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# CHURCHES AND RELIGIOUS COMMUNITIES AS LEGAL ENTITIES OF PUBLIC LAW

**Summary**

*The subject of this paper is the analysis of the legal subjectivity of churches and religious communities. Starting from the division of rights into public and private, the paper points out to the characteristics of legal entities of public law. After the analysis of the autonomy of churches and religious communities and their position in comparative law, it is concluded that their legal subjectivity is close to the status of legal entities of public law. Churches and religious communities can, by their legal acts, create rights and obligations in the legal order of the state. They can generate new legal entities, perform public services, keep public records and issue public documents, and they do so as organisations sui iuris et sui generis. The public law character of the legal subjectivity of churches and religious communities is essential and legitimate in modern law.*

**Keywords:** churches and religious communities, public law, legal subjectivity, legal entities of public law.

## 1. Introduction

Human existence is inextricably linked with religion. However, religion is not only a set of beliefs and their individual manifestation and practice. It permeates all spheres of an individual's life; it effects the understanding of concept of freedom, love and relationship with other people and thus determines the meaning of life and the meaning of existence. That is why religion is not, and can never be, reduced exclusively to privacy, nor is it individual. On the other hand, religion is not a material, and therefore temporary connection of individuals; it has its own deeper and broader social context and it effects the social system, cultures and civilisations, but it also outlives socio-economic systems. Therefore, it can be pointed out that religion is a public factor, a part of the public sphere.[1]

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[1] G. Robbers, „Legal Aspects of Religious Freedom", Opening Lecture, in: *Legal Aspects of Religious Freedom, International Conference Legal Aspects of Religious Freedom*, Ljubljana 2008, 11.

Since it is a part of the public sphere, religion inevitably encounters the state and its legal order. In this sense, it should be pointed out that the history of a large number of legal institutions is permeated with the influence of religion as well as the attempts to push it out of the state and the legal order. Religion and the legal order of the state always interweave and determine each other, starting from the issues of sovereignty to contemporary topics of human rights, discrimination and coexistence and preservation of diversity in supranational integrations, or multicultural societies. Such interweaving and mutual determination takes place at different levels and in different aspects, especially with regard to the legal position of churches, religious communities and other religious associations. The question of the character of the legal subjectivity of churches and religious communities, more precisely the necessity and legitimacy of their public legal status, is the subject of this paper. In terms of such a specific topic, it is necessary to first consider the understanding of the division of rights into public and private.

## 2. Division into Public and Private Law

Since Ulpian's definition from the Digest, i.e. Institutions *publicum ius est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet*, there have been disputes in legal science about its true meaning, validity, usability, scope, and even authenticity and authorship. Fundamentally and in the broadest sense, all the interpretations of that famous formulation can be classified into three main theoretical directions: 1. the interest theories, according to which *publicum ius* is the right by which public interests are realised and protected, while *privatum ius* is the right by which private interests are realised and protected; 2. the subjects theories, according to which *publicum ius* is the right that refers to the state, its organization and the relationships in which the state participates, while *privatum ius* is a right that refers to individuals and their relationships; and 3. the norms' origin theories, according to which *publicum ius* consists of legal norms created by the state, i.e. which are adopted by the state, while *privatum ius* consists of norms that are not made by the state.[2] Throughout history, the three basic theoretical directions of the interpretation of Ulpian's division have separated into forty branches that take different factors as the determining criterion of distinction, which, with more or less success, are argumentatively affirmed or disputed, thus strengthening or undermining[3] the validity of such a distinction between

[2] В. Водинелић, *Јавно и приватно право,* Службени гласник, Београд 2016, 54–55.
[3] *Ibid.,* 67–132.

public and private law. or undermines, and the presentation of which would greatly exceed the nature and purpose of this paper. In the context of the determining criteria that are used in theory to support or challenge such a distinction, at this point it should only be pointed out their classification into three groups: intranormative criteria, extranormative criteria and social criteria.[4]

Just as there are great differences in theoretical positions regarding the meaning and validity of the division into public and private law, there are also, more precisely due to that, disagreements about the usability and scope of their distinction. Understandings range from the claims that there is the essential dividing line of the entire objective law, or rather that public and private law are two parts (even positive ones) of the law, whose distinction is inevitable and scientifically relevant,[5] starting from the underlining the importance and usability of their distinction in systems, where positive law recognises such a division, to emphasising the function and importance of the division, possibly only for systematisation purposes, whereby public and private law would be understood only as the broadest parts of the scientific legal system.[6]

Theoretical disagreements regarding the meaning, validity, usability and scope of the distinction between public and private law have not remained without a face in the mirror of positive law and vice versa. Namely, in the positive law of different countries, the categories "public law" and "private law" are its integral part or, are completely omitted from it, while at the intersection of such approaches, there are positive rights which, although they do not explicitly and normatively postulate those categories, they contain, determine and refer to institutes of public (general) interest, public order, public order, public property, public prosecutor, public authorities, public services, public authority, public records, public documents, subjective public rights, and their corresponding antonyms, and even to the connections through public-private partnerships.

The dichotomy of rights into public and private rights cannot be equated with, also dichotomous, the division of rights into state and autonomous,[7] but, from a historical point of view, it is gradually infiltrated in

[4] С. Врачар, „Основи разликовања „јавног" и „приватног" права", *Анали Правног факултета* 5/1982*,* 788.

[5] *Ibid.,* 814.

[6] An overview of different understandings about the functions of division and its (un) justification for practical, ideological and systematization purposes see in В. Водинелић, 459–482 and 555–611.

[7] Д. Митровић, „О односу јавног, приватног, државног и самоуправног права", *Анали Правног факултета* 5/1982*,* 852–856.

it, thus gaining some kind of legitimisation, not only in the sphere of state law, but also in the sphere of autonomous law, especially the one that deals with religion and churches and religious communities. Namely, from the explanation in the Digests, according to which public law consists of and relates to sacred objects, priests and magistrates - *publicum ius in sacris, in sacerditobus, in magistratibus consistit*, over time, with the separation of state and church, in philosophical and legal thought, especially from the second part of the 18th century, within the Roman Catholic Church, and opposite to the part of rationalist legal philosophy that tried to extend the sovereignty of the state to the church area, the science of public ecclesiastical law (*ius ecclesiasticum publicum*) has been developed. It establishes the independence of the church area and the necessity of canon law in principle *ubi societas, ibi ius,* and it attributes the necessary possession of such a right[8] to the church, as a perfect community, yet a community of people, which can have its consequences in the sphere of state law.

