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An Example of the Principle of *Cuius Regio, Eius Religio* in the 21st Century – A Test of the Right to Property and Freedom of Religion in Montenegro and the Neutrality of the State

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…
First Amendment to the United States Constitution, 1791

Should the Serbian Orthodox Church reject the agreement, we will form an Orthodox Church in Montenegro
Milo Đukanović, President of Montenegro, 2020

Abstract

The neglect of freedom of religion is relevant once again. Montenegro passed its Law on Freedom of Religion, which caused tectonic disturbances in the relations between the state and the church, prescribing the nationalization of church land and shrines, inherently challenging the legal continuity of certain religious communities and with a questionable generality, i.e. the ability to apply to all. The law provoked mass litanies of Orthodox faithful as non-violent resistance, which also received recognition by the global public. A particular facet is the aspiration of the President of Montenegro and the decades-long ruling political party to form a new, independent Orthodox Church. There is thus a unique case in 21st century Europe that a government in a secular state is officially charging itself with the reorganization of an existing church organization. This article deals with the Law on Freedom of Religion in Montenegro, its concordance with the Constitution of Montenegro and the ECHR, and also analyzes the relationship between Montenegrin religious policy and the principle of state neutrality, as an indispensable principle of modern regulation of the church-state relations, bearing in mind the legislation and political situation in Montenegro until August 30, 2020.

Keywords: Freedom of Religion, Right to Property of Religious Communities, State neutrality, Orthodoxy, Montenegro

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I. Introduction

Freedom of religion is, to use Professor Cole Durham's metaphor,[1] *"the 'neglected grandparent' of human rights",* and has once more become relevant. The Law on Freedom of Religion or Belief and the Legal Status of Religious Communities (hereinafter: Law on Freedom of Religion)[2] was adopted in the Montenegrin Parliament on 27 December 2019, in a tense atmosphere that included the arrest of opposition MPs. Among other things, the law prescribes the nationalization of church property (land and buildings). This is not its only problematic characteristic, although certainly from the point of view of the functioning of religious communities and religion, it is undoubtedly the one with the most severe consequences. In addition, the law does not recognize the legal continuity of some religious communities, although the state recognizes them *de facto*, and they are thus forced to acquire new legal personality. Contrastingly, the state has recognized the legal personality and continuity of other religious communities by concluding agreements with them. The Law on Freedom of Religion raised the issue of respect for human rights, the principle of non-discrimination, the principle of separation of church and state and neutrality, especially in the context of the official program of the ruling political party, which proclaims the creation of an autocephalous Montenegrin Orthodox Church as a unique and organizationally-independent Orthodox Church.[3] The adoption of this law provoked peaceful protests in the form of litanies of large numbers of Orthodox faithful in almost all cities across Montenegro. The litanies were interrupted by the spread of the Covid-19 (corona) virus and the decisions of the Government of Montenegro to ban gatherings.[4] The phenomenon of mass litanies as a form of non-violent resistance did not go unnoticed by the world public, thus the protests in Montenegro against the disputed law received media coverage across the world.[5] This paper analyzes the disputed provisions of the

1 *B.G. Scharffs*, The Autonomy of Church and State, Brigham Young University Law Review 4|2004, p. 1227 ff. *W.C. Durham*, Perspectives on Religious Liberty: A Comparative Analysis, in: J. Witte/J. van der Vyver (eds), Religious Human Rights in Global Perspective: Legal Perspectives, The Hague 1996, p. 1 ff.

2 Law on Freedom of Religion or Beliefs and Legal Status of Religious Communities *(Zakon o slobodi vjeroispovijesti ili uvjerenja i pravnom položaju vjerskih zajednica)* (Official Gazette of Montenegro, No. 74/2019, 30 December 2019).

3 Political program of the Democratic Party of Socialists from 30 November 2019, p. 18, https://s3.eu-central-1.amazonaws.com/dps.website/media/files/1575286387-politicki-program-dps-viii-kongres.pdf, 14.6.2020. Program of Priorities of the Democratic Party of Socialists of Montenegro, June 2015, p. 13, https://s3.eu-central-1.amazonaws.com/dps.website/media/files/1519391010-program-cg.pdf, 21.6.2020.

4 Order for undertaking temporary measures to prevent the introduction into the country, suppress and prevent the transmission of a novel Coronavirus (Official Gazette of Montenegro, No. 18/20, 19/20, 40/20; other Orders 41/20 and 42/20).

5 *BBC*, Montenegro MPs arrested in clash over religious freedom law, https://www.bbc.com/news/world-europe-50923647; *Der Spiegel*, Proteste gegen Kirchengesetz in Montenegro. Milos Tricks, https://www.spiegel.de/politik/ausland/ montenegro-milo-djukanovic-heizt-mit-kirchengesetz-streit-an-a-1303294.html; *Vatican News*, Montenegro: Neues Religionsgesetz löst Proteste aus, https://www.vaticannews.va/de/welt/news/2019-12/montenegro-religionsgesetz-proteste-serbien-orthodox-kirche.html; *Deutsche Welle*, Kirchenstreit in Montenegro, https://www.dw.com/de/kirchenstreit-in-montenegro/a-52032224; *Frankfurter*

Law on Freedom of Religion and their compliance with the Constitution of Montenegro[6] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), observing the standards established by the case-law of the European Court of Human Rights (hereinafter: ECtHR), bearing in mind the legislation in Montenegro until August 30, 2020. The harmonization of the religious policy of Montenegro with the principle of neutrality of the state, inherent to modern democratic societies, is also analyzed, bearing in mind the political situation in Montenegro until August 30, 2020, when the parliamentary elections were held.

II. Overview of Basic Facts

Montenegro is one of the six former republics of SFR Yugoslavia that left the state union with the Republic of Serbia in 2006. It became a member of the Council of Europe on 11 May 2007, and a member of NATO on 5 June 2017, while negotiations on Montenegro's accession to the European Union are underway.

The 2003[7] and 2011 censa[8] counted about the same population, approx. 620,000, in Montenegro although with slightly different ethnic composition:

2003 Census: Ethnicity		**2011 Census: Ethnicity**	
Montenegrins	43.16%	Montenegrins	44.98%
		Montenegrins-Serbs	0.30%
		Montenegrins-Muslims	0.03%
Serbs	31.99%	Serbs	28.73%
		Serbs-Montenegrins	0.34%
Bosniaks	7.77%	Bosniaks	8.65%
		Bosniaks-Muslims	0.03%
Albanians	5.03%	Albanians	4.91%
Muslims (ethnicity)	3.97%	Muslims (ethnicity)	3.31%
Croats	1.10%	Croats	0.97%
Others	6.98%	Bosnians	0.07%
		Others	7.68%

Allgemeine Zeitung, Ein Raub an der serbischen Orthodoxie?, https://www.faz.net/aktuell/politik/ausland/warum-montenegros-neues-kirchengesetz-so-umstritten-ist-16555270.html; *Jerusalem Post*, Montenegro's parliament approves religion law despite protests, https://www.jpost.com/Breaking-News/Montenegros-parliament-approves-religion-law-despite-protests-612303.

6 The Constitution of Montenegro *(Ustav Crne Gore)* (Official Gazette of Montenegro, No. 1/2007 and 38/2013 –Amendments I–XVI).

7 Census data from 2003, Statistical Office of Montenegro, https://www.monstat.org/cg/page.php?id=57&pageid=57, 14.6.2020.

8 2011 Statistical Yearbook, Statistical Office of Montenegro, http://www.monstat.org/eng/page.php?id=101&pageid=101, http://www.monstat.org/userfiles/file/publikacije/godisnjak%202011/8.STANOVNIOSTVO.pdf, 14.6.2020.

The linguistic structure of the population does not correspond to the ethnic composition. The linguistic composition also varied between the 2003 and 2011 census.[9] In just eight years, there have been visible changes in terms of linguistic structure, especially in the proportion between Serbian and Montenegrin.

2003 Census: Mother Tongue		**2011 Census: Mother Tongue**	
Serbian	63.49%	Serbian	42.88%
Montenegrin	21.96%	Montenegrin	36.97%
Albanian	5.26%	Albanian	5.27%
Bosniak	3.21%	Bosniak	0.59%
Bosnian	2.29%	Bosnian	5.33%
Croatian	0.45%	Croatian	0.45%
Others	3.34%	Others	8.51%

In terms of religion, 72.07% of the population is Orthodox, 19.11% Muslim and 3.44% Catholic.[10]

These statistics show that Montenegro is a heterogenous state in terms of ethno-linguistic identity, which is important for clarifying the context in which the Law on Freedom of Religion was adopted.

Within the Orthodox Church, the Serbian Orthodox Church (hereinafter: SOC) has traditional ecclesiastical jurisdiction over Montenegro, whose two present-day dioceses have their sees in Montenegro, namely the Metropolitanate of Montenegro and the Littoral with its see in Cetinje and the Diocese of Budimlje and Nikšić with its see in Berane. Two other dioceses of the SOC operate in a smaller part of the Montenegrin territory, namely the Diocese of Zahumlje and Herzegovina and the Diocese of Mileševo. The SOC, then called the Archbishopric of Žiča, became autocephalous in 1219, and Saint Sava founded the Zeta Episcopate and the Budimlje Episcopate on the present-day territory of Montenegro, as two episcopates of the autocephalous SOC. When the SOC was elevated to the rank of patriarchate in 1346, under the name of the Patriarchate of Peć after the city of its see, the Zeta Episcopate was elevated to the rank of metropolitanate, with the following centuries gradually seeing its name change into the Metropolitanate of Cetinje and then Montenegro, while the Budimlje Episcopate was elevated to the rank of metropolitanate in the 15th century.[11] Follow-

9 Statistical Office of Montenegro, Book 1, Book 3, https://www.monstat.org/cg/page.php?id=222&pageid=57, 21.6.2020, *C. Brković*, Ambiguous notions of 'national self' in Montenegro, in: U. Brunnbauer/H. Grandits (eds), The Ambiguous Nation: Case Studies from Southeastern Europe in the 20th Century, Oldenburg 2013, pp. 135–137.

10 Statistical Office of Montenegro, Table CG1, CG2, CG3, https://www.monstat.org/cg/page.php?id=534&pageid=322, 14.6.2020.

