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## Legal Aspects of Processing of National Affiliation Data in Serbia

Ljubica Djordjević\*

*European Centre for Minority Issues (ECMI)*

### Abstract

The existing legal framework in Serbia enables the processing of national affiliation data: the Constitution guarantees that declaring national affiliation is free and voluntary, the Law on National Minorities opens the option to record national affiliation in official registers, and the Law on Personal Data Protection stipulates exceptions in which processing national affiliation data is lawful. Various sectoral laws also set legal grounds for the collection of national affiliation data. However, relevant legal provisions are not always consistent and coherent, and there is not a systematic approach towards the processing of national affiliation data. As a consequence, the collection of national affiliation data is rather ad hoc, without a clear idea of the purpose of processing it, without proper justification for, and communication of, the reasons and benefits of collecting and further processing it. The result is that, even when national affiliation data have been collected, their analytical potential remains underused.

**Keywords:** Serbia, national affiliation, national minorities, processing of data

Serbia has opted to accommodate the population's ethnic diversity<sup>1</sup> through recognition and protection of national minorities<sup>2</sup> and thus national affiliation becomes a relevant parameter, and the need emerges to monitor the national structure of people in various areas. There is an established practice for processing national affiliation data through the population census, and the share of the population belonging to national minorities determines access to some minority

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\* Senior Researcher, Head of Cluster 'Justice & Governance', European Centre for Minority Issues (ECMI).  
Contact: [djordjevic@ecmi.de](mailto:djordjevic@ecmi.de)

rights. There is also an emerging awareness of the need to monitor the representation of national minorities in the public sector, as well as the position and mobility of national minorities in education. This is reflected in various individual laws that call for the collection of national affiliation data. However, a systematic approach to processing national affiliation data, which would enable thorough evidence-based monitoring of the quality of national minority protection across various sectors, is missing. Without this important framework, the collection of national affiliation data is rather ad hoc; there is not a clear idea of the purpose of processing it and no proper justification for, or communication of, the reasons and benefits of collecting and further processing this data. The result is that, even where national affiliation data have been collected, their analytical potential remains underused.

This paper focuses on the legal aspects of processing national affiliation data in Serbia. The first part of the paper deals with the general legal framework for processing such data, as provided for in the Constitution, the Law on National Minorities, and the Law on Personal Data Protection. The second part provides an analysis of some sectoral laws that call for the collection of national affiliation data and for the recording of such data in official registers. The third and final part of the paper examines some methodological and conceptual questions on the existing approach to collecting national affiliation data in Serbia.

### **1. General legal framework for processing national affiliation data in Serbia**

Three acts set the general legal framework for processing national affiliation data in Serbia: the Constitution,<sup>3</sup> the Law on National Minorities,<sup>4</sup> and the Personal Data Protection Law.<sup>5</sup> The Constitution establishes that the expression of national affiliation is free and voluntary. The Law on National Minorities slightly elaborates this and explicitly stipulates the possibility (which is conceptualized as a right) of recording national affiliation data in official registers. The third pillar, the Personal Data Protection Law, sets the criteria and standards for legally processing national affiliation data. These laws provide the legal basis for processing national affiliation data, but they also leave some space for interpretation and thus for uncertainty. The weakest segment in this respect is the Law on National Minorities, which does not address the issue in a holistic manner, but rather offers a patchwork of provisions that were modified or added through amendments.<sup>6</sup> There is also some ambiguity concerning the Constitutional provision – that no one is obliged to declare their own national affiliation – which some interpret as a prohibition on collecting such data. Although the Constitutional provision could be clearer, it is the interpretation rather than the text, per se, that was misleading.

### **1.1. *The Constitution***

Article 47.1 of the Serbian Constitution stipulates that the expression of national affiliation is free. This freedom is two-sided and covers both the freedom to express one's own national affiliation and the freedom not to do so. In addition, it encompasses freedom from compulsory attribution or negation of specific national affiliation, and thus underpins the principle of free self-identification. An important precondition for this freedom is the guarantee that no person can be harmed because of expressing (or not expressing) their national affiliation;<sup>7</sup> this is not explicitly proclaimed in the Constitution,<sup>8</sup> but can be derived from the spirit of Article 47.1. Another important segment is the guarantee that expression of national affiliation is voluntary. The principle of voluntariness is additionally underpinned by Article 47.2, which stipulates that no person can be obliged to declare their own national affiliation.

The wording of Article 47.2 has caused some confusion because some have interpreted it as a legal obstacle to collecting national affiliation data. However, such argumentation is not fully developed and the underlying premises remain unclear. Two of the authoritative commentaries on the Constitution do not problematize the provision of Article 47.2,<sup>9</sup> and authors who do refer to Article 47.2 as a barrier to collecting national affiliation data fail to elaborate on this. Several approaches can be identified with respect to the latter: One approach is that the prohibition of collecting national affiliation data in Article 47.2 is taken for granted and unproblematized (Djurić, 2014: 30). Another approach is that the freedom of expression of national affiliation is indeed perceived as a legal barrier to the collection of such data, but that the need to remove such legal clauses has been noticed (Šuković, 2018: 41). Finally, a third approach criticizes a rigid interpretation of freedom of expression of national affiliation, in that the preclusion of ethnic statistics harms the quality of national minority protection (FER, 2017:107) and 'leads to de facto marginalization of minorities' (Hofmann, Jilek and Palermo, 2012: 27). In the end, the provision of Article 47.2 has not been widely elaborated in the literature, but has been (mis)used by public authorities to justify the lack of ethnic statistics in public institutions (Bašić and Lutovac, 2020: 8–9).

The Constitution indeed protects persons from the obligation to declare their national affiliation, but this does not mean that querying or declaring one's own national affiliation is absolutely outlawed. A wider interpretation of Article 47.2 could suggest that merely asking the question provokes a person to declare their national affiliation, and thus (at least implicitly) imposes an obligation. Following this line of interpretation, only endogenous expressions of

national affiliation (i.e. those triggered exclusively by the free will of person in question) would be in line with the Constitution (cp. Djurić, 2014: 15). A narrower interpretation of Article 47.2 would suggest that the principle of voluntariness is not violated by asking a person to declare their own national affiliation, as long they have the possibility (right) to decline. Article 47.2 would only be violated if the person were obliged to supply an answer and declare their own national affiliation. One could go a step further and argue that this freedom is upheld even when a person is obliged to supply an answer, provided there is a possibility to conceal one's own national affiliation (e.g. by providing the option to respond with 'none of the above', 'not declared' or similar).

Taking into consideration these two possible interpretations of Article 47.2, bearing in mind the Constitutional system of national minority protection and the legal relevance of national affiliation, it would be too extreme, and contrary to the spirit of the Constitution, to interpret Article 47.2 as an absolute prohibition on collecting national affiliation data. Article 47.2 only establishes voluntariness as the basic principle and condition under which the collection of national affiliation data is permissible.<sup>10</sup> Against this background, using Article 47.2 as a justification for not collecting such data is simply a fig leaf to disguise a lack of interest in evidence-based monitoring of the status of persons belonging to national minorities.

There are several other relevant provisions in the Constitution that implicitly call for the availability of national affiliation data and can thus serve as a legal basis for the collection of such data. The most prominent in this respect is the provision of Article 77.2 that stipulates that the national structure of the population and minority representation should be considered in relation to employment in State organs, public services, and provincial and local institutions. This provision calls for two kinds of national affiliation data: data on the national structure of the population and data on the national structure of persons employed in public institutions at the central, provincial, and local government levels. By matching these two data sets, it can be examined whether the Constitutional requirement for 'appropriate representation' of persons belonging to national minorities is fulfilled.<sup>11</sup> If this not the case, positive (affirmative) measures can be imposed to achieve such representation.<sup>12</sup> Constitutional provisions on the general prohibition of discrimination (Article 21) and on the prohibition of discrimination of national minorities (Article 76) are also striking and can serve as a legal basis for the collection of national affiliation data in a wide range of areas. Imposing positive measures to achieve 'full equality' for disadvantaged individuals and groups calls for the collection of national affiliation data in order to identify whether there is discrimination against national minorities and, if so,

whether combating such discrimination requires positive measures.<sup>13</sup> Furthermore, the effectiveness of the positive measures – whether the position of the targeted group(s) has improved – can only be assessed if accurate and reliable data exist. The need for national affiliation data arises also from the Constitutional provisions that oblige the State to impose effective measures to promote respect for diversity and social cohesion between ethnic groups (Articles 48 and 81).<sup>14</sup> Although these provisions are rather declaratory and do not provide further practical directions for State action (Pajvančić, 2009: 103), they nevertheless create a Constitutional basis for engaged and affirmative social integration policy; this, in turn, requires the monitoring of interethnic relations based on the analysis of relevant data. Finally, implementing the Constitutional prohibition on inciting racial and ethnic inequality and hatred (Article 49) also calls for the collection and statistical analysis of national affiliation data related to victims and perpetrators, as well as other relevant data for monitoring hate speech and hate crime.