Since in traditional jurisprudence, with the exception of intra-normative criteria, extra-normative and social criteria are often used to explain and understand the distinction between public and private law, some authors point out that this makes some kind of "unconscious" acknowledgment of the narrowness and inadequacy of the normative concept of law.[9] By advocating for a *realistic concept of law*, according to which law does not consist of only legal norms, taken separately or together, but it also includes, in addition to what are called legal norms, other elements of law such as legal entities, legal acts, legal relations, legal objects, etc., which are equally, and each in its own way, the bearers of specific legality thanks to which the wholeness and completeness of law as a separate social creation is established, those authors find the basis of the distinction between public and private law in the differentiation and polarisation that takes place in the content and forms of social life of people, and which confirm the presence of a specific and extremely important process for the state legal order itself — the process of political constitution of society as a whole, which inevitably implies the division of the public and private spheres, and consequently the distinction between those spheres in law as well.[10] Precisely starting from the character of public and privacy as separate spheres of social relations in a politically organised community, and following the position on the validity of the division into public and private law, with an understandable indication of the absence of clear, firm and predetermined boundaries of those spheres of social relations and whose

[8] С. Врачар, 788.
[9] *Ibid.,*795.
[10] *Ibid.,*812–814.

determination is, by the nature of things, the very subject of political (re) constitution of the community, we are of the opinion that in all the above mentioned elements of law, certain specificities inherent only to public, i.e. private law can be found. In this sense, mutually interwoven and mutually dependent elements of public law would constitute norms, most often imperative, which regulate social relations in the public sphere and with regard to the realisation of the public interest, most often explicitly determined by law, in which there is predominantly legal inequality of their participants to some extent and which (relationships) can be authoritatively based, regardless of whether they are regulated by the state or autonomous system of norms, in which subjects participate to a significant extent, which, due to their origin, character, legal regime to which their actions and property are subjected, as well as the prevailing type of legal acts they enact, and which decide on the rights and obligations of other persons and/or create legal consequences in the public sphere, are a special category of subjects.

## 3. Legal Entities Under Public Law

Having determined that with regard to subjects as a special element of law there are certain specificities inherent in public law, it is necessary to consider and explain them in more detail. However, before such a consideration and explanation, it is important to make a legal-philosophical and methodological note. Namely, among the various theoretical approaches in determining the essential criterion, and thus the meaning of the distinction between public and private law, the theory of entities has a special place. According to that approach, public law is determined by public law relations in which at least one party is the state, some part of it or a body or another so-called public legal entity. Not entirely unfounded, such theoretical approaches have been criticised and taken as a tautology, since public law is determined through a public law entity, and through public law is determined the feature of public law entity, as well as the fact that the same entities can participate in both public law and private law relations.[11] There is no disputing, in general, the validity of the above-mentioned comments. However, it is necessary to point out that the approach in this paper is integral, and that entities are only one of the elements of law, with certain public law particularities, which by no means implies that such entities cannot be participants in different, private law relationships.

Besides natural persons as subjects of law, more precisely as holders of rights and obligations, legal orders also recognise legal capacity to

[11] В. Водинелић, 108–110.

other entities. It is common for theoretical approaches and positive legislation to mention and define legal entities that are social constructions determined by special elements, or more precisely organisational units in which assets (funds) and people are united, which act through their bodies in order to achieve some goal and have an identity and a legal subjectivity recognised by the legal system.

However, the concept of a legal entity defined in such a way is too general and does not sufficiently express the features embodied in the manner of their creation, the character of their assets, their organisational structure, the goals they fulfil and the legal regime to which different types of legal entities are subjected. Also, the stated definition does not include the state and its bodies through which it acts, political-territorial communities narrower than the state, which are more frequently defined as legal entities in the positive law of many states (e.g. local self-government units and political-territorial autonomy), bodies through which the explicitly recognised collective rights of certain groups (e.g. national minorities) to non-territorial autonomy are realised *ex lege* in many legal orders, nor other types of entities which, although they do not have the status of a legal person, can at least, to a limited extent, be the holders of certain rights and obligations, (e.g. collectives and procedural communities that still do not have the status of a legal entity, and whose rights and obligations are decided in the administrative procedure).

Bearing in mind to some extent such deficiencies, and starting from the peculiarity of the national legal, both theoretical and positive, tradition, in many European countries there is a concept of public legal entities, i.e. legal entities under public law. In this sense, particularly French administrative law stands out, which uses the following criteria to determine the character of a legal entity under public law: a) institutions of public law (more precisely, government institutions) and public initiatives; b) rules on the organisation, functions and control of such persons are determined by the public authority; c) public law entities (institutions and establishments) can receive public subsidies and even mandatory payments (financing) from public (budgetary) funds; d) the public status of a person means that he has the prerogatives of the government, more precisely, that he can act authoritatively. Also, there are some derivative criteria, such as : a) establishment by the authorities by a state act, which is used to regulate their legal status and activity; b) established legal entities act on behalf of the state or on their own behalf, fulfilling some of the state functions; c) legal entities under public law carry out state management, more precisely, they

participate in the performance of administrative functions in accordance with their private responsibility; and d) legal entities under public law are granted the authorities to perform state duties.[12]

Unlike the interwar period, the concept of legal entities under public law and public law subjects has not been (fully) developed and accepted in contemporary legislation in the areas of the former Yugoslavia, as well as in local legal theory. In this context, it is necessary to point out the fact that the determination of the public law status of a subject in modern circumstances and tendencies of the development of public administration can be done in a functional sense, not only in a status-personal sense. Thus regarded, in a functional sense, the basic question is whether a subject has public powers understood as the possibility of authoritative representation, more precisely, decision on one's rights and obligations and/or passing general acts that have a generally binding character. Some subjects can have such powers because they originally have them or due to the state that entrusted them with power.

In domestic legal theory, under public powers, the majority of theoreticians understand the powers of non-state entities to act authoritatively[13], which is just another name for certain prerogatives of the state government.[14] Since it is considered that the basis for authoritative performance, i.e. the exercise of public powers, can only be the law,[15] the definition of that term can be expanded so that under public powers are considered special, legally entrusted powers to non-state entities which allows them to use certain administrative powers[16] in the performance of their basic economic or other activities. Bearing in mind that the new term "administrative powers" is being introduced in the definition of public powers, the question arises whether they are synonyms, i.e. whether public powers are the same as administrative powers. Therefore, further analysis of the concept of public powers should be directed towards the question of what is the content of authoritative performance.

According to some authors, public powers as the powers of their holders (non-state entities) to act authoritatively mean that their holders in that scope: 1. regulate certain relationships of broader interest with their general acts, 2. make decisions on specific situations through the adoption

[12] P. Bouvier, *Éléments de droit administratif*, De Boeck & Larcier, Bruxelles 2002.

[13] Д. Милков, *Управно право,* књ.1, Правни факултет, Нови Сад 2009, 95.

[14] З. Томић, *Управно право, систем*, Правни факултет, Београд 2002, 252.

[15] Д. Милков, 96.

