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## Law and Religion in Bosnia and Herzegovina

### I. Introduction

Freedom of religion is a key human right that has gone through different phases of development – from non-freedom, i. e. compulsion, through tolerance, to full freedom of religion and other forms of non-religious convictions. The development was accompanied by a variety of mechanisms for the protection of this right,<sup>1</sup> as well as different models of regulation of relationship between the religious and political authority. In essence, three models of this relationship may be identified: a state religion model, a recognised religious communities model, and a separation model.

After the Ottoman rule that contained the organic unity of political and religious authority, the Balkans area, besides the existence of confessional organisations of Christian denominations and Jews (millet) in most parts, had the state religion model (except in Bosnia and Herzegovina).<sup>2</sup>

Radical changes in terms of the position of the religion of society occurred after the end of the Second World War in 1946 as well as the establishment of a new, socialist state. A model separating religion and the state was adopted and implemented in the conditions of a one-party system and monopoly of a single ideology – Marxism (separation model with antagonism).<sup>3</sup> Religion was declared a private matter of each individual. The legal status of religious communities was regulated by a special law, which was adopted in 1953. Different state measures, such as an agrarian reform, nationalisation and expropriation, seized a substantial part of religious communities' property and weakened their social significance. Until the mid-20<sup>th</sup> century, religious laws were applied in Bosnia and Herzegovina for the regulation of marital and family issues, as well as hereditary and endowment issues for Muslims. After the abolition of religious courts in Socialist Yugoslavia in 1946, only civil marriages concluded before the competent state body were legally valid. After the conclusion of civil marriage, believers have been given the opportunity to marry according to religious regulations before the competent priest or religious official. However, religious marriage does not produce any consequences under the civil law. Such a situation is retained in the applicable family legislation in Bosnia and Herzegovina.

The 1974 Constitution placed the issue of regulating legal status of churches and religious communities under the competence of member republics, which adopted special laws for regulating this area in 1976 and 1978. However, there was no change in the adopted model of relationship between the state and religion or in the area of

1 M. D. Evans, Religious Liberty and International Law in Europe, Cambridge 1997.

2 M. Imamović, Vjerske zajednice u Bosni i Hercegovini i Jugoslaviji između dva svjetska rata, Sarajevo 2008, p. 7-25.

3 F. Karčić, Relgija i pravo: Kratak uvod, Sarajevo 2011, p. 5.

expressing freedom of religion. The laws remained in force until the beginning of the democratisation process in 1990 and the dissolution of the Yugoslav Federation (1991-1992).

## II. Normative framework and institutions for the protection of the freedom of religion in Bosnia and Herzegovina

Freedom of religion in Bosnia and Herzegovina (hereinafter: “BiH”) is granted by the Constitution of BiH and entities’ constitutions,<sup>4</sup> the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities<sup>5</sup> (hereinafter: “Law on Freedom of Religion”), and agreements between the state and religious communities. Due to a specific identification element that religion has in the creation of ethnic identity of the constituent peoples in Bosnia and Herzegovina (Bosniaks, Serbs, and Croats), the constitutional and political system of Bosnia and Herzegovina and the normative frameworks of the protection of collective rights of the peoples should be understood in a wider context as the protection of right to religious denomination even when religion is an identification element of one constituent people, which is in terms of constitution and law expressed through a veto mechanism in a consociational political system. The Constitution of BiH does not define vital national interest, but this term is used in the practice of the Constitutional Court of BiH (hereinafter: the “Constitutional Court”). In Article 70 of the Constitution of the Republika Srpska it is stated that vital national interest is defined, among other things, as: “identity of a constituent people”, i. e. as the right to „education, religion, language, promotion of culture, tradition, and cultural heritage“.<sup>6</sup> This term is defined in an identical manner in Article 17 a of the Constitution of the Federation of Bosnia and Herzegovina (hereinafter: the “FBiH”).<sup>7</sup>

The Constitution of BiH, Article II, regulating human rights and freedoms, guarantees the right to “freedom of thought, conscience, and religion”. Besides this, the same Article regulates that the rights and freedoms set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, hereinafter: “ECHR”) and the Protocols thereto would apply directly in BiH, and that they would have priority over all other laws. This by default includes

4 The Federation of Bosnia and Herzegovina and the Republika Srpska are two entities in Bosnia and Herzegovina. By their very nature, entities are most similar to federal units, with their exclusive competencies, constitutions and organization of power.

5 Law on Freedom of Religion and Legal Status of Churches and Religious Communities in BiH, Official Gazette of Bosnia and Herzegovina, 5/04.

6 Constitution of the Republika Srpska, Official Gazette of the Republika Srpska, no. 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 31/02, 31/03, 98/03, 115/05, 117/05, available under: [http://www.narodnaskupstinars.net/sites/default/files/upload/dokumenti/ustav/lat/ustav\\_republike\\_srpske.pdf](http://www.narodnaskupstinars.net/sites/default/files/upload/dokumenti/ustav/lat/ustav_republike_srpske.pdf), 26 May 2018.

7 Constitution of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05 i 88/08, available under: <http://legalist.ba/wp-content/uploads/2014/02/Ustav-Federacije-BiH-nesluzbeni-precisceni-tekst.pdf>, 26 May 2018.

