



HUMAN RIGHTS ACTION | AKCIJA ZA LJUDSKA PRAVA

**PRESIDENT OF MONTENEGRO**

**Mr. Milo Djukanović**

**PRIME MINISTER OF MONTENEGRO**

**Mr. Dritan Abazović**

Podgorica, 26 July 2022

RE: Harmonisation of the text of the “Basic Agreement between Montenegro and the Serbian Orthodox Church” with the legal order of Montenegro

Dear Mr. Djukanović and Mr. Abazović,

In the attachment, please find the proposals of the NGO Human Rights Action concerning the amendment of the document that was adopted by the Government of Montenegro on 8 July 2022, titled “The Basic Agreement between Montenegro and the Serbian Orthodox Church”.

As part of its preparation for the participation in the working group, which has been announced, the NGO Human Rights Action drafted the present proposals, with the assistance of our legal advisors: Tatjana Gogić, attorney Veselin Radulović and Prof. Dr. Vesna Rakić Vodinelić.

Our proposals represent a reasoned advice of legal experts on how to harmonise the adopted document with the legal order of Montenegro, and in no way have a political connotation.

We would like to remind you that the Government, when entering into contractual relations, is limited by the Constitution of Montenegro and its laws, based on Article 11 paragraph 3 of the Constitution. This means that the Government is not authorised to make any commitments other than those that are prescribed. Provisions of agreements that deviate from the current legal framework would thus be null and void, and as such would not benefit either the state or the Serbian Orthodox Church (SOC).

We emphasise that, to protect human rights, it is necessary to change the provisions that:

- Guarantee public law powers to the SOC;
- Promise that security measures in buildings and other premises owned by the SOC will not be applied without the consent of the church authorities;

- Restrict the right to appeal to the court in the process of making decisions of a disciplinary nature;
- Provide for religious education in a way that is different than provided in the law.

In addition, we believe that there is no reason to ignore the serious legal and technical errors we have pointed out in the preamble and in the articles of the agreement, and that there is no justification for repeating or paraphrasing the rights and obligations that are already governed by law.

While preparing the proposal, we had in mind the agreements that Montenegro and the countries in the region have already signed with religious communities, namely: “The Basic Agreement between Montenegro and the Holy See”, “The Agreement on Regulating Relations of Mutual Interest between the Government of Montenegro and the Islamic Community in Montenegro”, “The Agreement on Regulating Relations of Mutual Interest between the Government of Montenegro and the Jewish community in Montenegro”, “The Agreement between the Government of the Republic of Croatia and the Serbian Orthodox Church in the Republic of Croatia on Issues of Mutual Interest”, “The Agreement on the Legal Position of the Serbian Orthodox Church”, “The Agreement on Legal Issues between the Republic of Slovenia and the Holy See”, and “The Basic Agreement between Bosnia and Herzegovina and the Serbian Orthodox Church”.

Respectfully yours,

Tea Gorjanc Prelević,  
Executive Director

## **PROPOSAL TO AMEND THE TEXT OF THE “BASIC AGREEMENT BETWEEN MONTENEGRO AND THE SERBIAN ORTHODOX CHURCH”**

Concerning the text of the document entitled “The Basic Agreement between Montenegro and the Serbian Orthodox Church”, which was published on the website of the Government of Montenegro following its adoption at the Government session held on 8 July of this year, the NGO Human Rights Action hereby submits the following proposals for amendments to said text, with the aim of harmonising it with the legal order of Montenegro.

We submitted the initial argument, in the form of a warning about the provisions of the agreement that should be changed, in the letter that we dispatched on 6 July 2022 to: the Prime Minister Mr. Abazović, the Minister of Justice Mr. Kovač, and the Minister of Human and Minority Rights Mr. Gjeka. Below, we are proposing specific changes to the text of the Agreement, which will we additionally explain.

### **BASIC AGREEMENT BETWEEN MONTENEGRO AND THE SERBIAN ORTHODOX CHURCH**

**Proposed amendment:** Change the name “Basic Agreement between Montenegro and the Serbian Orthodox Church” to “Agreement on Certain Issues of Common Interest between Montenegro and the Serbian Orthodox Church”.

**Reasoning:** The Law on Freedom of Religion and the Legal Status of Religious Communities (“Official Gazette of Montenegro” nos. 074/2019 and 8/2021) does not contain the term “basic agreement”. Article 10 of the Law reads as follows: “Certain issues of common interest for Montenegro and one or more religious communities may be regulated by an agreement concluded between the Government of Montenegro (hereinafter referred to as: the Government) and the religious communities”.

Agreements concluded with the Islamic and Jewish communities are titled, in accordance with the law, “Agreement(s) on Regulating Relations of Mutual Interest between the Government of Montenegro and ...”. The Republic of Croatia regulated its relations with the Serbian Orthodox Church (hereinafter: the SOC) by concluding the “Agreement on Issues of Common Interest”, while the Republic of Slovenia concluded the “Agreement on the Legal Status of the Serbian Orthodox Church”, which are both titles that are harmonised with the respective laws of these countries.<sup>1</sup> We are using these agreements as examples because the Republic of Croatia and the Republic of Slovenia are both republics of the former SFRY and members of the European Union, whose membership Montenegro aspires to.