[16] С. Лилић, *Управно право / Управно процесно прво*, Правни факултет, Београд 2013, 168.

of certain legal acts and 3 exercise other public powers (e.g. issuing public documents).[17] What non-state entities do in such cases is to exercise those powers that the administration has and those are administrative powers.[18] However, starting from the determination of the content of the authoritative performance of administrative bodies, which includes the adoption of administrative acts and the performance of administrative actions in certain situations, the adoption of general legal acts, the exercise of administrative supervision and the issuance of public documents, it is concluded that non-state entities can be entrusted with only certain powers. Those powers are not precisely defined by legal regulations, but it can be concluded that they include the adoption of administrative acts, the regulation of relations of broader social importance by general acts and the keeping of public records as well as the issuance of public documents, but not the exercise of administrative supervision and the performing administrative actions.[19]предузимање управних радњи.

In theory, it is emphasized that the decision on which entities will be entrusted with public powers is not free, it does not depend on the discretion of the legislator, but that it is conditioned by the nature of the activities of certain entities.[20] In fact, the main reason why certain entities, such as public services, are entrusted with public powers, has to do with the need to ensure the orderly functioning of those services that perform activities that are of public interest. In order to perform that activity properly and easily, they need to have limited powers for authoritative performance.[21] The interest of the state as well as its transfer of public powers, is reflected in the importance of those activities for the normal development of life in the community, so it is a question of vital, and not derivative interests.[22]

In the presented theoretical framework of the understanding of the distinction between public and private law and the peculiarities of (public) legal entities in public law, the question of the character of the legal subjectivity of churches and religious communities has raised. In the attempt to understand the legal nature of their subjectivity, the need for a comparative legal analysis of positive solutions inevitably arises, but before that it is important to consider the essential frameworks of freedom of religion and

[17] П. Кунић, *Управно право (општи и посебни дио)*, Правни факултет, Бања Лука 2001, 290.
[18] Д. Милков, 95.
[19] *Ibid.*
[20] *Ibid.*, 96.
[21] Б. Милосављевић, *Управно право*, Правни факултет Унион, Београд 2013, 178.
[22] Д. Милков, 96, 97.

the autonomy that such subjects enjoy, precisely for the purpose of realising freedom of religion, which is a framework to understand the dilemma regarding the question on what basis and to what extent such entities have public powers, as well as the other characteristics that would classify them as legal entities under public law.

### 4. The Autonomy of Churches and Religious Communities

Basically, autonomy is a form of organisation in which certain territories or social groups, due to their particularity, have a special status and autonomous rights. The set of those autonomous rights, the means for their realisation and the special organisation make up the autonomous status of those territories and social groups within a state that guarantees such status by its own will.[23]

In many aspects, religious organisations are among the oldest communal structures known to mankind. Their self-determination with rooted existence often historically precedes the formation of modern states. In this sense, by guaranteeing freedom of religion, modern states accept the autonomy of churches and religious communities in structuring religious affairs and its protection as the core of the protection of freedom of religion. In fact, freedom of religion is not an exclusively individual right that only an individual can enjoy. According to the character of the subjects / entities who enjoy it and the way they enjoy it, freedom of religion is an individual right, but also a right that is enjoyed in community with others.[24]

Exercising freedom of religion in community with others leads to the autonomous existence of churches and religious communities and it is the legal basis for the formation of *new* churches and religious communities. The European Court of Human Rights is of the opinion that Article 9 of the Convention, which guarantees freedom of religion, must also be interpreted in the context of its Article 11, which guarantees freedom of association and protects associations from unjustified interference by the state, *since religious communities traditionally exist in the form of organised structures.* In that perspective, according to the understanding of Court, the right of believers to freedom of religion, which includes the right to exercise their faith in community with others, also includes the expectation that

[23] Д. Митровић, „Аутономија као појам и облик. О смислу, врстама и домашајима аутономије”,
*Анали Правног факултета у Београду* 3–4/2003, 417.

[24] В. Димитријевић, М. Пауновић, *Људска права*, Београдски центар за људска права, Београд 1997, 176.

they will be allowed to associate freely, without arbitrary interference of the state,[25] *and the right of religious communities to autonomous existence is at the very centre of guaranteeing freedom of religion.*[26]

Freedom of religion also includes institutional religious freedom, which the theory sometimes even calls corporate freedom.[27] Corporate freedom of religion is not a simple aggregation of the individual interests of members, it is not the totality of individual freedoms, but a set of rights, immunities, privileges and competencies of religious organisations (churches and religious communities), and in this sense it represents the freedom of a community of people, who share the same faith to organise and regulate corporate life in accordance with their ethical and religious rules.[28]

The autonomy of churches and religious communities, in a narrower sense, imply the right of religious organisations to decide and manage their internal religious affairs, without interference of public authorities.[29] More precisely, the essential framework of religious autonomy includes: the ability to determine basic beliefs, dogmas, doctrines and teachings; the range of issues related to religious service (issues of rites, rituals and liturgy, establishment of places for service, preaching, clergy, religious employment and engagement, etc.); determination of affiliation to a religious organisation, participation in its activities, withdrawal and exclusion from it, determination of the nature, management and territorial arrangements of substructures, as well as financing; and, finally, but perhaps the most important for the topic of this paper, the right to exercise religious life within the framework of a corresponding legal entity (subjectivity) or without it, which is inextricably linked to the right to create one's own subentities and their recognition in accordance with the decisions of the religious organisation and encountering state regulation of their activities in culture, education, humanitarian work, health care, etc.[30] In one part of domestic

[25] *Metropolitan Church of Bessarabia v. Moldova*, Application no. 45701/ 99, par. 118

[26] *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, Application no. 40825/98, par.78–79; *Hasan and Chaush v. Bulgaria*, Application no. 30985/96, para. 49.

[27] С. Аврамовић, *Црква и држава у савременом праву, Прилозу настанку државноцрквеног права у Србији*, Правни факултет, Београд 2007, 98.

[28] L. Bloß, „European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process", *Jean Monnet Working Paper* 13/03, 28.

[29] W. C. Durham, „The Right to Autonomy in Religious Affairs: A Comparative View", in: *Church Autonomy: A Comparative Survey* (ed. G. Robbers), Peter Lang, Frankfurt am Main 2001, 687.

[30] W. C. Durham, „Religion and the World's Constitutions", in: *Law, Religion, Constitution* (eds. C. Durham *et al.*), Ashgate Publishing Limited, Farnham 2013, 9–10.

works dedicated to state church law, it is considered that the basic rights that churches and religious communities have on the basis of autonomy include: the right to self-determination, i.e. the right to be recognized not only the historical but also the eschatological dimension of the church, the right to independently organize and implement their order and organization and to independently and freely carry out their internal and public affairs, the right to be carriers and generators of legal subjectivity, i.e. to give and abolish the status of legal entity to their organizational units and institutions, the state's guarantee that they will not interfere with the application of autonomous legal regulations of churches and religious communities, the right to transmit and spread their culture and their spiritual experiences through the public media service, as well as through the educational system, i.e. the right to organize and conduct religious studies, and the right to independently manage their property and funds, in accordance with their own autonomous regulations.[31]

Moreover, in certain theoretical works, with reference to Calvinist terminology and understandings, it is pointed out to the separation of the concept of autonomy from the concept of *the internal sphere of sovereignty.* Starting from the position according to which it is necessary to make a distinction between the exercise of power and decision-making by an organization in terms of a concession given to it by another organisation, which is considered autonomy, on the one hand, and the exercise of internal authority in its own right, which is designated as the internal sphere of sovereignty, on the other hand, it is concluded that the sphere of internal sovereignty implies relations between two or more distinctive social entities such as church and state. In that relationship, the internal sphere of competences of those institutions (church and state) does not depend on the concession of the other party, but it belongs to each of them in accordance with their own right and it is based on their existence and functioning as independent components of human society.[32] The presented approach mostly refers to analysis of the results of the internal exercise of power and management in churches and religious communities. The question that affects the character of the legal subjectivity of churches and religious communities in the state legal order is whether and to what extent the result of such an internal exercise of power and management in religious organisations has or can have

[31] М. Радуловић, *Обнова српског државно-црквеног права*, Фондација Конрад Аденауер, Београд 2009, 118.