11 *D. Šljivić/N. Živković*, Self-Ruled and Self-Consecrated Ecclesiastic Schism as a Nation-Building Instrument in the Orthodox Countries of South Eastern Europe, Genealogy 4|2020, p. 20, https://www.mdpi.com/2313-5778/4/2/52, 14.6.2020. *M. Dašić*, Manastir Đurđevi Stupovi i Budimljanska eparhija u istoriji [The Monastery of Djurdjevi Stupovi and the Eparchy of Budimlja through the Ages], in: M. Radujko (ed.), Đurđevi stupovi i Budimljanska eparhija: Djurdjevi Stupovi and the Eparchy of Budimlja, Berane 2011, p. 21–22.

ing the abolition of the Patriarchate of Peć in 1766 and its subordination to the Patriarchate of Constantinople, the Metropolitanate of Cetinje did not accept such a decision, but continued to function within a disputed canonical status, by using the title of Exarch of the See of Peć and claiming the continuity of the Patriarchate of Peć, in the canonical sense. After the First World War and the following establishment of the Kingdom of Serbs, Croats and Slovenes, the now Metropolitanate of Montenegro and Highlands, on 16 December 1918, decided to reunite for the first time since 1766 into a single SOC, together with the Orthodox Church in Serbia and other dioceses, which would later be confirmed by a *Tomos* on Autocephaly from the Patriarch of Constantinople.[12] The unified and renewed SOC was recognized as a legal entity in the Kingdom of Yugoslavia by the Law on the SOC from 1929, which in accordance with its Art. 3 and all its constituent parts and institutions had the status of a legal entity, and thus the Metropolitanate of Montenegro and the Littoral.[13] According to the unanimous opinion in Canonical Orthodoxy, the SOC in Montenegro is the only canonically-recognized Orthodox Church in Montenegro, which is the position of the Ecumenical Patriarch Bartholomew, as well as the Russian Orthodox Church.[14]

On the other hand, in Montenegro, there is also an association registered in 2001 under the name Montenegrin Orthodox Church, with minor significance in terms of popular support. It is important to emphasize that there was no schism in Montenegro, that is, the clergy and monkhood of the SOC in Montenegro did not separate, but the Montenegrin Orthodox Church association was founded by a priest *(Miraš Dedeić)* previously defrocked by the Ecumenical Patriarch.[15] The majority of Orthodox in Montenegro are faithful of the Serbian Orthodox Church, between just over 60% of the total population according to some surveys [16] (i.e. 85% of all Orthodox) and as much as 70% of the Orthodox population.[17] This means that, if the Orthodox comprise 72.07% of the population, and Montenegrins 44.98%, not only Serbs, but also the vast majority of Montenegrins are SOC faithful. This should not be surprising because, according to Orthodox teaching, the canonical jurisdiction of the autocephalous church is not conditioned by the ethnic affiliation of the faithful.

All these statistics indicate the need to apply modern principles in regulating the relationship between church and state in Montenegro, such as the principle of separation of church and state and the neutrality of the state in relation to religious beliefs

12 *Šljivić/Živković*, Fn. 11, p. 20.

13 Law on the Serbian Orthodox Church *(Zakon o Srpskoj Pravoslavnoj Crkvi)* (Official Gazette of the Kingdom of Yugoslavia, No. 269/1929).

14 *Šljivić/Živković*, Fn. 11, p. 21. Full Letter from the Ecumenical Patriarch to President Milo Đukanović regarding Orthodoxy in Montenegro (dated 21 June 2019; online since 28 June 2019), https://theorthodoxworld.com/full-letter-from-the-ecumenical-patriarch-to-president-milo-dukanovic-regarding-orthodoxy-in-montenegro/, 14.6.2020.

15 *Šljivić/Živković*, Fn. 11, p. 19.

16 *Šljivić/Živković*, Fn. 11, pp. 19–20. Intelligent Communications. Political survey, Montenegro, January 2020, https://volimpodgoricu.me/wp-content/uploads/2020/02/POLITI%C4%8CKO-ISTRA%C5%BDIVANJE-CG-2020.pdf, 16.6.2020.

17 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), mn. 10, Opinion No. 953/2019, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)010-e, 14.6.2020.

and religious communities. Any identification of the state with one of the existing religious communities, as well as the aspiration to reorganize the existing church organization, is not inherent to democratic societies.

Prior to the enactment of the Law on Freedom of Religion, the 1977 Law on the Legal Status of Religious Communities was in force in Montenegro (hereinafter: 1977 Law).[18] Aware that the law was outdated, Montenegro first began to partially regulate relations with religious communities by concluding agreements, and finally resorted to general regulation through laws of questionable scope, since some religious communities had previously concluded agreements with the state. Thus, before the adoption of the Law on Freedom of Religion, on 29 May 2012, Montenegro concluded the Basic Agreement with the Roman Catholic Church,[19] which, as an international agreement, pursuant to Art. 9 of the Constitution of Montenegro has priority over domestic legislation. On 30 January 2012, the Agreement on the Regulation of Relations of Common Interest Between the Government of Montenegro and the Islamic Community in Montenegro was concluded,[20] as well as the Agreement on the Regulation of Relations of Common Interest between the Government of Montenegro and the Jewish Community in Montenegro, concluded on 31 January 2012.[21] Of all the major religious communities, Montenegro only failed to conclude an agreement with the SOC, the largest religious organization in Montenegro, despite an initiative by the SOC to conclude an agreement identical to the Basic Agreement with the Holy See.[22]

III. Acquisition of Legal Personality by Religious Communities

The registration and entry into the Inventory of Religious Communities are regulated by the provisions of Arts 18–34 of the Law on Freedom of Religion, where registration refers to religious communities that are yet to be established, i.e. registered for the first time in accordance with Art. 18, while the entry into the Inventory of Religious Communities under Art. 24 refers to the religious communities that were reported un-

18 Law on Legal Status of Religious Communities (Official Gazette of the Socialist Republic of Montenegro, No. 9/77, 26/77 – corr., 29/89 – new Law and 39/89 – new Law and Official Gazette of the Republic of Montenegro, No. 27/94 – new law and 36/2003 – decision of the Constitutional Court).

19 Law on the Ratification of the Basic Agreement between Montenegro and the Holy See of 29 May 2012. (Official Gazette of Montenegro – International Agreements, No. 7 of 8 June 2012, 15/12), http://www.gov.me/vijesti/106956/Temeljni-ugovor-izmedu-Crne-Gore-i-Svete-Stolice.html? Alphabet = lat, 14.6.2020.

20 Agreement on the Regulation of Relations of Common Interest Between the Government of Montenegro and the Islamic Community in Montenegro, No. 01-427 of 30 January 2012, http://www.gov.me/vijesti/111246/Potpisan-Ugovor-izmedu.html, 14.6.2020.

21 Agreement on the Regulation of Relations of Common Interest Between the Government of Montenegro and the Jewish Community in Montenegro, No. 01-432 of 31 January 2012, http://www.predsjednik.gov.me/press-centar/izjave/111263/Potpisan-Ugovor-o-uredenju-odnosa-od-zajednickog-interesa-izmedu-Vlade-Crne-Gore-i-jevrejske-zajednice -in-Montenegro.html, 14.6.2020.

22 *Radio Free Europe,* SPC od Podgorice traži isti ugovor kao sa Vatikanom [The SOC is Proposing for Podgorica to Conclude the Same Agreement as with the Vatican], https://www.slobodnaevropa.org/a/24328429.html, 19.6.2020.

der the Law on the Legal Status of Religious Communities of 1977. The law does not mention the third category of religious communities – those that possessed the status of a legal entity even before the 1977 Law. Art. 19 Para. 2 of the Law on Freedom of Religion stipulates that the religious community is free to decide whether to register or not, which at first glance would mean that there is no forced registration or entry into the Inventory. However, Art. 28 Para. 2 of the Law on Freedom of Religion stipulates that religious communities that are unregistered and not entered into the Inventory do not have rights that exclusively belong to those registered and entered into the Inventory as legal entities, which in fact implies indirect coercion to register or be entered into the Inventory by the Law on Freedom of Religion.

The problematic part of the Law regarding registration / entering into the Inventory lies in the fact that the Law on Freedom of Religion makes an inadmissible distinction between, conditionally speaking, domestic and foreign religious communities (Arts 23 and 25 of the Law), i.e. it singles out from the general norm religious communities with a religious center abroad, but as such that they acquire legal personality only by entry in the Register or Inventory (Art. 25 Para. 3), regardless of whether they already exist and operate in the territory of Montenegro, whether they are reported in accordance with the Law on the Legal Status of Religious Communities from 1977, whether they existed before the enactment of the Law of 1977 and whether the state of Montenegro has already recognized their legal personality in another manner, through administrative and judicial bodies. Introducing the term "religious communities with a religious center abroad" in the state-church terminology is illogical, because there is no autochthonous Montenegrin religion, rather all of the religions are global, such that every single religious community has some kind of religious center abroad. The inadmissibility of this distinction is first of all reflected in the fact that even religious communities with a religious center abroad have their sees in Montenegro, and thus represent, from a strictly formal-legal point of view, domestic religious communities, and their organizational connection with a religious center abroad is an issue of internal church organization, church teaching and church autonomy. Church autonomy is protected by freedom of religion as a collective human right that also belongs to religious communities as organizations.[23] In addition, freedom of religion according to the Constitution of Montenegro (Art. 46) belongs to everyone, regardless

23 *J. Winter*, Staatskirchenrecht der Bundesrepublik Deutschland, 2nd edn, Berlin 2008, pp. 167–215; *G. Manssen*, Staatsrecht II. Grundrechte, 7th edn, Munich 2010, pp. 88–89, *G. Robbers*, Church Autonomy in the European Court of Human Rights—Recent Developments in Germany, *Journal of Law and Religion*, 26|2010, pp. 281–320; *Scharffs*, fn 1; *H. de Wall*, Von der individuellen zur korporativen Religionsfreiheit – die Rechtsprechung zu Art. 9 EMRK, in: J. Renzikowski (ed.) Die EMRK im Privat-, Straf-, und Öffentlichen Recht. Grundlagen einer europäischen Rechtskultur, Baden-Baden 2004, pp. 237–255; *C. Walter*, Religions- und Gewissensfreiheit, in: R. Grote/T. Marauhn (eds), EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Tübingen 2006, pp. 884–887; P. *van Dijk/G.JJ.H. Van Hoof*, Theory and Practie of the European Convention of Human Rights, Alphen aan den Rijn 1998, pp. 552–557; *B. Pieroth*, Grundrechte. Staatsrecht II, 26th edn, Heidelberg 2010, p. 134. *J. Ipsen*, Staatsrecht II. Grundrechte, 13th edn, Munich 2010, p. 104; *G. Mueller-Volbehr*, Europa und das Arbeitsrecht der Kirchen, Heidelberg 1999, pp. 60–103.

of whether they are domestic or foreign religious communities or domestic or foreign citizens, so any such distinction is inadmissible.

> **Article 25**
> The domain of registration or entry into the Inventory of a religious community in Montenegro shall be within the borders of Montenegro.
> The seat of the religious community registered or entered into the Inventory for the territory of Montenegro shall be in Montenegro.
> Part of the religious community with the religious center abroad, operating in Montenegro, shall obtain the status of a legal person in Montenegro upon entry into the Register or the Inventory.