Although the proper implementation of various Constitutional provisions, first and foremost those directly or indirectly pertinent to equality, calls for the availability of data disaggregated by national affiliation, this need has not been properly addressed. Public institutions in Serbia have not established a coherent system of ethnic monitoring that would enable an evidence-based assessment of the quality of national minority protection (the analysis in Part 2 below will show this in more detail).

### **1.2. *The Law on National Minorities***

Article 5 of the Law on National Minorities regulates several segments relevant to processing national affiliation data: freedom of expression of national affiliation, prohibition of registration of persons belonging to national minorities against their will, recording national affiliation data in official registers, and prohibition of forceful assimilation. Here, the focus is on subparagraphs 3 and 4, which were introduced with the latest amendments adopted in 2018.<sup>15</sup>

Subparagraph 3 stipulates the right of persons belonging to national minorities to have their own national affiliation data registered in official records and personal data databases, provided that this is envisaged within the law. This provision has several interesting aspects. First, it creates the legal basis for official records (and personal data databases) to contain national affiliation data. By providing this legal basis, the Law on National Minorities confirms the general legality of the collection of national affiliation data and opens the legal possibility to record this data in official registers. Second, it is conceptualized as a right of persons

belonging to national minorities, which reaffirms the principle of voluntariness. The right to have one's own national affiliation registered implies that it is solely up to the individual belonging to a national minority to request such entry, that it cannot be made *ex officio*,<sup>16</sup> that the competent authority cannot refuse to make such an entry if requested and provided that it is possible to do so, and that the person is free to determine which national affiliation is registered. However, for the enjoyment of this right, it is not sufficient that the individual belonging to a national minority make the request; the Law on National Minority requires that the possibility of registering national affiliation is envisaged within a special law. The Law on National Minorities does not establish this as an absolute right, but rather links it to those official registers which, according to relevant (sectoral) legislation, contain national affiliation data. Thus, a person cannot request to have their national affiliation registered in each and every official register, but only in those for which the law prescribes the inclusion of national affiliation data.

It is interesting that this right is defined as a 'minority right', which could be seen as excluding those who affiliate with the national majority, or those who identify with a group that is not 'recognized' as a national minority. There are three possible answers to the question of how Article 5.3 deals with this: One line of argumentation could be that, on the basis of the content of the right and the nature of the national affiliation, this right is unjustifiably reserved for persons belonging to national minorities. One could argue that persons not affiliated with a national minority are deprived of the right to 'officially' declare their own national affiliation and that it be 'recognized' by registration in the official record. Consequently, it could be argued that this right should have been conceptualized as a right of every person (not only those belonging to national minorities) whose data are registered in official records. A quite opposite argumentation is also possible, in which national affiliation indeed transcends affiliation with a national minority, but is legally relevant only with regard to persons belonging to national minorities. This is because affiliation with a national minority grants access to a wide range of special (minority) rights aimed at the preservation of minority identities and minority inclusion in wider society. Along these lines, one could argue that even when persons who do not belong to a national minority have the possibility (or even the right) to have their national affiliation registered in official records, this would be legally irrelevant. Consequently, one could argue that reserving this right for persons belonging to national minorities is justified if the purpose of such registration is access to the minority rights regime. A mid-way argumentation is also possible, wherein everyone has the option to have their own national affiliation recorded, but that it is additionally strengthened with a legal guarantee in the case of persons belonging to

national minorities. Unfortunately, the rationale behind the specific formulation of Article 5.3 as a minority right remains a puzzle, especially considering the established practice that in cases when national affiliation is registered, this is not limited only to persons belonging to national minorities.

The purpose of registering national affiliation (i.e. the purpose for which the data will be used) is a central question. Article 5.4 of the Law on National Minorities follows the established principle of personal data protection and reaffirms that the national affiliation data can only be used for the purpose for which it has been collected. It is interesting to note that the registration of national affiliation per Article 5.3 was justified by the need to ‘develop policies and measures for improvement of full and effective equality of persons belonging to national minorities’.<sup>17</sup> The Action Plan for the Realization of the Rights of National Minorities of the Republic of Serbia hints at a similar purpose. The ‘Personal Status Position’ section, which also covers the amending of the Law on National Minorities and the Law on Civil Records, lists among the overall (expected) results that the ‘data on the number of persons belonging to national minorities (are) available to the competent authorities for the purpose of monitoring and analysing the degree of realization of minority rights’.<sup>18</sup>

Although it is clear that national affiliation data are necessary to create and monitor policies on equality, minority protection, and (interethnic) social cohesion, the focus is usually put on macro (statistical) data. It is therefore questionable whether this purpose really justifies the recording of national affiliation in official registers. Assuming that macro data suffice for the development and monitoring of policies, one could ask whether it is really necessary to reach into the individual’s private sphere to the extent that national affiliation data are not only collected and further processed as personal data, but also recorded in an official register and thus officially ‘attached’ to the person. Against this background, recording national affiliation data in official registers for the purpose of policy creation and monitoring seems disproportionate. The only reasonable justification for this appears to be the linkage of such entries with some right or legal interest. If the enjoyment of some minority right or access to positive measures is conditioned on affiliation with a national minority, then recording minority affiliation in official registers could be justified. As a matter of fact, some authors (most prominently Vukašinić, 2017: 29; Vukašinić, 2019: 21) and representatives of national minorities (FER, 2017: 130) often lament that the Serbian approach to national identity and self-identification is too flexible and opens the way to abuse of positive measures. This could be a hidden rationale for the ‘fixation’ of national affiliation through registration in official

records. Notwithstanding the potential for abuse, it is doubtful that the current approach is the right one for addressing the problem (see also Vukašinović, 2017:30).

Although registering national affiliation in official records may be delicate, it is not entirely problematic; nevertheless, it remains unclear why the drafter of the law missed the opportunity to justify it more thoroughly. This begs the question of whether the drafter and the lawmaker have thoroughly considered all the aspects and consequences of registering national affiliation in official records. In a similar vein, it is regrettable that, having identified the need for national affiliation data for monitoring purposes (as per the justification provided in the amendments), this was not used to regulate the processing of national affiliation data in a more holistic way.<sup>19</sup> The ‘minimalistic’ approach might result from the fact that, alongside the amendments to the Law on National Minorities, the amendments to the Law on Civil Records were also adopted, with the former amendments actually serving as a legal basis for the latter, enabling the registration of national affiliation in the Register of Births (this will be explained in more detail below). Because of such a narrow focus, the opportunity was missed to create a comprehensive legal framework for processing national affiliation data for the sake of monitoring national minority protection.

### ***1.3. The Personal Data Protection Law***

An inevitable aspect of processing national affiliation data is data protection. In fact, in addition to the interpretation of Article 47.2 of the Constitution (as explained above), non-collection of national affiliation data has often been justified with reference to the data protection regulation. Processing of national affiliation data has been wrongly perceived as conflicting with the Law on Personal Data Protection,<sup>20</sup> although the legal reality is not so straight forward: processing this data is not absolutely prohibited, but is permitted under certain conditions and if proper safeguards are provided. Against this background, referring to personal data protection, more often than not, serves simply to disguise a lack of willingness to engage in an evidenced-based assessment of the position of national minority members.

Without going into detail, the following are some core provisions for personal data protection with relevance for national affiliation data. The Constitution guarantees the protection of personal data (Article 42.1) and puts the focus on the purpose for which the data have been collected: use of personal data for any other purpose than that for which they were collected is explicitly prohibited (Article 42.3).<sup>21</sup> It also establishes the right of every person to be informed of the data collected about them and their right to protection before the court in

case the data have been abused (Article 42.4). These are also important guarantees with respect to national affiliation data.

The Law on Personal Data Protection follows established European standards on the processing of ethnic (national affiliation) data:<sup>22</sup> these constitute a special category of personal data, to which special rules apply. The Law accepts the methodology of the General Data Protection Regulation (GDPR) and, in Article 17.1, generally prohibits the processing of such data. This prohibition is, however, not absolute, and the law (like the GDPR, which it resembles) lists a range of exceptions in which the processing of sensitive data is permitted (Article 17.2). The following are exceptions relevant for the processing of national affiliation data: the data subject has given explicit consent for the processing (point 1), processing is necessary for the establishment, exercise, or defence of legal claims or whenever courts are acting in their judicial capacity (point 6), processing is necessary for reasons of substantial public interest (point 7), and processing is necessary for archiving in the public interest, scientific or historical research purposes, or statistical purposes (point 10). With this approach, the law (following the GDPR) tries to strike a balance between acknowledging the sensitivity of national affiliation data and minimizing the risks of processing of such data, with the need to recognize the benefits that processing these data can bring.