Article 9 of the ECHR that grants freedom of thought, conscience, and religion. Apart from the fact that the ECHR is a part of Bosnia and Herzegovina's constitutional system, it is also a binding international legal document, since Bosnia and Herzegovina joined the Council of Europe on 24 April 2002 and the ECHR on 12 July 2002.<sup>8</sup> Therefore, the ECHR is binding on two grounds: (1) it is a part of Bosnia and Herzegovina's constitutional system and (2) it is a binding international legal agreement.

The Constitution of the FBiH guarantees "freedom of thought, conscience, and convictions", and "freedom of religion, including private and public worship".<sup>9</sup> The same article prohibits discrimination based on "religion or belief". Besides that, it is regulated that no person can be deprived of FBiH citizenship on the ground of religion,<sup>10</sup> and religion is listed as one of the elements of "vital national interest".<sup>11</sup>

The Constitution of the Republika Srpska guarantees "freedom of thought and orientation, conscience and conviction".<sup>12</sup> Besides, it also guarantees a collective aspect of the right to freedom of religion, declaring that

religious communities shall be equal before the law and shall be free to perform religious affairs and services. They may open religious schools and perform religious education in all schools at all levels of education; they may engage in economic and other activities, receive gifts, establish legacies and manage them, in conformity with law.<sup>13</sup>

Finally, the Law on Prohibition of Discrimination in Bosnia and Herzegovina<sup>14</sup> defines discrimination as every different treatment including every exclusion, limitation or preference based on real or assumed features towards any person or group of persons or persons who are in family or any other relationship with them and every other circumstance with a purpose or a consequence to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life (Article 2, paragraph 1 of the Law). In the same paragraph, the Law lists, among others, religion and ethnic affiliation as prohibited grounds of discrimination.

Therefore, the normative and legal regulation of the position of religious communities and the protection of right to religion is provided by the Law on Freedom of Religion, agreements between religious communities and the state, the ECHR, constitutions in Bosnia and Herzegovina, and the Law on Prohibition of Discrimination. In a wider context of religion as an identification element of constituent peoples in Bosnia and Herzegovina and the consotiation elements introduced by the 1995 Constituti-

<sup>8</sup> [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auh=stAKzUfM](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=stAKzUfM), 20 May 2018.

<sup>9</sup> Constitution of the FBiH, Article 2.

<sup>10</sup> Constitution of the FBiH, Article 5, paragraph 2.

<sup>11</sup> Constitution of the FBiH, Article 17a. "Vital national interest" is a veto mechanism by which one of the constituent peoples (Bosniaks, Serbs or Croats) in legislative bodies may block the passing of laws or other decisions. This veto mechanism is primarily legislative, and may be launched in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, the House of Peoples of the Parliament of the FBiH and the Council of Peoples of the National Assembly of the Republika Srpska.

<sup>12</sup> Constitution of the Republika Srpska, Articles 25, 28, paragraph 1.

<sup>13</sup> Constitution of the Republika Srpska, Article 28, paragraph 2.

<sup>14</sup> Law on Prohibition of Discrimination (Official Gazette of BiH, No. 59/09); Law on Amendments to the Law on Prohibition of Discrimination (Official Gazette of BiH, No. 66/16).

on of BiH, the constitutional and legal system is established in a way that protects collective identities of the peoples, and indirectly the protection of religion/religious denomination.<sup>15</sup>

According to the 2013 census, there are 50.7% Muslims, 30.75% Orthodox Christians, and 15.19% Catholic Christians in Bosnia and Herzegovina,<sup>16</sup> which shows a diverse image of BiH in terms of religion. The consequence of such a situation is the necessity of combining single treatment of all religious communities (through legal regulations) and respect of their differences through special contracts with the state. With this regard, the Law on Freedom of Religion which was adopted on 28 January 2004 sets the foundation to a single regulation of the individual and collective aspect of freedom of religion in BiH. This Law provides the possibility of concluding agreements between the state or its entities and religious communities related to issues of mutual interest. So far, such an agreement with the state was concluded by the Catholic Church, i. e. the Holy See as its universal authority<sup>17</sup> and the Serbian Orthodox Church. Negotiations on the agreement between the Islamic Community and the state are in process, but it was not signed until the publication of this paper. The Jewish Community has not signed the agreement with BiH either.

Protection of the freedom of religion or conviction in BiH may be exercised in a procedure before competent courts or human rights protection institutions: the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina and the Constitutional Court.<sup>18</sup> The Institution of the Human Rights Ombudsman gives recommendations for violations of rights that are not legally binding, and in its reports it points at systematic violations of individual and/or collective rights.<sup>19</sup> On the other hand, the Constitutional Court has appellate jurisdiction for violations of individual and collec-

15 More detailed information: *D. Banović/S. Gavrić/M. Barreiro*, The Political System of Bosnia and Herzegovina. Institutions – Actors – Processes, Sarajevski otvoreni centar, 2013; *D. Banović*, Collective Rights of Constituent Peoples in the Legal System of Bosnia and Herzegovina, in: Goran Marković (ed.), Public Law in Bosnia and Herzegovina: Trends and Challenges. European Public Law Organization and University of East Sarajevo, 2015.

16 Final census results. Link: <http://fzs.ba/index.php/popis-stanovnistva/popis-stanovnistva-2013/konacni-rezultati-popisa-2013/>, 22 May 2018.

17 The Basic Agreement between the Holy See and Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina – International Agreements, 10/07, was concluded on 19 April 2006 and has the status of an international agreement.

