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RES SACRAE – LEGAL STATUS AND LEGAL PROTECTION**

Summary

The subject of this article is the legal status of res sacrae in the law of the Republic of Serbia, concerning individual solutions of other legal systems. Some legal questions may be raised regarding this traditional institute of ancient Roman law, which reached the regulations of modern canonical law and certain state laws through canon law. Res sacrae should not be considered a special type of property, but special characteristics of the object of property, which deserve some special legal attributes due to their close connection with the worship and freedom of religion. Therefore, this paper presents the characteristics of res sacrae, i.e. the question of transferability, ownership restrictions and ways of acquiring and losing the status of res sacrae. The special characteristics of res sacrae are primarily intended for their protection and preservation of their sanctity, so the question of alternative mechanisms for the protection of res sacrae has arisen. Therefore, the other subject of this paper is the provision of legal protection of res sacrae through the protection of freedom of religion from Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as through national regulations on cultural property.

Keywords: *res sacrae,* consecration, ownership, cultural goods, legal status.

1. Introductory Remarks

Res sacrae is an old legal institution that originates from Roman law and it still exists in modern legal systems to this day. Its meaning and field of application have evolved so that many issues concerning *res sacrae* deserve

* LLM, Junior Research Assistant, Institute of Comparative Law in Belgrade, ORCID: 0000–0001–8818–1464, i.radomirovic@iup.rs.

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comparative legal and historical analysis. The definition of *res sacrae* is not the same in every legal system today and the range of things that can be *res sacrae* may vary. Also, their legal regime is not the same in all countries. For the aforementioned reasons, the initial part of the paper will contain the general characteristics of *res sacrae*, both according to traditional understandings of Roman law and Canon law and in modern legal systems. First of all, the general analysis of *res sacrae* includes the question of acquisition and the loss of the status of *res sacrae*. Secondly, the paper will cover the legal characteristics of *res sacrae*, which primarily refers to the question of the transferability of res sacrae and their suitability to be the subject to enforcement procedure. Through the special legal regime of *res sacrae*, they are also provided with specific legal protection, that is, by their purpose and function.

Furthermore, the paper deals with the issue of protection of *res sacrae* in an incidental way, through other legal mechanisms. Therefore, the further subject of this paper is the possibility of protecting res sacrae through the protection of freedom of religion, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The author will try to answer the question whether the protection of freedom of religion can also be provided with legal protection for things intended for worship and to what extent. Finally, the third platform, through which legal protection of *res sacrae* can be provided, is national and international regulations governing cultural property. In that part of the article, the question will be raised whether *res sacrae* are considered cultural goods, that is, whether they are protected as cultural goods or only some of them. Taking into the account *ratio legis* of the regulation in each case in question, it is necessary to assess whether the protection of *res sacrae* is provided only in an incidental or indirect way, whether all *res sacrae* are protected or only some of them, and whether the special protection of cultural goods also entails special rules which govern the disposition, management and maintenance of res sacrae.

2. *Res Sacrae* in General

2.1. Roman and Canon Law

The term *res sacrae,* in its developed form in Roman law, refers to certain objects that fall within the category of *res extra commercium,* and whose legal regime is caused by their association with sacredness.[1]

[1] H.–R. Held, „*Res sacrae* in Romano–canonical legal Tradition: Vicissitudes of a Roman Legal Concept in Canon Law and Contemporary Legal Systems“, in: *A New*

Therefore, it is clear why for a complete understanding of res sacrae it is necessary to understand several things: firstly, how an object becomes res sacrae, i.e. how it acquires the epithet of "holiness", and as a reflection in a mirror, how an object loses its status as res sacrae, and secondly, how it is accurately reflected on its actual legal regime especially on the issues of management and disposal of that matter.

The examples of *res sacra* in imperial Roman law included temples, land with sacral purposes, columns, altars, utensils used for worship etc.[2] In Roman law, cemeteries belonged to *res religiosae,* while in canon law graves were also part of *res sacrae*, since canon law knew not about such distinction. By the words of Gaius, *res sacrae* were thought to be "nobody's property" (*nullius bonus*), under divine protection, and the legal consequences of that were that they were exempted from any kind of transaction and that nobody could acquire ownership of them. The church, on the other hand, at the beginning of its existence within the framework of the Roman Empire, did not have the status of a legal entity, but was a *collegium illicitum* (illegal entity), and therefore did not have the legal capacity to acquire property.[3]

As for becoming *res sacra*, the object falls within the category of *res sacrae* if it is the object of *consecration.* Before Justinian's law, the act of consecration was conducted by the magister and the priest, and each of them had a separate role. After the Justinian's reform, the sole act of consecration was under the exclusive jurisdiction of the Church.

