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RELIGION, RELIGIOUS AND FOLK CUSTOMS ON THE BORDER

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**RELIGION AS AN ELEMENT OF NATIONAL IDENTITY
OF NATIONAL MINORITIES IN BORDER AREAS
(Legal Aspects)**

The legal determination of the notion of specific social groups, as the previous issue upon which depends the individual and collective enjoyment of numerous human rights, is one of the most complex issues of theory and practice of public international and constitutional law. In order to acquire legal personality, or for their legally relevant existence, groups as such, in numerous countries must be recognized by the legal system, which places the problem of “how to define the borders of the collective in a non-coercive manner” in the forefront, while, on the other hand, the manner in which specific elements of the notion of specific social groups will be nomotechnically formulated significantly influences the legal practice, i.e. the subsequent processes of legal interpretation and application. In all multinational and multi-cultural societies the issues of determining notions such as religion and national minority, particularly religion as an element of national identity, also causes significant political debates and can have important political consequences. The relation between the concepts of religion and national minority, particularly the issue of religion as an element of national minority identity, their notional and substantive legal determination in the legal system is the subject of this work. In this work, specific attention will be given to the analysis of those issues in cases of national minorities in border areas which have their “own” kin-states that have concluded national minority protection agreements with the Republic of Serbia.

THE INTERNATIONAL LEGAL DETERMINATION OF A NATIONAL MINORITY

There is no binding definition of a national minority in international law. The 1966 International Covenant on Civil and Political Rights provides in Article 27 that *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.* The presented provision opens several questions, among the first of which are whether the state’s recognition of the existence of a specific minority on its territory is a prerequisite for the use of the rights enumerated in Article 27 (Andraši, Bakotić i Vukas 1998, 328)? Among internationalists, the prevailing opinion is that the *bona fides* fulfillment of the international

agreement, such as the Covenant is, does not permit absolute self-interpretation and that *international bodies have a right to ascertain the existence of minorities in respect of Article 27 based on objective criteria* (emphasis – V. Đ.).¹ The General Comment of UN Human Rights Committee number 23(50) in Article 27 of the Covenant adopted April 26, 1994, clearly notes that *the existence of an ethnic, religious or linguistic minority in a given State party (as in a party to the Covenant – comment V. Đ.) does not depend upon a decision by that State party but requires to be established by objective criteria*. What are the objective criteria based on which the existence of a specified minority can be established?

With a specific basis on Article 27 of the International Covenant on Civil and Political Rights and in goal of its application's facilitation, the Special Rapporteur F. Capotorti suggested in 1977 the definition of a minority, under the guise of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Prof. Capotorti's notable definition provides that the expression "*minority*" *pertains to "a group numerically inferior to the rest of the population of a State, in non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics different from those of the rest of the population and sow, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."*² In order to assist states in the implementation of Article 27 of the International Covenant on Civil and Political Rights, the UN began drafting in 1978 a document presenting more clearly the principles of international law on minority rights. The United Nations General Assembly in its Resolution n. 47/135 of December 18, 1992 adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Declaration, which is not a legally binding act, does not include the determination of a national minority, but in its Paragraph 1 of Article 1 provides that *States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity*.

Through more careful examination of the presented norms, but also of the very names of specific international acts, it can be observed that vary-

¹ Some scientific works on Public International Law maintain that according to Article 27 of the International Covenant on Civil and Political Rights a state can claim its state territory to be homogeneous, in the opposite, or if it is not capable of making such a claim, its obligation according to Article 27 of the Covenant on Civil and Political Rights acquires a negative nature and the state *cannot deny minority rights to such persons* (emphasis – V. Đ.) – see Degan 2000, 530.

² UN doc E/CN.4/Sub.2/384. It should be noted that bad translations of Prof. Capotorti's definition are common in literature in which it is most common for the alternative conjunction "or" to be left out of the enumeration of the group characteristics in order for it to be reduced to a cumulative conjunction "and", so as to create the impression that Capotorti thought that a group, in order to be a minority, must have ethnic and linguistic and religious characteristics differing from the majority population – see further in the text.

ing notions are used in acts adopted, or prepared under the umbrella of the UN – the Covenant speaks of ethnic, religious or linguistic minorities, Prof. Capotorti's definition is devoted to the term “minority”, while the Declaration adds the notion of national minority. According to the Working Group on Minorities, the introduction of the notion of “national minority” in the Declaration does not imply the expansion of the scope of its application to groups not already referred to in the Covenant, singling out that “*there is hardly any national minority, however defined, that is not also an ethnic or linguistic minority*”.³ It is worth noting that such an identification is not also included in regards to religious minorities, although it is however noted that “*in some cases religion and ethnicity coincide*”.⁴ However, despite all of the presented international act provisions citing religion as one of the characteristics differentiating a minority from majority population, certain authors, based on the practice of the international institutions under the guise of the UN, the Committee on Human Rights, are foremost of the opinion that, despite the fact of them being explicitly recognized as one of three minority categories, religious minorities are to a large extent excluded from minority protection and deliberation in the field of minority rights and that, in cases where they face discrimination and persecution, such occurrences are often cited under the rights of conscience and religion, and not as issues of minority rights infringement (Ghanea 2012, 4, 5).

In difference to the concept adopted under the umbrella of the UN, regional European documents on minority rights solely contain the concept of national minority. The Council of Europe's Framework Convention for the Protection of National Minorities, does not contain the definition of a national minority, but in Article 3 it guarantees the right of every person belonging to a national minority freely to choose to be treated or not to be treated as such. In the Explanatory Report to Article 3 of the Framework Convention it is noted that the provision in question is left to such individuals to decide whether he/she wishes or not to be taken under the protection which derives from the principle of the Framework Convention, and that this paragraph “*does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.*”⁵

Specific bilateral agreements on national minority protection concluded in Europe do not contain the definition of a national minority,⁶ but, in

³ Commentary of The Working Group on Minorities to The United Nations Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities par.6 - E/CN.4/Sub.2/AC.5/2005/2.

