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**Religious symbols in Bosnia and Herzegovina's courtrooms.  
Between domestic law and ECHR system \*\*\***

*I simboli religiosi nelle aule giudiziarie di Bosnia ed Erzegovina.  
Tra diritto domestico e sistema CEDU \*\*\**

ABSTRACT: The essay deals with the wearing of religious symbols within the judiciary of Bosnia and Herzegovina. It outlines the protection of religious freedom and the church-state model underpinning the Bosnian legal order, before tracing the origins of the debate on religious symbols in judicial settings and beyond. The analysis then situates the Bosnian context within the broader framework of European Court of Human Rights case-law. It finally explores possible approaches to balancing individual freedom of religion with the principle of judicial neutrality in Bosnian courtrooms.

ABSTRACT: Il saggio esamina la questione del porto di simboli religiosi all'interno del contesto giudiziario della Bosnia ed Erzegovina. Dopo aver delineato il quadro di tutela della libertà religiosa e dei rapporti tra lo Stato e le confessioni religiose che sorregge l'ordinamento in questo ordinamento, il contributo ricostruisce le origini del particolare dibattito sui simboli religiosi nell'ambito giudiziario in Bosnia. L'analisi colloca tale quadro di riferimento nel più ampio panorama della giurisprudenza della Corte europea dei diritti dell'uomo. In conclusione, il *paper* esplora possibili criteri di bilanciamento tra

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la libertà individuale di manifestare la propria religione e il principio di neutralità del giudice nelle aule di giustizia bosniache.

KEY-WORDS: Freedom of religion, Right to manifest religion, Religious symbols, Judiciary, Bosnia and Herzegovina. Libertà religiosa, Diritto alla manifestazione del credo, Simboli religiosi, Tribunali, Bosnia ed Erzegovina.

**SUMMARY: 1. Introduction - 2. A brief overview the protection of religious freedom and on the church-state system of Bosnia and Herzegovina - 3. Religious symbols in BiH judiciary: the origins of the debate - 4. Religious symbols beside BiH's judiciary - 5. Limiting freedom to manifest religion in BiH's judiciary - 6. The wearing of religious symbols in the courtrooms: a brief overview of the Strasbourg case-law - 7. How to balance individual freedom of religion and neutrality principle in Bosnian courtrooms?**

## 1 - Introduction

The latest census in Bosnia and Herzegovina (BiH) (2013)<sup>1</sup> indicates that 96,64% of 3,5 million population, declare themselves as religious, with 50,70% being Muslims, 30,75% Orthodox Christians and 15,19% Roman Catholics. Furthermore, the latest available research (2018) shows that Bosnians are second most religious Europeans with 54% of them saying that religion is “very important in their lives”<sup>2</sup>.

Religions and churches like Orthodox Church, Catholic Church, Islam as well as Judaism, have always been part of the multi-religious life in BiH, “in the sense of the pluralism” which is required by the BiH Constitution and European Convention on Human Rights (ECHR), as necessary precondition for a democratic society<sup>3</sup>.

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<sup>1</sup> *Census of Population, Households and Dwellings in Bosnia and Herzegovina: Ethnicity/National Affiliation, Religion and Mother Tongue*, Agency for Statistics of Bosnia and Herzegovina, Sarajevo, BiH, 2019, p. 24.

<sup>2</sup> PEW RESEARCH CENTER, *Eastern and Western Europeans Differ on Importance of Religion, Views of Minorities, and Key Social Issues: People in Central and Eastern Europe are less accepting of Muslims and Jews, same-sex marriage, and legal abortion*, Online Report (<https://www.pewresearch.org/religion/2018/10/29/eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues/>), October 2018, p. 21.

<sup>3</sup> CCBiH, Partial Decision No. U 5/98 IV, 18 and 19 August 2000, para 44. CCBiH, Decision on admissibility and merits in case no. U 3/13, 26 November 2015, para 93. CCBiH decisions in admissibility and merits are published on the website of the CCBiH ([https://www.ustavnisud.ba/en/home?force\\_locale=true](https://www.ustavnisud.ba/en/home?force_locale=true)), including some of them in



That was a case until 1992, when almost all mosques, Islamic religious objects were damaged and destroyed, just like hundreds of catholic and orthodox churches<sup>4</sup>. At the same time, during Bosnian war (1992-1995) religion played such important part of the war, which led some to call it a “religious war”<sup>5</sup>. To support such claim, it has been argued that religious symbols were used for purposes of war mobilization; demolition of religious sites; religious clergy had been present among military forces; religion was used to justified for war crimes and finally war criminals and crimes have been praised by religious clergy<sup>6</sup>.

Dayton Peace Accords (DPA) (1995) simultaneously brought the end to the Bosnian war, and further shaped the institutional transition from socialism to democracy as well as respect for the rule of law<sup>7</sup> and human rights observance<sup>8</sup>, leading to the religion resurgence, redefinition of the position of the religion in the public life by guaranteeing the right to manifest freedom of religion in public<sup>9</sup> and its transformation from purely private and intimate one (*res privatae*) to the issue of public concern<sup>10</sup>. Religious greetings and religious clothing had become the most visible and present manifestation of the religion,

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English.

<sup>4</sup> See **M. ATTILA HOARE**, *Bosnia and Herzegovina: Genocide, Justice and Denial*, Center for Advanced Studies, Sarajevo, BiH, 2017.

<sup>5</sup> See **S. FLERE**, *Was the Bosnian War (1992-1995) a Full-fledged Religious War?*, in G. OGNJENović, J. JOZELIĆ (eds.), *Politicization of Religion, the Power of State, Nation, and Faith*, Palgrave Macmillan, New York, 2014.

<sup>6</sup> **A. ALIBAŠIĆ**, *History of Inter-Religious Dialogue in Bosnia and Herzegovina. From Force-Feeding to Sustainability?*, in *Interdisciplinary Journal for Religion and Transformation in Contemporary Society*, no. 2, 6, 2020, p. 354. **D. ABAZOVIĆ**, *Religious Claims during the War and Post-War Bosnia and Herzegovina*, in *Borderlands e-journal*, no. 1, 14, 2015, pp. 4-9.

<sup>7</sup> Art. I BiH Constitution, para 2.

<sup>8</sup> Art. II BiH Constitution, para 1.

<sup>9</sup> **D. ABAZOVIĆ**, *Sekularizam i sekularizacija u sadašnjem javnom diskursu - iz nereligijske perspektive*, in A. ALIBAŠIĆ (ed.), *Religija i sekularna država. Uloga i značaj religije u sekularnom društvu iz muslimanske, kršćanske i jevrejske perspektive sa fokusom na Jugoistočnu Europu*, Fondacija Konrad Adenauer - Predstavništvo u Bosni i Hercegovini, European Abrahamic Forum, Međureligijski institut u BiH, Sarajevo, 2007, pp. 192-193.

<sup>10</sup> **D. BANOVIĆ**, **E. MEMIŠEVIĆ**, *Law and Religion in Bosnia and Herzegovina*, in *Osteuropa-Recht*, no. 3, 64, 2018, p. 422. **N. BEGOVIĆ**, *Freedom of Religion or Belief: Bosnian Muslim Engagement with a Fundamental Human Right*, in *Context*, no. 7, 1, 2020, p. 72.



across all social fields including education, labour market, economy, public services as well as judiciary.

That came as a shock to the society which has lived in the socialist country which for almost five decades was ignorant and even hostile towards the religion. *Karčić* points out that many individuals, having accustomed to the earlier (socialist) state, all the sudden gained the impression of the domination of religion<sup>11</sup>, calling it “clericalization of public, especially political life<sup>12</sup>.” Among other examples, such impression was highlighted during a public debate initiated by High Judicial and Prosecutorial Council of BiH (HJPCBiH) ban (2015) on religious symbols/religious clothing from being worn by various actors in the courtrooms.

Another reason for heated public debate on place of religion and religious symbols in the public life and institutions was a duty of the state to create the environment suitable for return of refugees and displaced persons from places these have been expelled during the war<sup>13</sup> and place of religious (as well as ethnic and national) symbols in such process. Very often, the display of religious symbols has a connotation of means used to implement a political project based on nationalistic agenda<sup>14</sup>.

At the same time, religious clothing is being used as a chip in political battles and misuses to suppress the freedom to manifest the freedom of religion. For example, in 2010, Alliance of Independent Social Democrats (SNSD), a Serbian nationalistic party introduced a law to ban the wearing in public of clothing which prevents a person from being identified in the public spaces (targeting *de facto* Muslim women wearing burqa), in the response to the introduction of the law banning fascist and neo-fascist organizations in BiH<sup>15</sup>. With regards to the wearing religious clothing in the public, in 1950 Yugoslavia had enacted

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<sup>11</sup> F. KARČIĆ, *Islam u sekularnoj državi: primjer Bosne i Hercegovine*, in A. ALIBAŠIĆ (ed.), *Religija i sekularna država*, cit., p. 30.

<sup>12</sup> F. KARČIĆ, *Religija i pravo: vrlo kratak uvod*, Connectum, Sarajevo, 2011, p. 58.

<sup>13</sup> General Framework Peace Agreement for Peace in BiH, Annex no. 7, Art. 1 para 3 (<https://www.ohr.int/archive/1995-2000/docs/gfa/gfa-an7.htm>).

<sup>14</sup> N. BEGOVIĆ, E. KOVAČEVIĆ, *Law, State and Religion in Bosnia and Herzegovina*, Routledge, Taylor and Francis Group, London, New York, 2022, p. 112. See also examples in the book, pp. 114-116.

<sup>15</sup> The law proposal was not supported by the Constitutional and Legal Commission of the House of Representative of the BiH Parliamentary Assembly and thus the parliamentary procedure was aborted.



a law prohibiting burka and veil, which was enforced until the democratization of the country in later 1980 and early 1990. *De iure* the Law remains part of Bosnian legal order<sup>16</sup> as the only existing domestic legislation regulating the wearing religious clothing in public<sup>17</sup>.

One final note should be made on importance of the religion in Bosnian society as well as its legal order. Bosnian Constitution recognizes three ethnic groups: Bosniaks, Croats and Serbs as “constituent peoples”<sup>18</sup>. The constitutional power-sharing is rooted among these three peoples through tools of consociational democracy, providing them with privileges and special rights, including exclusive right to be members of the BiH Presidency<sup>19</sup>, upper house of the state parliament (House of Peoples of the Parliamentary Assembly of BiH [PA BiH])<sup>20</sup> as well as veto rights in legislative and executive government<sup>21</sup>. BiH Constitution goes further stating that the personal composition of the public institutions (including e.g. judiciary) shall reflect the composition of the society<sup>22</sup>.

Religion stands as important if not the most important element in establishing the ethnic identity of Bosniaks, Serbs and Croats, leading to the ethnic and religious identity mostly to overlap<sup>23</sup>. Thus, it has led to, as rule with exceptions confirming it, Muslims being Bosniaks, Catholics being Croats and Orthodox being Serbs. This underlines the

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<sup>16</sup> Art. I BiH Constitution, para 1.

<sup>17</sup> See e.g. initiative for the reinforcement of the law banning veal wearing in BiH: *U BiH zakonom zabranjeno nošenje feredže?* (<https://www.nezavisne.com/novosti/bih/U-BiH-zakonom-zabranjeno-nosenje-feredze/60836>), May 2010.

<sup>18</sup> Preamble, BiH Constitution, Line 10.

<sup>19</sup> Art. V BiH Constitution.

<sup>20</sup> Art. IV BiH Constitution, para 1.

<sup>21</sup> Art. IV BiH Constitution, para 3. Art. V BiH Constitution, para 2.

<sup>22</sup> Art. IX BiH Constitution, para. 3. In addition to the Constitution, other legislative acts further support this norm: see, e.g. Law on civil service in the Institutions of Bosnia and Herzegovina, *Official Gazette of BiH*, nos. 12/2002, 19/2002, 8/2003, 35/2003, 4/2004, 17/2004, 26/2004, 37/2004, 48/2005, 2/2006, 50/2008, 43/2009, 8/2010, 40/2012, 93/2017 & 18/2024. In art. 2, para 3, the Law determines that the structure of civil servants in the civil service roughly reflects the national structure of the population of Bosnia and Herzegovina, according to the last census.

<sup>23</sup> **D. ABAZOVIĆ**, “*Za naciju i Boga*”: *sociološko određenje religijskog nacionalizma*, Magistrat: Centar za interdisciplinarnе postdiplomske studije, Sarajevo, 2006, pp. 77-125. **D. ABAZOVIĆ**, *Religious Claims during the War and Post-War Bosnia and Herzegovina*, in *Borderlands e-journal*, no. 1, 14, 2015, p. 4. **N. BEGOVIĆ**, *Freedom of Religion*, cit., p. 82.



importance of the religion for the functioning of public institutions as well as everyday life of Bosnian citizens including their pursue of employment in public service.

In such a social context the issue of religious symbols in the courtrooms emerges. Especially, in the context of the right of the fair trial, given the domestic judiciary gradual inclusion in processing war crimes, including those motivated by the religion and ethnicity. This has led to the government seeking to balance individual rights and public values, resulting in advancing a neutrality principle in public services, including judiciary. This Article explores the relationship between churches, religious communities and the state in BiH and how it has affected individual right to the freedom of religion. Focusing on religious symbols we elaborate on cases law of the Constitutional court of BiH (CCBiH) as well as Bosnian scholarship with regards of headscarf and beard in armed forces, border police, as well as religious clothing worn by actors in criminal procedure and education system. Building up on established legal standards by the CCBiH, examining the legal framework and scholarship, we explore in depth the religious clothing rules with regards to judges and judicial officials, prosecutors and employees of the prosecutor's office, lawyers and parties, witnesses: private citizens, expert witnesses and others and public in the courtroom. We compare the adopted policies with European Court of Human Rights (ECtHR) case law and further evaluate how to the Council of Europe (CoE) member states given margin of appreciation has been limited in case of BiH by the Bosnian constitutional guaranty of the "the highest level of internationally recognized human rights and fundamental freedoms"<sup>24</sup>.