If the processing of personal national affiliation data is permitted, there is a need to observe legal and technical safeguards immanent to the key principles of data protection: lawfulness, fairness, transparency, purpose limitation, data minimization, data accuracy, storage limitation, data security, and accountability.<sup>23</sup> The sensitivity of national affiliation data also calls for data security precautions, which means that appropriate technical, organizational, and personnel measures need to be implemented (Article 42. 1, point 1 of the Law). The Law explicitly refers to pseudonymization as an appropriate measure; this can indeed be a suitable tool to secure national affiliation data when these are processed as personal data.<sup>24</sup>

National affiliation data fall under the personal data protection regime only if they are processed as personal data, i.e. if they relate to identified or identifiable individuals. If individual identification is not possible, the data cease to be 'personal' and are no longer subject to the personal data regime. The break between the individual and the data can be achieved through anonymization, which is indeed the most appropriate technique for processing national affiliation data. Anonymization not only simplifies the processing of data, but it also minimizes the risk of extensive intrusion into the individual private sphere and potential misuses of the data, which can be harmful to the individual. As the matter of fact, the data needed for

monitoring equality or minority protection are macro, statistical data, rather than personal data per se. The purpose here is to describe situations and identify trends, whereas linkages to individuals are unnecessary. Yet, it has to be borne in mind that ‘every statistic derives from data which were personal before they were converted into statistical information’ (Simon, 2007: 12). Consequently, such ‘impersonal use of personal data’ requires that ‘procedures for ensuring anonymity of data are properly followed, and confidentiality is scrupulously respected’ in all phases of data processing (ibid.).

Although anonymization is highly suitable for processing national affiliation data, it is not always applicable because some situations require these to be processed as personal data. For example, the enjoyment of some minority rights or access to positive measures may require these data to be registered in official records as personal data. Not only does this require that appropriate legal and technical data protection measures are in place, but also that a certain level of trust and interethnic relations have been established in a society. A certain level of ‘normalization’ (decrease in sensitivity) of ethnicity is also needed, together with a clear justification for, and communication of, the purpose, goals, and the envisaged benefits of processing national affiliation data. Unfortunately, Serbia shows weaknesses in all these aspects. First of all, it has not been thoroughly considered when it is sufficient to process anonymized data, and in which cases it is necessary to process national affiliation data as personal data. In fact, it seems that the authorities only consider two options for the ‘official’ monitoring of ethnicity: national affiliation data are either processed as personal data, or not collected at all. The potential of anonymized data for ethnic statistics is massively underused. Indeed, in Serbia, the very concept of ‘ethnic statistics’ is rudimentary. The quality of personal data protection in (everyday) practice is also problematic and there is a lack of trust that data will be properly used and secured. Persistent interethnic tensions, which cause different levels of interethnic distance, hamper the above-mentioned ‘normalization’ of ethnicity, and make the collection of national affiliation data rather complicated. Finally, even when such data are being collected, the purpose(s) thereof are not well grounded or properly communicated.

## **2. Regulations enabling the collection of national affiliation data in specific areas**

In Serbia, national affiliation data have been collected either to identify the share of people from national minorities in the general population or to identify the representation of national minorities in specific sectors. The population census is the authoritative channel for identifying the national structure of the population, and its results are also relevant for the enjoyment of

some national minority rights (for instance, the right to use a minority language in communication with public authorities). There is an intention to change the census methodology as of 2031, grounding it in data available in administrative registers; in this case, the possibility of recording national affiliation in the Register of Births becomes relevant. Special voting registers – established to register persons belonging to national minorities who are eligible to participate in elections for national minority councils – contain national affiliation data and might also serve as an indicative source for monitoring the national structure of the population. While there is an established practice of monitoring the national population structure through the census, the practice of monitoring the quality of national minority representation in various sectors is rather rudimentary. In many sectors, national affiliation data are simply not collected, and where they are collected, they are not further analysed or used to monitor the position of national minorities in that particular sector. Because of the above-mentioned Constitutional obligation to strive for the appropriate representation of national minorities in staffing public institutions and public services, it appears that this area attracts the most attention for ethnic monitoring. However, even in this area, there are inconsistencies in the regulations, and collected data are not subjected to systematic analysis for monitoring purposes. Another area in which some positive developments can be observed is education; the newly established Unified Education Information System offers some potential for more systematic monitoring of the position of national minorities in education. Although the prohibition of discrimination offers a channel through which the position of national minorities can be monitored across a wide range of areas (in addition to education and employment in the public sector), this possibility is regrettably underused in Serbia. There are no disaggregated data available that would indicate the degree of access that persons belonging to national minorities have to public institutions, employment in the private sector, services (from health care to internet connectivity, for instance) and public space. With the exception of monitoring complaints submitted to the Equality Commissioner and Ombudsperson by persons belonging to national minorities, one cannot say that comprehensive equality monitoring exists in Serbia.

### **2.1. *Population census***

The main channel for collecting national affiliation data in Serbia is the population census. The census results are decisive for identifying the national structure of the population; they serve as a threshold for the enjoyment of some minority rights and as a benchmark for measuring the appropriate representation of national minorities in some areas. The population census takes

place every 10 years: the most recent one was in 2011 and the next one is planned for 2021.<sup>25</sup> So far, the traditional method of ‘door-to-door’ enumeration has been applied, but there is an intention to introduce an administrative census as of 2031.<sup>26</sup>

In the most recent census of 2011, the question on national affiliation was placed in the ‘ethnic characteristics’ category, together with questions on mother tongue and religion. The ‘open question’ method was used,<sup>27</sup> without pre-set categories, and respondents were free to define their own national affiliation. It is interesting to observe that no definition, explanation, or other guidance is provided to indicate what is meant by national affiliation. This is striking in comparison to the two other questions in the category, which were also open-type questions, but for which some explanation was provided. Mother tongue was defined as the language that the person first spoke in early childhood (or, in the case of multilingual households, the language that the person considers to be their mother tongue). For religion, it was specified that the person need not be registered as a member of some religion, but that it is sufficient to have a personal affiliation with some religion (Statistical Office of the Republic of Serbia, 2011:70). No such guidelines are provided with regard to national affiliation, reflecting the principle of freedom of self-identification – it should be noted, however, that this principle also applies to declaring mother tongue and religion, and yet the census does not refrain from providing guidance in these areas. The lack of guidelines can indeed cause some confusion for respondents about the meaning of ‘national affiliation’. For example, it might be useful to indicate that national affiliation is not limited to the established categories of national majority and national minorities and that it does not require some active status in the group with whom the person identifies. More importantly, the option to state more than one affiliation (or a combination of affiliations) is not explicitly indicated. However, the fact that enumerators are obliged to record the answer exactly as given by the respondent (*ibid.*) implies that respondents are free to define their own national affiliation through multiple identities. Results of the 2011 census also show this, as it was the first time that (*ex post*) codes for double affiliation were established (Statistical Office of the Republic of Serbia, 2012: 11).

The Law on Population Census 2011 explicitly stipulated that the census form should contain a note stating that a person is not obliged to declare their own national affiliation (Article 27.3).<sup>28</sup> If a person declined to state their affiliation, this was to be noted in the census form as ‘not declared’ (Statistical Office of the Republic of Serbia, 2011: 70).

National affiliation data collected through the population census are used for statistical purposes,<sup>29</sup> with the primary goal of obtaining cumulative data on the ‘total number and

territorial dispersion of persons belonging to various national communities'.<sup>30</sup> Interestingly enough, the Law on Population Census 2021 explicitly prohibits the use of census data to identify the individual obligations of citizens, nor as proof for the enjoyment of their rights (Article 29.2). Yet, cumulative data on the share of national minorities in the total population have significant legal relevance because they set thresholds for: declaring a minority language as the official language in a municipality, the right to address public authorities in a minority language, establishing the special voting register for a national minority and the type of elections for the national minority council, and the obligation of a municipality to establish a council for interethnic relations.<sup>31</sup> Data on the share of each national minority in the total population at the central, provincial, and local levels set important benchmarks for assessing the appropriate representation of persons belonging to that national minority in various areas of life. These data gain additional value through intersections with data on mother tongue, religion, age, sex, and educational status,<sup>32</sup> which provide important statistical insights into the demographic structure of national minorities. Further intersections could include other important aspects such as sources of income, economic activity (employment), housing, and disability (which are all census categories), but this is unfortunately not the case. The potential of census national affiliation data is regrettably underused and is essentially limited to identifying the national structure of the population; there is no established practice of considering this data in the development of minority policies or monitoring the effects that various measures (not only those directly targeting them) have on national minorities. However, an important precondition for the utility of census data is that they are accurate and reliable. The population census of 2011 shows some flaws in this respect,<sup>33</sup> and a flexible approach has been advised when using census national affiliation data for policy development and to exercise minority rights (ACFC, 2013: 7 and ACFC, 2019: 8).