18 *Karčić*, l.c. (note 3), pp. 67-70; *N. Begović*, Ustavni okvir i Zakon o slobodi vjere i pravnom položaju crkava i vjerskih zajednica u BiH: normativna projekcija bosanskohercegovačkog sekularizma, Sveske za javno pravo, No. 18, 5, 2014, p. 5.

19 In 2017, the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina considered one case in terms of protection of the freedom of thought, conscience, and religion prescribed by Article II/3.g) of the Constitution of Bosnia and Herzegovina and Article 9 of the ECHR for violating the rights of members of the religious community. In that case, the complainant filed a complaint against the treatment of the University Clinical Centre Tuzla, stating that she was deprived of health care, which she claims is entitled to, because she did not consent to blood transfusion, which is contrary to her religious convictions. The complainant, in accordance with her beliefs, wanted a guarantee that she would not receive any blood transfusion, while the health institution in which the surgical procedure was to be conducted called for legal solutions, policies, and procedures of the institution, indicating to what extent they were able to meet her demands. This justifiably raised the following

tive rights of the citizens of Bosnia and Herzegovina, and in the context of BiH's legal system it represents the final appellate instance.<sup>20</sup>

### III. Freedom of religion/belief and its expression

The Law on Freedom of Religion guarantees each person the right to the freedom of religion or belief, the freedom to adopt or change religion, as well as the freedom – individually or in community with others, in public or private – to manifest his religion or belief in any manner in worship, practice and observance, cherishing customs and other religious activities.<sup>21</sup> In relation to the previous socialist legislation, one can notice the frequent use of the term “public” as an area of expression of religion. This

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questions: (1) to what extent the society, that is, the authorities, may limit the rights and freedoms of the complainant, and (2) in what way, in accordance with legal obligations, the institution can satisfy her request. On September 28, 2017, the Ombudsmen Institution sent a recommendation to the UKC Tuzla and the Ministry of Health of Tuzla Canton to consider the complainant's case and the possibilities in which her request could be met, starting with engagement of external associates and treatment in another health institution in Bosnia and Herzegovina. On October 26, 2017, the complainant's complaint was filed. It states that the Cantonal Court in Tuzla issued a judgement that recognised her lawsuit and it solved the administrative matter by obliging the Clinical Centre in Tuzla to provide her with health service in compliance with her religious beliefs, that is, without blood transfusion. Annual Report on results of the activities of the Institution of Human Rights Ombudsman of BiH for 2017; Available at: [http://www.ombudsmen.gov.ba/documents/obmudsmen\\_doc201803081034422eng.pdf](http://www.ombudsmen.gov.ba/documents/obmudsmen_doc201803081034422eng.pdf), 26 May 2018.

- 20 In cases in which the Constitutional Court reviewed the violations of Article 9 of the ECHR and Article II/3.g) (AP-2575/13 – *Greek Catholic Eparchy of Križevci in Bosnia and Herzegovina from Banja Luka*; AP-248/13 – *Serb Orthodox Church Mostar Municipality, and Serb Orthodox Church Blagaj Municipality*; AP-3947/12 – *Husmet Hamidović*; AP-2190/13 – *Emela Mujanović*; AP-286/06 – *Parish of St. Anthony of Padova from Bugojno, Franciscan Province Bosna Srebrna Sarajevo*) it did not find any examples of violation of the right to manifest religion. For example, in the case of the *Greek Catholic Eparchy of Križevci in Bosnia and Herzegovina from Banja Luka*, the Constitutional Court concluded that there was no violation of the rights referred to in Article II/3.g) and Article II/4. of the Constitution of Bosnia and Herzegovina, and the rights referred to in Article 9 in conjunction with Article 14 of the ECHR, because in the circumstances of the present case there is nothing to suggest that public authorities went beyond the framework of the free assessment area in establishing co-operation with religious communities, and that they led the appellant to an unequal and discriminatory position in relation to other churches and religious communities by the manner of financing of churches and religious communities. Similarly, in the case of the *Parish of St. Anthony of Padova from Bugojno, the Franciscan Province Bosna Srebrna Sarajevo*, the Constitutional Court concluded that the challenged decision did not violate Article II/3.e) of the Constitution of Bosnia and Herzegovina because it is in accordance with the constitutional and legal framework regulating the legal status of religious community. The Constitutional Court also concluded that there was no violation of Article II (3) (g) of the Constitution of Bosnia and Herzegovina and Article 9 of the ECHR because the challenged decision did not result in a “limitation” of the appellant's freedom of religion.
- 21 Law on Freedom of Religion, Article 4, paragraph 1.

abandons the previous understanding of religion as a “private matter”, and the limitation of expressing religion to the individual’s private sphere and places of worship.<sup>22</sup>

Besides, the Law on Freedom of Religion prohibits discrimination based on belief and conviction, the disturbance of religious rituals and other religious activities, assaults against religious officials, assaulting and damaging religious buildings and other property of religious communities, activities aimed at stirring up religious hatred to any religious community or its members, depreciation or mocking any religion, as well as forcing individuals to express their religion or convictions.<sup>23</sup>

Freedom of religion or convictions is also protected by regulations of criminal codes in BiH, within the following criminal offences: infringement of the equality of individuals and citizens,<sup>24</sup> disturbing religious services,<sup>25</sup> violation of the freedom of religion and practice of religion and denial of rights of religious communities to equality and practice of religious rituals in public,<sup>26</sup> and causing national, racial, and religious hatred, split, and intolerance.<sup>27</sup>