The paper claims that Bosnian legislative and judicial authorities should enforce less intrusive measure for the freedom of religion in preserving the neutrality as well as secularity of BiH.

## **2 - A brief overview the protection of religious freedom and on the church-state system of Bosnia and Herzegovina**

Church and state relations have long been studied and the debate is not completely wrecked yet.

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<sup>24</sup> Art. II BiH Constitution, para 1.



Prominent legal scholarship notes that “numerous typologies have been presented which attempt to classify the various current and historic State-religion relationships”<sup>25</sup>.

The map of the systems related to church and state relationships are multifold in terms of typologies described, canons adopted to produce the classification<sup>26</sup>.

One of the most well-know model has been conceived by Durham and Scharffs and described in the book *Law and Religion: National, International and Comparative Perspectives*. The model includes ten state-religion typologies: theocracy, establishment of religions, religious status systems, endorsed religions, preferred set of religions, cooperation, accommodation, separation, *laïcité*, secular control regimes, and abolitionist states<sup>27</sup>.

Although the model has a great potential, commentators underlined also some of its inherent limits. One limitation relates to the fact that the taxonomy of church and state relations is defined mostly based on rules and principles set forth in the constitutions. By contrast, law and religion as a branch of law is grounded *also*, or even in some cases *mostly*, on legal provisions other than the Constitution<sup>28</sup>.

Bosnia and Herzegovina is a good case to substantiate this critique: its constitution is silent about both religious freedom and church-state relations, but case-law and scholarship came to define this legal order as “secular”.

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<sup>25</sup> R. BARKER, *State and Religion: The Australian Story*, Routledge, London; New York, 2018, p. 21

<sup>26</sup> R.J. AHDAR-I. LEIGH, *Religious Freedom in the Liberal State*, Oxford University Press, Oxford, UK, 2013; R. ASTORRI, *Storia e sistemi dei rapporti tra Stato e Chiesa*, in *Anuario de derecho eclesiástico*, 1998, pp. 17-52; M. CANONICO, *I sistemi di relazione tra stato e chiese*, Giappichelli, Torino, 2015; G. CAROBENE, *I rapporti tra Stato e Chiese in Europa: modelli possibili e specificità del modello italiano*, in *Coscienza e Libertà*, 56, 2018; A. LICASTRO, *Il diritto statale delle religioni nei paesi dell'Unione Europea. Lineamenti di comparazione*, Giuffrè, Milano, 2012; M. MADONNA, *Profili storici del diritto di libertà religiosa nell'Italia post-unitaria*, Libellula, Tricase, 2012; J.-P. SCHOUPE, *Diritto dei rapporti tra Chiesa e comunità politica: profili dottrinali e giuridici*, EDUSC, Roma, 2018; J. TEMPERMAN, *State-religion relationships and human rights law: towards a right to religiously neutral governance*, Martinus Nijhoff Publishers, Leiden, 2010.

<sup>27</sup> C. DURHAM-B. SCHARFFS, *Law and Religion: National, International, and Comparative Perspectives*, Wolters Kluwer Law & Business, New York, 2019, pp. 124-139.

<sup>28</sup> See R. BARKER, G. CLARKE, *Understanding models of state-religion relationships*, in R. Barker, C. Baasch Anderson, M. Rasmi Alumari, Routledge, London, pp. 22-51.



In particular, the Constitution of BiH (1995) remains silent on relationship between state and religion<sup>29</sup>, while proclaiming the “highest level of internationally recognized human rights”<sup>30</sup> including the freedom of religion<sup>31</sup>.

According to BiH’s Constitution, human rights, including freedom of religion or belief, are protected by the eternity clause<sup>32</sup> and by the direct application and supremacy of the ECHR<sup>33</sup>. The Annex 1 to the BiH Constitution enumerates 15 international agreements on human rights that have legal strength of the constitutional provisions<sup>34</sup>. These include International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention for Elimination of All Forms of Racial Discrimination (ICERD) and Convention on the Rights of the Child (CRC). CCBiH, a hybrid body composed of six domestic and three foreign members, is given appellate jurisdiction in protecting human rights. In addition to the constitutional provisions, DPA which Annex four in the Constitution, contains a special Annex no VI on human rights protection, provided by hybrid body which included six domestic and eight international members. These imply that human rights are given primacy<sup>35</sup> in BiH post-war legal order.

Human rights guaranties, including guarantee of substantive protection of the freedom of religion or belief, are complemented by the strong anti-discrimination clause, including on the basis of the religion or belief<sup>36</sup>. According to the Venice Commission, streaming from the

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<sup>29</sup> CCBiH, Decision on admissibility and merits in case no. U 21/22, 18 January 2024, para 40.

<sup>30</sup> Art. II BiH Constitution, para. 1.

<sup>31</sup> Art. II BiH Constitution, para 3/g).

<sup>32</sup> Art. X BiH Constitution, para 2.

<sup>33</sup> Art. II BiH Constituton, para 2.

<sup>34</sup> CCBiH, Decision on admissibility and merits in case no. U 9/09, 26 November 2010, para 74.

<sup>35</sup> J.C. O’ BRIEN, *The Dayton constitution of Bosnia and Herzegovina*, in L.E. MILLER, L. AUCION (eds.), *Framing the State in Time of Transition: case Study in constitution Making*, United States Institute of Peace, Washington, 2010, pp. 338.

<sup>36</sup> Art. II BiH Constitution, para 4. According to the CCBiH, this provision which includes a general clause on non-discrimination, affords a greater protection against discrimination than the ECHR i.e. a constitutional obligation of non-discrimination in terms of a group right. See CCBiH, Decision on admissibility and merits in case no. U 3/13, para 85.



constitutional anti-discrimination clause, the general thrust of the Constitution is aimed at preventing discrimination<sup>37</sup>.

Although not explicitly stated in the Constitution, CCBiH<sup>38</sup> as well as ECtHR<sup>39</sup> defined the country as a secular state. Such definition was later embraced by the Freedom of Religion Act of BiH (2004) which proclaims separation between state and religion<sup>40</sup>. *Karčić* elaborates that

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<sup>37</sup> VENICE COMMISSION, *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, CDL-AD (2005) 004, 11 March 2005, para 74.

<sup>38</sup> CCBiH, Decision on admissibility and merits in case no AP 286/06, 29 September 2007, paras 28, 45. CCBiH, Decision on admissibility and merits in case no. U 3/13, para 94. CCBiH, Decision on admissibility and merits in case no AP 377/16, 20 April 2016, para 35.

<sup>39</sup> ECtHR, *Hamidović v. Bosnia and Herzegovina*, app. no. 57792/15, 5 December 2017, para 13.

<sup>40</sup> See Art. 14 Freedom of Religion Act of BiH (*Official Gazette of BiH*, no. 5/2004): Churches and religious communities are separated from the state, which means that: 1. The state cannot recognize the status of the state religion for any religion, nor the status of a state church or a religious one community to any church or religious community; 2. The state has no right to interfere in the internal organization and affairs of churches and religious communities; 3. No church or religious community, nor its officials, can receive special privileges from the state in relation to other churches or religious communities and their officials, nor can he formally participate in the work political institutions, except as stated in paragraph 4 of this article; 4. The state can, on the basis of equality for all, provide material support to churches and religious organizations communities for the preservation of cultural and historical heritage, health activities, educational, charitable and social services provided by churches and religious communities, only on the condition that churches and religious communities they perform the mentioned services without any discrimination, especially non-discrimination on the basis of religion or beliefs; 5. Churches and religious communities in the field of family, parental and child rights may perform the function of humanitarian, social and health assistance, upbringing and education, in accordance with the relevant laws regulating these rights and matters; 6. Public authorities are prohibited from any interference in the election, appointment or dismissal of religious dignitaries, the establishment of structures of churches and religious communities or organizations that perform the service of God and other rituals; 7. Public manifestation of religion or belief may be restricted only on the basis of law and in accordance with international standards when the competent authority proves that this is necessary in the interests of public security, protection of health, public morals, or in order to protect the rights and freedoms of other persons in accordance with international legal standards. Churches and religious communities have the right to appeal this decision. The appeals body, before making a decision on the appeal, must request an opinion from the Ministry for Human Rights and Refugees of Bosnia and Herzegovina regarding the case of a ban on public



there are three reasons why such kind of relationship was accepted by legislator: first, such framework was enforced since 1946; second, European legal heritage has a tendency to proclaim a duty of state to be neutral and impartial; finally, a secular state is particularly desirable for multi-religious societies, such is Bosnian<sup>41</sup>. Given the BiH Constitution and its human rights and anti-discrimination provision, Freedom of Religion Act, as well as CCBiH case-law, there is no dilemma in the secular character of the relationship between state and the religion<sup>42</sup> in which the existing domestic framework is in the line with international standards<sup>43</sup>.

Unlike the socialist regime, which supported the strict separation system, the BiH democratic regime's the general tendency in the relations between religion and the state is the cooperation<sup>44</sup> or so called cooperationist system of state-religion relations<sup>45</sup>. The second characteristic of the Bosnian state-religion relation is state neutrality against all religious community and their equal treatment before the law<sup>46</sup>. So, the established model is separation with cooperation<sup>47</sup> given that Freedom of Religion Act provides a legal basis for agreements to be concluded between state and churches and religious communities. By these agreements as well as legislative provision, that separation is complemented by the mutual cooperation in areas of common interest such are education, charity, culture etc.<sup>48</sup>. So far, such agreements are concluded with the Roman Catholic Church (RCC) (2006) and Serbian Orthodox Church (SOC) (2007). On the other hand, the agreement with

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manifestation of religion or belief. See also CCBiH decision in which an appellate request for the enforcement of rule of religious law: CCBiH, Decision in case no U 62/01, 5 April 2002 (on enforcement of *mehr* promise made in religious marriage which got divorced and never was concluded as a civil marriage); CCBiH, Decision on admissibility and merits in case no AP 286/06 (on enforcement of canon heritage law).

<sup>41</sup> F. KARČIĆ, *Islam u sekularnoj državi*, cit., p. 30.

<sup>42</sup> F. KARČIĆ, *Islam u sekularnoj državi*, cit.

<sup>43</sup> D. BANOVIĆ, E. MEMIŠEVIĆ, *Law and Religion*, cit., p. 432. N. BEGOVIĆ, *Ustavni okvir i Zakon o slobodi vjere i pravnom položaju crkava i vjerskih zajednica u BiH*, in E. ŠARČEVIĆ, D. BOJIĆ (eds.), *Sekularnost i religija: BiH i regija*, Fondacija Centar za javno pravo, Sarajevo, 2015, p. 97.

<sup>44</sup> D. BANOVIĆ, E. MEMIŠEVIĆ, *Law and Religion*, cit., p. 425.

<sup>45</sup> N. BEGOVIĆ, E. KOVAČEVIĆ, *Law, State and Religion*, cit., p. 4.

<sup>46</sup> N. BEGOVIĆ, E. KOVAČEVIĆ, *Law, State and Religion*, cit., p. 4.

<sup>47</sup> N. BEGOVIĆ, E. KOVAČEVIĆ, *Law, State and Religion*, cit., p. 38.

<sup>48</sup> N. BEGOVIĆ, E. KOVAČEVIĆ, *Law, State and Religion*, cit., p. 142.



Islamic Community in BiH (ICBiH) has been pending since 2015<sup>49</sup> while Jewish Community in BiH has not initiated the agreement signing procedure due to its size.

In summary, the secular state of BiH embodies the separation of the state and religion; constitutional guaranties of the freedom of religion without a discrimination; and state as a neutral organizer and regulator of the private and collective exercise of the religion<sup>50</sup>.

Before we explore the CCBiH case-law and enforcement of the secular state principle, we draw attention to the fact that BiH is a federation, composed of two highly autonomous federal units: Republika Srpska (RS) and Federation of Bosnia and Herzegovina (FBiH)<sup>51</sup>. In addition of these two federal units, BiH includes one district called Brčko District of BiH (BDBiH) which is a local self-government unit<sup>52</sup>. Following extensive ethnic cleansing policies in 1990's, RS had become dominantly a Serb entity while FBiH a Bosniak-Croatian entity. In post-war environment, both entities had been conducting discriminatory policies against those ethnic/religious groups that are minority - Bosniaks Muslims and Croatian Catholics in RS and Serb Orthodox in FBiH<sup>53</sup>.

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<sup>49</sup> See **H. IŠERIĆ**, *Prijedlog Osnovnog ugovora između Bosne i Hercegovine i Islamske zajednice u Bosni i Hercegovini*, in *Pravna misao*, no. 11-12, 2016, pp. 58-93.

<sup>50</sup> **N. ADEMOVIĆ, J. MARKO, G. MARKOVIĆ**, *Ustavno pravo Bosne i Hercegovine*, Fondacija Konrad Adenauer e. V. - Predstavništvo u Bosni i Hercegovini, Sarajevo, 2012, p. 89.

<sup>51</sup> Art. I BiH Constitution, para 4.

<sup>52</sup> See Amendment no I BiH Constitution, *Official Gazette of BiH*, no. 327/2009.

<sup>53</sup> See CCBiH, Partial Decision U 5/98 III, 1 July 2000. See also decisions by Human Rights Chamber for BiH, a body established by Annex 6 of the DPA. Decisions are available on the website of the Chamber (<http://hrc.ustavnisud.ba/ENGLISH/DEFAULT.HTM>). Cases: *Islamic Community v. Republika Srpska*, no. CH/96/29, 11 June 1999 (Banja Luka mosques); *Mahmutović v. the Republika Srpska*, no. CH/98/892, 8 October 1999 (on order of exhumation from the old Muslim town cemetery and reburial of applicant's Muslim wife in new non-existing cemetery. In the concurring opinion by *Manfred Nowak* calls such policy an "ethnic cleansing against the deceased".); *Islamic Community in BiH v. the Republika Srpska*, no. CH/99/2177, 11 February 2000 (Prnjavor; prohibition to use old Muslim graveyard and order to conduct exhumation); *Islamic Community in BiH v. the Republika Srpska*, no. CH/98/1062, 09 February 2001 (Zvornik mosques); *Čengić v. BiH and Republika Srpska*, no. CH/02/12016, 10 October 2003 (on the interference with Muslim graveyard); *Islamic Community in BiH v. the Republika Srpska*, no. CH/01/7701, 22 December 2003 (Mrkonjić-Grad mosques). See also **B. DAKIN**, *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska: Human Rights in a Multi-Ethnic Bosnia*, in *Harvard*



Constitutions of both entities build up on the state Constitution norm on freedom of religion, while the RS Constitution provides additionally: “The Serbian Orthodox Church is the church of the Serbian people and other peoples of the Orthodox faith.” Such provision remains unchallenged before the CCBiH, although it has been argued that it places SOC in privileged position and provides an advantage to one religion over another<sup>54</sup>.