## ***2.2. Register of Births***

The ability to record national affiliation in the Register of Births was introduced with the latest amendments to the Law on Civil Records<sup>34</sup> adopted in 2018, specifically with the addition of Article 45a, which, in subparagraph 1, stipulates that national affiliation data be recorded in the Register of Births. The entry is facultative and based on the request (and declaration) of the parents whose child is being registered (Article 45a.2). An adult person can also request for their own national affiliation data to be recorded in the Register of Births (Article 45a.6). The adult, or the parents of the child, can also request for national affiliation data to be changed or

removed from the register, in which case a note will be made in the register (Article 45a, subparagraphs 5 and 6). Article 47 of the Constitution sets the guiding principles for recording national affiliation in the Register of Birth: self-identification is free and voluntary,<sup>35</sup> and person(s) in question are informed of their rights in this regard. The entry is based on the open-type question without pre-set categories. If national affiliation data is recorded in the Register of Births, the birth certificate will also contain this data (Article 81.2 point 1).

The core issue around recording national affiliation in the Register of Births is its purpose: does the nature and personal immanence of national affiliation (if perceived as such) justify its recording in the Register of Births? Or are there perhaps some other grounds to justify it? Regrettably, the question of purpose was not thoroughly examined when the amendments were drafted, and the sole justification given, when the draft was presented to the lawmaker, was the need to harmonize laws regulating the rights of national minorities.<sup>36</sup> Nor is the Action Plan for the Realization of the Rights of National Minorities (mentioned above) very indicative in this regard, as it contains only broad strategic goals and general results expected from changes to laws relevant for the personal status of national minorities.<sup>37</sup> A potential hint could be the establishment of the Register of Civil Records, a unified database on the personal status of citizens (Article 33.1 of the Law on Civil Records). Since there is an intention to base the population census on the statistical register of the population (linked to data in administrative registers) as of 2031, one could assume that recording national affiliation in the Register of Births will eventually serve the purpose of the population census. In this context, the question of proportionality arises: is this 'fixation' of national affiliation data in the Register of Births necessary for the purpose of statistical processing, which lies at the core of the population census? On the other hand, the fact that the birth certificate now also contains national affiliation data raises questions around access to, and protection of, this data. In addition, it is unclear whether national affiliation data, as recorded in the Register of Births, can serve as grounds for the enjoyment of some (minority) rights, and if so, which ones. The status of the data (declaration) recorded in the Register of Births, and its relationship with some other records (for example, the special voting record, personnel records, or school records), also remains unclear. Although the Register of Births is the core register on the personal status of citizens, it would be against the established standards of free self-identification to give primacy to this data over national affiliation data in other registers, or to oblige (or at least expect) persons to always declare their own national affiliation as recorded in the Register of Births. In addition to this risk of a 'situational fixation' of national identity, the recording of national affiliation in the

Register of Births bears the risk of a ‘temporal fixation’ of national identity, because even the simple procedure for changing or removing data can be discouraging, reducing the flexibility of this approach to national identity. This fixation might indeed be intended as a means to mitigate the potential for abuse of positive measures (see above), but the taken approach is both conceptually problematic and full of pitfalls, indicating that it was not fully and thoroughly deliberated.

### **2.3. *Special voting registers***

Special voting registers are maintained for the purpose of elections for national minority councils, which are bodies of minority cultural autonomy in Serbia. Persons belonging to a national minority, who are enrolled in the respective special voting register, can participate in the elections for their respective national council,<sup>38</sup> with the number of persons enrolled defining the type of election.<sup>39</sup> To be enrolled in a special voting register, a person belonging to a national minority needs to submit a written and signed request in a set form. In this form, the person declares their own national affiliation, which is later also recorded in the special voting register (Article 50 of the Law on National Minority Councils). The enrolment is free and voluntary, and the person can request to be removed from the register at any time (Article 53 of the Law on National Minority Councils).

The core feature of special voting registers is that one person cannot simultaneously be enrolled in more than one such register (Article 52.2 of the Law on National Minority Councils). This limitation has been criticized as exclusive and ignorant of multiple affiliations because it pushes people to choose one option only (ACFC, 2019: 9). Although such rigidity of enrolment poses certain limitations to self-identification, it can be justified by the main purpose of the register, i.e. elections for national councils, and the need to preserve the principle of ‘one person one vote’. On the other hand, the principle of self-identification is underpinned by the possibility of removing oneself from one special register and enrolling in another. As a matter of fact, there are no limitations whatsoever regarding subsequent enrolments in different special voting registers, and the sole administrative burden refers to submitting a request. Despite this possibility of change, the fact that special voting registers are kept as a permanent database de facto demotivates (frequent) changes and reinforces monolayer, exclusive identities. Keeping special voting registers for one electoral cycle could have been more flexible with regards to free self-identification and less intrusive to personal data, but this would have added the burden of periodic re-registration. An alternative could also have been to enable registration in more

than one special register, but to limit (active and passive) voting rights to one national minority council in one electoral cycle,<sup>40</sup> and thus retain the principle ‘one person one vote’. However, the established system of special voting registers has been stabilized (despite the identified pitfalls and fragility) and there is no prospect of change. It is also debatable whether, in the current context, changes would bring more improvements or more problems.

The special voting register is kept for the sake of elections for national minority councils, but the law allows this data to also be used for the ‘realization of other rights of national minorities’, provided that this is regulated with a special law (Article 51.2 of the Law on National Minority Councils). This option has not so far been triggered and the potential of using this data beyond elections has not been explored. However, this possibility raises the question of the relationship between national affiliation data in the special voting register and data in other official registers, as well as with census results (Djurić, 2014: 42). Regrettably, the lawmaker remains silent on the issue and does not provide an answer to the confusion it caused.

#### ***2.4. Personnel registers in public administration and the judiciary***

Employment in the public sector appears to be the area of special interest and focus when it comes to sectoral monitoring of national minority representation. This is also reflected in the above-mentioned Constitutional provision, stipulated in Article 77.2, regarding the need to strike a balance between the national structure of the population and the national structure of employees in the public sector.

This Constitutional provision is also reaffirmed in Article 9.3 of the Law on Civil Servants,<sup>41</sup> which allows for preferential measures to address the underrepresentation of national minorities by giving priority to equally qualified candidates belonging to a national minority (Article 57.3). This inevitably calls for the collection of national affiliation data related to job candidates as well as employees in the State administration. In line with this, the relevant governmental regulation prescribes that job applications contain a voluntary declaration of affiliation with a national minority.<sup>42</sup> The text of this declaration implies that these data are only relevant if the job announcement states that persons belonging to underrepresented national minorities may enjoy preferential treatment. Hence, national affiliation data is not collected generally, but is limited to candidates belonging to a national minority, who, by providing this data, imply their willingness to be covered by the positive measure.

Data on all civil servants and employees in State organs are kept in the Central Personnel Register. This register also contains national affiliation data, provided the civil servant or employee has made a free and voluntary declaration (Article 160.1 point 1.12 of the Law on Civil Servants).<sup>43</sup> The data in the Central Personnel Register can be used for the purpose of managing human resources, but also for decisions on the rights and duties of civil servants or employees, and for other purposes pertinent to labour relations (Article 161 of the Law on Civil Servants). The Central Personnel Register is managed by the Human Resources Management Service, which is in charge of a wide range of human resources activities from announcing internal or external job vacancies to analysing human potential in organs of State administration (Article 158.2 of the Law on Civil Servants). Although the scope of the activities of this body implies the possibility of monitoring the national structure of civil servants and employees in the State administration, and their mobility within the system, there is no established practice to systematically and continuously perform such monitoring. The potential of this national affiliation data thus remains underused.

Similar rules can be found in the Law on Employees in Autonomous Provinces and Units of Local Self-Government: there is also the need to strike a balance between the national structure of employees and the national structure of the population, as well as the possibility of preferential treatment for candidates belonging to (underrepresented) national minorities.<sup>44</sup> The law also obliges the province and the unit of local self-government to keep personnel records, which can contain national affiliation data, based on the voluntary written declaration of the respective person (Article 190, subparagraphs 4 and 6). Data kept in the personnel records can be used for the purpose of human resources management and for other purposes in the area of labour relations (Article 190.1). Although the representation of national minorities is generally better in provincial and local institutions than in the provincial or local offices of central organs, this is more a result of the specific demographic reality or political power relations at the provincial or local level than it is a consequence of systematic monitoring and evidence-based management of minority representation in provincial and local institutions.