⁴ Ibid, par. 43.

⁵ CAHMIN Explanatory Report to the Framework Convention, H (1995) 010.

⁶ For example the Agreement between Serbia and Montenegro and the Republic of Hungary on protection of rights of the Hungarian national minority living in Serbia and Montenegro and of the Serbian national minority living in the Republic of Hungary and the Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of Romania on cooperation in the field of protection of national minorities. Done at Belgrade on 4 November 2002.

conjunction with the Framework Convention, provide that belonging to a national minority falls under an individual's freedom of choice.

Based on the presented provision and suggested determinations, without the existence of international legally binding definitions, can we determine specific criteria which could be used in ascertaining the existence of a national minority? In the holistic contemporary domestic legal theory studies which are not limited to the international viewpoint, but take into account different politico-theoretical approaches, the impossibility to rely on one concise and generally accepted definition of nation and national minority is noted as well as the need to remain on general definitions, of which particular concern is deserved by those which place culture in the center of the determination of a nation (as Rénan notes the "possession in common of a rich legacy of memories" and the "present-day consent, the desire to live together, the will to perpetuate the value of the heritage that one has received in an undivided form"), while taking into account additional, objective criteria of identification, of which language has a particular importance (Jovanović 2004, 49). Public international law theory notes that based on review of different approaches, one can notice several important elements of the notion of a national minority which include citizenship, undominant position and sufficient number (Janković i Radivojević 2005, 244; Dimitrijević, Račić, Đerić, Papić, Petrović i Obradović 2005, 174). Beside the presented criteria, a long-lasting, traditional, settlement should be added, not necessarily implied by the criterium of citizenship. The fulfillment of the presented criteria is necessary, but not of critical importance to the existence of a minority. From all of the presented provisions and suggested definitions, it derives that minorities differ from the majority according to their ethnic characteristics, i.e. origin and language, culture, tradition, which implies the question of relation between several presented bases of differentiation and the establishment of the existence of a basis of differentiation and the fulfillment of other criteria of importance to the existence of a national minority. Before considering those issues, particular attention will be given to the question of religion as an element of national minority identity and its importance as a distinction element in the notion of national minority?

RELIGION AS AN ELEMENT OF NATIONAL MINORITY IDENTITY

In international discussions considering the definition of a national minority there is no consensus on whether persons differing from the majority population only by religion, can be considered national minorities and whether they fall under the scope of application of international instruments aimed at the protection and promotion of national minorities' different identities (Hofmann 2006, 18). However, despite the lack of theoretical consensus, Article 5 Par.1 of the CE Framework Convention for the Protection of National Minorities explicitly provides that parties undertake an obligation to promote conditions necessary for persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity, namely their religion, language, tradition and cultural heritage. Therefore, religion, with other characteristics such as language, traditi-

ons and cultural heritage, is the very essence of what makes a social group a national minority, more precisely it is determined by the Framework Convention *expressis verbis* as an essential element of national minority identity.

What is the relation between religion and other essential elements of national minority identity, precisely between several presented criteria of differentiation, and how to establish whether one of those criteria is sufficient for the existence of a national minority? In the suggested definitions, or provisions, a national minority is determined by objective and subjective conditions which *must be cumulatively fulfilled* in order for a group of citizens to be considered a national minority. In public international law theory it is noted that more current international legal practice takes into account subjective elements as a basis for the evaluation of minority group belonging, but amends them with objective elements because minority belonging does not necessarily stem from objective elements (i.e. family belonging), but can also be a result of upbringing, or subjective feeling, but on the other hand, subjective elements can also be abused, so only a combination of these two groups of elements offers a solid basis for the evaluation of national minority belonging (Avramov i Kreća 2003, 337). In the presented determinations of a national minority, particular attention should be given to the part which provides that a national minority is a group of citizens *whose members are characterized by a concern for common maintenance of their identity, or express, even implicitly, a sense of solidarity directed towards preserving their culture, tradition, religion or language*. This subjective condition should be interpreted in a way that a certain group of citizens, even if it possesses characteristics different from the majority population, it cannot be considered as a national minority unless its members are not characterized by a concern for joint maintenance of a common identity. In the context of religion as an element of national minority identity, that signifies that a group different in religious characteristics from the majority population, cannot be considered a national minority, if its members are not characterized by a concern for maintaining their religion, as an element of national identity. Such an understanding stems from the freedom of expression of national identity, but also from the freedom of thought, conscience and religion which is guaranteed in a series of international treaties on human rights and in constitutions of democratic states.

The subjective choice of the individual is inseparably linked to the objective criterium relevant to his/her identity, which is also confirmed in the Explanatory Report to Article 3 of the Council of Europe's Framework Convention for the Protection of National Minorities. Nonetheless, the objective criterium to the national minority belonging, that is the existence of a national minority *is made up of several alternatively set conditions, or criteria* which in the offered determinations, or provisions, are not equally set and, beside religion, include tradition, culture, language, ethnic origin etc. The alternative consideration of objective criteria signifies that for a specific national minority's existence the fulfillment of *all* criteria isn't necessary, just as each of the criteria, by itself, or for itself, can be, but is not necessarily sufficient for the existence