Against such social context and legal environment, CCBiH was asked to review a privileged position for one specific church (SOC) in public space of the RS entity. The CCBiH jurisprudence speaks on challenges BiH and entities have faced given the constitutional duty of non-discrimination and legislative proclamation of separation of churches and state.

Early challenged provision (already in 1998) proclaimed that the RS provides a material support to the SOC and that RS and the SOC cooperate in all fields, in particular for the preservation, fostering and development of cultural, traditional and other spiritual values. CCBiH concluded that a special link established by the RS Constitution between SOC and RS is not purely declarative as its “clearly established aim is a constitutionally guaranteed influence of the Orthodox Church on the ‘public atmosphere’ as far as values and belief-systems are concerned”<sup>55</sup>. Furthermore, CCBiH citing *Otto-Preminger v. Austria*<sup>56</sup> stated that contested provision is a constitutional basis for the influence of the SOC, allowing the public authorities “to create a public atmosphere which prevents the free manifestation of religion”<sup>57</sup>. With regards to the declaration of the RS’s material support for the SOC, CCBiH considered it a privilege which could not be legitimized and is therefore inherently discriminatory<sup>58</sup>.

RS legislation on public holidays in RS was challenged twice before the CCBiH. In first case, contested provision of the Law on Family Patron-Saint’s Day and Church Holidays (1992) prescribed Serb Orthodox religious holidays as public holidays in RS. CCBiH found

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*Human Rights Journal*, no. 15, 20022, pp. 245-268.

<sup>54</sup> I. TERZIĆ, *Diskriminacija religijskih manjina u BiH*, in E. ŠARČEVIĆ, D. BOJIĆ (eds.), *Sekularnost i religija*, cit., p. 127.

<sup>55</sup> CCBiH, Partial Decision No. U 5/98 IV, para 43.

<sup>56</sup> CCBiH, Partial Decision No. U 5/98 IV, para 42.

<sup>57</sup> CCBiH, Partial Decision No. U 5/98 IV, para 47.

<sup>58</sup> CCBiH, Partial Decision No. U 5/98 IV, para 48.



(2006) such provision unconstitutional since it has included the holidays which only reflect and exalt the Serb religious identity, while the same values are imposed on everyone else living on the territory of the RS<sup>59</sup>. CCBiH in particular found this provision to be discriminatory and contrary to the ICERD<sup>60</sup>. This ruling has lead scholars to conclude that public authorities must act in accordance with a constitutional principle of the prohibiting discrimination, in order to establish a “religious harmony and interreligious tolerance”<sup>61</sup>.

In another case, CCBIH was asked to review Law on Holidays of RS (which was adopted in 2007 to replace previously annulled Law on Family Patron-Saint’s Day and Church Holidays). The Law stipulates that one of the republic holidays is Day of the Republic marked on 9 January. Among other reasons, the appellant has argued that as part of the celebration public authorities organize church festivities to mark this holiday. Also, on that date public authorities also celebrate the Patron Saint of the RS - Saint Archdeacon Stefan. It all clearly points to the official connection and attitude of the RS towards exclusively one religious group - Orthodox Christian, thereby neglecting all other groups and individuals living in the RS<sup>62</sup>. Appellant also claimed that Orthodox religious ceremony marking this holiday gives additional weight to this date thereby letting the members of other people’s know that this is not their holiday rather that this is solely the holiday of the Serb people<sup>63</sup>.

CCBiH found a celebration of the 9 January as a Day of RS unconstitutional and discriminatory. It elaborated that observance of this public holiday on 9 January, when both Patron Saint’s Day of the RS (which is as such *de facto* commemorated although not prescribed by the law itself) and the Day of the Republic are observed, has created the public atmosphere in which the system of values and beliefs is obviously such that a priority is given to the religious heritage, tradition and customs of only the one people (Serbs). It places them into a

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<sup>59</sup> CCBiH, The second partial decision on admissibility and merits in case no U4/04, 18 November 2006, paras 68, 70.

<sup>60</sup> CCBiH, The second partial decision, cit., para 70.

<sup>61</sup> J. MURATAGIĆ, *Vjerske slobode u praksi Ustavnog suda BiH: konkretizacija modela sekularnog uređenja*, in E. ŠARČEVIĆ, D. BOJIĆ (eds.), *Sekularnost i religija*, cit., p. 121.

<sup>62</sup> CCBiH, Decision on admissibility and merits in case no. U 3/13, para. 20.

<sup>63</sup> CCBiH, Decision on admissibility and merits in case no. U 3/13, para. 20.



privileged position in relation to other two constituent peoples<sup>64</sup>. Such environment is not in compliance with the obligation of the public authority to secure, while exercising its functions in a neutral and unbiased manner, a manifestation of different religions, faiths and beliefs as well as religious compatibility and tolerance in a democratic society<sup>65</sup>. By designating the Day of RS to be observed on 9 January, legislator has placed the members of the Serb people in the privileged position when compared to Bosniaks and Croats, Others and citizens of the RS, for the fact that this date represents a part of the historical heritage of only Serb people, and on account of the observance of the Saint Patron's Day of the RS being connected to the tradition and customs of only Serb people<sup>66</sup>. CCBiH eventually concluded that such practice goes against secular state principle.

In summary, the principle of the multiethnic composition of the entity must be applied in relation to public holidays. The celebration of a secular holiday on a date that is exclusively related to one people, the organization of church ceremonies and the celebration of the baptismal feast, unequivocally indicates the official connection of the public authorities with only one religious group and only one people. Such connection is not acceptable under BiH Constitution.

With regards to the state accommodation of the religious diversity, CCBiH was willing to grant such accommodation only in one case of the judicial hearing delay while in other cases of the religious symbols it was reluctant to do so. Here we shall only discuss the affirmative case-law while the negative one shall be discussed later.

In that concrete case, the ordinary court refused to delay a hearing planned for the second day of the religious holiday which is commemorated for four days. The Law on Civil Procedure of FBiH provides for the discretion of the court in determining an acceptable reason for a delay, but still the court refused to accept the request of the delay submitted by one of proceedings' parties. CCBiH eventually found a violation of the right to the fair trial<sup>67</sup>, assessing that the reason on which the request for delay was submitted is "justified". Elaborating on its conclusion, CCBiH stated:

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<sup>64</sup> CCBiH, Decision on admissibility and merits in case no. U 3/13, para. 92.

<sup>65</sup> CCBiH, Decision on admissibility and merits in case no. U 3/13, para. 93.

<sup>66</sup> CCBiH, Decision on admissibility and merits in case no. U 3/13, para. 97.

<sup>67</sup> For contrary decision see ECtHR, *Francesco Sessa v. Italy*, app. no. 28790/08, 3 April 2012.



“In addition, the Constitutional Court reminds that Bosnia and Herzegovina, as a multicultural and multi-ethnic community, must nurture the spirit of tolerance and respect for the cultural and traditional peculiarities of its peoples. The aforementioned, as a fundamental value of a multicultural society such as Bosnia and Herzegovina, according to the Constitutional Court's assessment, should also serve as a basis for regular courts to accept the appellant's request in a situation where the procedural law does not specify the justified reasons for delaying the hearing”<sup>68</sup>.

### 3 - Religious symbols in BiH judiciary: the origins of the debate

Discussion on religious symbols in BiH judiciary has been 22 years old, while there has been only a single judgement of the CCBiH<sup>69</sup> which got overturned by the ECtHR<sup>70</sup>. At the center of debate is state-level self-governing judicial and prosecutorial body - HJPCBiH - which is tasked by legislator, to ensure the maintenance of an independent, impartial and professional judiciary, and to ensure the provision of a professional and efficient court system and prosecutorial service in whole country<sup>71</sup>. HJPCBiH is also tasked to adopt and publish codes of ethics for judges and prosecutors<sup>72</sup>.

Already in July 2004 HJPCBiH was asked to consider the issue of national, religious and other symbols in judicial institutions. Given that there was a legislative vacuum, the HJPCBiH took the position that courts and prosecutors' offices should not be places for displaying symbols and insignia, except those prescribed by law, and that any other symbols must be removed. The was to ensure that all citizens receive equal protection of their rights and that the courts are not burdened by the war past, given that symbols and insignia were often related to the specific ethnic or religious groups.

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<sup>68</sup> CCBiH, Decision on admissibility and merits in case no. AP 2691/10, 22 October 2013, para 32.

<sup>69</sup> See CCBiH, Decision on admissibility and merits in case no. AP 3947/12, 9 July 2015.

<sup>70</sup> See ECtHR, *Hamidović v. Bosnia and Herzegovina*.

<sup>71</sup> Art. 4 Law on HJPCBiH, *Official Gazette of BiH*, no. 25/2004, 93/2005, 48/2007, 63/2023, 9/2024 & 50/2024.

<sup>72</sup> *Ibidem*.



A year later, in 2005, both BiH's federal units simultaneously adopted laws on courts, with the same provision prohibiting judges and judicial officials to display any sign of their religious, political, national or other affiliation during the performance of their official duties<sup>73</sup>.

In 2011, the president of the Municipal court of Travnik informed the HJPCBiH on the situation in which a female Muslim typist started coming to her job wearing a headscarf. HJPCBiH responded by instructing the president of the court to deal with the issues in accordance with the law and other regulation<sup>74</sup>, using the wording which was a bypass for the HJPCBiH in taking a stand on this issue.

Following January 2014 visit to the Municipal Court of Kalesija, the HJPCBiH adopted a conclusion<sup>75</sup>, asking its Department for Legal Affairs to prepare a legal analysis regarding religious clothing in judicial institutions in relation to the judicial employees and parties in the judicial proceedings. Drawing exclusively from the selected case law of the ECtHR, analysis concluded with following<sup>76</sup>: ECtHR grants state a margin of appreciation when regulating this issue, claiming that the requirement of the principal neutrality of public officials can be justified to guarantee the equality of all people and by secularity of the state. Such limitation of the freedom to manifest a religion must follow a general approach that is neutral and impartial towards all forms of faith and belief. Finally, limitations on wearing religious clothing may be necessary to reconcile the interests of different religions and ensure respect for everyone's beliefs, especially in those democratic societies

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<sup>73</sup> Art. 13, Law on Courts of FBiH, *Official Gazette of FBiH*, no. 38/2005. Art. 14, Law on Court of RS, *Official Gazette of RS*, no. 111/04. A new 2012 Law on Courts of RS (*Official Gazette of RS*, no. 37/2012, 14/2014, 44/2015, 39/2016 & 100/2017) also prescribed the same ban (Art. 14). Also, in Law on Courts of BD BiH (*Official Gazette of BD BiH*, no. 19/1007). Law on Court of BiH contains no such prohibition, as well as bylaws adopted by the Court.

<sup>74</sup> **B. PERIĆ**, *Pravosuđe i vjerska obilježja: izazov i perspektive*, in: E ŠARČEVIĆ (ed.), *Vjerski simboli u sudovima?*, Fondacija Centar za javno pravo, Sarajevo, 2016, p. 51.

<sup>75</sup> **HJPCBiH**, *Izveštaji sa sjednice Visokog sudskog i tužilačkog saveta BiH održane 22-23 januara 2014. Godine* (<https://ostv.pravosudje.ba/ostvofo-api/vijest/download/28565>), February 2014.

<sup>76</sup> **HJPCBiH**, *Analiza u vezi nošenja vjerskih obilježja u pravosudnim institucijama*, HJPCBiH, Sarajevo, 2016. Available at the HJPCBiH website, <https://pravosudje.ba/ostvofo/B/141/article/59614>.



where several religions coexist within the same population, as is the case in BiH.

Besides that, analysis did not provide for the unambiguous standing on compatibility of laws on courts limitation on freedom of religion manifestation with the ECHR and on whether judges and prosecutors should be allowed to wear religious clothing while performing official and judicial duties. But, with regards to the parties appearing before the court, it determined following:

“Due to the complexity of the issue of wearing religious clothing by parties - those who use the services of the court, it is necessary to carefully assess each individual situation in its overall context, taking into account the rights of the individual on the one hand and the requirement to respect and preserve the reputation of judicial institutions on the other, as well as the objective requirements of the court proceedings themselves”<sup>77</sup>.

Analysis was criticized as “tendentious and incomplete”<sup>78</sup>. It was claimed that it failed to consider ECtHR case law that is in the benefit of the displaying religious symbols in public (e.g. *Lautsi*); not elaborating on margin of appreciation and finally not exploring on why and how could religious clothing effect the impartiality of the court, and failing to consider soft law like CoE Parliamentary Assembly (PACE) Resolution 2076 (2015): *Freedom of religion and living together in a democratic society Resolution 2076*<sup>79</sup>.

Following presentation of the Analysis and heated debate on its findings, HJPCBiH adopted a set of conclusions to enforce 2005 entity’s laws’ ban against displaying the religious symbols by judges and judicial officials. First, it initiated inscription of the wearing religious symbols as a violation of the code of ethics and a discipline offence for judges and prosecutors<sup>80</sup>. This conclusion was implemented by

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<sup>77</sup> *Ibidem*.

<sup>78</sup> E. KOVAČEVIĆ, *Za ili protiv vjerskih obilježja u pravosudnim institucijama u BiH*, in E. ŠARČEVIĆ (ed.), *Vjerski simboli u sudovima?*, cit., p. 86.

<sup>79</sup> E. KOVAČEVIĆ, *Za ili protiv vjerskih obilježja*, cit., pp. 86-87.