[32] J. D. van der Vyver, „Constitutional Protections and Limits to Religious Freedom", in: *Law, Religion, Constitution* (eds. C. Durham *et al*.), Ashgate Publishing Limited, Farnham 2013, 106–107.

an impact on its external effects as well as the effects in the state legal order. For this reason, the focus of attention should be directed to the comparative legal analysis of the character of the legal subjectivity of churches and religious communities.

## 5. Legal Subjectivity of Churches and Religious Communities in Comparative Law

It is not surprising that in contemporary comparative law the range of organisational structures of churches and religious communities is as diverse as the range of the very religions.[33] Before the brief presentation of the basic characteristics and nature of the legal subjectivity that churches and religious communities enjoy in comparative law, it is important to point out the basic directions of the development of that issue and certain international standards regarding it.

The organisational structures and the character of legal subjectivity, which churches and religious communities enjoy in comparative law, undoubtedly depend on the historical heritage and the general relationship between the state and churches and religious communities, which can be positioned on a wide scale from strict separation to the regime of the state church or the prevailing religion, which is regulated by national constitutional provisions. Nevertheless, despite the existence and availability of various organisational structures, certain convergent processes in that field can be noticed, as well as international standards, developed primarily in the practice of the European Court of Human Rights. The most striking characteristic of comparative legislation, which deals with religious organisations is the one that it is primarily used to facilitate rather than to control religious activities, and to develop legal structures to increase religious pluralism, which religious organisations, to whom such structures are available, may find adequate for performing their legal and practical activities.[34] Basic international standards related to this issue include: the right of religious organisations to legal subjectivity, which will enable the performance of their activities; the prohibition of mandatory registration, or more precisely, the possibility of religious groups to choose whether they will perform their activities without acquiring formally such a status; the regulation of the registration process so that it does not present a major obstacle when it comes to the acquisition of legal subjectivity; the legal subjectivities of

[33] W. Cole Durham, „Legal Status of Religious Organizations: A Comparative Overview", *The Review of Faith & International Affairs* 2/2010, 3.

[34] *Ibid.,*3–14.

religious organisations should operate in the systems, based on the rule of law; the process of acquiring legal subjectivity must not be discriminatory; the requirement regarding the minimum number of members needed for the acquisition of legal subjectivity must not be high; the fact that it is a foreign religious group or a group based abroad is not a valid basis for denying legal subjectivity; the process of acquiring legal subjectivity should not be subject to manipulation by officials for the purpose of delay; in the process of acquiring legal subjectivity, discretionary decision-making by the state, when it comes to assessing the legitimacy of religious beliefs, is not allowed; in the process of acquisition of legal subjectivity, civil servants have a strict obligation of neutrality and impartiality with regard to religious organisations; it is not allowed to interfere in internal religious affairs; in accordance with the principles of autonomy of religious organisations, the state should not require religious groups to structure themselves in a way that is not according to their beliefs regarding that structure; in the process of acquiring legal subjectivity, legal remedies must be available; regarding the extent to what the registration rules impose restrictions on the exercise of religion, only restrictions provided for in international instruments are allowed and must be narrowly interpreted; in case of changes of the laws that regulate the acquisition of legal subjectivity, adequate transitional rules should be included in order to protect the acquired rights of religious bodies, organised under the previous law.[35]

In comparative law, churches and religious communities do not have the same legal position, nor rights within the formal neutrality of the state and its separation from churches and religious communities. On the contrary, in many countries, there are significant differences in the legal position and scope of rights that certain churches and religious communities enjoy. Even in the systems where they, basically, have the status of legal entities under private law, churches and religious communities can differentiate from other associations and have access to a legal status that corresponds to their specific religious needs. Moreover, in the majority of, at least European countries, it is clear that the legal position of churches and religious communities is regulated in stages and that, upon meeting certain, stricter conditions, they can be recognised with a special status, including the status of legal entities under public law, which enables the exercise of certain sovereign rights (e.g. church tax), or they can be granted "special rights", which include state financing, religious education in public schools and stronger cooperation with the state as well as performance

[35] *Ibid.,*8.

of the activities within the public domain.[36] In the following sections, we will give several examples.

The legal position of churches and religious communities in France is regulated by laws from 1901, 1905 and 1907, which have been partially amended. The 1901 law regulates associations. The 1905 law on the separation of church and state ended the existence of "recognized churches". According to that law, no religion receives state establishment, and churches and religious communities cease to be public institutions and become part of the private sector.[37] Although they are not public institutions, nor they are established by the state, which actually reflects the state's neutrality towards them, churches and religious communities are subject to a series of special rules in French law. Those rules do not refer to the status of churches and religious communities as such, but rather to institutions and bodies that are important for their work. In fact, French legislation does not always treat churches and religious communities as institutions of private law, but foresees various forms of association through which they can have the access to a legal status, which corresponds to their specific religious needs and through which they can realise tax benefits and public financing of certain activities. Thus, an association founded under the provisions of the 1901 Law (and the majority of Protestant and Jewish organisations belong to that corpus) can be declared an association of public interest by decree. After the First World War and the improvement of relations between France and the Holy See, an agreement was reached according to which the Roman Catholic Church in France could establish diocesan associations (*associations diocésaines*). The core of such associations, which have been established since 1924, is that they can be considered religious associations with a special status.

According to Article 137 of the Weimar Constitution, which has become an integral part of the Basic Law of the Federal Republic of Germany, churches and religious communities acquire legal subjectivity in accordance with the general provisions of civil law, which *prima facie* would make them legal entities under private law. However, religious associations with legal subjectivity, acquired on the basis of civil law, are not associations like others. They do not lose the special constitutional protection, enjoyed by all religious communities, regardless of their legal subjectivity. In this sense, it should be underlined that their constitution is not an ordi-

[36] В. Ђурић, „Слобода вероисповести и правни субјективитет цркава и верских заједница у европским земљама", *Страни правни живот* 1/2012, 50.