Although the Law on Freedom of Religion should be valid for all and have a general effect, its scope in terms of acquiring legal personality is questionable: Prior to its adoption, Montenegro had already resolved the issue of legal personality and continuity of certain religious communities. The Roman Catholic Church concluded a Basic Agreement with Montenegro, according to which the state of Montenegro recognizes the public-legal personality of the Roman Catholic Church (Art. 2 Para. 1). Art. 3 Para. 1 of the Agreement on the Regulation of Relations of Common Interest between the Government of Montenegro and the Islamic Community in Montenegro, recognizes the legal personality that the Islamic Community in Montenegro had before the entry into force of this Agreement, while the recognition of the legal personality of the Jewish Community is prescribed in Art. 2 Para. 1 of the Agreement on the Regulation of Relations of Common Interest between the Government of Montenegro and the Jewish Community. Consequently, out of the larger religious communities, the provisions on registration and entry into the Inventory of the Law on Freedom of Religion, and especially the provision of Art. 25 Para. 3, will apply mainly to the dioceses of the SOC which have their seat in Montenegro, but are part of the SOC which has its center in another state, i.e. in Serbia. Paradoxically, the provisions of the Law on Freedom of Religion would erase the legal continuity of the religious community that has existed in Montenegro with uninterrupted continuity and presence since 1219. For the sake of comparison, the provision of Art. 25 Para. 3 which introduces a new and rescinds the old legal personality of religious communities with a religious center abroad, will not apply to the Archdiocese of Bar and the Diocese of Kotor (as part of the Archdiocese of Split with a see in Croatia) which are organizational parts of the Roman Catholic Church, because Art. 2 of the Basic Agreement has recognized their public-legal personality.

The result of these provisions of the Law on Freedom of Religion is that a religious community's legal continuity is not recognized, all because of its religious center abroad, or if it was recognized as a legal entity before the 1977 Law, which would be why it did not have to report under the 1977 Law (such as the Serbian Orthodox Church in Montenegro). It is forced to acquire a new personality, regardless of the fact that it exists and is *de facto* recognized as a legal entity before the law was passed, because it legally participates in legal life, it has a tax identification number, it is the holder of a building permit, etc. Rescinding the existing personality and forcing it to acquire a new one would have incalculable legal consequences for the religious community with a religious center abroad, since it thereby loses acquired rights. The issue of recognizing legal personality is also important from the point of view of resti-

tution, since Montenegro is postponing the adoption of the law on restitution of church property confiscated after the Second World War. As a logical consequence thereof, the religious community from which the property was confiscated will have the right of restitution, but not a newly established religious community which acquires legal personality by entry into the Register/Inventory. The freedom of religion of this religious community has therefore been violated, which is also suggested in ECtHR case-law. In *Canea Catholic Church v. Greece*, it was pointed out that the Greek authorities in judicial and administrative practice for many years did not question the legal personality of Canea Catholic Church. The Greek authorities thus *de facto* recognized its legal personality; the new registration could be interpreted as an acknowledgment that the previous legal affairs of the church were invalid.[24] This position of the ECtHR is comparable to the case of the SOC dioceses and Montenegro, which existed as legal entities prior to the 1977 Law. They therefore did not have an obligation to register or report and were *de facto* recognized as legal entities by administrative and judicial bodies of Montenegro. However, the Law on Freedom of Religion does not recognize them or recognize their legal personality and continuity, but rather forces them to acquire a new legal personality.

IV. Nationalization of Church Land and Buildings without Compensation

1. Overview

> **Article 62**
> 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.
> Religious buildings constructed in the territory of Montenegro based on joint investment of the citizens by 1 December 1918, for which there is no evidence of ownership rights, as cultural heritage of Montenegro, shall constitute state property.
> With regard to the existence of evidence of the facts referred to in Paragraphs 1 and 2 of this Article, the means of evidence and rules of evidence shall be applied in accordance with the Law on Administrative Procedure and, in the alternative, the Law on Civil Procedure.

The transitional and final provisions of the Law on Freedom of Religion prescribe, in a – structurally – strange manner, the nationalization of church property (land and buildings) which belonged to the state until 1918 or which were built by joint citizens investment or by public funding, for which the religious community has no proof of property right. From the point of view of human rights, it is not disputable that the state can expropriate certain property, even church property, in the public interest when certain conditions prescribed by both the Constitution of Montenegro and the ECHR are met. Art. 58 of the Constitution of Montenegro guarantees the right to pro-

24 ECtHR, *Canea Catholic Church v Greece*, 16 December 1997, App. No. 143/1996/762/963, paras 41–42, *M.T. Javier*, Limitations on Religious Freedom in the Case Law of the European Court of Human Rights, Emory International Law Review 19|2005, p. 611, 614; *Scharffs*, Fn. 1, p. 1217.

perty; deprivation of the right to property may follow when required by the public interest and with fair compensation. According to Art. 1 of Protocol No. 1 to the ECHR, the right to the peaceful enjoyment of possessions may be restricted only if such restriction is necessary in the public interest, on the basis of law and in accordance with the general principles of international law.[25]

For a better understanding of this provision, it is necessary to point out the mechanism of acquiring property rights in Montenegro, according to which the acquisition of property rights requires a legal basis (iustus titulus) and the manner of acquisition (modus aquirendi). The legal basis can be a law, a legal transaction or inheritance, as well as a decision by a state body. According to the law itself, the right of ownership is acquired by creating something new, merging, mixing, building on another person's land, separating the fruits, positive prescription, acquiring property from non-owners, occupation and in other cases determined by law.[26] In addition to the legal basis, it is also necessary to register the right of ownership in the real estate cadastre as a modus aquirendi (principle of registration in the cadastre).[27] The procedure of registration in the real estate cadastre is characterized by the principle of legality, because the administrative body examines ex officio whether the legally prescribed conditions for registration are met, the principle of formalities of the procedure, because the administrative body decides on the registration on the basis of documents suitable for registration, as well as the principle of reliability according to which the data on real estate and rights to it entered into the real estate cadastre are considered correct.[28] Therefore, the state authorities keep real estate records, guarantee legality and accuracy, such that all third parties can rely on the accuracy of the data entered in the cadastre. The Real Estate Cadastre is a modern and unified record of real estate and attached rights. Prior to its introduction in 1984,[29] the Turkish Tapu deed system of real estate records was applied in most parts of the territory of Montenegro,[30] while the land register system was valid in the Littoral. The procedure of transferring data from land registers and tapu deeds was (or still is) conducted by state administrative bodies, since the preparation of the real estate cadastre has not been completed in all parts of Montenegro. According to the law, all interested persons participate in the procedure of forming the real estate cadastre, the data are submitted for public inspection, and dissatisfied par-

25 *J. Abr. Frowein*, The Protection of Property, in: R. St. John Macdonald/F. Matscher/H. Petzold (eds), The European System of the Protection of Human Rights, Dorcrecht 1993, pp. 516–529.

26 Arts 28 and 29 Law on Ownership Rights *(Zakon o svojinsko-pravnim odnosima)* (Official Gazette of Montenegro, No. 19/2009).

27 Art. 8 Law on Ownership Rights, Fn. 26.

28 Arts 10, 11 and 13 Law on Ownership Rights, Fn. 26.

29 Law on Surveying, the Cadastre and Registration of Rights to Real Estate of the Socialist Republic of Montenegro (Official Gazette of the Republic of Montenegro, No. 25/1984).

30 *O. Stanković/M. Orlić*, Stvarno pravo, Baden-Baden 1996, pp. 359–362. *M.J. Todorović*, The Tapu System in the XIX Century – an Ottoman Endowment to the South Slavs, PhD Thesis, Faculty of Law University of Belgrade, 2016, p. 287. Law on Issuance of Tapu Deeds in the Jurisdiction of the Courts of Appeal in Belgrade and Skopje and the Grand Court in Podgorica (*Zakon o izdavanju tapija na području apelacionih sudova u Beogradu i Skoplju i Velikog suda u Podgorici)* (Official Gazette of the Kingdom of Yugoslavia, No. 29 of 7 February 1930).

ties can file a complaint.[31] This means that the state has already examined once, both through the administrative bodies that formed the cadastre, and as an interested party in case of a property interest, whether a religious community has a legal basis for registering property rights on church buildings and had procedural possibilities to react in cases where state property was indeed transferred to the church.

Through literal interpretation of the provision of Art. 62 we conclude that, when the Law on Freedom of Religion speaks of proof of the right to property, it means proof of the legal basis, regardless of the fact that the religious community is registered in the real estate cadastre as the owner of the property. Therefore, the Law on Freedom of Religion introduces covert expropriation, i.e. nationalizes property that is registered in the real estate cadastre as the property of a religious community, bypassing the existing expropriation procedure in accordance with the Law on Expropriation of Montenegro.

2. Reasonable Public Interest in Violating the Peaceful Enjoyment of Possessions

The question of the purpose of a particular state measure which endangers human rights is an issue of great importance for the procedure of assessing the admissibility of restrictions and for the application of the proportionality test. Based on the purpose of the restriction, it is assessed whether there is a legitimate goal, whether the stated measure achieves that legitimate goal, whether there is possibly some other gentler means by which the same goal is achieved and which does less to violate human rights.[32] As it has already been said, expropriation is not forbidden in a democratic society, but it must be in the public interest. According to the case-law of the ECtHR, each state has the right to determine its public interest and this enters the *margin of appreciation*, but still it must be reasonable, as pointed out in *James and Others v United Kingdom*[33]and *Mellacher and Others v Austria*.[34] Insisting on a reasonable basis is a barrier against the use of public interest as a guise for arbitrariness in the pursuit of illegitimate interests and as such to be unhindered in having a fig leaf for human rights violations.

The question arises as to why, in the 21st century, a member of the Council of Europe would even need to nationalize church property. This is an issue that is cleverly concealed in official documents. The Government of Montenegro did not define the justification for nationalizing church property in the explanation of the law or in any other official document, nor is it apparent what interest Montenegrin citizens of otherwise different nationalities and linguistic affiliations have therein. Certain reasons for

31 Arts 56–71 Law on State Surveying and Cadastre of Immovable Property *(Zakon o državnom premjeru i katastru nepokretnosti)* (Official Gazette of Montenegro, No. 29/07 of 22 May 2007; Official Gazette of Montenegro, No 73/10 of 10 December 2010, 32/11 of 1 July 2011, 40/11 of 8 August 2011, 43/2015, 37/2017 and 17/2018).

32 *M-A. Eissen*, The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in: *St. John Macdonald/Matscher/Petzold*, Fn. 25, pp. 125–146. *Manssen*, Fn. 23, pp. 49–59; *D. Grimm*, Proportionality in Canadian and German Constitutional Jurisprudence**,** The University of Toronto Law Journal 57|2007, pp. 383–397.

33 ECtHR, *James and Others v United Kingdom*, 21 February 1986, App No. 8793/79, para. 46.

34 ECtHR, *Mellacher and Others v Austria,* 19 December 1989, App No. 11070/84, para. 45.

such a standardization were first heard before the Venice Commission, which then characterized them as vague and contradictory.[35] In addition, the problem with defining the public interest of nationalization lies in the fact that it is placed in a historical rather than a contemporary context. The justification of the draft law states only that the law is proposed due to harmonization with the *acquis communautaire* and international standards.[36] Therefore, nationalization does not seem to be, for example, in order to construct a hydroelectric power plant or for the needs of some modern public interest; the public interest has remained unknown in legal documents. On the other hand, the motive for passing this law can be concluded from the statements of the President and Prime Minister of Montenegro, as well as the program of the ruling party, which will also be discussed in this paper.

