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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

DRAFT JOINT INTERIM OPINION

OF THE VENICE COMMISSION AND THE OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE/ODIHR)

ON THE DRAFT LAW

ON FREEDOM OF RELIGION

OF MONTENEGRO

on the basis of comments by:

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Mr Jorgen Steen SORENSEN (Member, Denmark)
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I. Introduction

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

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

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

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

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

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

II. Background

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

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

8. The Constitution does not recognise specifically any traditional religious community in Montenegro. Its Article 14 states that religious communities shall be separated from the state and shall be equal and free in the exercise of religious rites and religious affairs. The wording of Article 14 is different from Article 11 of the previous Constitution (1992)[2] in that Article 14 does not stipulate explicitly any particular religious community.

9. The legal position of religious communities is currently governed by the 1977 Law on Legal Position of Religious Communities[3]. This Law establishes the framework for recognition of religious communities and their relationship with the State. Religious communities may only be established by citizens. The founder of a religious community shall report, within 15 days, the establishment of a religious community and/or of its bodies or organisations to the competent municipal authority in charge of internal affairs in the territory of which the seat of the newly established religious community and/or its body or organisation is situated. According to the information provided during the visit in Podgorica, the competent municipal authority must file this registration with the Ministry of Interior which maintains the register for religious communities.

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

11. There are many provisions in the 1977 Law which are similar to the provisions of the Draft Law on Freedom of Religion, subject to the present joint opinion. According to Article 11(1) of the 1977 Law, the performance of group religious ceremonies outside the place specified in the Law should be approved by the competent municipal authority at the request of the religious community (cf. Article 36(2) of the Draft Law). According to Article 18 of the 1977 Law religious communities may establish only religious schools for clerics and dormitory for students of such schools, manage them, set up school program and curriculum, and appoint teachers (cf. Article 44(1) of the Draft Law). Article 20 stipulates that a religious community may appoint citizens of the Socialist Federal Republic of Yugoslavia to teaching and other staff of cleric schools. Foreign citizens may teach in schools under paragraph 1 after the religious community obtains the approval of the competent municipal public authority (cf. Article 47(1) of the Draft Law).

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

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

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

Thus, according to the Explanatory note, Montenegro has an obligation to its citizens to comprehensively regulate this area. It is also explained that in order to place all religious communities as far as possible into the same equal status, the Draft Law does not single out any religious community on the basis of its historical duration, social role, number of believers, nor on any other basis, in order to avoid any form of discrimination.

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

15. Concerns have been expressed, however, during the meetings with religious communities in Podgorica as well as in press releases, as to the drafting process and non-inclusive character of the working group formed by the Ministry for Human and Minority Rights. It is not usual, according to those concerns, that the government adopts a draft law before a public debate on the draft has been held; for this reason, the religious communities have been deprived of the possibility to make their contribution during the drafting process before the adoption of the text by the government as a draft law; the working group formed last year by the Ministry for Human and Minority Rights did not include any representatives of the religious communities despite several calls. The announcement of the public debate on the Draft Law during annual leave (30 July) was also criticised for diminishing the effectiveness of the debate which started 3 days after the announcement (3 August).

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

III. Standards

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

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

19. ECHR provides in Article 9 (1) that everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief, in worship, teaching, practice and observance. The conditions for restriction to this rights are established in Article 9 (2) which provides that the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and necessary in a democratic society in the interests of public safety, public order, health or morals, or for the protection of the rights and freedoms of others. This list of possible restrictions is exhaustive. Article 9 must be read in conjunction with Article 14 ECHR which prohibit the discrimination on any ground, including sex, sexual orientation, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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

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

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

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

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

IV. Analysis of the Draft Law

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

25. As the Venice Commission and the OSCE/ODIHR underlined in their "Guidelines for Legislative Reviews of Laws Affecting Religion or Belief"[4] "[i]nternational standards do not speak of religion in an isolated sense, but of "religion *or* belief". The belief aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus atheism and agnosticism, for example, are generally held to be equally entitled to protection to religious beliefs". Article 1(3) of the Draft Law adopts this approach

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

and states that "Freedom of Religion shall protect theistic, non-theistic and atheistic beliefs, as well as the right not to manifest and religion or belief". Thus the Draft Law also encompasses non-religious beliefs and organisations based on such beliefs.

