Sima Avramović

RIGHT TO RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS

The author contradicts current objections that introduction of religious instruction in public schools is unconstitutional and contrary to international legal documents. He analyses in detail the principle of state and church separation in comparative European law, pointing out that although legal systems in most countries recognize the principle of separation and religious neutrality, they have still established religious instruction in their public schools. He stresses in particular that different and more modern understanding of separation, including the idea of co-operative relation between state and church, marks a significant tendency in contemporary law in Europe. He analyses international documents and international court decisions in connection with the current legislation in Serbia, where religious instruction in public schools is taught as an optional subject together with civic education. Therefore he thoroughly argues why, in such a context, religious instruction in public schools does not violate any of the following principles: right not to manifest religious attitude, right that no one shall be subject to religious coercion, liberty of parents to ensure the religious and moral instruction of their children in conformity with their own convictions, and children's right to freedom of thought, conscience and religion. The author points to the comparative legislation of European countries, showing that religious instruction in public schools exists nearly everywhere, except in Albania, Slovenia and France (apart from its North-Eastern provinces). Existence of the religious instruction in legal systems of European countries is not considered as a violation of any national or international legal principles, including the principle of state neutrality towards religion. The author concludes that the introduction of religious instruction in public schools enacted in the current Serbian legislation is neither conservative nor unconstitutional, but a step towards full respect of religious freedom and harmonization of the national law with the one in European countries.

Keywords: *Religious instruction in public schools. – Separation of State and Church. – Rights of the child. – Rights of the parent.*

The last few years have been marked with heated debate on the introduction of religious instruction to public schools. The Government of the Republic of Serbia passed at first the *Decree on organization and*

realization of religious instruction and of an alternative subject in elementary and high schools in July 2001.[1] The Decree was used as an interim legislation to enable religious instruction in public schools to start in the 2001/2002 school year, relating to the first-year elementary school pupils and those of the first year in high schools. In 2002 two Acts were passed in the Parliament, regulating in a similar way religious instruction in public schools on a longer term basis.[2]

After many reactions with firm ideological background, often without serious argumentation, an academic article on religious instruction legislation finally appeared a few years ago.[3] The purpose of this contribution is to argue that solutions in both Decree and two Acts are not unconstitutional, as Draškić has claimed in her article, but that they are in accordance with existing international and internal legislation. This paper is basically an attempt to challenge a few important and sensitive topics raised by her, in connection with issues like separation of Church and State, the right not to be compelled to make a statement regarding one's religious conviction, the prohibition to impose religion or faith, the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophic convictions, and the right of children to freedom of thought, conviction and religion.

1. *Separation of Church and State* or neutrality of State in relation to religious communities is certainly one of the most important constitutional principles proclaimed explicitly by the Constitution.[4] The idea has been spread out all over the world, having been born during the

1 Official Gazette of the Republic of Serbia, No. 46/2001 of July 27, 2001. According to the Decree, parents and other legally recognized representatives decide whether their children will attend religious instruction in primary school or not. Pupils in secondary schools (starting with the age of 14 or 15) decide for themselves on religious instruction classes enrolment. Attendance is mandatory for the current school year. If the pupil does not attend religious education, he or she shall instead attend classes in a new subject named "civic education." Pupils may also opt out all together. Classes in religious instruction or civic education are scheduled only once per week. Pupils are not to be graded in the same way as they are for other subjects, but will be given only a descriptive mark that does not affect their final grade point average.

2 *Act on amending the Act on Elementary School* (Official Gazette of the Republic of Serbia, No. 22/2002 of April 26, 2002) and *Act on amending the Act on High School* (Official Gazette of the Republic of Serbia, No. 23/2002 of May 9, 2002). The main modification was that religious instruction and alternative subject are not completely optional anymore. One has to choose one of the two subjects but can not opt out all together.