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<sup>1</sup> E.g. see Article 9 of the Law on the Legal Status of Religious Communities of the Republic of Croatia (“Official Gazette of the Republic of Croatia”, nos. 83/02 and 73/13)

The name “basic agreement”, which was used in the agreement between Montenegro and the Holy See, is in line with the legal order because it is an international agreement, which was ratified by the Parliament of Montenegro, has legal force, and was allowed to deviate from the applicable laws. The agreement concluded between Montenegro and the SOC is not an international agreement, but rather an agreement that is not subject to ratification, does not have the rank of a law, and thus must be harmonised with the applicable laws.

## **P R E A M B L E**

Montenegro, represented by the Government of Montenegro, and the Serbian Orthodox Church, represented by the Holy Synod of Bishops of the Serbian Orthodox Church (hereinafter: the Parties),

in order to regulate the legal framework of mutual relations,

**Proposed amendment:** “In an effort to regulate issues that are of common interest...”

**Reasoning:** In the preamble of the Draft Agreement, the intention of the Parties is defined in a way that is contrary to the Constitution and the law. Namely, the Government and the SOC do not have the authority to “regulate the legal framework of their mutual relations” by way of an agreement, which is provided in the preamble as the Parties’ intention. Pursuant to Article 10 of the Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities, the Government and the SOC can only regulate certain matters of common interest in an agreement. As parties to the agreement, they must do so in accordance with the legal framework that defines relations between the state and religious communities, and which is regulated by the Constitution and the laws. In this sense, we would like to point out that the agreements that were concluded with the Islamic and Jewish communities state, in their preambles, that they are being concluded **in an effort to regulate issues of mutual interest**, and not “in order to regulate the legal framework of their mutual relations”. The basic agreement between Montenegro and the Holy See states in the preamble that it was concluded in an effort to regulate the legal framework of relations between the Catholic Church and the state of Montenegro, but in this case we are talking about an international agreement confirmed by law, and the law *can* regulate the legal framework of the relationship between the state and a religious community.

Referring to the international law and the Constitution of Montenegro, guaranteed freedom of religion and the principle of separation of state and Church, to the Orthodox canon law, the Constitution of the Serbian Orthodox Church (hereinafter: the Constitution of the SOC), and the church organisation since the establishment of the Archbishopric of Žiča, the Patriarchate of Peć, i.e. the Serbian Orthodox Church,

**Proposed amendment:** “Montenegro, referring to the international law, the Constitution of Montenegro, the current laws, the guaranteed freedom of religion, and the principle of separation of state and Church, and the Serbian Orthodox Church (SOC), referring to the Orthodox canon law, the Constitution of the Serbian Orthodox Church (hereinafter: Constitution of the SOC) and the church organisation since the founding of the the Archbishopric of Žiča, the Patriarchate of Peć, i.e. the Serbian Orthodox Church”.

**Reasoning:** The state is not bound by canon law. The state can only refer to international law, the Constitution and laws,<sup>2</sup> and not to the Orthodox canon law, the Constitution of the Serbian Orthodox Church and the church organisation.

The solution we are proposing is contained in the Basic Agreement with the Holy See.<sup>3</sup>

In the agreement between the Republic of Croatia and the SOC, the state referred to international conventions and standards,<sup>4</sup> while there is no such or similar reference in the agreement that was concluded between the Republic of Slovenia and the SOC.<sup>5</sup> The preamble of the agreement signed with the Jewish community also does not contain any references to religious law.<sup>6</sup> Canon law may be mentioned out of respect for the other party to the agreement, as it governs church authority. However, it should be made clear that the state is not referring to said law.

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<sup>2</sup> See the Constitution of Montenegro, “*Official Gazette of Montenegro*”, nos. 1/2007 and 38/2013, Articles 9 and 16

<sup>3</sup> *Basic Agreement between Montenegro and the Holy See:*

“Montenegro and the Holy See (hereinafter: the Parties),

- In an effort to regulate the legal framework of relations between the Catholic Church and the state of Montenegro;
- Montenegro, referring to its constitutional principles regarding religious freedom, and the Holy See, referring to the documents of the Second Vatican Council and the provisions of the canon law;
- Bearing in mind the centuries-old presence of the Catholic Church in Montenegro, as well as the importance of the Convention signed between Leon XIII and Nicholas I, Prince of Montenegro, dated 18 August 1886;
- Respecting the role the Catholic Church has had in the social, cultural and educational fields;
- Referring to the internationally recognised principles of separation of religion and state, and freedom of religion;
- ...”

