

RELIGION AND NATIONAL MINORITIES IN THE LEGAL AND POLITICAL SYSTEM OF THE REPUBLIC OF SERBIA

Abstract

This article analyzes the normative regulation of the relation between religion and national minorities in the legal and political system of Serbia. The analysis of religion and national minorities in the legal and political system of Serbia includes four, mutually linked, groups of issues. The first includes issues of normative regulation of the very notion of national minorities and religion, as well as religion as an element of national minority identity. This article's second field of interest is made up of issues of normative regulation of religion in the political participation of national minorities. The third group of issues are those pertaining to religion and the cultural autonomy of national minorities, as a specific method of national minority participation in the public affairs of the Republic of Serbia. The issue of the range of application of minority rights in the regulation of the establishment and functioning of churches and religious communities is the fourth group of issues observed. It will be noticed that religion is considered, among other characteristics, in the legal and political system of Serbia, the very essence of what makes a social group a national minority and can be the sole element of differentiation and determination of a national minority. The influence and importance of religion as an element of national minority identity is more pronounced and direct in the sphere of national minority cultural autonomy, then in view of their political participation.

Keywords: religion, national minorities, churches and religious communities, legal system, political system.

The politicology of religion, with its subject of study that, among other things, comprises the issues of ideological and program content and practice of political system subjects, the political life and politics in general pertaining to issues of religion and religious communities,² must inescapably direct its interest to-

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2 Jevtić, Miroljub, Political Science and Religion, *Politics and Religion*, N° 1/2007 Vol I, p. 63-64; M.Jevtić, *Religija i politika, Uvod u politikologiju religije*, Institut za političke studije i Fakultet političkih nauka, Beograd, 2002. p. 15.

wards issues of relations between religion and national minorities as well. The normative regulation of the relation between religion and national minorities, as the central topic of this circle of interest of politicology of religion, undoubtedly has specific weight and can have important and far-reaching political consequences, especially in multicultural, i.e. multi-ethnic and multi-confessional states, such as the Republic of Serbia.³ The scientific analysis of religion and national minorities in the legal and political system of Serbia comprises four, mutually related, groups of issues. The first includes issues of normative regulation of the very notion of national minorities and religion, as well as religion as an element of national minority identity. This article's second field of interest is made up of issues of normative regulation of religion in the political participation of national minorities. The third group of issues are those pertaining to religion and the cultural autonomy of national minorities, as a specific method of national minority participation in the public affairs of the Republic of Serbia. The issue of the range of application of minority (ethnic) rights in the regulation of the establishment and functioning of churches and religious communities is the fourth group of issues of importance to the scientific consideration of the normative regulation of the relation between religion and national minorities in the Republic of Serbia.

I The Determination of Notions and Religion as an Element of National Minority Identity in Serbia

The legal determination of the notion of specific social groups, as the precursory 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.⁴ In all multinational and multicultural 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.

3 About religious diversity and tolerance see further Jakovljević, Dragan, *Verske raznolikosti i toelrancija*, *Politics and Religion*, N° 2/2008 Vol II.

4 See further in M. Jovanović, *Društveni identitet i pravni subjektivitet – kolektiviteti kao subjekti prava?*, *Etnoantropološki problemi* 3/2009.

The Determination of the Notions of Religion and National Minority in the Legal Order of the Republic of Serbia

In international law, especially human rights law, there is no binding definition of religion. The lack of definition does not differentiate religion from other categories protected by basic human rights and freedoms, but because religion is a much more complex notion in regards to other categories, the difficulty of understanding what is protected by basic human rights is considerably increased.⁵

Although it mentions religion in different contexts, the Constitution of the Republic of Serbia does not contain a definition of the notion of religion. That is somewhat understandable keeping in mind the fact that in comparative law constitutions hardly ever do so, and that such an approach would have a fundamental difficulty, since the Constitution, through Article 11 explicitly provides for Serbia to be a secular state in which churches and religious communities are separate from the state as well as that no religion can be established (proclaimed official) or compulsory. Furthermore, Article 44 Par. 44 of the Constitution provides for the freedom of churches to autonomously lead *religious affairs*, while Article 5 Par. 2 of the Law on Churches and Religious Communities provides for churches and religious communities to be free and autonomous in the definition of *their religious identity*. In the sense of the presented constitutional provisions, it could be said that the definition of what can be considered religion is foremost an issue of churches and religious communities themselves, i.e. falls within the scope of their autonomy vis-à-vis the state. Is, however, the state in the legal and political system of Serbia completely deprived of any role in the determination of religion?

If the notion of religion is not determined by the Constitution, i.e. if religious self-determination is considered an integral part of the autonomous position of churches and religious communities, then that immediately suggests the question what can be considered a church or religious community in the legal order of the Republic of Serbia? The Law on Churches and Religious Communities of the Republic of Serbia also does not contain the notion of a church and religious community, but according to the provision of Article 18 Par. 2 of the Law which provides for the submission for registration which contains a religious organisation act of incorporation, information on founders, a statute or other religious organization document which, among other things, contains a description of the organizational structure and governing rules, as well a review of religious teachings' fundamentals, religious ceremonies, religious goals and basic activities of a religious organization, one can conclude that a church, or reli-

5 Gunn, Jeremy, The Complexity of Religion and the Definition of "Religion" in International Law, *Harvard Human Rights Journal* Vol. 16/2003.p.190

gious community, in the Republic of Serbia's legal order is an organization which has an appropriate structure and governing rules regulated by autonomous acts, as well as its own religious teachings and ceremonies. According to the Law on Churches and Religious Communities, churches and religious communities are entered into the Registry of Churches and Religious Communities, and the state has, through the administrative procedure, the possibility and also the duty to observe whether certain teachings and ceremonies are of a religious character, without going into the legitimacy of the beliefs. In order for a confessional citizen group to acquire rights, responsibilities and the very treatment of a religious community, the state is the one that, among other things through the process of registration, recognizes the religious character of a certain legal entity.⁶