The obligation to strive for the appropriate representation of national minorities covers the judiciary too, in particular regarding the election of judges,<sup>45</sup> engagement of trainee lawyers,<sup>46</sup> election of public prosecutors and their deputies,<sup>47</sup> engagement of public prosecutors' trainees,<sup>48</sup> election of public notaries and their trainees,<sup>49</sup> and the appointment of public executors and their deputies.<sup>50</sup> However, official records on these 'personnel', established by the respective laws, do not contain national affiliation data.<sup>51</sup> Considering that

secondary legislation also fails to regulate how the national structure in the respective sectors of the judiciary is to be monitored, and how national affiliation data is to be collected, it remains unclear whether and how the judiciary is following the Constitutional obligation on appropriate representation. Even if national affiliation data is occasionally collected in the judiciary, this is an ad hoc rather than systematic approach, leaving many important issues of data collection open: on which legal bases are data collected, what is the purpose of that collection, how is data protected, and who has access to them.

In addition to specific personnel registers in public institutions, the law established a centralized database in the form of a register of all employed, elected, appointed, and engaged persons in all institutions and entities that are beneficiaries of public funds.<sup>52</sup> This Register also contains national affiliation data, which is collected on the grounds of a written declaration of the person covered by the Register and with respect to the voluntary principle (Article 8.2 of the respective law). Interestingly enough, the initial draft of the law did not stipulate that the Register would contain national affiliation data; this provision was added in the later phase of the law-making process. This shows that the drafter of the law (competent ministry) did not plan to use this register to monitor the national structure of the public sector (or, indirectly, also the portion of the private sector that benefits from public funds). Rather, this came as the result of an ad hoc intervention, reflecting the lack of thorough consideration given to ethnic monitoring policies. As a matter of fact, the main purpose of this register has been to monitor the number of persons paid from public funds and the amount of such payments, i.e. for financial/budgetary control. Nevertheless, in its *ex post* justification of entering national affiliation data in the Register, the competent ministry explained this as a reflection of the intention to consider the appropriate representation of national minorities, and to serve as an instrument for monitoring the representation of national minorities for the purpose of implementing suitable human resource policies.<sup>53</sup> Although the (analytical) potential of the Register is remarkable due its wide scope of coverage, some important issues remain unresolved: duplication of records, access to data, and competent institutions for monitoring the national structure of employees in various sectors and their coordination (Djordjević et. al., 2018: 87–90). And without the resolution of some basic conceptual issues, the analytical potential of this database for ethnic monitoring in the public sector cannot be properly utilized.

### ***2.5. Registers in educational institutions***

Education is an important area in which the legal possibility exists to collect national affiliation data. The novelties in the Law on the Foundations of the Education System<sup>54</sup> brought some detailed regulations on registers in the education system and provide for them to also contain national affiliation data; this created a precondition for the regular and systematic monitoring of the position of persons belonging to national minorities in education. The core novelty is the establishment of the Unified Education Information System (Article 175) which contains two important registers: the register of students<sup>55</sup> and the register of employees in educational institutions. These data are based on data that educational institutions keep in their records (Article 175.6).

Despite some small inconsistencies, the education laws stipulate that student records should contain national affiliation data, provided that the declaration is voluntary.<sup>56</sup> These data are consequently uploaded to the centralized register of students<sup>57</sup> and are thus available in the newly established Unified Education Information System. It is hoped that this will create the basis for standardized and systematic data collection on the national affiliation of students, and that the potential of this platform will be used to more comprehensively monitor the representation and mobility of students throughout the education system.

The regulations on employee records are not so straightforward: whereas the Law on the Foundations of the Education System stipulates that records of employees in educational institutions should also contain national affiliation data (Article 179.1), similar provisions cannot be found in all sectoral education laws. While records of employees in pre-school institutions can include national affiliation, this is not the case with the corresponding provisions regulating the records of employees in primary and secondary schools.<sup>58</sup> The records of employees in higher education institutions also contain national affiliation data, but the legal basis changed when the respective provisions in the sectoral law were derogated and introduced into the Law on the Foundations of the Education System.<sup>59</sup> Another inconsistency exists with regard to the register of employees in educational institutions, which is part of the Unified Education Information System. The provision regulating the content of the register of employees simply omits national affiliation data, and as such contradicts the provision that national affiliation data be part of the content of the record of employees in educational institutions.<sup>60</sup> This inconsistency raises the question of the purpose of recording national affiliation data in individual records; if it is not uploaded to the central register, this hampers the systematic monitoring of the national structure of employees in education. Another curiosity is that the very same law regulates the content of the register of employees in higher education<sup>61</sup>

in a different way, stipulating that it should contain national affiliation data. It remains unclear why the lawmaker considered national affiliation data to be relevant with regard to employees in higher education, but irrelevant for employees in lower levels of education.

The Law on the Foundations of the Education System lists a wide range of purposes for which data in the records of individual educational institutions and centralized registers are collected (Article 181). Some of these purposes properly justify the processing of national affiliation data: implementation of the right to quality education and equal access to education for all students, imposing educational and enrolment measures, imposing preventive measures for reducing school dropouts, and monitoring the professional status and professional development of employees in education. Disaggregation of data by national affiliation in all of these important segments can serve as a valuable basis for monitoring and assessing the position of persons belonging to national minorities in the education system, both as students and as employees. However, the Unified Education Information System is still to be operationalized in practice, and it remains to be seen whether its potential will be properly used.

### **3. A few remarks on data collection methodology and some open issues**

It is an established practice in Serbia to collect national affiliation data on the basis of the open-type question. In line with this approach, no pre-set categories are given, and respondents are free to determine their own national affiliation. The open-type question fully respects the principle of free self-identification,<sup>62</sup> but raises some important issues. For any statistical analysis of national affiliation data, some categorization is inevitable. The open-type question avoids pre-set categories but calls for *ex post* categorization of given responses. This can be complicated due to the fact that open-type questions, at least at a theoretical level, allow for an indefinite number of categories. The situation in practice is, however, less complicated because some ‘standardized’ responses prevail, on which basis the categories have been created. The main issue, however, is to define the criteria or thresholds under which certain responses become a (statistical) category of national affiliation, and thus relevant for further analysis. This is an important question for the ‘statistical recognition’ of groups, which is not only methodological, but can have important social, political, and legal consequences.<sup>63</sup> In Serbia, there is no clear guidance on how to address this issue, and it seems that numerical thresholds are decisive. For instance, in the population census, the threshold for responses to become statistically relevant is 2,000 people; on the other hand, the threshold for the establishment of a national minority council is 300 people. What remains unclear is which thresholds are set for

the statistical relevance of a group in public sector employment or in education, and whether the focus is limited to groups that qualify as national minorities.

The open-type question method raises another conceptual question regarding what is understood by ‘national affiliation’.<sup>64</sup> As mentioned above, in Serbia, no additional clarifications are provided when national affiliation data are collected. This can be positive from the perspective of free self-identification but can cause ambiguity. Although the term ‘national affiliation’ has been internalized, some clarifications would nevertheless be welcome. For instance, it could be underlined that national affiliation is not limited to the national majority and minorities but is wider and also covers ‘unrecognized’ groups. Although the Serbian system is rather flexible in this regard, a note in this direction could underpin not only this flexibility, but also free self-identification. In analogy with the clarifications given in the population census with regards to religion, it could also be underlined that national affiliation does not presuppose some institutionalized or formal links with the group. The most-needed clarification in Serbia is about the possibility of indicating more than one national affiliation, or a combination of different national affiliations,<sup>65</sup> which is crucial for the recognition of multiple or multilayer identities. Despite the fact that the open-type question enables respondents to indicate multiple affiliations, this possibility has not been adequately underlined when collecting national affiliation data. As it has been rightly pointed out, ‘persons belonging to national minorities are not sufficiently made aware of the advantages of multiple affiliations and (...) the system as a whole is not structured around this possibility’ (ACFC, 2019: 9). Another under-addressed issue is the possibility of changing affiliation: persons are neither bound by their previous declarations on national affiliation, nor are they obliged to indicate the same national affiliation in different contexts (ACFC, 2016: 9). The practice of recording national affiliation in official registers implies some sort of ‘fixation’ of national affiliation, and it would be welcome if it were clearly indicated that a person is free to declare different national affiliations both across time and according to the situational context. Yet, this aspect is not properly underlined when collecting national affiliation data in Serbia.