<sup>4</sup> Preamble to the Agreement concluded between the Government of the Republic of Croatia and the Serbian Orthodox Church in the Republic of Croatia on matters of mutual interest: (hereinafter: the Parties)

- In an attempt to regulate relations in the field of upbringing, education and culture, as well as pastoral care for believers in penitentiaries, prisons and correctional institutions, hospitals and institutions for social welfare, as well as for believers who are members of the armed forces and the police, and other persons permanently employed in the armed forces and the police and their family members,
- In an effort to ensure material conditions for religious activity,
- In order to create and maintain better conditions for religious activity,
- With the aim of mutual cooperation for the benefit of all citizens, regardless of their religious beliefs,
- Referring to international conventions and standards,

[https://narodne-novine.nn.hr/clanci/sluzbeni/2003\\_12\\_196\\_3109.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2003_12_196_3109.html)

<sup>5</sup> Instead of the preamble, the *Agreement on the Legal Position of the Serbian Orthodox Church* contains only the following sentence: “The Government of the Republic of Slovenia and the Serbian Orthodox Church, Metropolitanate of Zagreb-Ljubljana (hereinafter: the Serbian Orthodox Church) have agreed as follows:...”

<sup>6</sup> *Agreement on the arrangement of relations of mutual interest between the Government of Montenegro and the Jewish community in Montenegro*

The Government of Montenegro and the Jewish Community, (hereinafter: the Parties), bearing in mind:

- The former and current role of the Jewish community in Montenegro,
- Readiness for cooperation in order to achieve the well-being of all its citizens, regardless of their belief and nationality,
- Provisions of the Constitution of Montenegro, international conventions and standards,
- An effort to regulate the issues of common interest for the relations between the Government of Montenegro and the Jewish community in Montenegro, have agreed regarding the following:...”

Starting from the fact that the Christian Church has been present in the territory of Montenegro since the apostolic times, and taking into account its continuity, i.e. mission through the historical Orthodox and church organisation since the founding of the Zeta, Budimlja and Hum Episcopies of the Archdiocese of Žiža (1219-1220),

Respecting the contribution of the Serbian Orthodox Church to the social, cultural and educational development of Montenegro and the historical role of the Metropolitanate of Montenegro and the Littoral during the times of the Montenegrin metropolitans/masters

**Proposed amendment:** “Taking into account the long-term presence of the Serbian Orthodox Church in the territory of Montenegro, through its historical and current role and contribution to the religious, cultural and educational development of Montenegro, ...”.

**Reasoning:** The Christian Church is not a party to the agreement and there is no clear need to use its name therein, especially not in capitalised letters: “ the Christian Church”. It should also be taken into account that there are registered religious communities in Montenegro whose names contain the same term – such as e.g. the Christian Adventist Church, the Christian Religious Community of Jehovah’s Witnesses – and that using the term Christian Church would make things unclear. The agreement is certainly being concluded with the Serbian Orthodox Church, so the preamble should also be directed to the Party of the same name.

We would also like to point out that Article 11 of the Law on Churches and Religious Communities of the Republic of Serbia recognises the “continuity [of the Serbian Orthodox Church], with the legal subjectivity acquired on the basis of the Decree on Spiritual Authority (Decision of the National Assembly of the Principality of Serbia dated 21 May 1836) and the Law on the Serbian Orthodox Church (“Official Gazette of the Kingdom of Yugoslavia”, no. 269/1929)”, which shows that not even these documents go beyond the decision by which the state recognised the subjectivity of the SPC in 1836.

Noting that the Serbian Orthodox Church in Montenegro consists of the Metropolitanate of Montenegro and the Littoral and the Eparchies of Budamijlje-Nikšić, Mileševa, Zahum-Herzegovina and the Littoral (or: Zahum-Herzegovina), as its organic parts

**Proposed amendment:** Replace the words “organic parts” with the words “organisational parts”.

**Reasoning:** The Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities uses the term “organisational part”, not “organic part”; see Article 23 of said Law.<sup>7</sup>

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<sup>7</sup> The organisational part of a religious community that operates in Montenegro, whose religious centre is abroad, which has not been registered, i.e. registered with the competent state administration body in Montenegro, shall attach - together with the request from Article 21 of this Law - also the decision of the competent body of the religious community in question for registration in the Book of Registered Religious Communities.

# ARTICLES OF THE AGREEMENT

## Article 1

The Parties confirm that the Serbian Orthodox Church (hereinafter: the Church) and Montenegro (hereinafter: the State), each in their own field of activity, are independent and autonomous, and that they undertake to fully respect this principle in their mutual relations.

The Parties undertake to cooperate with each other for the purpose of achieving the integral spiritual and material development of man and society, and to improve the common good.

**Proposed amendment:** We believe that it is more appropriate to use the abbreviation “SOC” instead of “Church”, given that more than Montenegro has more than one registered church. The abbreviation “SOC” is common among the Montenegrin public. In addition, we would like to point out that, according to the current orthography,<sup>8</sup> the correct spelling is *Srpska pravoslavna crkva*, not *Srpska Pravoslavna Crkva*.

## Article 2

Article 2, paragraph 1:

The State recognises the continuity of legal subjectivity and, in line with its Constitution, guarantees the Church and its ecclesiastical legal entities (dioceses, church municipalities, monasteries, endowments, independent institutions and funds as well as, according to the church’s purpose, certain temples) the exercise of public legal powers in Montenegro in accordance with the Orthodox canon law and the Constitution of the SOC.