26. Nevertheless, the Draft Law, entitled as "on the freedom of religion", only addresses the freedom of religion and religious communities, and will replace the 1977 Law on the Legal Position of Religious Communities[5], which also deals with religious communities. Either the Draft law should be amended in its entirety in that the freedom of non-religious beliefs and their communities is also addressed, in which case the title of the Draft Law should also be amended as "on freedom of religion and belief", or Article 1(3) should be struck. In the latter case, it should be made clear in the Draft Law through which legal framework –for instance the Law on Non-Governmental Organisations- an equivalent protection of the freedom of –non-religious- beliefs is guaranteed as required by Article 9 ECHR in conjunction with its Article 14. The Venice Commission and the OSCE/ODIHR remind the international obligation of state authorities to review their legislation in order to prevent discrimination against non-believers[6].

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

B. Registration of Religious Communities

1. Whether the registration is compulsory

28. Article 14(1) of the Draft Law states that "[a] religious community (…) shall acquire legal personality by registration in the register of religious communities, kept by the Ministry". Also, Section III (Articles 26-41) of the Draft Law is entitled "Rights and Obligations of registered Religious Communities and their Believers". The combination of those Articles seems to imply that unregistered religious communities do not enjoy the right to freedom of religion and that the registration is a precondition for the benefit of those rights. Other provisions of the Draft Law, more specifically Article 21(4), seem to contradict this interpretation since it envisages the existence of "unregistered religious communities". Furthermore, Section I of the Draft law seems to guarantee collective religious freedom rights to any religious community, without requiring such a community to register and obtain legal personality.

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

30. In any case, it has to be underlined that under international human rights law, religious or belief communities should not be obliged to seek legal personality if they do not wish to do so[7]. The enjoyment of the right to freedom of religion does not depend on whether

[5] See Article 54 of the Draft Law.
[6] See 2004 Guidelines, p. 5.
[7] CDL-AD (2014)023 Joint Guidelines on the Legal Personality of Religious or Belief Communities (hereinafter, "the 2014 Guidelines") adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014), para. 21.

a group has sought and acquired legal personality[8]. As the Venice Commission and the OSCE/ODIHR considered in the Joint Opinion on Freedom of Conscience and Religious Organisations in the Republic of Kyrgyzstan, "[t]he decision whether or not to register with the state may itself be a religious one, and the right to freedom of religion or belief should not depend on whether a group has sought and acquired legal entity status"[9].

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

2. Registration requirements

32. The autonomous existence of religious communities is an issue that lies at the very heart of the protection that the freedom of religion affords[10]. As the 2014 Guidelines underlined, "*the right to legal personality status is vital to the full realisation of the right to freedom of religion or belief. A number of key aspects of organised community life in this area become impossible or extremely difficult without access to legal personality*", for instance, maintaining the continuity of ownership of religious buildings, establishing and operating schools, being able to facilitate larger scale production of items used in religious customs and rites, the employment of staff and the establishment and running of (especially larger-scale) media operations.[11] Therefore, a refusal to recognise the legal personality status of religious or belief communities has been found to constitute an interference with the right to freedom of religion or belief as exercised by both the community itself as well as its individual members.[12] The conditions to acquire legal personality (i.e. the registration requirements) have to be assessed in the light of these considerations.

a. Re-registration issue

33. The first issue that should be examined under this heading is the impact of the entry into force of the Draft Law on the situation of the already registered religious communities under the 1977 Law on Legal Position of Religious Communities. According to Article 51 of the Draft Law "[a] *religious community that is registered in accordance with the Law on the Legal Status of religious Communities shall be obliged to harmonise its acts and submit the application for registration in accordance with this Law within six months as of the date of its entry into force*". This implies that the religious communities which are already registered under 1977 Law, will lose their capacity as legal persons and will have to go through a new registration procedure to regain legal personality[13].