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 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 varying notions are used in acts adopted, or prepared under the umbrella of the UN – the Covenant speaks of ethnic, religious or linguistic minorities, 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.⁷

In difference to the concept adopted under the umbrella of the UN, re-

6 In that sense, we might profit from the reasoning of the German Constitutional Court in its decision Bverf GE 83,341 from Feb. 5, 1991 in the dispute by the Baha'i religious community in which it states that a community cannot pretend to be a religious community from mere claim and self-understanding, and justify its call on the guaranteed constitutional freedom based on that . . . , furthermore it must also factually, according to the spiritual content and external phenomenal image, be a religion and religious community. It further notes that . . . in case of dispute, that is verified, as an exercise of the state judiciary, by a state body in the final instance . . . , as well as that . . . the very notion of religious community points to the intended implication of a union based on the state judiciary, and not purely a spiritual community of the cult.

7 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.

gional 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, to which Serbia is a State party, 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."*⁸

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 that appears as a precondition of realization of national minority rights guaranteed by the Constitution.⁹ Certain articles of the Constitution create, to a certain extent, margins of freedom that 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.¹⁰ 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*

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

9 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 script, 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.

10 *"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.

State territory, and possessing 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,¹¹ sufficient representation,¹² a long-lasting and firm relation of the group with the state territory¹³ 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.

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 at-

11 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.

12 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 exorbitantly high criteria for the recognition of the legally relevant status of minority status – Jovanović, Miodrag, op. cit, p. 271

13 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.

14 Such as the freedom of religion which, among other things, embodies the right to preserve one’s religion, or to change it

tention 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*.

There is no specific process of recognition of existence of a national minority in the legal and political system of the Republic of Serbia, however there are specific legally relevant administrative procedures of the realization of minority rights in which groups of persons belonging to national minorities participate (in which they are a party), through which the common maintenance of their minority identity is manifested, i.e. the existence of a national minority. The legal determination of the notion of national minority is sufficiently wide for each social group with the noted characteristics and whose members express concern for a joint maintenance of their identity to be self-determined as a national minority. The national minority member's concern for the joint maintenance of their common identity can be manifested in different manners and in different fields of social life. In the sphere of culture, education, media and official use of language and script, the concern of minority members to jointly maintain their common identity is expressed through the process of national minority national council election which are, according to the provisions of the Constitution of the Republic of Serbia, the Law on National Councils of National Minorities and Law on the Protection of Rights and Freedoms of National Minorities, bodies which represent national minorities as collectives in those fields of social life, i.e. the bearers of cultural autonomy in those fields of social life (see further text). The concern of national minority members to jointly maintain their common identity in other fields of social life is manifested in a different manner and is partly regulated by provisions of specific laws. Having the presented in mind, national minority members electing their national council is not a prerequisite for national minority status but rather the concern for jointly maintaining their common identity can be manifested differently and in other fields of social life (e.g. by forming a political party), but the fact that members of a national minority elected their national council undoubtedly, based on provisions of the Constitution and the Law on the Protection of Rights and Freedoms of National Minorities, signifies that the group of citizens in question can be considered a national minority.

Religion as an Element of National Minority Identity in the Legal System of Serbia

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

according to one's own choice (Constitution Par. 1 Art. 43), the freedom of opinion and expression (Constitution Par. 1 Art. 46) etc.

protection and promotion of national minorities' different identities.¹⁵ 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, traditions 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***.

As was stated in relation to the legal determination of the notion of national minority, the subjective choice of the individual is inseparably linked to the objective criterion relevant to his or 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 criterion to 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 definitions, whether they be in international law, or those contained in domestic law, 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.¹⁶ 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.¹⁷ Since religion is one of the legally provided objective conditions, i.e. criteria for the existence of a national minority in the Republic of Serbia, the question is whether it can be the only distinctive element of a national minority? As previously said, national minority objective characteristics in domestic law are alternatively set, such that for the existence of national minority in the

15 Hofmann, Rainer, *Introduction, The Rights of Minorities in Europe, A Commentary on The European Framework Convention for the Protection of National Minorities*, 2006. p.18

16 Gilbert, Gunn, Article 5, *The Rights of Minorities in Europe, A Commentary on The European Framework Convention for the Protection of National Minorities*, 2006. p.155

17 Krivokapić, Boris, *Zaštita manjina u međunarodnom i uporednom pravu, Vol. I, Zaštita manjina: Istorijski razvoj, osnovna pitanja i zaštita u okviru UN*, 2004. p.193

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.¹⁸

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 that 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.* 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.¹⁹

II Religion and National Minority Political Participation

If religion can be the sole national minority identity element in the Serbian legal order, this raises the question if it has any normative regulative role in the political system, particularly in the political participation of minorities? In relation to that question, it should be noted that certain theoretical articles are of the position that effective participation of religious minorities in the decision-making process, which happens to be one of the standards of minority rights in general, clearly suggests that the protection of (religious) minorities enhances the protection beyond the protection offered within the freedom of religion.²⁰

18 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 religion in Serbia and the religious orientation being left to the individual – see Krivokapić, Boris, *Zaštita manjina u međunarodnom i uporednom pravu*, Vol. III. *Zaštita manjina u nacionalnim porecima država*, 2004. p.285

19 Đorđević B. Dragoljub, *Religije i veroispovest nacionalnih manjina u Srbiji*, *Sociologija* Vol. XLVII (2005) N°3, p. 195

20 Ghanea, Nazila, *Are Religious Minorities Really Minorities*, *Oxford Journal of Law and Religion*, (2012), p.8

Since the Republic of Serbia is constitutionally determined as a secular state, it is clear that religion cannot have any institutional role in the political life of the state. However, since a national minority can be determined as such in Serbia solely based on its religious particularity, this raises the question if any role for religion is normatively determined in the political participation of minorities? The presented question should be observed from two angles – through the problematics of establishment and functioning of national minority political parties and the consideration of institutional solutions for the facilitated participation of national minorities in representative bodies.