<sup>80</sup> HJPCBiH, *Izveštaji sa sjednice Visokog sudskog i tužilačkog vijeća BiH održane 21. septembra 2015. Godine* (<https://ostv.pravosudje.ba/ostvofo-api/vijest/download/31146>), September 2015. Conclusion was implemented by amending Code of Ethics for Judges (*Official Gazette of BiH*, no. 24/2015) and Code of Ethics for Prosecutors (*Official Gazette of BiH*, no. 32/2015), where under “Integrity and decent behaviour” it is determined following: “A judge/prosecutor may not display any religious, political, national or



adopting amendments to the code of ethics of judges and code of ethics of prosecutors, prohibiting to judges and prosecutors to display any religious, political, national or other affiliation while performing his or her official duties. The violation of the code of ethics leads to the disciplinary proceedings and potentially termination of the office.

By the second conclusion, a circular to all heads of courts and prosecutorial office was sent, reminding them of existing ban against wearing religious symbols by all employees of judicial institutional. In follow-up survey, it appeared that one judge and approximately ten court officials were wearing religious clothing, namely muslim headscarves<sup>81</sup>.

Finally, by the third conclusion and referring to the freedom of religion of parties, HJPCBiH determined that this issue is to be assessed and decides in each individual case, by taking into account on one hand the individual's right to freedom of religion and the right to equal access to justice for all, and, on the other hand, the requirement to respect and preserve the reputation of judicial institutions, as well as the objective requirements of court proceedings<sup>82</sup>.

Although HJPCBiH conclusions were only meant to be instructive and to support the enforcement of the existing legislative provision (at least with regards to the judges and judicial officials) these were perceived as a prohibition from wearing any form of "religious insignia," including headscarves, or practicing religion, such as by praying or proselytizing, at work<sup>83</sup>. Furthermore, the conclusion referred to all religious symbols, while the public reactions, debate and legal discussions, were focused dominantly on headscarf's, worn by Muslim women<sup>84</sup>.

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other affiliation while performing his or her official duties".

<sup>81</sup> ECtHR, *Hamidović v. Bosnia and Herzegovina*, para 14.

<sup>82</sup> HJPCBiH, *Izveštaj sa sjednice Visokog sudbenog i tužiteljskog vijeća BiH održane 14. i 15. listopada 2015. Godine* (<https://vsto.pravosudje.ba/vstfofo-api/vijest/download/32626>), November 2015.

<sup>83</sup> US DEPARTMENT OF STATE - OFFICE OF INTERNATIONAL RELIGIOUS FREEDOM, *Bosnia and Herzegovina 2021 International Religious Freedom Report*, US Department of State - Office of International Religious Freedom, Washington, 2022, p. 5 (<https://www.state.gov/wp-content/uploads/2022/04/BOSNIA-AND-HERZEGOVINA-2021-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf>). See also the 2023 edition of the same Report at p. 8.

<sup>84</sup> See E. ŠARČEVIĆ (ed.), *Vjerski simboli u sudovima?*, Fondacija Centar za javno pravo, Sarajevo, 2016.



Conclusions by HJPCBiH resulted in various and diverse public reaction, which has been rooted around claim of disproportional effect on Muslim women. State Agency on Gender Equality determined that HJPCBiH conclusions were discriminatory on basis of gender, in the field of labor and labor relations and as such contrary to the BiH Gender Equality Law<sup>85</sup>. Agency has also found that headscarves cannot pose a threat to the public safety, public order, health or moral as well as freedoms and rights of others (legitimate aims streaming from article 9 ECHR). BiH Ombudsperson also claimed that ban might be “indirectly discriminatory, given that it only affects women, which is discrimination based on gender or more specifically women of the Islamic faith”<sup>86</sup>.

To circumvent the game of words on whether the hijab is the symbol and as such a manifestation of the religion suitable for the limitation, ICBiH adopted the *fetwa* proclaiming that headscarves is a religious obligation and clothing practice of a Muslim woman<sup>87</sup>. It elaborated that headscarves in the Islamic tradition, is not treated as a special religious symbol and feature, but as other items of clothing that cover other parts of the human body and which also form an integral part of Muslim women's dress practice. Therefore, with regards to the headscarves, the legal provision on the prohibition of religious symbols and features in judicial institutions cannot be applied<sup>88</sup>.

Human rights and women rights CSOs also criticized HJPCBiH conclusions, claiming that these represent indirect discrimination,

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<sup>85</sup> **BIH GENDER EQUALITY AGENCY**, *Reakcija na postupanje VSTV BiH* (<https://arsbih.gov.ba>), 1 February 2016.

<sup>86</sup> **RADIO BIR**, *Bura zbog zabrane vjerskih obilježja: Odlukom VSTV-a su pogođene samo muslimanke u BiH* (<https://www.bir.ba/index.php/vijesti/bih/item/2544-bura-zbog-zabrane-vjer-skih-obiljezja-odlukom-vstv-a-su-pogodene-samo-muslimanke-u-bih>), 27 January 2016.

<sup>87</sup> See *Fetva o obaveznosti nošenja hidžaba* (<https://islamskazajednica.ba/fetve-i-rezolucije/26104-fetva-o-obaveznosti-nosenja-hidzaba>), 26 February 2016. In the preamble of the fetwa, the Riaysat of the ICBiH refers to the conclusion of the HJPCBiH as well as „especially considering the attempts of some members of the HJPC to subject the hijab/headscarves to this ban through their own interpretation of general legal provisions, thereby engaging in the interpretation of Islamic symbols and insignia, which is not within their jurisdiction or competence.”

<sup>88</sup> See for reaction of the Jewish Community in BiH: *Kožemjakin: Zaključak VSTV-a o zabrani nošenja vjerskih obilježja je neprimjeren* (<https://radiosarajevo.ba/vijesti/bosna-i-hercegovina/kozemjakin-zakljucak-vstv-a-o-zabrani-nosenja-vjerskih-obiljezja-je-neprimjeren/2144-26>), 27 January 2016.



targeting Muslim women<sup>89</sup>. According to CSO, the way a norm is defined affects mostly and perhaps exclusively Muslim women who wear the headscarves given that this religious sign is clearly and directly visible, unlike other religious signs<sup>90</sup>. Union gathering employees of the biggest municipal court in the country (Sarajevo) requested from HJPCBiH to annul its conclusions, under the threat of public demonstrations<sup>91</sup>. Reaction to the HJPCBiH conclusions culminated with a more than 2,000 women protesting in Bosnian capital<sup>92</sup> as well as in the rest of the country.

Following reactions to its conclusions, HJPCBiH reaffirmed the adopted conclusions, while publishing the Analysis<sup>93</sup> that has been used as basis for adoption of conclusion. It also expressed its interest in engaging in talks, or rather, to open a dialogue with representatives of all religious communities in BiH, as well as interested representatives of the legislative and executive branches<sup>94</sup>.

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<sup>89</sup> See *Argumenti protiv odluke VSTV-a* (<https://beeinspired.nahla.ba/kontekst/argumenti-pro-tiv-odluke-vstv-a/>), 14 February 2016.

<sup>90</sup> See *The decision of the HJPC discriminates women and is not in line with the Constitution of BiH* (<https://soc.ba/en/the-decision-of-the-hjpc-discriminates-women-and-is-not-in-line-with-the-constitution-of-bih/>), 28 January 2016; *Statement of the NGO organizations and individuals on the decision of HJPC* (<https://soc.ba/sopstenje-nevladinih-organizacija-i-pojedinaca-i-pojedinki-povodom-odluke-vstv-a-o-zabrani-nosenja-vjerskih-simbola/>), 8 February 2016.

<sup>91</sup> *Sindikatski Općinskog suda u Sarajevu: Zahtjev VSTV-u za ukidanje odluke o zabrani nošenja vjerskih obilježja* (<https://avaz.ba/vijesti/220121/sindikatski-opcinskog-suda-u-sarajevu-zahtjev-vstv-u-za-ukidanje-odluke-o-zabrani-nosenja-vjerskih-obiljezja/>), 15 February 2016.

<sup>92</sup> **US DEPARTMENT OF STATE - OFFICE OF INTERNATIONAL RELIGIOUS FREEDOM**, *Bosnia and Herzegovina 2016 International Religious Freedom Report*, US Department of State - Office of International Religious Freedom, Washington, 2017, p. 5 (<https://www.state.gov/wp-content/uploads/2019/01/Bosnia-and-Herzegovina-3.pdf>).

<sup>93</sup> Document was criticized by ICBiH for being selective and biased by failing to discuss conclusion of the ECtHR in case *Lautsi v. Italy*. It was also claimed that ECtHR case-law was instrumentalized to support public policies which aim to limit freedom of religion. Finally, it has been stated that behind claims on neutral, general, and fully applicable to any cases prohibition and limitation of the religious clothing, affects mostly, and in our circumstances perhaps only, Muslim women who wear the mahram. See **N. BEGOVIĆ**, *Osrt na Analizu VSTVBiH „Nošenje vjerskih obilježja u pravosudnim institucijama* (<https://islamskazajednica.ba/index.php/vijesti/aktuelno/23642-osvrt-na-analizu-vstovbih-nosenje-vjerskih-obiljezja-u-pravosudnim-institucijama>) 29 March 2019.

<sup>94</sup> HJPCBiH, *Izveštaj sa sjednice Visokog sudskog i tužilačkog vijeća BiH održane 10. i 11. februara 2016. Godine* (<https://vstv.pravosudje.ba/vstovofo-api/vijest/download/32647>),



According to the HJPCBiH own data<sup>95</sup> as well as US State Department annual freedom of religion reports, ever since adoption of conclusion and amendments to the codes of ethics, no judge or prosecutor was prosecuted for its violation<sup>96</sup>. But, the pure existence of these norms has caused uneasiness and uncertainty among Muslims visiting or employed in judicial institutions<sup>97</sup>.

Ten years later (2025), again, the issue of the freedom to manifest religion in judiciary emerged once Municipal court of Tuzla refused to employ two candidates for the position of typists, who were Muslim women wearing headscarves. The president of the Court elaborated it in following way: “(she) has an obstacle hindering her from being hired i.e., she wears a headscarf (hijab), which represents one of the religious characteristics and religious symbols, or the obligation of Muslim women”<sup>98</sup>.

Furthermore, the most recent legislative proposals<sup>99</sup> aiming at reforming state level judiciary, for the first time, contain reference to the signs of religious affiliations expressed by judges and other present in the courtroom of the Court of BiH. In 2013, the Venice Commission did not object to the prohibition to (only) judges to express any signs of religious affiliation, adding that such restriction should extend to the conduct such as praying, religious gesture or utterance<sup>100</sup>. In Opinion

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February 2015.

<sup>95</sup> Provided to authors in accordance with Freedom to Access Information Act at the level of BiH institutions, *Official Gazette of BiH*, no. 61/2023. HJPCBiH Conclusion, no. 17-07-10-104-20/2026, 26 January 2026.

<sup>96</sup> See **US DEPARTMENT OF STATE - OFFICE OF INTERNATIONAL RELIGIOUS FREEDOM**, *Bosnia and Herzegovina 2019 International Religious Freedom Report*, US Department of State - Office of International Religious Freedom, Washington, 2020 (<https://www.state.gov/wp-content/uploads/2019/01/Bosnia-and-Herzegovina-2.pdf>), p. 7. See also the 2021 edition of the same Report at p. 7 and the 2022 edition at p. 6.

<sup>97</sup> **US DEPARTMENT OF STATE - OFFICE OF INTERNATIONAL RELIGIOUS FREEDOM**, *Bosnia and Herzegovina 2020 International Religious Freedom Report*, p. 7.

<sup>98</sup> **ICBiH**, *Komisija za slobodu vjere: Alarmantna pojava vjerske diskriminacije u Općinskom sudu u Tuzli* (<https://islamskazajednica.ba/index.php/vijesti/aktuelno/32410-komisija-za-slobodu-vjere-alarmantna-pojava-vjerske-diskriminacije-u-opcinskom-sudu-u-tuzli>), 1 December 2025.

<sup>99</sup> See **Đ. KURIĆ, A. SVRAKA-IMAMOVIĆ**, *Courts and Headscarves in Bosnia and Herzegovina: The Importance of Article 14* (<https://lichrgalway.org/2025/12/10/courts-and-heads-carves-in-bosnia-and-herzegovina-the-importance-of-article-14/>), 10 December 2025.

<sup>100</sup> **VENICE COMMISSION**, *Opinion on the Draft Law on the Courts of Bosnia and Herzegovina*, CDL-AD(2013)015-e, 15 June 2013, para 35.



published ten years later (2023), the Venice Commission was asked to review the provision which includes the prohibition of religious signs, affiliation, prayers, gesture and expression by judges, while performing official and judicial duties. Legislative proposal also included determination that the President of the Court and the President of the Appellate Division of the Court are to prescribe the rules of conduct and dress for both employees and parties in a special ordinance, but in accordance with the prohibitions determined for judges. Venice Commission has recognized that the provision might interfere with the freedom of religion but claimed that ECtHR leaves considerable margin of appreciation to states, while restriction has to meet a legitimate aim and be necessary in democratic society, even within the margin<sup>101</sup>. The provision discussed here was apparently approved by the EU as part of the EU integration with the EU official even insisting the prohibition should be extended to everyone employed at the Court or Appellate Division of the Court<sup>102</sup>. Domestic parliamentary debate on this draft prohibition again focused on the headscarves<sup>103</sup>.

In support of argument that the HJPCBiH conclusions targeted Muslims, speak an incident that took place in February 2018. A judge of the Municipal Court Sarajevo was reported to the president of the Court for keeping Easter eggs. Eggs were placed in her office, which served as the courtroom, on the table that was located between two chairs on which parties would sit. So, the eggs would be visible to the parties. The complaint was not followed by the discriminatory proceeding, while the vice-president of the HJPCBiH stated that circular did not specify what religious insignia were, but "certainly [was] not food placed on the table", and it may include clothing and items of religious significance<sup>104</sup>.