When it comes to the loss of the status of *res sacra*, the temple that would cease to exist would not cause the land on which the temple was situated to lose its status as well. Also, the res sacra conquered by the enemy would cease to exist as *res sacra* but would be able to restore its status if it were returned to the Roman people.[4] Roman law did not recognize the concept of deconsecration or unmaking a sacred thing, due to the fact that res sacrae were considered as res without the owner so the *actus contrarius* couldn't be performed.[5]

Due to the development of the legal concept of *res sacrae,* the act of deconsecration was introduced in medieval canon law. There is also a mention of reconsecration, which may occur once the sacred object is

Role of Roman Taxonomies in the Future of Goods (eds. M. Falcon, M. Milani), Padova 2022, 121.

[2] H.–R. Held, 122.

[3] D. Perić, *Crkveno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd 2006, 169.

[4] H.–R. Held, 124.

[5] M. Farag, *What Makes a Church Sacred? Legal and Ritual Perspectives from Late Antiquity*, University of California Press, Oakland 2021, 12.

desecrated, either by physical damage or by the usage of the schismatic priest or if the excommunicated person is buried in the cemetery etc.[6] The relevance of reconsecration after the loss of the res in *res sacrae* status, even in case of doubt on whether the Church has already been consecrated, may be pointed out by the fact that the consecration (a well as reconsecration), was compared with the second baptism. When the question was raised before the Fourth Council of Carthage about whether to consecrate a church for which there is uncertainty as to whether it has already been consecrated, the assembled bishops drew an analogy between churches and persons, i.e. baptism, given the fact that a person could be baptised for the second time in case of uncertainty.[7]

As already mentioned, res sacrae were considered in Roman law as things outside of circulation (*res extra commercium*). Thus, strictly speaking, it was not possible to transfer ownership of those things. The reason lies in their sacred character, as well as in the understanding of Roman law at the time when they were the property of the deity, so it is not even possible to sell those things in the absence of a holder "on earth".

2.2. Contemporary Legal Regulations

The importance of the institute *res sacrae* extends beyond the borders of ancient Roman law and its influence can be seen in modern law as well.

Res sacrae are defined in modern theory as movable and immovable things consecrated by church for immediate use in worship.[8] The *ratio legis* for the legal protection of res sacrae ratio is found in the protection of freedom of religion, the right of the church and other religious communities to self–determination and the guarantee of church property.[9]

According to older Catholic canon law, *res sacrae* can be church buildings, altars, chalices, chalices, images of saints, bells and cemeteries, *vasa sacra*, gold and silver vessels, stoles, vestments (used in liturgy), while in Catholic–Protestant law, church buildings, church bells and cemeteries are considered res sacrae.[10] Furthermore, it is a generally accepted position in legal doctrine that objects consecrated for the pious use of believers, such

[6] H.–R. Held, 131.

[7] M. Farag, 20–21.

[8] J. Listl, D. Pirson, *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, Duncker & Humblot, Berlin 1994, 4.

[9] A. F. Campenhausen, H. de Wall, *Staatskirchenrecht – eine systematische Darstellung des Religionsverfassungsrechts in Deutschland and Europa*, Verlag C. H. Beck München, München 2006, 261.

[10] J. Listl, D. Pirson, 5.

as rosaries, candles, and holy water, are not *res sacrae*, and that they are the subject to the general legal regime of goods provided for by the state regulations of the country in question. Despite the absence of the unified view of which things can be *res sacrae*, there are some for which consensus has been reached, such as church buildings, cemeteries and church bells.[11]

As for the legal consequences of such arrangement of res sacrae, it is considered in German doctrine that one of the effects is notably a limitation in the transfer of those things, in the sense that during the transfer of those things, their purpose cannot be changed. Any acquirer of property *res sacra* has to suffer its purpose and must not change it, and even a conscientious acquirer, who did not know or could not have known of its purpose cannot acquire it without this restriction of use.[12] That means that the element of conscientiousness on the part of the acquirer is not important, that is, that the interest in preserving the purpose of *res sacrae* overrides the interest in protecting a conscientious person. *Res sacrae* have a clearly intended purpose, which is direct use in worship, and for the protection of their dignity, they need to be used with respect, and it is not allowed to use them for profane purposes or contrary to their purpose.[13] Thus, modern German law allows the sale of *res sacrae*, in contrast to the original regulation from Roman law. Contemporary Serbian law does not speak about the prohibition of the circulation of res sacrae, so it can only be concluded that their circulation is allowed, although sometimes in a limited form, for example when it comes to *res sacrae* which are also cultural goods, which will be discussed further in the text.

In Serbian law, *res sacrae* are owned by churches and other religious organisations or even other persons, and since they are the legal persons within the meaning of the private law, i.e. the church is also a civil legal entity, then its belongings are also in free circulation.[14] When it comes to immovable cultural assets that are *res sacrae*, such as religious temples, the dominant position is that they are *de facto* out of circulation, bearing in

[11] *Ibid.,* 10.