As the public interest in the nationalization of church property is not defined in the draft Law on Freedom of Religion, it is therefore impossible to assess whether they are met, or whether the conditions for the deprivation of property rights would be met in any particular case, and whether there is a fair balance between protection of property rights and claims of general interest. Namely, if the interference of the state in someone's property rights is legal and serves to achieve the public interest, the ECtHR further analyzes whether the application of such a measure by the state was necessary to achieve the goal, i.e. whether the goal could be achieved with less restrictive measures. The ECtHR has stated in several judgments that in confiscating property there must be a "fair balance which should be struck between the protection of the right of property and the requirements of general interest",[37] i.e. "there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized".[38] Precisely due to the lack of prescribing and official disclosure of the public interest, it is impossible to conduct a proportionality test in each individual case, which is why the Law on Freedom of Religion is in conflict with the right to peaceful enjoyment of property.

3. Compensation for Deprivation of Property Rights

Art. 58 Para. 2 of the Constitution of Montenegro stipulates that no one may be deprived of property rights except when the public interest so requires, with fair compensation. In that sense, the Constitution of Montenegro formally provides a higher level of protection of property rights than Art. 1 of Protocol 1 to the ECHR. Although the ECHR does not explicitly prescribe that compensation for deprivation of property rights is necessary, case-law has crystallized the view that confiscation of property without payment of an amount that is appropriately proportionate to the value of con-

35 Opinion No. 953/2019, Fn. 17, mn. 55.

36 Draft Law on Freedom of Religion or Beliefs and Legal Status of religious Communities with explanations (Predlog Zakona o slobodi vjeroispovjesti ili uvjerenja i rpavnom položaju *vjerskih zajednica)*, http://zakoni.skupstina.me/zakoni/ web/dokumenta/zakoni-i-drugi-akti/884/2178-12812-23-3-19-7.pdf, 14.6.2020.

37 ECtHR, *Hentrich v France*, 22 September 1994, App No. 13616/88, para. 49.

38 ECtHR, *James and Others v United Kingdom*, Fn. 33, para. 46.

fiscated property is generally disproportionate, severe and violates property rights,[39] and that the obligation to pay the fee arises from the entirety of Art. 1 of Protocol 1 to the ECHR.[40] However, the ECtHR considered in *Jahn v Germany*[41] that, due to extraordinary circumstances, the peaceful enjoyment of property was not violated if the deprivation of the right to property followed without payment of compensation. In this case, the agrarian reform in the German Democratic Republic after World War II gave farmers land that could only be inherited if the heirs continued to cultivate the allocated land. A 1990 law (Modrow Law) abolished the restriction of the German Democratic Republic, allowing the land to be inherited regardless of whether the heirs continue to engage in agriculture. After unification of Germany, amendments to the said law were passed, which abolished the right to unconditional inheritance, which was the subject of consideration by the ECtHR. This case is not comparable to the circumstances in Montenegro and the Law on Freedom of Religion, so the support of church property without payment of compensation is contrary to the ECHR.

The Law on Freedom of Religion does not prescribe any compensation for confiscated church land and buildings. In that sense it is at least contrary to the Constitution of Montenegro, but also to the ECHR, since such deprivation of property rights is disproportionate. Even if compensation was prescribed, the expropriation of shrines and other church buildings would be much more complex than the expropriation of other property, since there are no tangible measures to calculate the market value of a 13th century shrine, which includes, for example, a repository with valuable historical documents and cultural treasures, as well as the value of the graves on the church property, and the iconostasis and frescoes from the Middle Ages.

4. The Process of Conversion of Church into State Property

> **Article 63**
> 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.
> The public administration authority responsible for cadaster affairs shall register the rights referred to in Paragraph 1 of this Article within 15 days from the date of submission of the request, of which, without delay, it shall inform the religious community using the buildings and land referred to in Paragraph 1 of this Article.

The procedure of conversion of church into state property is also prescribed in an unusual way in the transitional and final provisions of this Law (Art. 63 Para. 1) and

39 ECtHR, *Holy Monasteries v Greece,* 9 December 1994, App No. 13092/87; 13984/88,71.

40 ECtHR, *Lithgow and Others v United Kingdom*, 8 July 1986, App No. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, para. 109; *D. König*, Der Schutz des Eigentums im europäischen Recht, Bitburger Gespräche: Jahrbuch 2004/I, pp. 131–132.

41 ECtHR, *Jahn and Others v Germany*, 30 June 2005, App. No. 46720/99, 72203/01, 72552/01; *B.I. Fischborn*, Enteignung ohne Entschädigung nach der EMRK? Zur Vereinbarkeit des entschädigungslosen Entzugs von Eigentum mit Artikel 1 des Zusatzsprotokolls zur EMRK, Tübingen 2010, pp. 194–196.

implies two procedures. The first procedure refers to establishing the facts crucial for the conversion, i.e. whether the church property was owned by the state before 1918, whether the church was built with public funding or joint citizen investment and whether the church has proof of ownership (Art. 62). The second procedure is the procedure of registration of state property in the real estate cadastre.

The ancient Romans first said *Ubi iudicat, qui accusat, vis, non lex valet – When the one who accuses is also the one who judges, force, not law, is the winner.* The fact that the procedure for establishing facts relevant to the conversion of church into state property is conducted by a body which is part of the executive branch is a serious objection to respecting the guarantee of a fair trial under Art. 6 ECHR. The procedure of establishing the facts crucial for the conversion is entrusted to the administrative body (Art. 63 Para. 1), with the fact that the law neither regulates the procedure of determination nor refers to the appropriate application of the rules of administrative procedure, i.e. no clearly determined procedure prior to registering the state as the owner of a particular property. What follows from the law itself is that the religious community, whose property is converted into state property, does not participate in the process of establishing the facts crucial for the conversion. The religious community is therefore unable to know which property is in dispute, to declare itself in that issue and to submit relevant evidence on the existence of property rights. Religious communities are also prevented from appealing against the decision of the administrative body in said undefined administrative procedure. Furthermore, Art. 62 Para. 3 stipulates that with regard to the existence of evidence of facts, the means of proof and rules of evidence are applied in accordance with the Law on Administrative Procedure and, in terms of subsidiarity, the Law on Civil Procedure. However, this provision concerns the means of evidence, and not the evidential procedure in which the affected religious community would be given the opportunity to make a statement. A special aspect of the problem of furnishing proof is the fact that many church buildings of great cultural significance were built before the creation of the state of Montenegro and before the adoption of modern laws governing the acquisition of property rights and real estate records; some even during the Serbian medieval Nemanjić dynasty,[42] and some during the Ottoman Empire.[43] For now, it is unclear what the administrative body will treat as proof of the existence of property rights for such church buildings. The Montenegrin legislator did not accept the recommendations of the Venice Commission in this part either, for additional protection, according to which the relevant provisions of the administrative and legal proceedings should be clearly denoted, and not merely naming laws, as well as to clarify whether the multi-annual *bona fide* use is to be con-

42 We will give only a few examples of the age of individual monasteries and shrines in Montenegro: Đurđevi Stupovi Monastery near Berane was built in 1213 by Prvoslav Nemanjić; Morača Monastery was built by Stefan Vukanov Nemanjić in 1252, the Church of St. Peter and Paul in Bijelo Polje was built in 1190, Uroševica Monastery in the 13th century by Uroš I Nemanjić, Čelija Piperska Monastery was built in the 12th century by Stefan Nemanja – the ancestor of the Nemanjić dynasty.

43 Ostrog Monastery was built in the 17th century by the Metropolitan of the Serbian Orthodox Church Vasilije Jovanović, Cetinje Monastery was built in 1484 by Ivan Crnojević, Piva Monastery was built in 1573 by the Patriarch of the Serbian Orthodox Church Makarije Sokolović,.

sidered as proof of the right of ownership and whether the registered ownership is treated as initial evidence, which the law also avoids to state.[44]

The registration procedure is defined in Art. 63 Para. 2 and implies that the administrative body responsible for cadastral affairs shall make a registration within 15 days from the day of submitting the request, of which, without delay, it shall inform the religious community that uses the buildings and land. The aforementioned provision is in direct contradiction with the opinion of the Venice Commission, according to which the change of the title holder should be made only after a final court decision.[45] It follows from the above provision that the real estate cadastre, without the possibility of reviewing the decision by the administrative body on which property meets the conditions to be converted, will register the state as the owner of church property or church building. The religious community (i.e. the right owner) will be notified only after the registration; a right to present their arguments and evidence probably only exercisable in the appellate procedure, which is an extremely short deadline for the preparation of evidence. While the Property Administration, as an administrative body, has a year to investigate and gather evidence in its favor, the religious community will only have the opportunity to prepare for its claims within the appeal period. Even if the religious community collects evidence in that extremely short period for the appeal, and having in mind that the real estate cadastre does not decide on the right itself and legal basis, but on whether the documents are suitable for the registration of property rights, the possibility to appeal the procedure by challenging the facts preceding the registration procedure are theoretically very small, practically non-existent.[46] Therefore, the appeal of the religious community against the decision on the registration of state property rights cannot be an effective legal remedy. First of all, the procedure before the real estate cadastre is not adequate for establishing disputable facts: Real rights are registered in the cadastre on the basis of an undisputed legal basis. In a case where the legal basis is disputable, the civil procedure is far more adequate for this type of dispute, which is prescribed in regular circumstances as a possibility in the Law on State Surveying and Cadastre of Montenegro.[47] In addition, a religious community registered as the owner of a property, which is later deleted at the request of the administrative body, is forced to prove its ownership, even though it is registered in the real estate cadastre as the owner. The religious community, as the registered owner, bears the burden of proving that it is the owner of the real estate, even though the state has already recognized that ownership for decades. Moreover, even if a religious community is not registered as the owner of property in the real estate cadastre, its use over a long period of time, according to the ECtHR, must be viewed as a property right.[48]

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44 Opinion No. 953/2019, Fn. 17, mn. 68, 78.

45 Opinion No. 953/2019, Fn. 17, mn. 69.

46 It should be said that the only situation when the real estate cadastre evaluates the legal basis is the situation when forming the real estate cadastre, i.e. when transferring data rights to real estate arising from land registers and deeds in the real estate cadastre. However, this situation cannot refer to this case because the conversion of property rights of religious communities registered during the formation of the cadastre or after the formation is performed here.