However, on the territory of BiH, attacks on religious facilities, cemeteries and property of religious communities and harassment of religious officials still pose a significant challenge to achieving full freedom of religion, especially when it comes to minority groups in a particular area.<sup>28</sup> From the beginning of the implementation of the project of the Inter-religious Council of Bosnia and Herzegovina (November 1, 2010) on the monitoring of attacks on religious facilities and believers until the end of the last reporting period (October 2, 2016), the project registered a total of 198 attacks on religious facilities, religious officials and believers who were directly related to religious facilities. Out of 198 attacks, 97 of them were directed against facilities of the Islamic Community, 58 against the premises of the Serbian Orthodox Church, 37 against the facilities of the Catholic Church, five against Jewish Community premises, and one attack was directed against the building of the Christian Adventist Church.<sup>29</sup> The competent judicial authorities in BiH managed to identify the perpetrators of 55 reported attacks (28% of the total number of attacks).<sup>30</sup> By the reporting period, 23 judgments were passed.<sup>31</sup>

22 *F. Karcić*, Islam u sekularnoj državi: primjer Bosne i Hercegovine, in: A. Alibašić (ed.), Religija i sekularna država, Sarajevo 2007, p. 28.

23 Law on Freedom of Religion, Article 6.

24 Article 177 of the Criminal Code of the FBiH, Official Gazette of the Federation of Bosnia and Herzegovina, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11 and 59/14; Article 162 of the Criminal Code of the Republika Srpska, Official Gazette of the Republika Srpska, 49/03.

25 Article 177 of the Criminal Code of the FBiH; Article 162 of the Criminal Code of the Republika Srpska.

26 Article 178 of the Criminal Code of the Republika Srpska.

27 Article 136 of the Criminal Code of the FBiH; Article 300 of the Criminal Code of the Republika Srpska.

28 *Begović*, l.c. (note 18), pp. 6-7.

29 Interreligious Council in Bosnia and Herzegovina, Monitoring napada na vjerske objekte i druga mjesta od značaja za crkve i vjerske zajednice u BiH – Zaštita svetih mjesta: Annual report, 1. novembar 2015. do 31.10.2016. godine, Sarajevo, 2017. Link: [http://www.mrv.ba/upload/attachments/sesti\\_godisnji\\_izvjestaj\\_KWs.pdf](http://www.mrv.ba/upload/attachments/sesti_godisnji_izvjestaj_KWs.pdf), 25 May 2018, p. 12.

30 Ibid, p. 16.

31 Ibid.

In the last Sixth Annual Report of 1st November 2015 to October 2016, which was published in May 2017, the Inter-Religious Council of Bosnia and Herzegovina recorded twelve reports of attacks on religious facilities, religious officials and believers who were in direct contact with religious facilities.<sup>32</sup> Of the total number of attacks, nine attacks were directed against the facilities of the Islamic Community, one attack against the facilities of the Serbian Orthodox Church, one attack against the premises of the Catholic Church, and one attack against Jewish Community facilities.<sup>33</sup> As to the crime solve rate (identified perpetrators), perpetrators were identified in only three cases (25%).<sup>34</sup> Compared to earlier periods, the number of attacks is decreasing.<sup>35</sup> The Inter-Religious Council of Bosnia and Herzegovina states in its report that in the event of attacks directed against religious facilities, public condemnations are becoming more frequent, and this fact is a good example of how local communities should react to an attack on religious facilities.<sup>36</sup>

#### IV. Restricted expression of religion or convictions

The limits of the expression of religion or convictions are given very broadly and in accordance with relevant international acts and practices. Namely, the Law on Freedom of Religion stipulates that public expression of faith may be restricted only by law and in accordance with international standards

when it is shown by the competent authorities to be necessary in the interests of public safety, to protect health, public morals, or for the rights and fundamental freedoms of others.<sup>37</sup>

The ECHR standards related to the limits of allowed restrictions to the freedom of religion are affirmed in judicial practice.<sup>38</sup> In several decisions of the Human Rights Chamber,<sup>39</sup> as a separate body established by the Dayton Agreement, it was found that the destruction and removal of the remains of demolished mosques in the Republika Srpska, the refusal to grant permits for their reconstruction, the prevention of burial, etc. constitutes an unjustified restriction of the right to freedom of religion, that

32 Ibid, p. 4.

33 Ibid, p. 6.

34 Ibid, p. 9.

35 Ibid.

36 Ibid, p. 21.

37 Law on Freedom of Religion, Article 14, paragraph 7.

38 Begović, l.c. (note 18), p. 7.

39 *Islamic Community v. Republika Srpska*, case no. CH/96/29, 11 June 1999; *Islamic Community in BIH v. the Republika Srpska*, case no. CH/99/2177, 11 February 2000; *Islamic Community in BIH v. the Republika Srpska*, case no. CH/98/1062, 09 February 2001; *Islamic Community in BIH (Mrkonjić-Grad) v. the Republika Srpska*, case no. CH/01/7701, 22 December 2003. All decisions are available in the database of the Human Rights Chamber: <http://www.hrc.ba/database/searchForm.asp>, last accessed: May 7, 2015.

is, discrimination against the Muslim population and a violation of the right to peaceful enjoyment of possessions.<sup>40</sup>