[12] *Ibid.,* 11, 12.

[13] J. Listl, D. Pirson, 5.

[14] O. Stanković, M. Orlić, *Stvarno pravo,* Nomos, Beograd 1996,14. The opinion on the status of the church as a legal person of private law is not unanimously accepted in the Serbian legal doctrine. On the position that the church is a legal person of public law, or that it should be, see: M. Radulović, „The Church–A Legal Entity Sui Generis", in: *Legal Position of Churches and Religious Communities in Montenegro Today* (ed. Bogoljub Šijaković), Nikšić 2009, 56; V. Marković, „O javnim ovlašćenjima crkava i verskih zajednica u svetlu Mitrovdanskog ustava i Zakona o crkvama i verskim zajednicama", in: *Prilozi državno–crkvenom pravu Srbije* (eds. Vladimir Đurić, Vladimir Čolović), Institut za uporedno pravo, Beograd 2022, 103.

mind the number and degree of ownership restrictions on those assets.[15] In this regard, Italian law is more by German, given the fact that para. 831 of the Italian Civil Code provides that buildings, intended for the public performance of Catholic worship, can be transferred, but their purpose cannot be changed until the intended use ceases in accordance with the provisions of the laws that apply to them.[16]

The issue of suitability for the forced execution of res sacrae matters should also be raised. In German law, execution of res sacrae is possible in general, as long as their purpose does not change.[17] On the contrary, the Serbian Law on Churches and Religious Communities expressly states that "sacred and cultural heritage of churches and religious communities, including immovable cultural assets, cannot be the subject to forced execution or alienation in bankruptcy or forced settlement proceedings".[18] In this place, certain inaccuracies in the legal wording of the Serbian Law should be noted, although the legal wording itself would be sufficient for comparison. It is not entirely clear whether sacral heritage on the one hand, and cultural heritage on the other, represent two different types of heritages and what each of them includes or it is only a matter of a stylistic formulation of the legislator. Also, the relationship of immovable cultural assets with those heritages is not clear, since a simple linguistic interpretation would lead to the conclusion that immovable cultural assets can be part of sacred or part of cultural heritage. In any case, immovable cultural assets that are consecrated for worship meet the conditions to be considered as *res sacrae*, so in that part, one can talk about exemption from execution, unlike the German solution.

2.2.1. The Acquisition and Loss of *Res Sacrae* Status

An object becomes *res sacra* by the act of consecration (*consecratio*), which some consider being an administrative act, but the more prevalent position is that the act of consecration should be considered as a unilateral declaration of will made by an authorised person, which produces prescribed legal consequences.[19]

In this sense, the declaration of will should be made freely and seriously, in a way that its content can be determined with an adequate level

[15] D. Čelić, „Ograničenja prava svojine na nepokretnim kulturnim dobrima", *Zbornik radova Pravnog fakulteta Univerziteta u Novom* Sadu 2/2021, 563.

[16] Italian Civil Code (*Codice Civile)* of March 16, 1942, with the latest change on March 2, 2023.

[17] J. Listl, D. Pirson, 12.

[18] Čl. 27, st. 1 Zakona o crkvama i verskim zajednicama Republike Srbije, *Službeni glasnik RS*, br. 36/2006.

[19] J. Listl, D. Pirson, 14; A. F. Campenhausen, H. de Wall, 262.

of certainty, while the question of form and procedure is within the area of church law. Some scholars also claim that the sacral character of immovable things can be a consequence of human action, i.e. the act of consecration, miraculous events that are recorded as such in religious sources, due to the presence of revered persons, as well as because some significant events took place on them.[20] The effect of the consecration of a building is reflected in the fact that it is considered consecrated as long as at least some part of the building remains preserved, and the second, subsequent effect is that consecration is not allowed unless the property is desecrated by bloodshed or another crime,[21] in which case the act referred is called *reconsecratio.* Legal protection of sacred objects located on state land, in public ownership, can be provided through laws and other regulations enacted for that purpose, or through general measures to protect freedom of religion in legal and other regulations.[22]

A thing ceases to be *res sacra* in several ways: by decay and deconsecration, an act that by its nature is considered the opposite of the act of consecration (actus contrarius), by which the thing is given a profane purpose, and it can also cease consequentially by the cessation of the church or religious community that consecrated it.[23]

The administration of goods in catholic canon law is based on the Second Vatican Council decrees *Christus dominus*[24] and *Presbyterorum ordinis*[25], which accentuated the desire to emphasize the spiritual function of church goods[26]. In accordance with the opinion of the canonists, in order to achieve justice in a broader notion, imbued with Christian values, it is necessary to use a more flexible approach when interpreting the legal norms, in order to resolve a certain legal issue in a way that is by a Christian perspective.[27]

In the Orthodox Worm, objects, within the property of the church, are divided according to the goal, purpose, and place where they are located.[28]

[20] R. B. Collins, „Sacred Sites and Religious Freedom on Government Land", *University of Pennsylvania Journal of Constitutional Law* 2/2003, 241.