3 M. Draškić, "Pravo deteta na slobodu veroispovesti u školi" (Right of children to religious freedom in the school), *Anali Pravnog fakulteta u Beogradu* 1–4/2001, 511–523.

4 Constitution of the Republic of Serbia of 1990, Art. 2: "Religious communities are separated from the State and are free in exercising religious activities and rites".

French revolution. In the same time a specific French concept of *laïcité* was formed, but it denotes today more than the separation of State and Church.[5] It is, of course, closely connected to the notion of secular State as well.[6] Concept of separation of Church and State is widely accepted by many European states, while only some of them have proclaimed the state religion or the sc. State Church system. However it does not mean, of course, that very existence of the state religion leads inevitably toward discrimination of all other religious communities in the country.

On the other hand, having proclaimed separation of Church and State, European legal systems regularly do not concieve a vast gap between the two, including hostility and suspicion. The separation does not mean an impossibility to perform common tasks and functions, and does not assume absolute lack of any relation. Contrary to modern comprehension of religious neutrality of State, in Serbian society an echo of the Marxist mantra that "religion is an opium for masses" is still very alive. This is why separation of Church and State is often interpreted in a form of strict division, so that goals and actions of the two can not be linked, combined and connected. In that view Church and State are not supposed to perform joint activities, and consequently any public or State function is not allowed to be in a slightest way connected with the Church. Solemn religious oath of State officials, invocation of God in the Constitution, beginning of parliamentary sessions with a pray or similar manifestation of the State – Church contact is still unimaginable in

5 Term *laïcité* derives from ancient Greek *laos* – people. Etymology and the concept of this French word encompasses today a basic idea that the State should act in the best interest of the whole people, in a common interest, without paying attention to any specific group particularly connected with specific religious conviction. However, in course of time the concept acquired different meanings, so that there is no consent on its practical effects today. Quite recently two important books have appeared revealing numerous controversies in France itself on that topic, see J.-P.Costa – G. Bedouelle, *Les laïcités à la française*, Paris, PUF (Presses Universitaires de France), 1998; Poulat, E., *La solution laïque et ses problèmes*, Paris (Berg international), 1997. See also J.-P.Durand, "Droit civil ecclésiastique français en 1997–1998" in *European Journal for Church and State Relations, Leuven* 5/1998, 61. A very interesting and accurate view of the *laïcité* in France today, see J. Robert, "Religious Liberty and French Secularism", *Brigham Young University Law Review, Provo* 2/2003, 637.

6 Term *secularization*, deriving from Latin *saeculum* – century, has also acquired different meanings. Historically it primarily denoted taking over Church property by the civil power, i.e. by the State, starting with the time of Charlemagne, and being more effective during Reformation and French Revolution. Secularization also started to denote diminishing influence of Church in a wider sense, then separation of Church and State competencies, while only quite lately it comprehended also lack of religious influence in education in schools. More in D. Martin, *A General Theory of Secularization*, Oxford 1978. See also J. Baubérot, "Secularization and Secularism from the View of Freedom of Religion", *Brigham Young University Law Review, Provo* 2/2003, 451.

Serbia. Such an idea would be immediately condemned as clerical, revolutionary and unconstitutional, as it allegedly violates the principle of State neutrality. On the contrary, neutrality is not comprehended like that in many legal systems that pioneered the principle of separation of Church and State, like in the USA.[7] A modern concept of neutrality is much more flexible and liberal than a part of Serbian political and academic community is still ready to face with and accept without prejudices.[8]

Many eminent scholars in modern ecclesiastical law[9] have argued during recent years that it is possible to distinguish not only two, but three basic types of Church and State relationships in comparative European legislations. At one hand there is a system of the established State Church with more or less strong mutual ties (Greece, England, Scotland, Denmark, Sweden,[10] Finland,[11] Norway), while on the other hand the strict separation is predominant in some States (France, Ireland, Holland to some extent). However, the system that might be called "coope-