Religion and National Minority Political Parties

The part of the Constitution that guarantees the rights of national minorities also contains Article 80 whose rubrum the “right to association and cooperation with persons belonging to the same ethno-national group” which provides the right of persons belonging to national minorities to establish voluntarily financed educational and cultural associations. Based on the presented provisions one could pose the question why the Constitution’s writer, in guaranteeing the right of association to minority members, failed to explicitly guarantee the right to political association as well, i.e. the establishment of political parties? However, as Article 55 Par. 1 of the Constitution of the Republic of Serbia explicitly guarantees the freedom of political association, it is clear that members of minorities also have the right to establish political associations.

The Law on Political Parties regulates the notion and establishment of national minority political parties separately. According to Article 3 of the Law, a national minority political party in the sense of that law is a political party whose functioning, aside from the realization of the political goals through democratic formation of citizen political will and electoral participation, is particularly oriented towards the representation and advocacy of a national minority’s interests and the protection and advancement of that national minority’s rights in accordance with the constitution, law and international standards which is regulated by the political party’s act of incorporation, program and statute. In as much as we were to observe the presented provision of the Law on Political Parties more carefully, in that it would be clear that a national minority political party can be a part of only **one** national minority. Since a national minority can be determined solely on its religious particularity in the legal and political system of Serbia, this gives cause to the question if a national minority party can have a religious prefix and to include in its functioning a specific striving for the representation and advocacy of national minority religious interests and the protection and advancement of religious rights? From an initial observation, there are no reservations to that. The theory of constitutional law clearly states that political parties, according to

the basis of membership association could be classified, among other things, as confessional parties that gather members of a particular faith.²¹ Of course, the right to association and establishment of confessional national minority political parties are not derived from their minority membership, but they enjoy them as citizens. In that sense, it is clear that all citizens of the Republic of Serbia can establish political parties that are guided, in the democratic formation of the will of citizens, by ideological viewpoints in which religion can be a significant, if not a prevalent factor (e.g. the establishment of Christian democratic parties, etc).

On the other hand, the establishment of religious political parties poses the question whether a political party that has in its name a religious label and whose political program is based on an ideology based on a religion which is the only characteristic of an existing national minority, can be considered a national minority party? An affirmative answer cannot be given to that question due to at least two reasons. First, it is clear from the presented provision of the Law on Political Parties that a political party, in order to be recognized as a national minority political party, must be clearly, undoubtedly and explicitly linked to a specific national minority through its acts. On the other hand, there are no religions in the Republic of Serbia whose followers are exclusively members of one national minority.²²

If the legal and political system of the Republic of Serbia allow for the establishment of confessional national minority political parties, can the clergy of churches and religious communities that gather national minorities be their members? An answer to the presented question could be that the Constitution guarantees participation in political life under equal conditions. In that sense, it should be noted that based on provisions of Article 52 Par. 1 of the Constitution according to which each Serbian citizen of legal age and capacity, has a right to elect and be elected, as well as based on provisions of Article 55 of the Constitution which guarantees the freedom of political association, it is clear that priests and religious officials retain their electoral right and can, through political parties, participate in the state's political life. It is clear that in a case where a church or religious community autonomous regulation provides for banning a cleric from participating in the political life, such a constraint can solely have an effect on the position of the cleric within his or her church or religious community and will not have any effect on his or her constitutionally guaranteed rights as a citizen of the Republic of Serbia. In that case we should also interpret Article 8 Par. 5 of the Law on Churches and Religious Communities which provides for a cleric's right to participate in all fields of political life, except when it is banned by internal rules or

21 Marković, Ratko, *Ustavno pravo i političke institucije*, Belgrade, 1995. str.312

22 According to the last population census (2002), even followers of Judaism are persons belonging to different (ethno-) national groups.

a specific decision by the church or religious community which ordained him.²³

The issue of the creation and functioning of confessional national minority political parties in the legal and political system of Serbia hides within it another dimension which is related to the constitutional margins of the freedom of functioning of political parties and churches and religious communities. It is about the constitutional bans of certain methods of functioning of political parties and associations. Namely, it is clear that the functioning of confessional minority parties can be sensitive in the context of inter-ethnic and inter-religious relations and that we should, in that sense, remind that the Constitution provides for the possibility of the Constitutional Court banning associations and political parties whose functioning is oriented towards the incitement of racial, ethnic and religious hatred.

Religion and the Participation of National Minorities in Representative Bodies

The Constitution of the Republic of Serbia contains specific provisions that create a legal basis for the facilitated participation of national minority members in representative bodies on all levels of public authority organization. According to Article 100 Par. 2 of the Constitution, in the National Assembly of the Republic of Serbia, as the highest representative body and bearer of constitutional and legislative authority, the equality and representation of national minority representatives are enabled. The Constitution provides in Article 180 Par. 4 that proportional representation of national minorities in parliaments be accorded in autonomous provinces and units of local self-government with a mixed ethnic population, in accordance with the law. The legal elaboration of the presented constitutional provision of Article 100 Par. 2 is contained in the Law on the Election of Members of Parliament.