[21] O. J. Reichel, *The Elements of Canon Law,* T. Baker, London 1889, 244, 245.

[22] R. B. Collins, 242.

[23] J. Listl, D. Pirson, 15.

[24] Christus Dominus: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat–ii_decree_19651028_christus–dominus_en.html, 31. 8. 2023.

[25] Presbyterorum Ordinis, *https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat–ii_decree_19651207_presbyterorum–ordinis_en.html.*

[26] P. Astorri, W. Decock, „Canon Law", in: *Elgar Encyclopedia of Comparative Law* (eds. J. M. Smits, J. Husa, C. Valcke, M. Narciso), Cheltenham 2023, 200.

[27] P. Astorri, W. Decock, 201.

[28] B. Stjepanović, „Imovina SPC u svetlu člana 62. Predloga Zakona o slobodi vjeroispovesti ili uvjerenja i pravnom položaju verskih zajednica", in: *Državno–crkveno pravo kroz vekove* (ed. Vladimir Čolović *et al*.), Institut za uporedno pravo, Mitropolija crnogorsko – primorska, Beograd 2019, 907.

They can be divided into consecrated goods and other goods.[29] When it comes to sacred objects, it is important to emphasise that according to the canons of the Seventh Ecumenical Council, sacred objects in the temple are holy by themselves therefore consecration is not required for their acquisition of the status of *res sacrae*.[30] That leads to the conclusion that sacred objects, i.e. objects intended for worship in churches, have an immanent sacred status and therefore the act of consecration is unnecessary.

The management of church property by the Serbian Orthodox Church is regulated by the Constitution of the Serbian Orthodox Church.[31] Thus, the Constitution of the Serbian Orthodox Church limits the use of church property, by providing that church property and church income can only be used for general or special church needs.[32] Furthermore, the Constitution of the Serbian Orthodox Church regulates the possibility of ownership restrictions on church assets acquired on the basis of a gift. Namely, immovable church property donated for a special purpose cannot be subject to alienation or pledge, if the donor expressly forbids it. Therefore, in the law of the Serbian Orthodox Church, there is a possibility of a complete restriction of conveyance on certain, immovable church assets, but it is not stated *a priori.* However, it depends on the will of the donor.

It may be concluded that the influence of Romano–canonical regulation of res *sacrae* is noticeable in several parts. First, the term *res sacrae* is still used in some contemporary legal systems. Secondly, many objects that are by definition considered to be *res sacrae* have acquired the status of cultural goods, by which they have obtained a whole new level of both national and international protection,[33] which will be elaborated in the following part of the text.

3. Protection of *Res Sacrae* as Cultural Goods

The concept of cultural goods does not include all things that are *sacred* by nature, and in this respect, it represents a broader concept. On the other hand, res sacrae as a legal institute includes several objects, not all of which are considered cultural goods. Thus, the relationship between the concept of cultural property, on the one hand, and *res sacrae,* on the other hand, can be shown in a Venn diagram, with intersection

[29] *Ibid.*

[30] M. Nikodim, *Pravila pravoslavne crkve s tumačenjima, knj. 1*, Istina, izdavačka ustanova Eparhije dalmatinske, Beograd, Šibenik 2004, 595.

[31] Constitution of the Serbian Orthodox Church, *Glasnik,* br. 7–8/47.

[32] Art. 247 of the Constitution of the Serbian Orthodox Church.

[33] H.–R. Held,138.

points where *res sacrae* is protected through cultural property protection regulations.

Cultural goods are, according to the provision of Art. 5 al. 3 "*part of the material and cultural heritage valued and determined in accordance with the law*".[34] Therefore, the cultural heritage of the Republic of Serbia is a broader concept, which includes a set of material and immaterial resources inherited from the past, recognised as a reflection and expression of continuously evolving values, beliefs, knowledge and traditions, created by the interaction of man and space over time, which are located on the territory of the Republic of Serbia, including the Autonomous Province of Kosovo and Metohija.[35]

First of all, it is important to note that the Serbian Law on Cultural Property of the Republic of Serbia does not define the concept of immovable cultural property, including places of worship.[36]

The term religious immovable cultural property includes religious temples, which are *res sacrae*, and immovable cultural property which, according to the position and autonomous regulations of the church or religious community, are considered sacred (*res sancti)*.[37] The protected environment of the immovable cultural property is provided with legal protection, as well as the immovable cultural property itself, while also its appendages. The Montenegrin Law on the Protection of Cultural Property contains a definition of immovable cultural property, and it defines immovable cultural property as a profane, sacred, memorial, fortification or infrastructural object, a group of buildings or an area with characteristic interactions between man and nature.[38]

When it comes to movable res sacrae, the Law on Cultural Heritage provides for the types of movable cultural assets such as: museum materials, archival materials, film and other audiovisual materials, and old and rare library materials. Based on that legal provision, it is clear in which part there is a discrepancy, that is, that movable *res sacrae* do not enjoy the legal protection provided for by that law.