In summary, religious symbols in judiciary for almost two decades have been raising social tensions in absence of the proper

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<sup>101</sup> VENICE COMMISSION, *Opinion on the draft law on Courts of Bosnia and Herzegovina*, CDL-AD(2023)003-e, 11 March 2023, para. 58.

<sup>102</sup> See *Neautorizirani transkript 29. sjednice Predstavničkog doma Parlamentarne skupštine Bosne i Hercegovine održane 12.06.2025. godine, sa početkom u 11:34 sati*, p. 67 ([https://static.parlament.ba/doc/178227\\_29.sjed.%20Predstavni%20c4%8dkog%20doma%2012062025.pdf](https://static.parlament.ba/doc/178227_29.sjed.%20Predstavni%20c4%8dkog%20doma%2012062025.pdf))

<sup>103</sup> *Neautorizirani transkript 29*, cit., pp. 61-72.

<sup>104</sup> *Prijavljena zbog vaskršnjeg jajeta* (<https://www.rtvbn.com/3895844/prijavljena-zbog-vaskrsnjeg-jajeta>), 6 February 2018.



public debate and dialogue between all social actors. By 2026, that debate remains open<sup>105</sup>. It is also interesting to note that this issue has not yet emerged before CCBiH, except with regards of the right of the witness in criminal procedure to manifest his religious belief. The presence of the religious symbols in other social context and environment was challenges before the CCBiH. Thus, in following chapter we are going to explore CCBiH's standings and legal reasoning.

#### 4 - Religious symbols beside BiH's judiciary

The most prominent issue of adjudicating manifestation of religion in BiH social context were cases of religious clothing (e.g. wearing headscarves or black veal covering hair, as worn by nuns) as well as physical appearance (e.g. wearing a beard).

Some of them are publicly known cases, given that they have had an epilogue at the CCBiH and even at the ECtHR. These include the witness in criminal case wearing skullcap<sup>106</sup>, female member of the armed forces wearing headscarves<sup>107</sup>, male members of the armed forced and border police having a beard<sup>108</sup>, and a nun wearing black veal<sup>109</sup>.

Some other cases reached scholarly attention thanks to the Freedom of Religion Commission established by the ICBiH. This Commission was established in 2012, with a mandate to monitor the enjoyment of the freedom of religion by Muslims in BiH. Its annual reports from 2014 to 2023 include record of complaints by the Muslim women being prohibited from wearing headscarves in hospitals (as employee<sup>110</sup> as well as patients after childbirth<sup>111</sup>); public

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<sup>105</sup> N. BEGOVIĆ, E. KOVAČEVIĆ, *Law, State and Religion*, cit., pp. 73, 141.

<sup>106</sup> See CCBiH, Decision on admissibility and merits in case no. AP 3947/12. ECtHR, *Hamidović v. Bosnia and Herzegovina*.

<sup>107</sup> See CCBiH, Decision on admissibility and merits in case no. AP 2190/13, 9 July 2015. CCBiH, Decision on admissibility and merits in case no. AP 1795/21, 11 July 2024.

<sup>108</sup> See CCBiH, Decision on admissibility and merits in case no. U 8/17, 30 November 2017 (Border Police). CCBiH, Decision on admissibility and merits in case no. U 9/21, 2 December 2021 (Armed Forces).

<sup>109</sup> See CCBiH, Decision on admissibility and merits in case no. AP 4583/14, 17 June 2017.

<sup>110</sup> Đ. ŠETA, M. KARADŽA, N. MEHMEDOVIĆ (eds.), *Report on Registered Case of*



administration<sup>112</sup> & armed forces<sup>113</sup>; wearing burkini while using a pool<sup>114</sup>; being treated unfavourably as a teacher wearing headscarves<sup>115</sup> and as a candidate for the position of the school's pedagogue<sup>116</sup>. Other complaints are submitted by Muslim men who were banned from having a beard as members of the armed forces<sup>117</sup>, border police<sup>118</sup> and

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*Violation of the Right to Freedom of Religion of Muslims in Bosnia and Herzegovina for 2015*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2016 ([https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2015/report\\_religious\\_rights\\_violation\\_2015.pdf](https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2015/report_religious_rights_violation_2015.pdf)), p. 16.

<sup>111</sup> RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Izveštaj o registriranim slučajevima kršenja prava na slobodu vjere muslimana u Bosni i Hercegovini za 2018. godinu*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2019 ([https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2018/BOS\\_Izvjestaj\\_komisije\\_za\\_slobodu\\_vjere\\_2018.pdf](https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2018/BOS_Izvjestaj_komisije_za_slobodu_vjere_2018.pdf)), p. 12.

<sup>112</sup> Đ. ŠETA, M. KARADŽA, N. MEHMEDOVIĆ (eds.), *Report on Registered Case*, cit., p. 17.

<sup>113</sup> RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Izveštaj o registriranim slučajevima kršenja prava na slobodu vjere muslimana u Bosni i Hercegovini za 2019. godinu*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2020 ([https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2019/BOS\\_Izvjestaj\\_komisije\\_za\\_slobodu\\_vjere\\_2019.pdf](https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2019/BOS_Izvjestaj_komisije_za_slobodu_vjere_2019.pdf)), p. 13. N. MEHMEDOVIĆ, E. TUCAKOVIĆ, E. KOVAČEVIĆ, DŽ. ŠUŠKO (eds.), *Report on Registered Case of Violation of the Right to Freedom of Religion of Muslims in Bosnia and Herzegovina for 2021*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2022 (<https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2021/ENG%20Izveštaj%20komisije%20za%20slobodu%20vjere%202021.pdf>), p. 21.

<sup>114</sup> N. MEHMEDOVIĆ, E. TUCAKOVIĆ, E. KOVAČEVIĆ, DŽ. ŠUŠKO (eds.), *Report on Registered Case*, cit., p. 24.

<sup>115</sup> Đ. ŠETA, E. TUCAKOVIĆ (eds.), *Report on Registered Cases of Violation of the Right to Freedom of Religion of Muslims in Bosnia and Herzegovina for 2014*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2015 ([https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2014/report\\_religious\\_rights\\_violation\\_2014.pdf](https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2014/report_religious_rights_violation_2014.pdf)), p. 19.

<sup>116</sup> Đ. ŠETA, E. TUCAKOVIĆ (eds.), *Report on Registered Cases*, cit., p. 16.

<sup>117</sup> RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Report on Registered Cases of Violations of the Right to Freedom of Religion of Muslims in Bosnia and Herzegovina for 2020*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2021 ([https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2020/ENG\\_Izvjestaj\\_komisije\\_za\\_slobodu\\_vjere\\_2020.pdf](https://islamskazajednica.ba/images/izvjestaji-slobodavjere/2020/ENG_Izvjestaj_komisije_za_slobodu_vjere_2020.pdf)), pp. 16-17. N. MEHMEDOVIĆ, E. TUCAKOVIĆ, E. KOVAČEVIĆ, DŽ. ŠUŠKO (eds.), *Report on Registered Case*, cit., p. 21.



regular police<sup>119</sup>. Commission has been repeatedly recommending to the public authorities to provide for proper accommodation in cases of rule of dressing and cloth wearing<sup>120</sup>.

The issue of public servants having a beard was discussed before the CCBiH in two different constitutional review cases. In both cases CCBiH has considered it as religious symbol as well as part of the body and physical appearance of the person<sup>121</sup>.

Director of the BiH Border Police justified the prohibition of having a beard by the purpose of the “neat and uniform in the

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<sup>118</sup> R. PITIĆ, M. KARADŽA, N. MEHMEDOVIĆ, *Izveštaji o registriranim slučajevima kršenja prava na slobodu vjere muslimana u Bosni i Hercegovini za 2016. i 2017. godinu*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2018 (<https://www.scribd.com/document/375027745/Izvojestaj-o-napadima-na-muslimane-u-BiH-2016-2017>), pp. 21-23.

<sup>119</sup> Đ. ŠETA, E. TUCAKOVIĆ (eds.), *Report on Registered Cases of Violation of the Right to Freedom of Religion of Muslims in Bosnia and Herzegovina for 2014*, p. 21. RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Report on Registered Cases*, cit., p. 17.

<sup>120</sup> RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Izveštaj o registriranim slučajevima kršenja prava na slobodu vjere muslimana u Bosni i Hercegovini za 2015. godinu*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2016 ([https://islamskazajednica.ba/images/izvjestaji-sloboda-vjere/2015/Izvojestaj\\_o\\_krsenju\\_vjer\\_skih\\_prava\\_2015.pdf](https://islamskazajednica.ba/images/izvjestaji-sloboda-vjere/2015/Izvojestaj_o_krsenju_vjer_skih_prava_2015.pdf)), p. 27. R. PITIĆ, M. KARADŽA, N. MEHMEDOVIĆ, *Izveštaji o registriranim slučajevima kršenja prava na slobodu vjere muslimana u Bosni i Hercegovini za 2016. i 2017. godinu*, p. 38. RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Izveštaj o registriranim slučajevima kršenja prava na slobodu vjere muslimana u Bosni i Hercegovini za 2018. godinu*, p. 25. RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Izveštaj o registriranim slučajevima kršenja prava na slobodu vjere muslimana u Bosni i Hercegovini za 2019. godinu*, p. 25. RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Report on Registered Cases*, cit., p. 27. N. MEHMEDOVIĆ, E. TUCAKOVIĆ, E. KOVAČEVIĆ, DŽ. ŠUŠKO (eds.), *Report on Registered Case*, cit., p. 46. RIYASAT - SEAT OF THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA COMMISSION FOR FREEDOM OF RELIGION, *Report on Registered Cases of Violations of the Right to Freedom of Religion of Muslims in Bosnia and Herzegovina for 2022*, Riyasat - Seat of the Islamic Community in Bosnia and Herzegovina Commission for Freedom of Religion, Sarajevo, 2023 (<https://islamskazajednica.ba/images/izvjestaji-sloboda-vjere/2022/ENG%20Izvojestaj%20komisije%20za%20slobodu%20vjere%202022.pdf>), p. 44.

<sup>121</sup> CCBiH, Decision on admissibility and merits in case no. U 8/17, para 41.



appearance”, while CCBiH questioned whether really a police officer, wearing a well-kept beard, would violate grooming and personal appearance standards to such an extent that it required an intervention to his fundamental constitutional rights. No argument was presented why having a beard would violate such general aim. The CCBiH also rejected the argument that a person with a beard is hardly recognizable than one without beard, for which reason a prosecution of a corruption is challenging. CCBiH concluded that it “does not find a reason that would in itself be an obstacle for the police to perform its duty in the interest of public safety or for the protection of public order, if some police officers wear a well-kept beard”<sup>122</sup>.

The same prohibition standing for the members of the Armed forces of BiH, was justified by BiH Ministry of Defence before CCBiH by, *inter alia*, the military need for soldiers with shaven and tidy beard, and who could use the military equipment for the tasks assigned, without any restrictions<sup>123</sup>. Both reasons were rejected by CCBiH, given that these represent a general aim and that no further elaboration on why soldier’s beard would violate any of these or be an obstacle in achieving those, was provided<sup>124</sup>. In summary, the Ministry of Defence failed to offer any relevant legitimate aim and reason to restrict the right to wear a well-groomed beard to all military personnel when on duty in uniform, as is permitted “only” to religious servants<sup>125</sup>.

Provision in the armed forces regulation, which prescribes that religious symbols may be worn with the uniform in such a way that they are not visible, was challenged as a provision which limits the rights of Muslim women wearing a headscarf. In this constitutional review case, appellant made the reference to the previously established case law on illegitimate restriction of having a beard in armed and border forces. CCBiH differentiated between a headscarf and a beard, pointing that a headscarf is a religious symbol, representing a strict religious duty and the clothing practice of Muslim women<sup>126</sup>. On the other hand, beard does not necessarily have to be linked to the freedom

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<sup>122</sup> *Ibidem*, para 43.

<sup>123</sup> CCBiH, Decision on admissibility and merits in case no. U 9/21, para 36.

<sup>124</sup> *Ibidem*, para 36.

<sup>125</sup> *Ibidem*, para 37.

<sup>126</sup> *Ibidem*, para 28.



of religion, but it could also be related to the lifestyle, fashion or some other personal preference<sup>127</sup>.

CCBiH also accepted, without a further elaboration, all legitimate reasons for such restrictions provided by the BiH Ministry of Defence as corresponding to one or more legitimate aims from Art. 9 para 2 ECHR<sup>128</sup>. These reasons are: to protect tolerance in a multi-ethnic and multi-religious society such as BiH, requirement of religious neutrality of public bodies, the Armed Forces of BiH, principle of neutrality towards the entire public of BiH, which the Armed Forces serve, keeping the uniform appearance of all Armed forces members<sup>129</sup>. In elaborating the necessity of restriction, CCBiH underlined that members of Armed forces are public servants and as a such are bound by the obligation of neutrality streaming from their official status and differentiate from private individual<sup>130</sup>.

Here CCBiH explicitly referred to the laws on courts, stating that these laws also invoke the neutrality principle by prohibiting to judges and judicial officials to wear any religious symbols<sup>131</sup>. According to the CCBiH, the protection of the principle neutrality of the Armed forces is in accordance with the values of the BiH Constitutional and ECHR<sup>132</sup>. Court stated that the neutrality could be justified by the wartime past of the armies out of which the Armed Forces of BiH were formed and the multi-ethnic and multi-religious structure of the Armed Forces of BiH<sup>133</sup>.

In two human rights cases which had the same appellant, CCBiH was asked to review a restriction suffered by a female member of the Armed Forces for wearing a headscarf<sup>134</sup>. The appellant, a Muslim woman, a few years into her working in the Armed forces, decided to start wearing a headscarf. Eventually, the appellant was reassigned to another working place, for which she unsuccessfully led an ant-

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<sup>127</sup> *Ibidem*.

<sup>128</sup> *Ibidem*, para 41.

<sup>129</sup> *Ibidem*, para 40.

<sup>130</sup> *Ibidem*, para 44.

<sup>131</sup> "Such neutrality has also been established in judicial institutions in Bosnia and Herzegovina, so the laws on courts do not allow judges and court officials to wear visible religious symbols in the performance of their duties." *Ibidem*, para 44.