The Law on the Election of Members of Parliament in the People's Assembly of the Republic of Serbia provides for a proportional electoral system and it ensures that only lists that have gathered over 5% of the total number of cast votes in the electoral district partake in the distribution of the mandates. Amend-

23 For example, according to Article 10 Par. 1 of the Statute of the Federation of Jewish Communities of Serbia, members of Federation bodies or holders of office cannot be political party officials or political party candidates, while according to the Canon Law Code of the Roman Catholic Church, one of the duties and rights of a cleric includes the obligation to refrain from active participation in political parties, nor in the governing of syndical associations, except when that is, according to the opinion of the competent Church authority, necessary for the protection of Church rights. About the Roman Catholic view of political community see Z. Fahed, How the Catholic Church Views the Political Community? *Politics and Religion Journal*, N° 1/2009 Vol III, Comparative experiences show that in some countries Roman Catholic Church functioned as an institution that gives the legitimacy to politics and this legitimacy calls for peoples' will and transparent institutions - Ribic, Biljana, Relations Between Church and State in Republic of Croatia, *Politics and Religion Journal*, N° 2/2009 Vol III, p.205.

ments to the Law on the Election of Members of Parliament in 2004²⁴ introduced the domestic legislative (Article 81 Par. 2 of the Law) the rule according to which national minority political parties and coalitions of national minority political parties, participate in the distribution of mandates even when they obtain less than 5% of the total number of cast votes. The same rule applies to local elections. In that manner, the local legislative accept the so-called “natural threshold” model for national minority parties as one of the possible models that enable the participation of national minorities in the decision-making process, such as in public affairs. The rule provided by the electoral law are significantly better in comparison to rules that applied up to 2004 and are affirmative for national minority members, because they facilitate the election of their representatives in the National Assembly of the Republic of Serbia. However, the presented rule raises several questions.

In the context of this article’s theme, the first question would be whether members of national minorities, elected in accordance with the presented legal rule, could be members of clergy? As has been said, the Constitution of the Republic of Serbia does not limit the passive voting right. However, there is the specific question of the existence of parliamentary incompatibility in the case of clergy, i.e. inconsistency of the parliamentary service with the status of a priest, or religious official. Theory points out that parliamentary incompatibility is regulated by the Constitution, and that the regulation of that matter is delegated to the legislator in certain constitutional systems.²⁵ Article 102 Par. 3 of the Constitution of Serbia prevents the member of parliament from being a parliamentarian in the assembly of an autonomous province, nor a official in bodies of the executive or judicial branch of power, nor from holding any other function, office or duties which are deemed by law to be in conflict of interest. Since the Constitution provides for the legislator to determine which other functions, offices and duties represent a conflict of interest; the question is which law ascertains what is incompatible with the parliamentary function? The Law on the Election of Members of Parliament does not provide the parliamentary incompatibility for priests and religious officials. However, the Law on Churches and Religious Communities (Article 8 Par. 5) provides for the right of a priest, or religious official, to participate in all fields of public life, except in cases where it is banned by internal rules, or by a specific decision of the church or religious community that ordained him.²⁶ The

24 Law on the Amendments to the Law on the Election of Members of Parliament - „Official Gazette of the Republic of Serbia” n. 18/04.

25 Pajvančić, Marjana, *Pasivno biračko pravo (poslanička sposobnost), Izbori u domaćem i stranom pravu*, Beograd 2012. str. 22 – notes that parliamentary incompatibility is most often, among others, provided for priesthood.

26 It should be noted that some religious communities do not have special priests or all members are considered priests and even Venice Commission in Guidelines for Legislative Reviews of Laws Affecting Religion or Belief held that the regulation of priests’ position by the state is questionable - Flere, Sergej, Registration of Religious Communities in European Countries, *Politics and Religion Journal*, N° 1/2010 Vol IV, p. 113.

presented provision, the expression of the autonomy of churches and religious communities, should not be interpreted as a limitation of a rights of clerics, for they can participate in all fields of public life as citizens, but rather as a limitation of a priest, or religious official, as persons in the service of a church, or religious community, from participating in public life, or certain forms of it, without the knowledge and/or authorization of the church or religious community, which could result in an unenviable position for the church or religious community. In that sense, the presented provision of the Law on Churches and Religious Communities should not be interpreted as an explicitly parliamentary incompatibility, but rather as a possibility that, due to regulations of the autonomous law of churches and religious communities, the member of clergy be unable to participate in political life, not because of the prevention of the state, but that of the proper church or religious community. Furthermore, because Par. 6 of the same Article of the Law on Churches and Religious Communities prevents the state from limiting the political rights of a cleric based on his or her religious office, or service which he/she provides, it could be reasoned that the state cannot curtail the political rights of a cleric, even in cases when the proper church or religious community, banned him/her from political participation, through internal rules, or a specific decision. It is understandable that the duty of the state in that case is to leave the provided political rights of the cleric unhindered, irrespective of his or her status in the church or religious community whose autonomous order has been breached.

Despite the non-existence of a parliamentary incompatibility for priests and religious officials, the possible election of a cleric that belongs to a national minority into the National Assembly could be debateable and cause a line of other questions in regards to the normative regulation of religion and participation of national minorities in representative bodies. One of those questions pertains to the character of the mandate of a priest and/or religious official that would be elected to the National Assembly as a national minority member, i.e. in accordance with the affirmative rule of the electoral legislative. Namely, despite the Constitution not containing a provision which explicitly regulates whom Members of Parliament represent, the presented provisions of Article 100 Par. 2 clearly point out the fact they are *representatives of minorities ex constitutione*, therefore not of representatives of citizens elected on electoral lists of minority parties, but of representatives of minorities as collectives. One can then ask the question if a priest or religious official elected as a member of a minority could truly be considered a *representative of a minority*, and if so, if that would signify that the church or religious community which he/she belongs to is (*ethno-*) *national and minority*?

The individual participation of clerics, members of national minorities, in the representative bodies clearly does not render the church or religious community which he/she belongs to ethno-national and minority. A national minor-

ity which the priest, or religious official, does not necessarily need to be mono-confessional, and such cases do not exist in the Republic of Serbia. On the other hand, a cleric appearing as a representative of a minority in the National Assembly of the Republic of Serbia could be greatly prevented from performing his or her clerical mission and pastoral care, which brings back the issue of the possible participation of priests or religious officials, members of minorities, in the representative bodies, to the necessity of autonomous law regulation by churches and religious communities.