**Proposed amendment:** Omit the word “continuity”; omit the words “guarantees ... the exercise of public legal powers in Montenegro in accordance with Orthodox canon law and the Constitution of the SOC”, so that the provision reads: “The state recognises the legal subjectivity of the SOC and its ecclesiastical legal entities (dioceses, church municipalities, monasteries, endowments, independent institutions and funds as well as, according to the church’s purpose, certain temples) in Montenegro, in accordance with the legal order of Montenegro”.

**Reasoning:** No other agreement concluded with a religious community in Montenegro mentions “continuity of legal subjectivity”, and it is not clear what such wording should mean. Deleting the word “continuity” would not mean that the SOC will end up in a disadvantageous position compared to other religious communities - it would, rather, be placed on an equal footing with them. In the agreements concluded with other religious communities, it is stated that “the subjectivity” acquired by those communities prior to the conclusion of the agreement is “recognised”; the same wording is present also in the agreements concluded by the SOC with the Republic of Croatia and the Republic of Slovenia.

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<sup>8</sup> The orthography of the Montenegrin language and dictionary of the Montenegrin language (orthographic dictionary), Ministry of Education and Science of Montenegro, Podgorica, 2009, p. 12; Orthographic dictionary of the Serbian language, with orthographic and grammar advice, M. Šipka, Prometej, Novi Sad, 2010, p. 1079.



In terms of the legal order of Montenegro, the legal subjectivity of legal entities, including church legal entities, cannot be acquired by canon law, i.e. “in accordance with Orthodox canon law and the Constitution of the Serbian Orthodox Church”, as can be concluded based on the text of the agreement, but based on registration with the competent ministry in accordance with the Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities. Any other solution would mean that the SOC is privileged in relation to other religious communities, which acquired legal subjectivity by way of registration, in accordance with the legal order of Montenegro.

In relation to the fact that the state guarantees the **SOC the exercise of public law powers** in Montenegro, we warn that a religious community cannot be the holder of public powers, because holders of public powers can only be state bodies, state administration bodies, local self-government bodies, local administrations, institutions and other entities that exercise public powers (public bodies), which must be established by law.<sup>9</sup> An example of “another entity exercising public powers” would be the Central Bank, which is governed by a special law.<sup>10</sup>

It is especially unacceptable for the state to guarantee the exercise of public powers by the church “in accordance with Orthodox canon law and the Constitution of the Serbian Orthodox Church”. The Government and the SOC do not have the authority to guarantee the exercise of public law powers - by a mutual agreement - to the church, in accordance with canon law and the Constitution of the SOC. Public powers can only be exercised based on the Constitution and the law, and in accordance with the Constitution and the law, and not in accordance with canon law.

Agreements concluded with other religious communities do not mention public law powers. There is also no mention of granting such powers to the SOC in any of the agreements the SOC has already concluded with other states from the region (Bosnia and Herzegovina, Republic of Croatia, Republic of Slovenia).

The right of the church to independently regulate its internal organisation, and to establish, change, abolish or recognise ecclesiastical legal entities according to the provisions of the Orthodox canon law and the Constitution of the SOC cannot be subsumed under the concept of public law powers, as **public law powers are exercised on behalf of the state and are backed by the authority of the state**. When necessary, the state exercises public powers using repressive measures. The exercise of public law powers is a type of exercise of power that is based on constitutional and legal authority. It is difficult to make a clear distinction, in terms of content, between the terms “power” and “public law authority”.

The Law on Administrative Procedure contains the rules according to which state bodies, state administration bodies, local self-government bodies, local administrations, institutions **and other entities that exercise public powers**<sup>11</sup> are obliged to act in order to protect the rights and legal interests of natural persons, legal entities or other parties, and the public interest. That is why it is unconstitutional and unlawful to stipulate that public powers may be exercised by a religious community, no less than in accordance with Orthodox canon law and the Constitution

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<sup>9</sup> See the Law on Administrative Procedure, “*Official Gazette of Montenegro*”, nos. 056/14 of 24 December 2014, 020/15 of 24 April 2015, 040/16 of 30 June 2016, 037/17 of 14 June 2017, Article 1, and the Law on State Administration, “*Official Gazette of Montenegro*”, no. 078/18, Article 42

<sup>10</sup> Law on the Central Bank of Montenegro, “*Official Gazette of Montenegro*”, nos. 40/2010, 46/2010 - corrigenda, 6/2013 – decision of the Constitutional Court, and 70/2017

<sup>11</sup> *Ibid.*



of the Serbian Orthodox Church. This would grossly violate the constitutional principle of separation of religious communities from the state.

The Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities does not prescribe public law powers, nor does it grant religious communities the status of public law bodies; it rather grants them the status of legal entities, on the condition that they register themselves in the register of religious communities.

The internal organisation of a religious community, education, composition, appointment and powers of religious officials are regulated by canon law, and the law obliges the state not to interfere in the religious community's internal affairs.<sup>12</sup> To regulate these issues and to decide on the rights and obligations of the believers, public law authorisations are not required, nor can these rights be granted by way of an agreement; they are granted exclusively by the Law, which has greater legal force than an agreement. Other religious communities also decide on their internal issues, rights and obligations of their believers, and do not have public law powers to do this.