<sup>132</sup> *Ibidem*.

<sup>133</sup> *Ibidem*.

<sup>134</sup> CCBiH, Decision on admissibility and merits in case no. AP 2190/13. CCBiH, Decision on admissibility and merits in case no. AP 1795/21.



discriminatory proceeding before the Court of BiH and then referred to the CCBiH. CCBiH has found out that wearing a headscarf represents a manifestation of the freedom of religion<sup>135</sup>. Elaborating on alleged violation of the freedom of religion, CCBiH accepted that Court of BiH and BiH Ministry of Defence provided “clear, reasonable and convincing reasons” which are in the line with the article 9 ECHR.

These reasons are: wearing of religious symbols in the Armed Forces of BiH may affect the protection of the rights and freedoms of others, including the possibility of provoking negative interpersonal relations among soldiers of the Armed Forces of BiH. It may lead to citizens' distrust of the army, given the composition and tasks of the Armed Forces of BiH and the sensitivity of society to religious symbols in public space, especially after the conflict that still causes ethnic and religious tensions in Bosnian and Herzegovinian society today. It is necessary to protect the principle of neutrality towards the entire BiH public, in whose service the Armed Forces of BiH are located<sup>136</sup>.

## 5 - Limiting freedom to manifest religion in BiH's judiciary

### 5.1 - Judges and judicial officials

Judges and judicial officials are placed in single group given that provisions in both laws on courts of both federal units (FBiH and RS) prohibit both groups from displaying any sign of religious, political, national or other affiliation while performing their official duties<sup>137</sup>. BDBiH Law on courts limits this prohibition only to the judges<sup>138</sup>. FBiH Law on courts defines judicial officials as civil servants and employee of the court<sup>139</sup>, while RS Law instead of judicial official lists down following categories: legal associates, senior legal associates<sup>140</sup> and court workers (which are all other employees of the court)<sup>141</sup>.

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<sup>135</sup> CCBiH, Decision on admissibility and merits in case no. AP 2190/13, para. 47.

<sup>136</sup> CCBiH, Decision on admissibility and merits in case no. AP 1795/21, para. 59.

<sup>137</sup> Art. 13 para 1 of the Law on courts of FBiH. Art. 13 para 1 of the Law on court of RS (2004). Art. 14 para 1 of the Law on Courts of RS (2012).

<sup>138</sup> Art. 14, *Official Gazette of BD BiH*, no. 18/2020 - consolidated text.

<sup>139</sup> Art. 42 para 2 Law on Courts of FBiH.

<sup>140</sup> Art. 71 Law on Court of RS (2012), defines that legal associates and senior legal associates assist the judge in his work, draft court decisions, study legal issues, case



The prohibition is not absolute, with limitations extending only to the time of the day when these perform official duties. But, it is not clear what official duties amount to and to which activities are limited. Are these only activities performed in the courtroom? Or official duties extend to the official meetings, participation in the obligatory education courses (either as a teacher or participant), or in the general session of the court? Could judges and judicial officials wear religious clothing in the private cabinet, or court halls (where they could meet at the proceeding party)?

Bosnian scholarship does not have a uniformed answer. One argues that such restriction of the freedom of religion manifestation is limited to the courtroom “an inviolable place of equality and justice, common to all, which should not be threatened by the public emphasis of any identities”<sup>142</sup>. Another claim that such restrictions apply in the whole court building<sup>143</sup>.

Law on Court of BiH does not contain any similar provision but the House rules and obligations of users of the complex of judicial institutions (which include Court of BiH, Prosecutor Office of BiH and HJPCBiH)<sup>144</sup> determine that visitors are prohibited from entering the complex of judicial institutions in clothing that does not correspond to generally accepted standards of dress in a business environment. Visitors to the complex are not allowed to wear miniskirts, shorts, summer T-shirts with thin straps, open-toed shoes and other items of clothing that do not befit a business environment in judicial institutions<sup>145</sup>. CCBiH and ECtHR both have accepted these house rules as adequate legal basis for limiting freedom of religion.

Finally, all judges in BiH, including judges of the Court of BiH, are bound by the Code of Ethics of Judges, adopted by HJPCBiH and implemented on the whole territory of BiH, as amended in 2015, prohibits judges from displaying any religious, political, national or

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law and legal literature, draft legal opinions, and perform other professional tasks independently or under the supervision and instructions of the judge.

<sup>141</sup> Art. 14 para 1, Art. 68 para 1 Law on Courts of RS (2012).

<sup>142</sup> **B. PERIĆ**, *Pravosuđe i vjerska obilježja*, cit., p. 65.

<sup>143</sup> **J. MURATAGIĆ**, *Implikacije zaključka Visokog sudskog i tužilačkog vijeća BiH o zabrani isticanja vjerskih obilježja u pravosudnim institucijama*, in E. ŠARČEVIĆ (ed.), *Vjerski simboli u sudovima?*, Fondacija Centar za javno pravo, Sarajevo, 2016, p. 109.

<sup>144</sup> It is unpublished and internal act, not even available online.

<sup>145</sup> Art. 20.



other affiliation during the performance of official duties<sup>146</sup>. Violations of the Code of ethics represent a disciplinary offence, prosecuted by the disciplinary prosecutor, and for which one of the following penalties could be issued: a) a written warning that is not made public; b) a public warning; c) a reduction in salary or remuneration by up to 50 percent, for a period of up to one year; d) temporary or permanent transfer to another court or prosecutor's office; e) transfer from the position of court president to the position of judge, or from the position of chief prosecutor or deputy chief prosecutor to the position of prosecutor; f) dismissal from office<sup>147</sup>.

In the Bosnian scholarship, there is a unanimous conclusion that limitation of the freedom of religion manifestation of judges is legitimate and necessary in democratic society. The leading legitimate aim is the rights of others - a right to the impartial court. The objective perspective of impartiality refers to how does public and parties in the proceedings perceive the court and where such perception could be objectively justified<sup>148</sup>. With regards to the reasons of necessity, legal literature argues the wide margin of appreciation enjoyed by the state, principle of neutrality which is immanent to the secular state, judicial impartiality and the general social context in BiH. Such context is determined by three issues: first are ongoing religious, ethnic, social and political tensions; second are war crimes trials and in third place the general critiques of domestic judiciary<sup>149</sup>.

It is argued that a manifestation of religion by judges would imply the relation of the judiciary with that single religion and ethnic group, in a plural Bosnian society<sup>150</sup>. Thus, the failure to oblige visual neutrality could further destabilize the judicial system and even the legal order as such<sup>151</sup>. Dressing rules and limitations of the freedom of religion manifestation are published and known in advance, thus any

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<sup>146</sup> Amendments to the Code of Ethics for Judges, *Official Gazette of BiH*, no. 24/2015.

<sup>147</sup> Art. 56 Law on HJPCBiH.

<sup>148</sup> **S. SALI TERZIĆ**, *Manifestacije vjerskih uvjerenja u pravosuđu: legitimno ograničenje ili diskriminacija?*, in E. ŠARČEVIĆ (ed.), *Vjerski simboli u sudovima?*, Fondacija Centar za javno pravo, Sarajevo, 2016, p. 33. **J. MURATAGIĆ**, *Implikacije zaključka*, cit., pp. 108-111.

<sup>149</sup> **S. SALI TERZIĆ**, *Manifestacije vjerskih uvjerenja*, cit., pp. 34-37. **D. DELIĆ**, *Vjerska obilježja u pravosuđu Bosne i Hercegovine - pro et contra*, in E. ŠARČEVIĆ (ed.), *Vjerski simboli u sudovima?*, cit., p. 83.

<sup>150</sup> **D. DELIĆ**, *Vjerska obilježja*, cit., p. 83.

<sup>151</sup> **J. MURATAGIĆ**, *Implikacije zaključka*, cit., p. 125.



person perusing the position of the judge is aware of these rules when applying for such position<sup>152</sup>. As final argument, it is pointed out that there is no less intrusive measure exists, to achieve the identical goal. But, the scholarship lacks any discussion on alternative measures and elaboration why none of these is suitable to achieve the legitimate aims.

With regards to the judicial official (civil servants and employees of the court), limitation of the freedom of religion manifestation could be justified by the wide margin of appreciation and nature of the institution of the court<sup>153</sup>. At the same time, judicial officials do not make a contact with parties, neither participate in distribution of justice nor decide on the rights of parties as they perform dominantly administrative tasks. Thus they are not obligated by principles of neutrality and impartiality. Finally, laws on civil servants and employees of the court do not limit their freedom to manifest freedom of religion, but only manifestation of political affiliation<sup>154</sup>.

## 5.2 - Prosecutors and employees of the prosecutor's office

All four existing domestic laws on prosecutorial office remain silent on whether prosecutors and employees of the prosecutor's office are prohibited from displaying signs of religious affiliation or any other signs as matter of fact. Code of Ethics of Prosecutors<sup>155</sup> as amended in 2015, determines that the prosecutor must not display any religious, political, national or other affiliation during the performance of official duties. The Code violation might result in disciplinary liability and penalty up to dismissal from the office<sup>156</sup>. Additionally, the above-mentioned House rules and obligations of users of the complex of state-level judicial institutions also applies to the employees of the Prosecutor's Office of BiH.

On the other hand, there was no legal basis for conclusions by HJPCBiH (that are discussed in chapter no. 5) to expand the limitation of the freedom of religion manifestation to the prosecutors and the

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<sup>152</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., pp. 109, 115. S. SALI TERZIĆ, *Manifestacije vjerskih uvjerenja*, cit., pp. 37-38.

<sup>153</sup> S. SALI TERZIĆ, *Manifestacije vjerskih uvjerenja*, cit., pp. 38-39.

<sup>154</sup> S. SALI TERZIĆ, *Manifestacije vjerskih uvjerenja*, cit., p. 38. J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 125.

<sup>155</sup> Amended Code of Ethics for Prosecutors, *Official Gazette of BiH*, no. 32/2015.

<sup>156</sup> Art. 57 Law on HJPCBiH



employees of the prosecutor's office, especially given that laws on prosecutor's office provide no limitation and it goes against wording of the FBiH Law on courts<sup>157</sup> which explicitly provides that the religious symbols ban does not apply on judicial parties.

In support of such prosecutor's limitation of the freedom of religion, it has been argued that prosecutors do work like the one done by judges, and thus the same proceeding's and ethical principles and rules apply (impartiality, neutrality and independence)<sup>158</sup>. Prosecutors, just like judges, are aware of dressing rules and limitations of the freedom of religion manifestation in advance and before they get employed<sup>159</sup>. Again, according to the scholars there is no less intrusive measure exist to achieve a legitimate aim<sup>160</sup>.

Similar legitimate aims and reasons for necessity of limitation of the freedom of religion manifestation, to those with regards judges, have been argued in case of prosecutors<sup>161</sup>. Although the prosecutors are parties in the proceeding, as a state institution it has to act in accordance with the principle of secularism. That is of most importance in BiH context, given the ethnic and religious tensions and the social context in which it is needed to keep unquestionable impression of religious and any kind of other neutrality<sup>162</sup>. Given that criminal procedure laws provide for the same reasons for the recusal of judges with regards to the visual impartiality, the same rule of visual impartiality and neutrality could be applied<sup>163</sup>.

On the other hand, claims are made that as prosecutor's office is a public not judicial institution, restriction of the freedom of religion manifestation should not be applied<sup>164</sup>. Again, a claim that less intrusive measure doesn't exist was not elaborated, including which alternative measure could be used and if not, why not.

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<sup>157</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 113. D. DELIĆ, *Vjerska obilježja*, cit., p. 84.

<sup>158</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 125.

<sup>159</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., pp. 109-115. S. SALI TERZIĆ, *Manifestacije vjerskih uvjerenja*, cit., pp. 37-38.

<sup>160</sup> S. SALI TERZIĆ, *Manifestacije vjerskih uvjerenja*, cit., pp. 37-38.

<sup>161</sup> S. SALI TERZIĆ, *Manifestacije vjerskih uvjerenja*, cit., pp. 34-37.

<sup>162</sup> S. SALI TERZIĆ, *Manifestacije vjerskih uvjerenja*, cit., p. 33. J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 113.

<sup>163</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., pp. 109, 114.

<sup>164</sup> B. PERIĆ, *Pravosuđe i vjerska obilježja*, cit., p. 60.



Arguments in favor of limiting the freedom of religion of prosecutors, investigators, legal associates, prosecutors' assistants and interns when working on cases, refer purely to the headscarf. It is argued that the wearing a headscarf would go against prohibition from entering the complex of judicial institutions in clothing that does not correspond to generally accepted standards of dress in a business environment<sup>165</sup>.

Others argue that such limitation would not be legitimate, given that these do not engage in the interference with the parties<sup>166</sup>.

### 5.3 - Lawyers and parties, witnesses and public

FBiH Law on courts explicitly proclaims that a prohibition to display signs of religious affiliation does not apply to parties and third parties<sup>167</sup>. RS Law and BD BiH Law on courts are silent, while 2004 RS Law contained the same provision as FBiH Law on courts<sup>168</sup>. Procedural laws on civil, administrative and criminal proceedings do not provide a legal basis for limiting freedom of religion manifestation. Thus, this freedom is enjoyed by lawyers, parties, witnesses and public without any limitation.

It should be noted that HJPCBiH conclusions (discussed in chapter no. 5), which as such, provide for a judge discretion to limit the freedom of religion manifestation of parties, witnesses and public, has been criticized for two reasons. First, it has no legal basis in the law and second, it provides a wide margin to the court, without any applicable criteria in deciding when and to which extend to limit freedom to manifest religion<sup>169</sup>. Furth more, it goes against provisions of the FBiH Law on Courts which exclude all these groups from the ban enforcement.

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<sup>165</sup> B. PERIĆ, *Pravosuđe i vjerska obilježja*, cit., p. 56. Here again, the headscarf is being singled out as "extremely powerful symbol." Also, at S. SALI TERZIĆ, *Manifestacije vjerskih uvjerenja*, cit., pp. 34-37.

<sup>166</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 116.