of a national minority. In the Commentary of Article 5 of the CE Framework Convention for the Protection of National Minorities it is clearly noted that not every one of these differences creates a national minority (Gilbert 2006, 155). In other words, a religious group is not always a national minority. As it was clearly observed in domestic legal theory, although religion can be and often is one of the elements which are objective characteristics of a minority, that is not necessary because, not only is it possible for a minority to be of the same religion as the majority, but it is very often that two or more religious communities are formed within a same ethnic group, whereas one of them being in the majority, and the rest in the minority (Krivokapić 2004, 193). The complex relation between religion and the existence of a national minority can also be seen *vice versa* – in order for a group of citizens to be a national minority it is not a prerequisite that it also differs from the majority population and from other national minorities, by religion. If a specific group of citizens form a specific national minority, it does not necessarily mean that it differs in all objective criteria from the majority population, and from other national minorities. On the other hand, religion is often the unique feature which distinguished persons belong to national minorities with a strong feeling of different identity from the majority. Precisely for that reason, *it seems that the objective criteria of the existence of a national minority, and among them most certainly religion, can also be foreseen in the context of subjective feeling of their members, or the importance that its members accord to the determination of their national self-identity.* It is understandable that self-identification should not be absolutized, because the logical consequence of absolutizing the right to self-identification can represent a legal abuse. This raises the question of who can and should be included in the resolution of issues if an objective characteristic, such as religion for example, is sufficient for a group whose members have a subjective feeling of particularity, to be truly determined as a national minority?

It seems that states are not the only sovereign arbiters in issues of national identity, especially in cases where specific groups of their citizens have a subjective feeling of differentiation from the majority population according to criteria important to the existence of a national minority, also including religion.⁷ In states where a constitutional principle of division of church and state exists, that conclusion can be referring to religion, because of a principle difficulty for a religiously neutral state to determine the existence of religious differences of specific social groups. On the other hand, a religiously neutral state which respects the rights of national minorities should also valorize the importance and autonomy of churches and religious communities and thus, the issue of religion as an element of national minority identity can also be foreseen in a series of new dimensions balancing between somewhat opposed, and surely different international and constitutional le-

⁷ For example, the Advisory Committee helping the CE Council of Ministers in monitoring the application of the Framework Convention in the case of Cyprus, took the position of encouraging the Government to re-examine the notion of “religious group” for the Maronites whose members were dissatisfied with that term (Heintze 2006, 121).

gal goals of protecting national minority identity from the one hand, and the respect of the autonomy of churches and religious communities and their distinction from the state on the other. Before considering the legal aspects of the overlapping of those goals, which are surely specific among national minorities in the border areas, an observation of the definition of the notion of national minority in the legal system of the Republic of Serbia should be given, as well as whether religion is one of the legally recognized distinctive elements of national minority identity.

THE DETERMINATION OF A NATIONAL MINORITY IN THE LEGAL SYSTEM OF THE REPUBLIC OF SERBIA

The 2006 Constitution of the Republic of Serbia does not contain any determination of a national minority. The Constitution's author, in several provisions devoted to minority rights, refers to the legislative regulation of the realization of minority rights, but in none of the Constitution's provisions is their explicit referral to the legislative determination of the term of a national minority. Nonetheless, certain provisions contain implicit referral to the legal definition of a national minority which appears as a precondition of realization of national minority rights guaranteed by the Constitution.⁸ Certain articles of the Constitution create, to a certain extent, margins of freedom which the legislator must have in mind when regulating the term of national minority. As such, Article 79 which regulates the right to the preservation of particularity, enumerates among other things, certain characteristics which account for that particularity, through a provision according to which members of national minorities have the right to expression, protection, preservation, development and open expression of *national, ethnic, cultural and religious particularities*.

The Law on the Protection of Rights and Freedoms of National Minorities is in force in the Republic of Serbia.⁹ According to Paragraph 1 of Article 2 of the Law on the Protection of Rights and Freedoms of National Minorities, a national minority in the legal system can be considered any *group of citizens sufficiently representative, although in minority position on the territory of the State, belonging to an autochthonous groups of population with a lasting and firm connection with the State territory, and possessing*

⁸ As such Paragraph 3 Article 75 of the Republic of Serbia's Constitution provides for the possibility for members of national minorities to elect their national councils in goal of realizing the rights to autonomy in the fields of culture, education, media and official use of language and alphabet, *in accordance with the law*. Seeing how the legal regulation of the national council elections implies previous ascertainment of who has the right to elect their national council, or who is considered a national minority, it is clear that such a law should contain the definition of a national minority or at least take into account the existing definition.

⁹ "FRY Official Gazette" n. 11/02. The law was adopted in 2002 in the former Federal Assembly of the FR of Yugoslavia following which it, in 2003, became a Law of Serbia and Montenegro, and following the end of the existence of the State Union, a law of the Republic of Serbia.

some distinctive features such as language, culture, national or ethnic affiliation, origin or religion differentiating them from the majority of the population and whose members are distinguished by care to collectively nurture their common identity, including culture, tradition, language or religion. The legal determination of a national minority in the Republic of Serbia contains several basic elements – citizenship,¹⁰ sufficient representation,¹¹ a long-lasting and firm relation of the group with the state territory¹² and objective criteria of identification.

The objective identification criteria of a national minority are marked in the domestic legal definition of a minority by the notion of “features” which, according to the legislator, include language, culture, national or ethnic belonging, origin or religion. The attributes which the Law provides for being the bases of differentiation between groups which should receive national minority recognition and the majority, Serbian people are alternatively set, such that for the existence of national minority in the Republic of Serbia it is sufficient for the group of citizens to differ by at least one characteristic from the majority Serbian people and other national minorities, under the condition of fulfilling the other elements of the legal definition of a national minority, foremost of subjective nature. In the context of the theme of our interest, it is clear that religion can be the only element of national minority identification in the Republic of Serbia, which the state explicitly recognizes on the international field.¹³

¹⁰ The lawmaker was of the opinion that for a group to make up a national minority, it must be made up of domestic citizens, which implies an exclusion, from minority protection in the Republic of Serbia, of groups of migrant workers and temporarily settled persons, refugees and persons without citizenship.