47 Art. 124 a Law on State Surveying and Cadastre of Immovable Property, Fn. 31.

48 ECtHR, *Holy Monasteries v Greece,* Fn. 39, para. 60.

Bearing in mind the characteristics of such a procedure of conversion of property from church to state, it can be concluded that the right of the religious community to a fair trial under Art. 6 ECHR has been infringed: The religious community is not participating in the procedure in which the facts relevant to the conversion are established; the procedure is conducted by the administrative body as part of the executive and not by the court as an independent branch of government; the effectiveness of the legal remedy against the decision for erasing the religious community as the owner is more than questionable; and, in addition, the religious community bears the burden of proving that it is the owner, regardless of the fact that it is registered as the owner of the property in the real estate cadastre or that it has been using the property for decades. The religious community is thus placed in an unequal procedural-legal status in relation to the state. Moreover, we may wonder whether the affected religious community has any guarantee of fair treatment. Similar situations have already been considered by the ECtHR: "each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent",[49] as well as that the legal provision that transfers the burden of proving the right of ownership from the state to the monastery in possession of the real estate is an interference with the right to property.[50] Thus, the opposition of the Law on Freedom of Religion to human rights standards is more than obvious. It is not surprising that the Venice Commission recommended that the provisions of Art. 62 and 63 of the Draft Law should provide protection that meets the standards of Art. 6 ECHR and Art. 1 of Protocol 1 to the ECHR, which was also not accepted by the Montenegrin legislator, as the said procedure was not elaborated in detail.[51]

Although the procedure of conversion from church to state ownership refers only to church property created before 1918, the consequences of the provisions on the registration of religious communities, as stated earlier in this paper, present a challenge to the legal personality and continuity of religious communities with religious centers abroad, as well as forcing registration anew, save for those which Montenegro has signed an agreement with. As a result, the legal fate of property acquired after 1918 is also disputable. In the event that a religious community with a religious center abroad (for example, the SOC) is registered / entered into the Inventory and thus accepts a new legal personality, the property acquired up to that moment will practically become a *res nullus*, a thing that belongs to a non-existent legal entity. As real estate cannot be without an owner, in the case of renunciation of property rights on real estate, they become state property.[52] In addition, in acquiring a new legal personality, the religious community would also lose its *locus standi* to emphasize and prove its ownership of church buildings built before 1918, because it would not have continuity with the previous religious community.

49 ECtHR, *Dombo Beheer BV v The Netherlands,* 27 October 1993*,* App No. 14448/88, para. 33.
50 ECtHR, *Holy Monasteries v Greece,* Fn. 39, paras. 58, 64.
51 Opinion No. 953/2019, Fn. 17, mn. 78.
52 Art. 107 Law on Ownership Rights, Fn. 26.

V. Application of Modern Legal Institutes of Substantive and Procedural Law

The Law on Freedom of Religion is in many ways a *lex specialis* in relation to the already existing procedural and substantive provisions that regulate property relations in Montenegro and which are characteristic of all countries of the European-continental legal circle. The Law on Freedom of Religion has completely annulled the Real Estate Cadastre as a modern record of real estate rights for which the state is competent and which is managed by state bodies. As a consequence, in the case of religious communities, the property right registered in the Real Estate Cadastre is without significance, as religious communities need once again to prove the existence of a legal basis. In addition, the universal institute of positive prescription – the acquisition of property rights on the basis of several years of conscientious use –[53] in the case of religious communities, also is without significance, because the moment of assessing the existence of property rights has been moved back more than a hundred years. The Law on Freedom of Religion abolishes the gift agreement through the syntagm "*joint citizen investment*", because it treats citizens' donations to the religious community from hundreds of years ago as joint investments, nullifying the autonomy of the will of the contracting parties (the faithful and the church), and worse of all awarding a third party (the state) property which came about from the legal affairs between the church and the faithful. The Law on Freedom of Religion, which uses the provisions on nationalization to convert donations from public funds from over 100 years ago into the right of state ownership, contradicts the meaning and purpose of the declared financial support of the state, which certainly did not aim to acquire ownership rights over a church, which seems to be the case with this Law, even if the state only partially financed the construction of a church building.

The Law on Freedom of Religion bypasses the existing Law on Expropriation of Montenegro[54] according to which real estate can be expropriated when required by the public interest with fair compensation, and the public interest in the expropriation of real estate is determined by law or on the basis of law (Art. 1). The Law on Expropriation defines the purposes for which expropriation may be carried out, thus in Art. 4 a prescribing that real estate may be expropriated for the purpose of constructing facilities or carrying out works of public interest, facilities of communal infrastructure, facilities for state bodies, capital city administrative bodies, the old royal capital and municipality (hereinafter: municipalities), health, educational, cultural and sports facilities, industrial, energy, water management facilities, traffic facilities with associated infrastructure, electronic communication infrastructure network facilities, as well as research and exploitation of mineral and other natural resources. According

53 *D. Krimphove*, Das europäische Sachenrecht. Eine rechtsvergleichende Analyse nach der Komparativen Institutionenökonomik, Siegburg 2006; *P. Malaurie/L. Aynes*, Les biens, 4th edn, Paris 2010, p. 165; *A. Piekenbrock*, Befristung, Verjährung, Verschweigung und Verwirkung, Tübingen 2006; *F. Baur*, Lehrbuch des Sachenrechts, 14th edn, Munich 1987, pp. 529–531. *V. Vodinelić*, Održaj – uporedno pravno [Positive Prescription – Comparative Law], Master's thesis, 1981.

54 Law on Expropriation *(Zakon o eksproprijaciji)* (Official Gazette of the Republic of Montenegro, No. 55/00, 12/02, 28/06, 021/08, 030/17).

to Art. 14 of the Law on Expropriation, if the public interest in the expropriation of real estate is not established by a special law, it may be established by the Government of Montenegro (hereinafter: Government), on the basis of a special study, in accordance with the law. The proposal for determining the existence of a public interest in an expropriation shall be submitted by a person who, according to the provisions of this Law, may be a beneficiary of expropriation. The proposal for establishing the public interest is submitted to the Government through the competent administrative body, and contains data on real estate for which the establishment of public interest is proposed, the purpose of expropriation and other data of importance for establishing the public interest. The government is obliged to decide on the proposal for determining the public interest within 60 days. The Government shall also establish the beneficiary of expropriation by an Act for establishing the public interest, in accordance with the provisions of this provision. An administrative dispute may be initiated against the Act of the Government for establishing the public interest.

There are two theses that were put forward by the representatives of the Montenegrin authorities as the reason for passing this law, although they were not mentioned in the justification of their proposal. One thesis is that the church seized something from the state, that now needs to be returned,[55] and the second is that it corrects illegal registration of property rights was made in favor of the church during the 1990 s.[56] On the other hand, there was no explanation as to why something that the citizens built before 1918, or that was financed by the state, should be state property. These theses are primarily inaccurate, but also illogical, because it would mean that the church had such power to take something from the state, as well as that the state bodies with the authority to manage the real estate cadastre and act according to the law did not do so, but for some reason, instead illegally registered the church in the real estate cadastre as an owner. During Montenegro's history, it was actually the other way around, because the communist authorities nationalized church land after the Second World War, which has yet to be returned to the churches. Regardless of the fact that these two theses are completely inaccurate and illogical, it is necessary to point out certain facts that show that, even if true, Montenegrin legislation has mechanisms by which these alleged illegalities can be corrected.

In regular circumstances, if it considers that something was seized from it, the state has the possibility to seek its return through an ownership suit *(actio rei vindicatio)*.[57] In addition, if the state considers that its administrative body has violated the rules of procedure and thus illegally registered the church or anyone else as an owner, it has the right to file a suit to delete the registration within three years.[58] The precondition for using these procedural possibilities is for the state to prove its legal interest, i.e. to prove that it was the previous owner of a real estate. Therefore, the burden of proof of ownership of the real estate in question would be on the state before the regular court. This is not the case according to the Law on Freedom of Religion, because

55 "We will return what was taken no matter how much someone objected", *Radio and Television of Montenegro*, http://www.rtcg.me/english/montenegro/279603/we-will-return-what-was-taken-no-matter-how-much-someone-bjected.html, 14.6.2020.

56 Opinion No. 953/2019, Fn. 17, mn. 58, 63.

57 Art. 112 Law on Ownership Rights, Fn. 26.

58 Art. 124 a Law on State Surveying and Cadastre of Immovable Property, Fn. 31.

the burden of proof of ownership lies with the owner – the religious community. In addition, following the expiration of three years from the registration in the real estate cadastre, in the event that a person believing their right has been violated does not file a suit to delete the entry, a type of positive prescription under the land registry ensues, i.e. the person registered in the cadastre is considered the owner, even if it did not have a valid legal basis for registration. The absurdity of the thesis about illegal entries of the religious community in the real estate cadastre is also demonstrated by the fact that during the formation of the real estate cadastre, both administrative bodies that form the cadastre and the public attorney's office dealing with the protection of state property interests, already checked the evidence of property rights. Moreover, in 1987, the State Administration for Geodetic and Property-Legal Affairs of Montenegro instructed the state bodies that formed the cadastre that the Metropolitanate of Montenegro and the Littoral, i.e. the Metropolitanate of the Serbian Orthodox Church, should be registered as the owner of the property of the Orthodox Church.[59]

The Law on Freedom of Religion bypasses all these legal institutes in order to introduce a completely new legal basis for the acquisition of state property rights, to the detriment of the property rights of religious communities. This seems most likely because the state is aware that, under regular circumstances, it could never prove that the church seized something from it or that the church was illegally registered as the owner of the real estate. Furthermore, the state cannot prove that prior to registration of the religious community as the owner, the state was the registered owner of the real estate.

The neglect of the existing legal substantive and procedural institutes certainly calls into question the constitutionality of the Law on Freedom of Religion, i.e. compliance with the principle of unity of the legal order, which implies that a legal system is seen as a unity of norms without contradictions.[60] Accordingly, the basic legal institutes of systemic laws must be applied in special laws, which is also highlighted in several decisions in the case-law of the Constitutional Court of Montenegro.[61] The Law on Freedom of Religion also violates the principle of legal certainty, because this Law determines that, even when the state guarantees the correctness of registration in the real estate cadastre, the state may assess that in certain cases this guarantee ceases to be valid and that owners are obliged to prove their property rights again.

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59 Information for solving problems related to the preparation of catalogue lists for the preparation of the 'cadastral opera' of 20 October 1987, https://mitropolija.com/2020/03/11/dokument-iz-1987-kojiji-potvrdjuje-da-je-drzava-smatrala-crkvu-vlasnikom-imovine/, 19.6.2020. To avoid misunderstandings, the Diocese of Budimlje and Niksic was reestablished in 2001.

60 *A. Hanebeck*, Die Einheit der Rechtsordnung als Anforderung an den Gesetzgeber? Zu verfassungsrechtlichen Anforderungen wie "Systemgerechtigkeit" und "Widerspruchsfreiheit" der Rechtsetzung als Maßstab verfassungsrechtlicher Kontrolle, Der Staat 41|2002, pp. 429–451. *F. Ossebühl*, Gesetz und Recht – Die Rechtsquellen im demokratischen Rechtsstaat, in: J. Isensee/P. Kirchhof (eds), Handbuch des Staatsrecht, Vol. V, 3rd edn, Heidelberg 2007, mn. 85–93,.

61 Decision UI 22/15 of 29 September 2017, Decision UI 15/15 of 14 October 2015, all available in the online database of Constitutional Court of Montenegro case-law, http://www.ustavnisud.me/ustavnisud/arhiva.php, 23.6.2020.