<sup>167</sup> Art. 13 para 3 Law on courts of FBiH.

<sup>168</sup> Art. 13 para 3 Law on courts of RS (2004). 2012 Law on court of RS doesn't contain any similar provision.

<sup>169</sup> B. PERIĆ, *Pravosuđe i vjerska obilježja*, cit., p. 71. D. DELIĆ, *Vjerska obilježja*, cit., p. 84.



*a) Lawyers*

Both FBiH and RS Law on Attorneys' Profession as well as bylaws, like statutes of the attorney chamber and ethical rule, in no way limit manifestation of the religion. Lawyers do not perform any official duty neither they are public officials and as such should not be bound by the religious neutrality obligation. It would be hard to argue that person wearing a headscarf is dressed in a way that does not correspond to generally accepted standards of dress in a business environment<sup>170</sup>. Furthermore, the judges and prosecutors are obliged by codes of ethics to recognize and respect the differences in society, particularly those related to race, skin color, gender, religious affiliation, national origin, social class, disability, age, marital status, sexual orientation, social and economic status and other criteria, and treats all persons with whom he or she has professional contacts with equal respect<sup>171</sup>.

*b) Witnesses*

When HJPCBiH adopted conclusions in 2015 (discussed in chapter no. 5), it obviously had in mind a case before the Court of BiH which involved a member of the *Vehabi* community which refused to remove their skullcap in the courtroom, claiming freedom of religion. In addition to that, a few months earlier, the CCBiH in *Hamidović* case found no violation of the freedom of religion once one of such witnesses was fined<sup>172</sup>.

In *Hamidović* case (discussed below) the Court of BiH imposed a fee (in amount of 10,000 BAM which was in second instance reduced to 3,000 BAM, but given that a witness could pay it, he was imprisoned for a month) to the witness in criminal case who refused to remove its skullcap, referring to the freedom of religion. When fining the witness who refused to remove a skullcap, the Court of BiH (in a way that is "not appropriate" as noted later by the CCBiH<sup>173</sup>) elaborated that:

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<sup>170</sup> B. PERIĆ, *Pravosuđe i vjerska obilježja*, cit., p. 56. We note that here again, the headscarf is being singled out as "extremely powerful symbol".

<sup>171</sup> Section 3 Code of ethics of judges. Section 3 Code of ethics for prosecutors.

<sup>172</sup> CCBiH, Decision on admissibility and merits in case no. AP 3947/12.

<sup>173</sup> CCBiH, Decision on admissibility and merits in case no. AP 3947/12, para 43.



“the frequency of such impertinent behaviour and the disregard for the Court of BiH has acquired the elements of a dangerous criminal activity and undoubtedly constitutes a special social threat, and that the retreat of the state before these and similar extremisms may have serious consequences for the reputation of the judiciary and the stability of the society”<sup>174</sup>.

In human rights review, CCBiH found no violation of the freedom of religion, claiming that measure taken was necessary to protect the dignity of the judicial institution<sup>175</sup>. The CCBiH supported standing of the Court of BiH that BiH is a secular state where religion is separated from public life, which is the reason why the premises of a court cannot be the place for one to manifest any religion whatsoever and to manifest anyone’s religious orientation<sup>176</sup>. CCBiH also supported finding that skullcap violates the usual standards of conduct, whereby the Court of BiH took into account its obligation to support “the values that bring people closer and not those that bring them apart”<sup>177</sup>.

Judge *Knezevic* in its dissenting opinion claims that is should be differentiated between the applicant who acts and private individual, and on the other hand citizens of BiH who acts as the public official - policeman, teacher or any other, and for that reasons there should have been found violation of the freedom of religion<sup>178</sup>. ECtHR would review the case and find violation of the freedom of religion.

Scholars have discussed the freedom to manifest a religion of the witness who is a Muslim women wearing a *niqab* (veil that covers a face)<sup>179</sup>. In absence of the legal framework, the issue is left to be arbitrary decided by the judge. There should be a difference in treating such person as a witness in administrative, civil and criminal procedure. In the criminal case the face expressions are of great relevance to a judge and parties when assessing whether a witness is lying or not.<sup>180</sup> It looks like in these cases limiting freedom to manifest

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<sup>174</sup> CCBiH, Decision on admissibility and merits in case no. AP 3947/12, para 51.

<sup>175</sup> CCBiH, Decision on admissibility and merits in case no. AP 3947/12, para 43.

<sup>176</sup> CCBiH, Decision on admissibility and merits in case no. AP 3947/12, para 43.

<sup>177</sup> CCBiH, Decision on admissibility and merits in case no. AP 3947/12, para 43.

<sup>178</sup> CCBiH, Decision on admissibility and merits in case no. AP 3947/12, para 43. Separate Partially Dissenting Opinion of the Vice-President Zlatko M. Knežević, para 7.

<sup>179</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 122.

<sup>180</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 122.



religion would be legitimate<sup>181</sup>. With regards to the identification of the witness wearing *niqab*, in all administrative and judicial proceeding, it could be done by an employee of the court, of the same gender, in the separate room<sup>182</sup>, while exposure of the face expression does not seem to be necessary for purposes of assessing the truthfulness of statements.

*c) Public*

Public just like parties and lawyers are not bound by principles of neutrality and impartiality. But, a former judge to the Court of BiH argues that even public should be a strict prohibition of the manifestation of the religion in the courtrooms, while it should not be applicable in the rest of the court e.g. registry office and land registry office<sup>183</sup>.

## 6 - The wearing of religious symbols in the courtrooms: a brief overview of the Strasbourg case-law

Religious clothing has come under the consideration of the Court of Strasbourg in a substantial number of cases<sup>184</sup>. As pointed earlier, in the

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<sup>181</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 123.

<sup>182</sup> J. MURATAGIĆ, *Implikacije zaključka*, cit., p. 122

<sup>183</sup> B. PERIĆ, *Pravosuđe i vjerska obilježja: izazov i perspektive*, p. 65.

<sup>184</sup> See, among many, S. BACQUET, *Religious Symbols and the Intervention of the Law: Symbolic Functionality in Pluralist States*, Routledge, Oxon, UK, 2020; L. ELLIS ET AL., *Religious Symbols and Attire in Schools Human Rights Law*, in *LawNow*, no. 30, 3, 2005, pp. 74 ff; D.J. HILL, D. WHISTLER, *The Right to Wear Religious Symbols*, Palgrave Macmillan, London, 2013; E. HOWARD, *Law and the Wearing of Religious Symbols in Europe*, Routledge, 2019; A.E. KIM, *The Absence of Pan-Canadian Civil Religion: Plurality, Duality, and Conflict in Symbols of Canadian Culture*, in *Sociology of Religion*, no. 54, 3, 1993, pp. 257 ff; I. LEIGH, A. HAMBLER, *Religious Symbols, Conscience, and the Rights of Others*, in *Oxford Journal of Law and Religion*, no. 3, 1, 2014, pp. 2 ff.; J. MARTÍNEZ-TORRÓN, *Institutional Religious Symbols, State Neutrality and Protection of Minorities in Europe*, in *Law and Justice*, no. 171, 2013, pp. 21 ff.; D. MCGOLDRICK, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, Hart, Oxford, 2006; I. RORIVE, *Religious Symbols in the Public Space: In Search of a European Answer*, in *Cardozo Law Review*, no. 30, 2008, pp. 2669 ff.; A. STEINBACH, *Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights*, in *Cambridge Journal of International and Comparative Law*, no. 4, 2015, pp. 29 ff.; H. VAN OOIJEN, *Religious symbols in public functions: Unveiling state neutrality*, Intersentia, Cambridge, UK, 2012.



CoE system, in fact, the right to wear religious symbols and clothing falls within the right to manifest religious freedom by practice, as protected by Art. 9 of the ECHR<sup>185</sup>.

So far, the ECtHR dealt with the wearing of religious symbols or clothing in the public space<sup>186</sup>, at work<sup>187</sup>, at school and university<sup>188</sup>, in relation to the obligation to appear bareheaded on identity photos on official documents<sup>189</sup> and during security checks<sup>190</sup>.

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<sup>185</sup> See, among many, **P. ANNICCHINO**, *La religione in giudizio: tra Corte Suprema degli Stati Uniti e Corte europea dei diritti dell'uomo*, il Mulino, Bologna, 2018; **E. CAMASSA** (ed.), *Democrazie e religioni: libertà religiosa, diversità e convivenza nell'Europa del XXI secolo*, Editoriale scientifica, Napoli, 2016; **E. DIENI**, **A. FERRARI**, **V. PACILLO** (eds.), *Symbolon/diabolon. Simboli, religioni, diritti nell'Europa multiculturale*, il Mulino, Bologna, 2006; **N. DOE**, *Law and Religion in Europe: A Comparative Introduction*, Oxford University Press, Oxford, 2011; **C.M. EVANS**, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford, 2001; **S. FERRARI**, **S. PASTORELLI** (eds.), *Religion in Public Spaces: A European Perspective*, Routledge, London; New York, 2016; **M. HILL KC**, **L. PAPADOPOULOU**, *Islam, Religious Liberty and Constitutionalism in Europe*, Bloomsbury, London, 2024; **H.G. KIPPENBERG**, *Regulating Freedom of Religion: From the United Nations to the European Court of Human Rights*, Cambridge Scholars Publishing, Cambridge, 2021; **R. MAZZOLA** (ed.), *Diritto e religione in Europa. Rapporto sulla giurisprudenza della Corte europea dei diritti dell'uomo in materia di libertà religiosa*, il Mulino, Bologna, 2012; **J. MURDOCH**, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights*, Council of Europe Press, Strasbourg, 2012; **K. MURPHY**, *State Security Regimes and the Right to Freedom of Religion and Belief: Changes in Europe since 2001*, Routledge, London; New York, 2013; **K. MURPHY**, *State Security Regimes and the Right to Freedom of Religion and Belief: Changes in Europe Since 2001*, Routledge, London; New York, 2013; **L. PALADINI**, **M. DEL ÁNGEL IGLESIAS VÁZQUEZ**, *Protection and Promotion of Freedom of Religions and Beliefs in the European Context*, Springer, Berlin, 2023; **A. PIN**, **J. WITTE**, *Libertà religiosa e diritti umani. Origini e futuro tra Europa e Stati Uniti*, il Mulino, Bologna, 2024; **C. ROBERTS**, *Freedom of Religion or Belief in the European Convention on Human Rights: A Reappraisal*, Cambridge University Press, Cambridge, 2023; **J. TEMPERMAN**, **J. GUNN**, **M. EVANS** (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis*, Brill Nijhoff, The Netherlands, 2019; **M. TOSCANO**, *Il fattore religioso nella Convenzione europea dei diritti dell'uomo*, Edizioni ETS, Pisa, 2018; **R. UITZ**, *Freedom of Religion in European Constitutional and International Case Law*, Council of Europe, Strasbourg, 2007.

<sup>186</sup> For example, ECtHR, *SAS v France*, app. no. 43835/11, 26 June 2014.

<sup>187</sup> For example, ECtHR, *Eweida et al v the United Kingdom*, app. nos. 48420/10, 36516/10, 51671/10, 59842/10, 15 January 2013.

<sup>188</sup> For example, ECtHR, *Şahin v Turkey*, app. no. 44774/98, 10 November 2005.

<sup>189</sup> For example, ECtHR, *Mann Singh v France*, app. no. 24479/07, 13 November 2008.

<sup>190</sup> For example, ECtHR, *Phull v France*, app. no. 35753/03, 11 January 2005 (decision on the admissibility).



Art. 9 has been repeatedly considered by the case-law as one of the foundations of a “democratic society”, a precious asset for believers, atheists, agnostics, sceptics and the unconcerned<sup>191</sup>. The provision is made up of a couple of twin clauses protecting, on the one hand, the absolute right to freedom of thought, conscience and religion<sup>192</sup>. This implies having, keeping and changing a religion or belief without any limitations or restrictions of any sort.

On the other hand, the provision guarantees also the qualified right to manifest one’s religion or belief, either alone or in community with others, in public or private, by worshipping, teaching, practicing and observing. As anticipated earlier, the exercise of these entitlements is qualified: unlike the right to hold or change a religion or belief, the right to manifest it or act upon it can be limited due to its impact on others<sup>193</sup>.

However, any restriction posed by public authorities can occur only if they are prescribed by law and are necessary in a democratic society for the achievement of specific purposes listed in the provision itself: in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others<sup>194</sup>.

The scholarship has recognized that a multiform series of rights, freedoms and entitlements fall within the scope of application of Art. 9,

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<sup>191</sup> See ECtHR, *Kokkinakis v. Greece*, Series A no. 260 A, 25 May 1993, para 31. See N. **BRATZA**, *The ‘Precious Asset’: Freedom of Religion Under the European Convention on Human Rights*, in *Ecclesiastical Law Journal*, no. 14, 2, 2012, pp. 256 ff.

<sup>192</sup> Art. 9 ECHR, para 1.

<sup>193</sup> Art. 9 ECHR, para 2.

<sup>194</sup> This is also known as “proportionality test”: see, among many, **A. BARAÇ**, *Proportionality constitutional rights and their limitations*, Cambridge University Press, Cambridge, UK, 2012; **J. CHRISTOFFERSEN**, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Martinus Nijhoff Publishers, Leiden-Boston, 2009; **M. COHEN-ELIYA**, **I. PORAT**, *Proportionality and the Culture of Justification*, in *The American journal of comparative law*, no. 59, 2, 2011, pp. 463 ff.; **J. COLLINGS**, **S.H. BARCLAY**, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, in *Boston College Law Review*, no. 63, 2, 2022, p. 453 ff.; G. HUSCROFT ET AL. (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press, New York, 2014; **V.C. JACKSON**, *Constitutional Law in an Age of Proportionality*, in *The Yale Law Journal*, no. 124, 8, 2015, pp. 2680 ff..



when the conviction or the belief is enough cogent, serious, cohesive and important<sup>195</sup>.

The wearing of religious clothing represents a positive right (the freedom to do something), alongside other examples such as religious propaganda, worship, and the opening of places of worship<sup>196</sup>.