[37] B. Basdevant-Gaudemet, „State and Church in France", in: *State and Church in the European Union* (ed. G. Robbers), Baden-Baden 2005, 160.

nary association statute, but the independent right of religious communities to have specially regulated rules on membership, etc., which means that it must be taken into account that it is a religious association when interpreting and applying the provisions of the Civil Code on associations.[38]

Starting from the situation present at the time of its adoption, the Weimar Constitution, in paragraph 5 of the same article, has provided that religious communities shall retain the status of corporate entities under public law (legal entities under public law) if, and to the extent they enjoyed that status in the past, while it has been provided that other religious communities shall have the same rights, i.e. the legal status of legal entities under public law shall be recognized (at their request) if their constitution, i.e. organisation and number of members guarantee permanence. For churches and religious communities that have the status of legal entities under public law, the Constitution explicitly provides that they have the right to collect taxes in accordance with the laws of the federal units. Moreover, the laws also contain a number of provisions that give legal advantages to churches and religious communities with the status of a public law corporation. Thus, besides tax collection, the status of a public law corporation includes several so-called corporate rights such as, for example: the right to employment in the status of employees as civil servants and to establish an employment regime of a public law nature; competence to create other subjects / entities of public law (within churches and religious communities); the right to establish autonomous legislation on the own affairs of churches and religious communities, which is also binding for the legal order of the state; parochial law (ie the right of the church to bind *ipso iure* all members living in a certain area); the right to create public church property, especially church buildings and church bells, to which the state law on public property applies. Bearing in mind the presented constitutional provision on the conditions for recognising the status of a legal entity under public law, the question arises as to whether public authorities have a broad area of assessment. In the decision in the case of the

[38] In this sense, the questions arise: does the self-determination of an association play a key role in determining its religious nature and what are the limits of state decision-making in that area? In its decision on February 5, 1991, in a dispute initiated by the Bahai religious community, the Federal Constitutional Court stated *that a community cannot claim to be a religious community based on its assertion and self-understanding, and on that basis justify invoking guaranteed constitutional freedom (...), moreover, it also must show by facts and the spiritual content and external appearance that it is a faith and religious community.* Further, it has stated that *in case of a dispute, and that is checked by a state body, as an application of the state-legal order, (...), as well as that the very term religious community indicates that it refers to the association based on the state-legal order, and not to a purely spiritual community of a cult.* - Bwerf GE 83, 341(353) – see comment in A. V. Campenhausen, H. De Wall, *Staatskirchenrecht*, 2006, 116.

religious community of Jehovah's Witnesses, which required the recognition of the status of a legal entity under public law, the Federal Constitutional Court partially specified those conditions. The court took the position that the conditions of constitutional structure and permanence do not imply only the legal act by which that structure is regulated, but also that they should be understood as a general current state of the church or religious community and a certain number of members. Moreover, the Court considered that the unwritten condition for the recognition of the status of a legal entity of public law consist of the loyalty, which the church or religious community should have towards the legal order. Such loyalty is reflected in acting in accordance with the law, especially when exercising the sovereign rights granted to churches or religious communities by that status, as well as in ensuring that the actions of the church or religious community will not jeopardize the basic principles contained in Article 79, paragraph 3 of the Constitution, fundamental rights of third parties, legal state and democracy. The recognition of the status of a legal entity under public law is within the competence of the federal units. The presented criteria for recognising the status of a legal entity under public law, contained in the provision of the Weimar Constitution, which is taken over by the Basic Law, and its interpretation given by the Constitutional Court, are not regulated more precisely by any lower general legal act passed at the federal level.[39] The recognition of the status of a legal entity under public law is carried out by various legal acts - a law (in Bremen, North Rhine-Westphalia), a decree (Hamburg), a conclusion of the provincial government (Baden Württemberg, Berlin, Lower Saxony, Saarland), or a decision of the Minister of Culture (Bavaria).[40] The decision on the recognition of the status of a legal entity under public law by the executive authority is by its legal nature an administrative act. As a "supra-regional act", the recognition of that status has a partial effect outside the federal province where it was carried out, in the sense that legal subjectivity is recognised throughout the territory of the federal state, while the sovereign powers, granted by that status are limited to the province, which has granted them.[41]

[39] On the contrary, in practice, they are determined so that the minimum number of members implies at least one per mille of the population of the federal unit, so that necessary the active participation of the religious community in the life of the local community, the availability of funds for financing, and the existence of the community for at least 30 years in FR Germany are necessary. - See more about those conditions in: B. Küster, „Germany, Administrative and Financial Matters in The Area of Religious Freedom and Religious Communities", in*: Legal Aspects of Religious Freedom, International Conference Legal Aspects of Religious Freedom*, Ljubljana 2008, 343.

[40] A. V. Campenhausen, H. De Wall,139.

[41] *Ibid.*

By the way, the presented provisions were not the only norms by which the Weimar Constitution regulated the legal position of churches and religious communities, and which became an integral part of the Basic Law. Article 138 stipulates that the right of (all) religious associations to state aid, based on law, contract or other legal basis, shall be regulated by the laws of the federal units, based on the principles, determined by the Reich. The same article guarantees the right to property and other religious associations rights with regard to their institutions, establishments and other goods that serve worship, education and charitable activities. The stated provisions of the German Constitution on freedom of religion and the legal status of churches and religious communities were elaborated in the laws that were passed at the level of federal units after the entry into force of the Basic Law, but also in concordats and specific agreements between the state, i.e., federal units and churches and religious communities.[42]

Article 16, paragraph 3 of the Spanish Constitution stipulates that no religion will have a state character, that public authorities will take into account all religious beliefs and will therefore maintain appropriate cooperation with the Roman Catholic Church and other denominations. The Spanish ecclesiastical legal system is regulated by acts that have a pyramidal structure, and the agreements with the Holy See, through which the Roman Catholic Church gets the most rights, are the part of that structure, just below the constitution. After that, there are the agreements concluded by the state, that is, those which the state can conclude with churches and religious communities that are entered in the register, provided it is justified by their influence in society according to the area or the number of followers. Such agreements have to be approved by Parliament in the form of law, and are therefore of a different legal nature than international agreements since they can be amended by a unilateral act of Parliament. Finally, the regime has been established by the Organic Law on Religious Freedom. Such a pyramidal structure shows a hierarchical legal order.[43] The above-mentioned sources of law prescribe different rights of individual churches and religious communities within the formal separation of state and church. In fact, it can be concluded that in Spain there are four different legal statuses of the following religious structures: The Roman Catholic Church, churches and religious communities that are entered in the register and that have a strong

[42] On such contracts, see В. Ђурић, „Уговорно државно-црквено право", у: *Државно-црквено право кроз векове* (ур. Владимир Чоловић *et al.*), Институт за упоредно право, Митрополија Црногорско–приморска, Београд–Будва 2019, 357–392.