7 One of the most secular countries in the world, the USA, offers many examples. It is not only that their national proverb "In God we trust" stands on the dollar banknote since 1865, as well as over the entrance to the Senate Chamber of Congress, but also their national anthem starts and ends with invocation of God. State officials, including the President of the USA, have to end their obligatory oath with famous wording "So help me God". Both houses of Congress have paid priests – chaplains, and they begin every parliamentary session with a prayer. Before sessions of the Supreme Court the clerk regularly invokes grace of God. And, of course, during the court trial witnesses have to take religious oath before giving their statements, putting their hand on the Bible. No one considers all those manifestations as violations of the secular tradition. I am grateful to Judge J.Clifford Wallace for enabling me to have and use his paper "The Framers' Establishing Clause: How High the Wall?", presented at the Conference *New Impulses in the Interaction of Law and Religion*, held on October 6–9, 2002 in Provo, Utah.

8 See an excellent contribution on neutrality issues by Reuter, H-R., "Neutralität – Religionsfreiheit – Parität", in: W. Lienemann – H-R. Reuter (eds.) *Das Recht der Religionsggemeinschaften in Mittel-, Ost– und Südosteuropa*, Nomos, Baden – Baden 2005, 15–31.

9 A specific scholarly discipline that studies relations between Church and State took its name from Greek – *Ecclesiastical Law*. Even more adequate English term would be *Civil Ecclesiastical Law* (like in French *droit civil ecclésiastique*, or in German *Staatskirchenrecht*). However, such a discipline in Serbia does not exist yet, and a term is often misunderstood by being comprehended as *Church Law*.

10 Although in 1999 a kind of formal separation of Church and State took place as a result of negotiations that lasted since 1995, nonetheless close connections between them remained in many aspects, being particularly apparent in State financing of the Church of Sweden.

11 Interestingly enough Finland recognizes two established State Churches: the first one is the Evangelical Lutheran Church on account of majority of followers, and the second is the Orthodox Church due to historical background, although it has less than 2% of followers in the country.

rative separation" is developing more and more in many countries: although Church and State are basically separate, they jointly undertake activities in the common interest, recognizing a multitude of common tasks, as some of those undertakings can not be properly realized without their cooperation (Germany, Austria, Belgium, Spain, Italy, Portugal, etc.).[12]

Along with that, a kind of gradual convergence can also be noticed: in systems where the State Church system is dominant, mutual interference of the two is in alleviation (like in England[13]), while in some cases the process led to formal separation, although close ties between Church and State were kept (Sweden). On the other side, in countries with vigorous separation of State and Church, in some issues separation is less strict than expected (example of France).[14] It leads to conclusion that an idea of separation of Church and State is dominant in most European legal systems, but in such a way that it comprises a certain kind of cooperation. This attitude is expressed most explicitly by S. Ferrari: "cooperation is the keynote to today's relationship between Church and State in the European Union and, after the fall of the communist regime, all over Europe".[15]

Shortly, contemporary theory and European legal practice do not conceive separation of Church and State as a mutual ignorance and avoidance of any contact, or even as a kind of confrontation of the two, as it had been in the former communist states. On the contrary, it comprehends a necessity of their cooperation in issues of common interest, like in Germany.[16] Religious instruction in public schools is an exemplary

12 More on that see in G. Robbers, *State and Church in the European Union*, Baden – Baden 1996, 324.

13 During the last decade a kind of separation of competencies can be noticed even there. The Church of England is basically still an established State Church with the Queen of England as its supreme governor who appoints the archbishops and bishops. There are 26 seats in the House of Lords of the Parliament still reserved for Anglican bishops (sc. spiritual lords). Internal autonomous law of the Anglican Church is formally reviewed by the Parliament, who can reject so-called "Measures" by the General Synod, as they have to pass through the Parliament (although Parliament rejects it very seldom, and has no power to amend the text of a Measure). However, General Synod is in certain cases more and more entitled to enact particular general legal norms, having as an effect a gradual partition of State and Church law.