Article 9 of the ECHR protects the so-called forum internum, the inner spiritual world that includes thoughts, conscience and religion of an individual.<sup>41</sup> This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.<sup>42</sup> Although this freedom contains several elements, the freedom of religion is central to judicial practice not only in BiH, but also throughout the entire region.<sup>43</sup> The reason lies in the fact that the constitutional order of the former Socialist Federal Republic of Yugoslavia was not inclined to manifesting the religious freedom of both individuals and religious communities.<sup>44</sup> Given the scant case law of the Constitutional Court (and formerly the Human Rights Chamber), it could be considered that complete “religious peace and coexistence” are enjoyed in BiH.<sup>45</sup> Actually, it is possible to conclude that there is not enough developed self-awareness among citizens for the use of legal remedies, which results in non-initiation of proceedings before state authorities. Nevertheless, in the process of reviewing the case law, consideration should also be given to the procedures in which religious communities initiated procedures for the return, rebuilding and reconstruction of their property, and in which they sought the protection of their cultural assets such as graveyards and cemeteries.<sup>46</sup> In other words, in order to obtain a full picture of the cases, the right referred to in Article 9 of the ECHR should be interpreted in the context of the right to property.

## V. Relationship between the state and religion: separation with cooperation

In the process of democratization of the BiH society, the principle of institutional and functional separation between the state and religious communities was preserved as inherited from the socialist regime.<sup>47</sup>

The Law on Freedom of Religion stipulates that churches and religious communities are separated from the state, which means that: (a) the state cannot recognize the status of a state religion to any religion, or the status of a state church or religious community to any church or religious community; (b) the state does not have the right

40 *M. Nowak/T. Vospernik*, Permissible Restrictions on Freedom on Religion or Belief, in: T. Lindholm et al. (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers 2004, p. 169.

41 *Ch. Steiner* et al., *Ustav Bosne i Hercegovine. Komentar*, Sarajevo 2010, p. 329.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 *Ibid.* p. 330.

47 *F. Karčić*, Razvoj državnog religijskog prava u Bosni i Hercegovini 1990-2009, in: *Zbornik radova Mustafa Imamović – 45 godina naučnog i publicističkog rada*, Sarajevo, Gradačac 2010, p. 365.

to interfere with the internal organization and the affairs of churches or religious communities; (c) no church or religious community can enjoy special state privileges in relation to other churches or religious communities, and religious officials cannot formally participate in the work of political institutions; and (d) the state may provide material support to churches and religious communities without discrimination, and in particular without discrimination based on religion or conviction.<sup>48</sup>

Therefore, unlike the socialist regime that was characterized by the separation system with ideological hostility towards religion, the general tendency in the relations between religion and the state is their co-operation. This is particularly reflected in the legally prescribed possibility of regulating issues of common interest by an agreement between the church or religious community and the competent state or entity authorities (e. g. religious education and spirituality in the military).

The return of religion to the public sphere resulted in, as *Fikret Karčić* points out, having many individuals, accustomed to the earlier state, gaining the impression of the domination of religion, which is especially evident in the new public debate on religious symbols in the public space, initiated by the recent decision of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (hereinafter, in this Section V: “the Council”). In adopting the decision, the Council referred to Article 13 of the Law on Courts in the FBiH which reads:

Judges and court officials may not express any religious, political, national or other affiliation during the performance of official duties. Symbols of religious, political, national or other affiliation shall not be displayed in the court building or in court premises. The prohibition referred to in paragraph 1 of this Article shall not apply to parties and third parties.

Namely, at its session in October 2015, the Council adopted a conclusion (No. 08-02-1-3163-1/ 2015 of October 21, 2015) banning the use of “religious symbols to all employees in judicial institutions in Bosnia and Herzegovina”. In addition, it was concluded that the wearing of religious symbols in terms of parties should be evaluated by the holders of judicial functions in each individual case,

bearing in mind, on the one hand, the rights of an individual to freedom of religion and the right to equal access to justice for all and, on the other hand, the requirement of respect and preservation of reputation of judicial institutions, and objective requirements of judicial proceedings.

It is noted that the question of wearing religious symbols in judicial institutions was considered “from the aspect of public perception of the existence of religiously motivated bias in the judiciary”.

In order to examine the application of the decision, on January 26, 2016, the Council requested all courts and prosecutors’ offices in BiH to provide information no later than February 5, 2016, on whether they encountered cases of wearing religious characteristics by the holders of judicial functions or other employees, and what specific measures have been taken with regard to ensure compliance with the positive regulations and guidelines of the Council.