III Religion and the Cultural Autonomy of National Minorities

The 2006 Constitution of the Republic of Serbia regulates the cultural autonomy of national minorities through provisions of Article 75 Par. 2-3 which provide that persons belonging to national minority through collective rights, directly or indirectly by their representatives, participate in the decision-making or decide by themselves on certain issues linked to their culture, education, media and official use of language and script, i.e. that autonomy in the noted fields of social life be realized through national councils which national minority members can elect in accordance with the law. The presented provisions of the Constitution represent a legal basis for the constitution and functioning of national minority cultural autonomy in the legal and political system of Serbia.²⁷ The possibility of religion being an element of national minority identity in the legal and political system of Serbia raises the question if and to what extent and in what manner can religion be normatively brought into relation with the cultural autonomy of national minorities.

The cultural autonomy of national minorities is legally regulated by the Law on National Councils of National Minorities ("Official Gazette of the Republic of Serbia" n. 72/09). Since the Law contains provisions which regulate the competencies and election of national bodies, it is necessary to observe whether national minority national councils, as bodies of national minority cultural autonomy, have any competencies in regards to religion, as well as whether religion has any institutionally regulated role in the process of election of national councils.

Since the Constitution ascertains that members of national minorities

27 In domestic theoretical articles devoted to issues of cultural autonomy and political participation of national minorities, there exist however wider opinions as well. As such, certain authors are of the position that the essence of cultural autonomy is made up of the preservation of particularity (Constitution Art. 79) which defines the right of members of national minorities to expression, preservation, fostering, development and public expression of their national, ethnic, cultural and religious particularity; to the use of their symbols in public places; to the use of their language and script; that in areas where they form a significant population, state bodies, organizations that perform public duties, bodies of autonomous provinces and units of local self-government conduct procedures in their language as well; to education in their language in state and autonomous provincial institutions; to the establishment of private educational institutions; etc. – see, Bašić, Goran, Crnjanski, Katarina, *Politička participacija i kulturna autonomija nacionalnih manjina u Srbiji*, 2006. str.35

can elect their national councils in order to exercise their rights to autonomy in culture, education, media and official use of language and script, it is clear that religion does not fall under the field of social life in which national councils can have competencies. However, the Law on National Councils of National Minorities contains certain provisions which leave room for different interpretation. Article 10 Par. 6 of that Law provides that national councils, among other things, establish institutions, associations, foundations, corporations in the fields of culture, education, media and official use of language and script as well as other fields of importance for the preservation of national minority identity. As religion can be a field of importance to the preservation of national minority identity, this raises the question whether a national council can establish institutions, associations or foundations of exclusively religious character. It seems that such an interpretation of the Law does not have foundation in the Constitution after all. Namely, the presented provisions of the Law are not in accordance with the Constitution because they, in contravention to Article 75 Par. 3 of the Constitution, expand the competencies of the Council and provide for national councils to establish institutions, associations, foundations and corporations, other than in fields of culture, education, media and official use of language and script, **as well as other fields of importance for the preservation of national minority identity**. Since the Constitution of the Republic of Serbia does not define, nor explicitly explain the content of the notion "other fields of importance for the preservation of national minority identity" it is clear that each action of a national council outside of the grounds of culture, education, media and official use of language and script would be unconstitutional. On the other hand, there is the question of whether a national council could, in the fields of culture, education, media and official use of language and script, along with churches and religious communities establish institutions, associations, foundations, corporations. The Law on National Councils of National Minorities contains provisions in several articles and according to which national councils can establish different forms of legal entities in the mentioned fields, individually, or jointly with other legal entities, in accordance with the law. As the Law on Churches and Religious Communities provides for churches and religious communities can establish educational and cultural institutions, it is clear that national minority national councils and churches and religious communities can establish jointly educational and cultural institutions, foundations and corporations.

Beside the competencies of the Councils to establish institutions, foundations, corporations in fields of importance to the preservation of national minority identity, the Law on National Councils of National Minorities provides other general competencies of national councils. In the context of normative regulation of religion and the cultural autonomy of national minorities, particular attention should be given to provisions according to which a national council formulates proposals for national minority (ethno-) national symbols, emblems

and holidays. Can (ethno-) national symbols, emblems and holidays of national minorities have a religious character in the legal and political system of Serbia?

Stemming from the belief that the possibility of displaying ethno-national symbols contributes to the preservation of ethno-national identity, Article 79 of the Constitution provides, among other things, that the Republic of Serbia recognizes and guarantees the right of national minorities to use ethno-national symbols. Serbian legislative solutions provide for a specific procedure for the formulation of (ethno-) national symbols, holidays and emblems. The national councils propose their national minority symbols, holidays and emblems to the Council for National Minorities of the Republic of Serbia for approval. Ethno-national symbols, emblems and holidays are undoubtedly a specific form of tradition and cultural heritage of national minorities. The use of ethno-national symbols is regulated more precisely by the Law on the Protection of Rights and Freedoms of National Minorities, whose norms in Article 16 Par. 2 find that a national minority ethno-national symbol and emblem cannot be identical to a symbol, or emblem of another state. The intention of the legislator was obviously for the adoption of symbols which would represent entire national minorities and not foreign states. Such a solution does not prevent the selection and use of traditional symbols, emblems and holidays which also have a religious character.²⁸

In relation to the normative regulation of religion and national minority cultural autonomy, particular attention is due to the competencies of national minority national councils in the field of culture. According to Article 18 of the Law on National Councils of National Minorities, a national council decides which cultural institutions and manifestations are of particular importance to the preservation, advancement and development of particularities and national identity of a certain national minority. Could, based on the presented provision, a national minority national council determine that a religious institution or religious manifestation is of particular interest to the preservation, advancement and development of particularities and national identity of the national minority that council represents? That, essentially speaking, is possible since religion can be an element of national minority identity.²⁹