There is a certain paradox in the approach to collecting national affiliation data: while there is a general tendency of flexibility toward national affiliation and openness to (and recognition of) numerous groups, the understanding of identity is rather ‘conservative’ and monocultural, with the tendency to delineate rigid boundaries between groups. Indeed, the system of national minority protection strongly favours a homogeneity of national identities (Bašić and Lutovac, 2020: 10; Vukašinović, 2017: 30; Guzina, 2019: 62; Vujačić, 2012: 157

and 160; Bašić and Pajvančić, 2015: 132; Djordjević et. al., 2018: 11–12), which also causes a certain rigidity in the approach to processing national affiliation data. The whole system is structured around the perception of identity as a clear-cut, ‘boxed’ category, which is taken for granted. Interestingly enough, this approach is not only driven by State actions, but is also endorsed by representatives of national minorities (Djordjević et. al., 2018: 12), who perceive national affiliation as exclusive and ignore the possibility that a person belonging to one national minority ‘may simultaneously identify with other minorities or with the majority’ (ACFC, 2019:9).

This tendency toward a ‘fixation’ of national identity can also be observed in calls to ‘objectify’ national identity and thus to limit arbitrariness in declaring national affiliation. Minority representatives often justify such calls with a need to avoid potential misuse and ungrounded access to minority rights and positive measures (see for example FER, 2017: 130). Indeed, ‘the individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity’,<sup>66</sup> but this does not mean that persons need to prove their declared national affiliation according to some objective parameters. In Serbia, the argument can often be heard that national affiliation data can be misleading (due to the fluidity and subjectivity of the concept; see for example Knežević, 2017: 66 and 67, Knežević and Radić, 2016: 71 and 76, Marinković, 2014: 411), and as such, some other parameter(s) should be used as ‘corrective’ or ‘control’ benchmarks. Usually, minority language is proposed as a suitable objective criterion for checking national affiliation data, or as an objective parameter for grounding access to positive measures and minimizing the potential for abuse. Indeed, language is an important element of national identity and it can be useful to intersect data on language with national affiliation data, but (data on) language cannot substitute for (data on) national affiliation. First, national affiliation transcends language and is a much wider concept. Furthermore, language (repertoire) is a complex phenomenon, and the correlations between language and national identity are not always straightforward. Finally, it is against the principle of individual self-identification to make an automatic inference from language to national affiliation, or to make assumptions about national affiliation using some other identity parameters (ACFC, 2016: 9).

The core problem with regard to collecting and further processing national affiliation data in Serbia is the lack of a systematic, holistic approach. The collection of national affiliation data is stipulated in some areas, without thorough consideration of the basic questions of ‘who, how, and why’. Questions of crucial importance defining ‘what type of data (...) are processed, using which definitions and for which purposes are they collected’ (Simon, Piché, Gagnon,

2015: 2) remain pending in Serbia. There is no clear strategy about areas in which national affiliation data need to be processed, and no strategic idea about the purpose and goals of processing such data. This results from the lack of clear indicators and developed methodology for monitoring the position of national minorities and the quality of the implementation of minority rights. As it has been rightly pointed out, ‘implementation [of the legal framework] is not monitored using evidence-based approaches’ (ACFC, 2019: 1). Two aspects are decisive here: in some sectors, national affiliation data are not collected at all, and in some sectors, national affiliation data are collected, but not further processed. The latter case leads to the situation that, with the exception of the population census to some extent, collected national affiliation data remain underused. The latter clearly shows the lack of genuine interest in monitoring the quality of minority protection and the intention to present the collection of data as policy. But data collection is simply a tool and not the goal, and it only makes sense if the data are analysed and used to develop and assess minority laws and policies.

### **Conclusion**

The existing legal framework in Serbia enables the processing of national affiliation data: the Constitution guarantees that the declaration of national affiliation is free and voluntary, the Law on National Minorities opens the possibility to record national affiliation in official registers, and the Law on Personal Data Protection stipulates exceptions in which processing national affiliation data is lawful. Various sectoral laws also set legal grounds for collecting national affiliation data. Despite this generally positive legal set-up, a range of shortcomings can be observed.

Constitutional provision stipulating that no person is obliged to declare their own national affiliation (Article 47.2) causes some unclarity and is occasionally interpreted as prohibiting the collection of national affiliation data. Such dubiety should be legally resolved, preferably with a reformulation of the provision when the Constitution is under revision, or through authoritative interpretation (Constitutional Court, National Parliament, Data Protection Commissioner). A more substantial regulation of the issue in the Law on National Minorities would also support an affirmative reading of the said Constitutional provision.

The 2018 amendments to the Law on National Minorities brought some novelties with regard to the entry of national affiliation data into official records but missed the opportunity to regulate the issue of ethnic monitoring in a more holistic way. Through amendments, subparagraphs 3 and 4 were inserted into Article 5 (regulating the freedom of expression of

national affiliation), but important questions such as the purpose of registering national affiliation, the relationship between different official records, and access to data and their practical utility remained unresolved. The identified shortcomings call for a more systematic and thoroughly conceptualized approach, which would be reflected in the development (and eventual adoption) of a separate article of the law entirely devoted to recording national affiliation and ethnic monitoring. A thoroughly deliberated secondary regulation would also reflect and underpin such a systematic approach to ethnic monitoring. Solving these conceptual questions in the Law on National Minorities would then inevitably affect the Law on Civil Records (recording of national affiliation in the Register of Births) and the Law on National Minority Councils (national affiliation data in the special voting register),

Insight into the relevant provisions of sectoral legislation shows inconsistency and incoherency, which are primarily the result of simply inserting provisions on collecting national affiliation data into the law, without prior thorough consideration and a clear strategy. The Law on Civil Servants and the Law on the Registry of Employed, Elected, Appointed, and Engaged Persons of Users of Public Funds are obvious examples of this practice. Both laws create a legal basis for national affiliation to be registered in the relevant personnel records, but fail to deal with the consequences of such registration, i.e. who, how, and why process national affiliation data? On the other hand, in some cases (and here the judiciary is an indicative example), the question of collecting national affiliation data remains unaddressed within the law, although the very same law makes national affiliation legally relevant. Finally, provisions in the laws on education show that, even when there is an intention to address the issue of collecting national affiliation data in a more systematic manner, some inconsistency remains.

All these shortcomings call for a comprehensive review of the legal framework on the protection of national minorities and the identification of areas and aspects in which national affiliation is relevant. It requires the development and regulation of modalities of data collection and clarification of the central issue of processing national affiliation data, i.e. the purpose. This, however, is not possible without a developed strategy of monitoring the quality of protection of national minorities and a clear vision of the purpose and goals for which national affiliation data are collected. In addition, a stronger effort is needed to properly communicate and justify the collection (and further processing) of national affiliation data, which is essential to building trust and underpinning the genuine freedom to declare one's own national affiliation, especially in the context of delicate interethnic relations. Finally, special attention is needed for

the (legal and technical) protection of national affiliation data as sensitive data, so that risks of intrusion and abuse are minimized.

## *Notes*

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<sup>1</sup> Approximately 14% of the population in Serbia belongs to national minorities (Statistical Office of the Republic of Serbia, 2012: 15).

<sup>2</sup> Protection of national minorities is set as one of the Constitutional principles (Article 14 of the Serbian Constitution) and the Constitution contains an extensive catalogue of national minorities' rights (Articles 75–81). There is a solid argument that protection of national minorities forms a part of the Constitutional identity of Serbia (Korhecz, 2017).

<sup>3</sup> 'Official Gazette RS', no. 98/2006. [in Serbian]

<sup>4</sup> The Law on the Protection of Rights and Freedoms of National Minorities, 'Official Journal SRJ', no. 11/2002, 'Official Journal SCG', no. 1/2003 and 'Official Gazette RS', no. 72/2009, 97/2013 and 47/2018. [in Serbian]

<sup>5</sup> 'Official Gazette RS', no. 87/2018. [in Serbian]

<sup>6</sup> The very conceptual weakness of the Law on National Minorities is that this Law was adopted in 2002 in a different context, as a federal and a framework law, that simply remained valid in Serbia after the dissolution of the union of Serbia and Montenegro and the adoption of the Constitution of Serbia in 2006. Despite strong arguments that the law does not correspond to the new reality and the need for (integrative) minority protection in Serbia (Bašić and Pajvančić, 2015: 73 and 133; Krivokapić, 2018: 43; Janjić, 2019: 12; ERC, 2019: 17), and consequently that a new law should be adopted, the strategy of the lawmaker in Serbia was to slightly 'fine-tune' the existing law with amendments here and there. Although some amendments indeed brought clarifications, the law falls short of full-fledged coherence and rather resembles a patchwork.