48 Law on Freedom of Religion, Article 14, paragraphs 1-4.

In the case of *Hamidović vs. Bosnia and Herzegovina*<sup>49</sup> before the European Court of Human Rights (hereinafter: the “European Court”), the applicant argued that it was his religious duty to wear a skullcap, and that the ban on wearing it before the State Court of Bosnia and Herzegovina had amounted to a “limitation” on the manifestation of his religion (article 9 of the ECHR).<sup>50</sup> In his view, that limitation had not been lawful as no statutory provisions expressly prohibited the wearing of the skullcap in the courtroom, and the sanction imposed on him was disproportionate.<sup>51</sup> The Bosnian government argued that the limitation was lawful: the House Rules on which the domestic decision had relied should be read in conjunction with Article 242 paragraph 3 of the Code of Criminal Procedure affording trial judges wide discretion with regard to questions of court decorum.<sup>52</sup> The Government maintained that the trial judge had simply enforced a generally accepted rule of civility and decent behaviour that skull-caps were not permitted in the courtroom in BiH.<sup>53</sup> Moreover, the trial judge had acted to protect the principle of secularism, which was of vital importance in a multicultural society such as that of BiH.<sup>54</sup> Both parties agreed that the punishment imposed on the applicant for wearing a skullcap in a courtroom constituted a limitation on the manifestation of his religion.<sup>55</sup> But, in the present case the parties’ opinions differed as to whether the impugned measure was “prescribed by law”.<sup>56</sup> The Constitutional Court concluded that the interference was lawful, taking into consideration especially the fact that the president of the trial chamber had informed the applicant of the applicable rule and of the consequences of disobedience.<sup>57</sup> The European Court had no strong reasons to depart from the findings of the Constitutional Court.<sup>58</sup> When examining whether there was a legitimate aim, the applicant took the view that the interference with the exercise of his freedom to manifest his religion did not correspond to any of the aims listed in the Article 9, paragraph 2.<sup>59</sup> The Government maintained that the impugned measure pursued two legitimate aims: (1) to protect the rights and freedoms of others (the principle of secularism and the need to promote tolerance in a post-conflict society) and (2) to maintain the authority and impartiality of the judiciary.<sup>60</sup> Since the European Court in previous cases had decided that the protection of secularism could be linked to the legitimate aim of the “protection of the rights and freedoms of others” with the meaning of Article 9 paragraph 2, the European Court decided that there is no reason to depart in the present case.<sup>61</sup> When it comes to the examination whether the measure was “necessary in a democratic society”, the European Court stated that the applicant appeared before the court as summoned and stood

49 Case of *Hamidović v. Bosnia and Herzegovina*, Application no. 57792/15, 5.3.2018.

50 The case of *Hamidović vs. Bosnia and Herzegovina*, paragraph 28.

51 Ibid.

52 Ibid, paragraph 29.

53 Ibid.

54 Ibid.

55 Ibid, paragraph 30.

56 Ibid, paragraph 33.

57 Ibid.

58 Ibid.

59 Ibid, paragraph 35.

60 Ibid.

61 Ibid.

up when requested and clearly submitting to the laws and courts of the county.<sup>62</sup> There is no indication that the applicant was not willing to testify or that he had a disrespectful attitude.<sup>63</sup> In these circumstances, his punishment for contempt of the court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society.<sup>64</sup> The European Court concluded that in this case the domestic authorities exceeded the wide margin of appreciation afforded to them and that there has been a violation of Article 9 of the ECHR.<sup>65</sup>

Restricting or banning religious symbols in judicial institutions in Bosnia and Herzegovina points to the challenges that the model of separating the state and religion in BiH is facing, established after the democratization process, after decades of experience with the socialist model of institutional and functional separation of the state and religion, and proclaiming the religion as a private matter of every individual.

## VI. Legal status of churches and religious communities

In accordance with the Law on Freedom of Religion, churches and religious communities in BiH have the status of legal entities, acquired by registration with the Ministry of Justice of BiH. As to the registration method, the Law distinguishes between three categories of churches and religious organizations.<sup>66</sup> The first category consists of historically based churches and religious communities (traditional religious communities): the Islamic Community, the Serbian Orthodox Church, the Catholic Church and the Jewish Community.<sup>67</sup> The second category consists of churches and religious communities that had acquired the status of legal entities prior to the adoption of the Law.

Considering that the Law recognized the continuity of the acquired legal position of the abovementioned categories, they only need to submit application for registration.<sup>68</sup> The third category consists of new churches and religious communities that attach the following documents to their respective registration application: a) statute or other basic act of the religious community that shows the content and manner of confession of faith, performing religious rituals, area and manner of action; b) a document on official religious teaching; c) signatures of 300 citizens – followers; and d) a decision on the establishment of a religious community, adopted by at least 30 foun-

62 Ibid, paragraph 42.

63 Ibid.

64 Ibid.

65 Ibid, paragraph 43.

66 The explicit or factual division of churches and religious communities, with different conditions of their registration, exists in other former members of the Socialist Federal Republic of Yugoslavia. See more in: *E. Memišević*, Savremeno regulisanje slobode religije ili uvjerenja u Bosni i Hercegovini, Hrvatskoj, Srbiji i Crnoj Gori, in: *T. Lindholm/W. C. Durham Jr./B. G. Tahzib-Lie (eds.)*, Sloboda vjere ili uvjerenja: Priručnik, Sarajevo 2015, pp. 481-527.

67 Law on Freedom of Religion, Article 8, paragraph 2.

68 Law on Freedom of Religion, Article 16, paragraph 3.

ders and signed by the head of the community, his deputy or other authorized representatives.<sup>69</sup>

In order to prevent unjustified delays in deciding on the registration, which has been qualified by the European Court of Human Rights as a violation of Article 9 of the ECHR,<sup>70</sup> the Law stipulates that a new religious community would be considered registered if the Ministry of Justice, within 60 days of filing the application, fails to make a decision on the application.