National minority national councils, according to the Law, determine which movable and immovable cultural goods (elements of cultural heritage) are

28 The current practice of the Council for National Minorities of the Republic of Serbia confirms such an approach. Namely the Council for National Minorities of the Republic of Serbia has confirmed, at the request of the Bosniak National Minority National Council, on December 23, 2005, the ethno-national symbols and holidays of that national minority in the Republic of Serbia. The first day of Kurban Bayram has been deemed, among other days, as the holiday of the Bosniak national minority. As well, the Council for National Minorities of the Republic of Serbia has confirmed, at the request of the Hungarian National Minority National Council, on December 23, 2005, the ethno-national symbols and holidays of that national minority in the Republic of Serbia. The day of St. Stephen (August 20th) has been deemed, among other days, as the holiday of the Hungarian national minority.

29 Such a decision would only have declarative importance, keeping in mind that a national council can participate in the governing of institutions which it deems to be of particular interest to the preservation of national minority identity, but only if the founder of such an institution is the state, an autonomous province or a unit of local self-government.

of particular interest to a national minority. According to the presented provision, national minority national councils could proclaim religious edifices and specific forms of sacral heritage as cultural goods of particular importance to the national minorities they represent. Such decisions would undoubtedly represent a specific expression of the stance that religion and religious heritage fall under national minority identity elements. However, since the Law on National Councils of National Minorities provides certain council competencies in regards to cultural assets which are by decision of the council determined as assets of particular importance to a national minority (e.g. the council suggests the undertaking of measures of preservation, rehabilitation and reconstruction of such cultural assets, accords opinions and proposals in the process of drafting a spatial and urban plan in a unit of local self-government which contains such cultural assets, proposes a termination of a spatial or urban plan execution in cases which it deems to endanger cultural assets, etc), it is clear that such a decision can open issues of harmonization with other legislative regulation, and even come into collision with the legislative regulation which regulates the status of churches and religious communities in the field of preservation of sacral heritage and cultural assets.³⁰

The consideration of the normative regulation of the relation between religion and national minority cultural autonomy must also encompass issues of the elections of national minority councils, as bodies of national minority cultural autonomy.

Article 75 Par. 3 of the Constitution provides for national minority members' right to elect their national council, in accordance with the law. The legislative normativization of national council elections was foremost carried out by provisions of the Law on the Protection of Rights and Freedoms of National Minorities by which it was provided for national councils to be elected by assemblies of electors made up of state and provincial parliamentarians elected to those posts by their belonging to a national minority, national minority member counsellors from units of local self-government in which the minority language is in official use, persons vouched for by (ethno-) national associations and organizations as well as persons gathering at least one hundred signatures of support. Theoretical articles considering the problematics of national council elections pointed out that such a method of electing minority autonomy open several contested issues among which was the basic question of indirect elections without democratic legitimacy, among other things also because in cases

30 For example, Article 42 of the Law on Churches and Religious Communities provides for the right of churches and religious communities to establish expert and scientific institutions for the preservation of sacral heritage within the frame of a unified system of preservation, in accordance with the law. In light of the presented provision of the Law on Churches and Religious Communities, one could raise the question of relation between national minority national council and such expert and scientific institutions for the preservation of sacral heritage which are founded by churches or religious communities, especially having in mind the competencies of national councils in proposing the undertaking of measures of preservation, rehabilitation and reconstruction of cultural assets which have been deemed of particular importance to the national minority.

where members of national minority political parties were properly organized and homogeneously concentrated into one or more areas of the country, they develop mechanisms with which they can overrule members of the electoral college whose legitimacy was derived from other sources – citizen support and proposals by minority associations.³¹ The Law on National Councils of National Minorities from 2009 changed that method of national council election.

Article 29 of the Law provides that elections for national councils could be direct or indirect by electoral assembly. According to the same Article, the national minorities themselves decide which one of these two methods to use by, as provides Par. 3, holding direct elections for their national council, if at least 50% of the total number of persons belonging to a national minority according to the last census, less 20%, are entered into a specific electoral register, up to the day of the national council election. Leaving aside the issue of constitutionality of a distinct national minority electoral registry and the quality of a hybrid model of national council elections (made up of direct and indirect elections), attention should be directed towards the issue of existence of a normative regulation of the possibility of a role for religion in the national council electoral process, especially in the context of possibility for the clergy to participate in the national council elections as well as becoming members of that body.

The Law on National Councils of National Minorities provides that, aside from exercising the constitutional and legislatively regulated general conditions for attaining the right to vote, a specific condition for attaining an active electoral right for the direct election of national council members for the entry into the specific electoral registry of the national minority. According to Article 33 of the Law, the passive voting right in the election of a national council is accorded to national minority members who fulfill conditions for the active right to vote and do not hold a certain public office. The Law provides that a national minority member holding the office of a judge, prosecutor or Constitutional Court Justice cannot be elected into a national council. Having the presented provision of the Law in mind, it is clear, that for priests and religious officials to participate in national council elections and become national minority national counsellors *mutatis mutandis* applies all of that was stated in the role of clerics in national minority political participation.