14 The State is still financing renovation of Churches; it pays the teachers of religious instruction in public schools in Alsace-Lorraine, where religious education is part of the general curriculum, etc.

15 S. Ferrari, "The Pattern of Church and State Relations in Western Europe", *Fides et Libertas, The Journal of the International Religious Liberty Association,* Silver Spring, Maryland 2001, 59–60. See also

16 A. Frhr. v. Campenhausen, *Der heutige Verfassungsstaat und die Religion. Handbuch des Staatskirchenrechts der Bundesrepublik Deutchland I*, Berlin 1994, 47 – 84.

field of such cooperation. The joint action of State and Church is present in those matters all over Europe, both in organization, and often in financing of religion instruction in State schools.

The very existence of religious instruction in public schools in many European countries, including majority of the European Union members, and particularly its presence in legal systems where postulate of Church and State separation is strictly obeyed, clearly manifests that the principle of state neutrality is by itself in no contradiction with religious education in the state-run schools. Maybe the most striking example is France, often incorrectly quoted as a country without religious education in public schools. However, even the French legal system does not consider religious instruction unconstitutional: on the contrary, it allows a specific form of religious assistance in all state schools, including religious education in three Eastern departments of the country within the general curriculum.[17]

2. *Right not to be compelled to make a statement regarding one's religious conviction* is also mentioned as one violated both by the Decree and by the subsequent Acts adopted, as they have introduced religious instruction in public schools. Allegedly, those compel pupils to declare their religious conviction. Most of the European Union member states, who strictly enforce international standards of human rights, also recognize religious instruction in public schools, which it is not considered to be by itself in contradiction with the principle of non-statement regarding religious conviction. It is not so even when religious instruction is a mandatory subject, with a possibility to ask for exemption, as it is the case in some countries. If religious instruction is an elective subject in alternative with civic education, as regulated by the existing law in Serbia, such a solution seems not to be in opposition to the "non-statement principle" – the pupil may simply opt for another subject. Opting

17 Religious needs of pupils are officially recognized in France by the Act of October 28, 1882, stating that the state-run schools have to provide for a day during a week, except Sunday, to enable parents to organize religious education to their children. For decades the day was traditionally Wednesday (while Saturday was a working day). This Act is formally still in power, but since 1990 disputes aroused only on issue whether the free day should be Saturday instead of Wednesday. Also, everyday presence of priests (*aumôneries, chaplains*) in the state-run schools has to be provided if needed since the time of Napoleon. Spiritual assistance has to be offered anytime when a pupil or a group of pupils ask for it, while upon request of parents a permanent position for a priest in school can be established. Of course, along with that, worth remembering is that a system of private schools is very developed in France, having about 95% of them run as the Catholic ones, with important role of religious instruction in their curricula. Finally, as already mentioned, the most excessive example is that of Alsace-Lorraine, where religious instruction is regularly organized in public schools. All those appearances are not considered as to violate the dominant principle of Church and State separation.

for religious education or civic education, quite similarly as opting for this or that foreign language, does not automatically mean a pressure to make statement regarding religious conviction. It is a matter of choice, and it can depend on interests or other different motives. Simple choice of one of the two subjects does not necessarily represent a statement regarding religious belief.

Similar objection can be raised more plausibly in the census issues, when citizens are questioned about their religious affiliation. Human rights activists strongly claim that the right not to be compelled to make statements regarding one's religion, personal beliefs, or lack of belief, is violated by this question, as well as a right to privacy. However, after thorough argumentation and controversial discussions, most European states, having a reasonable need to possess data on religious demography of the country, have found a solution (the same one as in Serbian legislation) in including possibility for an interviewed citizen not to give any statement on that topic. As long as such an alternative exists, the right not to give statement on religious conviction is not violated. Analogy with alternatives in taking one of two subjects in state schools is quite apparent. The issue of pressure to make statement regarding religious conviction can only be raised if pupils are obliged to take mandatory lessons in religious instruction, while no alternative or optional subject exists, like in Greece.[18]

3. *Prohibition to impose religious conviction* is, according to Draškić, seriously endangered and jeopardized by the new Serbian legislation on religious instruction in state-run schools. She points to Item 6. of the General Comment 22. on Art. 18 of the International Covenant on Civil and Political Rights, brought by the Committee for Human Rights, that says: "*The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians*".[19] She tries to depict that opinion of the Committee at few levels.