The *ratio legis* of the protection of cultural property is founded on the existence of legitimate interests of the community in protecting certain

[34] Zakon o kulturnom nasleđu Republike Srbije, *Službeni glasnik RS,* br. 129/21.

[35] *Ibid.*

[36] Zakon o kulturnim dobrima Republike Srbije, *Službeni glasnik RS*, br. 71/94, 52/2011 – dr. zakoni, 99/2011 – dr. zakon, 6/2020 – dr. zakon i 35/2021 – dr. zakon i 129/2021 – dr. zakon.

[37] D. Čelić, „Osobenosti ograničenja prava svojine na nepokretnim kulturnim dobrima u svojini crkava i verskih zajednica", *Crkvene studije* 19/2022, 468.

[38] Zakon o zaštiti kulturnih dobara, *Službeni list CG* br. 049/10 od 13. 8. 2010, 040/11 od 8. 8. 2011, 044/17 od 6. 7. 2017, 018/19 od 22. 3. 2019.

objects. It is interesting to note that the protection of cultural assets is not carried out by granting additional rights to their holder but through various mechanisms and legal solutions that limit property rights. Thus, cultural property cannot be damaged or destroyed without the consent of the competent institution, nor can its appearance, properties or purpose be changed. It is a matter of consent that is given according to the rules of administrative procedure, in the form of an administrative act, and it does not require the fulfilment of the conditions of the form from the law of obligations.[39]

3.1. Rights and Obligations of the Holder of Cultural Property

The Law of the Republic of Serbia regulating the protection of cultural goods explicitly states both the rights and obligations that are imposed on the owner and the holder of cultural property. In accordance with the statement that the limitation of ownership and holding powers, as well as deviation from their general rules, actually represents a protection mechanism, the Law on Cultural Heritage provides for the special rights and obligations of owners and holders of cultural assets. Thus, the owner, i.e. the holder, is authorised to use the object in accordance with the law and established measures, as well as to implement the measures *with the care of a good householder.* The legal standard in question is traditionally acknowledged in the law of obligations, and it is implemented through various provisions of the law regulating the obligations and is provided for by the general provision of the Law on Obligations, according to which the parties in an obligation are obliged to act with the due care that is required in legal transactions in the corresponding type of obligation relations. That further means that the degree of carelessness, which led to damage will be measured according to the degree of due care that is required in such type of a relationship.[40]

Based on that, as well as on the other provisions that speak about the legal position of owners and holders of cultural property, it may be concluded that, due to his status as the holder of real rights, he is in a certain type of relationship with the state, from which certain obligations of a legal character arise. Also, the owner or the holder of the cultural property has the right to compensation for damages suffered as a result of the sea, as a result of which the cultural property was made available to the public. The existence of a public interest in cultural property being accessible to

[39] I. Radomirović, „Saglasnost za zaključenje ugovora", *Glasnik Advokatske komore Vojvodine* 2/2023, 486.

[40] Z. Slakoper, S. Nikišć, „Dužna pažnja prema Zakonu o obveznim odnosima", *Zbornik radova Pravnog fakulteta Sveučilišta u Rijeci* 1/2023, 54.

everyone, in order to perform its social function, is a burden on the property, whose owner is obliged to bear.

Obligations of tolerance imposed on the holder of cultural property are diverse and refer to several measures that authorised bodies can take to preserve cultural property, keep records, conduct scientific and other research and ensure the performance of social functions and protection of public interests. The bigger the importance of the cultural property, the greater the limitation of its titular trip, which supports the fact that the owner or possessor holds the cultural property, not only in his name and on his behalf, but also in the name of the entire community and authorities to whom the value of the cultural good belongs. When it comes to immovable cultural goods, the owner of the cultural goods also suffers from certain property rights restrictions regarding the authorisation of use and actual disposal. First of all, he must not use the cultural property for purposes that are not by its nature, purpose and importance, or in a way that may lead to damage to the cultural property, nor may he excavate, demolish, rebuild, wall, rework or carry out any works which may violate the properties of cultural property under previous protection without the established conditions and consent of the competent authority.[41] Those are serious restrictions on property rights and possession, but they are still considered necessary and proportionate to the goal for which they are imposed.