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

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

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

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

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

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

34. As the 2014 Guidelines has noted, "*in cases where new provisions to the system governing access to legal personality of religious or belief communities are introduced, adequate transition rules should be contained in legislation whenever new rules to the system governing access to legal personality of religious or belief communities are introduced. Where laws operate retroactively or fail to protect vested interests of religious or belief organizations (for example, requiring re-application for legal personality status under newly-introduced criteria), the state is under a duty to (…) demonstrate the objective reasons that would justify a change in existing legislation, and show that the proposed legislation does not interfere with the freedom of religion or belief more than is strictly necessary in the light of those objective reasons*."[14] The Venice Commission and the OSCE/ODIHR consider that the obligation of a number of existing religious communities[15] that are already qualified as legal entities, to apply for re-registration in order to regain their legal personality, is a serious interference in the life and legal security of these communities and may amount to a breach of the freedom of religion in the absence of objective reasons for the re-registration procedure.

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

b. Substantive requirements

36. Articles 15 and 16(2)1 of the Draft Law stipulate the substantive conditions to be fulfilled in order to be registered. According to Article 15 "*[a] religious community can be registered if it has at least 50 adult believers who are Montenegrin citizens and have permanent residence in Montenegro"*. Moreover, according to Article 16(2)1 the name of a religious community must be different from that of other religious communities and must not contain the official name of other states and its features.

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

38. As to the requirement of "50 adult believers", in their 2004 Guidelines, the Venice Commission and the OSCE/ODIHR considered that high minimum membership requirements should not be allowed with respect to obtaining legal personality[16]. During the meetings in Podgorica, although the NGO representatives considered this number as high for smaller religious communities, the latter, also the smaller ones, did not put forth any particular criticism on this point. In its Opinion on the Draft Law on Amending and Supplementation of Law no. 02/L-31 on Freedom of Religion of Kosovo[17], the Venice Commission considered that the requirement of "a minimum of fifty members, adult citizens of the Republic of Kosovo does not give rise to criticism, although no specific explanation was given to the Rapporteurs for setting the minimum number at fifty (other than an attempt to find a compromise between various views within the religious communities)". The

[14] Joint Guidelines on the Legal Personality of Religious or Belief Communities, adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 36.
[15] According to the information submitted by the representatives of the Ministry of Interior during the meetings in Podgorica, the number of currently registered religious organisations under the 1977 Law is nineteen.
[16] CDL-AD (2004)028 Guidelines for Legislative Reviews of Laws Affecting Religion or Belief, adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004).
[17] CDL-AD(2014)012, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014), para. 68.

minimum number requirement in the Draft Law does similarly not give rise to any particular criticism.

39. As to the name of the religious community, the 2014 Guidelines stipulate that "*the state must respect the autonomy of religious or belief communities when fulfilling its obligation to provide them with access to legal personality by […] ensuring that national law leaves it to the religious or belief community itself to decide on […] its name and other symbols*."[18] It is of course legitimate to try to avoid a high risk of confusion between the name of the applicant community and the name of another registered community[19]. However, the requirement should not be strictly applied and too restrictive an approach should be avoided. The formulation of Article 15 on this point would benefit from being more specific, for example by stating that registration may be refused only if there is a very high risk that the name of an applicant community will be confused with the name of another registered community[20]. However, the requirement that the name of a religious community "must not contain the official name of other states" appears to be problematic, in particular, in the Montenegrin context, where the Serbian Orthodox Church, although not registered, is one of the most important religious communities in Montenegro. The provision should be reconsidered in the light of the principle of autonomy of religious or belief communities. In their letter of 11 November 2015 to the Secretariat of the Venice Commission, the authorities underlined that they are committed to recognise diversities in the names of religious communities and that the relevant provisions will be amended in order not to compromise the autonomy of religious communities. This is welcome.

c. Formal requirements

40. Article 16 of the Draft enumerates the formal conditions to be fulfilled for registration. It prescribes that the application has to contain 1) the name of the religious community; 2) the headquarters and address of the religious community in Montenegro; 3) the information on religious and other facilities used to perform religious rites and religious affairs; 4) the information on religious schools and homes for accommodation of persons attending the schools, social and humanitarian institutions, as well as informative and publishing activities of the religious community.