¹¹ The lawmaker failed to make any specific numerical criteria, but it is clear that his intention was to exclude groups which are best described by an archaic term from local anthropo-geographic science – “exotic population oases”. In rare scientific works devoted to the subject, there is word of the intention of our lawmaker to set a condition of “sufficient representation” instead of an enumeration of all communities which qualify for the status of national minority according to this law (save for the Roma which are explicitly mentioned as a national minority in Article 4 of the Law), or the definition of some relative threshold of participation in the total population number, can be considered correct and justified, as long as that does not create a practice of imposing exaggeratingly high criteria for the recognition of the legally relevant status of minority status (Jovanović 2004, 271).

¹² Groups which differ from the majority, Serbian population in the Republic of Serbia, in language, culture, national or ethnic appurtenance, origin or religion, and whose members have recently been naturalized cannot be considered national minorities in the Republic of Serbia.

¹³ In the first report on the implementation of the Framework Convention in the FR of Yugoslavia submitted in 2002 the State noted that according to its legal regulation religion can be one of the characteristics which set apart a group of citizens representing a national minority from the majority population – ACFC/SR (2002) PARA 65 (3.1.). It should be kept in mind in view of religion also not always being a reliable criterium for identifying different national minorities in view of the absence of a state

In the presented legal determination of a national minority particular attention should be given to the subjective criteria of determination, that is the part which provides for the national minority group of citizens “*whose members are characterized by a concern for joint maintenance of their common identity, including culture, tradition, language or religion*”. The presented legal determination should be interpreted such as that some group of citizens, although possessing attributes by which it differs from the majority population, cannot be considered a national minority unless its members are not characterized by a concern for joint maintenance of their common identity, including culture, tradition, language or religion. Such an understanding stems, among other things, from the constitutional freedom of expression of national identity (Article 47 of the Republic of Serbia Constitution), that is from the right of every person belonging to a national minority freely to choose to be treated or not to be treated as such (Article 3 of the Framework Convention for the Protection of National Minorities), but also from other rights and freedoms guaranteed by the Constitution which are related to religion, culture, and language.¹⁴ The legislator accords special attention to the self-determination of the national minorities which is also noticeable from the legal determination according to which members of minorities should *collectively* maintain their *common identity*. In the context of religion, as it is observed in sociology of religion articles, that can imply confessional identification which is a notion wider than religiosity and signifies the recognition and acquiescence to a particular religion disregarding personal (un)-religiosity (Đorđević 2005, 195).

The provisions of bilateral international agreements on the protection of national minorities to which Serbia is a party, are of significant importance for the determination of national minorities in the Republic of Serbia’s legal order, and foreseeing religion as an element of national minority identity in that light. Seeing how those agreements serve as primary protection for national minorities in the border area, in the foreseeing of open issues of religion as a national minority identity element, attention should be directed towards the appropriate provisions of those agreements as well.

OPEN ISSUES CONCERNING RELIGION AS A NATIONAL MINORITY IDENTITY ELEMENT

There are four groups of unresolved issues pertaining to legal aspects of religion as national minority identity elements which are of particular importance to border area national minorities.

The Role of the State in Promoting Conditions for the Protection of National Minority Religious Identity

religion in Serbia and the religious orientation being left to the individual (Krivokapić 2004, 285).

¹⁴ Such as the freedom of religion which, among other things, embodies the right to preserve one’s religion, or to change it according to one’s own choice (Constitution Par. 1 Art. 43), the freedom of opinion and expression (Constitution Par. 1 Art. 46) etc.

The relevant international acts on the protection of minorities provide for the right of persons belonging to national minorities to maintain their identity individually or in community with others. The obligation of the state to respect the identity of a minority, and to also ensure conditions for the protection of that identity, which is a step further in minority protection, is explicitly provided for in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the CE Framework Convention for the Protection of National Minorities. Article 1 of the Declaration prescribes for the states to protect the existence and national, ethnic, cultural, religious and linguistic identity of minorities on their territories, while Article 5 Par. 1 of the Framework Convention, among other things, provides for the parties to undertake the promotion of necessary conditions for persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity, religion, language, tradition and cultural heritage. In the Commentary of the Working Group on Minorities to the UN Declaration, it is noted that the minority protection is based on four demands: protecting the existence, non-exclusion, non-discrimination and non-assimilation of groups.¹⁵ If the only attribute which differentiates a minority group from the majority population is its religious affiliation, and if its members possess a national minority conscience and wish to maintain their identity, then the role of the state in preserving that identity is imposed as a specific issue, that is the character and content of its duty to protect minority identity and create conditions for such a protection. It is clear that the state must respect the existence and particularity of the group and its members, just as it respects the inviolability of life and human dignity of all, just as the freedom of religion. As well, the duty of the state not to exclude and not to discriminate persons belonging to minorities based on their religious identity can derive from the “general” ban on discrimination according to which religious affiliation is one of the banned bases of discrimination. Is there, beside those obligations, anything else that might be subsumed under requisite conditions needed for persons belonging to minorities to maintain religion, as one of the essential elements of their identity?