The first is "the fact that Yugoslavia was a secular State without any kind of religious instruction in State schools during last 56 years",

18 E.g. in Greece all pupils of public primary and secondary schools are obliged to attend classes of mandatory Orthodox religious instruction, while non-Orthodox pupils can only be exempt. However, in practice, many of them attend Orthodox religious instruction, as schools do not offer alternative subject or supervision during religious instruction classes. In that case the mentioned problem might appear more sharply.

19 The Right to Freedom of Thought, Conscience and Religion (Art. 18), 30/07/93 CCPR General comment 22.

while the introduction of religious instruction by new legislation imposes religion or faith, contrary to an idea of protection not only of theistic, but also of atheistic convictions.[20] An argument about continuity of religious instruction absence during many decades of communist regime has a clear connotation: secular communists did well by disallowing imposition of religious conviction through religious education! Further implication is that the current legislative change in Serbia is wrong, as it disrupts a long lasting good communist practice. Of course, such a statement can not be easily put in conformance with general principles of justice and equity. Coercive deprivation of certain rights, and in particularly of the right to religious freedom, is not expected to be legalized and fixed forever in a democratic society. According to the same approach and logic, no denationalization and restitution of the property taken over by communists would have been needed. Consequently, all illegitimate acts of the communist regime after the Second World War are to be accepted and confirmed, while the rights taken by force would not be necessarily given back, due to a long time flow. An important point in that context is that both the criticized Decree and Acts do not *introduce* religious instruction in public schools, but they *return* it back to life and legal system – as it has existed before. In that way the new legislation basically reaffirms the right to religious education that had been forcefully lost.

The second issue that Draškić mentions in connection with "imposing religion and belief" is statistical by nature. Besides, she erroneously connects religious conviction exclusively with nationality (by claiming that in Serbia 34% of population are non-Serbian). Even more wrongly she states that census statistics in Serbia have never taken into account the number of atheists and agnostics. Again, the connotation is clear: with the new legislation religious instruction in public schools will be imposed to an important part of population with non-Serbian (non-Orthodox) origin and to atheists. In fact, according to the census of 2002, the religious demography of Serbia is as follows (out of 7,498.001 inhabitants):

Orthodox Christians	6,371.584	–	84,97%
Catholics	410.976	–	5,48%
Muslims	239.658	–	3,19%
Protestants	80.837	–	1,07%
Jews	785	–	0,01%
Oriental cults	530	–	0,007%
Other religions	18.768	–	0,25%

20 M. Draškić, *op. cit.,* 514.

Believers of no confession	437	–	0,005%
Atheists	40.068	–	0,53%
Unanswered	197.031	–	2,62%
Unknown	137.291	–	1,83%

The fact that a certain religion includes considerable majority of followers in the country can not, of course, serve as an excuse to affect rights of other confessions believers. This is why both the Decree and Acts guarantee religious instruction in public schools not only for the Orthodox children. Six more traditional Churches and religious communities are encompassed, those who had had the right to religious education before the Second World War.[21] In that way religious education in public schools is available to nearly 95% of total population, in accordance with their religion or belief. Thus, the issue of religious conviction imposition through religious instruction in public schools appears to be practically marginal in Serbia.