If a national minority does not fulfill the legally set conditions for direct elections, the national council can, accorded to Article 100 Par. 1 of the Law, elect an electoral assembly of the national minority. The Law states that the right to become a member of an national minority electoral assembly is given to a person belonging to the national minority, appointed by a national minority organization or association to become an elector and submitting 100 forms with signatures of persons belonging to that specific national minority, along with the act

31 Bašić, Goran, Crnjanski, Katarina, *op.cit.* p.92.

of registration of the organization or association and a written decision of the assembly of the national minority organization or association appointing him or her for the national minority elector. In light of the presented legal provision, and based on the fact that religion can, in the legal and political system of Serbia, be an element of national minority identity and particularity, one could ask the question if a church or religious community could be considered an (ethno-) national organization or association? Article 101 Par. 2 of the Law considers as a national minority organization, association or political organization any organization, citizen association or political organization with a prefix of a national minority in its name, or which is declared by its statute as an organization, association or political organization which gathers, or functions in the interest of persons belonging to a national minority. Based on the observed provisions of the Law, clearly certain churches or religious communities could be considered (ethno-) national organizations in the sense of the provision of the Law on National Councils of National Minorities.³²

IV Churches and Religious Communities and Minority Rights

The Republic of Serbia's Constitution guarantees a wide pallet of minority rights. For analyzing the relation between religion and national minorities in the legal and political system of Serbia, it is particularly important to observe whether minority rights have an importance for education and the functioning of churches and religious communities.

Article 79 of the Constitution guarantees the right of persons belonging to national minorities, among other rights, to *develop* their religious particularity. That solution goes beyond the international standards³³ because international multilateral instruments do not clearly establish the "development" of minority religious particularity.³⁴ What could that actually mean?

The right to developing religious particularity can be manifested as an

32 For example, in accordance with the presented legal provision, the Slovak Evangelical Church A.C. or the Dacia Felix Eparchy of the Romanian Orthodox Church could already be considered minority organizations by their name alone.

33 That solution goes even beyond comparative standards since the religious freedom of persons belonging to national minorities proclaimed small numbers of constitutions – Kutlesic, Vladan, *Religija i verske zajednice u ustavima komparativno, s posebnim osvrtom na predloge za novi ustav Srbije, Politics and Religion Journal*, N° 1/2007 Vol I, p.129.

34 Article 5 Par. 1 of the CE Framework Convention for the Protection of National Minorities provides for the contracting parties to oblige to promote the necessary conditions for persons belonging to national minorities to maintain and develop their culture and preserve essential elements of their identity, religion, language, tradition and cultural heritage. Therefore, the Framework Convention does not contain any explicitly worded obligation for agreeing parties to create 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 contesting however, that in the wider context, minority religion and religious identity could also be considered part of its culture, it is nonetheless important to note a certain hesitation of the Framework Convention to explicitly provide for the obligation of contracting parties, but also the right of persons belonging to minorities, to the development of their religious identity.

issue of minority members having the right to establish their “own” churches and religious communities. International and domestic instruments do not contain a great number of provisions that call for that right. The Law on Churches and Religious Communities only contains the provision according to which the decision for establishing a church or religious community can be taken by 0.001% of *adult citizens* of the Republic of Serbia with residency in Serbia or the same number of foreigners with permanent residency in Serbia. Therefore, neither the Law on Churches and Religious Communities, nor other laws, provide for the explicit right of persons belonging to national minorities to establish “their” churches and religious communities.

The most notorious case 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 provides for the agreeing parties to undertake to recognize that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organizations and associations. In the Explanatory Report to the Convention for Article 8 it is clearly stated that the freedom applies to all persons and persons belonging to a national minority should, in accordance with Article 4 (without discrimination therefore), enjoy it as well.³⁵ The essence of the presented provision of the Framework Convention is therefore to ensure that *persons belonging to minorities not be discriminated in realizing their freedom of religion, because they belong to minorities, but not that they enjoy that right as persons belonging to a minority*. From that interpretation it could follow *that the establishment of religious institutions, organizations and associations is foremost done within the frame of existing religious identities, and not that it, at all costs and unconditionally, means the establishment of (ethno-) national religious institutions, organizations and associations*. Any form of establishment of ethno-national religious organizations could create significant dilemmas and impose the question if a certain religious identity is imposed to all persons belonging to an ethno-national community by the ethno-national prefix of such newly formed religious organizations, or whether there is encroachment on the autonomy, i.e. existing churches and religious communities’ structure and organization?³⁶ It could be concluded that persons belonging to minorities have a right to establish religious organizations, institutions and associations foremost

35 CAHMIN Explanatory Report to the Framework Convention, H (1995) 010, par.54.

36 The Commentary of Art. 8 of the Framework Convention clearly points 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.Đ.). – Z.Machnykova, Article 8. The Rights of Minorities in Europe, A Commentary on The European Framework Convention for the Protection of National Minorities, 2006. p.254. Churches and religious communities have their own view of ethnopletism, Stojanović, Ljubivoje, Ekumenizam I etnopletizam, pravoslavni pogled, *Politics and Religion Journal*, N° 1/2007 Vol I.

in the function of preserving their faith, and not the development of new churches and religious communities, or the institutionalization of religious community structures to whom minority members do not belong, (and who they can join by individually exercising their freedom of religion) at the expense of existing churches and religious communities, their autonomous order or property. Article 19 of the Law on Churches and Religious Communities should be understood in that sense providing for the Registry of Churches and Religious Communities to prevent the entry of religious organizations whose name contains a name, or part of a name which expresses an identity of a church or religious community or religious organization already entered in the Registry, or with a previously submitted request for registry.

The issue of importance of minority rights for churches and religious communities is somewhat also based on the legal obligations in the church and religious community identity policy, i.e. linked to the recognition of the existence of a minority by a church and religious community whose members belong to a minority. The recognition of national minorities by churches and religious communities whose members belong to a minority holds within it another aspect of the relation between state and churches and religious communities. Namely, despite there being no formal specific recognition of existence of national minorities in Serbia, where self-determination is of sole importance for their legal relevant existence, there still exist certain procedures through which the legal order unsuspectingly confirms the existence of a national minority – e.g. the process of national council election. On the other hand, the model of state and church and religious community separation in Serbia justifiably raises the question whether churches and religious communities must accept and recognize the existence of national minorities which are undoubtedly “recognized” by the state legal order, i.e. deemed as national minorities?³⁷

Basically, as the state and the church and religious communities are separated, it is clear that churches and religious communities could not be obligated to pronounce themselves on the existence of specific minority identities, nor to (publicly) accept or recognize them. The existence of national minorities is not a question in the jurisdiction of churches and religious communities. On the other hand, the “recognition” of the existence of national minorities would not be wholly deprived of influence on churches and religious communities – for example, following the formation of a national minority’s national council, churches and religious communities should not incite (ethno-) national intolerance and hatred through their functioning – e.g. to openly negate and/or advocate the (non-) existence of a minority.