<sup>7</sup> This, however, does not mean that enjoyment of some (minority) rights cannot be preconditioned on expression of national (minority) affiliation. In cases where this is justified, when a person does not express minority affiliation and consequently cannot access some minority right, this cannot be qualified as 'harm'.

<sup>8</sup> On the other hand, this is explicitly stipulated in the Law on National Minorities (Article 5.1).

<sup>9</sup> Pajvančić covers Article 47 in her commentary, but does not problematize paragraph 2 (Pajvančić, 2009: 64). On the other hand, Marković does not address Article 47 in his review of the Constitution at all, which implies that he does not find it problematic (Marković, 2007).

<sup>10</sup> In order to secure the principle of voluntariness, it is not sufficient only to fulfil formal criteria (for example, inform the person that there is no obligation to declare), but it is also essential to create an environment in which persons are indeed free to declare (or decline to declare) their national affiliation. In the case of the latter, persons should not feel an expectation or other pressure to declare their national affiliation, should not be afraid of any possible negative effects of non-declaration or of declaring a specific national affiliation. Whereas in Serbia the first criterion is fulfilled and the practice has been established to explicitly note that declaring national affiliation is not obligatory, it cannot be claimed that the overall social climate is fully supportive of free and voluntary expression of national affiliation. The most vulnerable in this respect are Roma, who 'due to their extremely unfavourable social situation, prejudice and discrimination against them, (...) resort to hiding their ethnic identity, most often, by assuming the identity of neighbouring ethnic communities' (Bašić and Marković, 2018: 53). The persisting interethnic distance, ethno-nationalism and ethnification of the polity (see for example Janjić, 2017: 201–202 or ERC, 2019) hamper the normalization of ethnicity in Serbia and make the expression of national affiliation still delicate, albeit to various extents for different ethnic groups.

<sup>11</sup> Although there is a wide consensus in interpreting the formulation 'appropriate representation' as proportional representation (Vukašinović, 2017: 51), there is also an interpretation that calls for different interpretations of appropriate and proportional representation (Djurić, 2014: 29). The latter interpretation rests on the difference in formulations used in the Constitution: proportional representation in Article 180.4, regulating minority representation in provincial and local assemblies and appropriate representation in Article 77.2, regulating minority representation in public administration and services, as well as on the view of the Constitutional Court of Serbia that Article 77.2 does not guarantee proportional representation (*ibid.*: 29 and 31). Notwithstanding terminological inconsistencies throughout the Constitutional text (Pajvančić, 2009), one has to acknowledge that the formulation of 'appropriate representation' in Article 77.2 has to be read in conjunction with the reference to 'the ethnic structure of the population' used in the same provision, i.e. as representation appropriate to the ethnic structure of the population, which indeed can be read as proportional representation. However, proportional

representation does not mean ‘a rigid, mathematical equality in the representation of various groups’ (ACFC, 2008: 31).

<sup>12</sup> The Constitution is not straightforward in this respect, as in Article 77.1 it prescribes that persons belonging to national minorities have the right to participate in administering public affairs and assume public positions, ‘under the same conditions’ as other citizens (Pajvančić, 2009: 99–100). An affirmative reading of Article 77.2 in conjunction with Articles 21.4 and 76.3 (Constitutional articles enabling positive measures) would suggest that imposing positive measures is constitutionally permitted for (persons belonging to) national minorities for which the criterion of ‘appropriate representation’ has not been achieved.

<sup>13</sup> It is worth mentioning here that the wording of Articles 21.4 and 76.3 of the Constitution is not coherent. While Article 21.4 sets ‘substantially unequal position’ as a criterion for imposing positive measures, Article 76.3 sets a higher threshold and refers to ‘extremely unfavourable living conditions which particularly effect’ persons belonging to national minorities. See Pajvančić, 2009: 99.

<sup>14</sup> The wording in these two provisions is also incoherent. See, Pajvančić, 2009: 65.

<sup>15</sup> ‘Official Gazette of RS’, no. 47/2018.

<sup>16</sup> The competent authority might be obliged to inform the person about this right, but the entry of national affiliation in the official register can only rest on the request of the individual.

<sup>17</sup> As stipulated in the Justification to the Draft Law on the Amendments of the Law on National Minorities, <https://www.paragraf.rs/dnevne-vesti/310518/310518-vest15.html>. [in Serbian]

<sup>18</sup> Section I of the Action Plan. Available in Serbian at [https://ljudskaprava.gov.rs/sites/default/files/prilog\\_fajl/akcioni\\_plan\\_za\\_sprovođenje\\_prava\\_nacionalnih\\_manjina\\_-\\_sa\\_semaforom.pdf](https://ljudskaprava.gov.rs/sites/default/files/prilog_fajl/akcioni_plan_za_sprovođenje_prava_nacionalnih_manjina_-_sa_semaforom.pdf)

<sup>19</sup> The Model of the Law on National Minorities that the Ethnicity Research Center presented in 2006 (Bašić, 2006) offers a good hint for a possible solution. It proposed to separately regulate freedom of expression of national affiliation (in Article 8) and protection of ethnic data (Article 13). The latter proposed provision might be outdated, because in the meantime protection of personal data has been regulated in a special law. However, along the lines of this approach, a separate article on processing of data on national affiliation, registration of national affiliation, and ethnic monitoring in general would have been introduced with the amendments to the law.

<sup>20</sup> See for instance the Action Plan for the Realization of the Rights of National Minorities in the Republic of Serbia, p. 5.

<sup>21</sup> This general prohibition is not absolute. The Constitution makes an exception if the use of data is necessary to conduct criminal proceedings or protect national safety (Article 42.3).

<sup>22</sup> Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108 of the Council of Europe, <https://rm.coe.int/1680078b37>) and Article 9 of the General Data Protection Regulation (GDPR) of the EU (<https://gdpr-info.eu/art-9-gdpr/>).

<sup>23</sup> For data protection key principles see FRA, 2018: 115–137.

<sup>24</sup> Through pseudonymization, personal data can no longer be attributed to an individual person without the use of additional information (code or key), which needs to be kept separately and securely. An important feature of pseudonymization is that it does not affect the legal status of data: it remains personal data and under the personal data protection regime. This is significantly different to anonymization of data, in which case anonymized data do not fall under the personal data protection regime. FRA, 2018: 83.

<sup>25</sup> Law on Population Census 2011 (Zakon o popisu stanovništva, domaćinstava i stanova 2011. godine, ‘Official Gazette RS’, no. 104/2009 and 24/2011) and Law on Population Census 2021 (Zakon o popisu stanovništva, domaćinstava i stanova 2021. godine, ‘Official Gazette RS’, no. 9/2020).

<sup>26</sup> This intention has been expressed in the Justification to the Draft Law on Population Census 2021, <https://www.paragraf.rs/dnevne-vesti/291119/291119-vest18.html>. [in Serbian]

<sup>27</sup> As prescribed in Article 27.4 of the Law on the Population Census 2011. Interestingly enough, this provision was not envisaged in the initial text of the draft, but was introduced in the amending procedure. The rationale for a legal guarantee of an open-type question was the fact that in the test census of 2009, the question on national affiliation was semi-open (with Serbian and Other as two possible answers, with the possibility to write in national affiliation other than Serbian, if applicable). See: <http://media.popis2011.stat.rs/2011/07/P1.pdf> and <http://www.pasztorbalint.rs/sr/amandmani/zakon-o-popisu-stanovnistva-2011-godine-prihvaceno#.XxbTp1UzbIU>.

<sup>28</sup> Interestingly, the same applies to the question on religion, but does not cover the question on mother tongue.

<sup>29</sup> Article 26.1 of the Law on Population Census 2011 and Articles 27.3 and 29.1 of the Law on Population Census 2021.

<sup>30</sup> Justification to the Draft Law on Population Census 2021, <https://www.paragraf.rs/dnevne-vesti/291119/291119-vest18.html>. [in Serbian]

<sup>31</sup> Djurić (2014) offers a detailed analysis of the legal relevance of census data.

<sup>32</sup> <https://www.stat.gov.rs/sr-Latn/oblasti/popis/popis-2011/popisni-podaci-eksel-tabele>. [in Serbian]

<sup>33</sup> A major inaccuracy refers to the under-reporting of Albanians (who boycotted the 2011 census) and Roma.

<sup>34</sup> 'Official Gazette RS', no. 20/2009, 145/2014 and 47/2018.

