proclaims “Separation of the religious communities from the state” and prescribes that religious communities are separated from the state, and that they are equal and free in the exercise of religious rites and religious affairs.

After the fall of the communist regime, the states of Eastern Europe began to enact laws in the 1990s to regulate restitution of confiscated property to individuals and legal entities, including churches and religious organizations in particular. In the Republic of Serbia, the Law on Restitution was passed in September 2011 and was one of the conditions for obtaining EU candidate status, while the Law on Restitution of Property to Churches and Religious Communities was adopted in 2006. On March 23, 2004, the Parliament of Montenegro adopted the Law on restitution of the taken away property rights and compensation. This Law regulates the conditions, manner, and procedure for restitution of ownership rights and other property rights and compensation of former owners for the rights taken away from them for the benefit of public, state, social, or cooperative ownership. As the Law on restitution of the taken away property rights and compensation from 2004 does not include restitution for churches and religious communities, Article 8, paragraph 2 of that Law provides that the conditions, methods and procedure for restitution of confiscated property rights to religious communities shall be regulated by a separate law. In the same Law, Article 8a stipulates that: “Churches and religious organizations may submit the application for recording the property that was taken away on the territory of the Republic of Montenegro for the benefit of public, state, social, or cooperative ownership without fair or market compensation”. In mid-2010, the Draft Law on Restitution of Property to

Churches and Religious Communities was made, but it was never adopted.

While other republics of the former SFRY are returning the previously confiscated properties to churches and religious communities, Montenegro clearly shows with this Draft law the intention to confiscate religious property and declare them state-owned. As already mentioned, no special law on restitution of former church properties-buildings and land was enacted in Montenegro, and its enactment is envisaged by Article 8, paragraph 2. By adopting the provisions of 62 and 63 of the Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities, Montenegro would completely deviate from its own previously defined policy, as well as from all trends accepted in the international community.

The Word of the Venice Commission

The cooperation between Venice Commission and the Government of Montenegro regarding this same issue has started in 2015, when the Ministry of Human and Minority Rights of Montenegro requested the opinion of the Commission on the Draft Law on Freedom of Religion of Montenegro. The rapporteurs appointed by the Commission made a number of criticisms of the proposed legislation during their visit to Montenegro. In view of that, the Montenegrin authorities expressed their wish to withdraw the Draft Law and the formal request for an Opinion of the Commission, which the Commission agreed to.

In mid-May 2019, the Minister for Human and Minority Rights of Montenegro requested the opinion of the Venice Commission on a new Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities, previously adopted by the Government of Montenegro. A delegation of three rapporteurs and two representatives of the Secretariat of the Venice Commission visited Podgorica at the end of May in order to gather material for drafting the Opinion. The draft Opinion was discussed at the Subcommittee on Fundamental Rights at its meeting held on 20 June 2019 and subsequently adopted, in a somewhat modified form in comparison to the original draft, at the 119th plenary session of the Venice Commission held on 21 and 22 June 2019²³.

The Opinion states that the historical account, on which the assessment of the Draft law is based, relies primarily upon information provided by the authorities of Montenegro and that the Archbishop of Cetinje, Metropolitan of Montenegro and the Littoral, expressed complete disagreement with such a version of historical facts²⁴. This raises the question of the justification of such an act by the Venice Commission. Namely, in the present circumstances, the Venice Commission should have a role of a mediator between parties with opposing

views and interests, thus it was not appropriate to accept *a priori* the allegations of only one party without its own engagement in finding the truth and without requesting evidence for the accepted allegations. The Commission had to take a neutral position and to take into account the allegations made by all parties that provided information relevant to the matter. In paragraph 63 of the Opinion, Venice Commission, on the contrary, it distanced itself from going into the historical background of the adoption of controversial solutions in the Draft Law and their assessment: "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". Since the adoption of the Draft Law is closely related to historical and political issues, it is impossible to see the substance, scope and eventual consequences of the proposed solutions from the legal side without entering into their historical background. On the other hand, the legal analysis given by the Venice Commission can, to some extent, be considered limited, precisely for the reasons stated above. It could be noted, too, that the Venice Commission Opinion in some segments contradicts itself. Namely, at the beginning of the Opinion, it is stated that the delegation of the Venice Commission 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, after which it is concluded that the Opinion was prepared on the basis of the contributions of the rapporteurs and on the basis of information received from the interlocutors during the visit. From this statement it appears that all the interlocutors made the same explanations and arguments, but from paragraph 12 of the Opinion, it is clear that this is not the case, with the fact that the Commission did not explain why it accepted the Montenegrin authorities' allegations and rejected the historical version of facts presented by representatives of the Serbian Orthodox Church.