The law also limits the right of legal disposal of cultural goods. The legal right of pre–emption has been established in favour of the Republic of Serbia, and its regulation deviates to a certain extent from the solution provided for by the Law on the Transfer of Real Estate. The greatest extent is the fact that it does not only apply to immovable objects but also to works of art and other movable items. The exercise of the right of pre–emption of immovable goods shall be conducted within the application of the Law on Real Estate Transactions.[42] The analysis of the wording used by the Law on the Protection of Cultural Property when it comes to the obligation of the owner of the property should be noted. First of all, the Law on the Protection of Cultural Property uses the term "notice", although it is not just a notice of intended sale, but an offer to conclude a contract on the transfer of immovable property, which must contain all the essential elements of the contract for which it is intended to be concluded. An even more interesting legal wording is the one by which the respective protection institution declares

[41] Čl. 102 Zakona o kulturnom nasleđu Republike Srbije.

[42] The right to pre–emption is also constituted for favor of the state in the Montenegrin Law on the protection of cultural goods. This right to pre–emption refers only to the emption of the goods in private ownership.

the "intention of use", and not the acceptance or rejection of the offer. That is a very clumsy and inappropriate wording, which does not bring the title holder of the cultural property into a state of certainty. Namely, the statement of intent to use cannot be considered as acceptance of an offer to conclude a contract. Thus, in the case of a statement, provided for by law, it would lead to legal uncertainty and frustrate the holder's already limited right of legal disposal. Therefore, the adaption of that provision to the purpose of the right of pre–emption, i.e. the use of precise wording, so that the notice of the protection institution leads to the conclusion of the contract under the conditions stipulated in the offer, should be *de lege ferenda*. Another important limitation is the ban on the permanent export of cultural goods outside the territory of the Republic of Serbia, which refers to movable cultural goods.

The Montenegrin Law on the Protection of Cultural Property expressly provides that cultural property in private ownership is managed by its owner or the person to whom he entrusts the management of the contract,[43] and the Law foresees the possibility of appointing a temporary representative for the protection of cultural property, if its owner or holder abandons it. Otherwise, throughout the entire Law on the Protection of Cultural Property of Montenegro, a clear distinction is made between cultural property in the state and private ownership and different legal consequences are attached to the personality of the holder. Thus, immovable cultural property in state ownership cannot be alienated (except in the case of alienation by exchange), while movable cultural property can only be temporarily assigned in cases specified by law.[44] Also, on state–owned cultural property, no encumbrance or limitation of ownership rights can be established, nor can enforcement proceedings be carried out, in order to secure and settle the obligations of the entities that dispose of it.[45] On the other hand, there are no legal obstacles to the enforcement procedure being carried out over a cultural good in private ownership, in which case the right of pre–emption is constituted in favour of the state.

The regulations on the protection of cultural property protect a large number of immovable res sacrae, bearing in mind that about 30% of the monuments included in the list of UNESCO's World Cultural Heritage are precisely res sacrae.[46] Therefore, national and international regulations

[43] Since it is not a deviation from the usual regime of exercising subjective rights, i.e. the principle that they can be exercised alone or through another, this provision is only of declarative importance.

[44] Čl. 42 Zakona o zaštiti kulturnih dobara Crne Gore

[45] *Ibid.,* čl. 43.

[46] D. Čelić (2021), 563.

on the protection of cultural property represent an important mechanism for the protection of *res sacrae*, although those regulations provide protection only to certain categories of res sacrae.

4. Protection of *Res Sacrae* Through the Protection of Freedom of Religion from Article 9 of the European Convention

4.1. General remarks

As the next potential mechanism for the protection of *res sacrae*, the question can be raised as to whether the threat of res sacrae by a state party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention) can be considered a violation of freedom of religion.

European Convention of Human Rights and Fundamental Principles (in further text: European Convention), article 9 states that:

„Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

First of all, it is important to emphasise that the church or other religious community is authorised to protect their rights on behalf of its adherents guaranteed by Article 9 of the European Convention. So, there is a possibility that a church or other religious body submits a petition in order to protect the freedom of religion of its believers.[47] Therefore, the question that the author raises in this chapter refers to the possibility of providing *res sacrae* with indirect protection, i.e. through the protection of the human rights of the believers of the church or other religious community to which *res sacrae* belongs, that is, in which case *res sacrae* status is recognised. For further analysis, it is necessary to specify two facts. First, it is a violation of the freedom of religion that is experienced by natural persons, believers, and not the church, even though the object on which the violation is committed and the violation of rights is in the possession of the church or religious body. Secondly, the author directs the question, raised to

[47] *Cha'are Shalom Ve Tsedek v. France* [GC], 2000, par. 72.

the violation of the collectivity of the aspect of freedom of religion. In this sense, it can be concluded that the petition submitted by the church or other religious organisation is compatible *ratione personae* with the Convention, and the church or organization may address the Court regarding the violation within the meaning of Article 34 of the Convention.[48]

One can manifest his religious beliefs according to the European Convention, through worship, teaching, practice and observance. The subject of the analysis is cases in which the applicants claimed that they were denied the opportunity to manifest their beliefs through worship, which threatened their freedom of religion.