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

42. As has been pointed out in the 2014 Guidelines, "*any procedure that provides religious or belief communities with access to legal personality status should not set burdensome requirements*."[21] The authorities are of course entitled to ask the information

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

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

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

[21] Joint Guidelines on the Legal Personality of Religious or Belief Communities adopted by the Venice Commission at its 99th plenary session (Venice, 13–14 June 2014), para. 25. The Joint Guidelines further specify: "Examples of burdensome requirements that are not justified under international law include, but are not limited to, the following: that the registration application be signed by all the members of the religious organisation

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

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

44. The requirements such as "to enclose the decision on the establishment" or "basic religious texts of the religious community" appear to be unjustified with regard in particular to the religious communities which already for centuries exist on the territory of Montenegro. Under international standards, it is not for the state to involve itself in evaluating the content of religious beliefs. Doctrinal and organisational matters, including the issue of which texts are authentic, are a matter for the religious community to decide for itself, not for the State.[22]

45. Finally, these requirements are much more demanding when compared to the rules that regulate legal personality of non-religious organizations (Law on Non-Governmental Organizations)[23]. Without further justification, these conditions are not compatible with the freedom of religion and the prohibition of discrimination in Articles 9 and 14 ECHR.

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

47. Article 18 of the Draft Law requires the Ministry to take the decision on the registration within 60 days starting from the date on which the application for registration is

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and contain their full names, dates of birth and places of residence, that excessively detailed information be provided in the statute of religious organization; (…) that the religious organization has an approved legal address or that a religious association can only operate at the address identified in its registration documents."

[22] The ECtHR has reaffirmed that "the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed"; see ECtHR, *S.A.S. v. France*, application no. 43835/11, 1 July 2014, par 55; cf. also Guidelines for Review of Legislation Pertaining to Religion or Belief, adopted by the Venice Commission at its 59th Plenary Session in June 2004, CDL-AD (2004)028, at D; ECtHR, *Hasan and Chaush v Bulgaria*, application no. 30985/96, 26 October 2000, para. 62; *Metropolitan Church of Bessarabia v. Moldova*, application no. 45701/99, paras. 118 and 123.

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

made. This provision has to be welcomed as "religious or belief communities have a right to receive prompt decisions on registration applications".[24] It is important to ensure in the practice that the deadline for issuing the decision on the registration is respected by the authorities[25]. A system of automatic registration, in case the registration authorities do not respond to the applications within the statutory time-limit, may be considered to be introduced into the Draft Law.

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

C. Discriminatory citizenship and territoriality requirements

49. According to Article 3(1) of the Draft Law, "*citizens of the same religion shall have the right to manifest their religion by establishing the religious community*". Probably the notion "citizens" stands for persons having the Montenegrin nationality. This provision is similar to Article 2(1) of the 1977 Law on Legal Position of Religious Communities, currently in force, which states that "*Citizens may establish religious communities*". However, freedom of religion is a right that is not restricted to citizens.[26] Therefore such a provision violates the Articles 1, 9 and 14 ECHR, which guarantee the freedom of religion, without discrimination, to everyone within the jurisdiction of the High Contracting Parties.

50. Another citizenship condition concerning the ability to register can be found in Article 15 of the Draft Law. This provision stipulates that only religious communities "*with at least 50 adult believers who are Montenegrin citizens and have a permanent residence in Montenegro*" can register and thus obtain legal personality. This condition likewise has to be questioned in the light of the aforementioned standards on freedom of religion and the principle of non-discrimination: the condition that 50 members have "*a permanent residence in Montenegro*" should be sufficient. As the European Court of Human Rights has ruled, the legislation should not deny access to legal personality to religious or belief communities on the grounds that members of the community are foreign or non-citizens[27]. Likewise the 2014 Guidelines have pointed out that, since freedom of religion or belief is a right that is not restricted to citizens, legislation should not deny access to legal personality status to religious or belief communities on such grounds.[28] In their letter of 11 November 2015 to the Secretariat of the Venice Commission, the authorities informed the Commission that this provision will be amended in order to recognise the right of non-citizens who have a

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

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

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

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

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

permanent residence in Montenegro to establish religious communities in Montenegro. This would be a step in the right direction.