Also, the Venice Commission did not want to take a stand on issue related to the regularity of the procedure

²³ Venice Commission Opinion CDL-AD (2019)010. URL: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)010-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)010-e).

²⁴ CDL-AD (2019)010, par. 12.

of preparation of this and the previous Draft law, and the meaningfulness of public hearings and consultations conducted in Montenegro. It only in a general way appealed that, despite ongoing tensions between religious communities, it is necessary to lead an inclusive and effective public consultation including all religious communities.

As for the provisions of Art. 62 and 63 of the Draft Law dealing with the property of religious communities, which are the focus of this paper, the Venice Commission was critical of. In the Opinion, it took the view that the disputed provisions and their factual background were unclear and ambiguous and emphasized that it was essential to clarify the meaning of these provisions during the course of the legislative procedure. It was noted that the interlocutors with whom the delegation of the Venice Commission met presented different and contradictory interpretations of the proposed solutions, which alluded to the lack of clear images and strategies even within the Montenegrin authorities. From the given recommendations, it can be concluded that the proposed solutions lack sufficient details and explanations and that they currently do not meet the foreseeability and accessibility requirements of the case law of the European Court of Human Rights when it comes to Article 1 of the First Protocol to the ECHR, which is necessary to be corrected. It was further emphasized that 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 as well as that is necessary to clearly state the relevant provisions of the codes on administrative and civil procedure which contain the standards of proof to be applied in the implementation of the relevant draft provisions. Recognizing the shortcomings of the proposed procedure, the Venice Commission stated in its Opinion that Article 63 should be revised to explicitly state the right of the religious community concerned to be informed and to participate in the administrative procedure before the cadaster administration authority as soon as the public authority submits a request for change of title over religious property in the real estate cadaster for the benefit of the state. The most significant criticism and suggestion made by the Commission, which can indeed increase the degree of legal certainty in relation to the solutions now

proposed, is recommendation that registration of state ownership rights should only take place after a final administrative or judicial decision is made. In this respect, paragraph 2 of article 63 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 ownership rights. The Opinion also concluded that the Law should make it clear that a change in the title over religious property will not automatically affect the already existing right to use that property, with the reservation that the state has the right to impose strict conditions for the use of the property for the purpose of protection of cultural heritage.

Although the Venice Commission, while taking a position on this, clearly, primarily political issue, was to some extent restrained, in its Opinion it made valuable observations and recommendations, which, if respected by the Montenegrin authorities in finalizing the text of the Law, will largely improve the now proposed solutions.

Conclusion

In the current situation of Serbia and Montenegro, as candidate countries for EU membership, they are expected to make above-average efforts to adopt and respect international standards in each field of law and to respect human rights proclaimed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the same time, it is necessary to definitely break with the harmful traces and legacy of the communist regime, as well as to make constant efforts to improve the relations between the countries in the Balkan region for the sake of international stability. The analysis of the Draft Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities, and particularly of the provisions of Art. 62 and 63, implies that their application would violate the principle of the rule of law, the right to property, legal certainty, equal protection of rights and freedoms, the right to a legal remedy, the principles of state separation from religious communities, freedom of religion, as well as the principle of non-discrimination, which in this case is not obvious but "hidden", indirect. That is why it is crystal clear that the adoption of this Law in its current form by the Parliament of Montenegro would lead to a serious setback in achieving all the aforementioned goals and that international community should warn Montenegro of the negative consequences of that act.

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