Documents issued to believers by church authorities cannot be considered the same as public documents that are issued by public law authorities on the basis of public law powers. For example, when a marriage takes place, the document issued by the church is not relevant for proving the existence of said marriage, because it is proved by the marriage certificate. In Article 16, the Family Law<sup>13</sup> stipulates that marriage is concluded by two consenting persons before the competent authority (meaning, the state authority), in the manner provided by law. Therefore, the fact that marriage was concluded before the church authorities *is not significant for the legal order of the state*. The agreement concluded between the Republic of Croatia and the Serbian Orthodox Church cannot serve as an example for this, because the legal regulation of marriage in Croatia is different than in Montenegro. Thus, the provision of the Croatian agreement from Article 8: "From the moment of its conclusion, a religious marriage has the effects of a civil marriage according to the provisions of the legislation of the Republic of Croatia, if the parties to the [marriage] contract have no civil obstacles and if the requirements provided for in the provisions of the legislation of the Republic of Croatia are met", is based on the provisions of Article 13 of the Family Law of the Republic of Croatia:<sup>14</sup> "Marriage is concluded by the consent of a woman and a man in a civil or religious form." Also, the birth certificates that the church issues to its believers are used exclusively for spiritual and religious matters, and are not treated by any law of the state of Montenegro. Issuance of diplomas and certificates to students of religious schools is explained below, in Article 16 of the Agreement.

#### Article 2, paragraph 2:

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<sup>12</sup> Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities ("Official Gazette of Montenegro", no. 074/19 of 30 December 2019 and 008/21 of 26 January 2021) in Article 7, paragraph 3: The religious community shall decide freely, in particular about:

- Internal organisation, education, composition, powers and functioning of its bodies;
- The election of its religious leader, the appointment and authorisation of its religious officials and other religious staff;
- The rights and obligations of their believers, provided that they do not interfere with their religious freedom;
- connecting with or participating in interfaith organisations based in Montenegro or abroad."

<https://www.gov.me/dokumenta/9d0b0752-9efb-4191-969e-2941c699b4c3>

<sup>13</sup> Family Law, "Official Gazette of Montenegro", no. 1/2007 and "Official Gazette of Montenegro", nos. 53/2016 and 76/2020

<sup>14</sup> <https://www.zakon.hr/z/88/Obiteljski-zakon>

The competent church authority has the right to independently regulate its internal organisation, and to establish, change, abolish or recognise ecclesiastical legal entities according to the provisions of Orthodox canon law and the Constitution of the Serbian Orthodox Church.

Article 2, paragraph 3:

The competent ecclesiastical authority informs the state administration body about these decisions for the purpose of recording ecclesiastical legal entities in accordance with state regulations.

Article 2, paragraph 4:

The competent state body is obliged to act on the report of the competent church authorities.

***Proposal to amend Article 2, paragraph 4:*** Delete the provision.

***Reasoning:*** The state authority is most certainly obliged to act in accordance with Article 26 of the Law on Freedom of Religion and the Legal Status of Religious Communities and register legal entities, and it is therefore unnecessary to repeat this, already existing, legal obligation here. In the event that the authority fails to act upon the registration application, the Law on Administrative Procedure applies, prescribing what will happen in the case of the so-called silence of the administration. Not a single one of the state's agreements with other religious communities contains this type of norm, nor do the agreements of the Republic of Slovenia and the Republic of Croatia with the Serbian Orthodox Church contain such a provision.

## Article 6

Article 6, paragraph 2:

As the highest ecclesiastical authority, the Holy Synod of Bishops of the Serbian Orthodox Church is exclusively responsible for the election, ordination and appointment of archbishops in dioceses in Montenegro, as well as for the establishment, change and abolition of dioceses in accordance with Orthodox canon law and the Constitution of the Serbian Orthodox Church.

***Proposal to change Article 6, paragraph 2:*** “Ordination” and “archbishop” are not concepts that a civil servant or someone who does not belong to the Serbian Orthodox Church is obliged to know. Should they be insisted upon, they should be explained in a special glossary, such as the one that constitutes an integral part the agreement that was concluded with the Islamic Community in Montenegro.

Article 6, paragraph 3:

Competent church authorities have the right to make decisions of a spiritual and disciplinary nature in accordance with the Orthodox canonical order and appropriate church regulations, without any interference from the state authorities.