51. The Draft Law also contains several problematic requirements as to the territorial residence and operation of registered religious communities. According to Article 11(1) of the Draft Law the "territorial configuration" of a religious community registered and operating in Montenegro shall not extend outside of Montenegro. Articles 11 (2) and 16(1)2 of the Draft Law prescribe that the headquarters of a religious community registered and operating in Montenegro must be located in Montenegro. These provisions severely interfere in the internal organisational autonomy of religious communities. For instance, they exclude the possibility of churches that operate internationally to have a branch in Montenegro, as well as the operation in other countries by churches that have their headquarters in Montenegro. In fact, religious beliefs are not bound to any particular geographical location, and religious communities very often operate in a range of different states and across borders, as is their right.[29] Interferences of this kind violate the organisational freedom of religion, because they cannot deemed to be "necessary in a democratic society" for the purposes mentioned in Article 9, § 2 ECHR. As the European Court of Human Rights has ruled, the acquisition of legal personality of religious organizations cannot be denied on the basis that its headquarters are located abroad[30], a view also endorsed in the 2014 Guidelines[31]. Furthermore, they are not in line with the principle of non-discrimination.

D. Restrictions on the freedom of religion

52. The Draft Law contains many problematic restrictions on the freedom of religion, concerning in particular, the appointment of religious leaders, activities of religious communities including the manifestation of their religious beliefs and performance of religious rites, the use of their property, spending of funds and religious instructions.

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

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

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

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

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

not in compliance with Article 9 ECHR. As the ECHR has stressed, it is therefore solely to the religious or belief community itself to decide on its leadership.[32]

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

56. First, Article 7(2) bans activities "*directed against other religious communities and religions, or to the detriment of other rights of other rights and freedom of believers and citizens*." Although this provision can be justified "for the protection of the rights and freedoms of others" especially in a country which has witnessed serious tensions between the followers of different religions, it has to be underlined that while religious freedom is primarily a matter of individual conscience, it also implies the freedom to "manifest one's religion" including the right to try to convince one's neighbour, for example through "teaching". As the ECtHR stated in *Larissis v. Greece*[33]*,* Article 9 does not, however, protect every act motivated or inspired by a religion or belief. It does not, for example, protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church. In other words, "a distinction has to be made between bearing […] witness and improper proselytism."[34]

57. Secondly, Article 7(3) prohibits "*political activities of a religious community and the abuse of religious feelings for political purposes*". The 2004 Guidelines states that *"States have a variety of approaches towards the permissible role of religious and belief organisations in political activities. These can range from the prohibition of religious political parties, to preventing religious groups from engaging in political activities, to eliminating tax exemptions for religious groups engaging in political activities. While such issues may be quite complicated, and although a variety of differing but permissible laws is possible, such laws should not be drafted in way either to prohibit legitimate religious activities or to impose unfair limitations on religious believers*"[35]. Article 7(3) of the Draft Law would benefit from clarification: what are "political activities of a religious community"? Does this provision only apply to the activities of "religious communities" as such or does it also apply to (all) religious leaders, clergymen and even believers? Does the prohibition imply that they may not participate in a political debate, be a candidate for local, regional or national elections and hold a public office? And if so, how does this provision relate to Article 8(2) of the Draft Law which states: "*No one shall, because of the membership in a religious community, be prevented to use the rights to which he is entitled by the law as the citizen.*"

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

59. Moreover, it is doubtful whether it is in compliance with the condition that a limitation has to be "necessary in a democratic society". As the ECtHR considered in the case of

[32] ECtHR, 22 January 2009, *Case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and others v. Bulgaria,* Application nos. 412/03 and 35677/04, para 120: "State measures favouring a particular leader of a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion."
[33] ECtHR, *Larissis v. Greece,* Application no. 23372/94, 24 February 1998, para. 45.
[34] ECtHR, *Kokkinakis v. Greece,* Application no. 412/03 and 35677/04, 25 May 1993, para 48.
[35] CDL-AD(2004)028 Guidelines for legislative reviews of laws affecting religion or belief, p.17.