Of course, the fact that religious education paid by the State is not organized for every single religious community, including the smallest one, may seem discriminatory. However, wider questions are reflected in that issue, including problems of equality and minority rights.[22] Equality of religious communities does not mean their identity, but adequate enjoyment of rights guaranteed by law.[23] If one insists on an absolute equality, one will be faced with actual impossibility to realize it with all consequences, what may deny an idea of equality itself. This is an old dilemma, and even some proverbs on that topic have remained, such as the one by Plinius – *Nihil est tam inaequale quam aequitas ipsa* (Nothing is so unequal as equality itself).[24] Equality in unequal circumstances leads to its own denial. A similar idea is reflected in Latin jurist saying *Summum ius, summa iniuria*. Consequently, equal legal position of religious communities means adequate use of all the rights in an equal way, along with differences deriving from common sense and within boundaries defined by law. In two papers devoted exclusively to that issue, one of the most prominent German authors convincingly shows that

21 Serbian Orthodox Church, Roman Catholic Church, Slovak Evangelical Church a.c., Reformed Christian Church, Evangelical Christian Church a.c., Islaamic Religious Comunity, Jewish Religious Comunity.

22 In the extensive literature worth mentioning on the topic might be W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford Political Theory),* Oxford 1996.

23 G. Robbers, "Religious Minorities in Germany", *Legal Status of Religious Minorities in the Countries of European Union*, Milano 1994, 153.

24 Plinius Secundus, *Epist.* 2, 12, 5.

parity and equity guaranteed by constitutional and other norms do not mean absolute identity in enjoying religious rights.[25] Paradigm that guarantees full respect of religious freedom is equality, but not identity of rights.[26]

There are also practical reasons. The limited number of Churches and religious communities[27] whose religious instruction will be financed by the State is a consequence of impossibility and non-rationality to organize religious instruction for each and every person or the smallest religious group. Similar limitations exist in other European countries as well. At the same time one should keep in mind that the *ratio legis* of the Serbian legislator was a kind of *restitutio in integrum* – restoration of the right to religious instruction, lost due to communist deprivation. The ratio is that to those who had not exercised a certain right, the right can not be restored. Also, in reviewing that objection, it is worth noticing that the legislation opens possibility to all religious communities to organize religious instruction, although at their own expense.[28] The meaning of Art. 27 of the International Covenant on Civil and Political Rights is clear: "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language*". It does not impose an obligation to the State to support materially all of them, but just to enable all of them to enjoy their rights. Serbian legislators have adopted a similar approach like in many countries: Austria and Belgium also set forth a certain number of Churches

25 M. Heckel, *Die religioinsrechtliche Parität*, Handbuch des Staatskirchenrechts der Bundesrepublik Deutchland, I, Berlin 1994, 589–622; M. Heckel, *Das Gleichbehanlungsgebot im Hinblick auf die Religion*, Handbuch des Staatskirchenrechts der Bundesrepublik Deutchland, I, Berlin 1994, 623–650.

26 G. Robbers, "Religious Freedom in Germany", *Brigham Young University Law Review* 2/2001, 666: "To safeguard religious liberty, the correct paradigm is equal rights, not identical rights. The paradigm of identical rights cannot appreciate the societal function of a religion, its historical impact, or its cultural background. Identical rights would preclude a multitude of manifestations of positive religious freedom. For instance, if an identical right to sit on youth protection boards was granted to each and every religious denomination, any utility of these boards would be crushed by their enormity...".

27 It does not include a small, limited number of citizens covered with paid religious instruction. As already mentioned, about 95% of them belong to some of Churches who have had the state financed religious instruction before the Second World War.

28 A good example offers North Serbian multi-religious province Vojvodina, where smaller Churches and religious communities, e.g. the Methodist Church, have very successfully organized religious instruction in public schools for children of their followers.

and religious communities for whom the State organizes religious instruction, Germany and England specify a minimal number of pupils necessary for religious instruction to be organized in public schools, etc.

Above all, the crucial argument that religious instruction in public schools in Serbian legislation does not violate the ban to impose religious conviction is obvious: a part of population who does not wish to opt for religious instruction is free not to do it. They have the choice. It is evident that the very existence of the alternative subject absolutely meets the criteria from the General Comment, in accordance with it's wording "unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians".