A separate issue regarding the (state) “recognition” of the existence of a

37 Some of the churches and religious communities, during the socialist period took part in pursuing national interest of national minorities – see Novaković Dragan, *Islamska zajednica u funkciji ostvarivanja albanskih nacionalnih interesa*, *Politics and Religion Journal*, N° 1/2007 Vol I.

national minority differing by language from the Serbian majority population, is whether churches and religious communities whose believers belong to that minority are obligated to apply the minority language and script in their functioning, from administrative to liturgical, and whether the state can intervene in such issues. The issue of language and script used in the churches and religious communities is regulated by acts of autonomous law and the state should not intervene in such issues. The possible state requests to churches and religious organizations to utilize, in their functioning, national minority languages and scripts, otherwise from being principally untenable because they would represent infringement of church and religious community autonomy and their canonical order, i.e. infringing the principle of separation of church and state, would also open a whole range of dilemmas in regards to their realization in practice, from numerical criteria needed for the direction of such requests, to data on the linguistic structure of faithful.

Conclusion

In the legal and political system of Serbia, religion is, with other characteristics, 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. The influence and importance of religion as an element of national minority identity is more pronounced and direct in the sphere of national minority cultural autonomy, then in the field of political participation.

In the sphere of national minority political participation, religion and religious content can be indirectly present in ideological determination, or the very name of political parties, but the right to establish confessional minority political parties is not derived from belonging to a minority, but persons belonging to a minority enjoy it as citizens. Despite religion being a possible basic element of national minority identity, a political party with a religious prefix in its name and solely advocating in its program an ideology based on a religion which is the only characteristic of a national minority, cannot be considered a national minority political party, without the explicit program and statutory determination as a national minority party. There is no parliamentary incompatibility for members of clergy in the Republic of Serbia, but clerics who would be elected in a representative body as a minority representative could be to a greater extent disabled in exercising his or her clerical mission and pastoral care, which points to the necessity for the participation of clerics in public life to also be regulated by the autonomous law of churches and religious communities. Because of solutions contained in church and religious community autonomous law, it is possible for a member of clergy to be prevented from participating in political life, not by the will of the state, but because of a prevention by his or her church or religious

community, all the while retaining the rights and possibilities of participating in political life as a citizen.

Within cultural autonomy, religious contents can have greater influence and significance, in cases when (ethno-) national symbols, emblems and holidays of national minorities can also have a religious character, when national minority national councils, as cultural autonomy bodies can proclaim religious edifices and certain forms of sacral heritage as cultural goods of particular importance for national minorities whom they represent and when there exists an institutional possibility for churches and religious communities, in the electoral process of national councils, to be treated as (ethno-) national organizations and as such, directly participate in the election of that body.

The Republic of Serbia is a state whose Constitution guarantees a wide pallet of rights to persons belonging to national minorities, but also a state with the proclaimed constitutional principle of separation of church and state, which warrants for the state to acknowledge both the status and autonomy of churches and religious communities. Therefore the issue of religion as a national minority identity element, particularly in the context of the issue of whether minority rights have any influence on the formation and functioning of churches and religious communities, is manifested through different dimensions of balancing between equally important goals of protection of national minority identity and the respect of the freedom of religion, the autonomy of churches and religious communities and their separation from the state. The constitutional right of persons belonging to national minorities to the *development* of religious particularity, if including the right to establishing religious institutions, organizations and associations, has a function of ensuring that persons belonging to minorities not be discriminated in the realization of their freedom of religion, due to their belonging to a minority, and not to enjoy that freedom as members of a minority. Since the state and churches and religious communities in the Serbia are separated and churches and religious communities enjoy autonomy, there exist no legal obligations for churches and religious communities to declare themselves on the existence of specific minority identities, do (publicly) accept or recognize them, nor to apply minority languages and scripts in their functioning, from administrative to liturgical.

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РЕЛИГИЈА И НАЦИОНАЛНЕ МАЊИНЕ У ПРАВНОМ И ПОЛИТИЧКОМ СИСТЕМУ РЕПУБЛИКЕ СРБИЈЕ

Резиме

Овај рад анализира нормативно уређење односа између религије и националних мањина у правном и политичком систему Србије. Анализа религије и националних мањина у правном и политичком систему Србије обухвата четири, међусобно повезане, групе питања. У прву спадају питања нормативног уређивања самог појма националних мањина и религије, као и религије као елемента идентитета националних мањина. Друго поље интересовања овог рада чине питања нормативног уређивања религије у политичкој партиципацији националних мањина. Трећу групу питања чине она која се односе на религију и културну аутономију националних мањина, као посебан вид учешћа националних мањина у јавним пословима у Републици Србији. Питања домаћаја примене мањинских права у уређивању формирања и деловању цркава и верских заједница је четврта група питања која су размотрена. Указаће се да се у правном и политичком систему Србије религија, уз остале карактеристике, сматра самом суштином онога што једну друштвену групу чини националном мањином и може да буде једини елемент разликовања и одређења националне мањине. Утицај и значај религије као елемента идентитета националних мањина израженији је и непосреднији је у сфери културне аутономије националних мањина, него у погледу њихове политичке партиципације.

Кључне речи: религија, националне мањине, цркве и верске заједнице, правни систем, политички систем.

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