Metropolitan Church of Bessarabia and others v. Moldova[36], while it cannot be ruled out that an organisation's programme might conceal objectives and intentions different from the ones it proclaims, the content of the programme should be compared with the organisation's actions and the positions it defends. Mere hypothesis, in the absence of corroboration, cannot justify restrictions on the exercise of the right to freedom of religion. Bearing in mind the principles of legality and foreseeability of legislation, it would be difficult for a religious community to adjust its behavior in light of such a vaguely worded provision. It is thus recommended to reconsider the intended purpose of this provision, and to either delete it, or formulate it in a narrower and specific manner.

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

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

62. Article 33(4) of the Draft provides that requests for the construction of religious facilities shall only be considered if they have the approval of the supreme organs of a religious community in Montenegro. The drafters have to take into account that not every religious community is organised in a hierarchical way. The notion "supreme organ" should therefore be replaced by the notion "representative of religious community".

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

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

65. In Article 41, firstly, the words "purposeful spending" and "in accordance with the law" has to be clarified. Also, in case the purpose of the provision is to assess the applicability of

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

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

E. Prohibition to operate/Deletion from the register

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

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

68. According to Article 21 (3) the provisions of this Article shall also apply to unregistered religious community if the reasons referred to in paragraph 1 items 1 and 2 of this Article exist. Since the reasons for prohibiting a registered religious community from operating also apply to unregistered religious communities, the provision of Art. 21 implies that the religious community as such has to cease its activities and not mere withdrawal of legal personality. However, the provision may be removed from Section II.

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

70. Secondly, although violent activities (Article 21(1)1) could indeed justify a ban, other non-violent activities may not meet the requisite standard for prohibition of a religious or belief community in international standards, which should be a matter of last resort.[37] In particular, if this provision is read as covering any activity that runs counter to the law ("the legal order"), this would also include relatively minor infringements, such as failure to send a change of address on time, to pay a fine within the set period, etc. However, the requisite standard for a ban is that there should be grave and repeated violations endangering public order, that no other sanctions can be applied effectively, and that overall, the measure is necessary in a democratic society and proportionate to a legitimate aim.[38] The provision, in its current wording is clearly not in compliance with the principle of proportionality, as it prescribes to most severe penalty – the prohibition to operate – for any violation provided in Article 21(1) of the Draft Law.

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

[38] *Ibid.*

71. The following passage of the 2014 Guidelines, although it concerns the sanction of withdrawal of legal personality and not the prohibition to operate, should be taken into account: "*considering the wide-ranging and significant consequences that withdrawing the legal personality status of a religious or belief organization will have on its status, funding and activities, any decision to do so should be a matter of last resort*." For that reason, in order to be able to comply with the principle of proportionality "*legislation should contain a range of various lighter sanctions, such as warning, a fine or withdrawal of tax benefits, which – depending on the seriousness of the offence – should be applied before the withdrawal of legal personality is completed*."[39]

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

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

74. Finally, depriving such communities of their basic rights by deciding to prohibit them has grave consequences for the religious life of all their members and, for that reason, care should be taken not to inhibit or terminate the activities of a religious community merely because of the wrongdoing of some of its individual members. Doing so would impose a collective sanction on the community as a whole for actions that in fairness should be attributed to specific individuals. The Draft Law should be amended so that any wrongdoings of individual leaders and members of religious organisations are addressed to the person in question through criminal, administrative or civil proceedings, rather than to the community and other members[40].

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

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

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

F. Religious instruction and religious schools

76. Article 42(1) provides that religious instruction shall be conducted only in facilities in which are performed religious rites and religious affairs. This prohibits for instance religious instruction in educational institutions. This limitation of the freedom of religion is not in compliance with Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief of 1981 which stipulates that "*the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedom […] to teach a religion or belief in places suitable for these purposes*."

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

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

79. The exclusion of religious communities to establish religious educational institutions is not compatible with the freedom of education as enshrined in Article 2 of the First Protocol to the ECHR. This provision contains the right of private organisations, groups and individuals to establish and run private educational institutions. Further, the 2004 Guidelines state that parents should be able to educate their children in private religious schools or in other schools emphasising ideological values, states being permitted to establish neutral criteria for the teaching standards[41].