<sup>35</sup> There are two concerns about the actual fulfilment of the principle of free and voluntary self-identification regarding recording national affiliation in the Register of Births. One refers to the right given to parents to decide on (and thus impose) the national affiliation of their minor child (cp. Vukašinić, 2017: 29). Although the principle of self-identification is underpinned by the possibility of adult persons to change that affiliation, the delicacy of the issue of national affiliation of minors remains. Another concern is about the possibility to record multiple national affiliations. Although the method of open-type registration together with the proclaimed neutral position of the registrar imply the possibility to indicate multiple affiliations, the dilemma arises around the legal provision stipulating that parents need to agree on the national affiliation of the child (Article 45a.4) and its repercussion on multiple identifications (for example, children of mixed marriages). An additional problem is that the existing system of national minority protection discourages multiple affiliations, because in order to enjoy some minority rights, people need to opt for one national identity (ibid., 30).

<sup>36</sup> Justification to the Draft Law on the Amendments of the Law on Civil Records, <https://www.paragraf.rs/dnevne-vesti/160518/160518-vest15.html>. [in Serbian]

<sup>37</sup> Personal principle, self-identification, improving of mechanisms for enumeration of persons belonging to national minorities, personal data protection, free and voluntary expression of national affiliation, State neutrality towards identity issues, availability of data necessary for monitoring implementation of minority rights (Action Plan, p. 7). Available in Serbian at: [https://ljudskaprava.gov.rs/sites/default/files/prilog\\_fajl/akcioni\\_plan\\_za\\_sprovodjenje\\_prava\\_nacionalnih\\_manjina\\_-\\_sa\\_semaforom.pdf](https://ljudskaprava.gov.rs/sites/default/files/prilog_fajl/akcioni_plan_za_sprovodjenje_prava_nacionalnih_manjina_-_sa_semaforom.pdf).

<sup>38</sup> Articles 32.2 and 33 of the Law on National Councils of National Minorities, 'Official Gazette RS', no. 72/2009, 20/2014, 55/2014 and 47/2018.

<sup>39</sup> Direct elections or elections via electoral assembly, Article 29.2 of the Law on National Minority Councils.

<sup>40</sup> For example, persons enrolled in more than one special voting register would need to opt in each electoral cycle for one national minority council in whose election they want to participate.

<sup>41</sup> Interestingly enough, the law deviates from the standard of 'appropriate representation' established in the constitution and refers to the need for the national structure of employees to reflect the structure of the population in the 'best possible manner' (Law on Civil Servants, 'Official Gazette RS', no. 79/2005, 81/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014, 94/2017 and 95/2018). Terminological inconsistencies of a similar kind can be found in other laws too (Vukašinić, 2017: 50–51). Although the used terminology 'softens' the Constitutional standard, it appears that 'different definitions of the notion of appropriate (proportionate) representation do not create a problem' (ibid.).

<sup>42</sup> Article 11.1 point 11 of the Regulation on Internal and External Recruitment in State Organs (Uredba o internom i javnom konkursu za popunjavanje radnih mesta u državnim organima), 'Official Gazette RS', no. 2/2019.

<sup>43</sup> The content of the register was only modified to include national affiliation data with the amendments to the law adopted in 2018 ('Official Gazette RS', no. 95/2018). Prior to that, no legal basis existed for the monitoring of the national structure of employees in the State administration (Djordjević et. al. 2018: 83).

<sup>44</sup> Articles 19.3, 47 and 101.5 of the law (Zakon o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave; 'Official Gazette RS', no. 21/2016, 113/2017 and 95/2018).

<sup>45</sup> Article 46.2 of the Law on Judges ('Official Gazette RS', no. 116/2008, 58/2009, 104/2009, 101/2010, 8/2012, 121/2012, 124/2012, 101/2013, 111/2014, 117/2014, 40/2015, 63/2015, 106/2015, 63/2016 and 47/2017).

<sup>46</sup> Article 65.4 of the Law on Organization of Courts ('Official Gazette RS', no. 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011, 101/2013, 106/2015, 40/2015, 13/2016, 108/2016, 113/2017, 65/2018, 87/2018 and 88/2018).

<sup>47</sup> Article 82.5 of the Law on Public Prosecutor Office ('Official Gazette RS', no. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012, 121/2012, 101/2013, 111/2014, 117/2014, 106/2015 and 63/2016).

<sup>48</sup> Article 122.4 of the Law on Public Prosecutor Office.

<sup>49</sup> Articles 29.5 and 34.4 of the Law on Notaries ('Official Gazette RS', no. 31/2011, 85/2012, 19/2013, 55/2014, 93/2014, 121/2014, 6/2015 and 106/2015).

<sup>50</sup> Articles 476.3 and 507.3 of the Law on Enforcement and Security Interest ('Official Gazette RS', no. 106/2015, 106/2016, 113/2017 and 54/2019).

<sup>51</sup> The content of respective records is stipulated in respective laws: Article 73 of the Law on Organization of Courts, Article 38 of the Law on Public Prosecutor Office, Article 30a of the Law on Notaries, and Article 510 of the Law on Enforcement and Security Interest.

<sup>52</sup> Law on the Registry of Employed, Elected, Appointed and Engaged Persons of Users of Public Funds (Zakon o Registru zaposlenih, izabranih, imenovanih, postavljenih i angažovanih lica kod korisnika javnih sredstava, 'Official Gazette RS', no. 68/2015 and 79/2015).

<sup>53</sup> ‘Goodwill and not obligation of civil servants to declare their own national affiliation’, a statement of the Ministry of Public Administration and Local Self-Government. In Serbian, available at <http://mduls.gov.rs/saopstenja/dobra-volja-a-ne-obaveza-sluzbenika-da-se-izjasne-o-nacionalnoj-pripadnosti/?script=lat>.

<sup>54</sup> ‘Official Gazette RS’, no. 88/2017, 27/2018, 10/2019 and 6/2020.

<sup>55</sup> The term ‘student’ is used here with a generic meaning and covers all levels of education.

<sup>56</sup> Article 7.2 of the Law on Preschool Education (‘Official Gazette RS’, no. 18/2010, 101/2017, 113/2017, 95/2018 and 10/2019); Article 81.2 of the Law on Primary Education (‘Official Gazette RS’, no. 55/2013, 101/2017, 27/2018 and 10/2019), Article 70.2 of the Law on Secondary Education (‘Official Gazette RS’, no. 55/2013, 101/2017, 27/2018 and 6/2020), and Article 118.3 of the Law on Higher Education (‘Official Gazette RS’, no. 88/2017, 73/2018, 27/2018, 67/2019 and 6/2020).

<sup>57</sup> Article 177 of the Law on the Foundations of the Education System. It is unclear why this data is stipulated under the category ‘educational status’ for students in preschool, primary and secondary education, and for students in higher education, it is stipulated under ‘personal status’ (cp. subparagraph 1, point 2 and subparagraph 2, point 1 in Article 177).

<sup>58</sup> Cp. Article 7a of the Law on Preschool Education and Article 85 of the Law on Primary Education and Article 74 of the Law on Secondary Education.

<sup>59</sup> Applicable in this matter was Article 120 of the Law on Higher Education, which was derogated and the respective provisions were incorporated into the (amended) Law on the Foundations of the Education System (Article 180a.2).

<sup>60</sup> Cp. Articles 179.1 and 180 of the Law on the Foundations of the Education System.

<sup>61</sup> Initially, the Law on the Foundations of the Education System established one register for employees in educational institutions, whereas the Law on Higher Education established the register of employees in higher education. With the amendments, the provisions of the latter law were derogated and incorporated into the general Law on the Foundations of the Education System.

<sup>62</sup> It also fully corresponds with the international recommendation that ‘respondents have the option of describing their identity in their own words’ (UNECE, 2015: 149).

<sup>63</sup> UNECE also recognizes the problem and calls for countries ‘to be careful in not setting a release threshold so high as to mask the reporting of minorities in census outputs’ (UNECE, 2015: 150).

<sup>64</sup> National affiliation is multi-dimensional and affected by various factors, and it is therefore ‘more a process than a static concept’ (UNECE, 2015: 149). Notwithstanding the difficulties in grasping national affiliation, a possible hint can be found in the legal definition of a national minority stipulated in Article 2 of the Law on National Minorities that *mutatis mutandis* can be applied more generally.

<sup>65</sup> In the Recommendations for the 2020 censuses, the Conference of European Statisticians has recommended that ‘[r]espondents should be free to indicate more than one ethnic affiliation or a combination of ethnic affiliations if they wish to do so’ (UNECE, 2015: 150). Special attention should be given to explaining ‘how the ethnicity of children from mixed couples is to be reported’ (ibid.).

<sup>66</sup> See para. 35 in the Explanatory Report to the Framework Convention for the Protection of National Minorities, <https://rm.coe.int/16800c10cf>.

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