[43] I. C. Ibán, „State and Church in Spain", in: *State and Church in the European Union* (ed. G. Robbers), Baden-Baden 2005, 246.

influence in Spanish society and based on that the state has concluded special agreements with them, churches and religious communities that are entered in the register and religious groups that are not entered in a special register, but may have the legal status of ordinary associations.[44]

The most important law, after the Constitution, which regulates the legal position of churches and religious communities in the Czech Republic is the Law on Religious Freedom and the Position of Churches and Religious Communities from 2002, but their position in certain areas of social life is also regulated by special laws. A very important legal source that regulates certain aspects of the position and activities of churches and religious communities are the agreements between them and the state. Those agreements regulate the issues from certain areas of social life. The legal status of all churches and religious communities is not the same. There are churches that have "basic legal subjectivity", ie. the status of a legal entity, and churches and religious communities that enjoy "special rights", such as: teaching religion in public schools, founding schools, the right to state funding, pastoral care in prisons and the army, etc. However, it is an open question whether churches and religious communities that enjoy special rights can be subsumed under the category of legal entities under public law, since that term[45] is not defined the Czech legal system. In fact, that model can be considered an adequately set symbiosis of (predominantly) private law and (partly) public law characteristics of churches in the Czech Republic.[46]

In 2007, Slovenia adopted the Law on Religious Freedom, which is the basic legal act that, besides the Constitution, regulates relationship between the state and churches and religious communities. However, although there are no explicit constitutional provisions, in the Republic of Slovenia, besides the enacted law, special agreements have been concluded with churches and religious communities. By their nature, such agreements are not identical acts. The agreements with the Holy See are, by their nature, international agreements, which are above other acts in the hierarchy of legal acts.[47] Agreements with other churches and religious communities

[44] G. M. Morhn, „The Spanish System of Church and State", *Brigham Young University Law Review* 2/1995, 541.

[45] J. R. Tretera, „State and Church in the Czech Republic", in: *State and Church in the European Union* (ed. G. Robbers), Baden-Baden 2005, 41.

[46] See the chapter in this collection: K. Frumarová, „Churches and Religious Societies in The Czech Republic – Private or Public Institutions?"

[47] D. Čepar, „Religious Freedom and Religious Communities in the Republic of Slovenia", in: *The State and Religion in Slovenia*, Ljubljana 2008, 20.

in Slovenia were concluded even before the 2007 Law entered into force. The Slovenian law explicitly prescribes in Article 6, paragraph 3 that registered churches are legal entities under private law.

### 6. The Necessity and Legitimacy of Public Law Subjectivity

On the basis of a very concise comparative law presentation, it is clear that churches and religious communities enjoy not only legal subjectivity, but in a different system of state-church relations, whether they are based on the principle of (strict) separation, cooperation or the existence of a state church/prevailing religion, they enjoy *public law* or *special* legal subjectivity, even when it is expressly determined as private law by positive law. That legal subjectivity is in many respects adaptable to the theoretical determinants of legal entities of public law, which were discussed in the previous sections of this paper, and the possible explicit norming of its private law character is rather a consequence of the normative consistency in the interpretation and postulation of the separation of the state and churches and religious communities than identical equalisation of its position with other private law subjectivities.

Such public law character of the legal subjectivity of churches and religious communities, which does not negate the possibility of their participation (and) in private law relations, is necessary and legitimate in modern law where the division into public and private is inevitable and scientifically relevant.

It is necessary primarily because autonomy, as an essential characteristic of churches and religious communities, implies the existence of their special normative order, their right to regulate relationships of their own importance and within their own structures. That autonomous normative order inevitably "meets", mutually interacts and also, with all the differences, it forms some kind of intersection with the normative order of the state. Naturally, the possibility of autonomous creation of legal norms does not mean *eo ipso* that the entities that create them are legal entities under public law, since such way of thinking would lead to the pointless conclusion that individuals are also considered as the entities under public law, but it paves the way for consideration of the question of whether and if yes, when it is possible for the autonomous creation of legal norms to have effects in another normative order, the one created by the state and other entities of public law, as well as whether churches and religious communities as creators of autonomous law can effect the recognition of its effects in the normative legal order of the state.

In this sense, it is clear that even acts that regulate issues, which by its nature, purpose, *and even its own self-understanding* of churches and religious communities, fall within their exclusive, internal sphere of competence for making norms, can create rights and obligations for third parties. For example, the regulation of access to religious facilities and institutions, which is undoubtedly in the very field of affairs of churches and religious communities, may inevitably include the regulation of the third parties' rights to access those facilities and institutions. That also reflects the necessity of certain public law characteristics of the legal subjectivity of churches and religious communities.

Starting from their own autonomy, which also includes the right to self-organisation, churches and religious communities use their acts to form, change and abolish different forms and entities, which, in order to effectively carry out their mission, may have the status of a legal entity. Precisely the right to create legal subjectivity, i.e., to grant and abolish the status of legal entity to their organisational units and institutions, which is followed by the state's *obligation* to recognise such subjectivity, because the state must not deal with religious organisation, gives (adds) churches and religious communities the status of legal entities under public law. On the other hand, in order to prevent such creation of legal subjectivities, and even those of a public law character from continuing ad infinitum, or more precisely, to stop newly created legal subjectivity by churches and religious communities to further generate legal subjectivities, there must be a qualitative difference between them in rights and powers. It originates from the very acts of autonomous law and undoubtedly gives *potestas* to churches and religious communities as creators of the others' legal subjectivities, and the regulation of internal public legal relations must necessarily have effects in the state legal order as well.

Apart from creating norms, i.e. regulation by general norms, the autonomy of churches and religious communities also includes the right *to command* in internal affairs, which is carried out by adopting individual norms, most often in matters of election and appointment, management, adjudication, etc. The authority to command within the churches and religious communities would not be complete, nor possible if the state did not accept the decisions of church bodies and institutions. Also, it would not be possible without the immediate legal effect of such decisions, and any state acts that follow those decisions can only have a declarative legal effect, or more precisely, they can only state that the decision of competent authorities and bodies of churches and religious communities has been made. For example,

from a legal point of view, a person becomes the Patriarch of Serbia by the decision of the Holy Synod of Bishops and from the moment of making such a decision, and not by entering that fact in the appropriate register, maintained by the competent state authority that is obliged to make such an entry. That level also reflects the necessity of public law subjectivity of churches and religious communities.

Since churches and religious communities do not have their own bodies that would directly, and if necessary, also by using physical force and performing other material actions, implement their legally adopted decisions in the domain of public law, they must use state aid. *Brachium seculare*, state aid to which churches and religious communities have the right in case of need, and the state is obliged to provide it, is also an indicator of the necessity of their subjectivity under public law. Indeed, one could ask a question whether the autonomy of churches and religious communities could exist at all if, for example, decisions on dismissing priests or religious officials and ordering their eviction from religious buildings were not implemented.

Churches and religious communities as legal entities dispose of property. Of course, their disposal of property is possible in private law, civil relations and through civil law affairs. However, the property of churches and religious communities in many aspects is subject to a special legal regime. In this sense, it is enough to point out that they are the owners of movable and immovable cultural property whose status, on the one hand, greatly limits property rights, but, on the other hand, also protects them in a special way (e.g. by making impossible forced sale of property). There are also *res sacrae*, items that have a ritual purpose, tax reliefs that churches and religious communities enjoy, the impossibility of expropriation of religious property, the possibility of performing economic activities, but with adequate limitations arising from the role they have and the mission they perform, etc. All of those are the clear indicators of the special legal subjectivity of churches and religious communities and the necessity of its normative postulation.