Although one can easily be of the position that the state has an obligation to secure conditions for the maintaining of national minority identities, and despite the fact that religion undoubtedly can be a method of identifying a group, it is debatable how far the state should go in securing conditions for a group to maintain and preserve its religious identity. Namely, in a state where the freedom of religion is guaranteed, in accordance with international standards, which among other things, embodies the right of persons not to possess, or change their religious beliefs, as is the case in the Republic of Serbia, it is clear that the freedom of religion of every person belonging to a national minority implies the freedom to change religion. In such a legal frame, the obligation of the state to promote conditions for maintaining nati-

¹⁵ Commentary of The Working Group on Minorities to The United Nations Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities par.6 - E/CN.4/Sub.2/AC.5/2005/2.

onal minority religious identity primarily means tolerating existing religious identities of minorities; it cannot embody the complete preservation of that identity, the stratification of the religious structure of the population, because such a role of the state would be in contravention to the group members' freedom of religion. However, freedom of religion is not an exclusively individual right, but it is also enjoyed in a community, it also has its corporate dimension whose expressions are churches and religious communities, which has its influence on foreseeing duties of the state to secure conditions for maintaining national minority identities in the context of their religious identity. So, in a state with a constitutionally proclaimed separation of church and state, the role of the state in promoting conditions for maintaining religious identity must not imply any form of intervening in issues of church and religious community autonomous life. Having that in mind, it is clear that for the principle of creating conditions for maintaining the religious identity of minorities, it is important that the state allows for various religious minorities to self-regulate (Gilbert 2006, 162). In that sense, states have a double role: to avoid unjustifiable interference and to take steps for the minority to maintain its culture (Gilbert 2006, 163). Avoiding unjustifiable intervention in the context of preservation of religion as an element of national minority identity does not only signify that the state must refrain from policies which have an effect of religious assimilation of minorities, but also need to protect minorities from activities of third parties which might have an assimilatory effect.¹⁶

The Constitution of the Republic of Serbia, in this regard, contains an excellent provision according to which the state, in measures of education, culture and public information, stimulates understanding, appreciation and respect of existing differences, among other things, because of the particularity of its citizens' religious identity. In what manner are such obligations of the state determined in bilateral agreements on the protection of national minorities by which, as was stated, the position of minorities in the border areas is mostly regulated, that is which were concluded with specific kin-states of Serbia's national minorities?

The role of the state in securing conditions for the protection of national minority identities, by that the securing of conditions for the protection of religious identity as well, is variously regulated in bilateral agreements on the protection of national minorities. According to the Agreement on protection of national minorities with the Republic of Macedonia,¹⁷ Article 1 provides for the contracting parties' obligation to promoting conditions necessary for maintaining and developing the identity and rights of national minorities as a whole, while Article 2 provides a right to express, maintain and develop

¹⁶ Commentary of The Working Group on Minorities to The United Nations Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities par. 6 - E/CN.4/Sub.2/AC.5/2005/2, par. 28.

¹⁷ Agreement between the Republic of Macedonia and Serbia and Montenegro on the protection of the Macedonian national minority in Serbia and Montenegro and protection of the Serbian and Montenegrin national minority in the Republic of Macedonia. – "SCG Official Gazette" – International Agreements, n. 6/2005.

not only ethnic, cultural, linguistic, but also religious identity, for persons belonging to national minorities. It should be noted that religious identity is mentioned only once more in that Agreement, in Article 5 which defines that persons belonging to minorities also have the right to express and develop their religious identity individually, or in community with other members of their group, and that the contracting parties will create conditions and adopt measures needed in that goal.

The Agreement on the protection of national minorities concluded with the Republic of Croatia¹⁸ prescribes in Article 1 that the contracting parties will secure members of minorities the right to express, maintain and develop their national, cultural, linguistic and religious identity. Article 2 specifically notes that the contracting parties oblige to secure, among other things, the right to maintain national identity and religion, for members of minorities. Differing from the Agreement concluded with the Republic of Macedonia, this Agreement contains a specific article which provides for the contracting parties to respect the right of members of minorities to freedom of expression of their religious affiliation, to practice of religion and maintaining religious rituals and catechism and to stimulate such aims of religious communities.

The Agreement on the protection of national minorities between Serbia and Hungary¹⁹ provides in Article 1 that the contracting parties agree to secure for the Hungarian national minority residing in Serbia and the Serbian minority residing in the Republic of Hungary the maintaining and development of their national, linguistic, cultural and religious identity according to the principles and provisions contained in documents of the UN, CSCE/OSCE and Council of Europe which are noted in the Preamble of that Agreement. According to Article 3 of the Agreement it is prescribed that persons belonging to national minorities have a right to, individually just as in community with other members of their group, freely express, maintain and develop not only their ethnic, culture and linguistic but also their religious identity.

The Agreement on the protection of national minorities concluded with Romania²⁰ prescribes in Article 5 that members of national minorities have a right to, individually or in community with other members of their group, express and develop their ethnic, cultural, linguistic and religious identity and the contracting parties will stimulate such aims as well as adopting

¹⁸ Agreement between Serbia and Montenegro and the Republic of Croatia on the protection of the rights of the Serbian and Montenegrin minority in the Republic of Croatia and of the Croatian minority in Serbia and Montenegro – “SCG Official Gazette” – International Agreements, n. 3/2005.

¹⁹ Agreement between Serbia and Montenegro and the Republic of Hungary on protection of rights of three Hungarian national minority living in Serbia and Montenegro and of the Serbian national minority living in the Republic of Hungary – “SCG Official Gazette” – International Agreements, n. 14/2004.

²⁰ Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of Romania on cooperation in the field of protection of national minorities – “SCG Official Gazette” – International Agreements, n. 14/2004.

necessary measures. That is the only provision on the religious identity of members of national minorities and the role of the state in securing conditions for its protection in that Agreement.

The issue of the state's role in protecting religious identity of national minorities, particularly those in border areas, can also be foreseen in the context of the role which their kin-state can and is permitted to have.

The Role of the Kin-state in Promoting Conditions for the Protection of National Minority Religious Identity

A certain number of state constitutions in Europe, including Serbia's and its neighbouring countries', contain provisions on members of "their" people abroad.

The Constitution of the Republic of Serbia, in Article 13 Par.2, prescribes for the state to develop and promote relations between the kin-state and Serbs living abroad.