4.2. Relevant case–law

The applicants in one case were representatives of two Jewish organisations, who claimed that their freedom of religion under Article 9 of the European Convention had been violated by the neglect of Jewish cemeteries by Ukraine, and by the fact that the Ukrainian authorities turned a deaf ear to their requests to re–establish the boundaries of Jewish cemeteries and bring them to the state they were in, before the Second World War, and stop further construction works on that land as well. In that proceeding, the court confirmed its previously stated position on the scope of application of Article 9, stating that Article 9 does not protect "every act motivated or inspired by religious beliefs".[49] The act that is either motivated or inspired by a religion or belief has to be intimately linked to the religion in question.[50] However, the quality of that act and its connection to religious beliefs has to be estimated by taking into consideration specific facts of the case in question.

The European Court of Human Rights has repeatedly taken the position that it cannot be concluded from the provisions of Article 9 of the European Convention that persons have the right to be provided by public authorities with a place of worship.[51] In that specific case, the church

[48] Council of Europe, Guide on Article 9 of the European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/guide_art_9_eng, 31. 8. 2023.

[49] The court also relied on the fact that the area of the said cemeteries was destroyed more than 70 years ago, and that in the meantime buildings were built on that area *Representation of the Union of Councils for Jews in the Former Soviet Union and Union of Jewish Religious Organisations of Ukraine* [GC], 2014, par. 36; *Kalaç v. Turkey*, 1997, par. 27.

[50] Council of Europe, Guide on Article 9 of the European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/guide_art_9_eng, 31. 8. 2023.

[51] *Rymsko–Katolytska Gromada Svyatogo Klymentiya V Misti Sevastopoli v. Ukraine* [C], 2016, par. 61.

building was the subject of nationalisation, after which it was renovated and adapted to be a children's cinema, so that the lower part of the altar was turned into a public toilet, while the rest of the space housed a currency exchange while in the process of renovation, the tower–bell has been destroyed. In his application, the applicant called that use of the church offensive and contrary to the beliefs about how it should be used. Despite that, the European Court of Human Rights has found that the authorities' refusal to transfer church premises into ownership by the applicant association does not have a direct bearing on the applicant association's expression of their beliefs. With that decision, the court has also shown that Article 9 does not include the right to the return of seized property, which was used for the performance of religious ceremonies

The court also ruled that the legitimate interests of others outweighed the applicant and his need to perform certain religious rites, *in concreto* related to the ringing of church bells before 7:30 a.m. In the specific case, the rights of other persons prevailed, as a legitimate interest, and the restriction passed the proportionality test, bearing in mind that the applicant was allowed to use the church bells before 7.30 in the morning, but at a limited volume, while during the rest of the day he was allowed to use them as before.[52]

On the other side, although the practice of the European Court of Human Rights confirms that the European Convention does not guarantee the right of churches and religious communities to acquire places of worship from the public authorities, it is nevertheless a clear position that the possession of a religious building in which to worship, as well as the manner of its operation, is, in principle, subject to protection in the sense of Article 9 of the European Convention.[53] The same reasoning applies to cemeteries if they are of key importance for the exercise of religion.[54]

However, what should be particularly emphasised is that the European Convention does not impose an obligation on the signatory states to provide for any special legal status for things intended for worship thus making the introduction and recognition of such a status the sole decision of each state individually. That means that *res sacrae*, regardless of their status in a specific state or church community, do not automatically enjoy

[52] *Schilder v. the Netherlands*, 2012.

[53] This opinion has been confirmed in several judgments of the European Court of Human Rights. See: *The Church of Jesus Christ of Latter–Day Saints v. The UK*, Application no. 7552/09, 2014, 30. It is pointed out that the building is thought to be the most sacred place by the members of the Church. See also: *Association Les Témoins de Jéhovah v. France*, Application no. 8916/05, 2011, par. 48–54.