The role and mission of churches and religious communities is inextricably linked with the performance of activities that serve the general interest and facilitate the satisfaction of citizens' needs in various areas of social life. They can perform public services and establish institutions for the purpose of - cultural, educational and scientific activities, health care, social and charitable activities, etc. Public services performance implies public powers in the domain of activities in which they are performed (e.g.

recognition of exams by the theological higher education institutions), as well as keeping adequate public records and issuing public documents (e.g. certificates that a person is a student of a religious school) that have effects in the sphere of state law and are provided with the assumption of accuracy, just as in other cases of public documents. The peculiarity of the performance of public services by churches and religious communities, which is realised through the right to generate new legal subjectivities, more precisely the right to establish institutions for their performance, which will be discussed more in the following sections, is not based on transferred public powers, but stems from the very role and mission of churches and religious communities.

The reasons that lead to the need for the public law subjectivity of churches and religious communities include the modalities of their inclusion in the activities and work of public authorities, other public services established by the state and other political-territorial units, as well as public media services, in order to satisfy religious needs of the population and easier realisation of the right to freedom of religion. In contemporary domestic works, which deal with the public powers of churches and religious communities, some part of such modalities is, not without reason and very lucidly, labelled with the term *participatory public powers.*[48] In this sense, it is necessary to mention that churches and religious communities must necessarily be involved in the creation, organisation and implementation of religious teaching in public educational institutions, if there are any, and there should be, since they are based on the right and need of parents and guardians, who are believers, but also taxpayers, to provide their children with a religious education in accordance with their own worldviews. Also, that set of reasons should include the performance of religious ceremonies as well as the organisation of pastoral care in the police, army, and prisons. Churches and religious communities are also approaching the status of legal entities under public law with their participation in the development of urban plans for the construction of religious buildings, since in that process they legitimately express the needs of believers. Finally, their participation in the creation of programs of public media services, based on the need of believers to be timely and objectively informed, among other things, on important religious issues, as well as to have the opportunity to follow a

[48] В. Марковић, „О јавним овлашћењима цркава и верских заједница у светлу Митровданског устава и Закона о црквама и верским заједницама", у: *Прилози државно-црквеном праву Србије,* Зборник радова са научног скупа поводом 15 година од доношења Закона о црквама и верским заједницама (ур. Владимир Ђурић, Владимир Чоловић), Институт за упоредно право, Београд 2022, 113.

program that contains spiritual values, which can be institutionalised in different ways, undoubtedly classifies churches and religious communities as special entities of public law.

Since they can perform activities that realise the general interest and facilitate the satisfaction of citizens' needs in various areas of social life and participate in the activities and work of public authorities, public services established by public authorities, as well as public media services, in order to satisfy the religious needs of the population and easier realisation of the right to freedom of religion, churches and religious communities can receive subsidies from public, budgetary sources, and part of their activities, especially with regard to the maintenance of cultural assets, in many systems is necessarily financed with public funds.

Finally, but perhaps most importantly, the ways of regulation and institutionalisation of all the above - mentioned reasons and aspects of the relationship between the state and churches and religious communities, besides the one that entirely stems from the state and implies the regulation through legal and constitutional provisions, also include their contractual regulation through agreements, concluded by the state with churches and religious communities. That type of regulation does not occur only in the systems, where it is explicitly provided for by the norms of the state legal order (e.g. FR Germany, Spain), but also spontaneously, since a number of issues related to the inclusion of churches and religious communities in the activities and work of the public authorities, public services established by public authorities, as well as public media services, and with the aim to satisfy the religious needs of population and facilitate the realisation of the right to freedom of religion, cannot be pre-determined and regulated without the participation of churches and religious communities. By their legal nature, such contracts are undoubtedly public – law contracts, and through their conclusion, albeit in a limited sense and scope, the will of churches and religious communities, in cooperation with the state, becomes a source of law.[49] That is another reason for the necessity of the existence of public law subjectivity of churches and religious communities.

Besides consideration of all the above - mentioned reasons in favour of the necessity of existence of the public legal subjectivity of churches and religious communities, it is also necessary to refer to the questions of whether and if so, when and why such a character of the legal subjectivity of churches and religious communities is legitimate in modern society and the state.

[49] В.Ђурић (2019), 391.

As pointed out, certain religious organisations are among the oldest community structures known to mankind, and their self-determination and rooted existence, have often historically preceded the creation of modern states. In the process of political constitution of society as a whole, which inevitably implied the division of the public and private spheres, they were often an active participant, either by giving legitimacy to such constitution and making a significant contribution to historical, cultural, even national integration and state-building affirmation, or by opposing the ambitions of absolute secular rulers to subjugate all spheres of social life, and (even) religion. As a result of that process, they found themselves both in the sphere of privacy and in the sphere of the public. More precisely, they gained essential freedom from state control, but not in the sense of an equal sovereign, but in the form of essential autonomy, remaining subject to general state regulation and deserving special respect and special protection in the political community. The basis of such special respect and special protection of churches and religious communities is found in the fact that their members might not agree with the general social agreement that creates a political community, if their inclusion in such a community implies that they are exposed to the risk of violating their strong religious principles.[50]

The special respect and protection that churches and religious communities enjoy in the political community implies the existence of complex and delicate organisational structures with different legal subjectivity, which the state order must make available to their choice. This is the way to satisfy the religious needs of different religious groups through the selection of appropriate organisational structures and types of legal subjectivity as well as to enable true social pluralism and peace. It is undeniably legitimate that different religious groups feel the need to act and organise their lives through different organisational structures, in a wide range, starting from informal associations to structures whose legal subjectivity and action require adequate effects in the sphere of public law. Just as the existence of different religious groups is one of the characteristics of social pluralism, so is the existence of different types of legal subjectivities, within which they act as a mirror, confirmation, but also as a special form of protection of such pluralism.

The existence of churches and religious communities that are legal entities under public law, whose actions and decisions can have public law effects, is not a violation of the separation of the state and the church, if it can be even spoken of such a separation in modern conditions of broad so-

[50] W. C. Durham (2013), 21.

cial participation. On the contrary, it could be also regarded as some type of corrective and limitation of state power, because the state power is deprived of the possibility to deal with delicate issues that are within the jurisdiction of churches and religious communities, and whose resolution, according to that, requires certain effects in its legal order. After all, the state is no longer, if it has ever been, omnipotent in the Hobbesian understanding of its sovereignty.