The Constitution of the Republic of Macedonia, in Article 49, provides for that state to care for the position and rights of members of the Macedonian people in neighbouring countries, to assist their cultural development and promote relations with them.

The 2011 Hungarian Constitution, in Article D, provides that the state, having in mind the existence of an integral Hungarian people, bears responsibility for the fate of Hungarians living beyond its borders and that it will assist the survival and development of their communities and support efforts to safeguard their identity, the advancement of their individual and collective rights, the establishment of their autonomies and their prosperity in states in which they reside, as well as mutual cooperation and cooperation with Hungary.

The Constitution of the Republic of Croatia, in Article 10, sets a norm for parts of the Croat people in other countries to be guaranteed specific care and protection by the Republic of Croatia.

The Constitution of the Republic of Romania, in Article 7, provides for the state to assist in reinforcing links with Romanians that live abroad and to act accordingly in goal of maintaining, developing and expressing their ethnic, cultural, linguistic and religious identity, respecting the laws of their countries of citizenship.

If we observe more closely the presented provisions of selected constitutions, we can conclude that the constitutional concept of relation between kin-state and their minorities abroad is determined variously by its content. In certain countries it merely embodies the reinforcing of links between the kin-state and their minority abroad, while other cases explicitly provide for the kin-state to have a role in defending the identity of its minority. The explicit mention of the minority religious identity and the assistance to its maintaining, development and expression is only included in the Constitution of Romania.

Certain countries adopted laws regulating the role of the kin-state in maintaining the identity of minorities abroad. In relevance to this work, atte-

tion should be directed to the question if those acts provide that religion is an element of national minority identity which kin-states protect in that manner and what the role of kin-states in protecting religious identity of their minority abroad is.

In 2001, Hungary adopted Law LXII on Hungarians living in neighbouring countries²¹ whose Article 2 explicitly states that the Republic of Hungary wishes to contribute to the well-being and welfare of Hungarians living in neighbouring countries and the *maintaining of their cultural and linguistic identity*. The Law has caused serious political reactions and scientific analyses.²² It is important to note however that the Law doesn't provide the maintaining of the religious identity of the Hungarian national minority, nor the role of the kin-state in that. The Romanian Law on Support to Romanians Abroad adopted in 2007, replacing the previous one from 1998, has a different approach. Article 1 of that Law determines the beneficiaries as ethnic Romanians, as well as those belonging to the Romanian cultural vein, living outside of Romanian borders and who endeavour to maintain, promote and assert their cultural, ethnic, linguistic and religious identity. Therefore, according to the Law, the religious identity can also be of importance for the kin-state and even in the case where the issue is of a group belonging to the Romanian cultural circle. The Law was amended in 2008 with an expansion of the circle of beneficiaries in order to even include persons belonging to national minorities, linguistic minorities and ethnic autochthonous groups existing in states neighbouring Romania "irrespective of the ethnic name they use". Comments of such an approach clearly demonstrate a peculiar expansion of the new legal frame and goals in comparison to documents of the Council of Europe, such that some communities that could be embodied by its provisions have the status of national minorities in Romania itself (e.g. Aromanians), while others do not enjoy such a status in states where they re-side (e.g. Vlachs) (Tanasescu 2009, 162). The Republic of Serbia adopted the Law on the Diaspora and Serbs in the Region who's Article 4 provides for the maintaining, reinforcing and realization of links between the kin-state and Serbs in the region through, among other things, the maintaining and caring for the Serbian cultural, ethnic, linguistic and religious identity.

What is the relation between the roles of the state where minority lives and the kin-state in securing the conditions for the protection of national minority identity, including also religious identity? The CE Venice Commission has deliberated this issue, specifically because of numerous so-called status laws, most particularly in its Report on Preferential Treatment of National Minorities by the Kin-State. In that Report, the Venice Commission has come to the position that responsibility for the protection of national minorities lies primarily with the states of residence, that the respect of the existing frame of minority protection must be considered a priority, as well as that the effectiveness of the agreement approach in national minority protection can be rocked if agreements on national minority protection are not in-

²¹ Croatia, Serbia, Slovenia, Romania, Slovakia, the Ukraine.

²² See for example the Hungarian view and justification of that approach in: Hatvany 2006.

terpreted and applied *bona fides* in light of principles of good neighbourly relations between states.²³ In the part of this work dedicated to the role of the state in promoting national minority identity it was pointed out that states should protect minorities from activities of third parties with an assimilatory effect as well. In that sense, the protection of minorities with a specific identity, including religious, might also embody measures and activities by which states prevent assimilation, or the imposition of a religious identity coming from other states, in the border area in cases where such activity is taken by the kin-state.

Identity Development

All bilateral agreements on the protection of national minorities contain provisions which clearly provide the right of members of national minorities not only to maintain and express, but also to *develop* a minority identity, including the religious identity as well. Article 79 of the Constitution of the Republic of Serbia also prescribes that members of national minorities, among other things, have a right to *develop* a religious particularity. The “development” of a minority identity, or at least its religious part, is not that clearly established in international multilateral instruments. Namely, Article 27 of the International Covenant on Civil and Political Rights does not contain guarantees for identity development, while the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides for states to *encourage conditions for the advancement of national or ethnic, cultural, religious and linguistic identity*. According to the Commentary of the Working Group on Minorities, the promotion of minority identity demands specific measures which express, reproduce and *further develop their culture*. The Working Group was of the opinion that cultures are not static and that minorities should be given the opportunity to develop their culture in context of a developing process and which should provide for interaction between minorities, between the minorities and the state, as well as between minorities and a wider social community.²⁴ A more careful observation of the Commentary can suggest that the Working Group left *development* out of the context of religious identity. A similar approach can be noticed in the text of the Framework Convention for the Protection of National Minorities. The presented Article 5 Par. 1 of the Framework Convention for the Protection of National Minorities explicitly provides that the contracting parties undertake to promote the conditions necessary for persons belonging to national minorities to *maintain and develop their culture* and to preserve the essential elements of their identity, namely their religion, language, tradition and cultural heritage. Therefore, the Framework Convention does not contain an explicitly worded obligation for contracting parties to promote

²³ Report on the Preferential Treatment of National Minorities by their Kin-States, CDL – INF (2001) 019.