**Proposal to change in Article 6, paragraph 3:** Delete the words “and disciplinary nature”.

**Reasoning:** Decisions of a spiritual nature *should* be made by the religious community without any interference of the authorities. However, the words “without any interference of the state authority” also refer to decisions of a disciplinary nature, and can be understood as limiting the right to access the competent court against decisions made in disciplinary proceedings in the SOC. The legal system of Montenegro allows employees, including employees of religious orders, to initiate disputes against disciplinary decisions made by legal entities before competent courts, and, prior to that, before an agency for the peaceful resolution of labour disputes or a centre for alternative dispute resolution (Labour Law, Articles 140, 141 and 151). Decisions of a disciplinary nature serve to decide on rights and obligations that are not of a spiritual nature, but which could have the same character and consequences as criminal sanctions could for a convicted person. The provision of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) applies to any procedure whose outcome has a direct impact on the determination and/or material position of some private right or obligation, including disciplinary procedures involving decisions of a disciplinary nature discussing things that can be subsumed under the broader concept of “criminal charges”. One of the guarantees provided by Article 6 of the Convention is the right of access to a court.

None of the agreements concluded with other religious communities in Montenegro contain a provision that grants a religious community the right to make decisions of a disciplinary nature in accordance with the canonical order and its own regulations without any interference of the state authorities.

## Article 7

Article 7, paragraph 4:

The state undertakes to register all unregistered immovable property in the ownership of the Metropolitanate of Montenegro and the Littoral, the Eparchy of Budamilje-Nikšić, the Eparchy of Mileševo, the Eparchy of Zahum and Herzegovina, and the ecclesiastical legal entities to which they belong, in accordance with the state’s legal order.

**Proposed amendment:** Delete the provision.

**Reasoning:** This provision is redundant because the state is already obliged to register immovable property, based on the law - specifically, the Law on State Survey and Real Estate Cadastre and the Law on Basic Property-Legal Relations. The general legal regime applies to the registration of property and other real rights, and additional contracting of such an obligation for the state would be unconstitutional.

In its decision U no. 70/09 of 20 May 2010, the Constitutional Court of Montenegro established that in the procedure of passing by-laws, in order to ensure compliance with the law,

provisions cannot be taken from the laws, that is, issues that are already regulated by law cannot be regulated through by-laws. Similarly, this Agreement cannot regulate issues that are already governed by law.

Article 7, paragraph 6:

State authorities cannot undertake security measures in buildings and spaces referred to in paragraph 3 of this Article without the prior approval of the competent church authorities, except when required to do so by urgent reasons involving the protection of people's lives and health.

**Proposed amendment:** Delete the provision.

**Reasoning:** In this way, the special status of the so-called extraterritoriality is given to buildings and spaces owned by the SOC. The term “security measures” is not defined in the Agreement, nor is there a definition of that term in either the Law on Internal Affairs or the Criminal Procedure Code. Article 41 of the Law on Internal Affairs mentions “police powers, measures and actions”, so this wording could be interpreted as referring to *those* measures and actions, of which there are more than 20 and which include search and arrest, i.e. deprivation of liberty, or in other words, procedures that are prescribed by law so as not to require the approval of the person who is being deprived of liberty, that is, in the case of a search, the person who is being searched, or the holder of a certain item. The conditions for taking these measures and the rules for taking them are prescribed by law, and an agreement cannot prescribe exceptions to the application of the law.

However, it *is* true that the same provision exists in the Basic Agreement that was concluded with the Holy See, and similar provisions exist also in two other agreements concluded with religious communities:

1. In the agreement concluded with the Holy See, the wording in question is the wording “without prior authorisation of the competent church authority”. In this case, we are talking about an international agreement, which Montenegro has ratified, meaning that it has been confirmed by the Parliament of Montenegro and now has the force of a law, i.e. a *lex specialis* in relation to the applicable laws.

2. The agreements concluded with the Islamic and Jewish communities contain the words “without prior notification of the competent religious authorities”. The law does not prescribe even prior notification, so this wording is not in accordance with the legal order either, i.e. the police should disregard such contractual provisions, as they are null and void and have no legal effect.

3. Such provisions do not exist in the agreements that were concluded between the SOC and the Republic of Slovenia or the Republic of Croatia, nor in the Holy See's agreement with the Republic of Slovenia.

Article 7, paragraph 7:

When holding worship services or religious ceremonies in public places or open spaces (litias, pilgrimages and similar church ceremonies), the competent church authorities shall promptly inform the state authorities thereof, in a timely manner, and the state authorities will ensure public order and the safety of people and property.

## Article 9

The secret of confession is completely and always inviolable.

**Proposal:** Delete this article.

**Reasoning:** The secret of confession is a religious issue, regulated by canon law, which the state neither applies nor interferes with. Therefore, it is unclear why this a provision is necessary. The Basic Agreement between Montenegro and the Holy See contains the same provision, while e.g. the agreements concluded between the SOC and the Republic of Croatia and the Republic of Slovenia do not. If the aim of this provision was to protect the secrecy of confessions, prohibit church officials from testifying before the court, and prevent them from disclosing the confessions entrusted to them by believers through said rite, it was unnecessary because such a provision already exists in Article 108, paragraph 1, item 3 of the Criminal Procedure Code of Montenegro. A religious confessor is a person who cannot be questioned as a witness, because his testimony would violate the duty of maintaining professional secrecy.