VI. Discrimination of the Serbian Orthodox Church in Relation to Other Religious Communities

Art. 14 of the Constitution of Montenegro, prescribes that all religious communities are equal, and Art. 8 prohibits any direct or indirect discrimination. In connection with the Law on Freedom of Religion, the question is often asked whether the Law is discriminatory and, if so, towards whom and why. The fact that Montenegro has concluded agreements with the Roman Catholic Church, the Islamic Community and the Jewish Community raises doubts and provokes the question why such an agreement was not concluded with the Serbian Orthodox Church, which had proposed, prior to the adoption of the Law on Religious Freedom, that Montenegro and the Serbian Orthodox Church in Montenegro, conclude an agreement based on the Basic Agreement concluded between the Roman Catholic Church and Montenegro.

The first topic that seems controversial is the issue of acquiring the legal personality of the religious community, and thus the recognition of legal continuity. As already mentioned, the Roman Catholic Church has concluded a Basic Agreement with Montenegro, according to which the state of Montenegro recognizes the legal personality of the Roman Catholic Church (Art. 2). Also, Art. 3, of the Agreement on the Regulation of Relations of Common Interest Between the Government of Montenegro and the Islamic Community in Montenegro, recognizes the legal personality that the Islamic Community in Montenegro had before the entry into force of this agreement, while the same is prescribed by Art. 2 Para. 1 of the Agreement on the Regulation of Relations of Common Interest between the Government of Montenegro and the Jewish Community. On the other hand, the Law on Freedom of Religion does not recognize the continuity of the dioceses of the Serbian Orthodox Church in Montenegro, it is in fact disputed and denied by Art. 25 Para. 3 of the Law on Freedom of Religion which prescribes that a religious community that is an organizational part of a religious community based abroad acquires legal personality only by entry in the Register, if it has not been previously registered, or inventoried, if it has been reported under the 1977 Law. Therefore, the dioceses of the SOC lose their existing continuity, regardless of the fact that the state of Montenegro, even before the Law of 1977, recognized them as legal entities and recognized their legal personality in court and administrative proceedings. The Metropolitanate of Montenegro and the Littoral and the Diocese of Budimlje and Nikšić of the Serbian Orthodox Church in Montenegro have their own tax identification number, are registered as real estate proprietors in the cadastre of real estate, conclude contracts and are participants in legal transactions. The Serbian Orthodox Church in Montenegro was recognized as a legal entity in 1929 by the Law on the Serbian Orthodox Church of the Kingdom of Yugoslavia.[62]

62 The Kingdom of Yugoslavia did not solely regulate the status of the Serbian Orthodox Church by law, this was the case for several other religious communities, thus the Law on the Evangelical Christian Churches and the Reformed Christian Church of the Kingdom of Yugoslavia (Official Gazette of the Kingdom of Yugoslavia, No. 95/1930), the Jewish Religious Community in the Kingdom of Yugoslavia (Official Gazette of the Kingdom of Yugoslavia, No. 301/1929), the Law on the Islamic Religious Community of the Kingdom of Yugoslavia (Official Gazette of the Kingdom of Yugoslavia, No. 29/1930), whereas the Roman Catholic Church signed a Concordat with the Kingdom of Serbia, confirmed by the

Unlike the President and Prime Minister of Montenegro, who deny that the Serbian Orthodox Church is a legal entity in Montenegro,[63] the Ministry of Internal Affairs of Montenegro deemed in 2016 that the Metropolitanate of Montenegro and the Littoral and the other dioceses of the SOC in Montenegro were not obliged to register and report under the Law on the Legal Status of Religious Communities of 1977, because they already existed at the time the law came into force, possessing legal personality at the time.[64] The Ministry is completely right here, because Art. 2 of the Law on the Legal Status of Religious Communities from 1977 prescribes registration (reporting) only for newly established religious communities, and not for those that already exist.[65] The previous Law on the Legal Status of Religious Communities from 1953 is in Art. 8 recognized the status of a legal entity to religious communities and their bodies, and as it did not prescribe new registration for existing religious communities; the Law of 1953 recognized the legal personality of the Serbian Orthodox Church, its dioceses and metropolitanates throughout Yugoslavia, as well of all other existing religious communities.[66] The Law on the Voiding of Legal Regulation passed before 6 April 1941 and During the Enemy Occupation stipulates that the regulations in force on 6 April 1941 have no legal force (Art. 2), but that the legal rules from those regulations apply, until new ones are adopted, provided that they do not conflict with the applicable regulations and with the principles of the constitutional order of the Federal People's Republic of Yugoslavia (Art. 4).[67] Since the existence of religious communities and their legal personality was not in conflict with the applicable regulations of the Federal People's Republic of Yugoslavia, it can be considered that the provisions of the Law on the SOC of 1929 that recognized the legal personality of the SOC were in force, i.e. that the Law on Voiding of Legal Regulation from 1946 did not abolish the legal personality of the SOC or other religious communities. Therefore, in our opinion, the claim that the Serbian Orthodox Church in Montenegro does not have a formal legal personality, as pointed out in the opinion of the Venice Commission, is incorrect.[68] On the contrary, it exists and there was no obligation to register (report) under the 1977 Law, as correctly stated in the Opinion of the Ministry of Internal Affairs of Montenegro. Art. 5 of the Serbian Orthodox Church Constitution of

Law on the Concordat between the Kingdom of Serbia and the Holy See (Decision of the National Assembly of the Kingdom of Serbia of 26 July 1914; Serbian Gazette, No. 199/1914), while another Concordat was signed with Montenegro in 1886.

63 *Vijesti*, Đukanović: SPC nikada nije imala status pravnog lica u CG, https://www.vijesti.me/vijesti/politika/423632/ dukanovic-spc-nikada-nije-imala-status-pravnog-lica-u-cg-litije-koristi-za-politizaciju, 27.6.2020., *Radio Free Europe*, Bez registracije, SPC u Crnoj Gori pravno ne postoji?, https://www.slobodnaevropa.org/a/registracija-spc-crna-gora-pravni-status/30392895.html, 27.6.2020.

64 Opinion No. 953/2019, Fn. 17, mn. 17.

65 Art. 2 of the Law on Legal Status of Religious Communities, Fn. 18.

66 Law on Legal Status of Religious Communities (Official Gazette of the SFRY, No. 22/53).

67 Law on the Voiding of Legal Regulation passed before 6 April 1941 and during the Enemy Occupation (Zakon o nevažnosti *pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije*) (Official Gazette of the FPRY, No. 86 from 25 October 1946, No. 105 from 27 December 1946, No. 96 from 12 November 1947 – official interpretation).

68 Opinion No. 953/2019, Fn. 17, mn. 17.

1931 prescribes that the SOC, dioceses, church communities, monasteries, endowments, independent institutions or similar funds and individual shrines have the status of legal entities. It follows from the above provisions that the recognition of the SOC and its integral parts, in accordance with its internal organization from the Kingdom of Serbs, Croats and Slovenes (later Kingdom of Yugoslavia), was maintained in Communist Yugoslavia. As such, the Law on the Legal Status of Religious Communities from 1953 recognized the status of a legal entity to religious communities and its integral parts, something that was not modified by the Law on the Legal Status of Religious Communities from 1977. It follows that the Serbian Orthodox Church has the status of a legal entity in Montenegro, as well as all of its dioceses, monasteries and church communities, that the Metropolitanate of Montenegro and the Littoral, the Diocese of Budimlje and Nikšić and other dioceses of the Serbian Orthodox Church in Montenegro derive their legal personality from the legal personality of the SOC itself, as well as that their legal personality depends on the internal regulations or canon law of the SOC. This is not strange because the situation is the same with the Roman Catholic Church whose organizational parts (dioceses, archdioceses etc.) in Montenegro even possess the status of a public entity in accordance with the canon law of the Roman Catholic Church, and the competent church authority has the right to establish, change, abolish or recognize ecclesiastical legal entities according to the provisions of canon law, as provided in Art. 2 Para. 2 of the Basic Agreement, from which it follows that the state of Montenegro can only recognize that and not dispute it in any way.

The ECtHR case-law also indicates that the Law on Freedom of Religion is discriminatory in this part. The ECtHR considers that one religious community must be given personality according to rules that are fair and similar to those applicable to other religious communities, and that it was discriminatory when the Orthodox Church and the Jewish Community in Greece had legal personality, while it was disputed with regard to the Roman Catholic Church.[69] Transferred to Montenegrin circumstances, this would mean that the state of Montenegro must recognize the legal personality and continuity of the SOC. The issue of legal continuity is not insignificant, because in addition to denying legal continuity and denying the property and cultural heritage acquired so far (not just prior to 1918) it prevents the Metropolitanate of Montenegro and the Littoral and other SOC dioceses in Montenegro from keeping the right to restitution of property confiscated by the communist authorities after 1945. Therefore, the Law on Freedom of Religion is discriminatory in relation to the Serbian Orthodox Church in the part related to the acquisition of legal personality and recognition of legal continuity.

The issue of the internal organization of the church and the right of the church to self-determination is also important for evaluating discrimination. The autonomy of churches is violated primarily by the fact that the Law on Freedom of Religion distinguishes between domestic and foreign religious communities, depending on the organizational and canonical connection the religious community has with religious communities outside Montenegro. Art. 25 Para. 1 of the Law on Freedom of Religion stipulates that a religious community based in Montenegro may have its jurisdiction on-

69 *Scharffs*, Fn. 1.

ly within the borders of Montenegro. Aside from the fact that such a provision is inapplicable because Montenegro certainly does not have the authority to prevent a religious community based in Montenegro from having canonical jurisdiction in other states, this provision also threatens the right of the church to self-determination, i.e. the right to organize one's organization according to one's own internal rules. On the other hand, the Basic Agreement does not deny or in any way encroach on the Roman Catholic Church's right to self-determination nor to force the Roman Catholic Church to change its internal structure and form a Montenegrin Archdiocese instead of the Bar Archdiocese and the Kotor Diocese, which is an organizational part of the Split Archdiocese, based in Croatia.

On the third issue, that of the nationalization of church property, at first glance it can be said that there is no discrimination. Montenegro has concluded agreements with the Roman Catholic Church, the Islamic Community and the Jewish Community in which the peaceful enjoyment of property is not explicitly guaranteed, which is why the agreements in this part are not a barrier to nationalization. However, the Law on Freedom of Religion places the nationalization of property in a historical, not a contemporary context, and takes as a measure the question of what was state property before 1918. Having in mind the specific relationship between the church and the state in Montenegro until 1918, where the Orthodox faith was the state religion,[70] and especially keeping in mind the statements of the President and Prime Minister of Montenegro that Ostrog Orthodox monastery "must be state-owned" even though the procedure has not even started, as well as the program of the ruling party of the Democratic Party of Socialists according to which Montenegro will strive to create a Montenegrin autocephalous Orthodox Church, we can conclude that the provisions on nationalization are aimed primarily at the buildings and land of the Orthodox Church, i.e. the Serbian Orthodox Church. In support of that conclusion, we can cite the reasons for the provisions on nationalization that the representatives of the Government of Montenegro pointed out to the Venice Commission, which concerned the allegedly illegal registration of buildings by the Serbian Orthodox Church, and no other religious communities.[71] Therefore, one can speak of indirect discrimination, since, at first sight, a neutral provision produces factual discrimination. In addition, with the already mentioned challenge to the legal continuity of the SOC, all of its property has become disputable, and not just the one acquired up to 1918: In case of registration / entry into the Inventory and the attaining of a new legal personality, the owner of all of the entire property will cease to exist. As a result, the SOC will lose its *locus standi* to prove that it has a legal basis for acquiring property (and not only for buildings built before 1918) in administrative and judicial proceedings.