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

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

82. Article 42(2) of the Draft provides that participation of a minor in religious instruction shall require the consent of parents, i.e. guardians, as well as the consent of the minor himself if he is older than 12. Although, during the meetings in Podgorica, some religious communities expressed the opinion that consent of the minor should be taken if he/she is older than 15, this provision does not rise any particular criticism. The following passage of

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

the 2004 Guidelines is relevant in this matter: "*Legislation should be reviewed to assure that the appropriate balance of autonomy for the child, respect for parents' rights, and the best interests of the child are reached. Problematic in this regard are provisions that fail to give appropriate weight to decisions of mature minors, or that interfere with parental rights to guide the upbringing of their children. There is no agreed international standard that specifies at what age children should become free to make their own determinations in matters of religion and belief. To the extent that a law specifies an age, it should be compared to other State legislation specifying age of majority (such as marriage, voting, and compulsory."*[42] Consideration may be given to setting a more flexible standard, such as consideration of the wishes of the child in line with his or her evolving capacities.[43]

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

G. Property of Religious Communities

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

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

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

87. Two issues arise in this context. First, under Article 1 of the First Protocol to the ECHR (peaceful enjoyment of possessions), a confiscation of property of this type is only

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

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

possible if it is in the public interest. Any interference with peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights.[44] As the ECtHR has held, "compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden […]". In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable [...] only in exceptional circumstances. The right to peaceful enjoyment of possessions does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value."[45] No compensation at all, however, is foreseen in the Draft Law.

88. Second, although a public interest must be served by all types of confiscation, a specific concern does arise when it comes to property which is in use by religious communities for the purposes of manifesting the collective dimension of the freedom of religion or belief. After all, as noted above, the issue is whether a fair balance is struck between the general interests of the community and individual rights; the latter would include the freedom of religion or belief. Article 9 ECHR provides that there is a right to manifest religion in community with others. This includes the right to maintain the continuity of ownership of religious edifices.[46]

89. Religious communities organise meetings, perform religious rituals, and conduct other religious activities, and require religious edifices for that purpose to ensure a meaningful existence and be able to conduct these and other collective manifestations of religion or belief. These edifices themselves may indeed be of greater historical and symbolic value to those communities. Confiscation, even with compensation, but without adequate provision for the right of the respective religious community, for example the right to use religious edifices, would also raise issues under Article 9 ECHR, as it would arguably limit the ability to manifest religion or belief in community with others. It is noted that as currently phrased, the wording of Articles 52 and 53 does not take these highly sensitive considerations into account. It is therefore recommended to reconsider the wording of Articles 52 and 53 to take into account the rights and freedoms of religion communities, including the right to manifest religion or belief in their respective religious edifices.

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

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

[44] See ECtHR, *Sporrong and Lönnroth v. Sweden*, application no. 7151/75 and 7152/75, 23 September 1982, par 69.
[45] See ECtHR, Lithgow and Others v. the United Kingdom, application no. 9405/81, 8 July 1986, para. 121.
[46] 2014 Guidelines, para. 20.

interference into the right to peaceful enjoyment of possessions within the meaning of Article 1 of the First Protocol 1. It appears from the explanations given in the note that if the competent authority referred to in Article 53 finds, during the examination, that a religious community has ownership on a property listed under Article 52, it should also examine the legality and regularity of the acquisition of this property by the religious community and of its registration into the land registry. The note further states that this provision also aims to "govern (...) the manner in which to restore legality and to eliminate numerous irregularities and illegalities regarding cultural properties (…)".

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

V. Conclusion

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

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

95. The Draft Law presents serious problems on many points that should be addressed with, concerning re-registration process, burdensome registration requirements, discriminatory citizenship and territorial requirements, disproportionate sanctions on the religious communities (prohibition and removal from registry) and finally the issue of "confiscation" (Art. 52-53) and the property rights of religious communities.

96. The following main recommendations are to be made:

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

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

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

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

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