According to the Instruction on the implementation of the Law, the Ministry of Justice is authorized to issue a decision on the removal of a church or religious community from the Register of Churches under the following conditions: a) if the competent body of the church or religious community decides on its termination, b) if the body of the judicial authority legally establishes that a church or religious community, by its action, invokes or incites religious, national or racial hatred or other forms of intolerance among the citizens of Bosnia and Herzegovina [...] or in any other way violates spiritual integrity and mental health in order to root and spread the doctrine.<sup>71</sup> The decision on refusing registration or removal from the Register of Churches and Religious Communities may be appealed before the Council of Ministers of BiH, i. e. by launching an administrative dispute before the Court of BiH within three months of the final decision of the Council of Ministers.

## VII. Autonomy of churches and religious communities

The Law on Freedom of Religion allows the autonomous action of churches and religious communities, which regulate their internal organization independently in “accordance with their internal regulations, laws and teaching”<sup>72</sup> It is forbidden for state authorities to interfere with the election, appointment or removal of religious leaders and staff of churches and religious communities that they perform in accordance with their regulations and needs.<sup>73</sup>

In addition to its core, the Law on Freedom of Religion also enables religious communities to establish companies and manage their assets, to establish cultural, charity, health and educational institutions that are in terms of rights equal to institutions founded by the state or other authorized founders, or to engage in all activities that are not prohibited by law.<sup>74</sup> This possibility represents a novelty in comparison with the socialist period when religious communities could only perform religious ri-

69 Law on Freedom of Religion, Article 8, paragraph18.

70 *R. Podoprigora*, Freedom of Religion and Discretionary State Approval of Religious Activity, in: T. Lindholm et al. (eds.), l.c. (note 66), p. 432; *Begović*, l.c. (note 18), p. 11.

71 Article 9 of the Instruction on the implementation of the Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in BiH, Official Gazette of Bosnia and Herzegovina, 83/06.

72 Law on Freedom of Religion, Article 11,paragraph 2.

73 Law on Freedom of Religion, Article 11, paragraphs 1-3.

74 Law on Freedom of Religion, Article 10.

tes and religious affairs,<sup>75</sup> under threat of criminal sanctions for violating these regulations.

### VIII. Financing and property of churches and religious communities

Churches and religious communities are guaranteed the right to acquire, own, and dispose of their own property and property rights.<sup>76</sup> The state may provide material support to religious organizations for the “preservation of cultural and historical heritage, healthcare, educational, charity and social services”, provided that the said services are provided without any discrimination, particularly without discrimination based on religion or conviction.<sup>77</sup> Besides, donations and income of churches and religious communities will be treated in accordance with laws and regulations related to non-profit, educational and charity organizations, which reflects indirect financial assistance. Unlike some other countries,<sup>78</sup> payments for pension, health and disability insurance of religious officials are paid by religious communities. However, in the Law on Freedom of Religion the state committed to regulate pension, disability and health insurance of religious officials by a special regulation, which has not been adopted yet.<sup>79</sup>

Considering that after the Second World War a significant part of the property of religious communities was subjected to measures of nationalization, expropriation and agrarian reform,<sup>80</sup> the Law guarantees the right to restitution of seized property throughout the territory of BiH,<sup>81</sup> which will be regulated by a special law. However, such a law was not adopted before the publication of this paper.

### IX. Religious education in public schools

The Law on Freedom of Religion guarantees the right to religious education in religious, as well as in public and private institutions of pre-school, primary schools and higher levels of education. However, the process of introducing confessional religious education in Bosnia and Herzegovina began after the first multiparty elections in

75 *Karčić*, l.c. (note 47), p. 365.

76 Law on Freedom of Religion, Article 12, paragraph 1-2.

77 Law on Freedom of Religion, Article 14, paragraph 4.

78 Such a solution exists in Croatia and Serbia. See more in: *Memišević*, l.c. (note 47), p. 500, 512. In Montenegro, the Law on Contributions for Compulsory Social Insurance stipulates the obligation of religious communities to pay contributions for pension, disability and health insurance for priests and religious officials. However, reports on the implementation of agreements with religious communities state that the Ministry of Human and Minority Rights granted the Roman Catholic Church and the Islamic Community financial assistance to regulate the contributions for pension and disability insurance of religious persons. See more in: *Memišević*, l.c. (note 47), p. 523.

79 Law on Freedom of Religion, Article 13, paragraph 4.

80 *F. Karčić*, Vakufi i reprivatizacija, *Glasnik*, *Rijaseta Islamske zajednice u SFRJ*, br. 3, 1991, pp. 267-272.

81 Law on Freedom of Religion, Article 12, paragraph 3.

1991/92. Namely, already in 1992, Orthodox religious education was introduced into primary schools in the Republika Srpska as a mandatory subject. In 1994, the Ministry of Education of the Republic of BiH introduced religious education in elementary and secondary schools as an elective subject for which a parental consent was previously required.<sup>82</sup>

The 2003 Framework law on primary and secondary education in BiH stipulates that schools “shall promote and protect religious freedom, tolerance and the culture of dialogue”, and that students will attend classes of religious education only if they are in accordance with their beliefs or beliefs of their parents.<sup>83</sup> It does not specify the possibility of restricting the rights of students to religious education, nor the minimum number of students required to organize religious education classes in a particular school.<sup>84</sup>

The method of organizing and conducting religious education differs in the two entities, the Brčko District, and the cantons within the FBiH. In the FBiH, it mostly has the status of a mandatory-elective course, which when elected becomes mandatory for the entire academic year, or in certain cases, for the entire primary or secondary education.<sup>85</sup> In the Republika Srpska, as well as in the Brčko District, religious education is mandatory in primary, but not secondary education. In order to organize religious education classes it is necessary that there are at least 30 students of a certain religion in one school.