70 According to Art. 40 of the Constitution of Montenegro from 1905, the state religion is Eastern Orthodox.

71 Opinion No. 953/2019, Fn. 17, mn. 58,.

VII. Ideological Background and Purpose of the Law

The reasons for the adoption of the Law on Freedom of Religion are explained in a completely blanket and concise manner. The draft law with justification states the need for harmonization with international standards and the *acquis communautaire* as the reason for passing the law.[72] There is not a single word about the reasons for the nationalization of church property and buildings and the distinction between domestic and foreign religious communities. A law that leads to a tectonic disturbance in the relations between the church and the state, and on the basis of which church property and shrines are to become state property, certainly deserves a more detailed justification and explanation than a platitude about an alleged harmonization with the *acquis communautaire*. Therefore, the real motive and aim of this law must be investigated from other documents or statements of ruling party politicians. In communication with the representatives of the Venice Commission, the representatives of the Government of Montenegro gave confusing and unclear answers to questions about the reasons for its adoption, as well as the historical and factual background of the provisions on nationalization.[73] While the Montenegrin government officials claimed before the Venice Commission that the SOC was illegally registered as an owner during the 1990 s, government officials have repeatedly stated that monasteries and churches must be state property, sometimes even mentioning a specific monastery,[74] although no proceedings have even commenced. They also pointed out that it is necessary to form an autocephalous Montenegrin Orthodox Church as the sole Orthodox Church in Montenegro. The President of Montenegro emphasized that, if the Serbian Orthodox Church does not accept the agreement, he will form the Montenegrin Orthodox Church; human rights are not imperative norms which limit a government, at least among Council of Europe members, and basic human rights depend on political will.[75] Moreover, the establishment of the Montenegrin Orthodox Church as an independent church organization has been declared, first in 2015 and again in 2019, as one of the program goals of the Democratic Party of Socialists.[76] That such a plan and program is directed against the existing church structure of the Serbian Orthodox Church is also shown by the fact that the Montenegrin Orthodox Church as NGO already exists, and there are no legal obstacles for it to perform religious services in its facilities. However, due to the impossibility for the Montenegrin Orthodox Church to gain wider legitimacy, the Government has now tried to enable the creation of a new

72 Draft Law on Freedom of Religion or Beliefs and Legal Status of religious Communities with explanations, Fn. 36.

73 Opinion No. 953/2019, Fn. 17, mn. 55.

74 *Vijesti, Marković*: Zašto bi Ostrog bio vlasništvo SPC a crkva u Beogradu države Srbije [Why Should Ostrog be the Property of the Serbian Orthodox Church, and a Church in Belgrade the State of Serbia], www.vijesti.me/vijesti/politika/ 414392/markovic-zasto-bi-ostrog-bio-vlasnistvo-spc-a-crkva-u-beogradu-drzave-srbije, 14.6.2020.

75 *Radio Free Europe*, Ako SPC odbije dogovor, formiraćemo pravoslavnu crkvu u Crnoj Gori [If the SOC rejects the agreement, we will form an Orthodox Church in Montenegro], www.slobodnaevropa.org/a/djukanovic-crna-gora-spc-pravoslavna-crkva-kriza/ 30619177.html, 14.6.2020.

76 Political Program of the Democratic Party of Socialists, Fn. 3, p. 18; Program of Priorities of the Democratic Party of Socialists of Montenegro, Fn. 3, p. 13.

church by legal means, in fact by legal violence. The motives can be deduced from earlier versions of the draft law, according to which, for example, the name of a religious community must not contain the name of other countries nor their attributes, which clearly shows the intention of the Government of Montenegro to implement a " Montenegrinization" of the religious communities in Montenegro.[77]

It is clear that the political establishment in Montenegro wants to create a new church without any connection to the SOC, preferably with property that now belongs to the SOC, from which it logically follows that the Law on Freedom of Religion should serve as an auxiliary mechanism to accomplish this goal. It does so by denying the legal continuity of the SOC dioceses in Montenegro, intervening in the right to self-determination of a religious community, discriminating against a religious community because it has a religious center abroad and by nationalizing its property without it having the possibility of effectively participating in that procedure. In addition, the provision of Art. 64 of the Law on Freedom of Religion guarantees the right of a religious community whose property is confiscated to use a confiscated building only until the decision on nationalization becomes final, and no further. This is again contrary to the recommendations of the Venice Commission which emphasized that nationalization must not interfere with the right to use property, although the conditions of use may be imposed to preserve the cultural heritage.[78] The culmination of the possibility of abuse in the application of the Law on Freedom of Religion is the fact that the law itself is in some parts unclear and unpredictable, which was not corrected by the remarks and recommendations of the Venice Commission,[79] and which, in conjunction with the ruling party's political agenda, can only represent pressure to separate the clergy and monkhood of the Serbian Orthodox Church in Montenegro from the rest of the Serbian Orthodox Church, i.e. to declare autocephaly, regardless of the fact that such a procedure has no canonical basis. On the other hand, there is no indication that the Montenegrin Government wants to do that with other religious communities whose religious center is abroad, i.e. to create, for example, a Montenegrin Catholic Church from the existing Roman Catholic Church.

In comparative law, one can find examples of certain dominant religious communities having a more privileged status in a state due to historical and traditional reasons, such as in Greece or England, which have an established church. However, it is difficult to find an example in modern Europe where the dominant religious community, present in a state for centuries, is discriminated against in this way and becomes the target of political ideologues who threaten its existence. It is not without significance to mention that the clergy and monkhood of the Serbian Orthodox Church in Montenegro were exposed to both verbal and physical attacks by members of the so-called "Montenegrin Orthodox Church", which is tolerated by the Montenegrin autho-

77 Draft Law on Freedom of Religion (*Nacrt Zakona o slobodi vjeroispovjesti*), Ministarstvo za ljudska i manjinska prava Crne Gore, http://www.mmp.gov.me/ResourceManager/FileDownload.aspx?rid=267618&rType=2&file=Nacrt%20zakona %20o%20slobodi%20vjeroispovjesti.pdf, 22.6.2020.

78 Opinion No. 953/2019, Fn. 17, mn. 78.

79 Opinion No. 953/2019, Fn. 17, mn. 78.

rities.[80] The tendentious refusal of the Montenegrin authorities to issue residency permits to the clergy of the Serbian Orthodox Church in Montenegro and their expulsion from Montenegro should be added.[81] The fact that the government in Montenegro wants an Orthodox church according to its own standards is indirectly stated in Art. 35 Para. 3 of the Law on Freedom of Religion, according to which funds from the state or local self-government budget can be allocated to a religious community for the promotion of the spiritual, cultural and state tradition of Montenegro, which means that religious communities that follow a certain political course will be favored. In the context of the ruling party's program, this can only mean funding a religious community that will promote the independent and autocephalous Montenegrin Orthodox Church.

The creation of a new church by the authorities, and thus direct interference in and destruction of the church order within the Orthodox Church, represents one of the grossest examples of violations of the principles of separation of church and state, and of state neutrality, as indispensable principles of modern states prescribed in numerous documents in comparative law.[82] For example, the First Amendment to the US Constitution explicitly stipulates that the state cannot establish religious communities.[83] In France, the principle of neutrality of the state in relation to religion derives from Art. 2 of the Law on the Separation of Church and State of 1905 and Art. 2 of the Constitution of 1958, while in Germany, the obligation of the state to be neutral derives from the German Basic Law, which was also emphasized by the German Federal Constitutional Court.[84] The legal order of the European Union also implies religious neutrality.[85] The principle of separation of church and state is proclaimed in

80 *B. Milosavljević*, Relations Between the State and Religious Communities in the Federal Republic of Yugoslavia, BYU Law Review 2002, p. 332.

81 *Orthodox Christianity,* Montenegro expelling 50+ clerics and monastics of Serbian church as president aims for autocephaly, https://orthochristian.com/118357.html, 30.6.2020. *Vijesti*, Pljevlja: Sveštenicima SPC odbijeni zahtjevi za boravište [Priests of the SOC were denied their residency requests], https://www.vijesti.me/vijesti/drustvo/243032/pljevlja-svestenicima-spc-odbijeni-zahtjevi-za-boraviste, 1.7.2020; *Radio Free Europe,* Odbijen boravak sedmorice sveštenika SPC u Crnoj Gori [Residency requests by seven priests of the Serbian Orthodox Church in Montenegro were denied], https://www.slobodnaevropa.org/a/24422482.html, 1.7.2020.

82 *C. Starck*, Staat and Religion, JuristenZeitung 1|2000, p. 5.

83 *W. Brugger*, Grundrechte und Verfassungsgerichtsbarkeit in den Vereinigten Staaten von Amerika, Tübingen 1987, pp. 290–291. *Starck*, Fn. 82, p. 4.

84 *G. Robbers*, Religious Freedom in Germany, BYU Law Review, 2|2001, pp. 649–655; *Starck* Fn. 82, p. 3. *A. v. Campenhausen*, Staat und Kirche in Frankreich, Göttingen1962, pp. 3–7, 155–159; *V. Wick*, Die Trennung von Staat und Kirche, Jüngere Entwicklungen in Frankreich im Vergleich zum deutschen Kooperationsmodell, Tübingen 2007, pp. 11, 42–43; BVerfGE 108, 282/299 (= *Entscheidungen des Bundesverfassungsgerichts* = Decisions of the German Federal Constitutional Court; *G. Robbers*, The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany, Emory International Law Review 19|2005, pp. 841–887; *L. Bloß*, European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process, New York University School of Law 2003, pp. 21–22; *Winter*, Fn. 23, pp. 67–69.

85 *Starck*, Fn. 82, p. 5. G. Robbers, *Religious Freedom in Europe*, 7, (http://home.lu.lv/~rbalodis/Publikacijas/Citu-raksti/Religious_Freedom_GR.pdf) accessed on 30 June 2020.