However, we would like to point out that the Criminal Code of Montenegro provides for a criminal offence ‘failure to report the preparation of a criminal offence’ (Article 385),<sup>15</sup> which also applies to a religious confessor, i.e. to knowledge obtained during confession, because the legislators did not expressly exempt a religious confessor from the application of the provision, as they did e.g. in the case of a criminal offence ‘failure to report a criminal offence and its perpetrators’ (see Article 386, paragraph 3 of the Criminal Code of Montenegro).<sup>16</sup> Therefore, it

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<sup>15</sup> Criminal Code of Montenegro (“*Official Gazette of Montenegro*”, nos. 70/2003, 13/2004 – *corrigenda* and 47/2006 and “*Official Gazette of Montenegro*”, nos. 40/2008, 25/2010, 32/2011, 64/2011 – *other law*, 40/2013, 56/2013 - *corrigenda*, 14/2015, 42/2015, 58/2015 – *other law*, 44/2017, 49/2018 i 3/2020), Article 385: (1) Anyone who has information that preparation is underway for commission of a criminal offence punishable under law by an imprisonment sentence of five years or more, but fails to report it when such an offence could have still been prevented, and the offence is attempted or committed, shall be punished by a fine or imprisonment not exceeding one year.

(2) For failure to report the preparation of a criminal offence punishable under law by a long prison sentence of forty years, the offender shall be punished by an imprisonment sentence of three months to three years.

(3) Persons to whom the offender is a spouse, a partner in a durable customary marriage, direct blood relative, brother or sister, adoptive parent or adopted child, as well as a spouse of one of the above mentioned persons, or a person living with one of such persons in a durable customary marriage shall not be punished for an offence referred to in paragraph 1 of this Article.

<sup>16</sup> Criminal Code of Montenegro (“*Official Gazette of Montenegro*”, nos. 70/2003, 13/2004 – *corrigenda* and 47/2006, and “*Official Gazette of Montenegro*”, nos. 40/2008, 25/2010, 32/2011, 64/2011 – *other law*, 40/2013, 56/2013 - *corrigenda*, 14/2015, 42/2015, 58/2015 – *other law*, 44/2017, 49/2018 i 3/2020), Article 386: (1) Anyone who knows that a person has committed a criminal offence punishable under law by a prison sentence of forty years or who knows that such a criminal offence has been committed but fails to report it before such a criminal offence and offender are detected, shall be punished by an imprisonment not exceeding two years.

(2) The sentence referred to in paragraph 1 of this Article shall also be imposed on an official or responsible person who knowingly fails to report the crime s/he has been informed about in the performance of his/her official duty, if it is a criminal offence punishable under law by imprisonment of five years or more.

(3) For failure to report a crime or offender referred to in paragraphs 1 and 2 of this Article, exempted from sentence shall be persons to whom the offender is a spouse or a partner in a durable customary marriage, direct blood relative, brother or sister, adoptive parent or adopted child, as well as a spouse to one of the above mentioned persons or a person living with one of such persons in a durable customary marriage, as well as a defence counsel, doctor or religious confessor of the offender.

should be borne in mind that, by way of this agreement, the Government cannot exempt religious officials of the SOC from the application of Article 385 of the Criminal Code of Montenegro, although the wording of Article 9 can be misleading in this regard.

This type of provision is not contained in the SOC's agreements with the Republic of Slovenia and the Republic of Croatia, but it does exist in the agreement that was concluded between the Republic of Slovenia and the Holy See. Although the same provision *is* contained in the Basic Agreement of Montenegro with the Holy See, we believe that bad practice should not be reinforced. It should be borne in mind that each of the agreements concluded with religious communities may be challenged before the Constitutional Court of Montenegro.

### Article 10

Sundays and the following religious holidays are scheduled as non-working days **for Orthodox Christians in Montenegro**:

- Christmas Day (24 December according to the Julian calendar / 6 January according to the Gregorian calendar),
- Christmas and the Feast of the Blessed Virgin Mary (25 and 26 December according to the Julian calendar / 7 and 8 January according to the Gregorian calendar),
- Good Friday,
- Easter Monday,
- The first day of '*slava*'.<sup>17</sup>

**Proposed amendment:** Instead of the words: “for Orthodox Christians in Montenegro”, the provision should read “for believers of the SOC in Montenegro”.

**Reasoning:** In this way, the rights of other Orthodox Christians in Montenegro, who are not believers of the SOC, will not be interfered with.

### Article 11

Provisions of the law regulating the protection of cultural goods shall apply in cases of relocation, removal from the state, or alienation of goods that are considered the cultural heritage of the State but are owned by the Church.

The Church may establish endowments and foundations according to the provisions of Orthodox canon law and the Constitution of the Serbian Orthodox Church, all in accordance with the legal order of the State.

**Proposed amendment:** Omit Article 11, paragraph 2 as redundant, since it is identical to Article 12 of the Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities and the content of Article 11, paragraph 3 is governed by Article 44 of the above Law. The general legal regime applies to all religious communities, as well as to all other legal entities under private law.

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<sup>17</sup> Translator's nota bene: Family saint's day



## Article 14

Article 14, para. 1:

The State guarantees the Church the freedom to carry out educational, cultural, scientific, informative, publishing and other activities related to its spiritual mission, in accordance with the legal order of the State.