²⁴ Commentary of The Working Group on Minorities to The United Nations Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Par. 6 - E/CN.4/Sub.2/AC.5/2005/2, Par. 29.

conditions for the *development of national minority religious identity*, but only provides the obligation of states to create conditions for religion, as an essential element of identity, to be *preserved*. Not denying however, that religion and a minority's religious identity can be considered part of its culture in the wider sense,²⁵ it is still important to note a certain hesitation of the Framework Convention to explicitly provide for the contracting parties' obligation, and the right of persons belonging to minorities, to *develop religious identity*. What would in fact such an obligation, or right, mean?

Bearing in mind that the relevant domestic and international acts, if providing for the development of identity, including religious, do so most often prescribing it cumulatively with the *maintaining, or preservation and expression* of common identity, one can first put the question whether its writers only had existing identities in mind, namely the further development of identities existing at the time of adoption of these acts, or is such a determination sufficiently wide enough to answer society's needs in recognizing the reestablishment of identities, or rather, in the true sense, the constitution of new minority identities? In principle, it seems, at least when it comes national identity, that based on individual liberty, the expressing national identity must take into account the position that a common care for the maintaining a common identity can also relate to developing and maintaining newly created or reestablished national identities, in as far as it is not *prima facie* clear that, *bona fides*, based on objective criteria, there is need for excluding the existence of a minority *national* identity (e.g. the case of Native Americans in the Republic of Serbia, or the equation of regional and ethnic identity). However, the development of religious identity can be, first of all, the development of individual religious identity, based on individual freedom of religion. In view of the collective aspects of freedom of religion, the development of identity can mean the development of identity within the frame of an existing religious affiliation of a minority – increase of faithful among persons belonging to a minority, the development of religious cultures and structures etc. Such an interpretation stems from two important starting presumptions: A religiously neutral state which respects individual freedom of religion, but also the autonomy of churches and religious communities, except for regulating religious organization establishment, could not have any role in the creation of conditions for the development of a religious identity; the right of persons belonging to a minority to develop a religious identity in community, if that would imply changing that identity, particularly in the case where the minority is determined exclusively on the grounds of religious particularity, could in fact be turned into the complete opposite of the idea of minority protection and could represent a planned modification of identity. Things are different with national minorities in the frame of which exist different religious identities. In such a case, identity development amo-

²⁵ Theory suggests that the term "culture" is perhaps best suited to describe literature, symbols and common manifestations and practices of relevant rituals, customs and legacies, such as for example holidays, fasts, pilgrimages, cults and a specific calendar distinguishing minorities from the majority population (Ghanea 2012, 6).

ng members of a minority can also signify a modification of religious identity which, understandably, does not result in a change of national identity. All of the mentioned follows from the interpretation by which religious identity is determined by religion.

A particular question is, however, if the religious identity of persons belonging to a minority can be equated with the belonging to a specific church or religious community, understood not only in the sense of religion, but also in the sense of, in time and space, a specific administrative-organizational structure. That would in fact manifest the issue of developing religious identity as a question of whether persons belonging to a minority can establish “their” churches and religious communities. International and domestic instruments do not contain, in important numbers, provisions which recognize such a right. Of the bilateral agreements on the protection of national minorities, such a possibility is provided only by the Agreement on the protection of national minorities concluded with Hungary. According to Par. 4 Art. 3 of that Agreement, the contracting parties, recognize the right of persons belonging to national minorities to freely manifest their faith and facilitate, among other things, the establishment of religious institutions. The most notorious example of recognition of that right is Article 8 of the CE Framework Convention for the Protection of National Minorities. In its Article 8, the Framework Convention prescribes that parties undertake to recognize that every person belonging to a national minority has the right to manifest his/her religion or belief and to establish religious institutions, organizations and associations. In regards to the presented provision, we can notice that it, unlike some other provisions of the same Convention, does not provide for the right to establish religious organizations, institutions and associations to be exercised in community with the other members of the group. Comments to that provision of the Convention, remind however that Art. 3 according to which members of the minority realize their rights and enjoy freedoms which stem from principles contained in the Convention individually or in community with others, thus the systemic approach was reason enough why such a determination was left out of that article (Machnykova 2006, 234). Still, in the Explanatory Report to the Convention it is clearly stated that the Convention does not imply the existence of collective rights, and for Art. 8 it is noted that the freedom of religion applies to all, thus meaning that persons belonging to national minorities should, in accordance with Article 4 of the Convention (therefore without discrimination), also enjoy it.²⁶ The essence of the presented provision of the Framework Convention is therefore the securing *that persons belonging to the national minority not be discriminated in the realization of the freedom of religion, for being members of a national minority, and not to enjoy that freedom as persons belonging to a national minority*. From such an interpretation could also derive that *the establishment of religious institutions, organizations and associations is primarily done within the frame of existing religious identities, and not to signify the establishment of national religious institutions, organizations and associations*. Any form of establishment of national religious organizations could give birth to important dilemmas and impose the question if the national pre-

²⁶ CAHMIN Explanatory Report to the Framework Convention, H (1995) 010, Par. 54.