Art. 14 of the Constitution of Montenegro, according to which religious communities are separated from the state, equal and free in performing religious rites and religious affairs. The ECHR does not determine a mandatory model for the relationship between state and church,[86] but freedom of religion, especially in connection with Art. 14 ECHR,[87] gives rise to the obligation of the state to be neutral, as emphasized in the case of *Hasan and Chaush v Bulgaria.*[88] In other cases in the field of freedom of religion, the ECtHR has derived the principle of state neutrality, as such it can be said that state neutrality is a common European standard, arising from the ECHR.[89] The principle of state neutrality in relation to religious beliefs is constantly evolving through the ECtHR case-law, being upgraded and expanded, but in any case this principle implies that the state must not intervene in disputes that are purely religious in nature, and that the state must be impartial and act without discrimination in determining the legal status of religious communities.[90]

It is difficult to imagine that the procedure of the state of Montenegro and the aspiration to create a new church organization can be in accordance with the principle of state neutrality. Moreover, it is the only example where the state is not neutral, but wants to create a new church organization from the existing one. What was conceived as a project in Montenegro is unthinkable in the EU Member States, although the history of Europe recognizes such negative examples. Thus, in Germany under national socialism, there was a movement of German christians with the goal of creating a single German church *(deutsche Volkskirche)* and for abolishing the provincial churches *(Landeskirche)*, contrary to the existing organization of the Protestant Church.[91] It would be unthinkable for, say, the CDU / CSU or any other political party in Germany to proclaim such a goal in its program today. The problematic nature of the Law on Freedom of Religion in Montenegro, and then the need for state neutrality, is additionally expressed when one considers the religious and national structure of Montenegro, according to which no nation has an absolute majority, while the majority of citizens declare themselves to be Serbian Orthodox.

In the history of church-state relations in Europe, the principle of ***cuius regio, eius religio*** established by the Augsburg Religious Peace of 1555, according to which the subjects must be of the same religion as the ruler himself, ruled for many years.[92]

86 *C. Evans/C.A. Thomas*, Church-State relations in the European Court of Human Rights, BYU Law Review 2006, pp. 699–725.

87 K.N. Kyriazopoulos, The "Prevailing Religion" in Greece: Its Meaning and Implications, Journal of Church and State 43|2001, pp. 511–538.

88 ECtHR, *Hasan and Chaush v Bulgaria*, 26 October 2000, App No. 30985/96.

89 ECtHR, *Metropolitan Church of Bessarabia and Others,* 13 December 2001, App No. 45701/99, paras 105 and 118; *Lautsi and Others v Italy,* 18 March 2011, App No. 30814/06; *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, 21 July 2008, App. No. 40825/98; *J. Ringelheim*, State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach, Oxford Journal of Law and Religion 2017, pp. 1–24; *Walter*, Fn. 23, pp. 891–892.

90 *Ringelheim*, Fn. 89, pp. 22–23.

91 *C. Kleine*, Religion in the Service of an Ethnic National Identity Construction: Erörtert am Beispiel der„Deutschen Christen" und des japanischen Shinto*,* Marburg Journal of Religion, 1|2002, p. 3.

92 *Winter*, Fn 23, pp. 29–31.

Seeing how the government in Montenegro has envisaged an organizationally independent Montenegrin Orthodox Church for the Orthodox population via the rearrangement of the existing Orthodox Church organization,[93] we conclude that the principle of ***cuius regio, eius religio*** in a slightly modified form is ***being revived*** in Montenegro in the 21st century, more than two hundred years since the establishment of the modern principle of state neutrality and separation of church and state in the US Constitution. It remains to be seen in which direction church-state relations will develop further, whether the Law on Freedom of Religion will be applied in this form and how, and whether the practice will answer many open questions regarding the participation of religious communities in the nationalization of land and shrines, and especially what will be accepted as proof of ownership of shrines that were built before the advent of Montenegro. In any case, the freedom of religion, as understood by Jelinnek to be the primal human right which gave birth to all of the remaining human rights[94] is having its biggest test in Montenegro, and in turn all of other human rights without which we cannot imagine a democratic society.

VIII. Conclusion

The Law on Freedom of Religion in Montenegro has made the issue of freedom of religion relevant again. It prescribes the nationalization of church land and shrines, and is an inherent challenge to the legal continuity of certain religious communities and questionable generality. The law regulates in a discriminatory manner the acquisition of the status of a legal entity by religious communities, so that those religious communities that have a religious center abroad acquire the status of a legal entity by entry in the Register (if newly established) or Inventory (if registered under the previous law of 1977), regardless of the circumstances where the state of Montenegro otherwise *de facto* recognizes them as legal entities and that they have had the status of a legal entity even before the validity of the Law from 1977. In this way, such religious communities have their legal personality erased and they are forced to acquire new ones. As a consequence, legal continuity is lost, with incalculable negative consequences for the religious community and in gross volitation of the right of the religious community to freedom of religion. Due to the coercion to acquire a new legal personality, all acquired rights would practically belong to a legal entity that no longer exists, with the consequence that the religious community that accepts the new personality loses its standing to prove its acquired rights to buildings built prior to 1918 in the procedure of conversion of church to state ownership. The law also prescribes the nationalization of church land and shrines in certain cases, without compensation, in a procedure that is not clearly defined and in which religious communities do not have procedural possibilities for adequate participation. In such a procedure, the religious community registered as the owner in the real estate cadastre also bears the burden of proving its ownership, instead of the administrative bodies disputing the ownership

93 Program of Priorities of the Democratic Party of Socialists of Montenegro, Fn. 3.

94 *G. Jellinek*, Die Erklärung der Menschen- und Bürgerrechte, Duncker & Humblot Berlin 1927 (2003 – reprint), p. 65.

bearing the burden of proof for their claim. In addition, the Law on Freedom of Religion prescribes nationalization without explaining the public interest, which makes it impossible to conduct a proportionality test in each specific case when assessing a violation of human rights. For these reasons, we believe that this law violates both the right to a fair trial and the right to property of a religious community.

This Law further circumvents the existing laws and legal institutes of Montenegrin legislation, first the Law on Expropriation, then the Law on State Surveying and Real Estate Cadastre, as well as the Law on Ownership Rights. Such a Law is a major blow to the unity of the legal order of Montenegro, a principle arising from the Constitution of Montenegro and the Constitutional Court of Montenegro case-law, which is why the Law on Freedom of Religion is to be considered unconstitutional.

In view of the existing regulations in Montenegro, we conclude that the Law on Freedom of Religion is discriminatory in relation to the Serbian Orthodox Church as the largest religious community in Montenegro. Prior to the adoption of the Law, Montenegro concluded the Basic Agreement with the Roman Catholic Church and the Agreement on the Regulation of Relations of Common Interest with the Islamic Community and the Jewish Community, which recognized the legal personality of these religious communities. Therefore, the provisions on acquiring legal personality according to which a religious community with a religious center abroad acquires legal personality by entry in the Register or Inventory, regardless of the fact that, for example, its legal personality was recognized before the 1977 Law, shall in fact apply only to the Serbian Orthodox Church, out of all the major religious communities. It thus loses its legal continuity, although it exists in the area of present-day Montenegro with an uninterrupted continuity since 1219. In this manner, church autonomy is also encroached upon, because the SOC in Montenegro is discriminated against in relation to other religious communities due to its canonical and organizational connection with the SOC based in Serbia. In addition, Art. 25 Para. 1 of the Law on Freedom of Religion in stipulates that a religious community based in Montenegro may have its jurisdiction only within the borders of Montenegro, which will apply to the SOC whose internal structure and division into dioceses and metropolitanates does not meet that legal requirement, while it will not apply to the Roman Catholic Church whose organization also does not meet the stated legal requirement, yet the Basic Agreement does not deny or in any way encroach on the right of the Roman Catholic Church to ecclesiastical autonomy, nor does it force it to change its internal structure to form a single Montenegrin archdiocese. Although formally valid for all, the intention of the legislator is to apply the provisions on the nationalization of church property primarily to the property of the Serbian Orthodox Church, which stems from the explanation of the Montenegrin government given to the Venice Commission and the statements of the highest Montenegrin authorities.

The draft law with justification states the need for harmonization with international standards and the EU *acquis communautaire*, while the reasons for nationalization, differentiation (conditionally speaking) of domestic and foreign religious communities and the revocation of existing legal personality are not explained in official documents neither of the Government as initiator nor the Assembly as the legislator. Representatives of Montenegrin authorities have repeatedly stated that monasteries and churches have to be state property, sometimes naming precisely which monasteries

they are coveting, and also emphasized that it is necessary to form an autocephalous Montenegrin Orthodox Church as the sole Orthodox church in Montenegro. It was emphasized that, if the Serbian Orthodox Church does not accept the agreement, the government will form the Montenegrin Orthodox Church, which is in line with the political program of the ruling party, according to which it unequivocally strives to create the Montenegrin Orthodox Church as an independent church organization. The fact that such a plan and program is directed against the existing church structure of the Serbian Orthodox Church is also demonstrated by the fact that the Montenegrin Orthodox Church already exists as an association of citizens. However, due to the impossibility for the Montenegrin Orthodox Church to gain wider legitimacy amongst the Orthodox population, the Montenegrin Government has now tried to enable the creation of a new church by legal means, and in fact by legal violence. The political establishment in Montenegro wants to create a new church without any connection to the SOC, preferably with property that now belongs to the SOC, from which it logically follows that the Law on Freedom of Religion should serve as an auxiliary mechanism to accomplish this goal. It does so by denying the legal continuity of the SOC dioceses in Montenegro, intervening in the right to self-determination of a religious community, discriminating against a religious community because it has a religious center abroad and by nationalizing its property without it having the possibility of effectively participating in that procedure. The aforementioned legal mechanism also represents a kind of pressure to separate the clergy and monkhood of the Serbian Orthodox Church in Montenegro from the rest of the Serbian Orthodox Church, i.e. to declare autocephaly, regardless of the fact that such a procedure has no canonical basis. On the other hand, there are no indications that the Montenegrin Government wants to do the same with other religious communities with a religious center abroad, that is, to create, for example, a Montenegrin Catholic Church from the existing Roman Catholic Church. In comparative law, one can find examples of certain dominant religious communities having a more privileged status in a state due to historical and traditional reasons, such as in Greece or England, which have an established church. However, it is difficult to find an example in modern Europe where the dominant religious community, present in a state for centuries, is discriminated against in this way and becomes the target of political ideologues who threaten its existence.

The creation of a new church by the authorities, and thus direct interference in and destruction of the church order within the Orthodox Church, represents one of the grossest examples of violations of the principle of separation of church and state and state neutrality, as indispensable principles of modern states prescribed in numerous documents in comparative law. The constitutions of the USA, France and Germany imply religious neutrality, while the principle of state neutrality represents a common European standard that derives from the ECHR. Seeing how the government in Montenegro has envisaged an organizationally independent Montenegrin Orthodox Church for the Orthodox population via the rearrangement of the existing Orthodox Church organization, we conclude that the 16th century principle of *cuius regio, eius religio,* in a slightly modified form, is being reanimated in Montenegro in the 21st century, thus more than two hundred years since the establishment of the modern principle of state neutrality and the separation of church and state in the US Constitution. It remains to be seen in which direction the relations between the church and the

state will develop further, whether the Law on Freedom of Religion will be applied in this form and how it will be applied, and whether the practice will answer many open questions regarding the participation of religious communities in the process of nationalization of land and shrines, and especially what will be accepted as proof of ownership of shrines that were built before the advent of Montenegro. In any case, the freedom of religion, as understood by Jelinnek to be the primal human right which gave birth to all of the remaining human rights, is having its biggest test in Montenegro, and in turn this is a test of all of other human rights without which we cannot imagine a democratic society.