By contrast, negative rights (the freedom from refraining to do something) include, for instance, the recognition to the right to conscientious objections that applies in many fields of the law<sup>197</sup>.

Religious clothing cases are an important part of the case-law associated with Art. 9 ECHR. In the literature, this proliferous number of applications is read as a symptom of the ongoing processes of integration related to a multi-religious society and to the continuous need to find a proper way of living together in difference without undermining neither social cohesion nor religious identities<sup>198</sup>.

In particular, the questions of departing from uniform applicable laws limiting the right to wear religious clothing in courtrooms poses unique challenges due to the pressing need of guarantee an independent, autonomous and impartial administration of justice<sup>199</sup>. Historically, impartiality in courtrooms has taken some typical expressions, such as the wearing of uniforms, robes, wigs and gowns. Clothing is intimately connected with the importance of leaving any human prejudice outside the trial and to avoid the fear of being discriminated against because of a specific religious adherence, especially from those who are adjudicating a case<sup>200</sup>.

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<sup>195</sup> On which see **T. WOLFF**, *Cogency, seriousness, cohesion, and importance: Assessing the Strasbourg Case-Law on Religion or Belief*, in *Oxford Journal of Law and Religion*, no. 11, 2-3, 2022, pp. 177 ff.

<sup>196</sup> On the difference, in matters of religious freedom, see **M. TOSCANO**, *Il fattore religioso*, cit., p. 203 ff.

<sup>197</sup> **M. TOSCANO**, *Il fattore religioso*, cit., p. 203 ff.

<sup>198</sup> See **J. CASANOVA**, *Religion, European secular identities, and European integration*, in **P. KATZENSTEIN**, **T.A. BYRNES** (eds.), *Religion in an expanding Europe*, Cambridge University Press, Cambridge 2006, p. 65 ff.; **G. DELANTY**, *Dilemmas of secularism: Europe, religion and the problem of pluralism*, in *Identity, belonging and migration*, no. 17, 2008, p. 78.

<sup>199</sup> **A. MADERA**, *Il porto di simboli religiosi nel contesto giudiziario*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (<https://riviste.unimi.it/index.php/statoechiese>), no. 4, 2020, p. 48.

<sup>200</sup> **A. MADERA**, *Il porto di simboli*, cit.



*a) Barik Edidi v. Spain (2016)*

The Court of Strasbourg dealt with the wearing of religious clothing in courtrooms in three cases. The one dates back to *Barik Edidi v. Spain* (2016) and regards a Spanish Muslim lawyer wishing to wear her advocate's gown and her *hijab* instead of wearing a biretta, the appropriate headgear<sup>201</sup>. The claimant appeared with her head covered during a hearing before the *Audiencia Nacional* for a trial concerning facts related to Islamic terrorism. For that, the president of the court asked Ms. Barik Edidi to leave the attorney's stand and sit in the public bench: lawyers appearing before the court should not have their heads covered indeed.

The Court of Strasbourg dismissed the application as ill-founded on grounds of procedural issues. Therefore, the decision is remembered mostly as a missed opportunity to adjudicate on all the alleged violations of MS Barik's Conventional rights to a fair hearing (Art. 6 § 1), to respect for private and family life (Art. 8), to freedom of thought, conscience and religion (Art. 9) and to the general prohibition of discrimination (Art. 1, Prot. 12).

*b) Hamidović v. Bosnia and Herzegovina (2017)*

The Court had the opportunity to enter the merit of the controversy in two other judgments. In *Hamidović v. Bosnia and Herzegovina* (2017) the Court ruled on a case regarding the wearing of a Muslim skullcap by a witness<sup>202</sup>. He was called to give evidence within a criminal trial related to a terrorist attack associated to the Islamic Salafist community, the same religious minority the accused and the witness belonged to. Asked to remove the skullcap by the adjudicating Court<sup>203</sup>, he refused to do so. Expelled from the courtroom, convicted for contempt of court and sentenced to a fine, Mr. Hamidović appealed to the ECtHR.

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<sup>201</sup> ECtHR, *Barik Edidi v. Spain*, app. no. 21780/13, 26 April 2016.

<sup>202</sup> ECtHR, *Hamidović v. Bosnia and Herzegovina*, app. no. 57792/15, 5 December 2017. On this, see **A. JUSIC**, *An (Un) Exceptional Case: Strasbourg's Court Reserved Nod to Religious Symbols in the Courtroom*, in *Oxford Journal of Law and Religion*, no. 8.1, 2019, pp. 213 ff.; **D. GALLIANI**, *La libertà di religione in un'aula di giustizia: istruzioni per l'uso dalla Corte di Strasburgo*, in *Costituzionalismo.it*, no. 1, 2018, pp. 9 ff.

<sup>203</sup> Pursuant to the House Rules of the Judicial Institutions of Bosnia and Herzegovina.



In adjudicating the case, the Court of Strasbourg recognized not only the subsidiary nature of the Convection protection, but also the wide margin of appreciation accorded to the respondent States in these matters:

“In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight. This is the case, in particular, where questions concerning the relationship between State and religions are at stake, as rules in this sphere vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one’s religion or beliefs is ‘necessary’”<sup>204</sup>.

Nevertheless, the Court ascertained that the domestic authorities exceeded the wide margin of appreciation afforded to them and acknowledged a violation of Ar. 9 of the ECHR grounding its judgment on two rationales.

The first one turns on the particular facts of the case and, in particular, on the absence of evidence demonstrating that the applicant adopted a concrete and disrespectful attitude toward the public authorities. His punishment for contempt of court, based solely on his refusal to remove his skullcap, was found not to be necessary in a democratic society<sup>205</sup>.

The second one is rooted in the crucial distinction between the concrete situation of a witness and the one of the public officials (such as judges)<sup>206</sup>. Only the latter are under a duty of discretion, neutrality and impartiality. For this reason, the obligation not to wear religious

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<sup>204</sup> Para 38 of the judgment.

<sup>205</sup> But see the *Concurring Opinion* of Judge Bošnjak at para 6: “While it is true that the applicant disobeyed the order to remove the skullcap, this disobedience can be considered similar to conduct motivated by conscientious objection and cannot in itself be considered as a sign of contempt of court”.

<sup>206</sup> ECtHR, *Pitkevich v. Russia*, app. no. 47936/99, 8 February 2001, concerning the dismissal of a judge because she had, among other things, proselytized and prayed during court hearings.



symbols and clothing, while exercising official authority, may be legitimately derived from the duty of neutrality<sup>207</sup>.

*c) Lachiri v. Belgium (2017)*

The case of *Lachiri v. Belgium* (2017) represented the first time where the Court found a violation of Art. 9 stemming from a headscarf ban<sup>208</sup>. Mrs. Lachiri was a Belgian national appearing as a civil party in a criminal proceeding regarding her brother's death. During the hearings, she entered the courtroom wearing a headscarf, a conduct that violates the obligation of standing uncovered imposed to anyone assisting the hearings<sup>209</sup>. She refused to fulfill this duty, and, as a consequence, the president of the chamber not only did not allow her to enter the courtroom but also condemned her for contempt of court.

The ECtHR, called to adjudicate on alleged violation of the applicant's right to religious freedom, noted that the respondent government did not claim that the restriction was part of safeguarding secular and democratic values of the Belgian state. The contested provision prevented disrespectful behaviors threatening the proper conduct of a hearing (that the applicant had not manifested in the instant case)<sup>210</sup>.

In addition to that, it noted that the applicant is a private citizen and has not an official status nor she is exercising a public function. Therefore, she cannot be subject to an obligation of discretion in the public expression of her religious beliefs<sup>211</sup>. The interference with Mrs. Lachiri's right to freedom of religion was not justified in a democratic society and the margin of appreciation, accorded to the council of Europe member states, was exceeded<sup>212</sup>.

While *Hamidović* and *Lachiri* might be cherished as a rare success for religious freedom in Strasbourg, legal commentators are very cautious.

They underline the limits of the ECtHR's reasoning in introducing a "a sort of safeguard clause" that impedes the bench from

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<sup>207</sup> Para 40 of the judgment.

<sup>208</sup> ECtHR, *Lachiri v. Belgium*, app. no. 3413/09, 18 September 2018.

<sup>209</sup> Article 759 of the Belgian judicial code.

<sup>210</sup> Paras 37 e 38 of the judgment.

<sup>211</sup> Para 44 of the judgment.

<sup>212</sup> Para 47 of the judgment.



judging on the full merit. By distinguishing the situation related to citizens by the one related to public officials, the ECtHR concludes that “a possible indirect impact of religiously connoted practices on the effective functioning of the public service cannot be absolutely excluded” in the future<sup>213</sup>.

In addition, these judgments not only offer little guidance to the future developments of Strasbourg’s case-law when slightly different facts might occur inside courtrooms. They also lose power in relation to barristers, attorneys and legal counsellors, precisely where Art. 9 protection could prove to be a game-changer in such precise circumstances:

“Attorneys wearing a headscarf have been banned from the bar in several Council of Europe states, including Belgium and Spain. After *Hamidović*, hijab wearing law school graduates in these countries remain in the dark as to their career opportunities at the bar, until a courageous woman challenges a ban first domestically, and then - if needed - in Strasbourg”<sup>214</sup>.

## **7 - How to balance individual freedom of religion and neutrality principle in Bosnian courtrooms?**

The research question to which the paper aims to answer is how to balance an individual religious freedoms exercised by judges, judicial officials, prosecutors and prosecutor's office staff with the principle of the neutrality and separation of state and churches proclaimed by CCBiH and later state level legislator. Earlier has been concluded that witnesses, lawyers and public, enjoy the freedom to manifest religion without any limitation.

It derives from the existing ECtHR case law that states belonging to the CoE system enjoy a wide margin of appreciation in these matters. Moreover, proportionate limitations of freedom to manifest religion through the wearing of religious symbols for all judicial officials would seem in the line with Art. 9 ECHR.

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<sup>213</sup> A. MADERA, *Il porto di simboli religiosi*, cit., p. 60.

<sup>214</sup> E. BREMS, J. VRIELINK. *Floors or ceilings: European supranational courts and their authority in human rights matters*, in K. LEMMENS, S. PARMENTIER, L. REYNTJENS (eds.), *Human Rights with a Human Touch: Liber Amicorum Paul Lemmens, Intersentia*, Cambridge; Chicago, 2019, p. 285.



Nevertheless, given that Bosnian constitutional framework guarantees to everyone, under BiH jurisdiction, the “highest level of internationally recognized human rights and fundamental freedoms”, including the right to freedom of religion or belief, whether the existing legal framework meet such requirement requires further examination. In addition, in ascertain the extent of the margin of appreciation afforded to a state, the importance of freedom of religion for religious pluralism, an essential and integral part of a democratic society, must be taken into account, especially taken into account specific features and history of a BiH state community<sup>215</sup>.

It should be noted again that the limitation of freedom of religion for judges, prosecutors and other judicial and prosecutorial officials applies purely to the courtrooms. It does not interfere with their freedom of religion outside courtrooms, including the freedom to manifest religion and wear religious clothing. As a consequence, in public, parties which civil or criminal rights are decided in courtrooms could see judges, prosecutors and their staff, while exercising freedom to manifest religion and thus become aware of their religious affiliation.

As elaborated within Section 5 of this paper, scholars who have supported the religious symbols’ ban for judges, prosecutors, judicial official and prosecutor's staff, claim, without any further elaboration, that there is no alternative measure which would be less intrusive for the individual freedom of religion.

Given that the aim of the restriction on manifestation of religion is uniformity/neutrality of everyone in their appearance and, related with that, the right to be heard by an impartial court, discussion should elaborate on whether there is any other (less intrusive) mean to achieve such goals.

Codes of ethics for judges and prosecutors in BiH provide that judges and prosecutors when in courtrooms have to wear robes<sup>216</sup>. Such uniform makes it possible for the person having a symbol (e.g. neckless with the cross) to wear it under robes. Adding to such uniform a wing could be used to cover whatever a religious symbol a person might wearing it on his or her head (e.g. headscarf or kippah).

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<sup>215</sup> N. ADEMOVIĆ, C. STEINER, *Constitution of Bosnia and Herzegovina: A Commentary*, Konrad-Adenauer-Stiftung e.V. Rule of Law Program South East Europe, Sarajevo, 2010, p. 364.

<sup>216</sup> Art. 4.13 Code of Ethics for Judges. Art. 4.14 Code of Ethics for Prosecutors.



Such additional peace of the uniform could potentially generate some administrative inconvenience, but in words of the ECtHR judges "this seems to us to be minimal and should perhaps be seen as the small price to be paid in order to ensure respect for freedom of religion in a multicultural society"<sup>217</sup>. CCBiH has repeatedly underlined that multicultural society is a fundamental value and BiH "as a multicultural and multi-ethnic community, must nurture the spirit of tolerance and respect for the cultural and traditional peculiarities of its peoples"<sup>218</sup>.

Finally, the specific reason to support introduction of wings, as a technical solution, is that jobs in judicial and prosecutorial offices are fulfilled by quota shared between the constituent people: Bosniaks, Serbs and Croats. As argued before, their ethnic identity is "crucially determined by belonging to one of three major religions, Islam, Orthodoxy and Catholicism"<sup>219</sup>. Excluding Bosniak Muslim women from public offices just because they wear headscarves means to undermine one constituent people – a Bosniak one – representation in public institutions.

The constitutional framework of Bosnia and Herzegovina was conceived with religious pluralism embedded as a constitutive feature. In addition, such a characteristic is reflected also in the composition of the judiciary itself. Any attempt by the ordinary legislator to curtail this inherent element of BiH constitutionalism must be supported by more cogent, well-reasoned, and justified grounds.

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<sup>217</sup> ECtHR, *Francesco Sessa v. Italy*, app. no. 28790/08, 3 April 2012, Joint dissenting opinion of judges Tulkens, Popović and Keller, para 13.

<sup>218</sup> Decision on admissibility and merits in case no. AP 2691/10, 22 October 2013, para 32.

<sup>219</sup> N. BEGOVIĆ, E. KOVAČEVIĆ, *Law, State and Religion*, p. 2.



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