[54] *Johannische Kirche and Peters v. Germany*, 2011, declared inadmissible.

protection according to the provisions of the European Convention. *Res sacrae* are protected, not because of their inherent properties, but only in that part in which their violation also represents a violation of freedom of religion. Therefore, the protection of *res sacrae* is significantly limited by the pure practical reasoning of the European Court. It is necessary to establish that the violation of specific *res sacra* prevents an individual from the act of worship as well as that such an act has also an intimate, meaningful connection with religion and the beliefs of the church or religious community of which the individual is a member. Therefore, it is not possible to state regularity in terms of the protection of *res sacrae* under the auspices of the Council of Europe and the European Court of Human Rights, but the provision of protection will depend on the details of the specific case. It is important to bear in mind that the jurisprudence of the European Court of Human Rights focuses on the theological and evolutionary interpretation of the norms of the European Convention,[55] whose goal is to improve and increase the scope of human rights protection, through the evolutionary interpretation of the European Convention and by giving new spirit to the provisions of the European Convention.[56]

5. Conclusion

Res sacrae is a legal institute coined in ancient Roman law, which has found its way to modern church law through the Justinian codifications. In the meantime, the very meaning of the term has evolved significantly and to this day there is not even a universal consensus on what can represent *res sacrae*. However, it can be said with certainty that it refers to objects, movable and immovable, intended for worship. At that point on the path of conceptual determination, the question arises as to whether the matter can be considered to be *res sacra* in itself, or whether a special procedure, such as consecration is necessary and is regulated by the autonomous regulations of a specific church or religious community. Also, it can be concluded with certainty that the status of *res sacrae* is determined by its purpose and not by its physical properties and characteristics. Further reasoning would lead to the conclusion that any object, movable or immovable, can aspire to become *res sacrae*. By acquiring that status, it comes under a special legal regime, but that does not mean that there is a special type of ownership.

[55] F. Sudre, *La Convention européenne des droits de l'Homme*, Presses Universitaires de France, Paris 2014, 21.

[56] I. Radomirović, „Odnos prava svojine i prava na dom iz perspektive nacionalnih sudova i evropskog suda za ljudska prava", in: *Zaštita ljudskih prava i sloboda u svetlu međunarodnih i nacionalnih standarda*, Kosovska Mitrovica 2022, 457, 458.

Therefore, it is important to distinguish the *modus acquirendi* of the ownership right to objects that are or aspire to become *res sacrae* and a kind of *modus acquirendi* of the *res sacrae* status itself.

Be that as it may, the imprecise conceptual definition significantly complicates their legal protection in a unique way in modern legal systems. For that reason, in legal science, one comes across the understanding that the concept of *res sacrae* in the legal sense has been overcome, and there are justified reasons for such a point of view. The group of objects that can be *res sacrae* is numerous and diverse, and they, prior to the status of *res sacrae*, also have other attributes, due to which they are protected in modern law. Therefore, the very essence of this article is to determine the various mechanisms by which the protection of the *res sacrae* is provided. There is a special understanding of the question of transferability of real rights on those objects, the question of the possibility of enforcement of res sacrae as well as the existence of ownership restrictions on the things that are *res sacrae* themselves. The property law itself strives to protect *res sacrae* objects through special modalities of use and circulation so that through their legal treatment, legal protection is primarily provided.

In addition, *res sacrae* are protected indirectly through the guarantee of freedom of religion guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That protection is not provided to all goods intended for worship, but only to those intended for worship practically and intimately, which is a question to which the European Court answers on a case–by–case basis. Certainly, protection is not provided primarily to objects, but to freedom of religion as one of the basic requirements in democratic societies, while *res sacrae* are protected only to the extent that is necessary to protect freedom of religion. The third modality of protection is the protection of *res sacrae* through national and international regulations on the protection of cultural heritage and cultural goods. Given the fact that not all *res sacrae* can be considered cultural goods, not all *res sacrae* enjoy legal protection on this legal basis. Also, the aim of protecting cultural assets is to protect the public interest in preserving symbols of cultural identity, national continuity and cultural heritage, and not to protect the worship itself.

Ивана Радомировић
Истраживач приправник, Институт за упоредно право Београд

RES SACRAE – ПРАВНИ СТАТУС И ПРАВНА ЗАШТИТА

Сажетак

Тема овог рада је правни режим res sacrae у позитивном праву Републике Србије, са освртом на поједина решења других правних система. У питању је традиционални институт старог римског права, који је путем канонистике стигао и до прописа савременог каконског права и појединих државних права. Res sacrae не треба сматрати посебном врстом својине, већ посебним карактеристикама предмета својине, због чије блиске повезаности са богослужењем и слободом вероиусповести заслужују нарочите правне атрибуте. Стога се у овом раду приказују својства res sacrae, односно питање прометљивости, својинскоправних ограничења и начина стицања и губитка статуса res sacrae. Посебне карактеристике res sacrae, првенствено су намењене њиховој заштити и очувању њихове светости, па се поставило питање алтернативних механизама заштите res sacrae. Стога је тема овог рада и пружање правне заштите res sacrae путем заштите слободе вероисповести из члана 9 Европске конвенције за заштиту људских права и основних слобода, као и путем националних прописа о културним добрима.

Кључне речи: *res sacrae, посвећење, својина, културно добро, правнни статус.*

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