4. *Right of parents to ensure the religious education of their children in conformity with their own religious and philosophical convictions* is confirmed in many international documents.[29] However, its interpretation offered by Draškić is one-sided: she stresses that it provides for the right of parents "to protect their children from ideological indoctrination by educational institutions". If that interpretation is considered as the only possible or the main meaning of the norm, not a single country which ratified those international documents would not have possibility to organize religious education in public schools, as it would have allegedly been in contradiction with the mentioned principle. The undeniable circumstance that most European countries do perform some kind of religious instruction in public schools is the most obvious attestation of conformity to those two standards. The real question is what kind of religious instruction is offered. Although it is not a legal issue, a peculiar characteristic of religious instruction in Serbia is worth mentioning. All textbooks for the subject, at all school levels and, for each of the seven denominations defined by the legislation, according to the law, have to be reviewed and accepted by the representatives of the remaining six Churches and religious communities, before they can be used by pupils of any confession. Quite unique in the comparative

29 To quote only Protocol 1, Art. 2 of the European Convention on Human Rights (1950): "*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions*"; Art. 18, 4 of the International Covenant on Civil and Political Rights (1966): "*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions*"; Art. 14, 2 of the Convention on the Rights of the Child (1989): "*States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child*".

European legislation! This is, by all means, formidable safeguard for preventing any kind of proselyte religious propaganda or domination which may lead to violation of the mentioned right of parents.

The problem with the cited interpretation by professor Draškić is that it stresses only negative aspects of that right, neglecting the positive ones, those that the norm is primarily directed to. Namely, the State has a certain obligation toward parents to protect the mentioned right. Parents, being taxpayers, have a right to expect that within the state-run schooling system their children will receive religious and moral instruction in accordance with their religious and philosophic conviction. Tax-payers, by participating in financing the expenditure for their children's schooling, ought therefore not to be forced to obtain an extra religious and philosophical (ethical) education for their children in some other way, out of the school, by financing it separately or by incompetently educating their children themselves. Taking over the responsibility concerning compulsory schooling of children, the State takes also the responsibility to perform it completely and universally.[30] Parents do bestow this form of education to the State and they pay for it.

Therefore there is no doubt that the parents have the right to control religious education of their children, and that the State is not allowed to impose any religious or philosophical attitude to them. An alternative subject in the curriculum enables parents to decide not to send their children to religious instruction classes at all, what completely disarms the suggested objection on violation of the mentioned parents' rights. Strict control that the State (and in Serbian case, other Churches and religious communities) performs over the religious education is a strong guarantee that such a parent's right will not be violated. The same or similar approach is held nearly all over Europe, and so it is in the Serbian new legislation on that topic.

5. *Right of children to freedom of thought, conviction and religion* is the last principle being allegedly endangered by the new Serbian legislation on religious instruction. The objection can be raised only for pupils of elementary schools, as according to the law, the high school pupils (persons older than 14 or 15 years) are to decide themselves whether they will take those classes or not.

In that context a heated international discussion took place on whether a child has independent right to form his own religious conviction, contrary to the ones of their parents. The claim that religious instruction in public schools may violate that right of the children depends on the answer to the question whether such a right, particularly in the case of

30 G. Robbers, "Religious Freedom in Germany", *Brigham Young University Law Review* 2/2001, 643.

younger minors, does really exist. The answer depends on the interpretation of a quite vague norm of Art. 14, 1 of the Convention on the Rights of the Child, stating "*States Parties shall respect the right of the child to freedom of thought, conscience and religion*". As the very wording has nothing to do with the issue of relation to the parents' conviction, there is no *communis opinio* on that topic.