The possibility that certain churches and religious communities act within organisational structures that are legal entities under public law does not represent a violation of equality. On the contrary, it is just a simple fact that all churches and religious communities, just like the religious groups, which gather the religions, whose teachings they preach, are not the same. The equality of churches and religious communities through some uniform legal structure in which they would be allowed to act and which would be imposed on them by the state legal order, would not be in accordance with the fact that equality is not the only social value. The tiered legal subjectivity of churches and religious communities, which enables them to be recognised as legal entities under public law after meeting certain, stricter conditions and which is explicitly postulated by certain European countries, does not violate the anti-discriminatory norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, if churches and religious communities can apply for such status under equal conditions and provided that the established criteria are not applied in an arbitrary and discriminatory manner. Such an approach reflects the assumption that there are reasonable and objective reasons that justify different treatment, and that they stem from history, tradition, existing obligations, identity formation and limiting the role of government, preservation of social peace and the practicality of dealing with large churches and religious communities.[51]

In the context of the legitimacy of the public-law subjectivity of churches and religious communities and the reasons why it is imposed as such, one question calls for special attention. It is the issue of the past, more precisely the longevity and traditionality of certain churches and religious communities as a justification of the recognition of their status as legal entities under public law. That longevity and traditionality are legitimate bases for the public legal subjectivity of churches and religious communities, more precisely for the recognition that their actions and acts can have effects in the state legal order, is also clear from the fact that their

[51] W. C. Durham (2010), 6.

existence is comparable to other ethno-cultural phenomena that precede the creation of modern states such as ethnic and linguistic groups. And just as such groups can have, most often non-territorial, autonomy in matters of vital importance for the preservation of their particularities and, through the bodies that represent them, decide on essential matters of importance for the preservation and development of their own culture and language, which public authorities should accept, in the same way, churches and religious communities must have the possibility to decide on issues of their own interest with the effect in the legal order of the state. Nevertheless, there is an essential difference between the public law subjectivity of churches and religious communities and the legal subjectivity of such non-territorial-autonomous bodies on the one hand, and churches and religious communities and other legal entities under public law, whose creator is the state, on the other. Namely, since churches and religious communities represent organisations *sui iuris et sui generis*, which means that the right to command has not been given to them by the state, but that, in certain areas, they have it by themselves,[52] it is clear that their public law differs from all the others in its origin, and that public powers are inherent in them.

## 7. Conclusion

The old division into public and private law, which is even today inevitable and scientifically relevant, and which is based on the particularities of many elements of law inherent only to public or only private law, includes and refers to subjects of law as well. Subjects of public law are a special category of subjects based on their origin, character, legal regime to which their activities and property are subject, as well as the predominant type of legal acts they enact, which decide on the rights and obligations of other persons and/or create legal consequences in public sphere. Those are entities that have been established by the public authority and/or that, even if they have been established by private individuals, they perform public services and are provided with public powers in order to achieve the public interest.

Churches and religious communities are among the oldest communal structures known to mankind, and their existence often historically precedes the creation of modern states. Modern states, by guaranteeing freedom of religion, accept the autonomy of churches and religious communities as their right to decide and manage their internal religious affairs, without public authorities' interference. The essential framework

[52] С. В. Троицки, *Црквено право*, Београд 2011, 180.

of religious autonomy includes, among other things, the right to exercise religious life within the framework of a corresponding legal entity (subjectivity) or without it, which is inextricably linked to the right of churches and religious communities to create their own subentities and their recognition in the state legal order in accordance with the decisions of religious organisations and encountering state regulation of their activities in culture, education, charity work, health care.

In comparative law, churches and religious communities do not have the same legal position, nor do they have the same rights within the formal neutrality of the state towards religion. The significant differences that exist in terms of the status and character of legal subjectivity, the legal position and scope of the rights enjoyed by certain churches and religious communities, reflect the diversity of religions and depend on the historical legacy and the general relationship between the state and churches and religious communities. However, even in the systems where, in principle, they have the status of legal entities under private law, churches and religious communities can differ from other associations and they can have access to a legal status that corresponds to their specific religious needs. Moreover, in most European countries, their legal status is arranged in stages and they can, upon meeting certain, stricter conditions, be granted a special status, even the status of legal entities under public law, which enables the exercise of "special rights", which ordinary associations do not have, nor they could have them.

Such a "special status" of churches and religious communities is in many respects identical to the status of legal entities under public law. Moreover, it is necessary and legitimate in modern law. It is necessary, since autonomy as an essential characteristic of churches and religious communities implies the possibility that they regulate with their acts the rights and obligations of third parties to a certain extent, and that their decisions, made within the scope of the right of command, have direct legal effects in the domain of state law and, if necessary, they can be carried out with the help of state, that they generate new legal subjectivities, which the state is obliged to recognise, as well as that, by performing public services, they have public powers in the domain of activities in which those services are performed, such as deciding on individual rights and interests, keeping appropriate public records and issuing public documents that have effects in the sphere of state law and are provided with the presumption of accuracy, just as in other cases of public documents. Also, such status is necessary so that they can be included in the activities and work of public authorities,

other public services, established by the state and other political-territorial units and public media services (participatory public authorities) in order to achieve public interest and meet the needs of citizens, as well as to allow them to perform religious ceremonies and organise spiritual care in the police, the army, prisons, etc. If we add to that the special legal regime of the property of churches and religious communities, as well as the possibility of their participation in the regulation of the above - mentioned issues through special agreements, concluded with the state and its bodies, it becomes unequivocally clear that their subjectivity under public law cannot be contested. Such a character of the legal subjectivity of churches and religious communities is legitimate, since, in some cases, they preceded the political constitution of society and/or they have made a special contribution in that process. In this sense, the recognition of the public-law subjectivity of certain churches and religious communities, with the right that others too, under equal conditions, can apply for such a status, is not a violation of equality, but an expression of the simple fact that all churches and religious communities as well as the religious groups, which also gather the religions, whose teachings they preach, are not the same. Such an approach reflects the assumption that there are reasonable and objective reasons, which justify their different status and treatment, and which derive from history, tradition, existing obligations, identity formation and limiting the role of the government, the preservation of social peace and the practicality of dealing with churches and religious communities that gather large number of believers.

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# ЦРКВЕ И ВЕРСКЕ ЗАЈЕДНИЦЕ КАО ПРАВНА ЛИЦА ЈАВНОГ ПРАВА

**Сажетак**

*Предмет овог рада је анализа правног субјективитета цркава и верских заједница. Полазећи од деобе права на јавно и приватно, у раду се указује на карактеристике правних лица јавног права. Након анализе аутономије цркава и верских заједница и њихового положаја у упоредном праву, закључује се да је њихов правни субјективитет близак статусу правних лица јавног права. Цркве и верске заједнице могу својим правним актима стварати права и обавезе у правном поретку државе, генерисати нове правне субјективитете, вршити јавне службе, водити јавне евиденције и издавати јавне исправе, и то чине као организације sui iuris et sui generis. Јавноправни карактер правног субјективитета цркава и верских заједница је у савременом праву нужан и легитиман.*

**Кључне речи:** цркве и верске заједнице, јавно право, правни субјективитет, правна лица јавног права.

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