Article 14, para. 2:

The State guarantees the Church the right to own, print and publish books, newspapers, magazines and audio-visual materials of religious, educational, cultural and scientific content.

Article 14, paragraph 3 and Article 14, paragraph 4:

The Church shall also have access to the means of public information (newspapers, radio, television, Internet).

The Church shall have the right to establish and edit radio and television stations, in accordance with the current legislation of Montenegro.

**Proposed amendment:** Delete the provisions of Article 14.

**Reasoning:** No issue that is regulated by law can be the subject of an agreement, by analogy with the by-laws and the position of the Constitutional Court, which was pointed out in the commentary to Article 7, paragraph 4. The content of the above mentioned provisions is contained in Article 43 of the Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities: “The religious community shall have access to public broadcasting services and other media, as well as the right to independently carry out its own informative and publishing activity on a non-profit basis, in accordance with the law”, while the details of the educational activities are regulated in chapter VI of the Law, as well as in other laws, as discussed in the commentary to Article 16.

## Article 16

Article 16, paragraph 1:

The state guarantees the right of parents and guardians to provide their children with religious education in accordance with their own beliefs.

**Proposed amendment:** Delete Article 16, paragraph 1.

**Reasoning:** This guarantee is more precisely prescribed by the Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities,<sup>18</sup> which, in articles 51-57 of in chapter IV - Religious Education and Religious Schools, regulates this issue in detail. Article 52 states as follows: “Parents shall have the right to carry out the religious education of

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<sup>18</sup> Article 51. paragraph 2: The participation of minors in religious education requires the consent of parents i.e. guardians, as well as the consent of a child if the child is older than 12 years of age”.



their child in accordance with their religion or beliefs, respecting the physical and psychological integrity of the child”. Article 51, paragraph 2 states as follows: “The participation of minors in religious education requires the consent of parents i.e. guardians, as well as the consent of a child if the child is older than 12 years of age”. For arguments in support of the fact that the agreement should not contain provisions that are already prescribed by law, see above, reference to the decision of the Constitutional Court of Montenegro in the commentary to Article 7, paragraph 4.

Article 16, paragraph 2:

Orthodox religious teaching in public schools can be regulated, in accordance with the legal order of the State.

**Proposed amendment:** Delete Article 16, paragraph 2.

**Reasoning:** The provision of paragraph 2 is redundant as well, since the Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities and the General Law on Education and Upbringing<sup>19</sup> govern the details of the issue of religious education in Montenegro. A provision formulated in this way could lead to misinterpretation. First of all, it cannot be prescribed “in public schools”, as both primary and secondary schools (gymnasia, vocational secondary schools, artistic secondary schools, etc.) are public schools, and *religious teaching is only allowed in licensed secondary religious schools*. Article 54 of the Law on Freedom of Religion or Beliefs and the Legal Status of Religious Communities prescribes as follows: “Religious communities may establish religious schools of all levels of education, except elementary school, which is mandatory by law, as well as homes for the accommodation of persons who study in those institutions.” The General Law on Education regulates this issue with greater precision in its Article 5: “In public institutions and in institutions that have been granted a concession to implement publicly valid educational programmes, education shall be of a secular nature. Religious activity is not allowed in institutions referred to in paragraph 1 of this Article, with the exception of institutions that are licensed as secondary religious schools”. Later in the text, Article 5a of the same Law clarifies the following: “Religious secondary schools that implement publicly valid educational programmes shall have the status of secondary schools. Public documents (diplomas) issued by institutions referred to in paragraph 1 of this Article shall be publicly valid and recognised for the purpose of continuing education”. This provision is also an argument in favour of the fact that the SOC does not need special public law powers to issue student diplomas, certificates, etc., because such documents are issued by licensed secondary religious schools and recognised by the state based on the General Law on Education.

## Article 17

Article 17, paragraph 1:

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<sup>19</sup> “Official Gazette of the Republic of Montenegro”, nos. 64/2002, 31/2005 i 49/2007 and “Official Gazette of Montenegro”, nos. 4/2008 – other law, 21/2009 – other law, 45/2010, 40/2011 – other law, 45/2011, 36/2013 – decision of the Constitutional Court, 39/2013, 44/2013 – corrigenda, and 47/2017)

Montenegro guarantees the Church the right to **pastoral care** of **Orthodox believers** in the armed forces and police services, as well as those that are in prisons, public health institutions, orphanages and any public and private health and social care institutions.

***Proposed amendment:*** The words “pastoral care” should either be defined in the glossary, or replaced with the words “religious spiritual care”.

Replace the words “Orthodox believers” with the words “believers of the SOC”.

***Reasoning:*** In Articles 46-48, the Law on Freedom of Religion uses the term “religious spiritual care”. The terms need to be adapted to the legal order of Montenegro as much as possible. The same objections apply to the agreements that have been concluded with other religious communities. The agreement concluded with the Islamic Community at least contains a glossary in which all religious terminology is explained.

This agreement should not regulate the rights of Orthodox Christians who are not believers of the Serbian Orthodox Church.