In any case, at this point right of children is intertwined with the mentioned right of parents to educate their child in accordance with their own religious and philosophical convictions. It includes the right of parents to have the child protected from someone else who could impose or form the child's religious convictions independently of the parents' will. As for the school, such a danger does not exist, as religious instruction in public schools is organized under a strict control of competent State authorities (and supervision of a body consisting of representatives of all seven traditional Churches and religious communities). The crucial argument that eliminates that objection is that the parents have choice to decide whether their children will take religious classes or not. And it is applied to children younger than 14 or 15 years only, while the older ones, according to the law, make their own decision on religious instruction attendance. In that way the right of children to freedom of thought, conviction or religion is both protected and affirmed.

6. *Comparative overview of European legislation* on religious instruction in public schools clearly shows that its very existence is not unconstitutional and that it does not violate international legal standards, principles and documents. Of course, there are some differences in approach, although most countries have a certain form of religious instruction organization. They can be classified according to a few criteria.

Concerning the content there are States with confessional religious instruction (such as Germany, Austria, Denmark in elementary and first classes of high schools, Belgium, Luxembourg, Spain, Italy, Ireland, Bulgaria, Poland, Slovakia, Romania, Croatia, Republic of Srpska), some of them favor multi-confessional approach (Great Britain, Norway, Finland, Portugal, etc.), while there is also a quite developed model of non-confessional, cognitive religious instruction (e.g. Sweden, Denmark in final classes of high school, Russia, Check Republic, Lithuania, Estonia).

Concerning the financing there are basically two possibilities – religious instruction costs are either paid by the State or by the Churches and religious communities themselves (mostly in countries where the so-called Church tax exists). Although rarely, a kind of combined system can be met, where the State basically bares most of the financial burden, while Churches and religious communities participate a smaller propor-

tion. A criterion for classification may also be if religious instruction is provided to all or to some Churches and religious communities only. Nevertheless, even in the first case, most legislation delineate some limits, most frequently in accordance with a number of children required for organization of religious instruction classes in public school.

Concerning the degree of compulsion there are basically four models. The first one is where religious instruction in public schools is formally mandatory for all pupils, such as in Sweden, Norway, Finland, Denmark, Estonia, Ireland, Great Britain, Austria, Greece, Malta, Republic of Srpska. The second group is formed by countries where the choice between religious instruction and an alternative subject is compulsory – most often the second subject is ethics, morals or something similar like in Serbia (civic education): those are Germany, Belgium, Luxembourg, Netherlands, Spain, Poland, Moldova, Letonia, Latvia, Federation of Bosnia and Herzegovina, Croatia in high schools, schools for EU officer's children, etc. The third system comprises religious instruction as an optional, non-compulsory subject, like in Czech Republic, Slovakia, Russia, Ukraine, Bulgaria, Romania, Hungary, Croatia in elementary schools, as well as most ex-communist countries. To the same group formally belong Italy and Portugal, although in practice many students opt for the Catholic religious instructions. Finally, exceptionally small number of countries have no religious instruction: Albania, FYR of Macedonia, Slovenia and France – but not absolutely, as religious instruction in public schools exist in some departments[31].

Taking all this into consideration according to most of criteria analyzed, it follows that Serbian legislation has found a middle way in regulating religious instruction in public schools. There is nothing in Serbian legislation that does not exist elsewhere on the issue in Europe, including the European Union member states. In addition, there is a specific kind of cooperative control over religious education in public schools, performed both by the State and by the competent body formed of seven Churches and religious communities. Therefore, religious instruction in public schools is at least as constitutional and in accord with international standards, as it is in other European countries. Hence one may claim that introduction (restitution) of religious instruction to public schools by Serbian legislation, structured as an elective subject in alternative with civic education, is a step towards harmonization of the Serbian legal system with comparative European legislation and tradition.

31 See n.17. For more detailed overview of solutions in particular countries mentioned in the text, see Serbian version of the article, Avramović, S., "Pravo na versku nastavu u našem i uporednom evropskom pravu", *Annals of the Faculty of Law in Belgrade*, 1/2005, 46–64.