However, the great disadvantage of the current model of confessional religious education is the absence of an alternative subject for those who do not choose religious education.<sup>86</sup> That is why in Brčko District, the first Deputy High Representative and Brčko Supervisor, *Raffi Gregorian*, ordered that several restrictions on teaching in religion be applied, until alternative classes are offered. These restrictions imply that no marks for classes of religious instruction shall be calculated as part of a student's grade point average and that religious instruction classes shall only be offered as either the first or last period of a shift.<sup>87</sup> With the purpose of overcoming the shortcomings of the current model and achieving goals of religious instruction, there is a suggestion of introducing simultaneous lessons of confessional religious instruction, alternative course, and a one-year religious studies course in the curricula of state schools.<sup>88</sup>

82 *A. Alibašić*, Religious Education in Public Schools in Bosnia and Herzegovina: Towards a Model Supporting Coexistence and Mutual Understanding, Sarajevo, 2009, p. 8.

83 Article 9 of the Framework law on primary and secondary education in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, no. 18/03.

84 *Z. Popov/A. M. Ofstad*, Religious Education in Bosnia and Herzegovina, in: *Z. Kuburić/C. Moe* (eds.), Religion and Pluralizam in Education: Comparative Approach in the Western Balkans, Novi Sad 2006, pp. 73-106.

85 *Popov/Ofstad*, l.c. (note 84), p. 78.

86 Only in Tuzla Canton, alternative course is Culture of Religions or History of Religions. See more in: *Alibašić*, l.c. (note 82), p. 9.

87 *Ibid.*

88 *Alibašić*, l.c. (note 82), p. 4.

## X. Providing religious services in public institutions and the issue of recognising religious holidays

Concerning the satisfaction of the religious needs of persons in public institutions, especially in the armed forces and prisons, specific co-operation between the state and churches and religious communities has been achieved. The Law on Service in the Armed Forces of BiH stipulates that military personnel have the right to perform religious activities in accordance with the specifics of their particular religion. The ways of organizing and conducting these activities in the Armed Forces of BiH, as well as the obligation of the state to provide financing of religious services in the army, are regulated by agreements between the Ministry of Defence of BiH and religious communities.<sup>89</sup> Members of the armed forces have the right to food in accordance with national and religious customs.

The Law on Execution of Criminal Sanctions of BiH also guarantees the right of prisoners to meet their religious needs, as well as the obligation of penitentiary institutions, in co-operation with religious communities, to create conditions for the realization of this right.<sup>90</sup>

The Law on Freedom of Religion does not address the issue of religious holidays. The fundamental agreement between the Holy See and BiH stipulates the obligation of the state to pass a special law recognizing Sunday and the following feasts as non-working days for all Catholics in the country: January 6 (Epiphany), Corpus Christi, August 15 (Assumption of the blessed virgin Mary), November 1 (All Saints' Day) and December 25 (Christmas). However, there is still no state law on religious holidays, but Eid-al-Fitr, Eid-al-Adha, as well as Orthodox and Catholic Christmas and Easter, are celebrated as public holidays. With the purpose of meeting religious or traditional needs, employees in the FBiH and Brčko District have the right to four days off in one calendar year, two of which are paid, while in the Republika Srpska, they have the right to three days off, but without the right to compensation.<sup>91</sup>

## XI. Conclusion

After the start of the democratization process, the 1990s and the dissolution of the Yugoslav Federation, the new independent states abandoned the socialist understanding of religion as an exclusively private matter, which is manifested in the privacy of the home and religious objects. The constitutional documents, in accordance with international norms, provide general individual and collective guarantees for the freedom of religion and its manifestation in "private or in public" – ceremonies, adherence to religious regulations, cherishing customs and other religious activities.

Further development of general guarantees is provided in the acts on the freedom of religion and the legal status of religious communities, adopted in the 2000s, with

<sup>89</sup> Article 29 of the Law on Service in the Armed Forces of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, no. 88/05, 53/07, 59/09, 74/10 and 42/1.

<sup>90</sup> Begović, l.c. (note 18), p. 12.

<sup>91</sup> Ibid.

the exception of Montenegro, where the 1977 Law on Legal Status of Religious Communities is still in force.

In BiH, the Law on Freedom of Religion and the Legal Status of Religious Communities adopted in 2004 seeks to establish, as its name suggests, a balance in the standardization of the protection of individual religious rights and the freedom and collective rights of churches and religious communities.

Although BiH, like other former members of the Socialist Federal Republic of Yugoslavia, retained the model of institutional and functional separation of the state and religious communities, which is guaranteed by the constitutions of these states,<sup>92</sup> one can basically state that there is a model of separation with co-operation in the area of issues of common interest. This co-operation is particularly evident in education, culture, health and other matters, as well as in the possibilities of providing material assistance to religious communities by the state. This is in greater detail regulated by laws and special agreements concluded between the state and religious communities on issues of common interest. However, certain numerically significant religious communities, in some countries, are given a special treatment due to different historical, social and political reasons.

For example, the different treatment of religious communities is reflected in the division of traditional and other churches and religious communities and in different conditions of their registration. However, even with certain, mainly stated, shortcomings, we may state that the constitutional and legal provisions on freedom of religion and its expression in Bosnia and Herzegovina are in line with the norms of international law.

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92 Memišević, l.c. (note 47), pp. 481-527.