fix of such newly-formed religious communities imposes a specific religious identity to all members of a national community? The Commentary to Art. 8 of the Framework Convention clearly point out the contracting parties' obligation to respect the autonomous character of internal religious affairs and to refrain from intervening, without a valid reason, in the religious organization of national minorities, corresponds to the responsibility to ensure that minority communities be able to exercise freedom of religion through legal entities. In other words, the contracting parties to the Framework Convention have a positive obligation to make a legal personality status available to national minorities who wish to practice *their faith (emphasis V. D.)* (Machnykova 2006, 254). Pursuant to the presented Article 5 of the Convention providing for the positive obligation of contracting parties to create specific conditions for members of national minorities to *maintain* religion as an essential element of their identity, through systematic interpretation of the Convention and linking Article 8 with Article 5 but also through a lack of provisions which might explicitly guarantee the right of persons belonging to minorities to develop a religious identity, it can be concluded that the right of persons belonging to national minorities to establish religious organizations, institutions and associations is primarily in the function of maintaining their religion, and not of the development of institutional structures of religious communities which members of the minority do not belong to, and which they can join, individually exercising their freedom of religion.

The Influence of Other Elements of National Minority Identity on Religious Identity

If a group of persons is a national minority which differs from the majority according to its language, culture, and other attributes, does that necessarily mean that the enumerated particularities have an influence on specific aspects of religious identity and religious life of that minority? There are two groups of questions in which the presented dilemma can occur. Primarily, in principle, it is related to the legal obligations in the churches' and religious communities' identity policies, and it is linked to the recognition of the existence of the minority on the part of the churches and religious communities whose believers are persons belong to the national minority. This issue beholds yet another aspect of the relation between the state and churches and religious communities. Namely, in states whose public authorities recognize the existence of specific national minorities, and in which there is a model of separation between state and churches and religious communities, the question arises have the churches and religious communities a duty to accept and recognize the existence of national minorities? Principally, having in mind that the state and churches and religious communities are separated in those models, it is clear that churches and religious communities are not obliged to declare themselves on the existence of specific minority identities, nor to (publicly) accept or recognize them. The existence of national minorities is not an issue under the jurisdiction of churches and religious communities. On the other hand, state recognition of the existence of national minorities cannot be entirely stripped of its influence on churches and religious communities – following such a recognition, churches and religious communi-

ties, through their actions, should not be allowed to incite national intolerance and hatred – e.g. to openly negate and/or promote the (non)existence of a minority identity.

A particular question in regards to (state) recognition of the existence of national minorities which differ from the majority according to language, is whether churches and religious communities whose believers are persons belong to that minority are duty-bound to use the minority language and alphabet in their affairs, from administrative to liturgical, and whether the state is allowed to intervene in such issues. The issue of language and alphabet used within churches and religious communities, is regulated by acts of autonomous law and the state should not be allowed to intervene in such issues. The state's possible demand to churches and religious communities that they use, in their affairs, national minority languages and alphabets, would, besides being principally untenable because of violating the autonomy of churches and religious communities and their canonical structure, that is violating the principle of separation of church from state, open a whole series of dilemmas in regards to their realization in practice, from numerical criteria needed for directing such demands, to information on the linguistic structure of the flock.

CONCLUSION

Religion, with other characteristics such as language, traditions and cultural heritage, is the very essence of what makes a social group a national minority and can be the sole element of distinction and determination of a national minority. Whether religion is an element of determination of a national minority is a complex issue in whose settlement the state is not the only and sovereign arbiter because of a principal difficulty for a religiously-neutral state to determine the existence of religious identity in a specific social group. On the other hand, a state with the constitutional principle of separation of state and church, and which respects the rights of national minorities, should accept both the status and autonomy of churches and religious communities and thus the issue of religion as an element of national minority identity is manifested in different dimensions of balancing between equally important goals of protection of national minority identity and the respect of the freedom of religion, the separation of churches and religious communities from the state and their autonomy. The state has an obligation to promote conditions for maintaining of national minority identity, but it is debatable how far the state needs to put in place conditions for the group in general so that it can maintain and preserve its religious identity. While on the one hand it is beyond doubt that the respect of minority religious structures' autonomy and self-rule can have its importance in that role of the state, on the other hand, we have yet to resolve whether the issue of promoting conditions for the maintaining and safeguard of religious identity imply the development of new group religious identities and the creation of new national religious organizations. If a national minority is solely determined by its religi-

ous identity, then the development of a new group religious identity, according to the right of its members and the obligation of the state, can lead to the opposite of minority protection. On the other hand, developing the religious identity of minorities which have yet to be determined, or are not exclusively determined by their religious identity, is not in function of protecting national minorities and thus falls under the general legal régime of treating religion and churches and religious organizations: from their autonomy and separation from the state, to the respect of general rules on establishment and the affairs of churches and religious communities. Even when the right of members of national minorities to establish religious institutions, organizations and associations is explicitly proclaimed, its function is to secure that persons belonging to a minority not be discriminated in realizing freedom of religion, because they are members of a minority, and not to enjoy that freedom as persons belonging to a national minority.

The legal aspects of religion as an element of national minority identity has certain particularities in view of minorities in the border areas and embody roles which kin-states can and are allowed to take in protecting the religious identity of national minorities, as well as foreseeing the manner in which religion is treated in bilateral agreements on the protection of national minorities concluded with those states. The regulation in Serbia, as well as in its neighbouring national minority kin-states, differ in content regarding the role of the kin-state in securing conditions for the maintaining and developing of religion as an element of national identity – certain countries do not even determine religion as an element of identity of “their” national minorities, nor do they provide any role of the state in religious identity protection and development, while some other kin-states are particularly interested in the protection and development of the religious identity of their diaspora. All bilateral agreements on the protection of national minorities concluded by the Republic of Serbia with national minority kin-states provide for members of national minorities to have a right to express, safeguard and develop not only of ethnic, cultural, linguistic, but also of religious identity, but variously regulate the role of the state in promoting the conditions for the preservation and development of such an identity.

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